MORGAN, LEWIS & BOCKIUS LLP
Bryan Killian (pro hac vice)
bryan.killian@morganlewis.com
1111 Pennsylvania Ave. NW
Washington, DC 20004
Tel: +1.202.739.3000
Fax: +1.202.739.3001

MORGAN, LEWIS & BOCKIUS LLP
James J. Dragna (SBN 91492)
jim.dragna@morganlewis.com
Yardena R. Zwang-Weissman (SBN 247111)
yardena.zwang-weissman@morganlewis.com
300 South Grand Ave., 22nd Floor
Los Angeles, CA 90071-3132
Tel: + 1.213.612.2500
Fax: + 1.213.612.2501

Attorneys for Defendant
ANADARKO PETROLEUM CORP.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

The COUNTY OF SAN MATEO, individually and on behalf of THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

CHEVRON CORP., et al.,

Defendants.

First Filed Case: No. 3:17-cv-4929-VC
Related Case: No. 3:17-cv-4934-VC
Related Case: No. 3:17-cv-4935-VC

SUPPLEMENTAL OPPOSITION TO PLAINTIFFS' REMAND MOTION

Case No. 3:17-cv-4929-VC

Date: Feb. 15, 2018
Time: 10:00 a.m.
Courtroom: 4
Judge: Hon. Vince G. Chhabria

The CITY OF IMPERIAL BEACH, a municipal corporation, individually and on behalf of THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

CHEVRON CORP., et al.,

Defendants.

Case No. 3:17-cv-4934-VC

The COUNTY OF MARIN, individually and on behalf of THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. CHEVRON CORP., et al., Defendants.	Case No. 3:17-cv-4935-VC

[*Additional Counsel Listed on Signature Page*]

INTRODUCTION

Plaintiffs' remand motion accuses Defendants of improperly removing this case on the back of a federal preemption defense. The Defendants' joint opposition explains why that's wrong: Whether state law is preempted (in the ordinary, familiar sense) isn't at issue now because state law doesn't apply to global climate change of its own force; it applies, if at all, only because federal law adopts it. We write separately to raise a complementary, alternative argument that, even if Plaintiffs were right that state law applies of its own force, their complaints still present removable federal questions.

Ambient air and water implicate uniquely federal interests.[1] Chief among them are the need for uniformity and predictability and the concern about avoiding clashes among States applying their own laws, unpredictably, inconsistently, and irreconcilably, to control ambient air and water. As it relates to the environment, unconstrained *choice* of law leads directly to *conflict* of law.[2]

Federal law exists to protect uniquely federal interests. Federal law, therefore, controls which substantive law applies to the use, apportionment, and pollution of ambient air and water. Federal law, in other words, supplies the background choice-of-law rules. For most of the nation's history, those rules chose federal common law. State law didn't apply—at all. In the 1970s, the Clean Air and Clean Water Acts vested EPA with lawmaking authority over ambient air and water,[3] and, because the Acts delegated *some* States *some* authority to cooperate with EPA, the Acts also modified the background choice-of-law rules to select *some* state law in *some* circumstances.[4] (The nature and extent of state law's application remains hotly contested.)

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1 *See Milwaukee I*, 406 U.S. 91, 104 (1972) ("When we deal with air and water in their ambient or interstate aspects, there is federal common law."); *International Paper v. Ouellette*, 479 U.S. 481, 492 (1987) ("[T]he control of interstate pollution is primarily a matter of federal law."); *see, e.g.*, *Georgia v. Tennessee Copper*, 206 U.S. 230 (1907) (early case applying federal common law).

2 *See Milwaukee III*, 731 F.2d 403, 411 n.3 (7th Cir. 1984) (state choice-of-law rules are "not applicable to the determination of liability and remedy for discharges within one state by its municipalities into an interstate body of water, which by their nature implicate uniquely federal concerns").

