UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
(Northern Division)

MAYOR AND CITY COUNCIL OF BALTIMORE Plaintiff, vs. BP P.L.C.; *et al.*, Defendants.	Case Number: 1:18-cv-02357 ELH [Removal from the Circuit Court for Baltimore City]

PLAINTIFF MAYOR AND CITY COUNCIL OF BALTIMORE'S REPLY IN SUPPORT OF ITS MOTION TO REMAND TO STATE COURT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. INTRODUCTION

The Mayor and City Council of Baltimore (the "City") brought well-established state law causes of action for concrete injuries to its own residents, infrastructure, and public resources, sounding in public nuisance, private nuisance, product liability, trespass, and the State Consumer Protection Act. *See* City's Memo. in Support of Its Motion for Remand, Dkt. 111-1 ("Mot.") at 5–6. Defendants' Notice of Removal, Dkt. 1, and Joint Opposition to Plaintiff's Motion to Remand, Dkt. 124 ("Opp."), drastically and fundamentally misconstrue the substance of the City's claims, spinning numerous grounds for removal out of fabrications found nowhere in the Complaint. Contrary to Defendants' assertions, the City's claims do not seek to "reshape the nation's longstanding national economic and foreign policies," upend federal regulations, bind the hands of the President, or control worldwide greenhouse gas policy. *See* Opp. 1–2. Rather, the City seeks relief only under established state law, and federal jurisdiction does not exist.

Defendants' arguments that federal common law provides a basis for removal jurisdiction should be flatly rejected. First, the federal common law claims on which Defendants rely have been displaced by the Clean Air Act ("CAA" or "the Act"), 42 U.S.C. § 7401, *et seq*. And by displacing the federal common law, the CAA left no room for the federal common law to "control," to the exclusion of state law or otherwise. Quite the opposite—the Act emphasizes and preserves state involvement in the field. Second, no appellate authority supports Defendants' contention that the (displaced) federal common law "controls" all causes of action relating in any way to climate change, to the exclusion all state law claims. Finally, Defendants' arguments that federal law "controls" at best present an ordinary preemption defense that cannot support removal jurisdiction.

The City's claims likewise do not "arise under" federal law under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005). Defendants do not point to one essential element of any claim at issue that depends on the interpretation or application of federal law, or otherwise necessarily raises disputed, substantial federal issues. Instead, Defendants broadly suggest that the City's claims "implicate" foreign affairs and a hodge-podge

of federal regulations. That position misconstrues the Complaint—which can and must be resolved entirely under state law—and would not satisfy the four-part *Grable* test even if it were accurate.

Nothing in the CAA completely preempts the City's claims, either. The Fourth Circuit has repeatedly cautioned that "[f]ederalism concerns strongly counsel against imputing to Congress an intent to displace a whole panoply of state law absent some clearly expressed direction," and none exists here. *Lontz v. Tharp*, 413 F.3d 435, 440 (4th Cir. 2005) (quoting *Custer v. Sweeney*, 89 F.3d 1156, 1167 (4th Cir. 1996)). The City's common law and statutory claims against Defendants for wrongful marketing and promotion of defective fossil fuel products are not "within the scope" of the CAA's regulatory framework governing source emissions. Moreover, multiple courts have already rejected Defendants' argument that the CAA completely preempts state law claims involving air pollution, for good reason. Courts have recognized and held that the CAA expressly identifies the "primary role" states play in regulating air pollution, and affirmed states' interests in addressing climate change. No court has found that the CAA has such extraordinary preemptive force that it completely preempts state law claims and converts them into federal ones.

Defendants' remaining bases for jurisdiction are without merit. The state law claims here do not arise out of operations on the Outer Continental Shelf or any federal enclave, and no federal officer directed Defendants to produce, market, and deceptively promote fossil fuels for profit. Defendants make no effort to contest the public purpose of the City's case, which brings it squarely outside the scope of bankruptcy jurisdiction. Finally, Defendants ignore extensive caselaw confirming that admiralty is not a sufficient basis for removal and fail to establish that the specialized nook of admiralty law is appropriate here. For all these reasons, remand is required.

II. RELEVANT LEGAL STANDARDS[1]

When a plaintiff's state court complaint asserts only state law claims, the action "arises under" federal law for purposes of removal jurisdiction in only two circumstances: when the state law claims satisfy the four-part test articulated in *Grable*, 545 U.S. 308, or when they are

[1] General standards governing removal and remand are stated in the City's Motion at Part III.

completely preempted by a federal statute. For the reasons in the City's Motion and in Parts III.B and III.C, *infra*, neither *Grable* nor complete preemption provide jurisdiction here.

