The Office of
Minnesota Attorney General Keith Ellison
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July 12, 2022

VIA EMAIL ONLY

Rob Schilling
Executive Director, Energy Policy Advocates
schilling@allhookedup.com

Re: Request for Data, Disclosures & "Resources Legacy Fund"

Dear Mr. Schilling,

Thank you for your May 17, 2022 email, in which you requested that the Minnesota Attorney General's Office ("AGO") provide you with copies of certain data. Specifically, you sought:

(1) "all *disclosures* made to [the AGO] by the law firm Sher Edling, LLP other than those contained in your "Special Attorney Appointment" agreement approved by the Legislative Advisory Commission in September 2020 or the Consulting Agreement Regarding Climate Change Litigation with Sher Edling, LLP dated June 23, 2020;" and

(2) "all *electronic or hard copy correspondence* sent to or from or copying John Keller, Donna Cassutt, Keith Ellison, Peter Surdo and/or Leigh Currie at any time in 2020 that uses the term 'Resources Legacy Fund.'"

As you may know, access to government data in Minnesota is regulated by the Minnesota Government Data Practices Act ("MGDPA"), Minn. Stat. §§ 13.01-.90 (2020). Government data are presumptively public unless otherwise classified as not public by state law, federal law, or temporary classification. Minn. Stat. § 13.01, subd. 3.

As to your first request for "disclosures," the AGO has identified one email communication with attachments as data potentially responsive to your request. Those data are attached hereto. The AGO has no other data responsive to your first request.

As to your second request for correspondence using the term "Resources Legacy Fund," the key phrase appears in only two attachments to emails, both of which are briefs filed by the defendants in the matter of *District of Columbia v. Exxon Mobil Corp. et al.*, No. 1:20-CV-01932 (D.D.C. 2020). Attached, please find the briefs and the communications to which those briefs were attached. Please note that portions of the communications have been redacted pursuant to Minn. Stat. § 13.393, which provides that "the use, collection, storage, and dissemination of data by an attorney acting in a professional capacity for a government entity shall be governed by statutes, rules, and professional standards concerning discovery, production of documents,

introduction of evidence, and professional responsibility." *See also* Minn. R. Civ. P. 26.02(d) (work product); Minn. Stat. § 595.02, subd. 1(b) (privileged communications). The redacted portions of the e-mails contain no references to the "Resources Legacy Fund." The AGO has no other data responsive to your second request.

The AGO has no other public data responsive to your request. Again, thank you for contacting the AGO.

Sincerely,

OLIVER J. LARSON
Assistant Attorney General
OLIVER J. LARSON
Assistant Attorney General

(651) 757-1265 (Voice)
(651) 297-1235 (Fax)
oliver.larson@ag.state.mn.us

(Attached: Data Response)

CC: Matthew Hardin, Esq.
MatthewDHardin@protonmail.com

From: Matt Edling <matt@sheredling.com>
To: "RFQ.Response@ag.state.mn.us" <RFQ.Response@ag.state.mn.us>
Cc: Vic Sher <vic@sheredling.com>
Subject: Request for Qualifications for Outside Counsel
Date: Mon, 27 Apr 2020 15:02:31 -0500
Importance: Normal
Attachments: 2020-04-27_Cover_Letter_to_MN_RFQ.pdf; 2020-04-27_Final_RFQ_Response.pdf

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Ms. Kramer and Ms. Ellis –

Attached is Sher Edling LLP's Cover Letter and Response to the Request for Qualifications for Outside Counsel Relating to Assisting the Minnesota Attorney General in Potential Litigation Related to Fossil Fuel Companies' Misrepresentations Regarding the Impact of Their Activities on the Climate.
We would be honored to assist your office in evaluating, investigating, and prosecuting claims on behalf of the State.

Sincerely,

Matthew K. Edling

SHER EDLING LLP
100 Montgomery St., Ste. 1410
San Francisco CA 94104
(628) 231-2520 | sheredling.com

SHER EDLING LLP
PROTECTING PEOPLE AND THE PLANET

April 27, 2020

By Email

Marianne Ellis
Liz Kramer
OFFICE OF THE MINNESOTA ATTORNEY GENERAL
445 Minnesota St., Ste. 1100
St. Paul, MN 55101
RFQ.response@ag.state.mn.us

Re: Response to Request for Qualifications for Outside Counsel Relating to Assisting the Minnesota Attorney General in Potential Litigation Related to Fossil Fuel Companies' Misrepresentations Regarding the Impact of Their Activities on the Climate

Dear Ms. Ellis and Ms. Kramer:

Sher Edling LLP is pleased to submit our qualifications and would be honored to support the Office of the Attorney General (AGO) in its investigation and potential litigation against one or more fossil fuel companies for violating Minnesota's consumer protection statutes by knowingly misleading the public about the impact of their products on the climate and other potential claims.

As explained in our submission, Sher Edling represents states, cities, counties and public agencies as plaintiffs in high-impact, high-value environmental cases. We combine decades of top-level litigation and trial experience with an unwavering dedication to holding corporations accountable for the damage they cause. The firm has assembled a unique team with legal and technical expertise that, coupled with its detailed and extensive experience in climate and high impact litigation, helps assure clients of the strongest case and highest possible recovery.

Similarly, we pride ourselves on understanding and meeting the needs of public counsel. Indeed, we currently co-counsel with two other Attorney General Offices on climate litigation. In Rhode Island, we are co-counsel with the Attorney General's Office in that state's climate damages case. In the District of Columbia, we are co-counsel with the Attorney General's Office in an investigation and potential litigation under the District's Consumer Protection Procedures Act against members of the fossil fuel industry for deceptive advertising and business practices concerning the environmental and climate change impacts of their products.

Sher Edling is well-qualified, if not uniquely qualified, to support the AGO for the State of Minnesota in its investigation and potential litigation against fossil fuel companies' misrepresentations regarding the impact of their activities on the climate.

We would be honored to assist your office in evaluating, investigating, and prosecuting claims on behalf of the State.

Sincerely,

Matthew K. Edling

Encl.

RESPONSE TO MINNESOTA ATTORNEY GENERAL'S REQUEST FOR QUALIFICATIONS FOR POTENTIAL LITIGATION RELATED TO FOSSIL FUEL COMPANIES' MISREPRESENTATIONS

Submitted by:

SHER EDLING LLP
100 Montgomery Street, Suite 1410
San Francisco, CA 94104
(628) 231-2500

State of Minnesota
Office of the Attorney General
445 Minnesota Street, Ste. 1100
St. Paul, MN 55101-2128
Telephone: (651) 282-5700

RFQ Closing: April 27, 2020; 4:00 PM CST

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EXECUTIVE SUMMARY

Sher Edling LLP represents states, cities, counties and other public agencies as plaintiffs in high-impact, high-value environmental cases. We combine decades of top-level litigation and trial experience with an unwavering dedication to holding corporations accountable for the damage they cause. The firm has assembled a unique team with legal and technical expertise that, coupled with its detailed and extensive experience in climate and high impact litigation, helps assure clients of the strongest case and highest possible recovery. This depth of experience shows when we lead a matter through trial and appeal, as we did for the City of New York in its landmark MTBE litigation against Exxon (discussed *infra*), or more recently when the cities of San Francisco and Oakland retained Sher Edling to replace their outside counsel in those cities' climate damages litigation. Attached as **Exhibit 1** is a copy of Sher Edling's resume.

We appreciate the opportunity to present our qualifications and would be honored to support the Office of the Attorney General in its investigation and potential litigation against one or more fossil fuel companies for violating Minnesota's consumer protection statutes by knowingly misleading the public about the impact of their products on the climate and in other potential claims.

A. CONTACT NAME

Attorneys responsible for this RFQ response and designated to be the contact persons to the AGO:

Victor M. Sher
Matthew K. Edling
100 Montgomery Street, Suite 1410
San Francisco, CA 94104
(628) 231-2500
vic@sheredling.com
matt@sheredling.com

B. GENERAL FIRM QUALIFICATIONS

1. The year the firm was established

After co-counseling for years, Victor Sher and Matthew Edling formed Sher Edling in August 2016. Before forming Sher Edling, Vic Sher led Sher Leff LLP, which specialized in representing public water suppliers and related public agencies. Mr. Sher's cases include acting as lead trial counsel for the City of New York in a major MTBE lawsuit against the oil industry (*In re MTBE Prods Liab. Litig.*, 725 F.3d 65 (2d Cir. 2013) (described in more detail below)), as well as lead counsel in many other landmark actions on behalf of public water suppliers arising out of MTBE, DBCP, TCP, and contamination by other toxic compounds. Matt Edling was a partner at Cotchett, Pitre & McCarthy LLP, one of the country's leading plaintiffs' trial firms, where he specialized in complex public entity representation.

2. The address of each office maintained by the firm

Sher Edling is located at 100 Montgomery Street, Suite 1410 San Francisco, CA 94104. Additionally, attorneys and staff are also located in Seattle, Boulder, New York, Maryland and Washington, D.C. The firm represents clients across the country in jurisdictions where primary attorneys hold bar admissions (California, Washington, D.C., and New York) or have been admitted *pro hac vice* on a case-by-case basis.

3. Firm size and composition of staff, including the number of partners, associates, law clerks, and legal assistants

Partners	2
Of Counsel	2
Associates	6
Paralegals	3
Law Clerks (seasonal)	5
Staff	6
Total	**22**

4. The firm's presence or litigation experience in Minnesota, if any

Sher Edling has no prior litigation experience in Minnesota. Its communications team, however, has worked on numerous projects in Minnesota over the past two decades. In particular, both Kevin Kirchner and John Lamson worked with now-Senator Tina Smith in a media/communications firm in the late 1990s. Throughout the 2000s, one or both of them worked with Conservation Minnesota, Minnesota Environmental Partnership, Minnesota Senate DFL Caucus, and Fresh Energy/Michael Noble on a wide range of public education, advocacy, and electoral campaigns, including passage of a $5.5 billion land and water conservation initiative in 2008, which at the time was the largest conservation-related ballot measure ever enacted in the United States.

5. The firm's experience with large complex contingency-fee cases against well-resourced and/or combative industries or opponents

a. General experience and information

Sher Edling represents States, counties, cities, and other public entities in complex climate damages and statutory litigation, water contamination, and natural resources litigation. Currently, the firm has filed 10 cases related to climate damages, and approximately 40 water contamination and natural resource damage actions. Sher Edling has deep experience with large, complex, hard-fought lawsuits against large corporate defendants. In particular, the firm has extensive experience litigating against the fossil fuel and petrochemical industries, including having played a lead role in nearly two decades of MTBE litigation.

Sher Edling attorneys have extensive complex litigation experience, including leadership in successful MDL actions (*In re MTBE Products Liability Litigation*, *In Re: Lehman Bros. Sec. & ERISA Litig.*) and currently in *In Re Aqueous Film-Forming Foams ("AFFF") Products Liability Litigation*, MDL No. 2873, *Suffolk County Water Authority v. Dow Chemical Co., et al.*, No. 17-cv-6980 (E.D.N.Y.) (filed Nov. 17, 2017) (actions on behalf of 26 public water suppliers seeking the cost of treatment for groundwater contamination), *City of Imperial Beach, et al. v. U.S. International Boundary & Water Commission*, No. 3:18-CV-00457 (S.D. Cal.) (filed Mar. 2, 2018) (action to require implementation of $450 million infrastructure project to address transboundary water pollution, on behalf of two cities and port district, and in concert with multiple local and state public agencies and nonprofit entity).

With limited exceptions, each action described above was a contingent fee relationship.

b. Specialized litigation experience

i. Climate change litigation

Sher Edling filed the first of our climate damages lawsuits—three cases focused on injuries from sea-level rise—in July 2017 on behalf of Marin and San Mateo Counties and the City of Imperial Beach, California. Sher Edling filed cases on behalf of the City and County of Santa Cruz in December 2017 and on behalf of the City of Richmond (CA) in January 2018; these cases include claims for relief related to other climate change-related impacts in addition to sea-level rise, including adverse modifications of the hydrologic cycle like extreme precipitation, drought, heat, and wildfires. In July 2018, Sher Edling filed similar lawsuits on behalf of the City of Baltimore and the State of Rhode Island, the first state in the country to pursue such litigation. Sher Edling also represents San Francisco and Oakland in their sea level rise lawsuits. In March 2020, Sher Edling filed a similar lawsuit involving climate impacts on behalf of the City and County of Honolulu. The lawsuits have received significant and sustained media attention and highly favorable scholarly response.

The first battleground in these cases has been over whether they should proceed in state courts (where they were filed) or in federal courts (to which defendants removed them). In concert with public counsel, Sher Edling has successfully briefed, argued, and prevailed on remand motions in eight of the climate actions identified above (*County of San Mateo*, *County of Marin*, *City of Imperial Beach*, *County of Santa Cruz*, *City of Santa Cruz*, *City of Richmond*, *Baltimore* and *Rhode Island*), including an affirmance by the Fourth Circuit. The appeals of the remaining remand orders are pending in the Ninth and First Circuits. Sher Edling was hired by San Francisco and Oakland—after those entities lost on Rule 12(b)(6) motions in district court—to prosecute their appeals (currently pending in the Ninth Circuit) and pursue the cases on remand. Pleadings, trial court, and appellate court briefing may be accessed at https://www.sheredling.com/climate-change-pr.

Highlighted below are examples of our current climate litigation on behalf of public entities in which Sher Edling serves as outside litigation counsel. A further description can be found at **Exhibit 1.**

- *Mayor and City Council of Baltimore v. BP P.L.C., et al.*, Case No. 24-C-18-004219 (Baltimore City Circ. Ct.), No. 18-cv-02357 (D. Md.) (filed July 20, 2018). This case asserts claims under the Maryland Consumer Protection Act, as well as for public nuisance, product liability, negligence, trespass, and failure to warn against members of the fossil fuel industry for injuries arising out of rising sea levels and disruptions to the hydrologic cycle (extreme heat, precipitation, drought, and wildfire). The case seeks abatement, damages, punitive damages, and disgorgement of profits.

  Judge Hollander of the U.S. District Court for Maryland granted Plaintiff's motion to remand. The Fourth Circuit Court of Appeals affirmed (*Mayor City Council of Baltimore v. BP P.L.C.*, 952 F.3d 452 (4th Cir. 2020)), and defendants recently filed a petition for certiorari with the U.S. Supreme Court on the limited question of the scope of appellate review of the district court's remand order. In fall 2019, defendants filed an emergency application to stay Judge Hollander's remand order with the Fourth Circuit and the Supreme Court of the United States, both of which denied defendants' request. The matter is now assigned to Judge Videtta A. Brown of the Circuit Court for Baltimore City, with briefing ongoing on defendants' motions to dismiss and for protective order to avoid jurisdictional discovery.

- *State of Rhode Island v. Chevron Corp., et al.*, Case No. PC-2018-4716 (Providence Sup. Ct.), No. 18-cv-00395 (D.R.I.) (filed July 2, 2018), *appeal docketed*, No. 19-1818 (1st Cir. Aug. 20, 2019). This case asserts claims for public nuisance, product liability, negligence, trespass, failure to warn, impairment of the public trust, and violation of the State Environmental Rights Act against members of the fossil fuel industry for injuries arising out of rising sea levels and disruptions to the hydrologic cycle (extreme heat, precipitation, drought, and wildfire). The case seeks abatement, damages, punitive damages, and disgorgement of profits.

  Chief Judge Smith of the U.S. District Court for Rhode Island granted the State's motion to remand. Defendants appealed to the First Circuit Court of Appeals, and briefing is complete. Defendants filed an emergency application to stay Judge Smith's Remand Order with the First Circuit and the Supreme Court of the United States. The First Circuit denied the application, and Justice Breyer denied defendants' application. The matter is now assigned to Judge Netti Vogel of the Providence County Superior Court, with briefing ongoing for defendants' motions to dismiss and plaintiff's motion to compel jurisdictional discovery.

- *County of San Mateo v. Chevron Corp., et al.*, No. 17-cv-04929 (N.D. Cal.), *appeal docketed*, No. 18-15499 (9th Cir. Mar. 27, 2018); *County of Marin v. Chevron Corp., et al.*, No. 17-cv-04935 (N.D. Cal.), *appeal docketed*, No. 18-15503 (9th Cir. Mar. 27, 2018); and *City of Imperial Beach v. Chevron Corp., et al.*, No. 17-cv-04934 (N.D. Cal.), *appeal docketed*, No. 18-15502 (9th Cir. Mar. 27, 2018). These three cases assert claims for public nuisance, product liability, negligence, trespass, and failure to warn against members of the fossil fuel industry for injuries arising out of rising sea levels. The cases seek abatement, damages, punitive damages, and disgorgement of profits.

These cases are on appeal by defendants from Judge Chhabria's order remanding them to state court. Briefing on the consolidated appeals is complete, and the Ninth Circuit Court of Appeals heard oral arguments in February 2020.

- *San Francisco and Oakland.* These cases are on appeal by plaintiffs from Judge Alsup's orders (1) denying the plaintiffs' motions to remand to state court; (2) granting defendants' motion to dismiss for failure to state a claim (Federal Rule 12(b)(6)), and (3) granting motions by ExxonMobil, BP, Shell, and ConocoPhillips to dismiss for lack of personal jurisdiction (Federal Rule 12(b)(2)). The Ninth Circuit Court of Appeals heard oral arguments in February 2020.

- *Washington, D.C.* The District of Columbia's Office of Attorney General has retained the Firm to assist its investigation and prosecution against fossil fuel companies under the District's Consumer Protection Procedures Act.[1]

ii. Water contamination

PFAS: Sher Edling currently represents eleven public water providers in New York and New Jersey in cases seeking damages for PFOA/PFOS contamination of drinking water wells caused by off-site pollution from airports, manufacturing facilities, and other sources. Plaintiffs assert a variety of state law tort claims against the manufacturers of PFOA, PFOS, and the products that contain or are manufactured with those toxic perfluorinated compounds.

Three of the eleven matters are part of the multi-district litigation, pending in the U.S. District Court for the District of South Carolina, titled *In re: Aqueous Film-Forming Foams ("AFFF") Products Liability Litigation*, MDL No. 18-mn-2878-RMG. The case is going through discovery, in which Sher Edling holds lead roles in the MDL discovery management committee.

Eight of the eleven matters were filed in the Eastern District of New York in 2019. Defendants filed an unsuccessful motion to have those matters heard in the AFFF MDL, and those cases are now proceeding in the Eastern District of New York.

1,4-Dioxane: Sher Edling represents 26 public water providers on Long Island, including Suffolk County Water Authority, the nation's largest supplier of public drinking water exclusively from groundwater, in litigation to recover damages for 1,4-dioxane contamination of drinking water wells. The lawsuits assert claims against the manufacturers of 1,4-dioxane and products containing 1,4-dioxane.

These cases are all pending in the U.S. District Court for the Eastern District of New York and are all related and managed by Judge Nina Gershon. Discovery is ongoing.

Transboundary Contamination: Sher Edling represents the City of Imperial Beach, the San Diego Unified Port District, and the City of Chula Vista in an action asserting environmental

[1] Sher Edling has been retained by other jurisdictions in planned litigation, and may be able to share those in confidence.

claims under the Clean Water Act and the Resource Conservation and Recovery Act against defendants the International Boundary and Water Commission (USIBWC), a U.S. federal agency, and Veolia Water North America–West, LLC. The plaintiffs' claims arise from defendants' discharges of pollutants from facilities they own and operate in the Tijuana River Valley. These discharges foul the air and beaches in and near the plaintiffs, which impacts property values and tourism, raises significant health concerns, and depresses plaintiffs' economy. Transboundary pollution has been identified as a problem in the region since the 1930s, and the particular water and sediment pollution at issue in this litigation has impacted the South San Diego County community since USIBWC constructed its facilities in the late 1970s. Local public entities pursued collaborative and political solutions for decades, with minimal change to the ongoing discharges from USIBWC's facilities.

After filing the complaint on behalf of its clients, several additional local and state agencies filed similar lawsuits, and are working collaboratively to prosecute the case. The Firm has taken the lead as to litigation strategy, in the courtroom, and in settlement negotiations.

iii. Related legal experience

- *In re MTBE Products Liability Litigation (City of New York) v. ExxonMobil*, 725 F.3d 65 (2d Cir. 2013). In 2008, the City of New York asked Vic Sher to assume the lead trial counsel role in the City's case against the oil industry over MTBE contamination of wells in Queens, the first to proceed to trial in a nationwide multidistrict litigation. In 2009, a four-month federal jury trial resulted in a verdict for the City of $104.7 million, with a total recovery (including pretrial settlements) of more than $125 million. The Second Circuit affirmed in all respects in 2013. Mr. Sher also was designated by the court as national co-lead plaintiffs counsel in the related federal multidistrict litigation, *In re MTBE Products Liability Litigation*.

- *State of New Hampshire v. ExxonMobil*, 168 N.H. 211 (N.H. 2015). In 2003, the New Hampshire Attorney General retained Vic Sher as lead outside counsel to prosecute the first statewide case to recover the costs of MTBE contamination. Over most of the next decade, Mr. Sher guided the case as it prepared for trial. First, the oil companies tried to transfer the case to federal court; Mr. Sher argued the case in the U.S. Court of Appeals for the Second Circuit that sent the matter back to state court, where it belonged. *In re MTBE Prods. Liab. Litig.*, 488 F.3d 112 (2d Cir. 2007). Mr. Sher prepared the expert and legal approach that allowed the State to prove its case. The oil companies challenged virtually every aspect of the case, including the State's rights to recover costs related to private wells and the ability to prove its case based on expert evidence of the extent of contamination. Ultimately, the State recovered more than $140 million in pretrial settlements, and, in the largest trial ever held in the State of New Hampshire, the jury awarded more than $236 million against ExxonMobil. The New Hampshire Supreme Court affirmed the jury verdict in 2015 (and the U.S. Supreme Court declined to review). *State v. Exxon Mobil Corp.*, 168 N.H. 211 (N.H. 2015).

- *In Re: Lehman Bros. Sec. & ERISA Litig.*, No. 09-md-02017 (S.D.N.Y.). Matt Edling was the lead counsel on behalf of six California cities and counties asserting claims arising out of misrepresentations and omissions made by Lehman Brothers, its directors and officers and Ernst & Young. Mr. Edling' clients recovered more than $100 million in different fora. In this

same action, Mr. Edling was designated by the court as national liaison counsel for all plaintiffs in nationwide federal multidistrict litigation.

6. The firm's legal practice management systems and policies, including any mechanism for accepting and tracking compliance with outside counsel guidelines

As nearly all of Sher Edling's practice is the representation of public entities, it maintains practice management systems to comply with public guidelines and reporting obligations. For example, Sher Edling currently uses Advologix, which generates reports on a monthly basis for time and cost reporting for many of its clients. Attorneys and staff are required to enter all their time for each matter they work on through Advologix. Additionally, the firm regularly interfaces with external auditors for its clients as required.

Sher Edling's practice management application has a built-in conflict check system. Counsel and parties related to a matter are entered into the application for that specific matter. A conflict check can be achieved by performing a system-wide search of any firm, attorney name, expert name, etc., and search results will be displayed.

7. Diversity and inclusion in hiring, training, and retention practices

Sher Edling recognizes diversity and inclusion as core values that enhance our firm and strengthen our ability to serve our clients. Sher Edling is committed to building a team with different backgrounds and viewpoints and to developing, retaining, and promoting traditionally underrepresented attorneys. Women comprise 47% percent of the firm's employees, including 3 of its 6 associates. Two associates are LGBTQ+, one of whom serves on the board of directors for the Pride Law Fund. Women and ethnic minorities both participate in key management decisions at the Firm, including all hiring decisions for attorneys and staff. The Firm is also dedicated to promoting diversity and inclusion throughout its practice and is proud to work with many minority-owned vendors.

8. Human and technical resources

Sher Edling's work infrastructure is cloud-based; all employees are able to work from home or anywhere with an internet connection.

Sher Edling has carefully vetted and selected reputable third-party cloud providers that maintain extensive and industry-standard disaster recovery plans. The firm maintains copies of the providers' disaster recovery plans, which will provide support as needed. Additionally, the firm has IT and Security staff to respond to any potential disasters. Sher Edling can provide the names of all providers and disaster recovery plans upon request.

The Sher Edling team has extensive experience with dozens of document review platforms, electronic databases, data collection tools, and forensic analysis. We issue competitive requests for

proposals and negotiate contracts with outside vendors based on the needs of each case and the volume of anticipated ESI productions to secure the most effective tools at the best pricing possible.

Our team is well-equipped to take on the complex discovery expected in the State's potential litigation. This is especially true of Senior Associate Stephanie Biehl's everyday experience in the ever-changing ESI landscape. Currently, Ms. Biehl leads the ESI team in the AFFF MDL—the largest contamination MDL in the country—and is also the Co-Chair of the Discovery Committee in that MDL. In all of her current matters, Ms. Biehl manages and leads the negotiations and motion practice related to discovery and e-discovery protocols and disputes (e.g., search term creation and implementation, data source and custodian identification, Technology Assisted Review ("TAR"), and predictive coding). She also trains, manages and works with hundreds of document reviewers, forensic data collectors, information technology groups that work for and with her clients, and internal and external data review and processing platforms.

9. Maintaining responsive communication with AGO

Sher Edling prides itself on its collaborative approach to working with public counsel, and, especially, on maintaining frequent and valuable communications. The Firm proposes to hold monthly conference calls with AGO to review the status of the case, deadlines, and general strategy. These calls may be more frequent when there are motion filings, hearings with the Court, and during the different stages of discovery. We also can provide regular written updates as desired. Our team would also welcome in-person meetings (or video conferences) when helpful to the State. When communicating with state entities, we are always mindful of privilege and potential "sunshine law" implications.

10. Representation of other governmental entities

Sher Edling currently represents two other Attorney General Offices: Rhode Island, as co-counsel with the Attorney General's Office in the state's climate damages case, and the District of Columbia, as co-counsel with the Attorney General's Office in investigation and potential litigation under the District's Consumer Protection Procedures Act against members of the fossil fuel industry for deceptive advertising and business practices concerning the environmental and climate change impacts of their products. Below is a current list of Sher Edling's governmental entity representations:

	Client Name	Contact	Phone
1.	State of Rhode Island	Neil F.X. Kelly, Assistant Attorney General Adi Goldstein, Deputy Attorney General	(401) 274-4400
2.	City of Baltimore	Suzanne Sangree Senior Counsel for Public Safety, Director of Affirmative Litigation	(410) 396-8393

	Client Name	Contact	Phone
3.	City and County of San Francisco	Matthew Goldberg Deputy City Attorney	(415) 554-4285
4.	County of San Mateo	John Beiers, County Counsel	(650) 363-4775
5.	County of Marin	Brian Washington, County Counsel	(415) 473-6117
6.	City of Imperial Beach	Jennifer Lyon City Attorney	(619) 440-4444
7.	County of Santa Cruz	Jordan Sheinbaum, Deputy County Counsel	(805) 451-4452
8.	City of Richmond	Bruce Goodmiller. City Attorney	(510) 620-6509
9.	City of Santa Cruz	Anthony P. Condotti, City Attorney	(831) 420-6200
10.	City of Oakland	Erin Bernstein, Senior Deputy City Attorney	(510) 238-3601
11.	District of Columbia	Jimmy R. Rock, Assistant Deputy Attorney General, Public Advocacy Division	(202) 724-6610
12.	City and County of Honolulu	Robert M. Kohn, Deputy Corporation Counsel	(808) 768-5129
13.	San Diego Unified Port District	John Carter, Deputy General Counsel	(619) 686-6506
14.	City of Chula Vista, California	Glen R. Googins, City Attorney	(619) 691-5037
15.	Sacramento Suburban Water District	Dan York, General Manager	(916) 679-3973
16.	Rio Linda Elverta Community Water District	Barbara A. Brenner, Counsel	(916) 468-0625
17.	City of Patterson, California	Barbara A. Brenner, Counsel	(916) 468-0625
18.	City of Riverbank, California	Barbara A. Brenner Counsel	(916) 468-0625
19.	City of Turlock, California	Barbara A. Brenner, Counsel	(916) 468-0625
20.	Suffolk County Water Authority	Timothy Hopkins, General Counsel	(631) 589-5200
21.	Albertson Water District	Anthony LaMarca, Counsel	(516) 677-9000
22.	Atlantic City Municipal Utilities Authority	G. Bruce Ward, Executive Director	(609) 345-3315
23.	Bethpage Water District	Michael Ingham, Counsel	(516) 370-5528
24.	Carle Place Water District	Peter Fishbein, Counsel	(516) 746-5599
25.	Franklin Square Water District	Peter Fishbein, Counsel	(516) 746-5599
26.	Garden City Park Water District	Michael Ingham, Counsel	(516) 370-5528
27.	Greenlawn Water District	Michael Ingham, Counsel	(516) 370-5528
28.	Jericho Water District	Michael Ingham, Counsel	(516) 370-5528
29.	Locust Valley Water District	Michael Ingham, Counsel	(516) 370-5528

	Client Name	Contact	Phone
30.	Manhasset-Lakeville Water District	Christopher Prior, Counsel	(516) 829-6900
31.	Oyster Bay Water District	Donald MacKenzie, Counsel	(516) 496-4529
32.	Plainview Water District	Michael Ingham, Counsel	(516) 370-5528
33.	Port Washington Water District	Peter Fishbein, Counsel	(516) 746-5599
34.	Ridgewood Water District	Matthew Rogers, Counsel	(201) 857-3700
35.	Roslyn Water District	Peter Fishbein, Counsel	(516) 746-5599
36.	South Farmingdale Water District	Michael Ingham, Counsel	(516) 370-5528
37.	South Huntington Water District	Michael McCarthy, Counsel	(631) 351-4000
38.	Town of Hempstead	Joseph Ra, Town Attorney	(516) 812-3188
39.	Town of Huntington / Dix Hills Water District	Nicholas Ciappetta, Town Attorney	(631) 351-3042
40.	Village of Garden City	Peter M. Fishbein, Counsel	(516) 746-5599
41.	Village of Hempstead	Cherice Vanderhall, Village Attorney	(516) 489-3400
42.	Village of Mineola	John Gibbons, Counsel	(516) 592-6806
43.	Village of Williston Park	James Bradley, Counsel	(516) 829-6900
44.	Water Authority of Great Neck North	Stephen Limmer, Counsel	(516) 829-6900
45.	Water Authority of Western Nassau County	Dominick Minerva, Counsel	(516) 872-7400
46.	West Hempstead Water District	Michael Ingham. Counsel	(516) 370-5528
47.	Westbury Water and Fire District	Michael Ingham, Counsel	(516) 370-5528
48.	City of National City	Angil Morris-Jones	(619) 336-4220

11. Financial capability

Sher Edling has ample resources to assist the State's prosecution of this potential matter, including prosecuting and responding to discovery, as well as handling voluminous and contentious motions practice, trial, and appeal. Our team is well-capitalized and well-recognized for undertaking substantial, multi-defendant litigation with the knowledge that the commitment will be an expensive one for a number of years—including some of the largest multidistrict litigations in the nation.

12. Professional liability insurance

Sher Edling maintains professional liability insurance in an aggregate amount of $4 million, $5 million in cyber liability, and excess policies of $3 and $5 million.

C. ATTORNEY QUALIFICATIONS AND EXPERIENCE

1. Professional resume

The firm Resume is attached as **Exhibit 1**. Bios for each attorney are available here https://www.sheredling.com/team.

2, 3, 4. Firm members and experience

Victor M. Sher has brought landmark environmental litigation on behalf of plaintiffs for nearly 40 years. His focus has been representing public water suppliers and other public agencies, cities, and states in lawsuits against polluters of drinking water. He has litigated some of the nation's most prominent groundwater contamination cases on behalf of public agencies, involving various pollutants. Mr. Sher served as New York City's lead outside trial counsel in *City of New York v. ExxonMobil*, a federal jury trial over MTBE contamination that resulted in a verdict for the City of $104.7 million and the lead pretrial lawyer in *New Hampshire v. ExxonMobil*, 126 A.3d 266 (N.H. 2015). A further description of Mr. Sher's experience can be accessed here: https://www.sheredling.com/team/vic-sher.

Matthew K. Edling has represented public entities for more than a decade. Mr. Edling has extensive experience prosecuting consumer protection actions and representing public entities. He successfully prosecuted actions on behalf of six California cities and counties asserting claims arising out of misrepresentations made by Lehman Brothers and Ernst & Young. In this same action, Mr. Edling was designated by the court as national liaison counsel for all plaintiffs in nationwide federal multidistrict litigation in *In Re: Lehman Bros. Sec. & ERISA Litig.*, No. 09-md-02017 (S.D.N.Y.). Mr. Edling currently serves on the Plaintiffs Executive Committee in *In Re Aqueous Film-Forming Foams Products Liability Litigation*, MDL 2873, representing the public water suppliers. A further description of Mr. Edling's experience can be accessed here: https://www.sheredling.com/team/matt-edling.

Corrie J. Yackulic (Of Counsel) is a tenacious and effective trial lawyer and negotiator who has yielded results for her clients totaling in the tens of millions. During her career, which has spanned more than 30 years, Ms. Yackulic has focused on environmental tort cases involving toxic dumping, drinking water contamination, corporate polluting, and catastrophic environmental disaster. Ms. Yackulic is based in Seattle, and a further description of her experience can be accessed here: https://www.sheredling.com/team/corrie-yackulic.

Michael H. Burger (Of Counsel) is the Executive Director of the Sabin Center for Climate Change Law, and a Senior Research Scholar and Lecturer-in-Law at Columbia Law School in New York City. In his role at Sher Edling, Michael combines his experience as both a litigator and a legal scholar to help public agencies hold fossil fuel companies accountable for the climate change related damage they knowingly caused. In recent years, he has filed a number of amicus briefs in climate cases on behalf of the National League of Cities, the U.S. Conference of Mayors, the International Municipal Lawyers Association, and coalitions of cities and mayors from across the country. Mr. Burger is based in New York City, and a further description of his experience can be accessed here: https://www.sheredling.com/team/michael-burger.

Associates **Stephanie Biehl**, **Katie Jones**, **Martin Quiñones**, **Adam Shapiro**, **Timothy Sloane**, and **Nicole Teixeira** will assist with case management, discovery, all phases of pretrial practice and trial, and will be principally responsible for law and motion work. Each associate has extensive background in complex environmental litigation. A further description of their experience can be accessed here: https://www.sheredling.com/team.

Sher Edling lawyers have been litigating against major players in the fossil fuel industry for decades, including over climate deception. We have experience in every facet of litigation—investigation, pleadings, discovery, motion practice, trial, and appeal. All members of our team have significant involvement in the pending climate litigation and investigations where Sher Edling serves as outside counsel.

5. The office at which the attorney primarily works, if the firm has more than one office location

All of our attorneys are based in San Francisco, California, except Corrie Yackulic (Seattle) and Michael Burger (New York City).

6. Descriptions of representative matters

All relevant matters are discussed above and in the attached resume.

7. Hourly rate or example(s) of any other rates that you would like the AGO to consider (flat fee, capped/collared arrangements, and metrics for diligence of timely and accurate time entry

Sher Edling proposes a contingent fee relationship where it advances the costs. Hourly rates can be provided upon request, but the firm does not anticipate an hourly or alternative fee arrangement where those rates will be relevant to retention.

D. NON-ATTORNEY STAFF

1. Communication Team

In high profile litigation, success in the courtroom and in the court of public opinion go hand in hand. Bringing climate damages lawsuits against some of the largest fossil fuel companies in the world has resulted in intense media scrutiny, including from partisan media outlets with political agendas and questionable journalistic ethics. Not only is such media attention directed toward the lawsuits and the communities filing them largely unavoidable, but the fossil fuel industry defendants, their surrogates, and others have a long history of aggressive and deceptive public relations and public affairs campaigns that could damage the lawsuits.

There have been campaigns aimed at discrediting the communities that filed climate damages lawsuits, their attorneys, their potential experts, and others involved in formulating and

presenting their cases, as well as to swaying public opinion and influencing policymakers regarding the cases.

As a result, Sher Edling has built an in-house communications team that works with our clients to protect the lawsuits from attacks that could affect their disposition in and outside the courtroom. Our team includes:

Kevin Kirchner (Director of Communications) put his legal training to work as a policy and media strategist, and he has an extensive background in legislative, issue advocacy, corporate accountability, and ballot measure campaigns. For nearly four decades, Kevin has developed, coordinated, and implemented hundreds of media and advocacy campaigns on issues that include climate change, clean energy, protecting forests, wildlife, water supplies, and fisheries, and holding the oil industry accountable for MTBE cleanup.

John Lamson (Director of Media Relations) has put strategic communications to work for the public interest for more than 25 years. Working across the fields of nonprofit issue advocacy, higher education and electoral politics, he has crafted communications campaigns to define and defend institutional reputations, translate complex technical information for lay audiences, and win political and legislative campaigns. John brings deep experience in crisis communications, media relations and PR coaching to the team.