3 *See Ouellette*, 479 U.S. at 487; *see also AEP v. Connecticut*, 564 U.S. 410, 424 (2011).

4 *See Ouellette*, 479 U.S. at 487 ("We hold that when a court considers a state-law claim concerning interstate water pollution that is subject to the CWA, the court must apply the law of the State in which the point source is located."); *id.* at 500 ("The application of affected-state laws would be incompatible with the Act's delegation of authority and its comprehensive regulation of water pollution. The Act preempts state-law to the extent that the state law is applied to an out-of-state point source.").

Plaintiffs assume, not that the Acts *delegated* States limited authority over ambient air and water, but that state law now applies to ambient air and water *of its own force*, subject to ordinary preemption standards. And so, Plaintiffs allege that California has regulated global climate change; that California imposes common-law duties and standards of care on companies across the globe who extract and market fossil fuels; and that companies that violate those duties and standards are liable to Californian municipalities for damages. Even accepting Plaintiffs' assumption about the current relationship between state and federal law (*i.e.* even accepting that ordinary preemption standards apply), their complaints still present two federal questions:

- *First*, federal law determines not only whether state law applies to cases about global climate change (vertical choice of law), but also *which* state law applies if any state law applies (horizontal choice of law). Plaintiffs allege that California law applies.[5]
- *Second*, federal law also determines *when* state law begins to apply, if ever. The earliest time state law could possibly apply to GHG emissions causing global climate change is 1970, the year Congress passed Section 111 of the Clean Air Act and displaced the substantive federal common-law standards that had governed.[6] Plaintiffs' allegations stretch back before that. Actions Defendants allegedly took, knowledge Defendants allegedly had, and emissions Defendants allegedly caused *as far back as the 1960s* form the factual predicate for Plaintiffs' claims.[7]

Both federal issues—the "which" and "when" questions—are disputed, substantial, and can be entertained without disturbing the balance of federal and state judicial responsibilities. Removal, therefore, was appropriate,[8] and the remand motion must be denied.

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5 *See* Remand Motion at 21–22.

6 *See AEP*, 564 U.S. at 424 (2011) (holding that Section 111 displaced "any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants"); *see also* Pub. L. 91-604, § 4(a) (Dec. 31, 1970) (enacting Section 111).

7 *See* Compl. ¶¶ 83–84, ¶ 153(a), ¶ 154, ¶¶ 162–64.

8 *See* Notice of Removal ¶ 17 ("While Plaintiff contends that its claims arise under California law, the question of which state, if any, may apply its law to address global climate-change issues is a question that is itself a matter of federal law, given the paramount federal interest in avoiding conflicts of law in connection with ambient air and water.").

ARGUMENT

I. UNIQUELY FEDERAL INTERESTS IN UNIFORMITY, PREDICTABILITY, AND AVOIDING CONFLICTS DRIVE FEDERAL DECISIONS ON AMBIENT AIR AND WATER.

Federal law governs subjects, conduct, and disputes that touch "uniquely federal interests."[9] Sometimes, "the entire body of state law" is superseded; other times, "only particular elements of state law are superseded."[10] Whether it's all or some depends on the strength of the federal interest.

In some areas, uniquely federal interests have led to the creation of federal choice-of-law rules, and when federal choice-of-law rules apply, it is clear that "the choice of applicable law presents a federal question."[11] Pollution of ambient air and water is one of the areas where uniquely federal interests—uniformity, predictability, and avoiding conflicts of law—are protected and advanced by federal choice-of-law rules. Those rules apply in all cases about ambient air and water; even if state substantive law is ultimately selected, state choice-of-law rules never apply.

