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28 UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA  
 SAN FRANCISCO DIVISION

THE COUNTY OF SANTA CRUZ,  
 individually and on behalf of THE PEOPLE  
 OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

CHEVRON CORP., et al,

Defendants.

First Filed Case: No. 3:18-cv-00450-VC  
 Related Case: No. 3:18-cv-00458-VC  
 Related Case: No. 3:18-cv-00732-VC

**DEFENDANTS' JOINT OPPOSITION TO  
 MOTION TO REMAND**

CASE NO. 18-CV-00450-VC

HEARING

DATE: MARCH 29, 2018  
 TIME: 10:00 AM  
 LOCATION: COURTROOM 4, 17<sup>TH</sup> FLOOR  
 THE HONORABLE VINCE CHHABRIA

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THE CITY OF SANTA CRUZ, a municipal corporation, individually and on behalf of THE PEOPLE OF THE STATE OF CALIFORNIA,  
  
Plaintiff,  
  
v.  
  
CHEVRON CORP., et al.,  
  
Defendants.

CASE NO. 18-CV-00458-VC

THE CITY OF RICHMOND, a municipal corporation, individually and on behalf of THE PEOPLE OF THE STATE OF CALIFORNIA,  
  
Plaintiff,  
  
v.  
  
CHEVRON CORP., et al.,  
  
Defendants.

CASE NO. 18-CV-00732-VC

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**TABLE OF CONTENTS**

- I.....INTRODUCTION ..... 1
- II. ....ARGUMENT ..... 1
  - A.....Plaintiffs’ Nuisance Claims Arise Under Federal Common Law Even If Congress Has “Displaced” Federal Common Law for Global Warming Claims ..... 3
  - B. ....By Seeking to Second-Guess and Undo Federal Regulations and Cost-Benefit Analyses, Plaintiffs’ Claims Raise Disputed, Substantial Federal Interests Under *Grable* ..... 8
    - 1..... California nuisance law would require a *national* cost-benefit analysis of Defendants’ nationwide conduct ..... 8
    - 2..... The close nexus to navigable waters further supports federal jurisdiction ..... 11
  - C.....Removal Is Warranted Under Multiple Jurisdiction-Granting Statutes and Doctrines ..... 15
- III.....CONCLUSION ..... 20

**TABLE OF AUTHORITIES**

Page(s)

**Cases**

*American Electric Power Co. v. Connecticut*,  
564 U.S. 410 (2011).....3, 4

*Amoco Prod. Co. v. Sea Robin Pipeline Co.*,  
844 F.2d 1202 (5th Cir. 1988).....16

*Ange v. Templer*,  
418 F. Supp. 2d 1169 (N.D. Cal. 2006) .....2

*ARCO Envtl. Remediation, L.L.C. v. Dep’t of Health & Envtl. Quality of Mont.*,  
213 F.3d 1108 (9th Cir. 2000).....2

*Bd. of Comm’rs of the Se. La. Flood Prot. Auth.-E v. Tenn. Gas Pipeline Co.*,  
850 F.3d 714 (5th Cir. 2017).....12

*California v. BP P.L.C., et al.*,  
No. 17-cv-6011, ECF No. 128 (N.D. Cal. Feb. 12, 2018) .....13

*California v. BP P.L.C., et al.*,  
No. 17-cv-6011, ECF No. 134 (N.D. Cal. Feb. 27, 2018) ..... *passim*

*California v. Gen. Motors Corp.*,  
2007 WL 2726871 (N.D. Cal. Sept. 17, 2007) .....4, 5

*City of Imperial Beach v. Chevron Corp., et al.*,  
3:17-cv-04934-VC .....1

*City of Milwaukee v. Illinois*,  
451 U.S. 304 (1981).....3

*Cnty. of San Mateo v. Chevron Corp., et al.*,  
3:17-cv-04929-VC, ECF No. 195 (N.D. Cal. Dec. 22, 2017).....15, 17, 18, 19

*Cnty. of San Mateo v. Chevron Corp., et al.*,  
3:17-cv-04929-VC, ECF No. 203 (N.D. Cal. Jan. 22, 2018)..... *passim*

*Cnty. of Santa Clara v. Astra USA, Inc.*,  
401 F. Supp. 2d 1022 (N.D. Cal. 2005) .....3

*Durham v. Lockheed Martin Corp.*,  
445 F.3d 1247 (9th Cir. 2006).....17

*EP Operating Ltd. P’ship v. Placid Oil Co.*,  
26 F.3d 563 (5th Cir. 1994).....15, 16

*Freeman v. Grain Processing Corp.*,  
848 N.W.2d 58 (Iowa 2014) .....10

*Goncalves By & Through Goncalves v. Rady Children’s Hosp. San Diego*,  
865 F.3d 1237 (9th Cir. 2017).....17

**TABLE OF AUTHORITIES**

Page(s)

**Cases**

1

2

3 *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*,

4 545 U.S. 308 (2005).....2, 8, 12

5 *Gully v. First Nat’l Bank in Meridian*,

6 299 U.S. 109 (1936).....8

7 *Hammond v. Phillips 66 Co.*,

8 2015 WL 630918 (S.D. Miss. Feb. 12, 2015).....16, 17

9 *Illinois v. City of Milwaukee*,

10 406 U.S. 91 (1972).....7

11 *Int’l Paper Co. v. Ouellette*,

12 479 U.S. 481 (1987).....6, 7

13 *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*,

14 513 U.S. 527 (1995).....19, 20

15 *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*,

16 754 F.2d 1223 (5th Cir. 1985).....16

17 *Martinez v. Pac. Bell*,

18 225 Cal. App. 3d 1557 (1990).....13

19 *Nat’l Farmers Union Ins. Cos. v. Crow Tribe of Indians*,

20 471 U.S. 845 (1985).....7

21 *Native Vill. of Kivalina v. ExxonMobil Corp.*,

22 696 F.3d 849 (9th Cir. 2012).....3, 4, 5

23 *New SD, Inc. v. Rockwell Int’l Corp.*,

24 79 F.3d 953 (9th Cir. 1996).....7, 8

25 *In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico,*

26 *on April 20, 2010*,

27 808 F. Supp. 2d 943 (E.D. La. 2011).....20

28 *Par. of Plaquemines v. Total Petrochemical & Ref. USA, Inc.*,

64 F. Supp. 3d 872 (E.D. La. 2014).....16

*Parlin v. DynCorp Intern., Inc.*,

579 F. Supp. 2d 629 (D. Del. 2008).....18

*In re Peabody Energy Corp.*,

No. 16-42529 (Bankr. E.D. Mo.).....19

*Plains Gas Sols., LLC v. Tennessee Gas Pipeline Co., LLC*,

46 F. Supp. 3d 701 (S.D. Tex. 2014).....16, 17

*Red Shield Ins. Co. v. Barnhill Marina & Boatyard, Inc.*,

2009 WL 1458022 (N.D. Cal. May 21, 2009).....20

**TABLE OF AUTHORITIES**

Page(s)

**Cases**

*Rocky Mountain Farmers Union v. Corey*,  
730 F.3d 1070 (9th Cir. 2013).....7

*San Diego Gas & Elec. Co. v. Super. Ct.*,  
13 Cal. 4th 893 (1996) .....9

*Savoie v. Huntington Ingalls, Inc.*,  
817 F.3d 457 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 339 (2016).....18

*Steel Co. v. Citizens for a Better Env’t*,  
523 U.S. 83 (1998).....4

*T.H. v. Novartis Pharm. Corp.*,  
4 Cal. 5th 145 (2017) .....10

*Taghadomi v. United States*,  
401 F.3d 1080 (9th Cir. 2005).....20

*Theriot v. Bay Drilling Corp.*,  
783 F.2d 527 (5th Cir. 1986).....20

*United Offshore Co. v. S. Deepwater Pipeline Co.*,  
899 F.2d 405 (5th Cir. 1990).....16

*In re Universal Life Church, Inc.*,  
128 F.3d 1294 (9th Cir. 1997).....19

*Wilson v. S. Cal. Edison Co.*,  
234 Cal. App. 4th 123 (2015) .....9

**Constitutional Provisions**

U.S. Const. art. III, § 2 .....19

**Statutes**

10 U.S.C. § 7422(c)(1)(B) .....11

28 U.S.C. § 1331 .....7, 18

28 U.S.C. § 1333 .....19

28 U.S.C. § 1334(b) .....15

28 U.S.C. § 1441 .....19, 20

28 U.S.C. § 1442 .....17, 18

28 U.S.C. § 1442(a)(1).....15, 18

28 U.S.C. § 1452(a) .....15

**TABLE OF AUTHORITIES**

Page(s)