2. Investigation/Paralegals

Sher Edling's team also includes in-house investigators as well as senior paralegals with more than 30 years of combined complex litigation experience.

E. FEE AND COST PROPOSAL

On a statewide matter that impacts the entirety of the state, Sher Edling proposes a contingent relationship where the firm advances all costs and the fee is 16.67% for any recovery up to $150 million, plus 7.5% for any portion of the recovery greater than $150 million. Should the AGO seek the firm to assist with a smaller matter, e.g., a site-specific injury, Sher Edling seeks the opportunity to discuss a fee commensurate with the time, risk, and anticipated scope of recovery. The proposed fee structure is net of litigation costs. Depending on the claims the State decides to prosecute, Sher Edling would consider a fee cap and a lodestar cap. As Sher Edling is responsible for all costs, we are ever mindful of those costs. That said, the anticipated litigation may, and likely will be, expert-heavy and Sher Edling would welcome an opportunity to work with the AGO regarding the retention of experts.

F. ACTUAL OR POTENTIAL CONFLICTS OF INTEREST

1. Conflicts of interest

There are no limitations, problems, conflicts, or other issues impacting retention of this matter and no other issues to report.

2. Potential conflicts

There are no actual or potential conflicts relevant to this request.

EXHIBIT 1

CLIMATE CHANGE LITIGATION EXPERIENCE

Current Representations

Climate Change Impacts:

Sher Edling currently represents the following entities in litigation over climate change impacts:

- City and County of Honolulu (HI; 2020)
- State of Rhode Island (RI; 2018)
- City of Baltimore (MD; 2018)
- City of Richmond (CA; 2018)
- City of Santa Cruz (CA; 2017)
- City of Imperial Beach (CA; 2017)
- City and County of San Francisco (CA, 2018)
- City of Oakland (CA; 2018)
- Santa Cruz County (CA, 2018)
- Marin County (CA; 2017)
- San Mateo County (CA; 2017)
- Pacific Coast Federation of Fishermen's Associations (CA; 2018)

County of San Mateo v. Chevron Corp., et al., No. 17-cv-04929 (N.D. Cal.), *appeal docketed*, No. 18-15499 (9th Cir. Mar. 27, 2018); *County of Marin v. Chevron Corp., et al.*, No. 17-cv-04935 (N.D. Cal.), *appeal docketed*, No. 18-15503 (9th Cir. Mar. 27, 2018); and *City of Imperial Beach v. Chevron Corp., et al.*, No. 17-cv-04934 (N.D. Cal.), *appeal docketed*, No. 18-15502 (9th Cir. Mar. 27, 2018). These three cases assert claims for public nuisance, product liability, negligence, trespass, and failure to warn against members of the fossil fuel industry for injuries arising out of rising sea levels. The cases seek abatement, damages, punitive damages, and disgorgement of profits.

County of Santa Cruz v. Chevron Corp., et al., No. 18-cv-00450 (N.D. Cal. filed Dec. 20, 2017), *appeal docketed*, No. 18-16376 (9th Cir. July 24, 2018); *City of Santa Cruz v. Chevron Corp., et al.*, No. 18-cv-00458 (N.D. Cal. filed Dec. 20, 2017), *appeal docketed*, No. 18-16376 (9th Cir. July 24, 2018); and *City of Richmond v. Chevron Corp., et al.*, No. 3:18-cv-00732 (N.D. Cal. filed Jan. 22, 2018), *appeal docketed*, No. 18-16376 (9th Cir. July 24, 2018). These cases assert claims for public nuisance, product liability, negligence, trespass, and failure to warn against members of the fossil fuel industry for injuries arising out of rising sea levels and disruptions to the hydrologic cycle (extreme heat, precipitation, drought, and wildfire). The cases seek abatement, damages, punitive damages, and disgorgement of profits.

City and County of San Francisco v. BP, P.L.C., et al., No. 17-cv-6012, (N.D. Cal.) (filed Sept. 19, 2017), *appeal docketed*, No. 18-16663 (9th Cir. Sept. 4, 2018); and *The People of the State of California, acting by and through the Oakland City Attorney v. BP, P.L.C., et al.*, No. 3:17-cv- 6011 (N.D. Cal.) (filed Sept. 19, 2017), *appeal docketed*, No. 18-16663 (9th Cir. Sept. 4,

2018). These cases assert a claim for public nuisance against members of the fossil fuel industry for injuries arising out of global warming and sea level rise. The cases seek abatement.

Mayor and City Council of Baltimore v. BP P.L.C., et al., No. 24-C-18-004219 (Baltimore City Circ. Ct.), No. 18-cv-02357 (D. Md.) (filed July 20, 2018), *remand to state court affirmed on appeal*, No. 19-1644 (4th Cir.), *cert. petition filed* (Mar. 31, 2020). This case asserts claims under the Maryland Consumer Protection Act, as well as for public nuisance, product liability, negligence, trespass, and failure to warn against members of the fossil fuel industry for injuries arising out of rising sea levels and disruptions to the hydrologic cycle (extreme heat, precipitation, drought, and wildfire). The case seeks abatement, damages, punitive damages, and disgorgement of profits.

State of Rhode Island v. Chevron Corp., et al., No. PC-2018-4716 (Providence Sup. Ct.), No. 18-cv-00395 (D.R.I.) (filed July 2, 2018), *appeal docketed*, No. 19-1818 (1st Cir. Aug. 20, 2019). This case asserts claims under the public trust and for public nuisance, product liability, negligence, trespass, and failure to warn against members of the fossil fuel industry for injuries arising out of rising sea levels and disruptions to the hydrologic cycle (extreme heat, precipitation, drought, and wildfire). The case seeks abatement, damages, punitive damages, and disgorgement of profits.

City and County of Honolulu v. Sunoco LP, et al., No. 1CCV-20-0000380 (Haw. 1st Cir. Ct.), No. 20-cv-00164 (D. Haw.) (filed Mar. 9, 2020). This case asserts claims for public nuisance, private nuisance, product liability, failure to warn, negligence, and trespass against members of the fossil fuel industry for injuries arising out of rising sea levels and disruptions to the hydrologic cycle (extreme heat, precipitation, drought, and wildfire). The case seeks abatement, damages, punitive damages, and disgorgement of profits.

Pacific Coast Federation of Fishermen's Associations, Inc. v. Chevron Corp., et al., No. CGC-18-571285 (S.F. Sup. Ct.), No. 18-cv-07477 (N.D. Cal.) (filed Nov. 14, 2018). This case asserts claims for nuisance, product liability, failure to warn, and negligence by the west coast's largest commercial fishing industry trade group against members of the fossil fuel industry for injuries arising out of climate change-caused sea temperature increase, which increases the frequency and intensity of marine heatwaves and, correspondingly, of harmful algal blooms, damaging both the productivity and the safety of commercially harvested seafood, including Dungeness crab. The case seeks abatement, damages, punitive damages, and disgorgement of profits.

Climate Change – Consumer Protection:

Washington, District of Columbia: The District of Columbia's Office of Attorney General has retained Sher Edling to assist its investigation and prosecution against fossil fuel companies under the District's Consumer Protection Procedures Act.

Current Representations

PFOA/PFOS:

Sher Edling represents 14 public water providers in New York and New Jersey in cases seeking damages for PFOA/PFOS contamination of drinking water wells caused by off-site pollution from airports, manufacturing facilities, and other sources. Plaintiffs assert a variety of state-law tort claims against the manufacturers of PFOA, PFOS, and the products that contain or are manufactured with those toxic perfluorinated compounds.

- Suffolk County Water Authority (NY, MDL; 2017)
- Roslyn Water District (NY; 2018)
- Port Washington Water District (NY; 2018)
- Ridgewood Water (NJ, MDL; 2018)
- Water Authority of Western Nassau County (NY; 2019)
- Village of Garden City (NY; 2019)
- Atlantic City Municipal Utilities Authority (NJ, MDL; 2019)
- Carle Place Water District (NY; 2019)
- Village of Mineola (NY; 2019)
- Water Authority of Great Neck North (NY; 2019)
- Bethpage Water District (NY; under investigation)
- Town of Hempstead (NY; under investigation)
- Franklin Square Water District (NY; under investigation)
- South Farmingdale Water District (NY; under investigation)

In addition, Sher Edling has a leadership role in *In re: Aqueous Film-Forming Foams Products Liability Litigation* (the "AFFF MDL"), a national Multi-District Litigation concerning certain PFAS-related cases recently assigned to Judge Richard Gergel in Charleston, S.C. Judge Gergel has appointed Matt Edling of SELLP to the Executive Committee, where he co-chairs the Public Water Supplier Committee of the Plaintiffs' Steering Committee in that MDL.

1,4-Dioxane:

Sher Edling represents 25 public water providers on Long Island, including Suffolk County Water Authority, the nation's largest supplier of public drinking water from groundwater, in litigation to recover damages for 1,4-dioxane contamination of drinking water wells. The lawsuits all assert state-law claims against the manufacturers of 1,4-dioxane and products containing 1,4-dioxane.

- Suffolk County Water Authority (NY; 2017)
- Roslyn Water District (NY; 2018)
- Garden City Park Water District (NY; 2018)
- Port Washington Water District (NY; 2018)
- Bethpage Water District (NY; 2018)
- Manhasset-Lakeville Water District (NY; 2018)
- Oyster Bay Water District (NY; 2018)
- Jericho Water District (NY; 2018)
- Locust Valley Water District (NY; 2018)
- Albertson Water District (NY; 2018)
- Westbury Water & Fire District (NY; 2019)
- Water Authority of Western Nassau County (NY; 2019)
- West Hempstead Water District (NY; 2018)
- Carle Place Water District (NY; 2018)
- Water Authority of Great Neck North (NY; 2018)
- South Farmingdale Water District (NY; 2018)
- Plainview Water District (NY; 2019)
- Village of Mineola (NY; 2019)
- Franklin Square Water District (NY; 2019)
- Village of Garden City (NY; 2019)
- Town of Huntington/Dix Hills Water District (NY; 2019)
- Greenlawn Water District (NY; 2019)
- South Huntington Water District (NY; 2019)
- Village of Hempstead (NY; 2019)
- Town of Hempstead (NY; 2019)

TCP:

Sher Edling attorneys have successfully litigated cases on behalf of water suppliers seeking damages for TCP contamination of drinking water wells for nearly fifteen years.

- City of Patterson, CA (2019; TCP well contamination)
- City of Turlock, CA (2019; TCP Well Contamination)
- City of Riverbank, CA (2019; TCP Well Contamination)
- Sacramento Suburban Water District (2019; TCP Well Contamination)
- City of Oceanside, CA (2005–2011; TCP well contamination)
- California Water Service Company (2003–2016; MTBE, TCP, PCE/TCE well contamination)
- California Water Service Company and City of Bakersfield, CA (2003–2016; TCP well contamination)
- Hawaii Water Service Co. (2003–2008; TCP and DBCP)
- City of Livingston, CA (2005–2011; TCP well contamination)
- City of Wasco, CA (2005–2013; TCP well contamination)
- City of Sunnyvale and Sunnyvale Redevelopment Agency, CA (2008–2011; PCE/TCE groundwater and soil contamination)

Transboundary Water Pollution:

City of Imperial Beach, et al. v. IBWC, Veolia North America (S.D. Cal. no. 18-cv-457-JM-JMA (filed Mar. 2, 2018). Sher Edling represents the cities of Imperial Beach and Chula Vista California, as well as the Port of San Diego, which seek equitable relief and damages related to transboundary water contamination against the International Boundary Water Commission and Veolia Water North America.

Hexavalent Chromium:

Sacramento Suburban Water District v. United States, Court of Federal Claims no. 17-860 C (filed June 23, 2017); *Rio Linda Elverta Community Water District v. United States*, Court of Federal Claims No. 17-859 C (filed June 23, 2017); *Sacramento Suburban Water District v. Elementis Chromium, Inc.*, E.D. Cal. No. 2:17-cv-01353-TLN-AC (filed June 30, 2017); *Rio Linda Elverta Community Water District v. United States*, E.D. Cal. No. 2:17−CV−01349−KJM−GGH (filed June 30, 2017). Sher Edling represents these water districts who seek damages for hexavalent chromium contamination of drinking water wells suffered by public water district resulting from off-site contamination of a former U.S. Air Force Base. Plaintiffs assert claims against the U.S. Government under the Resource Conservation & Recovery Act (imminent and substantial danger), the Federal Tort Claims Act, and in the Court of Federal Claims for an unconstitutional taking of property. Plaintiffs also assert state law tort claims against the manufacturers of products containing chromic acid.

- *In re MTBE Products Liability Litigation (City of New York*) *v ExxonMobil,* 725 F.3d 65 (2nd Cir. 2013). In 2008, the City of New York asked Vic Sher to assume the lead trial counsel role in the City's case against the oil industry over MTBE contamination of wells in Queens, the first to proceed to trial in a nationwide multidistrict litigation. In 2009, a four-month federal jury trial resulted in a verdict for the City of $104.7 million, with a total recovery of more than $125 million. The Second Circuit affirmed in all respects in 2013. Mr. Sher also was designated by the court as national co-lead counsel for the plaintiffs in the related federal multidistrict litigation, *In Re: MTBE Products Liability Litigation*.

- *State of New Hampshire v. ExxonMobil*, 168 N.H. 211, 126 A.3d 266 (N.H. 2015). In 2003, the New Hampshire Attorney General retained Vic Sher as lead outside counsel to prosecute the first statewide case to recover the costs of MTBE contamination. Over most of the next decade, Mr. Sher guided the case as it prepared for trial. First, the oil companies tried to transfer the case to federal court; Mr. Sher argued the case in the U.S. Court of Appeals for the Second Circuit that sent the matter back to state court where it belonged. Then, Mr. Sher prepared the expert and legal approach that allowed the State to prove its case against the oil companies on a landscape basis without getting bogged down in impossible intricacies of individual sites. The oil companies challenged virtually every aspect of the case, including the State's rights to recover costs related to private wells and the ability to prove its case based on expert evidence of the extent of contamination. Ultimately, the State recovered more than $140 million in pretrial settlements, and, in the largest trial ever held in the State of New Hampshire, the jury awarded more than $236 million against ExxonMobil. The New Hampshire Supreme Court affirmed the jury verdict in 2015 (and the U.S. Supreme Court declined to review).

- *In re MTBE Products Liability Litigation* (S.D.N.Y. 2003 – 2011). This multi-district litigation over public well contamination by the gasoline additive MTBE included more than 150 cases from around the country. The District Court designated Vic Sher as one of three co-lead counsels for the plaintiffs. Most of the cases settled against most of the defendants in 2008 for an aggregate $423 million cash payment plus a "safety net" for future well impacts. Mr. Sher's clients –public water agencies located in California – received more than $108 million from the group settlement.

- *City of St. Louis (MI) v. Velsicol Corp.* In 2006, the City retained Vic Sher to address DDT-related contamination leaking from a failed Superfund remedy at the former Velsicol facility in St. Louis, Michigan. Investigation revealed that pCBSA had already reached many of the City's wells. The case settled in 2011 with the City recovering $26.5 million to fund a new water system.

- *In re Methanex* (NAFTA Tribunal). In 2004 the U.S. Department of State retained Vic Sher as a consultant on the environmental and expert aspects of an international trade case brought by Methanex, a Canadian manufacturer of MTBE that claimed California's ban of MTBE because of concern over groundwater contamination violated NAFTA's free trade provisions. The matter was resolved against Methanex in 2005.

- *South Lake Tahoe Public Utility District v. Atlantic Richfield Co.*, *et al.* Vic Sher was a senior member of the trial team on this landmark MTBE case, which settled in August 2002. The Utility District brought an action against a manufacturer of MTBE (Lyondell), the California refiners who supplied gasoline containing MTBE, and several local gasoline station owner/operators. The case went to trial starting in September 2001 against six non-settling defendants. In April 2002, the jury returned a special verdict on refiner/manufacturer liability, finding that MTBE and gasoline containing MTBE were defective products, and that Shell and Lyondell Chemical had acted with "malice" by failing to disclose the significant hazards associated with the use of MTBE in gasoline. The matter finally settled in August 2002 for a total of more than $69 million.

- *City of Santa Monica v. Shell*, *et al.* Vic Sher served as lead outside co•counsel in the MTBE lawsuit relating to the City's Charnock well field, which provided about 40% of the City's drinking water (a total of about 7,500 gallons per minute ("gpm") peak capacity). MTBE contamination forced the City to shut down the wells and well field in 1996. Government agencies identified about thirty potential source sites (current or former retail gasoline stations and two oil company pipelines) within a one and one-quarter mile radius of the well field. The City filed suit in June 2000 against the manufacturers of MTBE and the refiners of gasoline containing MTBE based upon causes of action for products liability, negligence, nuisance, and trespass. In 2003 the City achieved a landmark settlement with all but one defendant, Shell, which settled in 2006. Under the settlements, the City received approximately $130 million in cash plus the full costs of constructing, operating, and maintaining an MTBE treatment facility to clean Santa Monica's water, with a total overall settlement value of about $500 million.

- *City of Pomona v. SQMNA*. The City retained Vic Sher to address perchlorate contamination from historic use of Chilean nitrate fertilizer on surrounding citrus crops. Mr. Sher argued the successful appeal of the trial judge's exclusion of expert testimony on stable isotopic analysis and related issues, *City of Pomona v. SQM North America Corp.*, 750 F.3d 1036 (9th Cir. 2014), and helped try the case in 2015 (the Ninth Circuit recently reversed a defense verdict).

- *County of Maui Board of Water Supply v. Dow Chemical et al.* (DBCP). DBCP, a soil fumigant used widely in Hawaii (and elsewhere) on pineapple and other crops, contaminated and threatened the County of Maui's public drinking water wells located around the Island. Vic Sher (with his then firm Miller & Sher) represented the plaintiff. A 1999 settlement with the chemical manufacturers resolved the County's lawsuit and provided the County with a 40-year guarantee of all costs associated with designing, building, installing, maintaining and operating granular activated carbon (GAC) facilities on any County well that either is currently contaminated or becomes contaminated during the 40-year life of the settlement.

- *Hawaii Water Service Co. v. Dow Chemical Co. et al.* (DBCP, TCP). In 2003 HWSC retained Vic Sher in connection with DBCP and TCP contamination of the wells that supply the Kaanapali Resort on Maui, HI. DBCP and TCP came from applications of soil fumigants manufactured by Dow Chemical and Shell Chemical to pineapple fields up-country from the Resort's water supply. The matter resolved favorably in 2008. Vic Sher

was also lead counsel on a series of TCP cases in California's Central Valley, including on behalf of the communities of Oceanside, Livingston, Shafter, and Bakersfield.

- *City of Riverside v. Shell Oil Co. et al.* (DBCP). Growing plumes of DBCP impacted a large number of wells in the City of Riverside's public water system. In 2001, the chemical manufacturers settled the City's litigation by paying $4.1 million and agreeing to provide all costs associated with treating DBCP-contaminated drinking water in currently contaminated wells or wells that become contaminated in the future. To date, the City has built two large combined GAC treatment facilities under the settlement, treating a combined flow of approximately 15,000 gpm, and the City anticipates needing a substantial number of additional wells treated over the 40-year life of the agreement either individually or in additional centralized treatment facilities.

- *City of Riverside/Lockheed Martin* (TCE). TCE from a Lockheed Martin defense facility impacted wells in the City of Riverside's public water system. Vic Sher helped the City negotiate a settlement (without the need for a lawsuit) under which Lockheed Martin has paid all costs of treating wells contaminated with TCE from this plume.

- *Lake Davis Rotenone Contamination*. A program to eradicate pike from Lake Davis, California, by the California Department of Fish & Game went horribly awry. Vic Sher represented Plumas County in negotiations that ultimately led the Legislature to appropriate more than $9 million for public and private damages suffered from the lake poisoning.

From: Adam Shapiro <adam@sheredling.com>
To: Leigh Currie <Leigh.Currie@ag.state.mn.us>, Peter Surdo <Peter.Surdo@ag.state.mn.us>, Oliver Larson <Oliver.Larson@ag.state.mn.us>
Cc: Nicole Teixeira <nicole@sheredling.com>, Vic Sher <vic@sheredling.com>, Matt Edling <matt@sheredling.com>
Subject: Removal in DC Climate Action
Date: Fri, 17 Jul 2020 16:40:42 -0500
Importance: Normal
Attachments: 2020-07-17_[1]_Notice_of_Removal.pdf

Leigh, Pete, and Oliver,

I hope all is well. As you know, the District of Columbia filed a climate impacts lawsuit against Exxon, Shell, BP, and Chevron around the same time as Minnesota. Exxon filed a notice of removal in that case today, which is attached. [redacted]

Regards,

Adam Shapiro
Sher Edling LLP
(628) 231-2508

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

DISTRICT OF COLUMBIA, 441 4th St., N.W., Washington, D.C. 20001,

Plaintiff,

v.

EXXON MOBIL CORP., 5959 Las Colinas Blvd., Irving, TX 75039, EXXONMOBIL OIL CORPORATION, 5959 Las Colinas Blvd., Irving, TX 75039, ROYAL DUTCH SHELL PLC, Carvel van Bylandtlaan 16, 2596 HR The Hague, The Netherlands, SHELL OIL COMPANY, 150 N. Dairy Ashford, Houston, TX 77079, BP P.L.C., 1 St. James's Square, London, SW1Y4PD, BP AMERICA INC., 501 Westlake Park Blvd., Houston, TX 77079, CHEVRON CORPORATION, 6001 Bollinger Canyon Road, San Ramon, CA, CHEVRON U.S.A. INC., 6001 Bollinger Canyon Rd., San Ramon, CA 94583,

Defendants.

Civil Action No. _____

NOTICE OF REMOVAL

PLEASE TAKE NOTICE THAT Defendants Exxon Mobil Corporation and ExxonMobil Oil Corporation (collectively, "ExxonMobil"), hereby remove this action, currently pending in the Superior Court of the District of Columbia, to the United States District Court for the District of Columbia pursuant to 28 U.S.C. §§ 1331, 1332(a), 1332(d), 1441(a), 1442(a), and 1453(b), and 43 U.S.C. § 1349(b)(1). To the extent any part of Plaintiff's causes of action can be construed as non-federal, this Court has supplemental jurisdiction over them under 28 U.S.C. § 1367(a) because they form part of the same case or controversy as those causes of action over which the Court has

original jurisdiction. All other defendants that have been properly joined and served, or purported to be served (collectively, "Defendants"), have consented to this Notice of Removal.[1]

While characterized as a consumer-protection action brought under municipal law, this lawsuit by the District of Columbia, acting through its attorney general (the "Attorney General"), instead seeks to wade into complex areas of federal statutory, regulatory, and constitutional regulation on climate change, and to substitute the District of Columbia's judgment for that of longstanding decisions by the federal government about national and international energy policy and environmental protection. A suit of this nature should be heard by a federal court.

TIMELINESS OF REMOVAL

1. Plaintiff filed this action against Defendants on June 25, 2020, in the District of Columbia Superior Court as Civil Action No. 2020 CA 002892 B. No Defendant was served prior to June 26, 2020.

2. This Notice of Removal is timely because it is filed within 30 days of service. *See* 28 U.S.C. § 1446(b).

NATURE OF THE ACTION

3. The Attorney General brought this action to limit and ultimately end Defendants' production of fossil fuels because of their connection to climate change. The origins of this lawsuit demonstrate the intent to regulate worldwide greenhouse gas emissions—a task assigned

[1] Consenting Defendants are Royal Dutch Shell PLC and Shell Oil Company (collectively, "Shell"); Chevron Corporation and Chevron U.S.A. Inc. (collectively, "Chevron"); and BP p.l.c., and BP America Inc. (collectively, "BP"). By filing or consenting to this Notice of Removal, Defendants do not waive any right, defense, affirmative defense, or objection, including without limitation any challenges to personal jurisdiction, insufficient process, and/or insufficient service of process. *See, e.g.*, *Rivera* v. *Bally's Park Place, Inc.*, 798 F. Supp. 2d 611, 615-16 (E.D. Pa. 2011).

exclusively to the federal government in our constitutional system. In early 2016, a coalition of state attorneys general, including the Attorney General, entered into a "Climate Change Coalition Common Interest Agreement" in furtherance of their shared interest in "limiting climate change" and "ensuring the dissemination of *accurate* information about climate change." Ex.[2] 1 at 1 (emphasis added).[3] Those state and local government officials—approximately 20 in number—called themselves the "Green 20," to reflect their commitment to a progressive climate change agenda.

4. On March 29, 2016, the Green 20 held a press conference, entitled "AGs United for Clean Power," with at least one representative of the Attorney General in attendance. Ex. 2 at 1. Noting the perceived "gridlock in Washington," the New York Attorney General promoted "collective efforts to deal with the problem of climate change" and urged his colleagues to "step into this [legislative] breach" through the "creative[]" and "aggressive[]" use of their respective offices to target the fossil fuel industry. *Id.* at 1, 3.[4]

5. The AGs United for Clean Power press conference was the product of a strategy of climate activists and plaintiff's lawyers developed years earlier. Its outlines emerged during a "Workshop on Climate Accountability, Public Opinion, and Legal Strategies" held in La Jolla, California in June 2012. Ex. 4 at 1. The workshop attendees discussed using law enforcement

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[2] "Ex." refers to an Exhibit attached to this Notice of Removal.

[3] The parties to the Climate Change Coalition Common Interest Agreement included the state attorneys general of California, Connecticut, Delaware, the District of Columbia, Iowa, Illinois, Maryland, Massachusetts, Maine, Minnesota, New Mexico, New York, Oregon, Rhode Island, Virginia, Vermont, Washington, and the U.S. Virgin Islands. *See* Ex. 2 at 1.

[4] This press conference drew criticism from thirteen other state attorneys general, who viewed the intentions expressed by the attorney general coalition as an attempt to "[u]s[e] law enforcement authority to resolve a public policy debate." Ex. 3 at 3.

powers and civil litigation to "maintain[] pressure on the [fossil fuel] industry that could eventually lead to its support for legislative and regulatory responses to global warming." *Id.* at 27. Some participants noted that "pressure from the courts offers the best current hope for gaining the energy industry's cooperation in converting to renewable energy." *Id.* at 27-28. The attendees concluded that "a single sympathetic state attorney general might have substantial success in bringing key internal documents to light" that could be used to coerce companies to change their positions on climate and energy policy. *Id.* at 11. They also saw civil litigation as a vehicle for accomplishing their goals, with one commentator observing, "Even if your ultimate goal might be to shut down a company, you still might be wise to start out by asking for compensation for injured parties." *Id.* at 13.

6. Prior to the AGs United for Clean Power press conference, the attorneys general met with climate activists who had participated in the La Jolla conference.[5] One of those activists had recently attended a meeting at the Rockefeller Family Fund offices to discuss a so-called "Exxon campaign" to undermine ExxonMobil's ability to conduct business. The campaign's goals included "delegitimiz[ing] [ExxonMobil] as a political actor," "establish[ing] in [the] public's mind that Exxon is a corrupt institution that has pushed humanity (and all creation) toward climate chaos and grave harm," and "driv[ing] divestment from Exxon." Ex. 6 at 1.

7. Over the next several years, the states associated with the Green 20 filed lawsuits against ExxonMobil and other energy companies named in this lawsuit, all with the goal of limiting—if not ceasing—Defendants' production and sales of fossil fuels, including by stifling

[5] These presentations were not only closed to the public; the attorneys general also affirmatively directed the participants to conceal their participation. *See* Ex. 5 at 1 ("My ask is if you speak to the reporter, to not confirm that you attended or otherwise discussed the event.").

speech on political issues and questions.[6] The first of these lawsuits, brought by the New York Attorney General, went to trial on October 22, 2019, and concluded with a defense verdict for ExxonMobil. Justice Ostrager, who presided over the trial, found the State's allegations to be "without merit," and its complaint to be "hyperbolic" and the "result of an ill-conceived initiative of the Office of the Attorney General." *People* v. *Exxon Mobil Corp.*, Civ. No. 18-45044, 2019 WL 6795771, at *2, *24 (N.Y. Sup. Ct. Dec. 10, 2019).

8. Several municipalities, also intending to shape the nation's energy policy, have joined in the effort to file lawsuits against energy companies.[7] A trial court in Texas concluded that climate activists had mounted a "crusade" against ExxonMobil "aimed to chill and suppress ExxonMobil's speech through legal actions & related campaigns." *City of San Francisco* v. *Exxon Mobil Corp.*, Civ. No. 18-106, 2020 WL 3969558, at *3, *8 (Tex. App. June 18, 2020) (internal quotation marks omitted). A Texas appellate court likewise expressed dismay about California municipalities' "[l]awfare," which it considered "an ugly tool by which to seek the environmental

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[6] *See State* v. *Am. Petrol. Inst.*, Civ. No. 20-3837 (Minn. Dist. Ct. June 24, 2020); *Commonwealth* v. *ExxonMobil Corp.*, Civ. No. 19-3333 (Mass. Super. Ct. Oct. 24, 2019); *People* v. *ExxonMobil Corp.*, Civ. No. 18-45044 (N.Y. Sup. Ct. Oct. 24, 2018); *State* v. *Chevron Corp.*, Civ. No. 18-4716 (R.I. Super. Ct. July 2, 2018).

[7] *See City of New York* v. *BP p.l.c.*, Civ. No. 18-182 (S.D.N.Y. Jan. 9, 2018); *City & County of Honolulu* v. *Sunoco LP*, Civ. No. 20-380 (Haw. Cir. Ct. Mar. 9, 2020); *Mayor & City Counsel of Baltimore* v. *BP p.l.c.*, Civ. No. 18-4219 (Md. Cir. Ct. July 20, 2018); *King County* v. *BP p.l.c.*, Civ. No. 18-11859 (Wash. Super. Ct. May 9, 2018); *Board of County Commissioners of Boulder County* v. *Suncor Energy (U.S.A.), Inc.*, Civ. No. 18-30349 (Colo. Dist. Ct. Apr. 17, 2018); *City of Richmond* v. *Chevron Corp.*, Civ. No. 18-55 (Cal. Super. Ct. Jan. 22, 2018); *City of Santa Cruz* v. *Chevron Corp.*, Civ. No. 17-3243 (Cal. Super. Ct. Dec. 20, 2017); *County of Santa Cruz* v. *Chevron Corp.*, Civ. No. 17-3242 (Cal. Super. Ct. Dec. 20, 2017); *City of Oakland* v. *BP p.l.c.*, Civ. No. 17-87588 (Cal. Super. Ct. Sept. 19, 2017); *City of San Francisco* v. *BP p.l.c.*, Civ. No. 17-561370 (Cal. Super. Ct. Sept. 19, 2017); *City of Imperial Beach* v. *Chevron Corp.*, Civ. 17-1227 (Cal. Super. Ct. July 17, 2017); *County of Marin* v. *Chevron Corp.*, Civ. No. 17-2586 (Cal. Super. Ct. July 17, 2017); *County of San Mateo* v. *Chevron Corp.*, Civ. No. 17-3222 (Cal. Super. Ct. July 17, 2017).

policy changes the California Parties desire, enlisting the judiciary to do the work that the other two branches of government cannot or will not do." *Id.* at *20.

9. More recently, Bloomberg Philanthropies funded the creation of a State Energy & Environmental Impact Center (the "Impact Center") to assist in litigation to shape national energy policy. *See* Juliet Eilperin, *NYU Law Launches New Center to Help State AGs Fight Environmental Rollbacks*, Wash. Post (Aug. 16, 2017). The Impact Center urges state attorneys general to bring climate change lawsuits and provides them resources on the condition that the participating attorneys general do so. *See* Ex. 7 at 1-3. Among its initiatives, the Impact Center embeds Special Assistant Attorneys General ("SAAG") within attorneys-general offices that agree to "advanc[e] progressive clean energy, climate change, and environmental legal positions." *Id.* 3. The Impact Center pays the SAAGs' salaries and benefits. *See id.* at 2.

10. When, in June 2020, the Attorney General filed its Complaint in this action, its allegations echoed the strategies announced at the AGs United for Clean Power press conference, the objectives of the Impact Center, and the assertions made in lawsuits brought by the attorneys general of New York, Massachusetts, Rhode Island, and Minnesota. Indeed, the Complaint's signature block includes a SAAG selected, embedded, and compensated by the Impact Center. *See* Compl. at 78. It also includes counsel from Sher Edling LLP, *see id.* at 78-79, which reportedly received grants worth $1.75 million from Resources Legacy Fund, a San Francisco-based non-profit organization that advocates for climate policies aimed at curbing the production and sale of fossil fuels. *See* Spencer Walrath, *Law Firm Behind Washington D.C. Climate Lawsuit Received Over $1.7 Million in Grant Money from Activist Foundation*, Energy In Depth (July 7, 2020), https://eidclimate.org/law-firm-behind-washington-d-c-climate-lawsuit-received-over-1-7-million-in-grant-money-from-activist-foundation/.

11. Thus, although brought in the name of the District of Columbia, the Complaint is actually the product of special interest groups and plaintiffs' lawyers. It has been filed to influence national energy policy and the United States' international position on climate change, and to seek discovery to be used outside the litigation. In a word, the Complaint is a political act, not a legal one.

12. The Complaint does little to mask the core purpose of the Attorney General's lawsuit—namely, to force reductions in fossil fuel production and sales—all under the guise of municipal consumer protection laws. For example, the Complaint alleges that "*none* of Defendants' fossil fuel products are 'green' or 'clean'; they all pollute and ultimately warm the planet." Compl. ¶ 8 (emphasis added). According to the Complaint, "Defendants' deception" was "detriment[al]" to "DC consumers and the public generally" because it allegedly "enabled the unabated and expanded *extraction*, *production*, promotion, marketing, and sale of Defendants' fossil fuel products." *Id.* ¶ 2 (emphasis added). Indeed, the Complaint asserts that "the development, production, refining, and consumer use of [Defendants'] fossil fuel products—including gasoline and motor oil—emit large volumes of greenhouse gases, which cause global climate change." *Id.* ¶ 71; *see also id.* ¶ 106 ("Defendants' fossil fuel products are the primary driver of global warming."); ¶ 149 (asserting that "current levels of fossil fuel use—even purportedly 'cleaner' or more efficient products—represent a direct threat to District residents and the environment"). The only solution, in the Attorney General's view, is to cease reliance on fossil fuels. *Id*. ¶ 52 ("[T]he continued use of fossil fuel products contributes to severe environmental and health threats at significant economic cost."); ¶ 31 ("[T]here is still time to save the world's peoples from the catastrophic consequence of pollution, but time is running out." (internal quotation marks omitted)).

13. These allegations make clear that the fundamental issue raised in the Complaint is not the accuracy of representations made in advertisements about the nature of the products being sold, but whether Defendants' products should be sold *at all*. *See, e.g.*, *id.* ¶¶ 87-88 (challenging Defendants' "commitment to sustainable development" based on their alleged "expansion of fossil fuel production"); ¶ 101 (challenging Defendants' alleged decisions to "continue[] to ramp up fossil fuel production globally and invest in new fossil fuel development—including in tar sands crude and shale gas fracking, some of the most carbon-intensive extraction projects—and to plan for unabated oil and gas exploitation indefinitely into the future"). This lawsuit is intended to force Defendants to significantly reduce, if not cease, their fossil fuel activities altogether, in an effort to curb global greenhouse gas emissions.

14. The Complaint's allegations of harm further demonstrate the inextricable relationship between Plaintiff's claims and the production and sale of fossil fuels. According to the Complaint, Defendants' alleged deception was harmful because it caused consumers to use more fossil fuels, which in turn contributed to greenhouse gas emissions and climate change. *See, e.g.*, Compl. ¶ 6 (listing "effects of a warming planet from massive fossil fuel combustion"); ¶ 65 (asserting that deception was "an effort to maintain consumer demand for [Defendants'] fossil fuel products"); ¶¶ 89-97 (further describing effects of carbon emissions and climate change); ¶ 161 (describing "[c]onsumer use of fossil fuel products" as "a significant contributor to climate change"); ¶ 168 (asserting that, if consumers were informed about fossil fuels and climate change, "people might purchase less fossil fuel products").

15. Those allegations show that the alleged consumer harms at issue are the effects of climate change, not the $2.40 per gallon the person paid for gasoline at the pump. The allegations also demonstrate that this lawsuit's objective is to reduce fossil-fuel use, and thereby discourage

its production. Indeed, the Complaint alleges that "Defendants' deception" was "detriment[al]" to "DC consumers and the public generally" because it allegedly "enabled the unabated and expanded *extraction*, *production*, promotion, marketing, and *sale* of Defendants' fossil fuel products." *Id.* ¶ 2 (emphasis added).

16. The global production, promotion, and sale of oil and gas products and global greenhouse gas emissions, produced when billions of consumers around the world use these products, are central to this case. Plaintiff's claims depend on Defendants' nationwide and global activities, as well as the activities of billions of fossil fuel consumers, including not only the U.S. government and military, but also hospitals, schools, manufacturing facilities, and individual households. Defendants' production of a dependable, affordable energy supply is the backbone of the American economy. Defendants' products power our national defense and military; drive production and innovation; keep our homes, offices, hospitals, and other essential facilities illuminated, powered, heated, and ventilated; transport workers and tourists across the nation; and form the materials from which innumerable consumer, technological, and medical devices are fashioned. The District of Columbia is itself a prodigious consumer and user of fossil fuels.