The whole of the Supreme Court's decisions on interstate air and water pollution speaks to the strength of the uniquely federal interests undergirding the federal choice-of-law rules. The "overriding federal interest in the need for a uniform rule of decision" reflects the "basic interests of federalism."[12] Historically, major conflicts have erupted out of disputes over ambient air and water,[13] and the prospect that individual States might apply their own laws to entities who allegedly cause transient environmental harm is intolerable: "more conflicting disputes, increasing assertions and proliferating contentions would seem to be inevitable."[14]

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9 *Boyle v. United Technologies*, 487 U.S. 500, 504 (1988) (quoting *Texas Industries v. Radcliff Materials*, 451 U.S. 630, 640 (1981)).

10 *Id.* at 508.

11 *North Dakota v. United States*, 460 U.S. 300, 317–19 (1983). *See United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 592 (1973) (holding that "the choice-of-law task is a federal task for federal courts" because the ultimate issue—land acquisition—was "one arising from and bearing heavily upon a federal regulatory program").

12 *Milwaukee I*, 406 U.S. at 105 n.6 (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *Clearfield Trust v. United States*, 318 U.S. 363 (1943); and *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942)).

13 *See North Carolina ex rel. Cooper v. Tennessee Valley Authority*, 615 F.3d 291, 301 (4th Cir. 2010).

14 *Milwaukee I*, 406 U.S. at 107 n.9 (quoting *Texas v. Pankey*, 441 F.2d 236 (10th Cir. 1971)).

In *Milwaukee I*, the Supreme Court made clear that federal choice-of-law rules apply in all disputes about use, apportionment, and pollution of ambient air and water. Applying those rules, the Court chose substantive federal common law and overruled the "contrary indication" that the substantive law of any State might apply to "control[] the pollution of interstate or navigable waters."[15] In the 1970s, after *Milwaukee I*, Congress revised the federal statutes governing pollution, and in two decisions (*Ouellette* and *Milwaukee II*), the Supreme Court addressed the amendments' effect on *Milwaukee I*. In *Ouellette*, the Court addressed the Clean Water Act's effect on *Milwaukee I*'s choice-of-law rule. *Ouellette* reaffirmed the strength of the federal interests in uniformity and predictability.[16] However, because the Act delegates source States some regulatory authority over ambient air and water within their borders, *Ouellette* modified *Milwaukee I*'s choice-of-law rule to choose source State law in some circumstances: "We hold that when a court considers a state-law claim concerning interstate water pollution that is subject to the CWA, the court must apply the law of the State in which the point source is located."[17] Thus, to what was originally just a *vertical* choice-of-law rule was engrafted a *horizontal* component.

Ouellette's modified choice-of-law rule advances the same uniquely federal interests as *Milwaukee I*'s. It advances uniformity (because "the restriction of suits to those brought under source-state nuisance law prevents a source from being subject to an indeterminate number of potential regulations") and predictability (because "a source only is required to look to a single additional authority, whose rules should be relatively predictable").[18] And *Ouellette*'s modified choice-of-law rule, like *Milwaukee I*'s, is exclusive. State choice-of-law rules never apply to ambient air and water, use or misuse of ambient air and water, or disputes about them; not even a source State may use its choice-

15 *Id.* at 102 & n.3; *see id.* at 108 n.10 (stating that the "rule of decision" was "federal").

16 *See Ouellette*, 479 U.S. at 496 (noting that state-law "nuisance standards often are 'vague' and 'indeterminate'" and recognizing that "application of numerous States' laws would only exacerbate the vagueness and resulting uncertainty").

17 *Id.* at 487.

18 *Id.* at 499.

of-law rules to choose the law of an affected State.[19] State choice-of-law rules are, in effect, completely preempted, replaced across the board and in all cases by the federal choice-of-law rule.