The well-pleaded complaint rule "makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). "[O]f course, claims founded upon federal common law give rise to federal question jurisdiction," but where a "defendant in essence wishes to use federal common law as a defense," that "does not satisfy the well-pleaded complaint rule" and does not support removal. *Aegis Def. Servs., LLC v. Chenega-Patriot Grp., LLC*, 141 F. Supp. 3d 479, 487 n.10 (E.D. Va. 2015) (remanding contract dispute between government contractor and competitor where defendant asserted "federal common law rule [as] a mere defense that is insufficient to support federal question jurisdiction").[2]

The narrow exception to the well-pleaded complaint rule embodied in the complete preemption doctrine applies only in the rare instance where "the pre-emptive force *of a statute* is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim.'" *Caterpillar*, 482 U.S. at 393 (emphasis added) (quoting *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987)). Federal common law cannot completely preempt state law because, among the "exacting standards that must be met before [the Supreme Court] will find

[2] Defendants quote *L-3 Commc'ns Corp. v. Serco Inc.*, 39 F. Supp. 3d 740, 745 (E.D. Va. 2014), for the proposition that "a case is properly removed if federal common law governs it." *See* Opp. 7. To the extent *L-3* holds that "governing" federal common law can create federal question jurisdiction over removed, well-pleaded state law claims without consideration of the *Grable* factors, the City respectfully contends it is an inaccurate statement of the law. The two cases cited for that proposition in *L-3* were both filed in federal court in the first instance, and did not consider any question of removal jurisdiction. *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 500 (1988); *Woodward Governor Co. v. Curtiss Wright Flight Sys., Inc.*, 164 F.3d 123, 125 (2d Cir. 1999). Both cases were decided more than a decade before *Grable*, moreover, which articulated the appropriate test to determine whether state law claims arise under federal law with due regard for the well-pleaded complaint rule. The language Defendants cite is a clear outlier—Defendants cite no appellate authority applying the same reasoning and the City is aware of none—and it is inconsistent with governing Fourth Circuit and Supreme Court precedent.

complete preemption, . . . congressional intent that state law be entirely displaced must be clear in the text of the statute." *Lontz*, 413 F.3d at 441.

III. ARGUMENT

A. Federal Common Law Does Not Confer Federal Jurisdiction over the City's Purely State Law Claims.

Federal common law cannot provide subject-matter jurisdiction over the City's claims for at least three reasons, all of which have already been addressed in the City's Motion. First, the federal common law of interstate air pollution on which Defendants rely was displaced by the CAA and "no longer exists." *County of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 937 (N.D. Cal. 2018), *appeal docketed*, No. 18-15499 (9th Cir. Mar. 27, 2018) ("*San Mateo*"). Second, even if it had not been displaced, no appellate court has held that federal common law "controls" claims like the City's. To the contrary, *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011) ("*AEP*"), and *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2390 (2013) ("*Kivalina*"), both held only that federal common law had been displaced, and expressly declined to resolve whether any body of federal law "controlled" state law claims. *See* Mot. 12–15. Third, even if federal common law *did* "control," that would not mean the City's state law claims arise under federal law. Instead, that result would at most provide ordinary, defensive, conflict or field preemption arguments that Defendants could raise in state court on remand—it would not create federal question jurisdiction. At bottom, displaced federal common law does not and cannot create federal subject-matter jurisdiction over state law claims under any valid analysis.

1. *AEP* and *Kivalina* Held that the Clean Air Act Displaced the Federal Common Law, and Expressly Reserved Ruling on State Law Claims.

a. *AEP* Held Only That Federal Common Law Is Displaced; Because It No Longer Exists, Federal Common Law Also Does Not "Control" the City's State Law Claims.

The Supreme Court clearly held in *AEP* that "the Clean Air Act and the EPA actions it authorizes displace *any* federal common law right to seek abatement of carbon-dioxide emissions

from fossil-fuel fired power plants." 564 U.S. at 423–24. It therefore expressly declined to entertain the "academic question whether, in the absence of the [Act], the plaintiffs could state a federal common law claim for curtailment of greenhouse gas emissions because of their contribution to global warming." *Id.* In turn, because "the Clean Air Act displaces federal common law, the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act," and not whatever independent force the now-displaced common law may once have had. *Id.* at 429. That result is necessarily so because "when Congress addresses a question previously governed by a decision rested on federal common law[,] the need for such an unusual exercise of lawmaking by federal courts disappears," and normal rules of federal preemption apply. *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 314 (1981) ("*Milwaukee*"). The district court in *San Mateo* thus rejected federal common law as a basis for removal jurisdiction, finding that those cases "should not have been removed to federal court on the basis of federal common law that no longer exists." *San Mateo*, 294 F. Supp. 3d at 937.