17. The Complaint seeks to hold Defendants liable for the consequences of longstanding decisions by the federal government regarding, among other things, national security, national energy policy, environmental protection, the maintenance of a national strategic petroleum reserve program, development of outer continental shelf lands, mineral extraction on federal lands (which have produced billions of dollars for the federal government), and the negotiation of international agreements bearing on the issue of climate change. Many of the Defendants have leases and contracts with the federal government to develop and extract minerals

from federal lands, and have acted under the direction of federal officers to produce and sell fuel and associated products to the federal government for the nation's defense.

18. The Complaint improperly attempts to apply the District of Columbia's municipal law to interstate and, indeed, international activity. The policy decisions surrounding the use of fossil fuels and the threat of climate change "require consideration of competing social, political, and economic forces," as well as "economic [and] defense considerations." *Juliana* v. *United States*, 947 F.3d 1159, 1172 (9th Cir. 2020) (internal quotation marks and citations omitted). "[A]ny effective plan [to reduce fossil fuel emissions] would necessarily require a host of complex policy decisions entrusted . . . to the wisdom and discretion of the executive and legislative branches" of the federal government. *Id.* at 1171. This lawsuit thus implicates bedrock divisions of federal-state responsibility, and the claims fall squarely on the federal side. The domestic aspects of this case are governed by the Clean Air Act and Environmental Protection Agency ("EPA") regulations, and the international aspects of the case are governed by the Foreign Commerce Clause and the foreign affairs powers of the federal government. The production and sale of fossil fuels is lawful throughout the world and many countries encourage the production of oil and gas within their borders—often going to great lengths to do so. As the United States has noted in a brief filed in a similar climate change action: "Where, as here, the Cities seek to project state law into the jurisdiction of other nations, the potential is particularly great . . . for interference with United States foreign policy." Brief for the United States, *City of Oakland* v. *BP p.l.c.*, 960 F.3d 570 (2020) (No. 18-16663), 2019 WL 2250196, at *15.

19. In sum, the Complaint intrudes on the federal political branches' exclusive authority to address important issues of national and international policy. The balance between the use of fossil fuels and reduction of greenhouse gas emissions is an interstate and international

issue, and the Attorney General's claims directly implicating this issue can be addressed only on a national level by the federal courts. Accordingly, the Complaint should be heard in this federal forum.

GROUNDS FOR REMOVAL

20. A defendant may remove "any civil action brought in State court of which the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441(a). This Court has original jurisdiction over this action on multiple grounds.[8] *First*, this case raises disputed and substantial federal questions arising under federal statutes, federal regulations, and international treaties dealing directly with the balance between the use of fossil fuels and the reduction of greenhouse gas emissions, warranting the exercise of federal jurisdiction under *Grable & Sons Metal Products, Inc.* v. *Darue Engineering & Manufacturing*, 545 U.S. 308, 312 (2005). *Second*, these claims, which concern both transboundary pollution and the navigable waters of the United States, necessarily arise under federal common law. *Third*, Plaintiff's claims arise out of federal enclaves, including enclaves within the District of Columbia. *See* U.S. Const., art. I, § 8, cl. 17. *Fourth*, the Federal Officer Removal Statute, 28 U.S.C. § 1442, authorizes removal because many of the activities for which this action seeks to hold Defendants liable were taken at federal direction. *Fifth*, this Court has original jurisdiction over this lawsuit and removal is proper pursuant to the Outer Continental Shelf Lands Act ("OCSLA"), because this action "aris[es] out

[8] Removal jurisdiction under 28 U.S.C. § 1441(a) is coextensive with original jurisdiction under 28 U.S.C. § 1331. *See Wis. Dept. of Corr.* v. *Schactz*, 524 U.S. 381, 390 (1998) ("Since a federal court would have original jurisdiction to hear this case had [the plaintiff] originally filed it there, the defendant may remove the case from state to federal court." (citing 28 U.S.C. § 1441(a))); *see also* 14C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3722 (4th ed. Apr. 2020 Update) ("Generally, then, removal based on Section 1441(a) embraces the same class of cases as is covered by Section 1331, the original federal-question jurisdiction statute.").

of, or in connection with . . . any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals." 43 U.S.C. § 1349(b)(1). *Sixth*, in the alternative, this suit is effectively a class action, brought under District of Columbia law, on behalf of District of Columbia consumers, thereby creating removal jurisdiction under the Class Action Fairness Act, 28 U.S.C. § 1332(d). *Seventh*, the Attorney General brings this suit on behalf of D.C. citizens, who are the real parties in interest, creating removal jurisdiction on the basis of diversity of citizenship, 28 U.S.C. § 1332(a).[9]

I. This Action Raises Disputed and Substantial Federal Issues

21. This suit, which purports to allege only claims under D.C. municipal law, nonetheless "arises under" federal law, warranting federal question jurisdiction, because the claims advanced (i) "necessarily raise a stated federal issue," (ii) that is "actually disputed and substantial," and (iii) that "a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Grable*, 545 U.S. at 314. Determining whether federal jurisdiction is present "calls for a common-sense accommodation of judgment to [the] kaleidoscopic situations that present a federal issue" and thus "justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues." *Id.* at 312-13 (internal quotation marks and citations omitted).

22. The substantial and disputed federal issues necessarily raised in this action are readily apparent based on the context in and purposes for which this suit has been brought, *see supra* ¶¶ 3-19, and the allegations Plaintiff has chosen to advance. While the Complaint alleges

[9] If Plaintiff challenges this Court's jurisdiction, Defendants reserve the right to further elaborate on these grounds beyond their specific articulations in this Notice.

violations of local consumer protection law, this case is not at its core a consumer protection action but instead an attempt to circumvent federal control of environmental policy under the Clean Air Act and EPA actions that directly regulate greenhouse gas emissions.

23. The federal government has already addressed—and is currently addressing—climate change through domestic statutes and regulations and international agreements. This action, by seeking to undermine and supplant these preexisting federal efforts, raises several federal issues. *See District of Columbia* v. *Group Hospitalization & Med. Servs., Inc.*, 576 F. Supp. 2d 51, 54-57 (D.D.C. 2008).

24. *First*, Congress has struck a careful balance between energy production and environmental protection by enacting federal statutes such as the Clean Air Act, 42 U.S.C. § 7401(c), and by directing the EPA to regulate Defendants' conduct and perform its own cost-benefit analyses, *see American Electric Power Co.* v. *Connecticut* (*"AEP"*), 564 U.S. 419, 426-47 (2011). Plaintiff seeks to have a jury in Superior Court in the District of Columbia reweigh the factors considered by the EPA in its analysis.[10]

25. The federal government "affirmatively promotes fossil fuel use in a host of ways, including beneficial tax provisions, permits for imports and exports, subsidies for domestic and

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[10] The EPA regulates both stationary and mobile sources of greenhouse gases on a national basis. *See* 40 C.F.R. § 60.1 *et seq.* (standards of performance for new stationary sources); *id.* § 85.501 *et seq.* (control of air pollution from mobile sources). The EPA has pending rulemakings addressing the emission of greenhouse gases from numerous sources. *See* The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, 84 Fed. Reg. 51,310-01 (Sept. 27, 2019) (EPA proposed rule establishing national program for fuel economy and greenhouse gas regulation); Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review, 84 Fed. Reg. 50,244 (Sept. 24, 2019) (EPA proposed rule addressing methane emissions). This lawsuit would allow a state court to balance exactly the same competing interests at issue in those rulemakings and come to potentially different results.

overseas projects, and leases for fuel extraction on federal land." *Juliana*, 947 F.3d at 1167. These federal statutes and regulations demonstrate that Congress has already weighed the costs and benefits of fossil fuels, and permitted their sale because, among other things, affordable energy is critical for economic stability and growth. *See, e.g.*, 42 U.S.C. § 15927(b) (declaring it the "policy of the United States that . . . oil shale, tar sands, and other unconventional fuels are strategically important domestic resources that should be developed to reduce the growing dependence of the United States on politically and economically unstable sources of foreign oil imports"); *City of Oakland* v. *BP p.l.c.*, 325 F. Supp. 3d 1017, 1023 (N.D. Cal. 2018) ("[O]ur industrial revolution and the development of our modern world has literally been fueled by oil and coal. Without those fuels, virtually all of our monumental progress would have been impossible."), *vacated on other grounds*, 960 F.3d 570 (9th Cir. 2020).

26. The Attorney General's request that a District of Columbia municipal court substitute its judgment for that of Congress and the EPA on these issues—and impose significant penalties, damages, and injunctive relief based on the Attorney General's assertion that a different balance should be struck, *see* Compl. § XII—constitutes a "collateral attack" on an "entire [federal] regulatory scheme . . . premised on the notion that [the scheme] provides inadequate protection." *Bd. of Comm'rs of Se. La. Flood Prot. Auth.—E.* v. *Tenn. Gas Pipeline Co.*, 850 F.3d 714, 724 (5th Cir. 2017) (internal quotation marks omitted). Removal is not only appropriate, but essential, in such circumstances. *See, e.g.*, *Pet Quarters, Inc.* v. *Depository Tr. & Clearing Corp.*, 559 F.3d 772, 779 (8th Cir. 2009); *Bryan* v. *BellSouth Commc'ns, Inc.*, 377 F.3d 424, 429-30 (4th Cir. 2004); *Hill* v. *BellSouth Telecomms., Inc.*, 364 F.3d 1308, 1317 (11th Cir. 2004). Thus, the balance struck by Congress, the EPA, and the President between the sometimes competing interest of economic and national security against reducing greenhouse gas emissions is a necessary part of

Plaintiff's claims. That issue—whether the federal response to climate change is adequate—is an issue that obviously should be decided by a federal court.

27. *Second*, the United States' international climate change policy has, for decades, sought to balance environmental policy with economic development.

28. In 1959, President Eisenhower invoked statutory authority to proclaim quotas on imports of petroleum and petroleum-based products into the United States "to avoid discouragement of and decrease in domestic oil production, exploration and development to the detriment of the national security." Adjusting Imports of Petroleum and Petroleum Products into the United States, Proclamation No. 3279, 24 Fed. Reg. 1781 (Mar. 12, 1959); *see* Act of July 1, 1954, 68 Stat. 360, ch. 445, § 2, *as amended by* Pub. L. No. 85-686, 72 Stat. 678, § 8(a) (Aug. 20, 1958). The import system was "mandatory and "necessary" to "preserve to the greatest extent possible a vigorous, healthy petroleum industry in the United States" and to regulate "patterns of international trade." Statement by the President Upon Signing Proclamation Governing Petroleum Products, 1 Pub. Papers 240-41 (Mar. 10, 1959). President Eisenhower further explained United States foreign and domestic policy: "Petroleum, wherever it may be produced in the free world, is important to security, not only of ourselves, but also of the free people of the world everywhere." *Id.*

29. After the 1973 oil embargo, the United States signed a treaty that requires member countries of the International Energy Agency to hold emergency oil stocks—through government stocks or industry-obligated stocks—equivalent to at least 90 days of net oil imports. *See* Agreement on an International Energy Program art. 2, Nov. 18, 1974, 1040 U.N.T.S. 271. The United States meets part of its obligation through government-owned stocks held in the U.S.

Strategic Petroleum Reserve. *See, e.g.*, 42 U.S.C. § 6231(b); Nat'l Energy Policy Dev. Grp., National Energy Policy 8-17 (2001), https://www.nrc.gov/docs/ML0428/ML042800056.pdf.

30. In the 1990s, in response to President Clinton's signing of the Kyoto Protocol, an international commitment to reduce greenhouse gas emissions, the Senate resolved that the nation should not be a signatory to any protocol that "would result in serious harm to the economy" or fail to regulate the emissions of developing nations. *See* S. Res. 98, 105th Cong., 1st Sess. (1997). And President Obama issued a series of directives in May 2011, "which included additional lease sales, certain offshore lease extensions, and steps to streamline permitting, all towards the President's goal of expanding safe and responsible domestic oil and gas production . . . as part of his long-term plan to reduce our reliance on foreign oil." Press Release, Office of the Press Secretary, Obama Administration Holds Major Gulf of Mexico Oil and Gas Lease Sale (Dec. 13, 2011), https://obamawhitehouse.archives.gov/the-press-office/2011/12/13/obama-administration-holds-major-gulf-mexico-oil-and-gas-lease-sale.

31. More recently, President Trump cited foreign-affairs implications in his decision to withdraw from the Paris Agreement, which was based in large part on the current Administration's conclusion that that treaty did not properly strike the balance between environmental and national economic and security concerns. *See* The White House, Statement by President Trump on the Paris Climate Accord (June 1, 2017), https://www.whitehouse.gov/briefings-statements/statement-president-trump-paris-climate-accord/. A different Administration may take a different view. Under the Attorney General's view, however, a jury in a state court could decide for itself how to strike the balance among competing policy imperatives. Plaintiff's claims thus infringe on the federal government's environmental, trade, and energy policies that require the United States to speak with one voice in coordinating with other nations. *See United States* v.

Pink, 315 U.S. 203, 233 (1942) ("Power over external affairs is not shared by the States; it is vested in the national government exclusively.").

32. The very existence and purpose of this lawsuit conflicts with the United States' position on the international front. The United States has consistently opposed the "establishment of sovereign liability and compensation schemes" to address climate change on the international level. Brief for the United States, *City of Oakland* v. *BP p.l.c.*, 960 F.3d 570 (9th Cir. 2020) (No. 18-16663), 2019 WL 2250196, at *17 (citing Todd Stern, Special Envoy for Climate Change, Special Briefing (Oct. 28, 2015), https://2009-2017.state.gov/s/climate/releases/2015/248980.htm).

33. This lawsuit contradicts that position by creating a retroactive "liability and compensation scheme" for alleged injuries due to the past production and use of fossil fuels. Foreign governments may react to this lawsuit by adopting their own theories of retroactive liability and compensation, contrary to the foreign policy of the United States. Thus, this lawsuit also constitutes a collateral attack on the foreign policy of the United States regarding the proper way to address the issue of climate change.

34. By improperly asking a court to weigh in on precisely those issues, this case would "implicate countless foreign governments and their laws and policies." *City of New York* v. *BP p.l.c.*, 325 F. Supp. 3d 466, 475 (S.D.N.Y. 2018), *appeal pending*, No. 18-2188 (2d Cir. argued Nov. 22, 2019). Indeed, the Complaint accuses Defendants of being complicit in attempting to "disrupt international efforts to negotiate any treaty curbing greenhouse gas emissions," Compl. ¶ 64, an allegation that will require a court to pass judgment on the political branches' decision-making in the realm of foreign affairs. Accordingly, the exercise of federal jurisdiction is both appropriate and necessary. *See Republic of Philippines* v. *Marcos*, 806 F.2d 344, 352 (2d Cir.

1986) (exercising federal jurisdiction where "plaintiff's claims . . . will directly and significantly affect American foreign relations"); *see, e.g.*, *Am. Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 413 (2003) (holding that claims implicating the "exercise of state power that touches on foreign relations" in a significant way "must yield to the National Government's policy"); *Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363, 381, 388 (2000) (striking down a Massachusetts law barring state entities from transacting with companies doing business in Myanmar because the law "undermine[d] the President's capacity . . . for effective diplomacy").

35. *Third*, Plaintiff also alleges a causation theory that depends on proof that federal policymakers were misled and would have adopted different energy and climate policies absent the alleged misrepresentations. According to the Complaint, the Global Climate Science Communications Team "continued Defendants' efforts to deceive the public about the dangers of fossil fuel use" by "[d]evelop[ing] and implement[ing] a direct outreach program to inform and educate members of Congress . . . about uncertainties in climate science" to "begin to erect a barrier against further efforts to impose Kyoto-like measures in the future." Compl. ¶ 64 (internal quotation marks omitted); *see also id.* ¶ 20(d) (noting that one of the stated purposes of the American Petroleum Institute is "influenc[ing] public policy in support of a strong, viable U.S. oil and natural gas industry" (alteration incorporated)). It is well settled that claims that a defendant has engaged in fraud on the federal government arise under federal law. *See Buckman Co.* v. *Pls.' Legal Comm.*, 531 U.S. 341, 347 (2001) ("[T]he relationship between a federal agency and the entity it regulates is inherently federal in character because the relationship originates from, is governed by, and terminates according to federal law."); *Pet Quarters*, 559 F.3d at 779 (affirming federal question jurisdiction where claims implicated federal agency's acts implementing federal law); *Kemp* v. *Medtronic, Inc.*, 231 F.3d 216, 235 (6th Cir. 2000) ("[C]laims alleging fraud on

federal agencies have never come within the 'historic police powers of the States.'"); *Bader Farms, Inc.* v. *Monsanto Co.*, Civ. No. 16-299, 2017 WL 633815, at *3 (E.D. Mo. Feb. 16, 2017) ("Count VII is in a way a collateral attack on the validity of [the Animal and Plant Health Inspection Service's] decision to deregulate the new seeds."). Indeed, the "inevitable result of such suits," if successful, is that Defendants "would have to change" their federally regulated "methods of doing business and controlling pollution to avoid the threat of ongoing liability." *Int'l Paper Co.* v. *Ouellette*, 479 U.S. 481, 495 (1987).

36. *Fourth,* the Complaint's reliance on injuries allegedly suffered by way of navigable waters, *see, e.g.*, Compl. ¶¶ 6, 30, 37, 39, 41-48, 61, 92, 94, 96, provides an additional basis for the exercise of federal jurisdiction under *Grable*, *supra*. Congress has given the U.S. Army Corps of Engineers jurisdiction to regulate the navigable waters of the United States. To adjudicate Plaintiff's claims, this Court will need to evaluate whether sea level rise can amount to a cognizable injury and whether the remedy the Complaint seeks is consistent with federal law. *See* 33 U.S.C. § 403; *see also id.* § 426i. That, in turn, will require the Court to interpret an extensive web of federal statutes and regulations, *see, e.g.*, 33 C.F.R. § 320.4(a)(1)-(2), and to evaluate whether the Corps has exercised its authority over navigable waters reasonably over the past several decades, *see, e.g.*, U.S. Army Corps of Eng'rs, Eng'g Circular 1105-2-186, Planning Guidance on the Incorporation of Sea Level Rise Possibilities in Feasibility Studies (Apr. 21, 1989) (providing "guidance for incorporating the effects of possible changes in relative sea level in Corps of Engineers feasibility studies").

37. *Fifth*, as explained below, moreover, federal common law *exclusively* governs Plaintiff's claims because they implicate three areas which our constitutional design does not allow state or municipal law to control: transboundary pollution, navigable waters, and foreign

relations. *See infra* ¶¶ 41-55. But even if there were some viable state law component to these claims (which there is not), federal common law would still govern at least some aspects of them, and the aspects necessarily governed by federal common law would justify removal under *Grable*, since a claim "raise[s] substantial questions of federal law by implicating the federal common law." *Torres* v. *S. Peru Copper Corp.*, 113 F.3d 540, 542 (5th Cir. 1997) (upholding removal of claims raising foreign relations issues); *see also Battle* v. *Seibels Bruce Ins. Co.*, 288 F.3d 596, 607 (4th Cir. 2002) (a claim in an area where "federal common law *alone* governs" "necessarily depends on resolution of a substantial question of federal law"); *Newton* v. *Cap. Assur. Co.*, 245 F.3d 1306, 1309 (11th Cir. 2001) (a claim that requires applying "principles of federal common law . . . satisfies § 1331 by raising a substantial federal question").

38. The federal questions raised here are substantial. This action sits at the intersection of federal energy and environmental regulations, which implicate foreign policy and national security considerations. The substantiality inquiry is satisfied when the federal issues in a case concern even *one* of these subjects. *See, e.g.*, *In re Nat'l Sec. Agency Telecomms. Recs. Litig.*, 483 F. Supp. 2d 934, 943 (N.D. Cal. 2007) (issues relating to the state secrets privilege); *Grynberg Prod. Corp.* v. *British Gas, p.l.c.*, 817 F. Supp. 1338, 1356 (E.D. Tex. 1993) (issues relating to allocation of international mineral resources).

39. For the same reason, the exercise of federal jurisdiction is fully consistent with principles of federalism—federal courts are the traditional and appropriate fora for litigation regarding the intersection of national energy and environmental law, and foreign policy. *See Massachusetts* v. *EPA*, 549 U.S. 497, 519 (2007) (explaining that the "sovereign prerogatives" to force reductions in greenhouse gas emissions "are now lodged in the [f]ederal [g]overnment").

40. This action, a thinly veiled effort to regulate fossil fuel production and greenhouse gas emissions, raises several substantial and disputed federal issues concerning domestic and international energy and environmental policy. It belongs in federal court.

II. The Complaint Arises under Federal Common Law

41. Section 1331 also supplies this Court with jurisdiction over this suit because its clams necessarily arise under federal common law. *See Nat'l Farmers Union Ins. Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845, 850 (1985) (recognizing original federal jurisdiction over "claims founded upon federal common law"). While the Attorney General presents its claims as being brought under municipal law, courts have long recognized that claims may arise under federal common law regardless of whether plaintiff purports to plead federal law claims. *See United States* v. *Standard Oil Co.*, 332 U.S. 301, 307 (1947) (holding that certain claims asserted under state law must be governed by federal common law because they involved "matters essentially of federal character"); *see, e.g., Sam L. Majors Jewelers* v. *ABX, Inc.*, 117 F.3d 922, 926 (5th Cir. 1997). This action implicates three "uniquely federal interests" that demand the application of federal common law: (i) transboundary pollution, (ii) the navigable waters of the United States, and (iii) international affairs and commerce.

42. Although "[t]here is no federal general common law," *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 78 (1938), there remain "some limited areas" in which the governing legal rules are supplied not by state law, but by "what has come to be known as 'federal common law,'" *Tex. Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (quoting *Standard Oil*, 332 U.S. at 308). In particular, federal common law governs areas implicating "uniquely federal interests," *see, e.g.*, *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 504-07 (1988), such as where the issue is, by nature, "within the national legislative power" and there is a "demonstrated need for a federal rule of decision" on that issue. *AEP*, 564 U.S. at 421-22 (internal quotation marks and

citation omitted). These interests are also present where "the interstate or international nature of the controversy makes it inappropriate for state law to control." *Tex. Indus.*, 451 U.S. at 641. "[I]f federal common law exists, it is because state law cannot be used." *City of Milwaukee* v. *Illinois* ("*Milwaukee II*"), 451 U.S. 304, 314 n.7 (1981). In these areas, "the entire body of state law . . . is replaced by federal rules." *Boyle*, 487 U.S. at 508.

Transboundary Pollution

43. The United States Supreme Court has long recognized that "[e]nvironmental protection is undoubtedly an area within national legislative power" for which "federal courts may . . . fashion federal common law." *AEP*, 564 U.S. at 421 (internal quotation marks and citation omitted); *see also Illinois* v. *City of Milwaukee* ("*Milwaukee I*"), 406 U.S. 91, 103 (1972) ("When we deal with air and water in their ambient or interstate aspects, there is a federal common law."). Thus, federal common law is to be applied to "transboundary pollution suits," *Native Village of Kivalina* v. *ExxonMobil Corp.*, 696 F.3d 849, 855 (9th Cir. 2012); *see, e.g.*, *Ouellette*, 479 U.S. at 487-88; *Missouri* v. *Illinois*, 200 U.S. 496, 517-21 (1906), including suits asserting claims rooted in the effects of global greenhouse gas emissions.

44. This is because, as the Supreme Court has held for more than a century, "[e]ach state stands on the same level with all the rest," no state "can impose its own legislation on one of the others." *Kansas* v. *Colorado*, 206 U.S. 46, 97 (1907). Because the District of Columbia cannot impose its law on the production, sale, and use of fossil fuels in the 50 States, some of which may disagree with the District's dim view of fossil fuels, this action must arise under federal common law. *See* Brief for the United States, *Milwaukee II*, 451 U.S. 304 (1981) (No. 79-408), 1980 WL 339512, at *18 ("[A state cannot] generally enforce its own law beyond its borders. Yet, its sovereign rights ought not be circumscribed by the law of its neighbor state, which may be

inadequate. Accordingly, federal law must perforce serve as a basis for resolving interstate pollution disputes." (internal quotation marks and citation omitted)).

45. In *Milwaukee I*, a unanimous Court held that a suit for interstate water pollution arose under federal law and was within the jurisdiction of the federal district courts. In that case, the State of Illinois filed a motion for leave to pursue an original action in the Supreme Court. 406 U.S. at 93. The proposed action sought to abate a nuisance allegedly created by Milwaukee and its sewerage authorities by their discharges of inadequately treated sewerage into Lake Michigan. *Id.* The Court denied the motion to invoke its original jurisdiction, but held that Illinois could seek relief in federal district court under the federal common law of nuisance. *See id.* at 107-08.

46. The Court characterized the issue before it as whether "pollution of interstate or navigable waters creates actions arising under the 'laws' of the United States within the meaning of [28 U.S.C.] § 1331(a)." *Id.* at 99. The Court answered that question in the affirmative, giving "laws" its "natural meaning" and holding that an action based on federal common law, as much as an action based on a federal statute, supports federal question jurisdiction. *Id.* at 99-100. The *Milwaukee I* Court was explicit: "federal common law . . . is [an] ample basis for jurisdiction under 28 U.S.C. § 1331(a)." *Id.* at 102 n.3. The Supreme Court reaffirmed the jurisdictional holding of *Milwaukee I* in *AEP*.

47. In *AEP,* plaintiffs sued several electric utilities, contending that the utilities' greenhouse gas emissions contributed to global climate change and created a "substantial and unreasonable interference with public rights, in violation of the federal common law of interstate nuisance, or, in the alternative, of state tort law." 564 U.S. at 418 (internal quotation marks and citation omitted). In determining whether plaintiffs had properly stated a claim for relief, the Supreme Court determined that federal common law governs claims involving "air and water in

their ambient or interstate aspects." *Id.* at 421 (internal quotation marks and citation omitted) ("When we deal with air and water in their ambient or interstate aspects, there is a federal common law." (quoting *Milwaukee I*, 406 U.S. at 103)). The Court rejected the notion that state law could govern public-nuisance claims related to global climate change, stating that "borrowing the law of a particular State would be inappropriate." *Id.* at 422.

48. The Ninth Circuit's decision in *Kivalina* applies the same logic. There, a municipality asserted a public-nuisance claim for damages to its property allegedly resulting from the defendant energy companies' "emissions of large quantities of greenhouse gases." 696 F.3d at 853-54. Plaintiff contended that its claim arose under federal and (alternatively) state common law. *Native Village of Kivalina* v. *ExxonMobil Corp.*, 663 F. Supp. 2d 863, 869 (N.D. Cal. 2009). The district court dismissed the federal claim and declined to exercise supplemental jurisdiction over any related state-law claims. *Id.* at 882-83. On appeal, the Ninth Circuit held that federal common law governed plaintiff's claims. *Kivalina*, 696 F.3d at 855. Citing *AEP*, the Ninth Circuit began from the premise that "federal common law includes the general subject of environmental law and specifically includes ambient or interstate air and water pollution." *Id.* Given the interstate and transnational character of claims asserting damage from greenhouse-gas emissions, the court concluded that the suit fell within that rule. *Id.*

49. Most recently, in *City of New York*, plaintiff sued energy companies for their "worldwide fossil fuel production and the use of their fossil fuel products, [which] continue[] to emit greenhouse gases and exacerbate global warming." 325 F. Supp. 3d at 471 (internal quotation marks and citation omitted). Because plaintiff's claims were "based on the 'transboundary'

emission of greenhouse gases," the court held that they "ar[o]se under federal common law and require[d] a uniform standard of decision." [11] *Id.* at 472.

50. Although the Attorney General frames its suit as derived from a state statute that concerns consumer protection, the gravamen of the Attorney General's alleged claims and damages is that Defendants caused consumers in the District of Columbia and around the world to consume fossil fuel products, which in turn contributed to greenhouse gas emissions, which in turn contributed to global climate change, which in turn caused harm to District of Columbia residents and consumers. The Attorney General may opportunistically attempt to fixate on an earlier moment in this causal chain, but claims regarding Defendants' roles in the promotion and sale of fossil fuels plainly constitute the type of transboundary pollution suit that has historically been governed by federal common law. The Complaint alleges at length the harms the District of Columbia will experience as a result of climate change, including heightened temperatures, an increased number of "extreme heat days" and "heatwaves," a rise in sea levels, and "inland drainage and riverine and coastal flooding." Compl. ¶¶ 94-97; *see Michigan* v. *U.S. Army Corps of Eng'rs*, 667 F.3d 765, 771-72 (7th Cir. 2011).

51. Because this suit is inherently premised on interstate pollution that allegedly causes environmental harm in the form of climate change, it implicates uniquely federal interests and is

[11] The federal district court in *City of Oakland* ruled that similar climate change lawsuits arose under federal common law. *See California* v. *BP p.l.c.*, Civ. No. 17-06011, 2018 WL 1064293, at *2 (N.D. Cal. Feb. 27, 2018) ("Plaintiffs' nuisance claims—which address the national and international geophysical phenomenon of global warming—are necessarily governed by federal common law."). The Ninth Circuit reversed on other grounds. *See City of Oakland* v. *BP p.l.c.*, 960 F.3d 570 (9th Cir. 2020). A petition for rehearing and rehearing *en banc* is currently pending before the Ninth Circuit.

governed by federal common law. *See AEP*, 564 U.S. at 421; *Kivalina*, 696 F.3d at 855; *City of New York*, 325 F. Supp. 3d at 472.

Navigable Waters

52. Federal common law also governs claims arising out of the "interstate or navigable waters" of the United States. *District of Columbia* v. *Schramm*, 631 F.2d 854, 864 (D.C. Cir. 1980); *accord Milwaukee I*, 406 U.S. at 92; *see, e.g.*, *Michigan*, 667 F.3d at 771-72. Thus, as noted above, the Supreme Court in *Milwaukee I* held that federal common law governed, and original federal question jurisdiction existed over, the State of Illinois's nuisance abatement suit against four cities and two sewerage commissions in Wisconsin, alleging that defendants were polluting Lake Michigan. 406 U.S. at 91-92. And in *Michigan*, the Seventh Circuit considered the application of federal common law to claims alleging that the operation of the Chicago Area Waterway System would allow invasive non-native species of carp to enter the Great Lakes. *See* 667 F.3d at 771. Because federal common law "extends to the harm caused by . . . environmental and economic destruction" by way of navigable waters, it necessarily applied to the claims at issue. *Id.*

53. Federal common law applies here because the claims at issue arise from navigable waters. Plaintiff alleges that the District of Columbia has suffered, or will suffer, "environmental and economic destruction" via the "navigable waters" of the United States. According to the Complaint, "sea level rise" is among the "economic impacts in the United States" felt from climate change, which is, in turn, allegedly caused by Defendants' fossil fuel production. Compl. ¶¶ 4, 94, 96. The District of Columbia, "[l]ocated at the confluence of the Anacostia and Potomac, two tidally influenced rivers," is "vulnerable to inland drainage and riverine and coastal flooding." *Id.* ¶ 97. "Relative sea level rise in the District has been higher than global sea level rise," the

Complaint alleges, "because the local landmass in the region also has been sinking as the result of long-term land subsidence. Sea level rise is expected to continue, and even accelerate, in the future due to climate change." *Id.* ¶ 96. Accordingly, the Complaint has tied the claim asserted in this action to the navigable waters of the United States, for which federal common law must govern.

International Affairs and Commerce

54. The international nature of the claims provides further support for the proposition that they cannot be local-law claims and that, if anything, they are federal common law claims that support jurisdiction in federal court. *See Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 425 (1964) (issues involving "our relationships with other members of the international community must be treated exclusively as aspects of federal law"); *accord Marcos*, 806 F.2d at 352 (explaining that "there is federal question jurisdiction over actions having foreign policy implications" under federal common law). As noted above, *supra* ¶¶ 27-34, these claims involve foreign commerce and the foreign affairs of the United States. That is an area where federal common law—not state or municipal law—must govern. *Tex. Indus.*, 451 U.S. at 641 ("[It is] the interstate or international nature of the controversy [that] makes it inappropriate for state law to govern.").

55. This suit implicates multiple "uniquely federal interests": transboundary pollution, injuries arising from the "navigable waters" of the United States, and international affairs and commerce. Accordingly, these claims must be brought, if at all, under federal common law, and must be heard in federal court.

III. This Action Arises out of Federal Enclaves

56. This Court also has original jurisdiction under the federal enclave doctrine. The Constitution's "Enclave Clause" authorizes Congress to "exercise exclusive Legislation in all Cases whatsoever" over all places purchased with the consent of a state "for the Erection of Forts,

Magazines, Arsenals, dock-Yards, and other needful Buildings." U.S. Const., art. I, § 8, cl. 17. Courts have "generally read the 'Enclave Clause' to establish 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); *see, e.g.*, *Federico* v. *Lincoln Mil. Hous.*, 901 F. Supp. 2d 654, 672 (E.D. Va. 2012).

57. The "key factor" in determining whether federal enclave jurisdiction exists "is the location of the plaintiff's injury or where the specific cause of action arose." *Sparling* v. *Doyle*, Civ. No. 13-0323, 2014 WL 2448926, at *3 (W.D. Tex. May 30, 2014). The "[f]ailure to indicate the federal enclave status and the location of the exposure will not shield plaintiffs from the consequences" of "federal enclave status." *Fung* v. *Abex Corp.*, 816 F. Supp. 569, 571 (N.D. Cal. 1992).

58. *First*, in targeting Defendants' oil and gas operations, Plaintiff necessarily sweeps in those activities that occur on military bases and other federal enclaves. *See, e.g.*, *Humble Pipe Line Co.* v. *Waggonner*, 376 U.S. 369, 372-74 (1964) (noting that the United States exercises exclusive jurisdiction over certain oil and gas rights within Barksdale Air Force Base in Louisiana); *see also Miss. River Fuel Corp.* v. *Cocreham*, 390 F.2d 34, 35 (5th Cir. 1968) (on Barksdale Air Force Base, "the reduction of fugitive oil and gas to possession and ownership[] takes place within the exclusive jurisdiction of the United States"). Indeed, as of 2000, approximately 14% of the National Wildlife Refuge System "had oil or gas activities on their land," and these activities were spread across 22 different states. U.S. Gov't Accountability Off., GAO-02-64R, U.S. Fish & Wildlife Service Information on Oil and Gas Activities in the National Wildlife Refuge System 1 (Oct. 31, 2001), http://www.gao.gov/new.items/d0264r.pdf.

59. *Second*, the Complaint alleges that climate change injuries will be suffered in federal enclaves within the District of Columbia. Plaintiff alleges that, on account of climate change, the District of Columbia will experience heightened temperatures, an increased number of "extreme heat days" and "heatwaves," a rise in sea levels, and "inland drainage and riverine and coastal flooding." Compl. ¶¶ 95-97. Necessarily impacted are the following federal enclaves, among others:

- The Washington D.C. Navy Yard, *see Jograg*, 270 F. Supp. 3d at 16-17;
- Military installations, such as the Marine Barracks and the Naval Observatory, *see Akin* v. *Ashland Chem. Co.*, 156 F.3d 1030, 1034 (10th Cir. 1998);
- Monuments and parks controlled by the National Park Service, such as the National Mall, and the Pennsylvania Avenue National Historic Park, *see* Memorandum from Randolph J. Meyers, Senior Att'y, Branch of Nat'l Parks, *National Park Service regulatory authority of the Cross Street Sidewalks at 3rd, 4th, 7th and 14th Streets on the National Mall* (July 28, 2010), https://comp.ddot.dc.gov/Documents/National%20Park%20Service%20Jurisdiction%20of%20Mall%20Street%20Crossings%20Memo.pdf; Nat'l Park Serv., *Legal Considerations for the National Mall and Pennsylvania Avenue National Historic Park*, https://www.nps.gov/nationalmallplan/Documents/Symposium%20Papers/Legal_Considerations_29_Oct.pdf (last visited July 16, 2020); and
- The Smithsonian Institution, *cf. Expeditions Unlimited Aquatic Enters., Inc.* v. *Smithsonian Inst.*, 566 F.2d 289, 296 (D.C. Cir. 1977) (holding Smithsonian

Institution is a federal agency for the purposes of determining whether it is immune from suit under the Federal Tort Claims Act).

60. *Third*, the Complaint alleges that Defendants' actions were material to District of Columbia consumers' decisions to purchase fossil fuel products. *See* Compl. ¶¶ 161-68. Fossil fuel products, including upon information and belief Defendants' products, were marketed and sold to consumers by the Army Air Force Exchange Service ("AAFES") at Express stations located on federal enclaves in the District of Columbia such as U.S. Army Fort Lesley J. McNair and Joint Base Anacostia-Bolling.