The Supreme Court also addressed the effect of recent federal legislation on *Milwaukee I*'s other holding about which federal standards apply when the federal choice-of-law rule chooses substantive federal law. In *Milwaukee II*, the Court held that enactment of the Clean Water Act in 1972 shifted the content of substantive federal law, away from common-law standards made by judges, to statutory and regulatory standards made by Congress and EPA.[20] And in *AEP*, the Court reached basically the same decision about the Clean Air Act and substantive federal law governing ambient air, air pollution, and global climate change; since 1970,[21] Section 111 of the Act has provided EPA authority to regulate emissions of GHGs and has displaced the pre-existing substantive federal common law.[22]

The upshot of the history is: Before the 1970s, the exclusive federal choice-of-law rule chose substantive federal common law to govern use, apportionment, and pollution of ambient air and water. In the 1970s, that choice-of-law rule was modified because Congress revised the Clean Air and Water Acts, and since the 1970s, the modified rule chooses federal statutory and regulatory law, and chooses *which* State's law, if any, may supplement substantive federal law. Disputes about pre-70s conduct are governed entirely by substantive federal law, and federal law remains the choice-of-law gatekeeper for disputes about post-70s conduct.

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19 *See id.* at 499 n.20 ("[I]f, and to the extent, the law of a source State requires the application of affected-state substantive law on this particular issue, it would be pre-empted as well.").

20 *See Milwaukee II*, 451 U.S. 304, 317 (1981); *id.* at 320 ("Federal courts lack authority to impose more stringent effluent limitations under federal common law than those imposed by the agency charged by Congress with administering this comprehensive scheme.").

21 Pub. L. 91-604, § 4(a) (Dec. 31, 1970) (enacting Section 111).

22 *See AEP*, 564 U.S. at 424–25; *see also id.* at 423 ("Any [federal common law claim] would be displaced by the federal legislation authorizing EPA to regulate carbon-dioxide emissions."); *Kivalina v. ExxonMobil*, 696 F.3d 849, 585 (9th Cir. 2012) (citing *AEP*).

II. THOSE FEDERAL QUESTIONS GIVE RISE TO FEDERAL-QUESTION JURISDICTION.

Even if, as Plaintiffs assert, California law creates the causes of action they've pleaded, that wouldn't defeat removal or mean that the only federal issue is a preemption defense. "[A] federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues."[23] This Court can decide a state-law claim that [1] "necessarily raise[s]" a federal issue, if the federal issue is [2A] "disputed" and [2B] "substantial," [3] as long as it won't disturb the "balance of federal and state judicial responsibilities."[24] Plaintiffs' action against a global industry for allegedly causing global climate change is such a case.

[1] Both federal questions appear on the face of the Plaintiffs' complaints.

Federal questions are raised when a plaintiff chooses to base his or her claims on them. It is easy for a plaintiff to raise a federal question in his or her complaint—so easy that federal jurisdiction usually depends on the substantiality of that question, not its presence.[25]

Here, Plaintiffs chose to base their case on both federal questions discussed above. Plaintiffs' contention that the governing law is California's is really their answer to the horizontal component of the federal choice-of-law question—the "which" question. And their allegations about Defendants' pre-70s knowledge and conduct raise a federal question—the "when" question—about the duties and standards of care that federal common law imposed before 1970. (In fact, history shows that Plaintiffs' causes of action, as they pertain to Defendants' pre-70s knowledge and conduct, are necessarily federal causes of action, meaning the Court has federal-question jurisdiction without any *Grable*-esque analysis.)

Plaintiffs can't dodge these federal questions by arguing that their suits *against extractors and marketers* of fossil fuels are beyond the reach of prior cases *against major emitters* of pollutants and GHGs. The uniquely federal interests in uniformity, predictability, and avoiding conflicts among States are not unique to emitters. It is the "regulation of interstate … *pollution*," not just interstate

23 *Grable v. Darue*, 545 U.S. 308, 312 (2005).

24 *Id.* at 314. *See Gunn v. Minton*, 568 U.S. 251, 258 (2013).