**Statutes**

30 U.S.C. § 21a .....11

30 U.S.C. § 201(a)(3)(C) .....11

30 U.S.C. § 1201 .....11

33 U.S.C. § 403 .....12, 14

33 U.S.C. § 408(a) .....14

33 U.S.C. § 426i .....12

42 U.S.C. § 5801 .....11

42 U.S.C. § 7411(d) .....7

42 U.S.C. § 13384 .....11

43 U.S.C. § 1349(b) .....15

43 U.S.C. § 1349(b)(1) .....16

43 U.S.C. § 1802(1) .....11

46 U.S.C. § 30101(a) .....19

Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63 .....20

Rivers and Harbors Act of 1899, ch. 425, 30 Stat. 1121 .....12

Water Resource Development Act of 2007, § 4027(a)(1), Pub. L. 110-114 .....12

**Regulations**

30 C.F.R. § 550.120 .....11

33 C.F.R. § 320.4(a)(1) .....14

43 C.F.R. § 3162.1(a) .....11

**Other Authorities**

CACI 2022 Private Nuisance—Balancing-Test Factors—Seriousness of Harm and Public Benefit .....9

Engineering Circular 1105-2-186: Planning Guidance on the Incorporation of Sea Level Rise Possibilities in Feasibility Studies (Apr. 21, 1989) .....13

Engineer Technical Letter 1100-2-1, Procedures to Evaluate Sea Level Change: Impacts, Responses and Adaptation (June 30, 2014) .....13

Restatement (Second) of Torts § 826, cmt. c .....9

1  
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3  
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**TABLE OF AUTHORITIES**

Page(s)

**Other Authorities**

Restatement (Second) of Torts § 826, cmt. f .....9

Restatement (Second) of Torts § 829A .....9

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R.H. Fallon, Jr. et al., *Hart & Wechsler’s The Federal Courts & the Federal System*  
832 (7th ed. 2015) .....8

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*Final Integrated Document* (Sept. 2015) .....13



1 **I. INTRODUCTION**

2 Plaintiffs have moved to remand these three cases to state court and have incorporated by ref-  
3 erence the plaintiffs' briefing in *County of San Mateo v. Chevron Corp., et al.* (3:17-cv-04929-VC)  
4 ("*San Mateo*"), *City of Imperial Beach v. Chevron Corp., et al.* (3:17-cv-04934-VC) ("*Imperial*  
5 *Beach*"), and *County of Marin v. Chevron Corp., et al.* (3:17-cv-04935-VC) ("*Marin*"). See *County*  
6 *of Santa Cruz v. Chevron Corp., et al.* (3:18-cv-00450) ("*County of Santa Cruz*"), ECF No. 68 at 1.  
7 Defendants likewise incorporate their briefing opposing remand in those three related cases. See *San*  
8 *Mateo*, ECF. Nos. 194, 195; *Imperial Beach*, ECF Nos. 185, 186; *Marin*, ECF Nos. 176, 177.

9 In addition, Defendants submit this supplemental brief to address specific issues raised during  
10 the February 15, 2018, hearing before this Court on the remand motions in *San Mateo*, *Imperial*  
11 *Beach*, and *Marin*. See Joint Stipulation and [Proposed] Order Regarding Briefing Schedule, *County*  
12 *of Santa Cruz*, ECF 81 at 4.

13 **II. ARGUMENT**

14 First, Plaintiffs' nuisance claims are "necessarily federal in character" because Supreme Court  
15 and Ninth Circuit precedent make plain that they are governed by federal common law, which by ne-  
16 cessity means that they are not "appropriate" subjects for state law. As Judge Alsup ruled this week  
17 in two nearly identical cases, "nuisance claims—which address the national and international geo-  
18 physical phenomenon of global warming—are necessarily governed by federal common law." *Calif-*  
19 *ornia v. BP P.L.C., et al.*, No. 17-cv-6011, ECF No. 134 at 3 (N.D. Cal. Feb. 27, 2018) ("*BP*").  
20 Judge Alsup explained: "If ever a problem cried out for a uniform and comprehensive solution, it is  
21 the geophysical problem described by the complaints, a problem centuries in the making (and study-  
22 ing) with causes ranging from volcanoes, to wildfires, to deforestation[,] to stimulation of other  
23 greenhouse gases—and, most pertinent here, to the combustion of fossil fuels." *Id.* at 4–5. He fur-  
24 ther noted: "Taking the complaints at face value, the scope of the worldwide predicament demands  
25 the most comprehensive view available, which in our American court system means our federal  
26 courts and our federal common law. A patchwork of fifty different answers to the same fundamental  
27 global issue would be unworkable." *Id.* at 5. And even if Congress has displaced the federal com-  
28 mon law governing these claims, that does not somehow "revive"—or more accurately, create—a

1 state common law that never applied in the first place, or otherwise deprive Defendants of federal ju-  
 2 risdiction.<sup>1</sup>

3 Second, Plaintiffs' claims depend on the resolution of substantial federal issues under *Grable*  
 4 & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing, 545 U.S. 308 (2005), because  
 5 their national and indeed global scope require analysis of nationwide costs and benefits that federal  
 6 statutes and regulations delegate to expert federal agencies. Plaintiffs' claims all require a determina-  
 7 tion whether Defendants' nationwide (and worldwide) conduct was "reasonable"—an unanswerable  
 8 question absent reference to numerous federal laws, policies, and regulations that address the costs  
 9 and benefits of that conduct. In addition, Plaintiffs' claims depend on the resolution of substantial,  
 10 disputed federal questions related to rising levels of "navigable waters of the United States." As  
 11 Judge Alsup noted, federally regulated navigable waters are "the very instrumentality of plaintiffs'  
 12 alleged injury." *BP*, ECF No. 134 at 8. For these reasons alone, this Court should deny Plaintiffs'  
 13 remand motion.<sup>2</sup>

14 Finally, several federal statutes independently grant jurisdiction over Plaintiffs' tort claims.  
 15 Although these statutes were not discussed in detail at the February 15 hearing, each presents an in-  
 16 dependent and sufficient ground justifying removal of the three cases at issue. In particular, the  
 17 Outer Continental Shelf Lands Act ("OCSLA"), federal officer removal statute, and bankruptcy re-  
 18 moval statute—as more fully discussed below—each independently confer jurisdiction upon this  
 19 Court. To properly remove a case to federal court, there need be only a single valid ground for re-  
 20 moval of a single asserted claim. *See Ange v. Templer*, 418 F. Supp. 2d 1169, 1172 (N.D. Cal. 2006);

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21  
 22 <sup>1</sup> For the purposes of his order, Judge Alsup "*presume[d]* that when congressional action displaces  
 23 federal common law, state law becomes available to the extent it is not preempted by statute." *BP*, ECF No. 134 at 6 (emphasis added).

24 <sup>2</sup> At the February 15 hearing, some of the Court's comments appeared to indicate that it might be  
 25 analyzing Defendants' federal common law and *Grable* arguments as species of "complete  
 26 preemption." *See, e.g.*, Hr'g Tr. 4:11-5:5. But these arguments are separate and independent  
 27 grounds for removal. As the Ninth Circuit has noted, there are at least three, disjunctive grounds  
 28 for federal jurisdiction: "(1) where federal law completely preempts state law; (2) where the claim  
 is necessarily federal in character; *or* (3) where the right to relief depends on the resolution of a  
 substantial, disputed federal question." *ARCO Env'tl. Remediation, L.L.C. v. Dep't of Health &*  
*Env'tl. Quality of Mont.*, 213 F.3d 1108, 1114 (9th Cir. 2000) (citations omitted) (emphasis  
 added). Accordingly, even if this Court were to conclude that federal law did not "completely  
 preempt" Plaintiffs' claims, federal jurisdiction nonetheless exists.

1 *Cnty. of Santa Clara v. Astra USA, Inc.*, 401 F. Supp. 2d 1022, 1025 (N.D. Cal. 2005). Thus, *any one*  
 2 of the bases for federal jurisdiction will suffice to defeat Plaintiffs’ motion.