61. Because the Complaint's claims arise out of federal enclaves both within and without the District of Columbia, this Court has original jurisdiction over this action.

IV. This Action Meets the Elements of the Federal Officer Removal Statute

62. Removal is also proper under the Federal Officer Removal Statute, 28 U.S.C. § 1442, which allows for removal of an action against "any officer (or any 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). Among other things, Defendants have acted under federal government mandates, leases, and contracts, performed critical and necessary functions for the U.S. military, and engaged in activities on federal lands under federal direction, oversight, and control. And "in the absence of [] contract[s] with [] private firm[s], the Government itself would have had to perform" these essential tasks itself. *Watson* v. *Philip Morris Cos.*, 551 U.S. 142, 154 (2007).

63. Removal under Section 1442 is warranted if: (i) the defendant is a "person" within the meaning of the statute; (ii) plaintiff's claims are "for or relating to" an act under color of federal office; and (iii) the defendant raises a colorable federal defense. *In re Commonwealth's Motion to Appoint Counsel*, 790 F.3d 457, 466, 470-71 (3d Cir. 2015); *see K&D LLC* v. *Trump Old Post*

Office LLC, 951 F.3d 503, 506 (D.C. Cir. 2020). These elements are construed "liberally in favor of removal," *K&D*, 951 F.3d at 506, and each is satisfied here.

64. Defendants, all of which are corporations, are "person[s]" within the meaning of Section 1442. *See Isaacson* v. *Dow Chem. Co.*, 517 F.3d 129, 135-36 (2d Cir. 2008).

65. Defendants "acted under" federal officers because the government exerted subjection, guidance, or control over Defendants' actions, and because Defendants engaged in "an effort to *assist*, or to help *carry out*, the federal superior's duties or tasks." *Watson*, 551 U.S. at 152. The Supreme Court has emphasized that "[t]he words 'acting under' are broad." *Id.* at 147. Moreover, Defendants' allegedly improper conduct, undertaken in part at the direction of federal officials, was "connected or associated" with Plaintiff's claims.[12] *E.g.*, *Latiolais* v. *Huntington Ingalls, Inc.*, 951 F.3d 286, 291-92 (5th Cir. 2020) (*en banc*). As explained above, the Attorney General's causes of action are aimed at stopping or reducing Defendants' production and sale of fossil fuels, which has allegedly played a "central role" in "causing climate change." Compl. ¶ 1; *see id.* ¶¶ 4, 6. But the activity the Complaint targets was precisely what the federal government *directed or obligated* Defendants to do. *See Latiolais*, 951 F.3d at 291.

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[12] Prior to 2011, Section 1442 conditioned removal on a defendant being "sued in an official or individual capacity *for* any act under color of such office." 28 U.S.C. § 1442(a) (2010) (emphasis added). As part of the Removal Clarification Act of 2011, Congress "amended section 1442(a) to add 'relating to'" to the statutory text, thereby "broaden[ing] federal officer removal to actions, not just *causally* connected, but alternatively *connected or associated*, with acts under color of federal office." *Latiolais*, 951 F.3d at 292, 296; *accord Baker* v. *Atl. Richfield Co.*, 962 F.3d 937, 943-45 (7th Cir. 2020); *Sawyer* v. *Foster Wheeler, L.L.C.*, 860 F.3d 249, 258 (4th Cir. 2017); *Caver* v. *Cent. Ala. Elec. Coop.*, 845 F.3d 1135, 1144 (11th Cir. 2017); *In re Commonwealth's Motion to Appoint Counsel*, 790 F.3d at 470-71; *see also K&D*, 951 F.3d at 507 n.1 (deeming it unnecessary to resolve the impact of the 2011 amendments on Section 1442's scope, but noting the views of its sister circuits).

66. *First*, acting under federal officers, Defendants developed and produced special fuels for the U.S. government, including unique fossil fuel products to meet national security requirements. The U.S. government is one of the largest consumers of fossil fuel products in the world. Indeed, the U.S. Department of Defense alone is the world's largest institutional user of petroleum fuels. There is thus far more than an incidental relationship between the United States' fuel needs (that have driven the federal government to mandate exploration and production of fossil fuels) and the alleged impacts about which Plaintiff complains here. The government relies heavily on Defendants and other industry members to meet these needs. This reliance is particularly acute with respect to matters of national security and defense. Starting at least as early as World War II, officers of the federal government were authorized to direct, and have directed, Defendants to conduct their production, extraction, and development of fossil fuel products, including the sale of gasoline at military exchanges located in the District of Columbia.

67. As just one example, during World War II, the federal government asserted substantial control over certain Defendants' development and production of high-octane aviation fuels ("avgas").[13] *See Betzner* v. *Boeing Co.*, 910 F.3d 1010, 1015 (7th Cir. 2018) (removal proper where defendant "acted under the military's detailed and ongoing control" by "contract[ing] to manufacture heavy bomber aircraft"); *Greene* v. *Citigroup, Inc.*, Civ. No. 99-1030, 2000 WL 647190, at *2 (10th Cir. May 19, 2000) (removal proper where defendant chemical company conducted a radium cleanup pursuant to a "remedy selected by the EPA"); *see also Camacho* v.

[13] The Complaint improperly conflates the activities of Defendants with the activities of their separately organized predecessors, subsidiaries, and affiliates. Although Defendants reject Plaintiff's erroneous attempt to attribute the actions of predecessors, subsidiaries, and affiliates to the named Defendants, for purposes of this Notice of Removal only, ExxonMobil describes the conduct of certain predecessors, subsidiaries, and affiliates of certain Defendants to show that the Complaint, as pleaded, can and should be removed to federal court.

Autoridad de Telefonos de Puerto Rico, 868 F.2d 482, 486 (1st Cir. 1989) (removal proper when the defendants "were acting under express orders, control and directions of federal officers" (internal quotation marks omitted)).

68. Avgas "was the most critically needed refinery product during World War II and was essential to the United States' war effort." *Shell Oil Co.* v. *United States*, 751 F.3d 1282, 1285 (Fed. Cir. 2014) (internal quotation marks and citations omitted).

> Because avgas was critical to the war effort, the United States government exercised significant control over the means of its production during World War II. In 1942, President Roosevelt established several agencies to oversee war-time production. Among those with authority over petroleum production were the War Production Board ("WPB") and the Petroleum Administration for War ("PAW"). The WPB established a nationwide priority ranking system to identify scarce goods, prioritize their use, and facilitate their production; it also limited the production of nonessential goods. The PAW centralized the government's petroleum-related activities. It made policy determinations regarding the construction of new facilities and allocation of raw materials, and had the authority to issue production orders to refineries.

United States v. *Shell Oil Co.*, 294 F.3d 1045, 1049 (9th Cir. 2002). In short, the "PAW told the refiners what to make, how much of it to make, and what quality." *Shell Oil*, 751 F.3d at 1286.

69. In the days after the attack on Pearl Harbor, the federal government "recognized the need to quickly mobilize avgas production, with the [Office of the Petroleum Coordinator for National Defense] stating: 'It is *essential*, in the national interest that the supplies of all grades of aviation gasoline for military, defense, and essential civilian uses *be increased immediately to the maximum.*" *Id.* (emphasis added). The federal government thus entered into contracts with predecessors or affiliates of Chevron and Shell "to sell vast quantities of avgas." *Id.* For example, the government's contract with Shell's predecessor or affiliate specified that it "*shall* use its best efforts" and work "*day and night*" to expand facilities producing avgas "*as soon as possible* and not later than August 1, 1943." *Shell Oil Co.* v. *United States*, Civ. No. 06-141 (Nov. 20, 2012),

ECF No. 106-1 (emphasis added) (contract between Defense Supplies Corporation and Shell Oil Company, Inc., dated April 10, 1942). And to maximize production of this critical product, "[t]he Government directed [those companies] to undertake extraordinary modes of operation which were often uneconomical and unanticipated at the time of the refiners' entry into their [avgas] contracts." *Shell Oil*, 751 F.3d at 1287 (internal quotation marks omitted). At the direction of the federal government, the oil companies increased avgas production over twelve-fold from approximately 40,000 barrels per day in December 1941 to 514,000 barrels per day in 1945, which was "crucial to Allied success in the war." *Id.*

70. During the Korean War, the Defense Production Act of 1950, Pub. L. No. 81-774 ("DPA"), gave the federal government broad powers to issue production orders to private companies to prioritize military procurement requirements. On September 9, 1950, President Truman issued Executive Order 10161 establishing the Petroleum Administration for Defense ("PAD"), which had the authority to issue orders under the DPA requiring private companies to operate refineries to ensure sufficient petroleum production for the military. The PAD issued production orders to oil and gas companies, including Defendants. For example, PAD issued orders to ensure adequate quantities of avgas for military use. *See* Fourth Annual Report on the Activities of the Joint Committee on Defense Production, 84th Cong., 1st Sess., H. Rep. No. 1, at 122 (Jan. 5, 1955). When supplying the federal government with fuels required to support the country's military, Defendants again were "acting under" federal officers "to *assist*, or help *carry out*, the duties or tasks" of the federal superior vital to national security. *Watson*, 551 U.S. at 152.

71. During the Cold War, Shell Oil Company (or a predecessor or affiliate) developed and produced specialized jet fuel for the federal government to meet the unique performance requirements of the U-2 spy plane (known as LF-1A) and later the Blackbird program (known as

JP-7, PF-1, or MIL-T-38219). *See* Ben Rich & Leo Janis, Skunk Works 73, 113 (1996); Gregory W. Pedlow & Donald E. Welzenbach, The Central Intelligence Agency and Overhead Reconnaissance: The U-2 and OXCART Programs, 1954-1974, at 61-62 (1992), https://www.archives.gov/files/declassification/iscap/pdf/2014-004-doc01.pdf.

72. Certain Defendants continue to produce special military fuels to meet the United States' need to power planes, ships, and other vehicles, and to satisfy other national defense requirements. Historically, Defendants Shell Oil Company, BP, and ExxonMobil (or their predecessors or affiliates) have been three of the top four suppliers of fossil fuel products to the United States military, whose energy needs are coordinated through the Defense Energy Support Center ("DESC"). *See* Anthony Andrews, Cong. Rsch. Serv., R40459, Department of Defense Fuel Spending, Supply, Acquisition, and Policy 10 (2009). DESC procures a range of military-unique petroleum-based products from Defendants, including JP-8 fuel (MIL-DTL-83133) for the U.S. Air Force and Army, and JP-5 fuel (MIL-DTL-5624 U) for the U.S. Navy, and a variety of other alternative fuels. In fiscal year 2008, for example, the DESC purchased 134.9 million barrels of fuel products in compliance with military specifications, totaling $17.9 billion in procurement actions. *See id.* at 2. In fact, "[t]he U.S. military services and the North Atlantic Treaty Organization forces use an estimated 5 billion gallons of JP-8 [jet fuel] each year." Subcommittee on Jet-Propulsion Fuel 8, Committee on Toxicology, National Research Council, Toxicologic Assessment of Jet-Propulsion Fuel 8 (2003), https://www.ncbi.nlm.nih.gov/books/NBK207616/.

73. By developing and producing these special fuels for the federal government and military, Defendants performed tasks under federal officers that, "in the absence of [] contract[s] with [] private firm[s], the Government itself would have had to perform." *Watson*, 551 U.S. at 154.

74. In addition, Defendants and other non-Defendant producers and refiners also continue to sell consumer products under contract with the United States government for the direct marketing and sale to military service members, retirees, and their families at military exchanges in the District of Columbia, including at AAFES Express, located on Joint Base Anacostia-Bolling at 1311 Chappie James Boulevard, Washington, D.C. 20032, and at AAFES Exchange on Fort McNair at 103 Fourth Avenue, SW, Washington, D.C. 20319.

75. *Second*, certain Defendants have engaged in the exploration and production of fossil fuels under agreements with federal agencies exercising supervision and control.

76. For example, in 1944, one of Chevron's predecessors, the Standard Oil Company, entered into a contract with the United States Navy "to govern the joint operation and production of the oil and gas deposits . . . of the Elk Hills Reserve." *Chevron U.S.A., Inc.* v. *United States*, 116 Fed. Cl. 202, 205 (2014). "The Elk Hills Naval Petroleum Reserve (NPR-1) . . . was originally established in 1912 to provide a source of liquid fuels for the armed forces during national emergencies." U.S. Gov't Accountability Off., RCED-87-75FS, Naval Petroleum Reserves – Oil Sales Procedures and Prices at Elk Hills, April Through December 1986, at 3 (Jan. 1987), http://www.gao.gov/assets/90/87497.pdf. Standard Oil worked at the direction of the U.S. Navy to produce oil to assist with the war effort during World War II. *See* Ex. 8 (NPR-1 operational documents from World War II providing production information and describing why Standard Oil was selected as the operator for the U.S. Navy, with the Navy "express[ing] its appreciation of the patriotism of the Standard Oil Company in undertaking such a project at cost with no profit to be received by the Company").

77. In response to the Organization of the Petroleum Exporting Countries ("OPEC") oil embargo of 1973–1974, the Naval Petroleum Reserves Production Act of 1976 was enacted,

which "authorized and directed that NPR-1 be produced at the maximum efficient rate for 6 years." U.S. Gov't Accountability Off., RCED-87-75FS, Naval Petroleum Reserves – Oil Sales Procedures and Prices at Elk Hills, April Through December 1986, at 3 (Jan. 1987), http://www.gao.gov/assets/90/87497.pdf; *see* Pub. L. No. 94-258, 90 Stat. 303. Congress directed production at Elk Hills to be significant; as the naval officer in charge of the facility explained, "We expect to reach a level of about 100,000 barrels daily in a few months, and 300,000 by the end of" the 1970s. Robert Lindsey, *Elk Hills Reserve Oil Will Flow Again*, N.Y. Times, July 3, 1976. The oil produced pursuant to this renewed effort was intended for sale in the domestic marketplace to reduce the economic shocks caused by the OPEC embargo. Given Elk Hills Reserve's new focus on production for civilian consumption, Congress in 1977 transferred the Navy's interests and management obligations to the Department of Energy, and Chevron continued its interest in the joint operation until 1997. Lindsey, *Elk Hills Reserve Oil Will Flow Again*, *supra*.

78. Akin to the avgas production arrangement, Standard Oil's contract with the Navy evidenced significant control over fossil fuel exploration, production, and sales at the reserve. *See Betzner*, 910 F.3d at 1015; *Greene*, 2000 WL 647190, at *2; *Camacho*, 868 F.2d at 486. Indeed, the Navy was "afforded" a "means of acquiring *complete control over* the development of the entire Reserve *and the production of oil therefrom*." Ex. 9, Recitals § 6(d)(i) (emphasis added). The Navy would, "subject to the provisions hereof, have the exclusive control over the exploration, prospecting[,] development and operation of the Reserve," *id.* § 3(a), and "*full and absolute power* to determine from time to time the rate of prospecting and development on, and the quantity and rate of production from, the Reserve, and may from time to time shut off wells on the Reserve if it so desires," *id.* § 4(a) (emphasis added). An "Operating Committee" was to "supervise and direct" "all exploration, prospecting, development and producing operations on the Reserve." *Id.*

§ 3(b). And the Navy retained ultimate and even "absolute" discretion to suspend production, decrease the maximum amount of production per day that Standard Oil was entitled to receive, or increase the rate of production. *Id.* §§ 4(b), 5(d)(1).

79. Although Standard Oil conducted the exploration and drilling activities on the Reserve, it "share[d] production, revenues, and expenses" with the government "in proportion to their ownership shares." U.S. Gov't Accountability Off., RCED-87-75FS, Naval Petroleum Reserves: Oil Sales Procedures and Prices at Elk Hills, April Through December 1986, at 3 (Jan. 29, 1987), http://www.gao.gov/assets/90/87497.pdf; *see also United States* v. *Standard Oil Co.*, 545 F.2d 624, 636-37 (9th Cir. 1976) (noting dispute over Navy's payment of its share of costs). From 1976 to 1998, the Reserve generated over $17 billion for the United States Treasury. *See* Dep't of Energy, Naval Petroleum Reserves, https://www.energy.gov/fe/services/petroleum-reserves/naval-petroleum-reserves (last visited July 16, 2020).

80. In addition, certain Defendants, including ExxonMobil and Chevron, have explored for, developed, and produced oil and gas on federal lands under federal government leases governed by OCLSA, 43 U.S.C. § 1331 *et seq.* and the Mineral Leasing Act of 1920, 30 U.S.C. § 181 *et seq.* ("MLA"). The unique and controlling provisions of these statutes and leases demonstrate that when producing federal minerals, Defendants were "acting under" a federal official within the meaning of Section 1442(a)(1).

81. In enacting OCSLA in 1953, "Congress was most concerned with establishing federal control over resources" on the outer Continental Shelf ("OCS"). *Laredo Offshore Constructors, Inc.* v. *Hunt Oil Co.*, 754 F.2d 1223, 1227 (5th Cir. 1985). Congress made clear that it intended the leasing program "to meet the urgent need for further exploration and development of the oil and gas deposits" of the OCS. 43 U.S.C. § 1337(i). In 1978, following the Arab oil

embargo of 1973, Congress directed the federal government to develop and use the resources of the OCS to reduce dependence on foreign oil and address "the Nation's long-range energy needs." *Id.* § 1801. In aid of this objective, Congress established detailed "policies and procedures for managing the oil and gas resources" of the OCS, which were "intended to result in *expedited exploration and development* of the Outer Continental Shelf in order *to achieve national economic and energy policy goals*, *assure national security*, *reduce dependence on foreign sources*, and maintain a favorable balance of payments." *California ex rel. Brown* v. *Watt*, 668 F.2d 1290, 1296 (D.C. Cir. 1981) (emphasis added). In so doing, Congress confirmed OCSLA's objective: "the expeditious development of OCS resources," which the Department of Interior is called upon to implement. *Id.* at 1316-17.

82. To fulfill their statutory obligations, Department of Interior officials maintain and administer the OCS leasing program, under which lessees are obligated to "develop[] . . . the leased area" diligently, including carrying out exploration, development, and production activities for the express purpose of "maximiz[ing] the ultimate recovery of hydrocarbons from the leased area." Ex. 10 § 10; *see* 30 C.F.R. § 250.1150. The leasing program is reviewed every five years, and leases are permitted in the manner that the Secretary of Interior "determines will best meet national energy needs for the five-year period following its approval or reapproval." 43 U.S.C. § 1344(a).

83. The federal government supervises and controls the oil and gas development and production activities of its lessees, like Defendants, in myriad and extensive ways. The OCS leases instruct that "[t]he Lessee *shall comply* with all regulations and orders relating to exploration, development, and production," and that "[a]fter due notice in writing, the Lessee *shall drill* such wells and produce at such rates *as the Lessor may require* in order that the leased area or any part thereof may be properly and timely developed and produced in accordance with sound operating

principles." Ex. 11 § 10 (emphasis added). All drilling takes place "in accordance with an approved exploration plan (EP), development and production plan (DPP) or development operation coordination document (DOCD)" as well as "approval conditions"—all of which must undergo extensive review and approval by federal authorities, and all of which must conform to "diligence" and "sound conservation practices." Ex. 10 §§ 9, 10.

84. Critically, the federal government retains the right to control a lessee's rate of production from its lease. *See* 43 U.S.C. § 1334(g) (The lessee "shall produce any oil or gas, or both, . . . at rates consistent with any rule or order issued by the President in accordance with any provision of law."). In particular, the Bureau of Safety and Environmental Enforcement within the Department of Interior may set the Maximum Efficient Rate for production from a reservoir—that is, a cap on the production rate from all of the wells producing from a reservoir. 30 C.F.R. § 250.1159. This requirement has been in existence since 1974, *see* 39 Fed. Reg. 15,885 (May 6, 1974) (approving OCS Order No. 11), and the government adopted this "significant burden" to control production from its leases for the purpose of responding to "a period of oil shortages and energy crises," 75 Fed. Reg. 20,271, 20,272 (Apr. 19, 2010), a public policy purpose distinct from the conservation factors that typically motivate lessors regarding production rates. For onshore operations, the Interior Department's Bureau of Land Management leases similarly provide that the United States "reserves the right to specify rates of development and production in the *public interest*." Ex. 12 § 4 (emphasis added).

85. The government also maintains certain controls over the disposition of oil, gas, and other minerals extracted from federally owned property. For example, the government conditions OCS leases with a right of first refusal to purchase all minerals "[i]n time of war or when the President of the United States shall so prescribe." Ex. 10 § 15(d); Ex. 11 § 15(d); *see* 43 U.S.C.

§ 1341(b). The government also reserves the right to purchase up to 16 2/3% of lease production, less any royalty share taken in-kind. 43 U.S.C. § 1353(a)(2). The Secretary of Interior may direct a lessee to deliver any reserved production to the Department of Defense (military operations), the Department of Energy (*e.g.*, Strategic Petroleum Reserve), or the General Services Administration (government civilian operations). *Id.* § 1353(a)(3). For onshore leases, the Secretary may take any royalty owed on oil and gas production in-kind and "retain the same for the use of the United States." 30 U.S.C. § 192. Bureau of Land Management leases also provide that the "[l]essor reserves the right to ensure that production is sold at reasonable prices and to prevent monopoly." Ex. 12 § 10. In addition, the Secretary may compel a lessee to offer a percentage of lease production "to small or independent refiners" (*e.g.*, in shortage situations where independent refiners may not have access to production to the same extent as integrated producers/refiners). Ex. 10 § 15(c); Ex. 11 § 15(c); *see* 43 U.S.C. § 1337(b)(7) (OCS leases); 30 U.S.C. § 192 (onshore leases).

86. The federal government also uniquely reserves the authority to determine the value of production for purposes of determining how much royalty a lessee owes. Ex. 11 § 6(b) ("The value of production for purposes of computing royalty shall be the reasonable value of the production *as determined by the Lessor*.") (emphasis added). The standard Bureau of Land Management lease for onshore minerals in effect for decades has a similar provision. *See* Ex. 12 § 2 ("Lessor reserves the right . . . to establish reasonable minimum values on products."). A typical commercial private (*i.e.*, fee) lease would never reserve similar unilateral authority to one contracting party to control a material economic term of the lease contract; this would be akin to an apartment rental lease providing that the landlord has sole discretion to specify the rent owed.

87. Through federal leases, the government balances economic development with environmental considerations. The Secretary may reduce or eliminate the United States' royalty share, and thus provide the lessee an additional economic incentive to produce oil and gas. 43 U.S.C. § 1337(a)(3) ("The Secretary may, in order to promote increased production on the lease area, through direct, secondary, or tertiary recovery means, reduce or eliminate any royalty or net profit share set forth in the lease for such area.") (OCS lease); 43 C.F.R. § 3103.4-1(a) ("[T]he Secretary . . . may waive, suspend or reduce . . . the royalty on an entire leasehold, or any portion thereof.") (MLA leases). The Secretary may also suspend production from an OCS lease "if there is a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life), to property, to any mineral deposits (in areas leased or not leased), or to the marine, coastal, or human environment." 43 U.S.C. § 1334(a)(1); *see id.* § 1334(a)(2) (authority to cancel any lease for similar reasons); Ex. 10 § 13 (offshore lease provision governing suspension or cancellation). For onshore federal leases, the Secretary may similarly direct or grant suspensions of operations. *See* 30 U.S.C. § 226(i); 43 C.F.R. § 3103.4-4. The standard Bureau of Land Management onshore lease also requires the lessee to cease any operations that would result in the destruction of threatened or endangered species or objects of historic or scientific interest. Ex. 12 § 6.

88. Through federal leases, the government retains supervision and control over the use of federal property. The mineral leasing laws, including OCSLA and the MLA, are an exercise of Congress's power under the Property Clause of the Constitution. U.S. Const. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."). The government issues onshore and offshore leases for a primary term of five to ten years, with a habendum clause

under which the lessee retains the lease for so long after the primary term as the lease produces oil and gas in paying quantities. 30 U.S.C. § 226(e) (onshore); 43 U.S.C. § 1337(b)(2) (OCS); Ex. 10 § 3. But when the lease terminates, the property interest reverts to the United States; the lessee cannot acquire fee title interest. Nor may a federal lessee assign its lease to another person without express government approval. 30 U.S.C. § 187; 43 C.F.R. § 3106 (onshore leases); 30 C.F.R. §§ 556.701(a), 556.800 (OCS leases).

89. The United States controls federal mineral lessees like Defendants in other ways. An OCS lessee does not have an absolute right to develop and produce; rather, it has only an exclusive right to seek approval from the United States to develop and produce under the lease. *See Sec'y of the Interior* v. *California*, 464 U.S. 312, 337-39 (1984); *Village of False Pass* v. *Clark*, 733 F.2d 605, 614-16 (9th Cir. 1984). The MLA limits the onshore federal oil and gas lease acreage that may be held by any one person, enforceable by an action in federal court. 30 U.S.C. § 184(d), (h). The government has the right to obtain "prompt access" to facilities and records. Ex. 10 § 12; Ex. 11 § 12; 30 U.S.C. § 1713. And the United States also reserves the right to all helium produced from federal leases, which the lessee produces solely for the government's benefit. *See* 43 U.S.C. § 1341(f); Ex. 10 § 6(a); Ex. 11 § 6(a) (OCS leases); 30 U.S.C. § 181 (onshore leases).

90. As the above statutory and lease provisions demonstrate, a federal oil and gas lease is a contract to develop federal minerals on the government's behalf, and the government retains extensive supervision and control over the lessees for many purposes, including in some cases solely to further public policy or achieve purely governmental objectives. In light of these restrictions, obligations, and directives, Defendants were acting at the direction of a federal officer within the meaning of Section 1442 when they fulfilled their obligations with respect to oil and

gas development and production under the leases. *See Betzner*, 910 F.3d at 1015; *Greene*, 2000 WL 647190, at *2; *Camacho*, 868 F.2d at 486. These are activities that the federal government would itself need to undertake unless the Defendants did it for the government through the obligations of the federal leases on federal lands. Under *Watson*, this is not run of the mill regulation; rather, it is the kind of "special relationship" that supports federal officer removal. 551 U.S. at 157.

91. In 2019, oil production by private companies, including some Defendants, from federal offshore and onshore leases managed by the Interior Department was nearly 1 billion barrels. Historically, annual oil and gas production from federal leases has accounted for as much as 36% of domestic oil production and 25% of domestic natural gas production. *See* Cong. Rsch. Serv., R42432, U.S. Crude Oil and Natural Gas Production in Federal and Nonfederal Areas 3, 5 (updated Oct. 23, 2018). The federal government has reaped enormous financial benefits from the ongoing policy decision to contract for the production of oil and gas from federal lands in the form of royalty regimes that have resulted in billions of dollars of revenue to the federal government.

92. As another example, several Defendants also "acted under" federal officers in producing oil and operating infrastructure for the Strategic Petroleum Reserve. Under 43 U.S.C. § 1353(a)(1), "all royalties . . . accruing to the United States under any oil and gas lease [under OCLSA] . . . shall, on demand of the Secretary [of the Interior], be paid in oil and gas." *See* Ex. 8 § 6. For example, after the September 11 attacks, President George W. Bush ordered that the Strategic Petroleum Reserve, "an important element of our Nation's energy security," "will be filled . . . principally through royalty-in-kind transfers to be implemented by the Department of Energy and the Department of the Interior." Statement on the Strategic Petroleum Reserve, 1 Pub. Papers 1406 (Nov. 13, 2001). From 1999 to December 2009, the federal government's "primary

means of acquiring oil for the [Strategic Petroleum Reserve]" was by taking its royalties from oil produced from federal offshore leases as royalties "in kind" as part of the so-called "RIK" program. U.S. Dep't of Energy, Filling the Strategic Petroleum Reserve, https://www.energy.gov/fe/services/petroleum-reserves/strategic-petroleum-reserve/filling-strategic-petroleum-reserve (last visited July 16, 2020). During that time, "the Strategic Petroleum Reserve received 162 million barrels of crude oil through the RIK program" valued at over $6 billion. U.S. Dep't of Energy, Strategic Petroleum Reserve Annual Report to Congress for Calendar Year 2010, at 18 (2011) ("SPR 2010 Report"); *see id.* at 39 (Table 13). The federal government required certain Defendants (and/or their predecessors, subsidiaries, or affiliates), as lessees of federal offshore leases on the OCS, to pay royalties "in kind," which the government used for its strategic stockpile, a crucial element of U.S. energy security and treaty obligations. *See, e.g.*, U.S. Dep't of Interior, Mins. Mgmt. Serv., Sample Dear Operator Letter (Dec. 14, 1999), https://onrr.gov/ReportPay/PDFDocs/991214.pdf (invoking OCSLA and royalty provisions in federal leases operated by certain Defendants, and/or their predecessors, subsidiaries, or affiliates, "to use royalties in kind (RIK) to replenish the Strategic Petroleum Reserve (SPR)"). Defendants thus "help[ed] the Government to produce an item that it needs." *Watson*, 551 U.S. at 153.

93. The federal government also contracted with certain Defendants (and/or their predecessors, subsidiaries, or affiliates) to deliver millions of barrels of oil to the Strategic Petroleum Reserve as part of the RIK program. *See, e.g.*, U.S. Dep't of Interior, Mins. Mgmt. Serv., MMS RIK Program to Help Fill Strategic Petroleum Reserve (May 31, 2007), https://www.onrr.gov/PDFDOCS/20070531.pdf (describing such contracts "to transport Royalty in Kind (RIK) crude oil that will be used to resume filling the nation's Strategic Petroleum Reserve (SPR)"); Minority Staff of the Perm. Subcomm. on Investigations of the Comm. on Governmental

Affairs, U.S. Strategic Petroleum Reserve: Recent Policy Has Increased Costs To Consumers But Not Overall U.S. Energy Security, S. Rprt. 108-18, at 19 (2003) (describing government contract with a predecessor affiliate of Defendant Shell Oil Company (Equiva Trading Company) to deliver nearly 19 million barrels of oil to the Strategic Petroleum Reserve as part of the RIK program). Defendants thus engaged in "an effort to *assist*, or to help *carry out*," the federal government's task in ensuring energy security. *Watson*, 551 U.S. at 152.

94. In addition, certain Defendants acted under federal officers within the meaning of 28 U.S.C. § 1442 as operators and lessees of Strategic Petroleum Reserve infrastructure. For example, from 1997 to 2019, the Department of Energy leased to affiliates of Defendant Shell Oil Company (Equilon Enterprises LLC dba Shell Oil Products US and Shell Pipe Line Corporation) the Sugarland/St. James Terminal and Redstick/Bayou Choctaw Pipeline in St. James, Louisiana. *See* SPR 2010 Report, at 34. "The St. James terminal [wa]s leased to Shell Oil Products US under a long-term lease agreement. Under the lease agreement, Shell provide[d] for all normal operations and maintenance of the terminal and [wa]s *required* to support the Strategic Petroleum Reserve as a sales and distribution point in the event of a drawdown." *Id.* at 16 (emphasis added). Beginning in January 2020, the Department of Energy leased the St. James facilities to an affiliate of Defendants Exxon Mobil Corporation and ExxonMobil Oil Corporation (ExxonMobil Pipeline Company). *See* U.S. Dep't of Energy, Department of Energy Awards Strategic Petroleum Reserve Lease to ExxonMobil (Oct. 28, 2019), https://www.energy.gov/fe/services/petroleum-reserves/strategic-petroleum-reserve/releasing-oil-spr. And the Department has leased the same ExxonMobil affiliate two government-owned pipelines that are part of the Strategic Petroleum Reserve near Freeport, Texas. *See* SPR 2010 Report, at 34; U.S. Dep't of Energy, DOE Signs Major Agreement with Exxon Pipeline to Lease Idle Pipelines at Strategic Reserve (Jan. 14, 1999),

https://fossil.energy.gov/techline/techlines/1999/tl_bmlse.html. The Department of Energy's leases enable the affiliates of Defendants Shell Oil Company and ExxonMobil to use the facilities for their commercial purposes, subject to the federal government's supervision and control in the event of the President's call for an emergency drawdown. *See* 42 U.S.C. § 6241(d)(1) ("Drawdown and sale of petroleum products from the Strategic Petroleum Reserve may not be made unless the President has found drawdown and sale are required by a severe energy supply interruption or by obligations of the United States under the international energy program."). The United States has exercised this control, including through the President's orders to draw down the reserve in response to Hurricane Katrina in 2005 and disruptions to the oil supply in Libya in 2011, emergency actions taken in coordination with the International Energy Agency. *See* U.S. Dep't of Energy, History of SPR Releases, https://www.energy.gov/fe/services/petroleum-reserves/strategic-petroleum-reserve/releasing-oil-spr (last visited July 16, 2020). Thus, the hundreds of millions of barrels of oil flowing through these facilities were subject to federal government control and supervision.

95. These are but a few examples of the services Defendants have provided the federal government, under the direction of federal officers. Should Plaintiff challenge this Court's jurisdiction, Defendants reserve the right to further elaborate on these grounds and will not be limited to the specific articulations in this Notice. *Cf., e.g.*, *Betzner*, 910 F.3d at 1014-16.

96. Finally, Defendants have several colorable (indeed, likely meritorious) federal defenses to Plaintiff's claims, including preemption, and that those claims are barred by the Commerce Clause, *Healy* v. *Beer Inst.*, 491 U.S. 324, 336 (1989); Due Process Clause, *State Farm Mut. Ins. Co.* v. *Campbell*, 538 U.S. 408, 421 (2003), *BMW of N. Am.* v. *Gore*, 517 U.S. 559, 572-73 & n.19 (1996); First Amendment, *see Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 481-82

(1995); derivative sovereign immunity, *see Yearsley* v. *W.A. Ross Const. Co.*, 309 U.S. 18, 20-21 (1940); and foreign affairs doctrine, *see Garamendi*, 539 U.S. at 419. Each of these defenses satisfies Section 1442, which requires only that a defendant identify a single defense that is "colorable," *i.e.*, is neither "immaterial and made solely for the purpose of obtaining jurisdiction" nor "wholly insubstantial and frivolous." *Latiolais*, 951 F.3d at 297 (internal quotation marks omitted); *see, e.g.*, *K&D*, 951 F.3d at 506 ("The federal defense need only be colorable, not clearly sustainable. We do not require the officer virtually to win his case before he can have it removed." (internal quotation marks and citations omitted)).

97. Because Defendants are "persons" within the meaning of Section 1442, are being sued for activity taken at the direction of federal officers, and have colorable federal defenses to Plaintiff's claims, removal under Section 1442 is proper.

V. This Action Is Removable under the Outer Continental Shelf Lands Act

98. This Court also has original jurisdiction pursuant to the OCSLA. 43 U.S.C. § 1349(b); *see Tenn. Gas Pipeline* v. *Houston Cas. Ins. Co.*, 87 F.3d 150, 155 (5th Cir. 1996).

99. OCSLA grants federal courts original jurisdiction over all actions "arising out of, or in connection with . . . any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil or seabed of the outer Continental Shelf, or which involves rights to such minerals." 43 U.S.C. § 1349(b); *In re Deepwater Horizon*, 745 F.3d 157, 163 (5th Cir. 2014) (The "language" of § 1349(b)(1) is "straightforward and broad."). The OCS includes all submerged lands that belong to the United States but are not part of any State. 43 U.S.C. §§ 1301, 1331.

100. Congress passed OCSLA "to establish federal ownership and control over the mineral wealth of the OCS and to provide for the development of those natural resources." *EP Operating Ltd. P'ship* v. *Placid Oil Co.*, 26 F.3d 563, 569 (5th Cir. 1994). "[T]he efficient

exploitation of the minerals of the OCS . . . was . . . a primary reason for OCSLA." *Amoco Prod. Co.* v. *Sea Robin Pipeline Co.*, 844 F.2d 1202, 1210 (5th Cir. 1988). Indeed, OCSLA declares it "to be the policy of the United States that . . . the [OCS] . . . should be made available for expeditious and orderly development." 43 U.S.C. § 1332(3). The statute further provides that "since exploration, development, and production of the minerals of the outer Continental Shelf will have significant impacts on coastal and non-coastal areas of the coastal States . . . such States, and through such States, affected local governments, are entitled to an opportunity to participate, *to the extent consistent with the national interest*, in the policy and planning decisions made by the Federal Government relating to exploration for, and development and production of, minerals of the outer Continental Shelf." *Id.* § 1332(4) (emphasis added).