25 *See Gunn*, 568 U.S. at 260.

polluters, that "is a matter of federal, not state, law."[26] The federal choice-of-law rule thus applies whenever a plaintiff seeks to regulate ambient air and water, to address the cause of interstate (or international) pollution, or to seek abatement of it.[27] Plaintiffs' suits have that purpose and effect; it is written all over their complaints and remand motion.[28] When a suit seeks to regulate global climate change, federal interests are at their zenith, no matter the identity of the defendant or the way in which the defendant allegedly contributed to the problem.

[2] Both federal questions are disputed and substantial.

Federal courts are open to state-law claims presenting federal questions when there is a "serious federal interest in claiming the advantages inherent in a federal forum."[29] So, not every property case warrants federal jurisdiction even though the meaning of federal title is at the bottom of "every suit to establish title to land in the central and western States."[30] The same goes for environmental cases: not every one warrants federal jurisdiction even though the federal choice-of-law rules are potentially implicated in every environmental dispute. Federal issues need to be more than present in the background; they must be disputed and substantial.

"Disputed" means the plaintiffs and defendants propose different answers.[31] Here, as for the "which" question, Plaintiffs propose that California law applies to all Defendants because California is where Plaintiffs allege that they were injured[32]; Defendants propose that an affected State's law

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26 *Ouellette*, 479 U.S. at 488 (emphasis added).

27 *See id.* at 492 ("[C]ontrol of interstate pollution is primarily a matter of federal law."); *Milwaukee I*, 406 U.S. at 102 ("[I]t is federal, not state, law that in the end controls the pollution of interstate or navigable waters."); *see also Texas*, 441 F.2d at 241 (discussing the "imperative" of applying federal law to disputes about a State's "ecological conditions and impairments of them").

28 *See, e.g.*, Compl. ¶ 11 ("By this action, the County seeks to ensure that the parties responsible for sea level rise bear the costs of its impacts."); Remand Motion at 3 ("The 36 Defendants are responsible by themselves for at least about 20% of all industrial carbon dioxide emissions between 1965 and 2015.").

29 *Grable*, 545 U.S. at 313.

30 *Shulthis v. McDougal*, 225 U.S. 561, 569–70 (1912).

31 *Gunn*, 568 U.S. at 259.

32 *See* Remand Motion at 1, 3–4; *see also id.* at 38 ("As a matter of common sense and California substantive law, each of Plaintiffs' claims 'arose' only once all the elements of the tort were complete, which, here, was only when and where that Plaintiff suffered injury … .").

does not trump in a dispute over a global phenomenon and, assuming state law can apply, the applicable law is not necessarily California's. Similarly, as for the "when" question, Plaintiffs allege that Defendants' pre-70s knowledge and conduct is tortious; Defendants strongly disagree. These are critical disputes in these cases.

Federal questions are substantial when they are important "to the federal system as a whole."[33] (The *Grable* question was substantial because it implicated the government's interest in recovering delinquent taxes, and the *Smith* question was substantial because it implicated the constitutionality of securities issued by the government.[34]) Here, the federal questions are substantial because deciding which State's law applies to global climate change "involves a dispute or controversy respecting the validity, construction or effect of" federal laws,[35] especially the Clean Air Act, as *Ouellette* teaches.[36] Moreover, resolution of the federal questions will "be controlling in numerous other cases."[37] The question of which State's law applies when municipalities complain about global climate change and questions about Defendants' pre-70s conduct are bound to recur. Plaintiffs are only three of countless municipalities that could assert similar actions, and the relief Plaintiffs demand (including abatement) could conflict with relief ordered in other cases.

[3] Hearing this case won't open federal courthouse doors too wide.

Federal questions within state-law causes of action shouldn't be heard in federal court if doing so would open federal court to "a tremendous number of cases" traditionally resolved by state courts.[38] There's no risk of that, here. A federal forum always has been available for defendants in suits about interstate (and international) pollution.[39] Over the last half century, federal courts have heard every major case about global climate change, as well as ambient air and water pollution generally (the

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33 *Gunn*, 568 U.S. at 260.