Defendants' arguments regarding *AEP* rip various phrases from their proper context and stitch together an unrecognizable version of its holdings. Contrary to Defendants' assertions, *AEP* did not hold that "federal common law governs [all] public nuisance claim[s] for global-warming-related injuries." Opp. 13. Quite the opposite is true. If, as Defendants contend, the Supreme Court intended the breathtaking holdings that (1) *no* state law may apply to *any* "global warming claims," (2) "federal law" and a "federal rule of decision" are "required" no matter what is alleged in the pleadings, and (3) all such claims must be adjudicated in federal court, *see* Opp. 24, one would expect the Court to state those sweeping new standards unambiguously. But none of them are stated expressly or even implicitly in *AEP*. Abrogating the right of all fifty states and their courts, including Maryland, to hear or adjudicate any claims asserting "global-warming-related injuries," Opp. 13—without any express of implied direction from Congress—would present profound federalism problems, would make no sense in the context of a case holding that a federal statute *displaced* the very common law that Defendants purport controls, and would likewise make no sense given the Court's statement that "the availability *vel non* of a state lawsuit depends, *inter*

alia, on the preemptive effect of the federal Act." *AEP*, 564 U.S. at 429. The *San Mateo* court recognized as much when it rejected identical arguments:

> Far from holding (as the defendants bravely assert) that state law claims relating to global warming are superseded by federal common law, the Supreme Court [in *AEP*] noted that the question of whether such state law claims survived would depend on whether they are preempted by the federal statute that had displaced federal common law (a question the Court did not resolve).

294 F. Supp. 3d at 937. Defendants' interpretation of *AEP* is baseless and must be rejected.

b. *Kivalina* Also Held Only That Federal Common Law Is Displaced.

The Ninth Circuit in *Kivalina* reached the same result as *AEP*, holding that the plaintiff's federal common law claims were displaced by the CAA and going no further. It did not, as Defendants contend, hold that the displaced federal common law "controls" any issue, nor consider any question of jurisdiction over state law claims like the City's here.

Because the *Kivalina* plaintiff "s[ought] to invoke the federal common law of public nuisance," the court properly began its analysis "by addressing first the threshold questions of whether such a theory is viable under federal common law in the first instance and, if so, whether any legislative action has displaced it." *Kivalina*, 696 F.3d at 855. The court observed that "federal common law can apply to transboundary pollution suits," but went on to note that "when federal statutes directly answer the federal question, federal common law does not provide a remedy because legislative action has displaced the common law." *Id.* at 855–56. The court then held that it need not determine whether the plaintiff's federal common law claims might once have been cognizable, because "[t]he Supreme Court has already determined that Congress has directly addressed the issue of domestic greenhouse gas emissions from stationary sources and has therefore displaced federal common law." *Id.* at 856 (*citing AEP*, 564 U.S. at 423–24). Defendants mischaracterize the court's recitation of the *history and general application* of federal common law, and its statement that federal common law "can apply" to certain pollution claims, as a broad holding that federal common law somehow replaced any and all state law claims after *AEP*. Opp. 11–12. That assertion is simply wrong—no state law claims were even before the court, and it had no occasion to rule on their relationship to either federal common law or the CAA. There is

no good-faith reading under which *AEP* or *Kivalina* can be understood to abrogate all state law causes of action for any injury related to climate change.

Other circuits have agreed with *Kivalina* that displacement of federal common law by the CAA does not convert claims pleaded under state law into federal causes of action. *See Bell v. Cheswick Generating Station*, 734 F.3d 188, 197 n.7 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2696 (2014) (*AEP* "does nothing to alter our analysis" that state law claims were not preempted by CAA, because displacement of federal common law is governed by different principles than preemption of state law, and *AEP* "explicitly left open the question of whether the Clean Air Act preempted state law"); *Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685, 693 (6th Cir. 2015) ("There are fundamental differences . . . between displacement of federal common law by the [Clean Air] Act and preemption of state common law by the Act."). The CAA could only create federal jurisdiction over well-pleaded state law claims if it completely preempted those claims, and as explained in Part III.C, *infra*, it does not.

c. No Appellate Authority Supports Defendants' Position That Federal Common Law "Controls" State Law Claims Like the City's, or Creates Federal Question Jurisdiction Over Them.