101. Under OCSLA, the U.S. Department of the Interior administers an extensive federal leasing program aiming to develop and exploit the oil and gas resources of the federal OCS. *Id.* § 1334 *et seq.* Under this authority, the Interior Department "administers more than 5,000 active oil and gas leases on nearly 27 million OCS acres. In FY 2015, production from these leases generated $4.4 billion in leasing revenue . . . [and] provided more than 550 million barrels of oil and 1.35 trillion cubic feet of natural gas, accounting for about sixteen percent of the Nation's oil production and about five percent of domestic natural gas production." *The Impact of the President's FY 2017 Budget on the Energy and Min. Leasing and Production Missions of the Bureau of Ocean Energy Management (BOEM), the Bureau of Safety and Environmental Enforcement (BSEE), and the Bureau of Land Management (BLM): Hearing Before the Subcomm. on Energy and Min. Resources of the H. Comm. on Nat. Resources*, 114th Cong. 3 (2016) (statement of Abigail Ross Hopper, Director, Bureau of Ocean Energy Mgmt., Dep't of the

Interior), https://www.boem.gov/FY2017-Budget-Testimony-03-01-2016.[14] In 2019, OCS leases supplied more than 690 million barrels of oil, a figure that has risen substantially in each of the last six years, together with 1.034 trillion cubic feet of natural gas. Bureau of Safety & Envtl. Enf't, Outer Continental Shelf Oil and Gas Production, https://www.data.bsee.gov/Production/OCSProduction/Default.aspx (last visited July 16, 2020).

102. Defendants and their affiliates operate a large share of the more than 5,000 active oil and gas leases on nearly 27 million OCS acres administered by the U.S. Department of the Interior under OCSLA. Hopper, *supra*.

103. For example, from 1947 to 1995, Chevron U.S.A. produced 1.9 billion barrels of crude oil and 11 billion barrels of natural gas from the federal OCS in the Gulf of Mexico alone. U.S. Dep't of Interior, Mins. Mgmt. Serv., Gulf of Mexico Region, Production by Operator Ranked by Volume (1947-1995), https://www.data.boem.gov/Production/Files/Rank%20File%20Gas%201947%20-%201995.pdf. In 2016, Chevron U.S.A. produced over 49 million barrels of crude oil and 50 million barrels of natural gas from the OCS in the Gulf of Mexico. U.S. Dep't of Interior, Bureau of Safety & Envtl. Enf't, Gulf of Mexico Region, Production by Operator Ranked by Volume (2016), https://www.data.boem.gov/Production/Files/Rank%20File%20Gas%202016.pdf. Numerous other Defendants conduct, and have for decades conducted, similar oil and gas operations on the federal OCS. *See* Bureau of Ocean Energy Mgmt., Lease Owner Information, https://www.data.boem.gov/Leasing/LeaseOwner/Default.aspx (last visited July 16, 2020).

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[14] The Court may look beyond the facts alleged in the Complaint to determine that OCSLA jurisdiction exists. *See, e.g.*, *Plains Gas Sols., LLC* v. *Tenn. Gas Pipeline Co., LLC*, 46 F. Supp. 3d 701, 703 (S.D. Tex. 2014); *St. Joe Co.* v. *Transocean Offshore Deepwater Drilling Inc.*, 774 F. Supp. 2d 596, 2011 A.M.C. 2624, 2640 (D. Del. 2011) (citing *Amoco Prod. Co.*, 844 F.2d at 1205).

104. Moreover, OCSLA makes clear that oil and gas activities on the OCS can only be governed by federal law. As the Supreme Court recently confirmed, "OCSLA defines the body of law that governs the OCS." *Parker Drilling Mgmt. Servs., Ltd.* v. *Newton*, 139 S. Ct. 1881, 1887 (2019). In particular, OCSLA extends "[t]he Constitution and laws and civil and political jurisdiction of the United States" to the OCS. 43 U.S.C. § 1333(a)(1). Federal law applies "to the same extent as if the [OCS] were an area of exclusive Federal jurisdiction located within a State." *Id.* Disputes under OCSLA may borrow from the law of adjacent states, but such claims remain creatures of federal law. "[T]he civil and criminal laws of each adjacent State . . . are declared to be the law of the United States for that portion of the subsoil and seabed of the [OCS]." *Id.* § 1333(a)(2)(A).

105. OCSLA jurisdiction exists even if the Complaint pleads no substantive OCSLA claims. *See, e.g.*, *In re Deepwater Horizon*, 745 F.3d at 163. Consistent with Congress's intent, courts have repeatedly found OCSLA jurisdiction where the claims involved conduct that occurred on the OCS or resolution of the dispute foreseeably could affect the efficient exploitation of minerals from the OCS. *See, e.g.*, *EP Operating Co.*, 26 F.3d at 569-70; *United Offshore* v. *S. Deepwater Pipeline*, 899 F.2d 405, 407 (5th Cir. 1990).

106. A substantial part of Plaintiff's claims "arise[] out of, or in connection with," Defendants' "operation[s] conducted on the outer Continental Shelf" that involve "the exploration and production of minerals." *In re Deepwater Horizon*, 745 F.3d at 163. The Complaint, in fact, challenges Defendants' advertising relating to all of their products, regardless of where they were extracted and produced. And a substantial quantum of those products are extracted and produced from OCS operations. *See, e.g.*, Bureau of Ocean Energy Mgmt., Ranking Operator by Oil, https://www.data.boem.gov/Main/HtmlPage.aspx?page=rankOil (documenting Chevron's oil and

natural gas production on the federal OCS from 1947 to 2017) (last visited July 16, 2020). Therefore, Plaintiff's claims necessarily encompass all of Defendants' exploration, production, extraction, and development on the OCS and fall within the "broad . . . jurisdictional grant of section 1349." *EP Operating Ltd.*, 26 F.3d at 569.

107. Thus, as *Parker Drilling* explains, the choice-of-law "question under the OCSLA" is not one of "ordinary" preemption. 139 S. Ct. at 1889. "OCSLA makes apparent that federal law is exclusive in its regulation of [the OCS], and that state law is adopted only as surrogate federal law." *Id.* (internal quotation marks omitted, alteration in original). Thus, the courts have affirmed removal jurisdiction where plaintiff's claims, "though ostensibly premised on [state] law, arise under the 'law of the United States' under" 43 U.S.C.§ 1333(a)(2) such that "[a] federal question . . . appears on the face of [plaintiff's] well-pleaded complaint." *Ten Taxpayer Citizens Grp.* v. *Cape Wind Assoc., LLC*, 373 F.3d 183, 193 (1st Cir. 2004). Accordingly, this lawsuit is removable under OCSLA.

VI. This Action Satisfies the Class Action Fairness Act's Requirements

108. In the alternative, even if properly brought under municipal law, this Court has original jurisdiction under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d), because the Attorney General expressly seeks to represent a class of District of Columbia consumers and CAFA's statutory requirements are satisfied.

109. CAFA permits removal of (i) any "class action" (ii) where minimal diversity exists; (iii) at least 100 class members are represented; and (iv) "the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interests and costs." 28 U.S.C. § 1332(d)(1), (2), (5); *Bradford* v. *George Wash. Univ.*, 249 F. Supp. 3d 325, 332 (D.D.C. 2017); *see also* 28 U.S.C. § 1453(b). Each criterion is satisfied here.

110. CAFA defines a "class action" as "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." 28 U.S.C. § 1332(d)(1)(B). CAFA's legislative history provides that "the definition of 'class action' is to be interpreted liberally. Its application should not be confined solely to lawsuits that are labelled 'class actions.' Generally speaking, lawsuits that resemble a purported class action should be considered class actions for the purpose of applying these provisions." S. Rep. No. 109-14, at 35 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 34 (formatting altered); *see also McMullen* v. *Synchrony Bank*, 82 F. Supp. 3d 133, 140 (D.D.C. 2015) (relying on CAFA's legislative history to interpret its scope). In other words, CAFA permits removal of a suit that is "in substance a class action" notwithstanding a plaintiff's "attempt to disguise the true nature of the suit." *Addison Automatics, Inc.* v. *Hartford Cas. Ins. Co.*, 731 F.3d 740, 742 (7th Cir. 2013); *see, e.g.*, *Williams* v. *Empl'rs Mut. Cas. Co.*, 845 F.3d 891, 901-02 (8th Cir. 2017); *Song* v. *Charter Commc'ns, Inc.*, Civ. No. 17-325, 2017 WL 1149286, at *1 n.1 (S.D. Cal. Mar. 28, 2017).

111. Notably, Congress did not exempt actions by attorneys general from CAFA. To the contrary, Congress *rejected* an amendment proposing such an exemption. *See* 151 Cong. Rec. S1,157-65 (daily ed. Feb. 9, 2005) (statement of Sen. Mark Pryor).

112. This action is a putative "class action" under CAFA. This suit—brought in the name of the "public interest"—is filed on behalf of a class of "consumers in Washington, D.C." Compl. ¶¶ 1, 12. The suit seeks to hold Defendants liable for the "unabated and expanded extraction, production, promotion, marketing and sale of Defendants' fossil fuel products, to the detriment" not of the District of Columbia itself, but "*of DC consumers and the public generally*." *Id.* ¶ 2 (emphasis added).

113. The Complaint alleges (i) efforts by Defendants to mislead *Washington, D.C. consumers*, and (ii) resulting injuries allegedly suffered by *Washington, D.C. consumers*. *See, e.g.*, *id.* ¶ 7 ("Defendants . . . create unwarranted doubt in the minds of consumers about the reality and severity of the climate change impacts from their fossil fuel products."); ¶ 71 ("Defendants have deceived—and they continue to deceive—DC consumers."); ¶ 109 ("[G]reenwashing advertisements . . . are deceptive to DC consumers."); ¶ 148 ("[T]he development, production, refining, and consumer use of Defendant's fossil fuel products . . . increase greenhouse gas emissions to the detriment of public health and consumer welfare."); ¶ 163 ("By misleading DC consumers about the climate impacts of using fossil fuel products . . . Defendants have deprived and are continuing to deprive consumers of information about the consequences of their purchasing decisions.").

114. The Complaint also requests relief on behalf of the class members it represents, seeking "restitution or damages" to make *District of Columbia consumers* whole, and an injunction to protect *District of Columbia consumers* from future injuries. *See id.* § XII (Prayer for Relief); *see also id.* ¶ 3 ("The District seeks . . . restitution for DC consumers.").

115. By suing in a representative capacity on behalf of "consumers in Washington, DC," *id.* ¶ 1, Plaintiff has chosen to bring what is in substance a putative class action: a "representative suit[] on behalf of [a] group[] of persons similarly situated," 1 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 1.1 (4th ed. 2002). Indeed, the District of Columbia Court of Appeals has recently explained that similar, private-attorney general suits for damages under the District of Columbia Consumer Protection Procedures Act ("CPPA") are necessarily subject to the "framework long established by" D.C. Superior Court Rule of Civil Procedure 23, *Rotunda* v. *Marriot Int'l, Inc.*, 123 A.3d 980, 982 (D.C. 2015), which is in all relevant respects "identical"—

not merely "similar"—to Federal Rule of Civil Procedure 23, *see* D.C. Super. Ct. R. Civ. P. 23 cmt. *But see Nat'l Consumers League* v. *Gen. Mills Inc.*, 680 F. Supp. 2d 132, 136-39 (D.D.C. 2010).

116. Minimal diversity is present here, too. *See* 28 U.S.C. § 1332(d)(2)(A) (requiring that "any member of a class of plaintiffs" be "a citizen of a State different from any defendant"). This suit seeks to represent District of Columbia consumers, at least one of which, on information and belief, is a citizen of the District of Columbia. *See, e.g.*, Compl. ¶ 12. Yet not a *single* Defendant is a citizen of—*i.e.*, is either incorporated or has its principal place of business in, *see* 28 U.S.C. § 1332(c)(1)—the District of Columbia:

- Exxon Mobil Corporation is incorporated in New Jersey and has its principal place of business in Texas, Compl. ¶ 13(a);
- Exxon Oil Corporation is incorporated in New York and has its principal place of business in Texas, *id.* ¶ 13(f);
- Royal Dutch Shell PLC is incorporated in England and Wales and has its principal place of business in the Netherlands, *id.* ¶ 14(a);
- Shell Oil Company is incorporated in Delaware and has its principal place of business in Texas, *id.* ¶ 14(e);
- BP P.L.C. is incorporated in England and Wales and has its principal place of business in England, *id.* ¶ 15(a);
- BP America Inc. is incorporated in Delaware and has its principal place of business in Texas, *id.* ¶ 15(e);
- Chevron Corporation is incorporated in Delaware and has its principal place of business in California, *id.* ¶ 16(a); and

- Chevron U.S.A. Inc. is incorporated in Pennsylvania and has its principal place of business in California, *id.* ¶ 16(f).

117. The number of represented plaintiffs necessary for CAFA jurisdiction is present here because the number of "consumers in Washington, DC," *id.* ¶ 1, plainly exceeds 100, *see* 28 U.S.C. § 1332(d)(5)(B); U.S. Census Bureau, *Quick Facts: District of Columbia* (July 1, 2019), https://www.census.gov/quickfacts/DC (estimating the District of Columbia population at 705,749).

118. Although the Complaint does not allege a specific amount in controversy, the Complaint's allegations demonstrate that CAFA's $5,000,000 threshold is satisfied.[15] *See* 28 U.S.C. § 1332(d)(2). In noticing removal, a defendant need only include a "plausible allegation that the amount in controversy exceeds the jurisdictional threshold." *Dart Cherokee Basin Operating Co.* v. *Owens*, 574 U.S. 81, 89 (2014). Here, the Complaint alleges that Defendants are liable under the CPPA for a sweeping pattern of deception in countless communications with consumers for more than 50 years, and seeks restitution and damages, as well as civil penalties in the amount of $5,000 per purchase of Defendants' products. *See* D.C. Code § 28-3909; *Zuckman* v. *Monster Beverage Corp.*, 958 F. Supp. 2d 293, 300-01 (D.D.C. 2013); Compl. §§ IV-XII.

119. Those allegations alone establish that the amount in controversy plausibly exceeds $5,000,000. But Plaintiff also seeks injunctive relief, for which the amount in controversy is "measured by the value of the object of the litigation," *Hunt* v. *Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 347 (1977), and can be satisfied either by the "value of the right that plaintiff seeks to enforce or to protect" or "the cost to the defendant[] to remedy the alleged denial," *Smith* v.

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[15] Indeed, even the "Civil Division Information Sheet" acknowledges that the suit demands "[i]n excess of $1 million."

Washington, 593 F.2d 1097, 1099 (D.C. Cir. 1978); *accord Pietrangelo* v. *Refresh Club, Inc.*, Civ. No. 18-1943, 2019 WL 2357379, at *8 (D.D.C. June 4, 2019). Put differently, "[t]he value of injunctive relief for determining the amount in controversy can be calculated as the cost to the defendant." *GEO Specialty Chems., Inc.* v. *Husisian*, 951 F. Supp. 2d 32, 39 (D.D.C. 2013).

120. Here, Plaintiff seeks to enjoin Defendants from "violating the CPPA." Compl. § XII(a). To the extent that means precluding Defendants from utilizing specific means of advertising and marketing, the value of such an injunction far exceeds $5,000,000. The Complaint asserts that Defendants' present advertising campaigns are deceptive to District of Columbia consumers. For example, Plaintiff alleges that ExxonMobil is currently running a series of deceptive "full-page advertisements in print editions and posts in the electronic edition of the *New York Times*, and in other publications with wide circulation to DC consumers, such as *The Economist*, as well as on ExxonMobil's YouTube channel." *Id.* ¶ 110. The Complaint also accuses Shell, BP, and Chevron of running current or recent deceptive advertising campaigns. *See id.* ¶¶ 118-24 (allegations regarding Shell's "Make the Future" advertising campaign currently being run on the *Washington Post* and *New York Times* websites); ¶¶ 127-29 (allegations regarding BP's 2019 "Possibilities Everywhere" advertising campaign); ¶ 145 (allegations regarding Chevron advertisement currently available on *New York Times* website). Moreover, the Complaint alleges that Defendants "currently advertise [fossil fuel products] to DC consumers as environmentally beneficial, while simultaneously omitting any mention of the products' role in causing catastrophic climate change," thereby deceiving District of Columbia consumers. *Id.* ¶¶ 155-60. Overhauling Defendants' existing advertising and marketing campaigns to meet the Complaint's specifications would indisputably exceed $5,000,000. *See Dart Cherokee*, 574 U.S. at 89.

121. Insofar as Plaintiff seeks to enjoin Defendants from violating the CPPA by altering Defendants' business practices, and not merely their marketing and advertisements, the amount in controversy is even higher. The Complaint alleges, for example, that Defendants engaged in deceptive and unfair business by "portray[ing] themselves as working to reduce reliance on fossil fuels through investment in alternative energy sources" while their "investments in low-carbon energy [we]re negligible" in comparison to "fossil fuel production . . . and new fossil fuel development." Compl. ¶¶ 100-01. Even assuming this described a cognizable "deceptive and unfair business practice[]"—which it does not[16]—putting an end to said practice would require Defendants to substantially increase their investments in "low-carbon energy." *Id.* ¶ 100. Such an investment would surely exceed $5,000,000 by many, many multiples.

122. Just by way of example, the Complaint alleges that ExxonMobil earned $198 billion in revenue in 2016, but "invested less than 1% of that in alternative energy research." *Id.* ¶ 113. BP's "activities in solar energy" represent "only 0.4% of BP's annual capital expenditure of approximately $16 billion, nearly all of which focuses on fossil fuels." *Id.* ¶ 130. And Chevron's "investment of 'millions' in renewables is miniscule in comparison to its investment of billions in fossil fuels." *Id.* ¶ 142. Bringing their investments in renewable energy to just **5%** of capital expenditures, then, would require Defendants to invest billions on an annual basis. Given the magnitude of the investments Defendants already make in renewable energy, any increase

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[16] Defendants do not concede—and in fact deny—that Plaintiff is entitled to any of the relief it seeks. A plaintiff's claim "fixes the right of the defendant to remove" whether "well or ill-founded in fact." *St. Paul Mercury Indem. Co.* v. *Red Cab Co.*, 303 U.S. 283, 294 (1938); *accord Griffin* v. *Coastal Int'l Sec., Inc.*, Civ. No. 06-2246, 2007 U.S. Dist. LEXIS 40041, at *7 (D.D.C. June 4, 2007); *see also* 14B Wright & Miller, *supra* § 3702.1 ("[A] defendant who seeks to prove that the amount in controversy is greater than the jurisdictional amount does not automatically concede that the jurisdictional amount is recoverable.").

sufficient to address the Complaint's allegations of deception would necessarily exceed the $5,000,000 jurisdictional threshold. *See Dart Cherokee*, 574 U.S. at 89.

123. Finally, CAFA's purposes are best served by litigating this case in federal court, as the statute was intended "to strongly favor the exercise of federal diversity jurisdiction over class actions with interstate ramifications." S. Rep. No. 109-14, at 35; *see also Dart Cherokee*, 574 U.S. at 89 ("CAFA's primary objective is to ensur[e] Federal court consideration of interstate cases of national importance." (internal quotation marks and citation omitted)); *Standard Fire Ins. Co.* v. *Knowles*, 568 U.S. 588, 595 (2013) (same). As described more fully above, this lawsuit implicates issues of national and international importance. It belongs in federal court.

124. CAFA jurisdiction is proper because this suit is in substance a "class action" on behalf of more than 100 purported class members, for which there is (greater than) minimal diversity, and an amount in controversy in excess of $5,000,000.

VII. This Court Has Diversity Jurisdiction Because the Real Party in Interest Has Diverse Citizenship from All Defendants

125. Defendants are also authorized to remove this action under 28 U.S.C. § 1441, based on diversity jurisdiction. This court has original diversity of citizenship jurisdiction under 28 U.S.C. § 1332(a), because the real parties in interest are citizens of different states, and the amount in controversy exceeds the value of $75,000.

126. *First*, as explained above, this suit is brought on behalf of the citizens of the District of Columbia, who are the real parties in interest to this action. "[D]iversity jurisdiction must be based only on the citizenship of the real parties in interest." *Nat'l Ass'n of State Farm Agents, Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 201 F. Supp. 2d 525, 529 (D. Md. 2002). While Plaintiff is captioned as the "District of Columbia," the Attorney General is bringing these consumer protection claims against Defendants on behalf of "misled consumers in Washington, DC."

Compl. ¶ 1. It is those consumers who hold the substantive right to be free from allegedly unfair or deceptive trade practices, and thus those consumers are the real parties in interest.

127. The Attorney General brings its claims under the CPPA, D.C. Code §§ 28-3901 *et seq.*, specifically for alleged violations of Section 28-3904. Section 28-3909 allows the Attorney General to bring claims for the "unfair and deceptive trade practices" disallowed by Section 28-3904, when it is "in the public interest." D.C. Code § 28-3909. However, that provision granting the Attorney General the right to sue does not itself make the District of Columbia a party in interest to these consumer protection claims. *See Merrill Lynch, Pierce, Fenner & Smith* v. *Cavicchia*, 311 F. Supp. 149, 155-56 (S.D.N.Y. 1970) (rejecting New York Attorney General's argument that New York was the real party in interest because a state statute gave him "power to bring an action in the name of the state" (citing *Missouri, K. & T. R. Co.* v. *Hickman*, 183 U.S. 53, 59-60 (1901))). "The real party in interest is the person holding the substantive right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery." *Varnum Props., LLC* v. *Dep't of Consumer & Reg. Affair*s, 204 A.3d 117, 121 (D.C. 2019) (citing *United States ex rel. Spicer* v. *Westbrook*, 751 F.3d 354, 362 (5th Cir. 2014)). Here, the Complaint asserts a substantive right to avoid allegedly deceptive statements and advertising, and a right that is held by consumers who are District of Columbia residents, not by the District of Columbia itself.

128. The District of Columbia could theoretically be the party in interest if it "articulate[d] an interest apart from the interests of particular private parties." *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982). However, a generalized interest in protecting the citizens of the District of Columbia from deceptive consumer practices is not enough. *See Hickman*, 183 U.S. at 60 (noting that a state's general interest in protecting the welfare of its citizens "is not that which makes the state, as an organized political community, a party in

interest in the litigation"); *Dep't of Fair Empl. & Hous.* v. *Lucent Techs., Inc.*, 642 F.3d 728, 737 (9th Cir. 2011) ("'[G]eneral governmental interest[s]' will not satisfy the real party to the controversy requirement for the purposes of defeating diversity" (quoting *Hickman*, 183 U.S. at 60)); *Ramada Inns, Inc.* v. *Rosemount Mem'l Park Ass'n*, 598 F.2d 1303, 1307 (3d Cir. 1979) ("If a federal judgment will have no effect other than to implicate the state's general 'governmental interest in the welfare of all its citizens . . . and in securing compliance with all its laws,' . . . then the state is not a real party in interest." (quoting *Hickman*, 183 U.S. at 60 (citation omitted))). The District of Columbia has not asserted an interest in this action beyond the welfare of its citizens and a desire to enforce its consumer protection laws. Given that those laws exist for the benefit of consumers, it is clear that District of Columbia consumers are the real parties in interest here.

129. Because the real parties in interest to this action are citizens of District of Columbia, Plaintiff's citizenship for purposes of determining diversity jurisdiction is the District of Columbia.

130. *Second*, as no Defendant is a citizen of the District of Columbia, *see supra* ¶ 116, there is complete diversity of citizenship, and thus diversity jurisdiction.

131. *Third*, as shown above, *supra* ¶¶ 118-22, the amount-in-controversy requirement is satisfied.

132. Having established complete diversity of the parties and a sufficient amount in controversy, Defendants have demonstrated that this Court has original diversity jurisdiction over this action, and are authorized to remove it to this Court.

COMPLIANCE WITH OTHER REMOVAL REQUIREMENTS

133. Based on the foregoing, this Court has original jurisdiction of this action under 28 U.S.C. §§ 1331, 1332(a), 1332(d), 1367, 1442, 1453(b), and 43 U.S.C. § 1349(b)(1).

134. The United States District Court for the District of Columbia is the appropriate venue for removal under 28 U.S.C. §1441(a) because it is the federal judicial district encompassing the Superior Court of the District of Columbia, where this suit was originally filed.

135. Copies of all process, pleadings, and orders from the state-court action being removed to this Court that ExxonMobil has obtained from the Superior Court and which are in the possession of ExxonMobil are attached hereto as Exhibit 13. Pursuant to 28 U.S.C. § 1446(a), this constitutes "a copy of all process, pleadings, and orders" received by ExxonMobil in the action.

136. Pursuant to 28 U.S.C. § 1446(d), Defendants will promptly file a copy of this Notice of Removal, as well as a Notice of Filing of this Notice of Removal, with the Clerk of the Superior Court of District of Columbia, and serve a copy of the same on all parties. A copy of this filing (without exhibits) is attached as Exhibit 14.

137. This Notice of Removal is signed pursuant to Federal Rule of Civil Procedure 11. *See* 28 U.S.C. § 1446(a).

138. Defendants reserve the right to amend or supplement this Notice of Removal. Defendants also reserve all defenses and objections available under applicable law, and the filing of this Notice of Removal is subject to, and without waiver of, any such defenses or objections.

WHEREFORE, Defendants respectfully give notice that this action is hereby removed from the Superior Court of the District of Columbia to the United States District Court for the District of Columbia.

DATE: July 17, 2020
New York, New York

Respectfully submitted,

EXXON MOBIL CORPORATION and
EXXONMOBIL OIL CORPORATION,

By its attorneys,

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Subject: RE: MN Climate - Agenda for 11/10 call
Date: Wed, 11 Nov 2020 11:15:31 -0600
Importance: Normal
Attachments: [redacted]2020-10-15_[51]_D's_Oppo_to_Remand.pdf

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[redacted]

Nicole Teixeira
Senior Associate

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[redacted]

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Subject: RE: MN Climate - Agenda for 11/10 call

[redacted]

[redacted]

[redacted]

-Pete

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Subject: MN Climate - Agenda for 11/10 call

Hi Pete and Leigh,

[redacted]

- [redacted]
  - [redacted]
  - [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

Thanks,

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UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

DISTRICT OF COLUMBIA,

Plaintiff,

v.

EXXON MOBIL CORP., EXXONMOBIL OIL CORPORATION, ROYAL DUTCH SHELL PLC, SHELL OIL COMPANY, BP P.L.C., BP AMERICA INC., CHEVRON CORPORATION, CHEVRON U.S.A. INC.,

Defendants.

20 Civ. 1932 (TJK)

BRIEF OF DEFENDANTS IN OPPOSITION TO PLAINTIFF'S MOTION TO REMAND

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PRELIMINARY STATEMENT

In this case of national and global dimension, federal jurisdiction is not merely permissible, but necessary. Plaintiff the District of Columbia, acting through the Office of the Attorney General ("Attorney General"), cannot avoid federal court simply because it has omitted the language of federal law from its complaint. The Attorney General seeks to use the District of Columbia Consumer Protection Procedures Act ("CPPA"), D.C. Code §§ 28-3901 *et seq.*, as a vehicle to force Defendants to discontinue or reduce their extraction, production, and sale of fossil fuels around the world. But United States federal policy has, for many decades, expressly recognized the fundamental strategic importance of oil and gas to the Nation's economic well-being and national security. Congress provided for removal to prevent precisely this type of interference with longstanding federal policy. This case belongs in federal court.

In an attempt to evade federal jurisdiction, the Attorney General *now* claims not to "seek relief to stop or reduce" fossil-fuel sales. Br. 28. But the Complaint's allegations contradict this litigation position—as do the origins of this lawsuit, which is part of an avowed campaign to discourage the production and sales of fossil fuels in favor of renewable energy sources. The Complaint challenges, *inter alia*, Defendants' "commitment to sustainable development" based on their alleged "expansion of fossil fuel production," as well as Defendants' alleged decisions to "continue[] to ramp up fossil fuel production globally and invest in new fossil fuel development." Compl. ¶¶ 87, 88, 101. By putting production and sales activities front and center, the Attorney General cannot reasonably deny that this lawsuit seeks to curtail them—that is its very design.

This action originates from a pact of like-minded attorneys general seeking to "limit[] climate change" and compel energy companies and the public to transition to clean energy. Ex. 1 at 1. These attorneys general, along with other climate-activist strategists and funders, seek to force Defendants to significantly scale down, if not eliminate, fossil-fuel production as a means of

regulating—and reducing—global carbon emissions. Indeed, this lawsuit is part of an effort to use litigation to impose sufficient "pressure" to coerce "the energy industry's cooperation in converting to renewable energy" and away from oil and gas. Ex. 2 at 27-28.

Curtailing domestic production of oil and gas, however, is fundamentally inconsistent with and contrary to longstanding federal policy. For vital economic and security reasons, every administration since at least Franklin D. Roosevelt's has taken active steps to increase domestic oil production. Through a variety of means, the federal government regulates greenhouse gas emissions and seeks to balance the nation's energy needs with environmental considerations. Any attempt by a municipal court to balance the costs and benefits of the use of oil and gas will constitute a collateral attack on the balance already struck under the laws, regulations, and treaties of the United States. That is why this case belongs in federal court.

Seven separate grounds provide independent bases for federal subject matter jurisdiction:

First, the Attorney General's claims implicate a variety of "uniquely federal interests" including the regulation of transboundary pollution, U.S. navigable waters, and foreign affairs and commerce. Under our constitutional structure, these claims arise exclusively under federal common law, not the diverse laws of the various states and the District of Columbia.

Second, this lawsuit requires the resolution of substantial, disputed questions of federal law about national and international energy policy and environmental protection. Congress and federal agencies have already decided—over the course of several decades and administrations—that domestic oil and gas production should be promoted. The Attorney General disputes that long-held conclusion, and would have this Court declare that fossil fuel products are so "detrimental" to the environment that statements promoting oil and gas are inherently misleading. Compl. ¶ 11.

Third, the Attorney General seeks to hold Defendants liable for sales and use of their

products on federal enclaves in the District of Columbia, supporting federal enclave jurisdiction.

Fourth, the Attorney General's claims are connected to many actions Defendants undertook at the direction of federal officers, warranting removal under the Federal Officer Removal Statute. Defendants have engaged in substantial activities at federal direction since the 1940s, including through (i) the production and transportation of fuels indispensable to the Allied effort in World War II; (ii) production of specialized jet fuels throughout the Cold War and up to the present; (iii) fossil fuel exploration and extraction on the federally managed Outer Continental Shelf; and (iv) exploration and production pursuant to agreements with federal agencies.

Fifth, the Attorney General challenges as misleading Defendants' advertisements about their fossil fuel production activities including, necessarily, their activities on the Outer Continental Shelf. Jurisdiction is thus authorized under the Outer Continental Shelf Lands Act.

Sixth, diversity jurisdiction is satisfied because the District of Columbia consumers on whose behalf the Attorney General sues are completely diverse from all Defendants.

Seventh, this case can be removed under the Class Action Fairness Act because it is in substance a class action and subject to procedures identical to Federal Rule of Civil Procedure 23.

Litigation about the appropriate level of fossil fuels and the national and global issues presented by global climate change belongs in a federal forum. Because of the overtly federal nature of this lawsuit, removal is proper. The motion should be denied.[1]

BACKGROUND

The Attorney General brought this action as part of a long-standing effort by state and municipal officials to limit and ultimately end Defendants' production and sale of fossil fuels. In

[1] By filing this brief in opposition to the Attorney General's motion to remand, Defendants do not waive any right, defense, affirmative defense, or objection, including any challenges to personal jurisdiction over Defendants.

2016, a coalition of state attorneys general, including the D.C. Attorney General, joined a "Climate Change Coalition Common Interest Agreement" to advance their shared interests of "limiting climate change" and pursuing investigations and litigation to accelerate "the implementation and deployment of renewable energy technology." Ex. 1 at 1. Those officials, approximately 20 in number, called themselves the "Green 20," to reflect their commitment to a progressive climate change agenda.[2]

That same year, the Green 20 held a press conference, entitled "AGs United for Clean Power," with at least one representative of the Attorney General in attendance. Ex. 3 at 1. There, they unveiled an agenda of promoting "clean power" from renewable sources as the only legitimate response to climate change. *Id.* at 13. Noting what he characterized as the "gridlock in Washington," the New York Attorney General promoted "collective efforts to deal with the problem of climate change" and urged his colleagues to "step into this [legislative] breach" through the "creative[]" and "aggressive[]" use of their respective offices to end the world's reliance on fossil fuels. *Id.* at 1, 3, 18. He insisted, "We have to change conduct" to "mov[e] more rapidly towards renewables" and away from fossil fuels. *Id.* at 20. This press conference drew criticism from thirteen other state attorneys general, who correctly described the intentions expressed as an attempt to "[u]s[e] law enforcement authority to resolve a public policy debate." Ex. 4 at 3.

The AGs United for Clean Power press conference echoed themes expressed in June 2012 by climate activists gathered in La Jolla, California for a "Workshop on Climate Accountability, Public Opinion, and Legal Strategies." Ex. 2 at 1. There, they began to formulate a plan to utilize the law enforcement powers of "sympathetic" attorneys general, in conjunction with civil

[2] The "Green 20" comprises the attorneys general of California, Connecticut, Delaware, D.C., Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia, Washington, and U.S. Virgin Islands. *See* Ex. 3 at 1.

litigation, to "maintain[] pressure on the [fossil fuel] industry that could eventually lead to its support for legislative and regulatory responses to global warming." *Id.* at 11, 27. The activists concluded that "a single sympathetic state attorney general" might have "substantial success in bringing key internal documents to light" that might influence national climate and energy policy.[3] *Id.* at 11. They hoped the "pressure" caused by the burden of investigations would force energy companies to alter their speech on climate policies and coerce "the energy industry's cooperation in converting to renewable energy" and away from fossil fuels. *Id.* at 27-28.

Several years later, the climate activists reconvened in New York City to transform their strategy into a plan of action. Meeting at the Rockefeller Family Fund offices, the climate activists formulated a so-called "Exxon campaign" to undermine ExxonMobil's ability to continue producing and promoting fossil fuels by "delegitimiz[ing] [ExxonMobil] as a political actor," "establish[ing] in [the] public's mind that Exxon is a corrupt institution that has pushed humanity (and all creation) toward climate chaos and grave harm," and "driv[ing] divestment from Exxon." Ex. 5 at 1. Then, before the AGs United for Clean Power press conference, one of the activists who had contributed to the development of the "Exxon Campaign" conducted a closed-door briefing on the campaign to members of the Green 20.[4]

Over the ensuing years, nearly a third of the Green 20 have filed lawsuits against ExxonMobil and other energy companies named in this lawsuit, all with the purpose of limiting—if not ceasing—Defendants' production and sales of fossil fuels, including by stifling speech on

[3] The workshop participants also emphasized the power of civil litigation to achieve these goals, with one opining that "[e]ven if your ultimate goal might be to shut down a company, you still might be wise to start out by asking for compensation for injured parties." Ex. 2 at 13.

[4] One state official cautioned the activist that, "if you speak to the [Wall Street Journal] reporter, do not confirm that you attended or otherwise discussed the event." Ex. 6 at 1.

political issues and questions.[5] The first of these lawsuits, a fraud action brought by the New York Attorney General, went to trial in October 2019, and concluded with a complete defense verdict for ExxonMobil. Justice Ostrager, who presided, found the State's allegations to be "without merit," and its complaint to be "hyperbolic" and the "result of an ill-conceived initiative of the Office of the Attorney General." *People* v. *Exxon Mobil Corp.*, 2019 WL 6795771, at *1-2, *26 (N.Y. Sup. Ct. Dec. 10, 2019).

Municipal governments have filed similar lawsuits against energy companies.[6] Like the state complaints, the municipal complaints expressly target efforts to "promot[e] fossil fuels and undercut[] non-dangerous renewable energy and clean technologies." *City of San Francisco* v. *Exxon Mobil Corp.*, 2020 WL 3969558, at *5 (Tex. App. June 18, 2020). A Texas trial court found this litigation campaign to be a "crusade" "aimed to chill and suppress ExxonMobil's speech through legal actions & related campaigns." *Id.* at *3, *8. And a Texas appellate court expressed

[5] *See State* v. *Exxon Mobil Corp.*, Civ. No. 20-6132568 (Conn. Super. Ct. Sept. 14, 2020); *State* v. *BP Am. Inc.*, Civ. No. 20-097 (Del. Super. Ct. Sept. 10, 2020); *State* v. *Am. Petrol. Inst.*, Civ. No. 20-3837 (Minn. Dist. Ct. June 24, 2020); *Commonwealth* v. *ExxonMobil Corp.*, Civ. No. 19-3333 (Mass. Super. Ct. Oct. 24, 2019); *People* v. *ExxonMobil Corp.*, Civ. No. 18-45044 (N.Y. Sup. Ct. Oct. 24, 2018); *State* v. *Chevron Corp.*, Civ. No. 18-4716 (R.I. Super. Ct. July 2, 2018).