3 **A. Plaintiffs’ Nuisance Claims Arise Under Federal Common Law Even If Congress**  
 4 **Has “Displaced” Federal Common Law for Global Warming Claims**

5 At the February 15 hearing, this Court asked how Plaintiffs’ claims could arise under federal  
 6 law even if federal common law “has been displaced out of existence” by the Clean Air Act. Hr’g Tr.  
 7 4:23–24; *see also id.* at 9:5–6 (“[T]he Court[] actually used the word ‘existence,’ right?”). As an ini-  
 8 tial matter, in *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011) (“*AEP*”), the Su-  
 9 preme Court did not state that federal common law had been displaced out of “existence.” Rather,  
 10 the Court held that “the Clean Air Act and the EPA actions it authorizes displace any federal common  
 11 law *right to seek abatement*” of greenhouse gas emissions that allegedly cause global warming. *Id.* at  
 12 424 (emphasis added). As the Court explained, because Congress removed any federal common law  
 13 right to abate global climate change, “federal judges may [not] set limits on greenhouse gas emissions  
 14 in the face of a law empowering EPA to set the same limits.” *Id.* at 429.<sup>3</sup> That holding is consistent  
 15 with the axiom that “[j]udicial power can afford no remedy unless a right that is subject to that power  
 16 is present.” *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 857 (9th Cir. 2012). In short,  
 17 to say that federal common law has been “displaced” is simply to say that there is no longer any right  
 18 to a judicial *remedy* under federal common law. *See id.* at 856 (“[W]hen federal statutes directly an-  
 19 swer the federal question, federal common law does not provide a remedy because legislative action  
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22 <sup>3</sup> The Court held that the federal common law remedy had been displaced because the Clean Air  
 23 “Act itself . . . provides a means to seek limits on emissions of carbon dioxide from domestic  
 24 power plants—the same relief the plaintiffs seek by invoking federal common law.” *AEP*, 564  
 25 U.S. at 425. The Court also stated that it was “altogether fitting that Congress designated an ex-  
 26 pert agency, here EPA, as best suited to serve as primary regulator of greenhouse gas emissions,”  
 27 and that EPA “is surely better equipped to do the job than individual district judges issuing ad  
 28 hoc, case-by-case injunctions.” *Id.* at 428. The same rationale applies equally to state courts. In-  
 deed, the “judgments the plaintiffs would commit to federal judges [or here, state judges,] in suits  
 that could be filed in any federal district court [or here, any state court], cannot be reconciled with  
 the decisionmaking scheme Congress enacted.” *Id.* at 429. These same considerations confirm  
 the inescapably federal nature of *any* claim that would purport to rely on such judgments, and the  
 displacement of federal common law thus cannot transform uniquely federal interests into state-  
 law claims to be adjudicated in state courts. *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 n.7  
 (1981) (“[I]f federal common law exists, it is because state law cannot be used”).

1 has displaced the common law.”); *id.* at 857 (“[D]isplacement of a federal common law right of ac-  
2 tion means displacement of remedies.”).

3 But the absence of a valid cause of action under federal common law neither affects subject-  
4 matter jurisdiction nor alters the federal character of the Plaintiffs’ claims. *See Steel Co. v. Citizens*  
5 *for a Better Env’t*, 523 U.S. 83, 89 (1998) (“It is firmly established in our cases that the absence of a  
6 valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction . . .”).  
7 Neither *AEP* nor *Kivalina* suggested that the Clean Air Act converted plaintiffs’ federal common law  
8 claims into state law claims. On the contrary, the effect of Congress enacting the Clean Air Act was  
9 to refine and focus the available remedies for interstate and global environmental problems. Thus,  
10 the Court in *AEP* still took it as given that, because of the unavoidably national and transnational na-  
11 ture of the phenomena at issue, the subject of global warming was “meet for federal law governance,”  
12 and that “borrowing the law of a particular State” to address alleged harms from global warming  
13 “would be inappropriate.” 564 U.S. at 422. Similarly, the Ninth Circuit held in *Kivalina* that the  
14 plaintiff’s global warming-based tort claims were the sort of “transboundary pollution suit[.]” tradi-  
15 tionally governed by federal common law. 696 F.3d at 855. Far from holding that the Clean Air Act  
16 obliterated federal common law so as to deprive them of jurisdiction, both the Supreme Court in *AEP*  
17 and the Ninth Circuit in *Kivalina* held only that the plaintiffs’ necessarily federal claims were invalid.

18 *AEP* and *Kivalina* thus direct a two-step analysis to determine *first* whether, given the nature  
19 of the acts alleged, federal law governs the claims, and *second* whether Plaintiffs have stated claims  
20 upon which relief may be granted. *See AEP*, 564 U.S. at 422; *Kivalina*, 696 F.3d at 855. This is pre-  
21 cisely the approach the Ninth Circuit followed in *Kivalina*. In Section II.A of the opinion, it ad-  
22 dressed the “threshold question[.] of whether [the plaintiffs’ nuisance theory was] viable under federal  
23 common law in the first instance.” *Id.* After answering that question in the affirmative, it determined  
24 in Sections II.B and II.C that dismissal was required because a federal statute had displaced the rem-  
25 edy Plaintiffs sought. *Id.* at 856–58; *see also California v. Gen. Motors Corp.*, 2007 WL 2726871, at  
26 \*16 (N.D. Cal. Sept. 17, 2007) (explaining that if the case were justiciable the first inquiry would be  
27 “whether there exists a federal common law claim for nuisance that would authorize Plaintiff’s action  
28 for damages against the Defendant automakers for creating and contributing to global warming,” and

1 that if “such a common law claim exists, the next step in the inquiry would be to determine whether  
2 the available statutory guidelines speak sufficiently to the issue so as to displace the common law  
3 claim”).

4 Plaintiffs’ motion to remand implicates the first (jurisdictional) step of the analysis, not the  
5 second. And, as Defendants have explained, Plaintiffs’ claims arise under federal common law be-  
6 cause disputes about global climate change are inherently federal in nature, and Plaintiffs ask the  
7 Court to assess the reasonableness of Defendants’ worldwide fossil fuel production insofar as those  
8 activities have led to greenhouse gas emissions by billions of third parties around the world, which, in  
9 turn, have allegedly increased global temperatures and contributed to rising seas that have purport-  
10 edly harmed Plaintiffs. *See San Mateo*, ECF No. 195 at 7–14; *see also Kivalina*, 696 F.3d at 855  
11 (“[F]ederal common law includes the general subject of environmental law and specifically includes  
12 ambient or interstate air and water pollution.”).

13 The “step two” question—whether Plaintiffs’ federal common law claims are valid or have  
14 been displaced—should be reserved until consideration of the Defendants’ motion to dismiss. Alt-  
15 hough the Court stated at the February 15 hearing that “there’s not a federal common law claim,”  
16 Hr’g Tr. 6:19–20, Plaintiffs have not expressly conceded that their claims are displaced. Rather,  
17 Plaintiffs have conceded only that the Clean Air Act displaces “federal common law claims *regard-*  
18 *ing greenhouse emissions.*” *San Mateo*, ECF No. 203 at 2–3, 6. At the same time, Plaintiffs assert  
19 that this case is not about emissions but about fossil fuel production and promotion, which they argue  
20 takes it outside of *AEP* and *Kivalina*. *See* Hr’g Tr. 24:23–24 (“These are not cases that seek to regu-  
21 late emissions, as did *Kivalina* and *AEP*.”); *id.* 6:22–24 (“I think the plaintiffs will probably argue  
22 that their claim is somehow different than an *AEP* and *Kivalina* because they’re making a product lia-  
23 bility claim.”).<sup>4</sup> To the extent Plaintiffs are correct that production and promotion are somehow dif-  
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28 <sup>4</sup> Defendants intend to argue, in their motions to dismiss in this case and in *BP*, that Plaintiffs’  
claims necessarily implicate greenhouse gas emissions and thus have been displaced by the Clean  
Air Act. At the *BP* remand hearing, it was the *plaintiffs* arguing that any federal common-law  
claims were displaced and that state law therefore governed. *See BP*, Hr’g Tr. 16:24-17:2. Judge

1 ferent than direct emissions for purposes of *AEP* and *Kivalina*'s displacement analysis, then the argu-  
 2 ment for application of federal common law to this interstate and transnational pollution case be-  
 3 comes even clearer. *See BP*, ECF No. 134 at 6–7 (denying remand in global warming case without  
 4 determining whether the complaint stated viable claim under federal common law). Plaintiffs cannot  
 5 have it both ways. But this issue has not yet been briefed and need not be decided on a motion to re-  
 6 mand.<sup>5</sup>

7 Moreover, as pleaded, Plaintiffs' claims cannot arise under state law because, within the  
 8 congressional scheme to address sources of interstate pollution, state common law can be applied, if  
 9 at all, to limit a defendant's emissions *only within that source state*. As the Supreme Court explained  
 10 in the Clean Water Act context, Congress's "pervasive regulation," combined with "the fact that the  
 11 control of interstate pollution is primarily a matter of federal law," make "clear that the only state  
 12 suits that remain available are those specifically preserved by the Act." *Int'l Paper Co. v. Ouellette*,  
 13 479 U.S. 481, 492 (1987). "After examining the CWA as a whole, its purposes and its history," the  
 14 Court was "convinced that if affected States were allowed to impose separate discharge standards on  
 15 a single point source, the inevitable result would be a serious interference with the achievement of the  
 16 'full purposes and objectives of Congress.'" *Id.* at 493. The Court thus concluded that the CWA  
 17 "precludes a court from applying the law of an affected State against an out-of-state source." *Id.* at  
 18 494; *see also id.* at 496 (rejecting application of state law to out-of-state sources because it would  
 19 result in "a variety of" "'vague' and 'indeterminate'" state common law "nuisance standards" and  
 20 "[t]he application of numerous States' laws would only exacerbate the vagueness and resulting  
 21 uncertainty"). The Clean Air Act, which likewise "dominate[s] the field of pollution regulation," *id.*

22  
 23 \_\_\_\_\_  
 24 Alsup rejected the plaintiffs' argument, concluding that the Clean Air Act did not displace nui-  
 25 sance claims against producers who "put fossil fuels into the flow of international commerce."  
 26 *BP*, ECF No. 134 at 7. He reasoned that some of the "fuel produced by defendants" is consumed  
 27 overseas, and that "these foreign emissions are out of the EPA and Clean Air Act's reach." *Id.*  
 28 The displacement issue has not been briefed yet in this case, and the Court need not decide on the  
 motion to remand whether federal common law has been displaced by the Clean Air Act or any  
 other federal statute. But if this Court believes that federal jurisdiction turns on the displacement  
 question, it should follow Judge Alsup's ruling and retain jurisdiction.