Ignoring the clear holdings in *AEP* and *Kivalina*, Defendants argue that this Court has jurisdiction because "in the context of a particular claim involving climate change, a federal rule of decision is necessary to protect uniquely federal interests." Opp. 15. And since there are supposedly a variety of "uniquely federal interests" here, the Court should craft a new federal rule of decision and use that rule as a basis to assert federal question jurisdiction. Opp. 15. Defendants' argument fails for multiple reasons.

First, as explained in the City's Motion, Mot. 17–20, there is no uniquely federal interest in providing redress for local injuries from Defendants' tortious over-promotion, over-marketing, and failures to warn of their dangerous and defective products. *See, e.g.*, *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1324 (5th Cir. 1985) (*en banc*) (state law, not federal common law, governed in cases against asbestos manufacturers); *In re Agent Orange Prod. Liab. Litig.*, 635 F.2d 987, 995 (2d Cir. 1980) (state law, not federal common law, governed class action tort case on

behalf of millions of Vietnam War veterans against producers of Agent Orange, despite federal interest in the health of veterans). Nor is there a uniquely federal interest in addressing climate change generally. *See* Mot. 17–18 (citing *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013); *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 339–40 (D. Vt. 2007)).

Second, Defendants' repeated out-of-context reliance on the Court's dictum in *AEP* that, in that case, "borrowing the law of a particular state would be inappropriate," remains inapposite. 564 U.S. at 422; Opp. 19. In describing the history and development of "specialized federal common law," the Court observed that "[a]bsent a demonstrated need for a federal rule of decision, the Court has taken the prudent course of adopting the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation." 564 U.S. at 422. But where "borrowing the law of a particular State" and incorporating it as federal common law "would be inappropriate, the Court remains mindful that it does not have creative power akin to that vested in Congress." *Id.* In context, the Court's observation pertained to the circumstances under which the federal common law should incorporate state law rules of decision for *choice of law* purposes when a federal common law cause of action is pled. That dicta cannot be read for the broad proposition that federal common law necessarily supplants *all* state law claims relating to climate change sufficient to support removal jurisdiction.[3]

Defendants' arguments that *AEP* and *Kivalina* do not "authorize" state law claims for any injuries related to climate change are baseless. Defendants first argue that "the decision that federal common law applies to a particular cause of action *necessarily* reflects a determination that state law does *not* apply." Opp. 23. As the City has already explained at length, neither *AEP* nor *Kivalina* stands for the proposition that "federal common law applies" to the City's claims. More importantly, Defendants' reliance on the tautological statement in *Milwaukee* that "if federal

[3] As explained in the City's Motion, the Court observed that it would be inappropriate to "borro[w] the law of a particular State" because the *AEP* plaintiffs represented eight states and New York City. If federal common law *did* apply, it would be difficult, if not impossible, to determine which jurisdiction's law should be incorporated as the controlling federal rule. *See* Mot. 13 n.5.

common law exists, it is because state law cannot be used," ignores the immediately preceding clauses: "If state law can be applied, there is no need for federal common law." 451 U.S. at 313 n.7. Both *Kivalina* and *AEP* declined to determine whether those plaintiffs' federal common law claims could ever have been cognizable, and neither held that "state law cannot be used."

As a final matter, this Court may not resurrect displaced federal common law tort claims and bootstrap its own jurisdiction onto them, especially when no federal law claims appear on the face of the Complaint. The Supreme Court has stated clearly that "when Congress addresses a question [that was] previously governed by a decision rested on federal common law[,] the need for such an unusual exercise of lawmaking by federal courts disappears." *Milwaukee*, 451 U.S. at 305. Such is the case here—*AEP* and *Kivalina* both squarely hold that "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants." *AEP*, 564 U.S. at 423–24. Whatever policy basis may have once existed to craft a body of federal common law that might "govern" the City's claims has therefore also been displaced.

d. Defendants' Remaining Arguments Concerning *Ouellette* Implicate Only Non-Jurisdictional Ordinary Preemption.