[6] *See City of New York* v. *BP p.l.c.*, Civ. No. 18-182 (S.D.N.Y. Jan. 9, 2018); *County of Maui* v. *Sunoco LP*, Civ. No. 20-283 (Haw. Cir. Ct. Oct. 12, 2020); *City of Charleston* v. *Brabham Oil Co.*, Civ. No. 20-10 (S.C. Ct. Common Pleas Sept. 9, 2020); *City of Hoboken* v. *Exxon Mobil Corp.*, Civ. No. 20-3179 (N.J. Super. Ct. Sept. 2, 2020); *City & County of Honolulu* v. *Sunoco LP*, Civ. No. 20-380 (Haw. Cir. Ct. Mar. 9, 2020); *Mayor & City Counsel of Baltimore* v. *BP p.l.c.*, Civ. No. 18-4219 (Md. Cir. Ct. July 20, 2018); *King County* v. *BP p.l.c.*, Civ. No. 18-11859 (Wash. Super. Ct. May 9, 2018); *Board of County Commissioners of Boulder County* v. *Suncor Energy (U.S.A.), Inc.*, Civ. No. 18-30349 (Colo. Dist. Ct. Apr. 17, 2018); *City of Richmond* v. *Chevron Corp.*, Civ. No. 18-55 (Cal. Super. Ct. Jan. 22, 2018); *City of Santa Cruz* v. *Chevron Corp.*, Civ. No. 17-3243 (Cal. Super. Ct. Dec. 20, 2017); *County of Santa Cruz* v. *Chevron Corp.*, Civ. No. 17-3242 (Cal. Super. Ct. Dec. 20, 2017); *City of Oakland* v. *BP p.l.c.*, Civ. No. 17-87588 (Cal. Super. Ct. Sept. 19, 2017); *City & County of San Francisco* v. *BP p.l.c.*, Civ. No. 17-561370 (Cal. Super. Ct. Sept. 19, 2017); *City of Imperial Beach* v. *Chevron Corp.*, Civ. 17-1227 (Cal. Super. Ct. July 17, 2017); *County of Marin* v. *Chevron Corp.*, Civ. No. 17-2586 (Cal. Super. Ct. July 17, 2017); *County of San Mateo* v. *Chevron Corp.*, Civ. No. 17-3222 (Cal. Super. Ct. July 17, 2017).

dismay about the California municipality plaintiffs' "[l]awfare"—"an ugly tool by which to seek the environmental policy changes the California Parties desire, enlisting the judiciary to do the work that the other two branches of government cannot or will not do." *Id.* at *20.

The climate activists have continued to facilitate similar litigation to advance their agenda of pushing the energy industry away from fossil fuels and toward renewables. Recently, Bloomberg Philanthropies joined their cause by funding the creation of a State Energy and Environmental Impact Center (the "Impact Center") to assist in litigation to shape national energy policy.[7] The Impact Center has encouraged state attorneys general to bring climate lawsuits by providing them resources—including Special Assistant Attorneys General ("SAAG"), whose salaries and benefits it pays—on the condition that they do so. Indeed, the Complaint's signature block includes a SAAG sponsored by the Impact Center. Compl. 78.

When the Attorney General filed the Complaint in this action, its allegations echoed the strategies announced at the AGs United for Clean Power press conference and the objectives of the Impact Center. The Complaint includes counsel from Sher Edling LLP, *see id.* at 78-79, which reportedly received at least $1.75 million in grants from Resources Legacy Fund, a San Francisco-based organization focused on curbing the production and sale of fossil fuels through advocacy.[8]

THE COMPLAINT

The Complaint's allegations demonstrate that this lawsuit is an artfully pleaded effort to use claims nominally asserted under a local consumer-protection statute to discourage federally promoted fossil-fuel production, reduce federally regulated interstate and international carbon

[7] *See* Juliet Eilperin, *NYU Law Launches New Center to Help State AGs Fight Environmental Rollbacks*, Wash. Post, Aug. 16, 2017.
[8] *See* Spencer Walrath, *Law Firm Behind Washington D.C. Climate Lawsuit Received Over $1.7 Million in Grant Money from Activist Foundation*, Energy In Depth (July 7, 2020), https://eidclimate.org/law-firm-behind-washington-d-c-climate-lawsuit-received-over-1-7-million-in-grant-money-from-activist-foundation/.

emissions, and undermine federal energy and environmental policy. The Attorney General alleges that Defendants violated the CPPA by "engaging in a number of deceptive acts and practices in [their] marketing, promotion, and sale of fossil fuel products." *See, e.g.*, Compl. ¶¶ 174, 181, 188, 195. The Complaint recites a laundry list of alleged advertisements—appearing across the country, over diverse media—that, in the Attorney General's view, misled consumers about the role Defendants' products play in causing climate change. Its allegations of "greenwashing"—*i.e.*, "creat[ing] a false impression that a company and/or its products are environmentally friendly," *id.* ¶ 98—demonstrate the Attorney General's focus on reducing fossil-fuel production.

For example, the Complaint challenges as deceptive one Defendant's alleged advertisements promoting its investments in hydrogen fuel cells as "'[o]ne of the cleaner sources' that power electric vehicles." *See id.* ¶¶ 121-22. The Complaint asserts that hydrogen fuel cells cannot be "solutions to global warming" because "almost all of the hydrogen fuel in the United States is produced by reforming natural gas, which releases significant amounts of greenhouse gases," and because "producing and transporting the natural gas for hydrogen fuel production leads to methane emissions that make the total greenhouse gas emissions associated with hydrogen fuel similar to petroleum." *Id.* ¶ 122. The problem, according to the Complaint, is that "Defendants have cut fossil fuels from their brand but not their business." *Id.* ¶ 109. The Attorney General wants this Court to compel Defendants to "cut fossil fuels" from their businesses across the globe.

The Complaint unequivocally asserts the Attorney General's view that Defendants' fossil fuel products, produced and sold around the world, are to blame for climate change and that its preferred solution is to end reliance on those products. According to the Complaint, "Defendants' deception" was "detriment[al]" to "DC consumers and the public generally" because it allegedly "enabled the unabated and expanded *extraction*, *production*, promotion, marketing, and sale of

Defendants' fossil fuel products." *Id.* ¶ 2 (emphasis added). Those products, the Complaint alleges, "pollute and ultimately warm the planet." *Id.* ¶ 8. Revealing that the claims—however labeled by the Attorney General—are, at bottom, interstate and international pollution claims, the Complaint further alleges that "the development, production, refining, and consumer use of [Defendants'] fossil fuel products—including gasoline and motor oil—emit large volumes of greenhouse gases, which cause global climate change." *Id.* ¶ 71; *see also id.* ¶ 106 ("Defendants' fossil fuel products are the primary driver of global warming."); ¶ 149 (asserting that "current levels of fossil fuel use—even purportedly 'cleaner' or more efficient products—represent a direct threat to District residents and the environment").

According to the Complaint, Defendants' "commitment to sustainable development" is contradicted by their alleged "expansion of fossil fuel production," as well as Defendants' alleged decisions to "continue[] to ramp up fossil fuel production globally and invest in new fossil fuel development—including in tar sands crude and shale gas fracking, some of the most carbon-intensive extraction projects—and to plan for unabated oil and gas exploitation indefinitely into the future." Compl. ¶¶ 87-88, 101. The Attorney General's preferred solution, like those of the other Green 20 members, is to end the world's "rel[iance] on fossil fuel[s]" and "mov[e] more rapidly towards renewables." Ex. 3 at 16, 20; Ex. 2 at 27-28 (discussing compelling the energy industry's "cooperation in converting to renewable energy"); *see also* Compl. ¶ 52 ("fossil fuel products contribute[] to severe environmental and health threats at significant economic cost").

The purported harms that the Attorney General identifies are directly linked to Defendants' fossil fuel production and sales and demonstrate the Complaint's objective of reducing both. According to the Complaint, Defendants' alleged deception was harmful because it caused consumers to use more fossil fuels, which in turn contributed to greenhouse gas emissions and

global climate change. *See, e.g.*, *id*. ¶¶ 6, 65, 89-97, 161, 168.

LEGAL STANDARD

"The removal process was created by Congress to protect defendants." *Legg* v. *Wyeth*, 428 F.3d 1317, 1325 (11th Cir. 2005). A defendant may remove "any civil action brought in State court of which the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441(a). Although the party opposing remand "bears the burden of establishing that jurisdiction exists in federal court," *Mizell* v. *SunTrust Bank*, 26 F. Supp. 3d 80, 84 (D.D.C. 2014), removal is proper so long as jurisdiction exists over a single claim, *see* 28 U.S.C. § 1367; *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 563 (2005). The inherently federal nature of the claims stated on the face of the complaint, not the plaintiff's characterization of them as state law claims, is controlling. 14C Charles Alan Wright et al., Federal Practice and Procedure § 3722.1 (4th ed. 2020); *Sam L. Majors Jewelers* v. *ABX, Inc.*, 117 F.3d 922, 928 (5th Cir. 1997). It is well-settled that the question of whether a case arises under state or federal law, and is, therefore, properly removable, is a question of subject matter jurisdiction that the federal removal court must resolve for itself, subject to the court's "unflagging obligation" to exercise such jurisdiction where it does exist. *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 716 (1996).

ARGUMENT

I. The Complaint Arises under Federal Common Law.

This Court is vested with federal question jurisdiction over this suit because the Attorney General's claims necessarily arise—if at all—under federal common law. *See Nat'l Farmers Union Ins. Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845, 850 (1985). Although "[t]here is no federal general common law," *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 78 (1938), there remain "some limited areas" in which the governing legal rules are supplied not by state law, but by "what has come to be known as federal common law," *Tex. Indus., Inc.* v. *Radcliff Materials, Inc.*, 451

U.S. 630, 640 (1981). In particular, "federal common law addresses . . . subjects . . . where the basic scheme of the Constitution so demands," *Am. Elec. Power Co.* v. *Connecticut* ("*AEP*"), 564 U.S. 410, 421 (2011), such as issues "so vitally affecting interests, powers and relations of the Federal Government as to require uniform national disposition," *United States* v. *Standard Oil Co.*, 332 U.S. 301, 307 (1947), as when "the interstate or international nature of the controversy makes it inappropriate for state law to control." *Tex. Indus.*, 451 U.S. at 641. "[I]f federal common law exists, it is because state law cannot be used." *City of Milwaukee* v. *Illinois* ("*Milwaukee II*"), 451 U.S. 304, 314 n.7 (1981).

Courts have long recognized that claims may arise under federal common law regardless of whether a plaintiff affixes a federal law label. Courts determine at the outset whether plaintiffs' claims arise under federal or state law. This analysis does not implicate preemption principles or standards because a claim that "arise[s] under federal common law" is "a permissible basis for jurisdiction based on a federal question." *Treiber & Straub, Inc.* v. *U.P.S., Inc*., 474 F.3d 379, 383 (7th Cir. 2007). The two-step analysis the Supreme Court established in *Standard Oil* for determining whether a common law claim arises under state or federal law makes clear that this threshold jurisdictional question does not depend on the answer to the distinct substantive question of whether the plaintiff has stated a viable claim under federal law. Under the applicable two-step approach, courts must (1) determine whether the source of law is federal or state based on the nature of the issues at stake, and (2) if federal law is the source, then determine the substance of the federal law, including whether plaintiff has stated a viable federal claim. *United States* v. *Swiss Am. Bank, Ltd.*, 191 F.3d 30, 42-45 (1st Cir. 1999) (citing *Standard Oil*, 332 U.S. 301). The Attorney General's claims, purportedly brought under municipal law, implicate three "uniquely federal interests" that demand the application of federal common law: (i) transboundary pollution,

(ii) the navigable waters of the U.S., and (iii) foreign affairs and commerce.

A. This Suit Asserts Interstate and International Pollution Claims.

1. The Supreme Court Has Repeatedly Held that Federal Common Law Exclusively Governs Interstate and International Pollution Claims.

The United States Supreme Court has long recognized that interstate "[e]nvironmental protection is undoubtedly an area within national legislative power" for which federal courts may "fashion" federal common law. *AEP*, 564 U.S. at 421; *see also Illinois* v. *City of Milwaukee* ("*Milwaukee I*"), 406 U.S. 91, 103 (1972). Thus, federal common law applies to claims that "deal with air and water in their ambient or interstate aspects." *AEP* 564 U.S. at 421 (quoting *Milwaukee I*, 406 U.S. at 103); *see, e.g.*, *Int'l Paper Co.* v. *Ouellette*, 479 U.S. 481, 487-88 (1987), including suits asserting claims rooted in the effects of global greenhouse gas emissions. As the Supreme Court has held, "[e]ach state stands on the same level with all the rest" and none "can impose its own legislation on . . . one of the others." *Kansas* v. *Colorado*, 206 U.S. 46, 97 (1907). The Court put the point succinctly in *Ouellette*, observing that "interstate water pollution is a matter of federal, not state law." 479 U.S. at 488.

Actions like the Attorney General's, which seek to use municipal law to limit the production, sale, and use of fossil fuels not just in the District of Columbia but in all 50 states, some of which disagree with the Attorney General's policy preferences and explicitly *encourage* the production of oil and gas for multiple purposes, are precisely those that necessitate the application of federal law. *See* Brief for the United States, *Milwaukee II*, 451 U.S. 304 (1981) (No. 79-408), 1980 WL 339512, at *18.

In *AEP*, the plaintiffs sued several electric utilities, contending that the utilities' greenhouse gas emissions contributed to global climate change and created a "substantial and unreasonable interference with public rights, in violation of the federal common law of interstate nuisance, or,

in the alternative, of state tort law." 564 U.S. at 418. In assessing whether the plaintiffs had stated a claim for relief, the Supreme Court determined that federal common law governs claims involving "air and water in their ambient or interstate aspects." *Id.* at 421. Rejecting the notion that state law could govern claims related to global climate change, the Court stated, "borrowing the law of a particular State would be inappropriate." *Id.* at 422. Federal common law thus applied. The Court held plaintiffs could not state viable federal common law claims because the Clean Air Act, and the EPA actions it authorizes, "displace any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power-plants." *Id.* at 424.

In *City of New York* v. *BP p.l.c.*, the plaintiff sued energy companies for their "worldwide fossil fuel production and the use of their fossil fuel products, [which] continue[] to emit greenhouse gases and exacerbate global warming." 325 F. Supp. 3d 466, 471 (S.D.N.Y. 2018), *appeal pending*, No. 18-2188 (2d Cir. argued Nov. 22, 2019). Because plaintiff's claims were "based on the 'transboundary' emission of greenhouse gases," the court held that they "ar[o]se under federal common law and require[d] a uniform standard of decision."[9] *Id.* at 472.

2. Federal Common Law Governs This Interstate Pollution Suit.

The Complaint's allegations make evident that this is an "interstate pollution" suit for which the application of federal common law is necessary. *AEP*, 564 U.S. at 421; *Milwaukee I*, 406 U.S. at 91; *see also Ouellette*, 479 U.S. at 488 ("interstate water pollution is a matter of federal, not state, law"). The thrust of this action is that Defendants are responsible for climate change brought about by greenhouse gas emissions. The Complaint endeavors to trace Defendants'

[9] The Attorney General argues *City of New York* is distinguishable because it concerned causes of action for public nuisance, private nuisance, and trespass. *See* Br. 16 n.5. Yet in the rest of its brief, the Attorney General claims that *Baltimore*, *Boulder*, *Oakland*, *Rhode Island*, *and San Mateo*, which asserted the same causes of action, are "materially indistinguishable" and provide support for the Attorney General's positions. *Id.* at 3. It cannot have it both ways.

advertisements to the Attorney General's alleged climate change injuries.[10] The Complaint alleges that Defendants' advertising allegedly "influenc[es]" consumers' decisions to purchase and consume Defendants' fossil fuel products, *see, e.g.*, Compl. ¶¶ 175, 182, 189, 196; consumers' use of those products allegedly contributes to greenhouse gas emissions, *see, e.g.*, *id.* ¶ 4; emissions allegedly contribute to climate change, *see, e.g.*, *id.* ¶ 6; and climate change allegedly causes harms including "increased sea levels; increased ocean temperatures and acidity; extreme weather including heat and drought, as well as extreme precipitation events, wildfires, flooding, and more frequent, longer-lasting, and more severe storms." *Id.* An entire section of the Complaint focuses on the harms the District of Columbia and its residents allegedly suffer, and expect to suffer, from climate change. *See id.* § VII. By seeking to hold Defendants liable for activities that, the Attorney General alleges, ultimately implicate "air and water in their ambient or interstate aspects," *AEP*, 564 U.S. at 421, the Attorney General has brought an interstate pollution suit for which federal common law must govern, and "state law cannot be used." *Milwaukee II*, 451 U.S. at 313 n.7.

3. *AEP* Did Not Authorize Transboundary Pollution Suits to Be Decided under State Law.

The Attorney General responds that *AEP* permits state law, not federal law, to govern transboundary pollution suits. This argument misunderstands both *AEP* and federal jurisdiction.

First, the Attorney General contends that, because *AEP* ultimately held that the Clean Air Act displaced federal common law remedies for transboundary pollution suits, such suits cannot arise under federal law, and state law fills the void. *See* Br. 16 n.4. That argument is backward. Whether federal common law has been displaced—*i.e.*, whether Congress has spoken "directly to [the] question" at issue, *AEP*, 564 U.S. at 424—is relevant to the merits of whether the Attorney

[10] Defendants dispute the notion that the Complaint's alleged climate change injuries are caused by or traceable to Defendants' activities, as opposed to global emissions due to billions of actors.

General can state a claim for relief, not the jurisdictional inquiry of whether its claims arise under federal law in the first instance. *See Standard Oil*, 332 U.S. at 316-17. More importantly, the Attorney General's approach turns the *Erie* doctrine on its head. As a matter of constitutional structure, federal law exclusively governs claims implicating "uniquely federal interests" that make it "inappropriate for state law to control." *Tex. Indus.*, 451 U.S. at 640-41. That Congress, through the Clean Air Act, would have so comprehensively addressed the "question" at issue so as to leave no room for *federal* common-law remedies cannot mean *state* statutory remedies become viable. By its very nature, federal common law—whether displaced or not—exists precisely where state law cannot, because "our federal system does not permit the controversy to be resolved under state law." *Tex. Indus.*, 451 U.S. at 641.

Second, the Attorney General suggests that *AEP*'s observation that "the availability *vel non* of a state lawsuit depends" on the Clean Air Act's "preemptive effect" expressly left open the possibility of climate-change-based claims, like the Attorney General's, being brought under state law. *See* Br. 16 n.4. That aspect of *AEP* is of no help to the Attorney General. The Court left "open for consideration" only the narrow question of whether the Clean Air Act preempted state-law nuisance claims based on "the law of each State where the defendants operate power plants." 564 U.S. at 429. Claims seeking to regulate the interstate and international productions and sales of fossil fuels—such as those brought by the Attorney General here—however, arise under federal law because "the basic scheme of the Constitution so demands." *AEP*, 564 U.S. at 421-22. "[B]orrowing the law of a particular State would be inappropriate." *Id.*

B. The Attorney General's Claims Arise out of the Interstate or Navigable Waters of the United States.

Federal common law also governs claims, like the Attorney General's, that arise out of the "interstate or navigable waters" of the United States. *District of Columbia* v. *Schramm*, 631 F.2d

854, 864 (D.C. Cir. 1980); *accord Milwaukee I*, 406 U.S. at 99; *see, e.g.*, *Michigan* v. *U.S. Army Corps of Eng'rs*, 667 F.3d 765, 771-72 (7th Cir. 2011). In *Milwaukee I*, the Court held that federal common law necessarily governed the State of Illinois's nuisance abatement suit against four cities and two sewerage commissions in Wisconsin, which alleged that defendants were polluting Lake Michigan. 406 U.S. at 91-92. Similarly, in *Michigan*, the Seventh Circuit considered the application of federal common law to claims alleging that the operation of the Chicago Area Waterway System would allow invasive non-native species of carp to enter the Great Lakes. *See* 667 F.3d at 771. Because federal common law "extends to the harm caused by . . . environmental and economic destruction" by way of navigable waters, it applied to the claims at issue. *Id.*

The Complaint details the alleged harms the District of Columbia suffers—and expects to suffer—from climate change by way of its navigable waters. Specifically, the Complaint alleges that "sea level rise" is among the "economic impacts" felt in the United States from climate change. Compl. ¶¶ 94, 96. The District of Columbia, "[l]ocated at the confluence of the Anacostia and Potomac, two tidally influenced rivers," is particularly "vulnerable to inland drainage and riverine and coastal flooding." *Id.* ¶ 97. And "[r]elative sea level rise in the District has been higher than global sea level rise" "because the local landmass in the region also has been sinking as the result of long-term land subsidence. Sea level rise is expected to continue, and even accelerate, in the future due to climate change." *Id.* ¶ 96. Thus, despite the Attorney General's conclusory assertion that this case has "nothing to do with . . . 'interstate or navigable waters,'" Br. 15, the Complaint clearly alleges "environmental and economic destruction" via navigable waters, *Michigan*, 557 F.3d at 771, for which federal common law must govern.

C. The Attorney General's Claims Implicate Foreign Affairs.

Finally, the international nature and impacts of the Attorney General's claims are another reason why this suit arises only under federal common law. Issues involving "our relationships

with other members of the international community must be treated exclusively as an aspect of federal law," *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 425 (1964), and "actions having important foreign policy implications" should be governed by federal common law and heard in federal court, *Republic of Philippines* v. *Marcos*, 806 F.2d 344, 353 (2d Cir. 1986). This case is designed to—and would—significantly interfere with U.S. foreign policy.

The United States' regulation of energy production through foreign policy traces its origins to at least the 1950s. In 1959, President Eisenhower invoked statutory authority to impose quotas on imports of petroleum and petroleum-based products into the United States "to avoid discouragement of and decrease in domestic oil production, exploration and development to the detriment of the national security."[11] The import system was "mandatory" and "necessary" to "preserve to the greatest extent possible a vigorous, healthy petroleum industry in the United States" and to regulate "patterns of international trade." Statement by the President Upon Signing Proclamation Governing Petroleum Products, 1 Pub. Papers 240-41 (Mar. 10, 1959). As a matter of United States foreign policy, President Eisenhower explained, "Petroleum, wherever it may be produced in the free world, is important to security, not only of ourselves, but also of the free people of the world everywhere." *Id.*

After the 1973 oil embargo, the United States signed a treaty that requires member countries of the International Energy Agency to hold emergency oil stocks equivalent to at least 90 days of net oil imports. *See* Agreement on an International Energy Program art. 2, Nov. 18, 1974, 1040 U.N.T.S. 271. The United States meets part of its obligation through government-

[11] Adjusting Imports of Petroleum and Petroleum Products into the United States, Proclamation No. 3279, 24 Fed. Reg. 1781 (Mar. 12, 1959); *see* Act of July 1, 1954, 68 Stat. 360, ch. 445, § 2, *as amended by* Pub. L. No. 85-686, 72 Stat. 678, § 8(a) (Aug. 20, 1958).

owned stocks held in the U.S. Strategic Petroleum Reserve.[12]

In the 1990s, the Senate responded to President Clinton's signing of the Kyoto Protocol by resolving on a 95-0 vote that the nation should not be a signatory to any protocol that "would result in serious harm to the economy" or fail to regulate the emissions of developing nations. *See* S. Res. 98, 105th Cong., 1st Sess. (1997). In May 2011, President Obama issued a series of directives "which included additional lease sales, certain offshore lease extensions, and steps to streamline permitting, all towards the President's goal of expanding safe and responsible domestic oil and gas production . . . as part of his long-term plan to reduce our reliance on foreign oil."[13] President Obama explained, "Given our energy needs, in order to sustain economic growth and produce jobs, and keep our businesses competitive, we are going to need to harness traditional sources of fuel even as we ramp up production of new sources of renewable, homegrown energy."[14]

President Trump cited foreign-affairs implications in withdrawing from the Paris Agreement, after his administration concluded the treaty did not strike the proper balance between environmental and national economic and security concerns.[15] In a similar case, the United States explained as amicus that "federal law and policy has long declared that fossil fuels are strategically important domestic resources that should be developed to reduce the growing dependence of the

[12] *See, e.g.*, 42 U.S.C. § 6231(b); Nat'l Energy Policy Dev. Grp., National Energy Policy 8-17 (2001), https://www.nrc.gov/docs/ML0428/ML042800056.pdf.
[13] Press Release, Office of the Press Secretary, Obama Administration Holds Major Gulf of Mexico Oil and Gas Lease Sale (Dec. 13, 2011), https://obamawhitehouse.archives.gov/the-press-office/2011/12/13/obama-administration-holds-major-gulf-mexico-oil-and-gas-lease-sale.
[14] Noelle Straub, *Obama Proposes Opening Vast Offshore Areas to Drilling*, N.Y. Times, Mar. 31, 2010.
[15] *See* The White House, Statement by President Trump on the Paris Climate Accord (June 1, 2017), https://www.whitehouse.gov/briefings-statements/statement-president-trump-paris-climate-accord/; *see also* 83 Fed. Reg. 23295, 23296.

United States on politically and economically unstable sources of foreign oil imports."[16]

In seeking to achieve different regulatory objectives than those advanced by longstanding U.S. foreign policy, the Attorney General's claims not only affect U.S. interests, but also necessarily "implicate countless foreign governments and *their* laws and policies." *City of New York*, 325 F. Supp. 3d at 475 (emphasis added). Thus, in this case, the interests of countless foreign sovereigns affected by U.S. foreign policy must be considered and protected by federal law and federal court jurisdiction. *See Tex. Indus.*, 451 U.S. at 641.

The Attorney General contends that a court in this District rejected "virtually identical arguments" for the application of federal common law in *In re Tobacco/Governmental Health Care Costs Litigation*, 100 F. Supp. 2d 31 (D.D.C. 2000). That is not correct. There, tobacco companies sought to remove to federal court tort suits brought against them in state court by the Republics of Bolivia and Venezuela. *Id.* at 33-34. The court recognized that several courts of appeal had understood "the federal common law of foreign relations to encompass any lawsuit that would have an impact on a foreign nation's vital economic or sovereign interests," *id.* at 36, but was unwilling to do so because the potentially affected foreign nations had "*chose[n]* to bring these lawsuits under state law in state courts," *id.* at 37 (emphasis added). "To the extent that the federal common law of foreign relations is premised on the notion that the federal courts must protect foreign sovereigns from diverse decisions by state courts," the court reasoned, "such protection ought not to be provided when it is not sought—and in fact is resisted—by foreign sovereigns, as is the case here." *Id.* In this action, by contrast, the potentially affected sovereigns—the foreign countries, and their economies, that would be impacted by a U.S. court

[16] Brief of the United States as Amicus Curiae 10, *Oakland* v. *BP PLC*, 960 F.3d 570 (2020) (No. 18-16663), ECF No. 198 (quoting 42 U.S.C. § 15927(b)(1)).

passing judgment on U.S. foreign policy—have not appeared, much less affirmatively eschewed the protection that federal common law, and federal court adjudication, are designed to confer.

D. The Well-Pleaded Complaint Rule Is No Obstacle to Removal.

The Attorney General asserts that Defendants have "[i]gnor[ed]" the well-pleaded complaint rule, and that the invocation of federal common law "amounts to an unsupported claim of preemption," which is a federal defense. Br. 17. The well-pleaded complaint rule provides that federal question jurisdiction exists only when "a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar, Inc.* v. *Williams*, 482 U.S. 386, 392 (1987). Thus, neither plaintiff's anticipation, nor defendant's assertion, of a federal defense suffices for a case to arise under federal law. *See Franchise Tax Bd. of Cal.* v. *Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 10 (1983). Defendants do not invoke federal common law here as a defense to state-law claims. Rather, Defendants argue that federal common law exclusively governs claims for interstate and international pollution because the Constitution dictates that "state law cannot be used." *Milwaukee II*, 451 U.S. at 314 n.7. State or municipal law simply has no presence and no role to play in this realm of exclusive federal law. Under the well-pleaded complaint rule, the substance of the claims, not the plaintiff's characterization of them as state or federal claims, controls. *See Majors*, 117 F.3d at 928. As the inherently federal nature of the Attorney General's claims is clear from the face of the Complaint, the well-pleaded complaint rule is satisfied.

Several courts in related cases have come to a contrary conclusion; in doing so, they have misinterpreted the well-pleaded complaint rule.[17] Those decisions have given dispositive force to

[17] The Attorney General's assertion that Defendants "deliberately misl[ed]" this Court is wrong. *Contra* Pl.'s Br. 18. Defendants cited the district court's holding in *California* v. *BP p.l.c.*, Civ. No. 17-06011, 2018 WL 1064293, at *2 (N.D. Cal. Feb. 27, 2018), to the effect that climate-change claims "are necessarily governed by federal common law," *see* Notice ¶ 49 n.11. The Ninth Circuit (incorrectly) held that no exception to the well-pleaded complaint rule permits removal based on federal common law. *See City of Oakland*, 969 F.3d at 906.

the *label* a plaintiff applies to the claims in its complaint, rather than the *substance* of the allegations. *See, e.g.*, *Board of County Commissioners of Boulder County* v. *Suncor Energy (U.S.A.) Inc.*, 405 F. Supp. 3d 947, 968 (D. Colo. 2019), *aff'd*, 965 F.3d 792 (10th Cir. 2020). The well-pleaded complaint rule, however, does not allow a plaintiff to "exalt form over substance," *Standard Fire Ins. Co.* v. *Knowles*, 568 U.S. 588, 595 (2013), by affixing a state-law label to a claim that is necessarily federal in nature. That is, a plaintiff cannot "block removal" by attempting to "disguise [an] inherently federal cause of action." Wright § 3722.1. That is consistent with the general rule that courts do not rely on "[l]egal labels characterizing a claim" to determine whether a complaint suffices. *Lambram* v. *Havel*, 43 F.3d 918, 920 (4th Cir. 1995); *see Johnson* v. *City of Shelby*, 574 U.S. 10, 11 (2014). The substance controls. Here, though the Attorney General labels its claims as arising under municipal law, the federal issues implicated by the substance of those claims demand that federal common law apply.

II. This Action Satisfies the *Grable* Doctrine's Jurisdictional Prerequisites.

This suit, which purports to allege only municipal law claims, "arises under" federal law pursuant to *Grable*. That doctrine provides federal jurisdiction over a putative state law claim 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. *Grable Metal Prods., Inc.* v. *Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005). Determining whether federal jurisdiction is present "calls for a common-sense accommodation of judgment to [the] kaleidoscopic situations that present a federal issue" and thus "justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues." *Id.* at 312-13.

While the Complaint asserts violations of municipal consumer protection law, the Attorney General's allegations demonstrate an attempt to countermand federal energy and environmental policy. The federal government has already addressed, and is currently addressing, climate change

through domestic statutes and regulations, and international agreements. The Attorney General's allegations necessarily implicate those federal issues, requiring the application of *Grable* here.

A. The Attorney General's Claims Necessarily Raise Substantial Federal Issues that Are Actually Disputed.

The first three elements of *Grable* are satisfied here. The Complaint (1) "necessarily raise[s] a stated federal issue" that is (2) "actually disputed" and (3) "substantial." *Id.* 314.

First, the Attorney General's theory of deception expressly seeks to impose liability for representations made to federal policymakers. Indeed, this is a key part of the Complaint's chain of alleged injury causation. It alleges that the Communications Team for Global Climate Science (a trade association) "continued Defendants' efforts to deceive the public about the dangers of fossil fuel use" by "[d]evelop[ing] and implement[ing] a direct outreach program to inform and educate members of Congress . . . about uncertainties in climate science" to "begin to erect a barrier against further efforts to impose Kyoto-like measures in the future." Compl. ¶ 64; *see also id.* ¶ 20(d) (one of the stated purposes of the American Petroleum Institute is "influenc[ing] public policy in support of a strong, viable U.S. oil and natural gas industry"). But claims of fraud on the federal government arise under federal law. *See Buckman Co.* v. *Pls.' Legal Comm.*, 531 U.S. 341, 347 (2001); *Pet Quarters, Inc.* v. *Depository Tr. & Clearing Corp.*, 559 F.3d 772, 779 (8th Cir. 2009); *Kemp* v. *Medtronic, Inc.*, 231 F.3d 216, 235 (6th Cir. 2000).

The Attorney General contends that "[n]o element" of its claims "requires proof" of Defendants' alleged misstatements to policymakers. Br. 10 n.3. That is incorrect. To state a claim for relief under the CPPA, a plaintiff must establish that a defendant (i) made a "misrepresentation as to a material fact which has a tendency to mislead," *Grayson* v. *AT&T Corp.*, 15 A.3d 219, 251 (D.C. 2011); (ii) failed to "state a material fact if such failure tends to mislead," *id.*; or (iii) made specific representations that its "goods or services" have "characteristics" or "standards" that they

do not, in fact, possess, *Floyd* v. *Bank of Am. Corp.*, 70 A.3d 246, 255 (D.C. 2013); *see* D.C. Code § 28-3904(a), (e), (f). The Attorney General's theory of materiality is that Defendants' allegedly "false and misleading misrepresentations and omissions . . . have the capacity to . . . deter consumers from adopting cleaner, safer alternatives" to Defendants' "fossil fuel products." Compl. ¶¶ 175, 182, 189, 196; *see also id.* ¶ 168.

That theory implicates Defendants' alleged statements to policymakers because those statements allegedly contributed to policymakers not implementing legislation that would limit emissions (*e.g.*, the Kyoto Protocol), which then prevented consumers from adopting "cleaner, safer alternatives." *Id.* ¶ 175; *see, e.g.*, *id.* ¶ 64. The Complaint's theory is that Defendants' alleged misstatements or omissions were false and material as they led consumers to use more fossil fuels compared to renewables—that is, they supposedly led consumers to believe that the costs of fossil fuels did not outweigh the benefits. But that theory necessarily implicates the federal political branches' policy decisions over decades that the benefits of fossil fuels outweigh the costs.

Second, Congress has already struck a careful balance between energy production and environmental protection by passing federal statutes such as the Clean Air Act, 42 U.S.C. § 7401(c), and by directing the EPA to regulate Defendants' conduct and perform its own cost-benefit analyses, *see AEP*, 564 U.S. at 426-47.[18] The federal government "affirmatively promotes fossil fuel use in a host of ways, including beneficial tax provisions, permits for imports and

[18] The EPA regulates both stationary and mobile sources of greenhouse gases on a national basis. *See* 40 C.F.R. § 60.1 *et seq.*; *id.* § 85.501 *et seq*. The EPA has pending rulemakings addressing the emission of greenhouse gases from numerous sources. *See* The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, 84 Fed. Reg. 51,310-01 (Sept. 27, 2019); Repeal of the Clean Power Plan; Emissions Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32,520 (Sept. 6, 2019). This lawsuit would allow a municipal court to balance exactly the same competing interests at issue in those rulemakings and come to potentially different results.

exports, subsidies for domestic and overseas projects, and leases for fuel extraction on federal land." *Juliana* v. *United States*, 947 F.3d 1159, 1167 (9th Cir. 2020). These federal statutes and regulations demonstrate that Congress has already weighed the costs and benefits of fossil fuels, and permitted and encouraged their sale in part because affordable energy is critical for economic stability and growth. *See, e.g.*, 42 U.S.C. § 15927(b); *City of Oakland* v. *BP p.l.c.*, 325 F. Supp. 3d 1017, 1023 (N.D. Cal. 2018), *vacated on other grounds*, 960 F.3d 570 (9th Cir. 2020).

The Attorney General's request that a municipal court substitute its judgment for that of Congress and the EPA on these issues—and impose significant penalties, damages, and injunctive relief based on the Attorney General's assertion that a different balance should be struck, *see* Compl. § XII—constitutes a "collateral attack" on an "entire [federal] regulatory scheme . . . premised on the notion that [the scheme] provides inadequate protection." *Bd. of Comm'rs* v. *Tenn. Gas Pipeline Co.*, 850 F.3d 714, 724 (5th Cir. 2017). Removal is thus essential. *See, e.g.*, *Pet Quarters*, 559 F.3d at 779; *Bryan* v. *BellSouth Commc'ns, Inc.*, 377 F.3d 424, 429-30 (4th Cir. 2004); *Hill* v. *BellSouth Telecomms., Inc.*, 364 F.3d 1308, 1317 (11th Cir. 2004).