34 *Id.*

35 *Hopkins v. Walker*, 244 U.S. 486, 489 (1917) (cited in *Grable*, 545 U.S. at 316).

36 *Ouellette*, 479 U.S. at 494–97.

37 *Empire Healthchoice Assurance v. McVeigh*, 547 U.S. 677, 700 (2006).

38 *Grable*, 545 U.S at 318.

39 *Texas*, 441 F.2d at 240 (noting the "entitle[ment] to federal judicial protection" in cases about out-of-state pollution).

Milwaukee cases, *Ouellette*, *AEP*, *Comer*, *Kivalina*)—even when state law applied.[40] Moreover, state-law public-nuisance and products-liability claims challenging pre-70s conduct that Plaintiffs allege has caused global climate change are a tiny fraction of such claims, so exercising jurisdiction here will not fundamentally alter the federal docket. As in *Grable*, the absence of a federal cause of action for Plaintiffs doesn't bespeak a congressional judgment that state courts should be deciding cases about global climate change; the federal common-law cause of action for public nuisance was taken away in 1970 because Congress was *narrowing* and *focusing* remedies, not *expanding* them.

CONCLUSION

Substantial federal questions are presented in this case *even as Plaintiffs have framed it*. In our view, as the joint remand opposition demonstrates, the federal interest goes beyond supplying choice-of-law rules for state-law causes of action governing global climate change. But, whether the Court recognizes that Plaintiffs' tort claims are actually federal, or accepts Plaintiffs' conceit that state law now applies of its own force to global climate change, the inevitable conclusion is that this Court has federal-question jurisdiction over these claims as pleaded. The remand motion should be denied.

40 *Cf. Ouellette*, 479 U.S. at 500 ("[T]he rule is settled that a district court sitting in diversity is competent to apply the law of a foreign State.").

By: ** */s/ Bryan Killian*

Bryan Killian (pro hac vice)
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Ave. NW
Washington, DC 20004
Telephone: (202) 373-6191
Email: bryan.killian@morganlewis.com

James J. Dragna (SBN 91492)
Yardena R. Zwang-Weissman (SBN 247111)
MORGAN, LEWIS & BOCKIUS LLP
300 South Grand Ave., 22nd Floor
Los Angeles, CA 90071-3132
Telephone: (213) 680-6436
Email: jim.dragna@morganlewis.com
Email: yardena.zwang-weissman@morganlewis.com

Attorneys for Defendant
ANADARKO PETROLEUM CORPORATION

** Pursuant to Civ. L.R. 5-1(i)(3), the electronic signatory has obtained approval from all other signatories

By: */s/ J. Scott Janoe*

Scott Janoe (pro hac vice)
BAKER BOTTS L.L.P.
910 Louisiana Street
Houston, TX 77002
Telephone: (713) 229-1553
Facsimile: (713) 229 7953
Email: scott.janoe@bakerbotts.com

Evan Young (pro hac vice)
BAKER BOTTS L.L.P.
98 San Jacinto Boulevard
Austin, TX 78701
Telephone: (512) 322-2506
Facsimile: (512) 322-8306
Email: evan.young@bakerbotts.com

Christopher J. Carr (SBN 184076)
Jonathan A. Shapiro (SBN 257199)
BAKER BOTTS L.L.P.
101 California Street
36th Floor, Suite 3600
San Francisco, CA 94111
Telephone: (415) 291-6200
Facsimile: (415) 291-6300
Email: chris.carr@bakerbotts.com
Email: jonathan.shapiro@bakerbotts.com

Megan Berge (pro hac vice)
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave, NW
Washington, DC 20004
Telephone: (202) 639-7700
Facsimile: (202) 639-1171
Email: megan.berge@bakerbotts.com

Attorneys for Defendants
HESS CORPORATION,
MARATHON OIL COMPANY,
MARATHON OIL CORPORATION,
REPSOL ENERGY NORTH AMERICA CORP., and
REPSOL TRADING USA CORP.