<sup>5</sup> In any event, the question whether Plaintiffs' federal common law claims have been displaced is a  
 substantial, disputed issue of federal law that gives rise to federal jurisdiction under *Grable*.



1 at 492, similarly preserves a narrow role for state common law remedies. Significantly, the Clean Air  
 2 Act does *not* allow state courts to balance the costs and benefits of *global* emissions produced by out-  
 3 of-state sources. Rather, the Act “entrusts such complex balancing to EPA in the first instance, in  
 4 combination with state regulators.” *AEP*, 564 U.S. at 427. Accordingly, it would be “inappropriate”  
 5 to apply California law to Defendants’ out-of-state conduct, as Plaintiffs seek to do. *Id.* at 422. To  
 6 the extent that any global warming-based tort remedy exists, it must be grounded in *federal* law.<sup>6</sup>

7 For this reason, Defendants respectfully disagree with the Court’s statement that this case pre-  
 8 sents a “straight preemption question.” Hr’g Tr. 9:16. Because state law does not, of its own force,  
 9 apply to global problems, the issue of preemption of state laws need not be reached now. Nor are the  
 10 circumstances here comparable to the hypothetical situation, raised by the Court, where federal legis-  
 11 lation displacing federal common law expressly creates “a role for state law in the . . . administration  
 12 of this complex regulatory scheme.” *Id.* at 14:25–15:1. To be sure, states can participate in regulat-  
 13 ing of greenhouse gas emissions through the Clean Air Act, which grants power to adopt State Plans  
 14 in accordance with federally-issued guidelines. 42 U.S.C. § 7411(d). And Section 116’s savings  
 15 clause preserves *otherwise existing* state authority. 42 U.S.C. § 7416. But the Clean Air Act does not  
 16 create or authorize state common law claims addressing alleged effects of global climate change.

17 In short, regardless of whether Plaintiffs have pleaded all of the elements of a viable claim—  
 18 *i.e.*, a claim for which they have a right to a judicial remedy—their claims are nonetheless “founded  
 19 upon federal common law,” and thus give rise to federal question jurisdiction under 28 U.S.C.  
 20 § 1331. *Nat’l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 850 (1985); *see Illi-*  
 21 *nois v. City of Milwaukee*, 406 U.S. 91, 99 (1972) (federal common law claims “aris[e] under the  
 22 ‘laws’ of the United States within the meaning of § 1331(a)”); *New SD, Inc. v. Rockwell Int’l Corp.*,

23  
 24  
 25 <sup>6</sup> At the February 15 hearing, Plaintiffs argued that global warming is not “uniquely federal.” Hr’g  
 26 Tr. 26:19–27:2 (citing *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013)).  
 27 But the relevant question is not whether California has an interest in preventing harm from global  
 28 warming—it plainly does—but whether a lawsuit targeting interstate pollution implicates  
 “uniquely federal issues.” The Ninth Circuit did not address that question in *Rocky Mountain*  
*Farmers* because that case did not involve interstate pollution. Rather, the issue in that case was  
 whether California’s Low Carbon Fuel Standard—which applies to “transportation fuels that are  
*burned in California*”—ran afoul of the Commerce Clause or the Clean Air Act. 730 F.3d at  
 1077, 1080 (emphasis added).

1 79 F.3d 953, 954–55 (9th Cir. 1996) (“When federal law applies, . . . it follows that the question  
2 arises under federal law, and federal question jurisdiction exists.”).

3 **B. By Seeking to Second-Guess and Undo Federal Regulations and Cost-Benefit**  
4 **Analyses, Plaintiffs’ Claims Raise Disputed, Substantial Federal Interests Under**  
5 ***Grable***

6 In *Grable*, the Supreme Court called for a ““common-sense accommodation of judgment to  
7 the kaleidoscopic situations’ that present a federal issue” and thus “justify resort to the experience,  
8 solicitude, and hope of uniformity that a federal forum offers on federal issues.” 545 U.S. at 312–13  
9 (brackets omitted) (quoting *Gully v. First Nat’l Bank in Meridian*, 299 U.S. 109, 117 (1936)). If  
10 there ever were a set of cases where a federal court should exercise its broad discretion under *Grable*  
11 “to tailor jurisdiction to the practical needs of the particular situation,” these international global  
12 warming cases are it. See R.H. Fallon, Jr. et al., *Hart & Wechsler’s The Federal Courts & the Fed-*  
13 *eral System* 832 (7th ed. 2015). As this Court stated at the February 15 hearing, “This certainly feels  
14 like a national issue” and it is not “a great idea or the right approach for all these different localities to  
15 be filing state law actions in various places against the same defendants for basically the same thing.”  
16 Hr’g Tr. 4:6–10.

17 The issues raised in these cases *are* national, and they should be heard in a federal forum be-  
18 cause Plaintiffs’ claims necessarily raise multiple, disputed federal law issues including the impact of  
19 these claims on foreign affairs, the balancing of costs and benefits on a national and international  
20 scale in assessing the reasonableness of Defendants’ conduct, and validity of numerous federal for-  
21 eign relations and regulatory decisions, among others. See *San Mateo*, ECF No. 195 at 14–28; see  
22 also *San Mateo*, ECF No. 194 (supplemental brief offering additional *Grable* arguments). Indeed,  
23 Plaintiffs’ public nuisance and product liability claims will require cost-benefit analyses.

24 **1. California nuisance law would require a national cost-benefit analysis of De-**  
25 **fendants’ nationwide conduct**

26 Plaintiffs do not (and cannot) dispute that the federal government has analyzed, and continues  
27 to analyze, the relative costs and benefits of the production and use of fossil fuels. A host of federal  
28 statutes and regulations direct federal agencies to maximize production of fossil fuels while balancing  
that production against environmental protection, including protection from greenhouse gas impacts.



1 See *San Mateo*, ECF No. 195 at 17–18 & n.8; Hr’g Tr. 26:4–5 (“The regulatory cost benefits analysis  
 2 takes on society as a whole.”). This Court questioned at the February 15 hearing whether such cost-  
 3 benefit analysis is required under California law. *Id.* at 19:4–7. The answer is clearly yes: balancing  
 4 is absolutely required as a matter of California law, as Plaintiffs conceded. *See id.* at 26:1–5 (“The  
 5 balancing test that is applied in a tort case focuses on the costs and benefits of the product . . .”). In-  
 6 deed, the California Supreme Court has expressly held that, for nuisance actions, “[t]he primary test  
 7 for determining whether the invasion is unreasonable is whether the gravity of the harm outweighs  
 8 the social utility of the defendant’s conduct.” *San Diego Gas & Elec. Co. v. Super. Ct.*, 13 Cal. 4th  
 9 893, 938 (1996). The inquiry is broad, “looking at the *whole* situation” “in light of *all* the circum-  
 10 stances.” *Id.* at 938–39 (emphases added). No California court has ever applied an “alternate” test,  
 11 nor has any court found any alleged harm to be so severe that it did not need to be weighed against  
 12 the utility of a defendant’s conduct in making a determination of reasonableness. Moreover, as De-  
 13 fendants explained at the February 15 hearing, *Wilson v. Southern California Edison Co.*, 234 Cal.  
 14 App. 4th 123 (2015)—a case cited by another group of California plaintiffs raising similar global  
 15 warming-based claims in the Northern District of California—is a private nuisance case in which the  
 16 Court of Appeal required the trial court to adopt jury instructions that balanced the gravity of the  
 17 harm *against the utility of the defendant’s conduct*. Hr’g Tr. 28:4–13; *see* 234 Cal. App. 4th at 163–  
 18 64. California’s standard Civil Jury Instructions expressly cite *Wilson* as *requiring* courts to give a  
 19 balancing instruction to juries in nuisance cases. *See* CACI 2022 Private Nuisance—Balancing-Test  
 20 Factors—Seriousness of Harm and Public Benefit.<sup>7</sup>