This action will upset the careful balance Congress has struck regarding energy production, greenhouse gas emissions, and climate change. The Green 20—of which the Attorney General is a member—specifically proclaimed their intent to "step into th[e] [legislative] breach" through the "creative[]" and "aggressive[]" use of enforcement authority. Ex. 3 at 3, 18. This Complaint tries to second-guess congressional judgments. *See San Francisco*, 2020 WL 3969558, at *20. The Attorney General is thus forced to argue that its collateral attack is "irrelevant" to federal question jurisdiction because second-guessing congressional judgments is not "essential" to its claims, essentially accusing Defendants of raising preemption arguments. Br. 8-9. That argument fails because "some areas involving 'uniquely federal interests' may be so important to the federal

government that a 'federal common law' related to those areas will supplant state law . . . regardless of whether Congress has shown any intent to preempt the area." *Caudill* v. *Blue Cross & Blue Shield of N.C.*, 999 F.2d 74, 77 (4th Cir. 1993). In an effort to establish the CPPA's essential materiality element, the Complaint asserts that the risks of fossil-fuel production and use outweigh the benefits, such that promotion of fossil fuels that allegedly minimizes those risks is materially misleading. Thus, it alleges that Defendants misled consumers by marketing their fossil fuel products as "safe" and "impliedly beneficial to the climate" when the "production and use of such products is the leading cause of climate change." Compl. ¶ 150. Indeed, the Attorney General asserts that Defendants acted unlawfully because their conduct allegedly "enabled the unabated and expanded *extraction*, *production*, promotion, marketing, and *sale* of Defendants' fossil fuel products, to the detriment of DC consumers and the public generally." *Id.* ¶ 2 (emphasis added). But the extent to which the production and use of fossil fuels should be restricted as unduly "detriment[al]" to the environment is *precisely* the question Congress and the EPA have addressed through legislation and national policy.[19]

Third, as described in detail *supra*, U.S. foreign policy reflects the federal government's careful balancing of a variety of interests relevant to the regulation of energy production, greenhouse gas emissions, and climate change. Because the Attorney General's claims necessarily

[19] *Animal Legal Defense Fund* v. *Hormel Foods Corp.*, 249 F. Supp. 3d 53 (D.D.C. 2007), on which the Attorney General relies, *see* Br. 10-11, is not to the contrary. There, plaintiff challenged as misleading a meat producer's advertisements claiming that its products were "natural." 249 F. Supp. 3d at 55. *Grable* jurisdiction was proper, defendant averred, because plaintiff's claims would "subvert" existing federal regulations "on the use of 'natural'" in describing meat and poultry products. *Id.* The district court disagreed. There was no "real conflict between the false advertising claims and the [applicable] federal laws" because plaintiff's claims concerned product *advertising*, and the federal laws governed product *labeling* and *packaging*. *See id.* at 57. There is no similar mismatch here. To prevail on its claims, the Attorney General must show that Congress's determination that Defendants' products are not "detrimental" is wrong.

require determining the social utility of fossil fuels in relation to the environmental consequences, they will require this Court to evaluate and interfere with the wisdom of those policy judgments. Any such judicial evaluation "will directly and significantly affect American foreign relations," *Marcos*, 806 F.2d at 352; *see City of New York*, 325 F. Supp. 3d at 475, justifying *Grable* jurisdiction, *Grynberg Prod. Corp.* v. *British Gas, P.L.C.*, 817 F. Supp. 1338, 1356 (E.D. Tex. 1993). Moreover, because foreign policy inherently implicates national security, the need for federal jurisdiction in this case is only heightened. *See In re Nat'l Sec. Agency Telecomms. Records Litig.*, 483 F. Supp. 2d 934, 943 (N.D. Cal. 2007).

B. Federal Jurisdiction Would Protect, Not Disturb, Federalism Principles.

Federal jurisdiction over this case would be fully "consistent with congressional judgments about the sound division of labor between state and federal courts." *Grable*, 545 U.S. at 313. Federal courts are the traditional fora for adjudicating claims involving the federal issues implicated here: environmental regulation, regulation of vital national resources, foreign policy, and national security. *Cf., e.g.*, *Massachusetts* v. *EPA*, 549 U.S. 497, 519 (2007).

In fact, permitting these claims to be governed by municipal law would *threaten* the balance of federal-state relations. "Power over external affairs is not shared by the States; it is vested in the national government exclusively." *United States* v. *Pink*, 315 U.S. 203, 233 (1942). State and municipal governments must yield to the federal government in foreign affairs so that this exclusively national power is "entirely free from local interference." *Hines* v. *Davidowitz*, 312 U.S. 52, 63 (1941). It is even more important for foreign policy to be free from state or municipal *judicial* interference. The Supreme Court has recognized that courts should not "judge the wisdom of the National Government's [foreign] policy; dissatisfaction should be addressed to the President or, perhaps, Congress." *Am. Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 427 (2003).

The Attorney General responds by denying any objective other than "enforc[ing] its own

state consumer protection laws," for which the Federal Trade Commission Act ("FTCA") purportedly affords the District of Columbia an "equal role" in enforcement. *See* Br. 13. This argument fails for at least three reasons.

First, this is not a traditional state consumer protection enforcement action; it is an attempt to change federal policy by reducing the production and use of fossil fuels and regulating global greenhouse gas emissions. *See supra* § I.A. The Complaint therefore challenges longstanding federal energy and environmental policy. Its origin in a pledge among attorneys generals to "change conduct" to "mov[e] more rapidly towards renewables," Ex. 3 at 20, confirms that conclusion. To achieve this goal, the Attorney General seeks relief aimed at forcing Defendants to adopt the Attorney General's preferred energy-production means, rather than the means federal law encourages and promotes.

Second, even assuming this were purely a consumer protection action, the FTCA does not call for states to play an "equal role" in consumer protection. The provision to which the Attorney General points merely provides that the Federal Trade Commission's enforcement tools "are in addition to, and not in lieu of, any other remedy provided by State or Federal law." 15 U.S.C. § 57b(e). That Congress has not preempted states from providing remedies for unfair or deceptive practices hardly creates an "equal" role in all respects.

Third, even if this were a pure consumer protection action, and even if Congress intended for state courts to play an "equal role" in adjudicating such disputes, federal jurisdiction in *this* case would not disrupt that balance. This is no garden-variety consumer protection suit. Its resolution—even on state consumer protection grounds—could have sweeping impacts on national and international economies and policies. *See supra* § I.A. Exercising jurisdiction over this unique

case will not meaningfully alter the caseloads of state and federal courts.[20] *Cf. R.I. Fishermen's All., Inc.* v. *R.I. Dep't of Envtl. Mgmt.*, 585 F.3d 42, 52 (1st Cir. 2009).

C. The Attorney General's Arguments Against *Grable* Are Unpersuasive.

Arguing that the Complaint does not support *Grable* jurisdiction, the Attorney General relies on rulings in several of the climate-change tort actions brought against certain Defendants in other jurisdictions. Br. 7. But in those cases, plaintiffs advanced claims largely based on nuisance, not consumer protection theories.[21] Here, federal jurisdiction exists because the Attorney General claims would force a court to second-guess federal decision-making on the propriety of fossil-fuel-production activities in the process of deciding whether Defendants' advertisements of those activities were misleading. The Complaint alleges Defendants' conduct was "detriment[al]" as it "enabled the unabated and expanded extraction, production . . . and sale of Defendants' fossil fuel products." Compl. ¶ 2. Moreover, all but one of the other decisions the Attorney General cites remain subject to further review, and in only one has the *Grable* ruling been subject to appellate consideration.[22] In none of those cases did a court address "defendants'

[20] For this reason, the Attorney General's reliance on *Nevada* v. *Bank of America Corp.*, 672 F.3d 661, 676 (9th Cir. 2012), is misplaced. In that case, defendant premised *Grable* jurisdiction on the state consumer protection statute's reference to the federal Fair Debt Collection Practices Act. *See id.* at 674-75. Unlike here, the *Bank of America* court had reason for concern that exercising jurisdiction would "herald[] a potentially enormous shift of traditionally state cases into federal courts" given the "frequen[cy]" with which "[s]tate courts . . . handle state-law consumer protection suits that refer to or are predicated on standards set forth in federal statutes." *Id.* at 676.

[21] *See, e.g.*, *Mayor & City Council of Baltimore* v. *BP p.l.c.*, 388 F. Supp. 3d 538, 559 (D. Md. 2019), *aff'd*, 952 F.3d 452 (4th Cir. 2020), *cert. granted*, 2020 WL 5847132 (U.S. Oct. 2, 2020).

[22] The Supreme Court recently granted Defendants' petition for certiorari in *BP plc* v. *Mayor & City Council of Baltimore*, No. 19-1189, 2020 WL 5847132 (U.S. Oct. 2, 2020), to determine whether a court of appeals may review any issue encompassed in a district court's remand order where the removing defendant premised removal in part on the federal-officer removal statute, or the civil-rights removal statute. Thus, the prior decisions to which the Attorney General refers may be subject to further review should the Supreme Court rule in Defendants' favor.

arguments" as to whether federal adjudication would "disrupt the principles of federalism,"[23] and in only two did the court consider whether the federal interests were "substantial."[24]

III. This Action Arises out of Federal Enclaves.

The Constitution's "Enclave Clause," which authorizes Congress to "exercise exclusive Legislation in all Cases whatsoever" over all places purchased with the consent of a state "for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings," U.S. Const. art. I, § 8, cl. 17, has "generally [been] read" to "establish federal subject matter jurisdiction over tort claims occurring on federal enclaves," *Jograg* v. *Enter. Servs., LLC*, 270 F. Supp. 2d 10, 16 (D.D.C. 2017). The "key factor" in evaluating federal enclave jurisdiction "is the location of the plaintiff's injury or where the specific cause of action arose." *Sparling* v. *Doyle*, 2014 WL 2448926, at *3 (W.D. Tex. May 30, 2014). This action arises out of federal enclaves in three distinct ways, each sufficient to justify federal enclave jurisdiction.

First, the Attorney General's claims arise out of sales of Defendants' (or their subsidiaries' or affiliates') products within the District of Columbia—as well as their advertisements allegedly inducing these sales—including those on federal enclaves such as the Army Air Force Exchange Service Express stations at U.S. Army Fort Lesley J. McNair and Joint Base Anacostia-Bolling. *See* Ex. 7. The Attorney General does not dispute that these locations within the District of Columbia are federal enclaves. Instead, it claims that removal cannot be premised on these sales because they are not specifically identified in the Complaint. *See* Br. 20-21. Not so. "Failure to indicate federal enclave status and the location of the exposure will not shield plaintiffs from the consequences" of "federal enclave status." *Fung* v. *Abex Corp.*, 816 F. Supp. 569, 571 (N.D. Cal.

[23] *Rhode Island* v. *BP p.l.c.*, 393 F. Supp. 3d 142, 150-51 (D.R.I. 2019), *appeal pending*, No. 19-1818 (1st Cir.); *Baltimore*, 388 F. Supp. 3d at 559; *County of San Mateo* v. *Chevron Corp.*, 294 F. Supp. 3d 934, 938 (N.D. Cal. 2018), *aff'd on other grounds*, 960 F.3d 586 (9th Cir. 2020).
[24] *City of Oakland*, 969 F.3d at 906-07 (9th Cir. 2020); *Boulder*, 405 F. Supp. 3d at 968.

1992). The Complaint "clearly alleges that the District seeks redress" regarding "goods and services that are or would be purchased, leased, or received in the District." Br. 20; *see, e.g.*, Compl. ¶ 10. That the Complaint does not enumerate where precisely "in the District" those sales took place, including on these enclaves, is irrelevant. *See, e.g.*, *Olig* v. *Xantera Parks & Resorts, Inc.*, 2013 WL 3936904, at *3-4 (D. Mont. July 30, 2013). The Attorney General also cannot pick and choose which fossil fuels sales are responsible for its alleged climate change injuries. "[T]here is no realistic possibility of tracing any particular alleged effect of global warming to any particular emissions by any specific person, entity, [or] group at any particular point in time." *Native Village of Kivalina*, 663 F. Supp. 2d 863, 880 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012).

Second, in targeting Defendants' 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, e.g.*, *Humble Pipe Line Co.* v. *Waggoner*, 376 U.S. 369, 372-74 (1964). As of 2000, approximately 14% of the National Wildlife Refuge System "had oil or gas activities on their land," and these activities were spread across 22 different states.[25] The Attorney General dismisses these activities as irrelevant. This action, it says, is limited to "seek[ing] redress under a District statute for misrepresentations and omissions." Br. 20. But such an opportunistic characterization counts for little. *See Wecker* v. *Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 186 (1907). This action is a self-proclaimed "effort[] to deal with the problem of climate change." Ex. 3 at 1. It is a "tool by which to seek the environmental policy changes" the Attorney General desires by "enlisting the judiciary to do the work that the other two branches of government cannot or will not do." *City of San Francisco*, 2020 WL 3969558, at *20.

[25] U.S. Gov't Accountability Off., GAO-02-64F, U.S. Fish & Wildlife Service Information on Oil and Gas Activities in the National Wildlife Refuge System 1 (Oct. 31, 2001), http://www.gao.gov/new.items/d0264r.pdf.

Third, the Complaint alleges a variety of climate change injuries suffered—and expected to be suffered—within the District of Columbia: heightened temperatures, an increased number of "extreme heat days" and "heatwaves," a rise in sea levels, "inland drainage and riverine coastal flooding," and others. Compl. ¶¶ 95-97. Necessarily impacted are these federal enclaves within the District of Columbia, among others: (i) the Washington Navy Yard, *see Jograg*, 270 F. Supp. 3d at 16-18; (ii) military installations, such as the Marine Barracks and Naval Observatory, *see Akin* v. *Ashland Chem. Co.*, 156 F.3d 1030, 1034 (10th Cir. 1998); (iii) monuments and parks controlled by the National Park Service, such as the National Mall and the Pennsylvania Avenue National Historic Park;[26] and (iv) the Smithsonian Institution, *cf. Expeditions Unlimited Aquatic Enters., Inc.* v. *Smithsonian Inst.*, 566 F.2d 289, 296 (D.C. Cir. 1977).

The Attorney General does not dispute that these locations are federal enclaves, or that its Complaint necessarily alleges injuries suffered to those federal enclaves. Instead, it argues that those injuries cannot support federal enclave jurisdiction because it does not "seek relief for . . . injuries to land." Br. 20. This purported disclaimer will not suffice to deprive this Court of jurisdiction, however, because federal enclave jurisdiction can be predicated on either "the location of the plaintiff's injury or *where the specific cause of action arose*." *Sparling*, 2014 WL 2448926, at *3 (emphasis added). Here, the Complaint's causes of action arise out of harms allegedly suffered on federal enclaves even if it does not seek relief for them. As the Attorney General's own brief spells out, the Complaint's "references to the effects of climate change in the District . . . summarize[] . . . why Defendants' misrepresentations and omissions" matter to District of Columbia consumers. Br. 20; *see* Compl. ¶ 65. In any event, the Attorney General did

[26] *See* Memorandum from Randolph J. Meyers, Senior Att'y, Branch of Nat'l Parks, U.S. Dep't of the Interior, to John Piltzecker, Superintendent, Nat'l Mall & Mem'l Parks, U.S. Dep't of the Interior (July 28, 2010), https://tinyurl.com/MeyersLetter.

not disclaim injuries allegedly suffered by District of Columbia consumers on federal enclaves.

The Attorney General argues that, even assuming federal enclave jurisdiction is otherwise satisfied, the District of Columbia Court Reform and Criminal Procedure Act divests this Court of jurisdiction over "purely local" matters like this one. *See* Pub. L. No. 91-358, 84 Stat. 473 (1970) ("Court Reform Act"). The Court Reform Act's provisions and purposes contradict that argument. Prior to 1970, District of Columbia courts had "limited jurisdiction," and the U.S. District Court had "concurrent jurisdiction with the Court of General Sessions [one of three local trial courts] over most of the criminal and civil matters handled by that court." *Palmore* v. *United States*, 411 U.S. 389, 392 n.2 (1973). By enacting the Court Reform Act, Congress intended to give the District of Columbia "a court system comparable to those of the states," and to place this Court "on a par with other United States District Courts" in its relationship with the local courts. *JMM Corp.* v. *District of Columbia*, 378 F.3d 1117, 1123-24 (D.C. Cir. 2004). The Court Reform Act thus transferred all "purely local" jurisdiction from the District of Columbia federal courts to the District of Columbia Superior Court and Court of Appeals. *Id.* That transfer, however, did not divest this Court of jurisdiction over this action for at least three reasons.

First, federal enclave jurisdiction is an exercise of federal question jurisdiction under 28 U.S.C. § 1331,[27] *see Durham* v. *Lockheed Martin Corp.*, 445 F.3d 1247, 1250 (9th Cir. 2006); *Mater* v. *Holley*, 200 F.2d 123, 125 (5th Cir. 1952), which this Court "plain[ly] retained" "in the wake" of the Court Reform Act, *Police Officers Guild, Nat'l Union of Police Officers* v. *Washington*, 369 F. Supp. 543, 548 (D.D.C. 1973); *see* D.C. Code § 11-501.[28]

[27] Even the Attorney General acknowledges that "any claim that arises on a federal enclave is necessarily a creature of federal law." Br. 19.

[28] The Attorney General's reliance on *McEachin* v. *United States*, 432 A.2d 1212 (D.C. 1981), and *Davis* v. *United States*, 385 A.2d 757 (D.C. 1978), is misplaced. Both involved criminal jurisdiction, which the Court Reform Act treated separately differently than civil jurisdiction.

Second, the "purely local" matters over which this Court was divested of jurisdiction include only specific, enumerated categories of cases, such as those relating to "gifts to minors," "partition and assignment of dower," and "the proof of wills."[29] This case does not fit within any of these categories, and is in *no sense* "purely local."[30]

Third, this argument, taken to its logical conclusion, is untenable. The Court Reform Act's purpose was to place this Court "on a par with other United States District Courts." *JMM Corp.*, 378 F.3d at 1124. Thus, if the Court Reform Act divested this Court of jurisdiction over this case, then *no* federal district court could *ever* have subject matter jurisdiction over a consumer protection action, or any action "aris[ing] under local law." Br. 19. That is not the state of the law. *See, e.g.*, *Nick's Garage, Inc.* v. *Progressive Cas. Ins. Co.*, 875 F.3d 107, 113 (2d Cir. 2017).

IV. This Action Meets the Elements of the Federal Officer Removal Statute.

Defendants may also remove this action because the federal government directed Defendants to engage in activities relating to the Attorney General's claims. *See* 28 U.S.C. § 1442(a)(1). "[D]efendants enjoy much broader removal rights under the federal officer removal statute than they do under the general removal statute." *Leite* v. *Crane Co.*, 749 F.3d 1117, 1122 (9th Cir. 2014). A defendant's allegations "in support of removal" need only be "facially plausible." *Baker* v. *Atl. Richfield Co.*, 962 F.3d 937, 941 (7th Cir. 2020). A court must "credit

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Compare D.C. Code § 11-502, *with id.* § 11-501. Both cases also addressed whether the Superior Court *possessed* jurisdiction, not whether the federal courts *lacked* jurisdiction; "[e]xisting federal jurisdiction is not affected by concurrent jurisdiction in the state courts." *Mater*, 200 F.2d at 125.

[29] D.C. Code §§ 11-501(2)(A), (3)(A); 11-921(a)(5)(A)(iv), (a)(5)(B); *see* S. Rep. No. 91-405, at 19 (1969); H.R. Rep. No. 91-907, at 31-33 (1970).

[30] In addition to the national and global reach of the Attorney General's efforts to curtail greenhouse gas emissions, its nominal consumer protection claims reach far beyond the District of Columbia. The Complaint challenges dozens of Defendants' nationwide advertisements, including advertorials in the *New York Times*, *see, e.g.*, Compl. ¶ 74, online advertisements accessible anywhere in the world, *see, e.g.*, *id.* ¶ 131, and television advertisements appearing in San Francisco, *see, e.g.*, *id.* ¶ 139.

[the defendant's] theory of the case," *Jefferson County* v. *Acker*, 527 U.S. 423, 432 (1999), and grant it the "benefit of all reasonable inferences from the facts alleged," *Baker*, 962 F.3d at 945.

The Federal Officer Removal Statute authorizes removal of claims where the defendant (1) is a "person" within the meaning of 28 U.S.C. § 1442; (2) it acted pursuant to the directions of a federal officer; (3) the claim is "for or relating to"—*i.e.*, "connected or associated with"—that act under color of federal office; and (4) the defendant raises a colorable federal defense. *Latiolais* v. *Huntington Ingalls, Inc.*, 951 F.3d 286, 291-92 (5th Cir. 2020) (*en banc*); *see K&D LLC* v. *Trump Old Post Office LLC*, 951 F.3d 503, 506 (D.C. Cir. 2020). Only the second and third elements are in dispute.[31]

Allegations in the Attorney General's Complaint and statements made by a coalition of attorneys general and climate activists over the years demonstrate that the Attorney General seeks to penalize Defendants for their lawful production and marketing of fossil fuels, while forcing Defendants to switch their portfolios to renewable energy. While the Attorney General might contest the degree to which its claims are predicated on Defendants' production of oil and gas under the direction and control of federal officers, that is a *merits question* for a federal court to decide. *See Willingham* v. *Morgan*, 395 U.S. 402, 409 (1969); *accord Baker*, 962 F.3d at 944.

A. Defendants Have, for Many Decades, Acted under the Direction and Subject to the Control of the Federal Government.

The Supreme Court has emphasized that "[t]he words 'acting under' are broad," and are

[31] The Attorney General does not dispute that the first and fourth elements are satisfied. Defendants, all of which are corporations, are "person[s]" within the meaning of § 1442. *See Isaacson* v. *Dow Chem. Co.*, 517 F.3d 129, 135-36 (2d Cir. 2008). Defendants also have several colorable (indeed, meritorious) federal defenses, including preemption, and that those claims are barred by the Commerce Clause, *Healy* v. *Beer Inst.*, 491 U.S. 324, 336 (1989); Due Process Clause, *State Farm Mut. Ins. Co.* v. *Campbell*, 538 U.S. 408, 421 (2003), *BMW of N. Am.* v. *Gore*, 517 U.S. 559, 572-73 & n.19 (1996); First Amendment, *see Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 481-82 (1995); derivative sovereign immunity, *see Yearsley* v. *W.A. Ross Const. Co.*, 309 U.S. 18, 20-21 (1940); and foreign affairs doctrine, *see Garamendi*, 539 U.S. at 419.

satisfied where, "in the absence of [] contract[s] with [] private firm[s], the Government itself would have had to perform." *Watson* v. *Phillip Morris Cos.*, 551 U.S. 142, 147, 154 (2007). Defendants "acted under" federal officers because the government guided, supervised, and controlled Defendants' actions, and because Defendants engaged in "an effort to *assist*, or to help *carry out*, the federal superior's duties or tasks." *Watson*, 551 U.S. at 143.

1. The Federal Government Has Directed and Controlled Defendants' Conduct since at Least World War II.

Federal officers extensively supervised and controlled Defendants' production of fossil fuels and development of specialized military products in support of multiple war efforts.[32]

First, the federal government exercised comprehensive control over the entire oil and gas industry in World War II by enlisting and fundamentally reshaping the industry to produce necessary war products. "Because avgas was critical to the war effort, the United States government exercised significant control over the means of its production during World War II." *United States* v. *Shell Oil Co.*, 294 F.3d 1045, 1049 (9th Cir. 2002). As the U.S. District Court for the Southern District of Texas recently held, "the federal government directed the owners and operators of the nation's crude oil refineries to convert their operations" to produce 100-octane aviation gasoline ("avgas"), which "the military desperately needed as fast as possible," and other products "like motor gasoline that also met military needs." *See Exxon Mobil Corp.* v. *United States*, 2020 WL 5573048, at *30 (S.D. Tex. Sept. 16, 2020). Avgas was considered indispensable to an Allied victory. *See id.* at *13 (quoting a Petroleum Administration for War ("PAW") official: "[o]n all counts, 100-octane [avgas] was the lifeblood of the [U.N.] in the air"); *Shell Oil Co.* v. *United States*, 751 F.3d 1282, 1285 (Fed. Cir. 2014) (Avgas "was the most critically needed

[32] The facts discussed in the text are only examples of the many ways in which Defendants have acted under federal officers. Defendants reserve the right to supplement the factual bases supporting federal-officer removal. *See* 28 U.S.C. § 1653.

refinery product during World War II and was essential to the United States' war effort.").

Defendants would not have produced avgas—let alone at the levels the military required—without federal control and direction. The federal government "insist[ed] that each company utilize all of its facilities to make 100 octane aviation gasoline to the extent of its ability to so do, and there [wa]s not in fact any freedom to make a choice between contracting and not contracting." *Exxon Mobil*, 2020 WL 5573048, at *12. The PAW—one of the federal entities responsible for directing avgas production—"told the refiners what to make, how much of it to make, and what quality," *Shell Oil*, 751 F.3d at 1286, going so far as to issue monthly instructions as to "the composition of [the refiner's] blends, the sources from which he was to obtain components, and to whom he was to ship other components—all to the end that the utmost possible 100-octane could be forced each month from the available facilities." *Exxon Mobil*, 2020 WL 5573048, at *12.

The PAW issued directives to refineries to "run their production operations on a continuous basis and to minimize downtime for maintenance and repair" in order to ensure maximum production. *Id.* For example, Shell Oil Company's predecessor or affiliate was obligated to "use its best efforts" and work "*day and night*" to expand facilities producing avgas "*as soon as possible* and not later than August 1, 1943." *Shell Oil Co.* v. *United States*, Civ. No. 06-141 (Ct. Cl. Nov. 20, 2012), ECF No. 106-1 (emphasis added) (contract between Defense Supplies Corporation and Shell Oil Company, Inc., dated April 10, 1942). These "extraordinary modes of operation" were "often uneconomical and unanticipated at the time of the refiners' entry into their [avgas] contracts." *Shell Oil*, 751 F.3d at 1287. At the direction of the federal government, the oil companies, which include certain Defendants, increased avgas production "over twelve-fold from approximately 40,000 barrels per day in December 1941 to 514,000 barrels per day in 1945,

[which] was crucial to Allied success in the war." *Id.*[33]

When directing the production of avgas and other essential military products, PAW coordinated all oil and gas company activities as if they were "units of one enterprise and directed their operations so as to produce the maximum quantities of aviation gasoline at the earliest possible time." *Exxon Mobil*, 2020 WL 5573048, at *12. The PAW's chief counsel testified that it would "quit allocating crude oil to those that didn't devote themselves to what we called the war effort," in effect shuttering them. *Id.* Companies that "weren't making essential war materials" were simply not able to run their refineries. *Id.* The court rejected the argument that private industry "voluntarily cooperated." *Id.* at *11. Defendants had no choice but to comply with the federal government's production and specifications mandates. Certain Defendants or their predecessors or subsidiaries also produced toluene, a component of the explosive TNT, "under direct contract with the Army Ordnance Department." Ex. 8 at 222; *see Exxon Mobil*, 2020 WL 5573048, at *13; Harold Nockolds, The Engineers 28 (1949).

Defendants also acted under the federal government as its agents in building and operating pipelines transporting oil. During World War II, oil transportation by tankers "experienced major disruption as a result of attacks by German submarines." Ex. 9 at 3. "To insure adequate supplies of petroleum through the east during . . . World War II, the Government caused to be constructed, between the Texas oilfield and the Atlantic seaboard, two large pipelines, commonly known as the 'Big Inch' and the 'Little Big Inch,' respectively" (together, the "Inch Lines"). *Schmitt* v. *War*

[33] The Complaint improperly conflates the activities of Defendants with the activities of their separately organized predecessors, subsidiaries, and affiliates. Although Defendants reject Plaintiff's erroneous attempt to attribute the actions of predecessors, subsidiaries, and affiliates to the named Defendants, for purposes of this remand opposition only, Defendants describe the conduct of certain predecessors, subsidiaries, or affiliates of certain Defendants to show that Plaintiff's Complaint, as pleaded, can and should be removed to federal court.

Emergency Pipelines, Inc., 175 F.2d 335, 335 (8th Cir. 1949) ("*WEP II*"). War Emergency Pipelines, Inc. ("WEP"), an entity that included predecessors or affiliates of Defendants,[34] constructed and operated the Inch Lines "under contracts" and "*as agent*" for the federal government "without fee or profit." *Id.* at 335-36 (emphasis added); *see Schmitt* v. *War Emergency Pipelines, Inc.*, 72 F. Supp. 156, 158 (E.D. Ark. 1947) ("*WEP I*") (explaining delegating and agency relationship). The government had power to "direct such affirmative action as may be necessary to accomplish the purposes" of the Inch Lines—namely, "relieving shortages" and "augmenting supplies for offshore shipments." 8 Fed. Reg. at 13,343. Through Petroleum Directives 63 and 73, the government controlled all oil that WEP moved through the pipelines on its behalf. 8 Fed. Reg. 1,068, 1,069, § (e)(4); *id.* at 13,343, § (d)(3).

During their operation by WEP, to counteract the transportation barriers imposed by submarine warfare, the Inch Lines provided "life lines to the east," delivering "379,207,208 barrels of crude oil and refined products" and serving "military necessity" for "the cross-Atlantic fronts." Ex. 8 at 104-05, 108. The Inch Lines "were built for a single purpose, to meet a great war emergency. . . . [T]hey helped to win a war that would have taken much longer to win without them."[35] Defendants who participated in the construction and delivery of oil by WEP "acted under" federal officers by "serving as the government's agent." *Goncalves* v. *Rady Children's Hosp. San Diego*, 865 F.3d 1237, 1246 (9th Cir. 2017). Indeed, the significant and comprehensive control the federal government exerted over Defendants' World War II activities is precisely what the Federal Officer Removal Statute contemplates. *See Betzner* v. *Boeing Co.*, 910 F.3d 1010, 1015 (7th Cir. 2018); *Greene* v. *Citigroup, Inc.*, 2000 WL 647190, at *2 (10th Cir. May 19, 2000);

[34] *See* Ex. 8 at 108; Ex. 10 at 1-2.
[35] *Wartime Petroleum Policy under the Petroleum Administration for War: Hearing Before the Special Comm. Investigating Petrol. Res.*, 78th Cong. 17 (1945).

see also Camacho v. *Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482, 486 (1st Cir. 1989).

Second, the federal government has continued its control of Defendants' contributions to military efforts. At the advent of the Korean War in 1950, President Truman established the Petroleum Administration for Defense ("PAD") under authority of the Defense Production Act of 1950, Pub. L. 81-774. The PAD issued production orders to Defendants and other oil and gas companies, including to ensure adequate quantities of avgas for military use. *See* Ex. 11 at 122; *Exxon Mobil*, 2020 WL 5573048, at *15.

After the 1973 Oil Embargo, the government invoked the PAD to address "immediate and critical" military petroleum shortages. Ex. 12 at 442. Interior Priority Regulation 2 authorized "directives" to ensure "normal supply of petroleum products required by the Department of Defense" and provided complying companies with immunity from "damages or penalties." Petroleum Products Under Military Supply Contracts, 38 Fed. Reg. 30,572, 30,572, § 3 (Nov. 6, 1973). The government "issued directives to 22 companies [including Defendants] to supply a total of 19.7 million barrels of petroleum during the two-month period from November 1, 1973, through December 31, 1973, for use by the DOD." Ex. 13 at 78; Ex. 12 at 443; Ex. 14.

During the Cold War, Shell Oil Company developed and produced specialized jet fuel for the federal government to meet the unique performance requirements of the U-2 spy plane and later the OXCART and SR-71 Blackbird programs. For the U-2, Shell Oil Company produced fuel known as JP-7, which required special processes and a high boiling point to ensure that the fuel could perform at very high altitudes and speeds. Manufacturing this special fuel required petroleum byproducts. Ex. 15 at 61-62. "The Government stated that the need for the 'Blackbird' was so great that the program had to be conducted despite the risks and the technological challenge. . . . A new fuel and a chemical lubricant had to be developed to meet the temperature

requirements." Ex. 16 at 23. For OXCART, Shell Oil Company produced millions of gallons of secret fuel under government contracts with specific testing and inspection requirements. Ex. 17; Ex. 18. It also constructed "special fuel facilities" for handling and storage, including a hangar, pipelines, and storage tanks, at air force bases at home and abroad, and "agreed to do this work without profit" under special security restrictions per detailed government contracts for the OXCART program. Exs. 19-25 (attaching CIA contracts).

DOD continues to procure from Defendants highly-specialized military fuels to power planes, ships, and other vehicles, and to satisfy national defense needs. Historically, Shell Oil Company, BP, and ExxonMobil (or their predecessors or affiliates) have been three of the top four suppliers of fossil fuel products to the military.[36]

2. Defendants Have Engaged in the Exploration and Production of Fossil Fuels under Agreements with Federal Agencies Exercising Supervision and Control.

In addition to their service in support of national defense, Defendants have also worked under federal direction in extracting and producing critical energy resources for the nation.

First, certain Defendants, including ExxonMobil and Chevron, have explored for, developed, and produced oil and gas on the Outer Continental Shelf ("OCS") pursuant to leases issued by the federal government, and governed by the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1331 *et seq.* Under OCSLA, the Department of the Interior is charged with "manag[ing] access to, and . . . receiv[ing] a fair return for, the energy and mineral resources of the Outer Continental Shelf."[37] To fulfill their statutory obligations, Department of the Interior

[36] *See* Anthony Andrews, Cong. Rsch. Serv., R40459, Department of Defense Fuel Spending, Supply, Acquisition, and Policy 10 (2009).
[37] *Innovation in Offshore Leasing Act: Hearing on H.R. 5577 Before the Subcomm. on Energy and Min. Res. of the H. Comm. on Nat. Res.*, 114th Cong. (2016) (statement of Walter Cruickshank, Deputy Director, Bureau of Ocean Energy Mgmt., U.S. Dep't of the Interior).

officials maintain and administer the OCS leasing program, under which lessees are obligated to "develop[] . . . the leased area" diligently, including carrying out exploration, development, and production activities for the express purpose of "maximiz[ing] the ultimate recovery of hydrocarbons from the leased area." Ex. 26 § 10.

Over the past 70 years, the U.S. government has directed Defendants to produce oil and gas from the OCS to protect the vital national interest of promoting energy security and reducing reliance on oil imported from hostile powers. In 1953, Congress passed OCSLA for the express purpose of making these essential national resources "available for expeditious and orderly development" in keeping with "national needs." 43 U.S.C. § 1332(3). Two decades later, in the wake of the Arab Oil Embargo of 1973, President Nixon announced "a series of plans and goals set to insure that by the end of [the 1970s], Americans will not have to rely on any source of energy beyond our own," which was dubbed "Project Independence."[38] President Nixon ordered the Secretary of the Interior "to increase the acreage leased on the [OCS] to 10 million acres beginning in 1975, more than tripling what had originally been planned."[39]

Congress responded to the dire energy shortages of the 1970s by amending OCSLA in 1978 to require "expedited exploration and development of the [OCS] in order to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade," including by "mak[ing] such resources available to meet the Nation's energy needs as rapidly as possible." 43 U.S.C. § 1802(1) & (2); *see also California ex rel. Brown* v. *Watt*, 668 F.2d 1290, 1296 (D.C. Cir. 1981). In the lead-up to these amendments, Congress considered a proposal to create a national company to

[38] Address to the Nation About National Energy Policy, 1 Pub. Papers 973, 976 (Nov. 25, 1973).
[39] Special Message to the Congress on the Energy Crisis, 1 Pub. Papers 17, 29 (Jan. 23, 1974).

facilitate OCS development.[40] The proposal was ultimately rejected; instead, the government decided to contract with private energy companies, including Defendants, to perform these essential tasks on its behalf with expanded federal supervision and control. The adopted amendments greatly increased the Secretary of the Interior's control over the OCS leasing program to align production with national needs, and instructed the Secretary to create oil and gas leasing programs on a five-year review cycle "which he [or she] determines will best meet national energy needs for the five-year period following its approval or reapproval."[41] 43 U.S.C. § 1344(a)-(e).

In the years following the 1978 amendments, Defendants' activities on the OCS increased significantly. For instance, more than three times as many barrels of oil were produced from the OCS in the 25 years following the Arab Oil Embargo of 1973 than in the 25 years before the embargo.[42] In the years since 1973, Defendants (or their subsidiaries or affiliates) have consistently ranked among the top operators on the OCS, as ranked by volume of oil produced.[43]

The Notice detailed specific lease and statutory provisions through which the federal government supervises and controls them as federal mineral lessees on federal lands, including the OCS. *See* Notice ¶¶ 80-90; Ex. 26; Ex. 28; Ex. 29. For example, "the federal government retains the right to control a lessee's rate of production from its lease," including by setting the "Maximum Efficient Rate for production from a reservoir—that is, a cap on the production rate from all of the

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[40] *See* Ex. 27 at S903-04.

[41] In the lead-up to the 1978 amendments, the Ad Hoc Select Committee on the OCS published a report stating that "alternative sources of energy will not be commercially practical for years to come," and thus, "a healthy economy remains dependent on supplies of oil and gas." H.R. Rep. No. 94-1084, at 254 (1976).

[42] U.S. Dep't of Interior, Bureau of Safety & Env't Enf't, *Gulf of Mexico Region: Annual Summary of Production for Entire Region* (last visited Sept. 29, 2020), https://www.data.bsee.gov/Main/HtmlPage.aspx?page=annualRegion.

[43] U.S. Dep't of Interior, Mins. Mgmt. Serv., *Gulf of Mexico Region: Production by Operated Ranked by Volume* (Dec. 22, 2000), https://www.data.bsee.gov/Production/Files/Rank%20File%20Oil%201947-1995.pdf.

wells producing from a reservoir." Notice ¶ 84. Defendants holding leases *must* develop the OCS to meet these needs. *See* Notice ¶ 88; Ex. 26 § 10. Regulations also control the means of oil and gas production on the OCS, including the use of enhanced oil and gas recovery operations (30 C.F.R. § 250.1165), well tests (*id.* §§ 250.1151, 250.1152), and flaring and venting gas (*id.* § 250.1160-64). The Fourth Circuit recognized that, with such details, Defendants could "satisfy their burden of justifying federal officer removal." *Mayor & City Council of Baltimore* v. *BP p.l.c.*, 952 F.3d 452, 466 n.9 (4th Cir. 2020). Through these leases, Defendants have fulfilled a government need to produce oil and gas from federal lands to further energy security. *See Sawyer* v. *Foster Wheeler LLC*, 860 F.3d 249, 255 (4th Cir. 2017).