Defendants' reliance on *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), and the source-state rule articulated therein, is an ordinary preemption argument that has no relevance to the jurisdictional question before the Court. Defendants' themselves recognize: "The question in *Ouellette* was whether the [CAA] preempted a public nuisance claim brought by Vermont plaintiffs in Vermont court under Vermont law to abate a nuisance in New York." Opp. 25. No question of jurisdiction was before the Court in either *Ouelette* or any of the other cases Defendants cite interpreting it. As Defendants further admit, the question remanded in *AEP* was whether the plaintiffs' state law claims "were preempted by the Clean Air Act." *Id.* at 24–25. Whether or not the City's claims here are preempted by the CAA under *Ouelette*—the City contends they are not—is a federal defense that Maryland courts are competent to adjudicate on remand, and that does not create federal jurisdiction.

Finally, Defendants' attacks on *San Mateo* simply rehash their other arguments that the City's claims are "preempted by the CAA," Opp. 26, which, despite their statements to the contrary, cannot serve as a basis for this Court's jurisdiction. *See* Part III.C, *infra*; Mot. 35–42. Defendants state that "the *San Mateo* Court failed to appreciate the difference between the type of claims that the plaintiffs were alleging and the narrow state-law claims that *AEP* suggested could be viable if not preempted by the CAA." Opp. 26. As the *San Mateo* court recognized, however, whether the claims "could be viable if not preempted by the CAA" is an ordinary preemption defense that Defendants may assert on a motion to dismiss after the matter is remanded to state court. It is wholly irrelevant to the jurisdictional question now before the Court, and indeed the Court lacks jurisdiction to rule on it.

2. Defendants' Argument That Federal Common Law "Provides an Independent Basis for Federal-Question Jurisdiction" Contradicts All Controlling Appellate Authority.

The Fourth Circuit has squarely and repeatedly held: "the well-pleaded complaint rule demands that we confine our inquiry to the plaintiff's statement of his own claim," and with due respect for that rule, a "civil action can arise under federal law in two ways." *Flying Pigs, LLC v. RRAJ Franchising, LLC*, 757 F.3d 177, 181 (4th Cir. 2014); *see* Part II, *supra*. Specifically, a case "arises under federal law when federal law creates the cause of action asserted," or when it falls within "the second, more narrow basis applicable only to a state-law cause of action" that satisfies *Grable*'s "slim contours." *Flying Pigs, LLC*, 757 F.3d at 181. The "narrow exception to the well-pleaded complaint rule" that is "[k]nown as the 'complete preemption' doctrine, . . . provides that if the subject matter of a putative state law claim has been totally subsumed by federal law—such that state law cannot even treat on the subject matter—then removal is appropriate." *Lontz*, 413 F.3d at 439–40. The City has discussed each of those analytical paths in detail, and each requires remand. *See* Mot. 20–38; Parts III.B & III.C, *infra*.

Relying on the court's faulty reasoning in the *Oakland* cases, Defendants assert that sidestepping both *Grable* and complete preemption is "entirely proper" because the court may simply "conclud[e] that the plaintiffs' claims, if they exis[t] at all, asser[t] a *federal* [common law]

cause of action." Opp. 19–20. This argument facially violates the well-pleaded complaint rule, ignores its limited exceptions, and invites reversible error. Defendants' insistence that they "are not contending that Plaintiff's state-law nuisance claim addressing transboundary pollution *conflicts* with federal law—the point is that the claims *arise under* federal common law," and that "the well-pleaded complaint rule does not prevent removal where . . . a federal question is apparent from the face of the complaint," Opp. 19, simply begs the question. The City has pleaded state law claims, and all controlling authority states that those claims can *only* "arise under" federal law if they satisfy *Grable* or are completely preempted by a statute. Defendants' arguments to the contrary gravely misstate controlling law and must be rejected.[4]

Defendants' attempt to distinguish and minimize *Pinney v. Nokia, Inc.*, 402 F.3d 430 (4th Cir. 2005), *cert. denied*, 546 U.S. 998 (2005), only highlights the inadequacy of federal common law as an "independent basis" for jurisdiction. As discussed in the City's Motion, *Pinney* squarely rejected the defendants' arguments that "where a plaintiff's state law complaint is sufficiently connected to a federal regulatory regime as to which Congress has expressed a need for uniform implementation and interpretation, that connection can provide a basis for federal question jurisdiction even if no explicitly federal claim is pled." 402 F.3d at 448. The Court held that the defendants' "sufficient connection" theory was "similar to, if not indistinguishable from," an argument that the plaintiffs' claims were "removable . . . because they are preempted" by federal regulation, and in any event the theory was irreconcilable with Supreme Court authority. *Id.* at