21  
 22 <sup>7</sup> Likewise, under the Restatement, some form of balancing is *always* required in nuisance cases.  
 23 The Restatement asserts that, in some cases involving intentional conduct causing severe harms,  
 24 the balancing inquiry includes “determining whether the conduct of causing the harm without  
 25 paying for it is unreasonable.” Restatement (Second) of Torts § 826, cmt. *f*; *see also id.* § 829A  
 26 (inquiry in some cases considers whether the “harm resulting from the invasion is severe and  
 27 greater than the other *should* be required to bear without compensation” (emphasis added)). The  
 28 Restatement’s approach to such cases merely refocuses the balancing inquiry, and it does not  
 eliminate the requirement *always* to consider competing considerations before determining  
 whether compensation should be made. *See id.* § 829A, cmt. *a* (“[I]n determining whether the  
 gravity of the interference with the public right outweighs the utility of the actor’s conduct (see  
 § 826, Comment *a*), the fact that the harm resulting from the interference is severe and greater  
 than the other *should* be required to bear without compensation will normally be sufficient to  
 make the interference *unreasonable*.” (emphasis added)); *see generally id.* § 826, cmt. *c* (in all

1           The broad scope of Plaintiffs’ nuisance claims—which are expressly based on Defendants’  
 2 alleged national and worldwide activities—would require the court to balance *nationwide* costs  
 3 against *nationwide* benefits.<sup>8</sup> Plaintiffs allege, for example, that “[t]he seriousness of anthropogenic  
 4 global warming impacts including *inter alia* rising sea levels, more frequent and extreme droughts,  
 5 more frequent and extreme precipitation events, more frequent and extreme heat waves, and more  
 6 frequent and extreme wildfires, and the associated consequences of those physical and environmental  
 7 changes, is extremely grave, and outweighs the social utility of Defendants’ conduct.” *County of*  
 8 *Santa Cruz*, Compl. ¶ 260. They further allege that “the social benefit of the purpose of placing fossil  
 9 fuels into the stream of commerce, if any, is outweighed by the availability of other sources of energy  
 10 that could have been placed into the stream of commerce that would not have caused sea level rise,  
 11 more frequent and extreme droughts, more frequent and extreme precipitation events, more frequent  
 12 and extreme heat waves, and more frequent and extreme wildfires, and the associated consequences  
 13 of those physical and environmental changes.” *Id.* ¶ 260(f). There is no support in the case law for  
 14 Plaintiffs’ contention that a court adjudicating an interstate pollution case targeting out-of-state con-  
 15 duct may focus narrowly on harms and benefits “in a site specific manner.” Hr’g Tr. 26:1–3. The  
 16 single—non-California—case that Plaintiffs mentioned at the hearing, *Freeman v. Grain Processing*  
 17 *Corp.*, 848 N.W.2d 58 (Iowa 2014), held only that the Clean Air Act did not preempt a state common  
 18 law nuisance claim against a local corn wet milling facility that was emitting noxious odors that in-  
 19 vaded the plaintiffs’ land and diminished their enjoyment of their property. *Id.* at 63, 69. In con-  
 20 trasting the Clean Air Act with state nuisance law, the court noted that “the common law focuses on  
 21 special harms to property owners *caused by pollution at a specific location.*” *Id.* at 69 (emphasis  
 22 added). But Plaintiffs here have not alleged pollution arising from any “specific location.” Rather,  
 23

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24           nuisance cases, “[c]onsideration must be given not only to the interests of the person harmed but  
 25 also for the interests of the actor and to the interests of the community as a whole”).

26           <sup>8</sup> Although the cost-benefit analysis required for Plaintiffs’ nuisance claims is sufficient to show  
 27 the substantial federal interests raised in this action, Plaintiffs’ products liability claims also ap-  
 28 pear to require cost-benefit analysis. In such actions, California law “will not recognize a duty of  
 care even as to foreseeable injuries where the social utility of the activity concerned is so great,  
 and avoidance of the injuries so burdensome to society, as to outweigh the compensatory and  
 cost-internalization values of negligence liability.” *T.H. v. Novartis Pharm. Corp.*, 4 Cal. 5th  
 145, 168 (2017).

1 they allege that Defendants’ worldwide conduct has contributed to changes in the global atmosphere,  
 2 which has resulted in global warming, which has caused sea levels to rise. There is thus no way for a  
 3 court to decide that Defendants’ conduct is unreasonable without balancing the nationwide costs im-  
 4 posed by fossil fuel production with the nationwide benefits of such production.

5 For a state court to undertake such a nationwide balancing would necessarily require resolu-  
 6 tion of federal issues because the court must consider the numerous federal statutes and regulations  
 7 promoting and otherwise addressing fossil fuel production and usage and balancing alleged costs.<sup>9</sup>  
 8 Indeed, the balancing of costs and benefits Plaintiffs ask the court to undertake is indistinguishable  
 9 from the balancing conducted by the Secretary of Energy, who is directed to “assess[] . . . alternative  
 10 policy mechanisms for reducing the generation of greenhouse gases. Such assessment shall include a  
 11 short-run and long-run analysis of the social, economic, energy, environmental, competitive, and ag-  
 12 ricultural costs and benefits, including costs and benefits for jobs and competition, and the practical-  
 13 ity” of various “mechanisms” for reducing greenhouse gases. 42 U.S.C. § 13384. Thus, to find De-  
 14 fendants liable, the court would necessarily have to determine that every federal agency that has con-  
 15 cluded that benefits of fossil fuel production outweigh the harms was wrong. These and other federal  
 16 issues are necessarily embedded within the global warming-based tort claims Plaintiffs allege here.

## 17 **2. The close nexus to navigable waters further supports federal jurisdiction**

18 As Judge Alsup recently observed, “the proprietary [sic] of federal common law jurisdiction”  
 19 is “also demonstrate[d]” by the fact that “the very instrumentality of plaintiffs’ alleged injury — the  
 20 flooding of coastal lands — is, by definition, the navigable waters of the United States.” *See BP*,

21  
 22 <sup>9</sup> *See, e.g.*, 43 U.S.C. § 1802(1) (promoting the “expedited exploration and development of the  
 23 Outer Continental Shelf in order to achieve national economic and energy policy goals [and] as-  
 24 sure national security”); 10 U.S.C. § 7422(c)(1)(B); 30 U.S.C. § 201(a)(3)(C). Consistent with  
 25 these statutory objectives, the Bureau of Land Management requires federal oil and gas lessees to  
 26 drill “in a manner which . . . results in maximum ultimate economic recovery of oil and gas.” 43  
 27 C.F.R. § 3162.1(a); *see also* 30 C.F.R. § 550.120 (similar for offshore oil and gas leases). Con-  
 28 gress has repeatedly explained that its laws are informed by this balance. *E.g.*, 42 U.S.C. § 5801  
 (Congressional purpose to “develop, and increase the efficiency and reliability of use of, all en-  
 ergy sources” while protecting “environmental quality”); 30 U.S.C. § 21a (Congressional purpose  
 to encourage “economic development of domestic mineral resources” balanced with “environ-  
 mental needs”); 30 U.S.C. § 1201 (coal mining operations are “essential to the national interest”  
 but must be balanced by “cooperative effort[s] . . . to prevent or mitigate adverse environmental  
 effects”).

1 ECF No. 134 at 8. Plaintiffs’ claims “necessarily implicate an area quintessentially within the prov-  
 2 ince of the federal courts . . .”, *id.*, and raise substantial, federal questions under *Grable* because they  
 3 are closely connected to the navigable waters of the United States. And they amount, moreover, to a  
 4 “collateral attack” on the comprehensive regulatory scheme Congress established for the protection  
 5 and preservation of the navigable waters. *See Bd. of Comm’rs of the Se. La. Flood Prot. Auth.-E v.*  
 6 *Tenn. Gas Pipeline Co.*, 850 F.3d 714, 724 (5th Cir. 2017).<sup>10</sup>

7 Congress has given the Army Corps of Engineers exclusive jurisdiction over construction and  
 8 dredging activities in navigable waters, 33 U.S.C. § 403, and numerous federal statutes authorize the  
 9 Corps to regulate navigable waters. Notably, the Rivers and Harbors Act (“RHA”) authorizes the  
 10 Corps to (among other things) preserve navigation by regulating construction, dredge, and fill activi-  
 11 ties in the navigable waters, *id.* §§ 401–413, and “to investigate, study, plan, and implement structural  
 12 and nonstructural measures for the prevention or mitigation of shore damages.” 33 U.S.C. § 426i.