Second, certain Defendants have engaged in the exploration and production of fossil fuels pursuant to agreements with federal agencies. *See* Notice ¶¶ 76-79. "The Elk Hills Naval Petroleum Reserve (NPR-1) . . . was originally established in 1912 to provide a source of liquid fuels for the armed forces during national emergencies."[44] When it was created, the Navy and Standard Oil owned intermingled parts of Elk Hills, and Standard Oil eventually agreed not to produce oil without notice to the federal government. *See United States* v. *Standard Oil Co. of Cal.*, 545 F.2d 624, 626-27 (9th Cir. 1976). As a result of World War II, Standard Oil entered into a United Plan Contract ("UPC") with the United States Navy "to govern the joint operation and production of the oil and gas deposits . . . of the Elk Hills Reserve" to serve the national interest. *Chevron U.S.A., Inc.* v. *United States*, 116 Fed. Cl. 202, 205 (Fed. Cl. 2014).

The UPC provided the government with the absolute right to establish the time and rate of production and the exclusive right to carry out the actual operations at the site. *See* Notice

[44] U.S. Gov't Accountability Off., RCED-87-75FS, Naval Petroleum Reserves: Oil Sales Procedures and Prices at Elk Hills, April Through December 1986, at 3 (Jan. 29, 1987), http://www.gao.gov/assets/90/87497.pdf

¶¶ 76-79. Indeed, the Navy was "afforded" a "means of acquiring complete control over the development of the entire Reserve and the production of oil therefrom." Ex. 30, Recitals § 6(d)(i). As operator of Elk Hills, the Navy could operate the Reserve itself, or hire a contractor to perform that function at the direction of federal officers: "The Navy chose to operate the reserve through a contractor rather than with its own personnel. Standard Oil Company of California bid for the operator's contract in 1944, was awarded the contract, and continued to operate NPR-1 [for the Navy] for the next 31 years."[45] The Navy used a private contractor to operate Elk Hills on its behalf instead of doing so itself to maximize production as quickly as possible. This is reflected in declassified documents explaining the decision to hire Standard Oil:

> A substantial increase in production at the earliest possible date was urgently requested by the Joint Chiefs of Staff to meet the critical need for petroleum on the West Coast to supply the armed forces in the Pacific theatre . . . . The Standard Oil Company of California was chosen as operator because it was the only large company capable of furnishing the facilities for such a development program and partially because it was the largest private owner of lands in the Reserve. The Navy has expressed its appreciation of the patriotism of the Standard Oil Company in undertaking such a project at cost with no profit to be received by the Company.

Ex. 31 at 1. "Shortly after the unit plan contract was signed, the Congress, according to DOE, authorized the production [at the Elk Hills Reserve] at a level of 65,000 [barrels per day] to address fuel shortages on the West Coast and World War II military needs."[46] Standard Oil's production and operation of Elk Hills for the Navy were subject to substantial supervision and inspections by Navy officers. The Operating Agreement between the Navy and Standard Oil provided that "OPERATOR [Standard Oil] is in the employ of the Navy Department and is responsible to the Secretary thereof through the Officer in Charge and Director, Naval Petroleum and Oil Shale

[45] U.S. Gov't Accountability Off., RCED-88-198, Naval Petroleum Reserve No. 1: Efforts to Sell the Reserve, at 15 (July 28, 1988), https://www.gao.gov/assets/220/210337.pdf ("GAO Report").
[46] GAO Report at 15.

Reserves." Ex. 32 at 188.

Standard Oil's operation of Elk Hills "in the employ" of the Navy is quintessential "acting under" as it was "an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior." *Watson*, 551 U.S. at 152. Standard Oil operated Elk Hills for decades on behalf of, and under the "subjection, guidance or control" of, the Navy, and is a paradigmatic example of the "unusually close [relationship] involving detailed regulation, monitoring, or supervision." *Id.* at 151, 153.

Third, certain Defendants acted under federal officers as operators and lessees of the Strategic Petroleum Reserve infrastructure. From 1997 to 2019, the Department of Energy ("DOE") leased to Shell Oil Company affiliates the Sugarland/St. James Terminal and Bayou Choctaw Pipeline in St. James, Louisiana. *See* U.S. Dep't of Energy, Strategic Petroleum Reserve Annual Report to Congress for Calendar Year 2018, at 15 (2020) ("2018 SPR Report"). Starting in January 2020, DOE leased those facilities to an affiliate of Defendants Exxon Mobil Corporation and ExxonMobil Oil Corporation (ExxonMobil Pipeline Company). *Id.* The Strategic Petroleum Reserve subjects Defendants to the federal government's supervision and control in the event of the President's call for an emergency drawdown.[47] The United States has exercised this control, including through the President's orders to draw down the reserve in response to Hurricane Katrina in 2005 and disruptions to the oil supply in Libya in 2011, emergency actions taken in coordination with the International Energy Agency.[48] Thus, the hundreds of millions of barrels of oil flowing through these facilities were subject to federal government control and supervision, and Defendants engaged in "an effort to *assist*, or to help

[47] *See* U.S. Dep't of Energy, Strategic Petroleum Reserve Annual Report to Congress for Calendar Year 2010, at 16 (2011); 2018 SPR Report at 15; 42 U.S.C. § 6241(d)(1).
[48] *See* U.S. Dep't of Energy, History of SPR Releases, https://www.energy.gov/fe/services/petroleum-reserves/strategic-petroleum-reserve/releasing-oil-spr.

carry out," the federal government's task in ensuring energy security.[49] *Watson*, 551 U.S. at 152.

Fourth, Defendants and other non-Defendant producers and refiners sell consumer products under contract with the federal government for direct marketing and sale to military service members, retirees, and their families at exchanges in the District of Columbia, including at AAFES Express on Joint Base Anacostia-Bolling and on Fort McNair. *See* Ex. 7.

B. Defendants' Activities, Undertaken at Federal Direction, Are "Connected or Associated" with the Attorney General's Claims.

The Attorney General's claims "relate to" Defendants' activities taken at federal direction. 28 U.S.C. § 1442(a). Oil and gas production at federal direction are among Defendants' activities the Complaint alleges play a "central role" in causing climate change, Compl. ¶ 1, which is the gravamen of the Complaint. To evade this conclusion, the Attorney General argues that removal is permissible only if "federal officers *dictated the content* of Defendants' advertisements to D.C. consumers or *the concealment* of their products' known hazards." Br. 28 (emphasis added). The Attorney General misstates the governing standard.[50]

The Attorney General has erroneously described the legal standard for federal-officer removal. Section 1442 originally conditioned removal on a defendant being sued "in an official or individual capacity *for* any act under color of such office." 28 U.S.C. § 1442(a) (2010) (emphasis added). As part of the Removal Clarification Act of 2011, Congress "amended section 1442(a) to add 'relating to'" to the statutory text, thereby "broaden[ing] federal officer removal to actions, not just *causally* connected, but alternatively *connected or associated*, with acts under

[49] The Notice documents several other substantial activities Defendants took at federal direction in connection with the Strategic Petroleum Reserve. *See* Notice ¶¶ 92-93.

[50] To the extent *Massachusetts* held differently, it is both wrongly decided and distinguishable. Unlike in this case, plaintiff there did not seek almost unbounded damages as a means of crippling defendant into submission. *Cf. Massachusetts* v. *Exxon Mobil Corp.*, Civ. No. 19-12430, 2020 U.S. Dist. LEXIS 93153, at *37 (D. Mass. May 28, 2020).

color of federal office." *Latiolais*, 951 F.3d at 292, 296.[51] And in assessing whether the requisite nexus is satisfied, courts credit the defendant's theory of the case. *Leite*, 749 F.3d at 1124.

Baker illustrates how the connection between Defendants' activities under federal direction and the Attorney General's climate change claims suffices. There, a company that had produced chemicals at the government's direction sought to remove a pollution lawsuit brought against it. 962 F.3d at 939. The plaintiffs argued that the defendant could do so only by showing that the chemicals allegedly responsible for their injuries were those produced at federal direction. *Id.* at 943. The court disagreed; the showing plaintiffs demanded involved "*merits questions* that a federal court should decide." *Id.* at 944. Indeed, courts have consistently found it is not necessary "that the complained-of conduct *itself* was at the behest of a federal agency"; rather, it is "sufficient" if plaintiff's "allegations are directed at the relationship between the [defendants] and the federal government" for at least *some* of the time frame relevant to plaintiff's claims. *Id.* at 944-45; *accord Commonwealth*, 790 F.3d at 470; *Papp* v. *Fore-Kast Sales Co., Inc.*, 842 F.3d 805, 813 (3d Cir. 2016). So, too, here. Defendants have produced fossil fuels at federal direction, and under federal control, for decades. The issue whether that production is allegedly responsible for the Attorney General's harms is a merits question properly resolved at a later phase of this case.

V. This Action Is Removable under the Outer Continental Shelf Lands Act.

Removal is also warranted under OCSLA, which vests federal courts with original jurisdiction over all actions "arising out of, or in connection with . . . any operation conducted on the [OCS] which involves exploration, development, or production of the minerals, of the subsoil or seabed of the [OCS], or which involves rights to such minerals." 43 U.S.C. § 1349(b); *see Tenn.*

[51] *Accord Baker*, 962 F.3d at 943-45; *Sawyer*, 860 F.3d at 258; *Caver* v. *Cent. Ala. Elec. Coop.*, 845 F.3d 1135, 1144 (11th Cir. 2017); *In re Commonwealth's Motion to Appoint Counsel*, 790 F.3d 457, 470-72 (3d Cir. 2015); *see also K&D*, 951 F.3d at 507 n.1 (resolving the effect of the 2011 amendments on Section 1442's scope unnecessary, but noting other circuits' views).

Gas Pipeline v. *Houston Cas. Ins. Co.*, 87 F.3d 150, 154 (5th Cir. 1996). There is no dispute that Defendants have engaged in significant "exploration, development, or production" of minerals on the OCS. 43 U.S.C. § 1349(b). Defendants and their affiliates operate a large share of the more than 5,000 active oil and gas leases on the nearly 27 million OCS acres that the Department of the Interior administers under OCSLA, which were collectively responsible for producing 690 million barrels of oil and 1.034 trillion cubic feet of natural gas in 2019 alone. Notice ¶¶ 101-02. Chevron U.S.A., for example, produced over 49 million barrels of crude oil and 50 million barrels of natural gas from the OCS in 2016.[52] *Id.* ¶ 103.

Further, the Attorney General's claims "arise out of, or in connection with" those operations, 43 U.S.C. § 1349(b), a standard not nearly as onerous as the Attorney General's brief would suggest, *see* Br. 22-23 (demanding a "direct[]" or "[]material" connection). OCSLA's jurisdictional sweep is "broad," *Barker* v. *Hercules Offshore, Inc.*, 713 F.3d 208, 213 (5th Cir. 2013), as it was intended to "extend[] to the entire range of legal disputes" that Congress "knew would arise relating to resource development" on the OCS, *Laredo Offshore Constructors, Inc.* v. *Hunt Oil Co.*, 754 F.2d 1223, 1228 (5th Cir. 1985). Indeed, the phrase "arising out of, or in connection with" is "undeniably broad in scope." *EP Operating Ltd. P'ship* v. *Placid Oil Co.*, 26 F.3d 563, 569 (5th Cir. 1994). Courts have adopted a "broad reading of the jurisdictional grant of section 1349," which "is supported by the expansive substantive reach of the OCSLA." *Id.* Accordingly, a plaintiff's claims "arise out of, or in connection with" operations on the OCS so

[52] According to Department of the Interior data for the period 1947 to 1995, thirteen of the twenty largest—including the three largest—OCS operators in the Gulf of Mexico, measured by oil volume, were a Defendant (or a predecessor of a Defendant) or one of their subsidiaries. Ex. 33. In every subsequent year, from 1996 to present, at least three of the top five OCS operators in this area have been a Defendant (or a predecessor) or one of their subsidiaries. *See* Ex. 34.

long as those operations *contribute* to the injuries alleged.[53] *See Tenn. Gas*, 87 F.3d at 155.

The Attorney General's claims arise out of Defendants' OCS operations because fossil fuel production on the OCS is part of the production about which Defendants allegedly misled District of Columbia consumers.[54] *See Tenn. Gas*, 87 F.3d at 155. Put differently, in alleging that Defendants' advertisements about their fossil fuel production efforts misled consumers, the Complaint necessarily sweeps in Defendants' activities on the OCS.

Indeed, even if the Attorney General were to purportedly waive any relief for injuries caused by Defendants' OCS activities, that would not deprive this Court of jurisdiction. Not only are its claims predicated on misleading statements about *all* of Defendants' oil and gas production, not just onshore production, the Attorney General also could not possibly isolate injuries traceable to onshore versus offshore activities in light of the undifferentiated nature of harm alleged in the Complaint. *See Kivalina*, 663 F. Supp. 2d at 880.

Finally, exercising jurisdiction here would accord with OCSLA's purposes. Congress "intended" that "any dispute that alters the progress of production activities on the OCS," and thus "threatens to impair the total recovery of the federally-owned minerals from the reservoir or reservoirs underlying the OCS," would fall within OCSLA's "grant of federal jurisdiction." *Amoco Prod. Co.* v. *Sea Robin Pipeline Co.*, 844 F.2d 1202, 1210 (5th Cir. 1988). That is *precisely* the case here. The Attorney General seeks potentially billions of dollars in damages plus costly

[53] To the extent the Attorney General asserts that OCSLA imposes a causal nexus, it is incorrect. The statutory language—"or in connection with"—means there is no causal requirement. In the context of federal-officer removal, multiple courts of appeal have held that when Congress added the words "related to" to the statute, it "broadened . . . removal to actions, not just *causally* connected, but alternatively *connected or associated*." *Latiolais*, *supra*.

[54] This reality renders inapposite the Attorney General's cases in which none of the relevant production activities took place on the OCS. *See, e.g.*, *Parish of Plaquemines* v. *Total Petroleum & Refin. USA, Inc.*, 64 F. Supp. 3d 872, 895 (E.D. La. 2014); *Plains Gas Sols., LLC* v. *Tenn. Gas Pipeline Co.*, 46 F. Supp. 3d 701, 706 (S.D. Tex. 2014).

equitable relief. *See* Notice ¶¶ 120-22; Compl. § XII. An award of that magnitude would substantially discourage OCS production, jeopardizing the federal government's leasing program and impairing national energy security.[55] *See Brooklyn Union*, 930 F. Supp. at 292.

The Attorney General is mistaken that exercising OCSLA jurisdiction here would "open the floodgates to cases . . . far beyond" OCSLA's "intended purpose." Br. 23. As the Attorney General acknowledges, it is "unsurprising[]" that courts have yet to apply OCSLA jurisdiction for claims "involv[ing] state consumer protection laws."[56] Br. 24. That is because the Green 20's theory of liability is novel. Never before have plaintiffs attempted to use state consumer protection law as a vehicle for regulating global greenhouse gas emissions and fossil fuel production efforts. And if the merits of this approach are rejected (as they should be), the likelihood of similar claims being asserted will only diminish. *See R.I. Fishermen's All.*, 585 F.3d at 52.

VI. This Court Has Diversity Jurisdiction Because the Real Parties in Interest Are Completely Diverse from All Defendants.

Federal courts are vested with diversity jurisdiction over civil actions for which (1) the amount in controversy "exceeds the sum or value of $75,000," and (2) there is "complete

[55] The few decisions the Attorney General points to in which courts have deemed the impact on OCS production activities insufficient to warrant OCSLA jurisdiction are clearly distinguishable. *See Fairfield Indus., Inc.* v. *EP Energy E&P Co.*, Civ. No. 12-2665, 2013 WL 12145968, at *5 (S.D. Tex. May 2, 2013) (no effect where business, having merged with a party to a licensing agreement for seismic data collected from the Gulf of Mexico, was alleged to owe a "transfer fee" due to the merger), *report and recommendation adopted*, 2013 WL 12147780 (S.D. Tex. July 2, 2013); *LLOG Expl. Co.* v. *Certain Underwriters*, Civ. No. 06-11248, 2007 WL 854307, at *3 (E.D. La. Mar. 16, 2007) (no effect where damage to production facilities for which insurance coverage was sought had already occurred, and had already been repaired); *Brooklyn Union Expl. Co.* v. *Tejas Power Corp.*, 930 F. Supp. 289, 292 (S.D. Tex. 1996) (no effect where pricing dispute concerned gas that had already been produced, sold, and conveyed to purchaser).

[56] Several district courts have declined to exercise OCSLA jurisdiction over climate change actions asserting nuisance claims. *See, e.g.*, *Boulder*, 405 F. Supp. 3d at 978. Those courts, however, are all within courts of appeal with scant OCSLA jurisdiction precedent, and none of those decisions have been affirmed on that basis. *See, e.g.*, *Board of County Commissioners of Boulder County* v. *Suncor Energy (U.S.A.) Inc.*, 965 F.3d 792, 819 (10th Cir. 2020).

diversity," meaning that no plaintiff is a citizen of the same State as any defendant. 28 U.S.C. § 1332(a); *Lincoln Prop. Co.* v. *Roche*, 546 U.S. 81, 89 (2005). Both criteria are satisfied here.

First, it is undisputed that the amount-in-controversy exceeds $75,000.[57] *Second*, the parties are "completely diverse." All plaintiffs—the District of Columbia consumers on whose behalf the Attorney General sues, who are the real parties in interest in this action—and no Defendants are citizens of the District of Columbia.[58] *See* 28 U.S.C. § 1332.

The Attorney General's only argument in opposition to diversity jurisdiction is that the District of Columbia, rather than the consumers on whose behalf it sues, is the real party in interest. *See* Br. 32. But because the Attorney General fails to plausibly allege that Defendants caused widespread harm to the District of Columbia as a whole, and seeks relief that would accrue to the personal benefit of individual consumers, the Attorney General is not the real party in interest.

"Ordinarily, [i]n an action where a state is a party, there can be no federal jurisdiction on the basis of diversity of citizenship because a state is not a citizen for purposes of diversity jurisdiction." *Louisiana* v. *Union Oil Co. of Cal.*, 458 F.3d 364, 366 (5th Cir. 2006). "However, if the State is a nominal party with no real interest in the dispute, its citizenship may be disregarded." *Id.* To establish more than a nominal interest in the litigation, the Attorney General must demonstrate a "quasi-sovereign interest" distinct "from the interests of particular private parties" such as an "interest in the health and well-being—both physical and economic—of its residents in general." *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982); *see also Pennsylvania* v. *New Jersey*, 426 U.S. 660, 665 (1976). A general interest in

[57] The Complaint seeks restitution, damages, civil penalties in the amount of $5,000 per purchase of Defendants' products, and costly injunctive relief. *See* D.C. Code § 28-3909; Compl. §§ IV-XII; Notice ¶¶ 120-22.

[58] No Defendant is incorporated or has its principal place of business in the District. Notice ¶ 116.

protecting District of Columbia residents from deceptive consumer practices is not enough. *See Mo., K. & T. Ry. Co.* v. *Mo. R.R. & Warehouse Comm'rs*, 183 U.S. 53, 60 (1901); *Dep't of Fair Empl. & Hous.* v. *Lucent Techs., Inc.*, 642 F.3d 728, 738 (9th Cir. 2011). The Attorney General must instead advance an "injury to a sufficiently substantial segment of its population." *Snapp*, 458 U.S. at 607. The Attorney General must allege more than a discrete injury to a "group of individual residents." *Id.*

The Attorney General has failed to do so. The Complaint merely claims an undefined injury to an unquantified segment of District of Columbia residents due to Defendants' alleged violations of the CPPA. The Complaint is replete with conclusory allegations that Defendants have engaged in deceptive practices "to the detriment of DC consumers and the public generally" and "helped coordinate the deception of consumers and the broader public about the risks of climate change." Compl. ¶¶ 2, 60. Nowhere, however, does the Complaint allege that Defendants' deceptive practices had a widespread financial impact on the District of Columbia's economy sufficient to implicate the "quasi-sovereign interest in the economic well-being of its citizens." *In re Standard & Poor's Rating Agency Litig.*, 23 F. Supp. 3d 378, 405 (S.D.N.Y. 2014). Nor is there any allegation that Defendants' purportedly deceptive conduct worked an extensive harm on consumers such that it would have an aggregate impact on the District of Columbia itself. Absent plausible allegations that Defendants caused widespread harm to the District of Columbia as a whole, the Attorney General is merely a nominal party, suing on behalf of a class of D.C. consumers, but with no direct interest in the consumer protection claims at issue.

The cases the Attorney General cites to resist this conclusion are inapposite. It relies, for example, on *Maryland* v. *Louisiana*, 451 U.S. 725, 731 (1981), in which the Supreme Court considered whether several states had standing to challenge Louisiana's "First-Use Tax" on any

natural gas brought into Louisiana which was not previously subject to taxation by another state or the United States. While "[a] State is not permitted to enter a controversy as a nominal party in order to forward the claims of individual citizens," the Court reasoned, "it may act as the representative of its citizens in original actions where the injury alleged affects the general population of a State in a substantial way." *Id.* at 737. Because the States had an interest "in protecting [their] citizens from *substantial economic injury* presented by imposition of the First-Use Tax," and "a *great many citizens* in each of the plaintiff States are themselves consumers of natural gas and are faced with *increased costs aggregating millions of dollars per year*," the Court held that exercising original jurisdiction was proper. *Id.* at 739 (emphasis added). Here, by contrast, the Attorney General suggests that Defendants' allegedly deceptive conduct may have the capacity to influence some consumers' subjective preferences in energy and transportation. *See* Compl. ¶¶ 175, 182, 189, 196. That is different in kind from an objective, quantifiable harm to consumers tantamount to injuring the District of Columbia as a whole.

Similarly, the Attorney General relies on *Nevada* v. *Bank of Am. Corp.,* 672 F.3d 661, 670 (9th Cir. 2012), in which the State of Nevada "sued to protect the hundreds of thousands of homeowners in the state allegedly deceived by Bank of America" as a result of deceptive mortgage practices during the foreclosure crisis. In holding that the State was the real party in interest, the court emphasized that foreclosures "work a widespread and devastating injury not only to those borrowers who are defrauded, but also on other Nevada residents and *the Nevada economy as a whole*." *Id.* (emphasis added). Foreclosures affected "nearly one million homes" costing residents approximately $54.5 billion in equity. *Id.* at 670-71. No such harms are alleged here.

The Complaint's prayer for relief fares no better. Pursuant to Section 28-3909 of the D.C. Code, any restitution or economic damages recovered by the Attorney General would be payable

directly to the allegedly aggrieved consumers who purchased Defendants' products. *See* Compl. ¶ 3 ("The District seeks . . . restitution for DC consumers"). For these claims, the Attorney General is not seeking relief for District of Columbia residents in general, but to restore the interests of certain private individuals who allegedly would have refrained from purchasing gas for their vehicles had they known about a connection between fossil fuel combustion and climate change. That confirms that these consumers are the real parties in interest. *See In re Baldwin-United Corp.*, 770 F.2d 328, 341 (2d Cir. 1985). The Attorney General's other requested relief—including prospective injunctive relief and statutory civil penalties—are remedies also available to private consumers to enforce their substantive right to be free from allegedly deceptive trade practices. *See* D.C. Code § 28-3905(k)(2). Because the benefits of these remedies do not necessarily flow to the District of Columbia as a whole, its quasi-sovereign interest is not implicated. *See West Virginia ex rel. McGraw* v. *Comcast Corp.*, 705 F. Supp. 2d 441, 450 (E.D. Pa. 2010).

VII. This Action Satisfies the Class Action Fairness Act's Requirements.

The Class Action Fairness Act ("CAFA") permits removal of (1) any "class action" for which (2) minimal diversity exists; (3) at least 100 class members are represented; and (4) "the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs." 28 U.S.C. § 1332(d)(1), (2), (5); *Bradford* v. *George Wash. Univ.*, 249 F. Supp. 3d 325, 332 (D.D.C. 2017); *see also* 28 U.S.C. § 1453(b). All four elements are satisfied here.

The only element in dispute is the first—whether the Attorney General's suit on behalf of District of Columbia consumers is a "class action" within the meaning of CAFA. 28 U.S.C. § 1332(d)(1)(B). CAFA defines a "class action" as "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or *similar state statute or rule* of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." *Id.* § 1332(d)(1)(B) (emphasis added). The definition of a "class action," Congress explained, "is to be interpreted

liberally. Its application should not be confined solely to lawsuits that are labeled 'class actions.' Generally speaking, lawsuits that resemble a purported class action should be considered class actions for purposes of applying these provisions." S. Rep. No. 109-14, at 35 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 34 (formatting altered); *see also McMullen* v. *Synchrony Bank*, 82 F. Supp. 3d 133, 140 (D.D.C. 2015) (relying on CAFA's legislative history to interpret its scope). Put differently, CAFA permits removal of a suit that is "in substance a class action," notwithstanding a plaintiff's "attempt to disguise the true nature of the suit." *Addison Automatics, Inc.* v. *Hartford Cas. Ins. Co.*, 731 F.3d 740, 742 (7th Cir. 2013); *see, e.g.*, *Song* v. *Charter Commc'ns Inc.*, 2017 WL 1149286, at *1 n.1 (S.D. Cal. Mar. 28, 2017).

Song is instructive. There, plaintiff sued various cable companies, alleging that "defendants unlawfully charge[d] California customers a surcharge of $8.75 per customer per month." 2017 WL 1149286, at *1. "Though he did not style his complaint as a class action," Song asserted that he "brought the lawsuit to put an end to Charter's unlawful actions, not only for his benefit but also for the benefit of the millions of California consumers whom Charter continues to target with this illegal and fraudulent scheme." *Id.* On these facts, the court found CAFA jurisdiction satisfied. Lawsuits like Song's "that *resemble* a purported class action," the court held, "should be considered class actions" for purposes of CAFA. *Id.* at *1 n.1 (emphasis added).

So, too, here. The Attorney General sues various energy companies, alleging that they engaged in "unabated and expanded extraction, production, promotion, marketing and sale of . . . fossil fuel products, to the detriment of *DC consumers and the public generally*." Compl. ¶ 2 (emphasis added). The Complaint is replete with allegations concerning the efforts to mislead, and injuries suffered by, the class members on whose behalf this suit is brought: *Washington, D.C. consumers*. *See, e.g.*, *id.* ¶¶ 8, 71, 110, 150, 163. The Complaint also requests relief on behalf of

the class members it represents, seeking "restitution or damages" to make certain *District of Columbia consumers* whole, and an injunction to protect *District of Columbia consumers* from future injuries. *See id.* § XII (Prayer for Relief); *see also id.* ¶ 3 ("The District seeks . . . restitution for DC consumers."). Thus, by suing in a representative capacity on behalf of "consumers in Washington, D.C.," *id.* ¶ 1, the Attorney General has chosen to bring what is in substance a putative class action: a "representative suit[] on behalf of [a] group of persons similarly situated." 1 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 1.1 (4th ed. 2002).

Jurisdiction would not only satisfy CAFA, it would further CAFA's legislative purposes. CAFA's "primary objective" is to "ensure Federal court consideration of interstate cases of national importance." *Dart Cherokee Basin Operating Co.* v. *Owens*, 574 U.S. 81, 89 (2014); *accord* Pub. L. No. 109-02, § 2(b)(2), 119 Stat. 4, 5 (2005). The "Framers were concerned that state courts might discriminate against interstate businesses and commercial activities, and thus viewed diversity jurisdiction as a means of ensuring the protection of interstate commerce." S. Rep. No. 109-14, at 8; *see generally* John P. Frank, *Historical Bases of the Federal Judicial System*, 13 Law & Contemp. Probs. 3, 22-28 (1948).

Prior to CAFA's enactment, however, plaintiffs were able to "game the procedural rules and keep nationwide or multi-state class actions in state courts." S. Rep. No. 109-14, at 4. The state courts in which these nationwide cases were brought were effectively "invite[d]" to "dictate to 49 others what their laws should be on a particular issue, thereby undermining basic federalism principles." *Id.* at 24. To Congress, that was untenable. "[A] system that allows state court judges to dictate national policy" from the "local courthouse steps is contrary to the intent of the Framers when they crafted our system of federalism." *Id.* As Congress "firmly believe[d]" that such "interstate class actions . . . properly belong in federal court," it enacted CAFA "to ensure that

qualifying interstate class actions initially brought in state courts may be heard by federal courts if any of the defendants so desire." *Id.* at 5.

This is exactly the type of case Congress did not want to slip through the cracks—resulting in an outsized impact on all other states based on the dictates of a single municipal court judge. This suit is a thinly veiled assault on the national (and international) oil and gas industry, and directly implicates the entire patchwork of relevant federal legislation and regulation. It is merely one of many coordinated suits brought by attorneys general, municipalities, and climate activists, who have stated clearly that they intend to use targeted litigation, such as this suit, in a concerted effort to stymie the operation of the oil and gas industry. Such a backdoor attempt to affect and supplant federal regulation of the oil and gas industry deserves a federal forum.

The Attorney General's efforts to remove this action from CAFA's ambit are unavailing. To start, it attempts to constrict CAFA's coverage by narrowing the statute's intentionally broad definition of a "class action." It contends that an action not styled as a class action can satisfy CAFA only if it is subject to specific procedures "similar" to those of Federal Rule of Civil Procedure 23. *See* Br. 30; Fed. R. Civ. P. 23. But even assuming CAFA demands such similarity, this suit meets—and surpasses—any such requirement. Attorney general suits under the CPPA are governed by D.C. Superior Court Rule 23, which is not merely similar, but "identical," to Federal Rule 23 in all relevant respects.[59] *See* D.C. Super. Ct. R. Civ. P. 23 cmt.

In *Rotunda* v. *Marriott International, Inc.*, 123 A.3d 980, 989 (D.C. 2015), the District of Columbia Court of Appeals held that Superior Court Rule 23 "necessar[il]y" applies to attorney general claims under the CPPA. There, a private attorney general brought CPPA claims for

[59] The Attorney General's reliance on *Massachusetts* is misplaced. The statute at issue there was merely "comparable to a class action," 2020 U.S. Dist. LEXIS 93153, at 36, rather than subject to procedures "identical" to Federal Rule of Civil Procedure 23, D.C. Super. Ct. R. Civ. P. 23 cmt.

damages on behalf of himself and the "general public," but expressly disclaimed "any intention to seek class certification" under Superior Court Rule 23. 123 A.3d at 982. The Superior Court dismissed the representative portion of the suit, holding that a CPPA claim for money damages "brought by an individual on behalf of himself and other similarly situated members of the general public is *in essence a class action*, whether pled as such or not, and must satisfy the requirements of Rule 23." *Id.* (emphasis added). On appeal, the Court of Appeals affirmed. *See id.* at 989.

The Court of Appeals held that Rule 23 was a necessary complement to CPPA suits brought on behalf of the "general public" because, without its application, those suits would raise "unique challenges to procedural fairness and administration." *Id.* at 989. The CPPA "says nothing on the critical issue of how absent members of the represented class are to be given notice so as to make their own decisions whether to be bound by the suit," thus requiring the application of Rule 23. *Id.* at 985. Trial courts would also face "deep uncertainty" in their "effort[s] to regulate CPPA actions on behalf of the general public" without Rule 23's tools for managing suits "brought on behalf of a potentially vast number of plaintiffs." *Id.* at 986. The court concluded that Rule 23 must apply in the absence of "clear[]" and "explicit proof" "that the legislature has taken . . . into account" the "unique challenges . . posed by a representative suit for damages." *Id.* at 988-89. Finding the CPPA to be "virtually silent" on this issue, the Court of Appeals held that Rule 23 provided the "necessary vehicle" for representative suits under the CPPA. *Id.* at 985, 988-89.

The Attorney General endeavors to distinguish *Rotunda* on the basis that that action was brought by a private, rather than public, attorney general. *See* Br. 30-31. Yet it offers no reason why the "unique challenges to procedural fairness and administration" facing private attorney general actions on behalf of the "general public," *Rotunda*, 123 A.3d at 989, are absent or attenuated in public attorney general actions on behalf of the "publicly generally," Compl. ¶ 2.

Nor could it. Because private and public attorney general actions "have long been analogized," *Nat'l Consumers League* v. *Bimbo Bakers USA*, 46 F. Supp. 3d 64, 76 n.7 (D.D.C. 2014), courts have refused to draw any distinction between them in evaluating CAFA's applicability, *see Baumann* v. *Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1123 (9th Cir. 2014).[60]

The Attorney General also cites to a collection of cases standing for the proposition that *parens patriae* actions are categorically exempt from CAFA. *See* Br. 29 & n.11 (collecting cases). Whether that is true is academic, however, because it did not—and could not—sue as *parens patriae*. The doctrine of *parens patriae* is a "species of prudential standing," which in certain circumstances permits a sovereign to sue on behalf of its residents. *SEIU Health & Welfare Fund* v. *Philip Morris, Inc.*, 249 F.3d 1068, 1073 (D.C. Cir. 2001). Like any theory of prudential standing, it is forfeited if not adequately preserved. *See Huron* v. *Cobert*, 809 F.3d 1274, 1280 (D.C. Cir. 2016). That is what happened here. Despite knowing full well how to do so, *see, e.g.*, Compl. at 29, *District of Columbia* v. *Beretta U.S.A. Corp.*, 2000 WL 34591622 (D.C. Super. Ct. Jan. 20, 2000), the Attorney General did not invoke *parens patriae* authority in its Complaint. Because "it is axiomatic that [p]laintiffs cannot amend their Complaint via their briefs," *Zaccari* v. *Apprio, Inc.*, 390 F. Supp. 3d 103, 110 n.6 (D.D.C. 2019), it is too late now.

The Attorney General's failure to invoke *parens patriae* authority is ultimately unsurprising, as it would have been in vain.[61] To maintain a *parens patriae* action, the government

[60] The Attorney General contends *Rotunda* is irrelevant as it did not address whether the CPPA *itself* is "similar to [Federal] Rule 23." Br. 31. That the requirements governing representative CPPA claims are housed elsewhere within the D.C. Code is irrelevant.

[61] *Massachusetts* is not helpful to the Attorney General here either. The *Massachusetts* court held that the Commonwealth acted "not as a representative of a class of injured citizens but in its own right as a sovereign" based partially on the relief it sought: a civil penalty due to the Commonwealth, rather than damages due to consumers. *See* 2020 U.S. Dist. LEXIS 93153, at *37. Here, in contrast, the Attorney General also seeks "restitution or damages" to make District of Columbia consumers whole. Compl. § XII (Prayer for Relief).

"must articulate an interest apart from the interests of particular private parties, *i.e.*, the State must be more than a nominal party." *Snapp*, 458 U.S. at 607. Specifically, the government "must express a quasi-sovereign interest," such as in "the health and well-being . . . of its residents in general." *Id.* The Attorney General cannot do so. As described in the context of diversity jurisdiction, it brought this action on behalf of a discrete group of District of Columbia consumers to remediate private harms, the antithesis of a quasi-sovereign interest. *See supra* § VI.

In sum, whether it is because this suit is "in substance" a class action, or because it is governed by procedures equivalent to Federal Rule of Civil Procedure 23, this action is a "class action" within the meaning of CAFA. Because minimal diversity exists, at least 100 class members are represented, and the amount-in-controversy exceeds $5,000,000, all of CAFA's jurisdictional requirements are satisfied. *See* 28 U.S.C. § 1332(d).

CONCLUSION

For the foregoing reasons, this Court has subject matter jurisdiction, and the motion to remand should be denied.[62]

[62] In the final two sentences of the conclusion of its brief, the Attorney General requests attorneys' fees and costs under Section 1447(c). That argument is forfeited. *See, e.g.*, *Wehrs* v. *Wells*, 688 F.3d 886, 891 n.2 (7th Cir. 2012). A party may not "mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones." *Capitol Servs. Mgmt., Inc.* v. *Vesta Corp.*, 933 F.3d 784, 790 n.1 (D.C. Cir. 2019). In any event, a plaintiff opposing removal is entitled to attorneys' fees or costs under Section 1447(c) only if it can show that "the removing party lacked an objectively reasonable basis for seeking removal." *Martin* v. *Franklin Cap. Corp.*, 546 U.S. 132, 141 (2005). Conversely, "when an objectively reasonable basis exists, fees should be denied." *Id.* A defendant's basis for removal is "objectively reasonable" so long as there is "at least some logical and precedential force behind it . . . regardless of whether it is correct." *Knop* v. *Mackall*, 645 F.3d 381, 383-84 (D.C. Cir. 2011). Defendants' arguments—supported by evidence and persuasive, if not binding, authorities—are not merely objectively reasonable, they are correct. *See id.*

DATE: October 15, 2020

Respectfully submitted,

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