[4] The three out-of-circuit cases Defendants cite in support of their untethered view of "arising under" jurisdiction pre-date the 2005 *Grable* decision, and are incompatible with it. *See New SD, Inc. v. Rockwell Int'l Corp.*, 79 F.3d 953 (9th Cir. 1996); *Wayne v. DHL Worldwide Express*, 294 F.3d 1179, 1184 (9th Cir. 2002); *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 928–29 (5th Cir. 1997). In particular, multiple courts have directly questioned the continued validity of the Ninth Circuit's holding in *New SD*, because its reasoning that "[w]hen federal law applies, … it follows that the question arises under federal law" is inconsistent with the Supreme Court's express instruction in *Grable*. *See Babcock Servs., Inc. v. CH2M Hill Plateau Remediation Co.*, No. 13-CV-5093-TOR, 2013 WL 5724465, at *4 (E.D. Wash. Oct. 21, 2013) (noting that *New SD*'s premise is "no longer sound" under *Grable*); *Raytheon Co. v. Alliant Techsystems, Inc.*, No. CIV 13-1048-TUC-CKJ, 2014 WL 29106, at *4 (D. Ariz. Jan. 3, 2014) (same).

448–49. The court observed that "the substantial federal question doctrine applies only when a disputed issue of federal law is an essential element of at least one of the plaintiffs' state claims," which the "sufficient connection" theory could not satisfy. *Id.*

Here, the nub of Defendants' argument—functionally identical to that rejected in *Pinney*—is that "global-warming-related harms implicate 'uniquely federal interests' and demand a uniform federal rule" drawn from federal common law. Opp. 16. Therefore, "disputes about global climate change" are supposedly "inherently federal in nature" for jurisdictional purposes. Opp. 23.[5] Under *Pinney*, however, the method a court must use to determine whether well-pleaded state law causes of action are "inherently federal in nature" is the substantial federal question doctrine, as clarified by *Grable* and its progeny. *See, e.g.*, *Flying Pigs, LLC*, 757 F.3d at 181 (describing substantial federal question doctrine as one of only "two ways" federal question jurisdiction may arise, noting that "[i]n recent years, the Supreme Court has brought greater clarity to what it describes as a traditionally 'unruly doctrine,' emphasizing its 'slim contours'"). Defendants' attempts to tunnel past *Grable* are contrary to controlling law.

In sum, Defendants' arguments that the City's state law claims "*arise under* federal common law," Opp. 29, ignore on-point, controlling authority that spells out the analysis a court must apply: namely, *Grable* and the complete preemption doctrine. *See* Parts III.B and III.C, *infra*. The Court has no alternative, free-floating, unguided authority to find that the City's state law causes of action simply *are* federal, in derogation of the pleadings.

[5] Defendants attempt to distance themselves from *Pinney* by averring—without explanation or support—that "Defendants' federal common law argument does not depend on the presence of a federal regime that preempts Plaintiffs' state-law claims, but rather turns on the inherently federal nature of the claims themselves." Opp. 20. In the very next paragraph, however, Defendants try to bolster their position by arguing that "the enactment of a comprehensive federal statutory framework [the CAA] in an area previously occupied by federal common law . . . underscores the federal nature of the field" for jurisdictional purposes. Opp. 21. That position just restates the argument that *Pinney* rejected with different words, and entirely undercuts Defendants' attempts to evade its clear holding.

3. Defendants' Argument That the Clean Air Act's Displacement of Federal Common Law Made State Law Claims Unavailable Is Plainly an Ordinary Defensive Preemption Argument.

Finally, Defendants' argument that the City's "nuisance claim arises under federal common law, whether or not the CAA has displaced any federal common law remedy," Opp. 23, repackages Defendants' ordinary preemption arguments, and inappropriately conflates ordinary and complete preemption. "[O]nce federal common law is displaced by a federal statute, there is no longer a possibility that state law claims could be superseded by the previously-operative federal common law." *San Mateo*, 294 F. Supp. 3d at 937. Defendants' contention that "a comprehensive federal statutory framework [the CAA] in an area previously occupied by federal common law . . . underscores the federal nature of the field," Opp. 21, even assuming it were correct, could only be relevant to the City's state law claims in one of two ways: ordinary or complete preemption by the CAA itself. Ordinary preemption is not a basis for jurisdiction, and complete preemption fails.