13 Congress, through the RHA and other statutes and appropriations, has charged the Corps with  
 14 authority and responsibility to undertake civil works activities to protect the navigable waters, includ-  
 15 ing flood risk management, navigation, recreation, infrastructure, environmental stewardship, and  
 16 emergency response. Congress has also expressly authorized the Corps to address climate change  
 17 effects in California, instructing it to “conduct a study of the feasibility of carrying out a project for,”  
 18 among other things, “flood damage reduction along the South San Francisco Bay shoreline, Califor-  
 19 nia.” Water Resource Development Act of 2007, § 4027(a)(1), Pub. L. 110-114. Indeed, many of the  
 20 coastal armoring, levee, erosion control, and other projects to protect against sea level rise in Plain-  
 21 tiffs’ locales were undertaken under Corps oversight, including authorizations issued by the Corps

22  
 23  
 24  
 25 <sup>10</sup> As Judge Alsup found, “[t]his issue was not waived, as defendants timely invoked federal com-  
 26 mon law as a grounds for removal.” *BP*, ECF No. 134 at 8. Moreover, here Defendant Marathon  
 27 Petroleum Corporation (“MPC”), a signatory to this brief, timely filed, within 30 days of being  
 28 served, an Additional Notice of Removal (*County of Santa Cruz*, ECF No. 90) that expressly  
 elaborated on the navigable waters ground, as well as the admiralty jurisdiction ground discussed  
 in greater detail *infra*. To the extent necessary, Defendants consent to MPC’s additional Notice  
 of Removal on all grounds asserted therein (and again preserving all defenses).

1 under the RHA during the very decades when Defendants’ allegedly injurious conduct took place.<sup>11</sup>  
 2 Plaintiffs’ claims require the Court to evaluate the exercise of federal authority over many decades as  
 3 the claimed injuries attributable to rising seas occurred despite the existence of a comprehensive fed-  
 4 eral regulatory scheme covering the very waters at issue.

5 Moreover, the Corps’ active federal involvement in the precise issues on which Plaintiffs pur-  
 6 port to base their claims underscores the federal regulations and policies the Court will need to evalu-  
 7 ate in considering Plaintiffs’ assertions regarding present and future injury, including causation and  
 8 whether Plaintiffs’ requested remedies conflict with federal action or are necessary in light of such  
 9 action.<sup>12</sup> To succeed on their public nuisance claim, Plaintiffs will be required to prove causation.  
 10 *See Martinez v. Pac. Bell*, 225 Cal. App. 3d 1557, 1565 (1990). A necessary and critical element of  
 11 Plaintiffs’ theory of causation is the rising sea levels in the areas alleged to be impacted.<sup>13</sup> The atten-  
 12 uated chain of causation contemplated by Plaintiffs’ Complaints is as follows: (1) Defendants ex-  
 13 tract, manufacture, deliver, market, and sell fossil fuels (*e.g.*, Compl. ¶ 2); (2) combustion of those  
 14 fuels around the globe causes emissions of greenhouse gases (*e.g.*, *id.* ¶ 53); (3) accumulated green-  
 15 house gases trap atmospheric heat and increase global temperatures (*e.g.*, ¶¶ 52, 54); (4) increased  
 16 temperatures cause thermal expansion of “navigable waters” and the melting of land-based ice therein  
 17 (*e.g.*, *id.* ¶ 58); (5) such phenomena cause accelerated rise of “navigable waters” (*e.g.*, *id.*); (6) current

18  
 19 <sup>11</sup> The Corps has considered sea-level change in its planning activities since 1986. *See, e.g.*, Engi-  
 20 neering Circular 1105-2-186: Planning Guidance on the Incorporation of Sea Level Rise Possibil-  
 ities in Feasibility Studies (Apr. 21, 1989); Engineer Technical Letter 1100-2-1, Procedures to  
 Evaluate Sea Level Change: Impacts, Responses and Adaptation (June 30, 2014).

21 <sup>12</sup> For example, the South San Francisco Bay Shoreline Project employed “hydrologic modeling  
 22 provid[ing] information on the forecasted tidal exchange in the South Bay, with allowances for  
 23 climate change,” U.S. Army Corps of Engineers, *South San Francisco Bay Shoreline Phase I*  
 24 *Study: Final Integrated Document* 1-41 (Sept. 2015), leading the Corps to predict that the Project  
 “would manage flood risk for a population at risk of approximately 6,000 residents and people  
 25 working in the area,” with only “1,140 structures . . . in the 0.2-percent Annual Chance of Ex-  
 26 ceedance (ACE) floodplain under the USACE High sea level change (SLC) scenario,” *id.* at 9-7.  
 And the South San Francisco Bay Shoreline Proposal “recommended that the USACE project . . .  
 be authorized for implementation, as a Federal project, with such modifications thereof as at the  
 discretion of the Commander, U.S. Army Corps of Engineers, San Francisco District, may be ad-  
 visable.” *Id.* at 10-2.

27 <sup>13</sup> In Judge Alsup’s order requesting supplemental briefing on removal based upon the concept of  
 28 “navigable waters of the United States,” he noted that “a necessary and critical element” of Plain-  
 tiffs’ theory of causation “is the rising sea level along the Pacific coast and in the San Francisco  
 Bay, both of which are navigable waters of the United States.” *BP*, ECF No. 128 (Feb. 12, 2018).

1 federal projects and Plaintiffs’ current infrastructure are inadequate to address the rising waters (*e.g.*,  
2 *id.* ¶¶ 8, 12); and (7) “navigable waters” will encroach upon on Plaintiffs’ land, causing damage (*e.g.*,  
3 *id.* ¶¶ 8–9). Every link in this chain is inextricably intertwined with federal issues, including the  
4 movement and impact of “navigable waters” and second-guessing of federal projects.

5 Determining whether (and to what extent) Plaintiffs will suffer injury—and evaluating the  
6 remedies they seek in light of this direct federal intervention—will also require interpretation of fed-  
7 eral law. Plaintiffs ask this Court for “[e]quitable relief, including abatement of the nuisances.” *See*,  
8 *e.g.*, *County of Santa Cruz*, Compl., Prayer for Relief. The City of Santa Cruz claims that it is “plan-  
9 ning adaptation strategies to address sea level rise and related impacts, including coastal armoring . . .  
10 .” *City of Santa Cruz v. Chevron Corp., et al.*, (3:18-cv-00458), Compl. ¶ 213. But the RHA states  
11 that “it shall not be lawful to build or commence the building of any wharf pier, dolphin, boom, weir,  
12 breakwater, bulkhead, jetty, or other structures in any . . . water of the United States . . . except on  
13 plans recommended by the Chief of Engineers and authorized by the Secretary of the Army.” 33  
14 U.S.C. § 403. Thus, Plaintiffs will have to show that the remedy they seek is consistent with federal  
15 action and will be authorized by the Corps. This will require interpretation of an extensive web of  
16 federal regulations. For example, before approving a project “[t]he benefits which reasonably may be  
17 expected to accrue from the proposal must be balanced against its reasonably foreseeable detri-  
18 ments.” 33 C.F.R. § 320.4(a)(1). And “in the evaluation of every application” to undertake a project  
19 in navigable waters, the Corps must also assess “the practicability of using reasonable alternative lo-  
20 cations and methods to accomplish the objective of the proposed structure or work.” *Id.*  
21 § 320.4(a)(2). Even attempts by Plaintiffs to modify or alter existing flood-mitigation structures re-  
22 quire approval of the Corps, and the Corps *cannot* grant such approval if the project will be “injurious  
23 to the public interest.” 33 U.S.C. § 408(a).

24 In short, because Plaintiffs’ claims hinge on alleged effects in the navigable waters of the  
25 United States, over which the Corps has exclusive jurisdiction, this case presents numerous substan-  
26 tial and disputed federal issues that provide a basis for federal jurisdiction.



1           **C. Removal Is Warranted Under Multiple Jurisdiction-Granting Statutes and Doctrines**

2           Defendants’ Removal Notices and past remand briefing demonstrate that five additional statu-  
3 tory provisions and legal doctrines each provide an independent and fully sufficient basis for re-  
4 moval, including (i) OCSLA, *see* 43 U.S.C. § 1349(b); (ii) the federal officer removal statute, *see* 28  
5 U.S.C. § 1442(a)(1); (iii) the federal enclaves doctrine; (iv) the bankruptcy statutes, *see* 28 U.S.C.  
6 § 1452(a) and 28 U.S.C. § 1334(b); and (v) federal admiralty and maritime jurisdiction. *See San*  
7 *Mateo*, ECF No. 1 ¶¶ 49–74; *County of Santa Cruz*, ECF No. 90. These statutes reflect Congress’s  
8 determination that certain cases and controversies—including those at issue here—implicate vital  
9 federal interests that warrant federal jurisdiction and a uniform application of law.

10           *First*, this Court has jurisdiction under OCSLA because Plaintiffs’ lawsuits mount a direct  
11 challenge to Defendants’ oil and gas production operations conducted on the federal Outer Continen-  
12 tal Shelf (“OCS”). (For purposes of this brief, Defendants assume *arguendo* that Plaintiffs are correct  
13 in contending that Defendants’ activities include those of their subsidiaries.) These operations are  
14 responsible for billions of barrels of oil, and trillions of MCF of natural gas, produced from federal  
15 offshore lands on the OCS. *See San Mateo*, ECF No. 195 at 34–35. Indeed, federal data suggests  
16 that in some years *a third* of domestic production originates from the OCS. *Id.* at 35. In all, Defend-  
17 ants and their affiliates hold approximately 32.95% of the more than 5,000 federal leases on the OCS,  
18 with certain of these properties able to generate hundreds of thousands of barrels of oil per day. *See*  
19 *County of Santa Cruz*, ECF No. 1, ¶ 53. Plaintiffs’ wide-reaching allegations sweep in *all* of De-  
20 fendants’ production activities, including Defendants’ extensive activities on the OCS. *See San*  
21 *Mateo*, ECF No. 195 at 35–36. Particularly if the cases are viewed—as Plaintiffs insist—as produc-  
22 tion rather than emissions cases (*cf. BP*, ECF No. 134 at 5), the connection to production activities on  
23 the OCS is inherent and determinative of federal jurisdiction.

24           The scope of OCSLA removal jurisdiction reflects the overriding federal interest in oil and  
25 gas production operations on the OCS. *See EP Operating Ltd. P’ship v. Placid Oil Co.*, 26 F.3d 563,  
26 569 (5th Cir. 1994). “OCSLA was passed . . . to establish *federal ownership and control over the*  
27 *mineral wealth of the OCS* and to provide for *development of those natural resources*,” *id.* at 566, and  
28 “the efficient exploitation of the minerals of the OCS . . . was . . . a primary reason for OCSLA.”

1 *Amoco Prod. Co. v. Sea Robin Pipeline Co.*, 844 F.2d 1202, 1210 (5th Cir. 1988). When enacting 43  
2 U.S. § 1349(b)(1), the OCSLA jurisdictional provision, “Congress intended for the judicial power of  
3 the United States to be extended to the entire range of legal disputes that it knew would arise relating  
4 to resource development on the [OCS].” *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*, 754  
5 F.2d 1223, 1228 (5th Cir. 1985). Courts, therefore, repeatedly have found OCSLA jurisdiction where  
6 resolution of the dispute foreseeably could affect the efficient exploitation of minerals from the OCS.  
7 *See, e.g., EP Operating*, 26 F.3d at 569–70; *United Offshore Co. v. S. Deepwater Pipeline Co.*, 899  
8 F.2d 405, 406–07 (5th Cir. 1990).

9 Plaintiffs’ argument that OCSLA cannot extend federal jurisdiction here because OCS pro-  
10 duction, by itself, was not the sole cause of their alleged injuries ignores key federal government in-  
11 terests underlying OCSLA’s jurisdictional grant. Plaintiffs’ allegations challenge not only Defend-  
12 ants’ production of offshore oil and gas that represent a material part of the federal “mineral wealth  
13 [on] the OCS” but also the federal treasury’s multibillion dollar revenues that result from Defendants’  
14 OCS operations. In terms of protecting the crucial federal interests that OCSLA was enacted to pro-  
15 tect, there likely has never been a more important case in which to exercise the OCSLA jurisdictional  
16 grant than the present one.

17 In arguing against OCSLA jurisdiction, Plaintiffs cite *Par. of Plaquemines v. Total Petro-*  
18 *chemical & Ref. USA, Inc.*, 64 F. Supp. 3d 872 (E.D. La. 2014), but there the complained-of activities  
19 “all occurred in state waters” and “[n]one of the activities . . . took place on the OCS.” *Id.* at 894–95  
20 (emphasis added). Yet here, as Plaintiffs’ counsel admitted, the Complaints “allege injuries stem-  
21 ming from the nature of Defendants’ fossil fuel products *no matter where and in what form they are*  
22 *extracted.*” *See San Mateo*, ECF No. 203 at 30 (emphasis added). Accordingly, the complained-of  
23 activity necessarily incorporates operations on the OCS.

24 Plaintiffs also rely on *Plains Gas Solutions, LLC v. Tennessee Gas Pipeline Co., LLC*, 46 F.  
25 Supp. 3d 701 (S.D. Tex. 2014), and *Hammond v. Phillips 66 Co.*, 2015 WL 630918 (S.D. Miss. Feb.  
26 12, 2015), to argue that their injuries do not arise out of Defendants’ OCS operations, *see San Mateo*,  
27 ECF No. 203 at 31–32. Neither case is on point. In *Plains Gas*, the court held that the activities that  
28 allegedly caused the injury did not constitute “operations, or physical acts, conducted on the OCS.”



1 See 46 F. Supp. 3d at 705–06 (“With the exception of Kinetica’s closure of the onshore valve, none  
2 of the alleged activities are physical acts, and thus cannot constitute an operation.”). But Plaintiffs do  
3 not dispute that a substantial portion of the alleged misconduct here—production of fossil fuels—oc-  
4 curred on the OCS. *Hammond* is likewise inapposite because there the court was “unable to conclude  
5 that ‘a “but-for” connection’ exist[ed] between Hammond’s claimed injury, asbestosis, and his nine-  
6 month period of offshore employment,” because Hammond worked for nearly ten years on “land-  
7 based rigs” where he was exposed to asbestos. See 2015 WL 630918, at \*4. Here, however, Plain-  
8 tiffs allege that *all* greenhouse gas emissions—even those occurring decades ago—contribute to  
9 global warming. See *County of Santa Cruz*, Compl. ¶¶ 56–58. Thus, to the extent Plaintiffs’ theory  
10 of causation is viable at all (a merits issue that Defendants dispute), Plaintiffs’ injuries “arise out of”  
11 Defendants’ conduct on the OCS. Therefore, OCSLA supports removal.

12 *Second*, federal officer removal is proper because Defendants extracted, produced, and sold  
13 fossil fuels at the direction of the federal government. Federal courts have jurisdiction under Section  
14 1442 whenever a defendant’s challenged conduct “occurred *because of* what they were asked to do  
15 by the Government.” *Goncalves By & Through Goncalves v. Rady Children’s Hosp. San Diego*, 865  
16 F.3d 1237, 1244–45 (9th Cir. 2017) (emphasis in original) (citations omitted). Because there is a  
17 “clear command from both Congress and the Supreme Court . . . to interpret section 1442 broadly in  
18 favor of removal,” see *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1252 (9th Cir. 2006), the  
19 various extraction, production, and sales activities that Defendants perform at the federal govern-  
20 ment’s command are sufficient to confer subject-matter jurisdiction over these actions. See *San*  
21 *Mateo*, ECF No. 195 at 41–47.

22 Plaintiffs do not dispute that Defendants produce and sell a substantial quantity of oil and gas  
23 pursuant to carefully tailored government contracts. Instead, Plaintiffs argue that these contracts did  
24 not require Defendants to “produce and sell massive amounts of fossil fuel products knowing those  
25 products were dangerous, fail to warn of the known risks, mislead the public regarding those risks,  
26 and promote their dangerous use.” *San Mateo*, ECF No. 203 at 39. But the Complaints allege the  
27 fossil fuel production itself is tortious conduct. See *County of Santa Cruz*, Compl. ¶ 282 (Fourth  
28 Cause of Action for strict liability design defect: “Defendants . . . extracted, refined, . . . advertised,

1 promoted, and/or sold fossil fuel products”). These broadly alleged activities are precisely the activi-  
 2 ties required by the contracts Defendants have entered into with the government. Plaintiffs’ principal  
 3 case, *Parlin v. DynCorp Intern., Inc.*, 579 F. Supp. 2d 629, 636 (D. Del. 2008); *see San Mateo*, ECF  
 4 No. 203 at 39–40, is inapposite because the defendants in that case could not show that the allegedly  
 5 tortious conduct was “taken pursuant to a federal officer’s direct orders or to comprehensive and de-  
 6 tailed regulations.” *Id.* at 636. “At most, Defendants have shown that they were acting under the  
 7 general auspices of the Department of State, which is insufficient to satisfy the ‘acting under’ compo-  
 8 nent of § 1442(a)(1).” *Id.* Here, by contrast, Defendants are extracting and selling oil under detailed  
 9 government contracts. *See Savoie v. Huntington Ingalls, Inc.*, 817 F.3d 457, 465–66 (5th Cir. 2016),  
 10 *cert. denied*, 137 S. Ct. 339 (2016). (“[I]t is the government’s detailed specifications, to which the  
 11 shipyard was contractually obligated to follow, that required the use of asbestos . . . [that] is enough  
 12 to show a causal nexus between the Savoies’ strict liability claims and the shipyard’s actions under  
 13 the color of federal authority.”). Especially in view of the broad and generic activities for which  
 14 Plaintiffs seek to hold Defendants liable—which they claim is production and sale, not emissions, *cf.*  
 15 *BP*, ECF No. 134 at 5—Federal officer removal is thus appropriate.<sup>14</sup>

16 *Third*, Plaintiffs’ sweeping allegations encompass Defendants’ production activities on fed-  
 17 eral military bases and reserves, as well as their lobbying activities in Washington, D.C., all of which  
 18 are federal enclaves. *See San Mateo*, ECF No. 195 at 38–41.