Defendants' argument that the CAA "so comprehensively addresses the subject" that it would be "inappropriate for state law to control" because of the "federal nature of the field," Opp. 20–21, plainly describes ordinary field preemption—a federal defense that cannot serve a basis for federal question jurisdiction. *See, e.g.*, *Sullivan v. Am. Airlines, Inc.*, 424 F.3d 267, 273, 276 & n.7 (2d Cir. 2005) (observing that "field preemption and the doctrine of complete preemption both rest on the breadth, in some crude sense, of a federal statute's preemptive force," and the two analyses are "better considered distinct" because complete preemption is a jurisdictional analysis and field preemption is not, and holding that Railway Labor Act "does not completely preempt state-law claims that come within its scope"). If, on the other hand, the CAA both displaced federal common law *and* abrogated state law claims, converting them to federal ones, that would plainly describe complete preemption. For the reasons discussed in the City's Motion and herein, the CAA does not completely preempt state law. *See* Mot. Part IV.C. Nothing in *AEP*, *Kivalina*, or any other decision of any court, supports the free-wheeling jurisdictional grant Defendants advocate.

Plowing onward, Defendants contend that no matter what the CAA did or did not do with respect to federal common law, *AEP* and *Kivalina* demand a "two-step analysis" that first asks the

"jurisdictional" question whether "federal law governs" a state law claim, and if it does, converts the well-pleaded state law causes of action into federal ones. Opp. 22. That position profoundly misrepresents and misquotes both opinions. First, in both *Kivalina* and *AEP*, the courts discussed whether the claims were "viable under federal common law," *AEP*, 564 U.S. at 422; *Kivalina*, 696 F.3d at 855, *because the plaintiffs expressly brought federal common law causes of action in federal district court*. Defendants' contention that the "first step" in their analysis is "jurisdictional" makes no sense because no jurisdictional question was before the court in either case. Second, Defendants' contention that *AEP* instructed a "two-step analysis" that asks "first whether . . . federal law governs" is contradicted by (1) the Court's declining to answer the "academic question whether, in the absence of [the CAA], the plaintiffs could state a federal common law claim," and (2) its statement that "the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act." *AEP*, 564 U.S. at 422–23, 429. Nothing akin to Defendants' interpretations appears anywhere in either opinion.

The only Fourth Circuit cases Defendants cite for their "two-step" proposition are inapposite. In *Stop Reckless Economic Instability Caused by Democrats v. FEC*, 814 F.3d 221, 224 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 374 (2016), several political action committees brought federal constitutional challenges, in the Eastern District of Virginia, to certain contribution limits enacted by the FEC under the Federal Election Campaign Act. On appeal, the FEC argued in relevant part that the district court lacked subject matter jurisdiction; because "federal courts must determine whether they have subject-matter jurisdiction over a claim before proceeding to address its merits," the court first considered whether the plaintiffs' causes of action were moot before turning to the merits of the appeal. *Id.* at 228–32. Finding that two of the causes of action were moot, the court remanded with instructions to dismiss for lack of subject matter jurisdiction. *Id.* at 231–32. In *Goldfarb v. Mayor & City Council of Baltimore*, 791 F.3d 500, 503 (4th Cir. 2015), the plaintiff brought claims under the federal Resource Conservation and Recovery Act ("RCRA") in the District of Maryland. The district court had dismissed all the plaintiffs' claims, "though its specific reasoning was sometimes imprecise and it varied as to each defendant and claim." *Id.* The

Fourth Circuit held in relevant part that if the district court had intended to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), it had erred, because it misinterpreted RCRA's anti-duplication provision—which prohibits activities regulated under the Clean Water Act from being separately regulated under RCRA—as jurisdictional. *Id.* at 507–08. Neither case says anything about federal common law, anything about the jurisdictional consequences of displacement of federal common law, or anything about state law causes of action, let alone any "two-step" analysis that asks whether federal common law "governs" removed state law claims. Defendants' arguments find no support whatsoever in controlling authority.

B. Baltimore's State Law Claims Do Not Support *Grable* Jurisdiction.

As explained in the City's Motion, state law claims only fall into the "'special and small' category of cases in which arising under jurisdiction still lies," *Gunn v. Minton*, 568 U.S. 251, 258 (2013), when they "really and substantially involv[e] a dispute or controversy respecting the validity, construction or effect of [federal] law." *Grable*, 545 U.S. at 313. That is so only when, on the face of the complaint, a federal issue is: "(1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn*, 568 U.S. at 258. Defendants repeatedly assert that the City's claims are removable because they merely "implicate" or "impact" federal interests. *E.g.*, Opp. 28, 29, 31, 34, 37, 38, 39, 41. But those assertions evade the actual test for "arising under" jurisdiction required by *Grable*. *Grable* did not alter the well-pleaded complaint rule, and a federal defense cannot bring state law claims into federal court. *See Pinney*, 402 F.3d at 446.