19 *Fourth*, bankruptcy removal is proper because these cases are “related to” numerous bank-  
 20 ruptcy cases and have a “close nexus” to many confirmed bankruptcy plans. *See San Mateo*, ECF  
 21 No. 195 at 51–52. By naming 100 Doe defendants, Plaintiffs have necessarily dragged numerous  
 22 bankrupt oil and gas companies into this case. *See id.* at 51 & n.39. Moreover, Defendants may seek  
 23 indemnification against any number of joint tortfeasors—many of which may also be in bankruptcy  
 24 or operating under a confirmed bankruptcy plan—thus relating Plaintiffs’ claims to even more Chap-  
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 27 <sup>14</sup> As noted at the February 15 hearing, Defendants have a right to appeal any remand order because  
 28 they removed these actions pursuant to, among other grounds, 28 U.S.C. § 1442. Hr’g Tr. 29. In  
 the event that an appeal is necessary, the Defendants request a temporary stay to allow Defend-  
 ants to move for a stay pending appeal. *See id.* at 30.

1 ter 11 cases. *See id.* at 51. Nonetheless, Plaintiffs argue that bankruptcy removal is improper be-  
 2 cause they are enforcing their police powers through this action. *See, e.g., San Mateo*, ECF No. 203  
 3 at 42–44. But this exemption does not apply because Plaintiffs primarily seek to advance their pecu-  
 4 niary interests. Indeed, a bankruptcy court considering the very claims made in this litigation (albeit  
 5 brought by different governmental plaintiffs) has already held that “[t]he clear purpose [of the claims]  
 6 . . . is for the Plaintiffs to obtain a pecuniary advantage.” *See In re Peabody Energy Corp.*, No. 16-  
 7 42529 (Bankr. E.D. Mo.), ECF No. 3514 at 15–16. Plaintiffs cite *In re Universal Life Church, Inc.*,  
 8 128 F.3d 1294, 1299 (9th Cir. 1997), for the proposition that the police power exemption can apply  
 9 even when there is a pecuniary interest, but in that case there was a clear public policy goal that was  
 10 *independent* of collecting funds for the government. *See id.* at 1298 (determining whether organiza-  
 11 tion is tax exempt “serves a general public welfare purpose beyond any pecuniary application in a  
 12 particular case”—namely, “fraud detection”). In this case, however, Plaintiffs have disclaimed public  
 13 policy goals independent of their pecuniary interests. As Plaintiffs’ counsel informed the Court,  
 14 these actions “focus on . . . obtaining compensation”—they do not seek “to regulate emissions.” Hr’g  
 15 Tr. 24. Accordingly, under Plaintiffs’ asserted theory of the case, there is no applicable exemption to  
 16 bankruptcy removal.

17 *Finally*, Plaintiffs’ claims are also removable insofar as they fall within the Court’s original  
 18 admiralty jurisdiction. 28 U.S.C. § 1333; 1441(a).<sup>15</sup> The Constitution extends federal judicial power  
 19 “to all Cases of admiralty and maritime Jurisdiction.” U.S. Const. Art. III, § 2; *Jerome B. Grubart*,  
 20 *Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 531 (1995) (citing 28 U.S.C. § 1333(1)).  
 21 “The admiralty and maritime jurisdiction of the United States extends to and includes cases of injury  
 22 or damage, to person or property, caused by a vessel on navigable waters, *even though the injury or*  
 23 *damage is done or consummated on land.*” 46 U.S.C. § 30101(a) (emphasis added). Under the two-  
 24 part test established by the Supreme Court in *Grubart*, to determine whether there is admiralty juris-  
 25 diction, the court considers: (1) whether, *inter alia*, the alleged “tort occurred on navigable water”  
 26 (the “location” test), 513 U.S. at 534, and (2) the alleged tort is connected to maritime activity (the

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<sup>15</sup> This ground for removal was timely raised. *See County of Santa Cruz*, ECF No. 90.

1 “connection” test), *id.* Both are satisfied here.

2 Plaintiffs’ claims meet the “location” test because the tort, as alleged, occurred on navigable  
3 waters, *Red Shield Ins. Co. v. Barnhill Marina & Boatyard, Inc.*, 2009 WL 1458022, at \*1 (N.D. Cal.  
4 May 21, 2009) (tort occurring in marina “on the navigable waters of the San Francisco Bay . . . falls  
5 under our admiralty jurisdiction”), and arises from production of fossil fuels, including worldwide  
6 extraction, a significant portion of which takes place on “mobile offshore drilling unit[s]” that operate  
7 in navigable waters and are considered “vessels” under established law. *See In re Oil Spill by the Oil*  
8 *Rig Deepwater Horizon in the Gulf of Mexico, on April 20, 2010*, 808 F. Supp. 2d 943, 949 (E.D. La.  
9 2011).

10 Plaintiffs’ claims also have the requisite “connection” to maritime activity. The *Grubart* con-  
11 nection test is satisfied where, as here, “one of the arguably proximate causes of the incident origi-  
12 nated in maritime activity” and “one of the putative tortfeasors was engaged in traditional maritime  
13 activity.” *Taghadomi v. United States*, 401 F.3d 1080, 1087 (9th Cir. 2005) (quoting *Grubart*, 513  
14 U.S. at 541). Indeed, Plaintiffs allege that the navigable waters are or will be dramatically impacted  
15 by the alleged tort and that one of the “potential effects” of that conduct is damage to ports (Compl.  
16 ¶ 1). Therefore, accepting the allegations in the Complaints as true, Defendants’ fossil fuel extraction  
17 has the “potential to disrupt maritime commerce.” *Grubart*, 513 U.S. at 539. Moreover, “there is no  
18 question that the activity” “giving rise to the incident” is “substantially related to traditional maritime  
19 activity,” *id.* at 540, because “[o]il and gas drilling on navigable waters aboard a vessel is recognized  
20 to be maritime commerce,” *Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 538–39 (5th Cir. 1986); *see*  
21 *also In re Oil Spill*, 808 F. Supp. 2d at 951. Because Plaintiffs’ claims satisfy *Grubart*’s two-part  
22 test, they “fall[] within the Court’s admiralty jurisdiction,” *id.*, and are therefore removable under 28  
23 U.S.C. § 1441, as recently amended by the Federal Courts Jurisdiction and Venue Clarification Act of  
24 2011 (“VCA”), Pub. L. No. 112-63.

### 25 **III. CONCLUSION**

26 For the foregoing reasons, and those set forth in Defendants’ briefing in *San Mateo, Imperial*  
27 *Beach*, and *Marin*, the Court should deny Plaintiffs’ motion to remand.

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**CERTIFICATE OF SERVICE**

I, Kelsey J. Helland, declare as follows:

I am employed in the County of San Francisco, State of California, I am over the age of eighteen years and am not a party to this action; my business address is 555 Mission Street, Suite 3000, San Francisco, CA 94105-0921, in said County and State.

I hereby certify that on March 2, 2018, the foregoing Joint Opposition to Motion to Remand was filed with the Clerk of the Court via CM/ECF. Notice of this filing will be sent by email to all registered parties by operation of the Court’s electronic filing systems.

I further certify that on March 2, 2018, the foregoing Joint Opposition to Motion to Remand was served on the following parties by the means described below:

**BY ELECTRONIC SERVICE:** On the above-mentioned date, the documents were sent to the persons at the electronic notification addresses as shown below.

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**(FEDERAL)** I declare under penalty of perjury that the foregoing is true and correct.

Dated: March 2, 2018

By:                   /s/ Kelsey J. Helland                  

Kelsey J. Helland