1. No Question of Federal Law Is a Necessary Element of Any Claim Here.

The City's claims do not "necessarily raise" any issue of federal law, because no "question of federal law is a *necessary element*" of any of them. *See Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 13 (1983) (emphasis added). If a disputed question of federal law is not an essential element of any well-pleaded state law claims, but only "lurking in the background," those claims do not arise under federal law and removal is not proper. *Pinney*, 402 F.3d at 445.

The only court that has analyzed *Grable* jurisdiction over state-law tort claims for climate change-related injuries rejected federal jurisdiction, emphasizing that the "defendants mostly gesture[d] toward federal law and federal concerns in a generalized way" and that they "ha[d] not pointed to a specific issue of federal law that must necessarily be resolved to adjudicate the state law claims." *See San Mateo*, 294 F. Supp. 3d at 938. The same result obtains here: none of the federal issues Defendants identify are necessary elements of the City's causes of action.

a. Defendants' Invocation of Foreign Affairs Misconstrues the City's Claims, and Does Not Supply Any Basis for *Grable* Removal.

As explained in the City's Motion, Mot. 31, "[u]nder the foreign affairs doctrine, state laws that intrude on th[e] exclusively federal power [to administer foreign affairs] are preempted." *Gingery v. City of Glendale*, 831 F.3d 1222, 1228 (9th Cir. 2016). The City here seeks monetary and equitable relief for its injuries from Defendants' production and wrongful promotion of defective products. This relief in no way intrudes on the federal government's foreign policy and diplomatic powers. The argument that the City's claims will supposedly hamstring the President's ability to negotiate with foreign nations regarding climate change misrepresents the Complaint, mischaracterizes federal climate and energy policies as excluding state action, and denies the well-accepted role of states in combatting climate change.[6]

[6] Defendants cite President Obama's Climate Action Plan to argue that climate change policy is exclusively federal because it is a matter of foreign policy. Opp. 29. But that Plan acknowledges states' concurrent role in combatting climate change. Lipshutz Decl., Ex. 11 ("*Building on efforts underway in states and communities across the country*, the President's plan cuts carbon pollution that causes climate change . . . ." (emphasis added)). None of the various presidential speeches cited by Defendants indicates climate change or energy policy are solely the federal government's province. *See id.* Exs. 1–10. To the contrary, those speeches emphasized states' roles in energy and environmental policy. *See e.g.*, *id*. Ex. 3. ("I will also ask every State to pass laws protecting Americans from arbitrary cutoffs of heat for their homes. . . I will set targets for our 50 States to reduce gasoline consumption and ask each State to meet its target.") (Jimmy Carter); *id.* Ex. 9 ("But going forward, we're going to continue to work . . . with states, to ensure the high-quality, fuel-efficient cars and trucks of tomorrow are built right here in the United States of America.") (Barack Obama). Far from impeding foreign policy, state efforts to combat climate change are aligned with decades of domestic energy policy, which has promoted decreased reliance on foreign oil imports and fossil fuels through energy conservation and efficiency and expanding clean energy

More fundamentally, Defendants misapply the foreign relations doctrine altogether. Contrary to Defendants' arguments, the City's causes of action have no intended effect on foreign affairs and do not "necessarily raise" foreign affairs. *Provincial Government of Marinduque v. Placer Dome, Inc.*, 582 F.3d 1083 (9th Cir. 2009), is analogous and instructive. There, a Philippine province sued an American company in Nevada state court, alleging that the company caused environmental harm to the Province. *Id.* at 1085. The Province alleged that Philippine President Ferdinand Marcos, "in exchange for a personal stake in the mining operations, eased various environmental protections" to benefit the defendant. *Id.* The defendant removed, arguing that the complaint "tender[ed] questions of international law and foreign relations," and that the Province's claims were barred by the act of state doctrine, which requires deference to acts of foreign governments. *Id.* at 1085–86. Ordering remand to state court, the Ninth Circuit held "that the act of state doctrine is implicated here only defensively and the complaint does not 'necessarily raise a stated federal issue, actually disputed and substantial.'" *Id.* at 1090–91. Although the complaint was "sprinkled with references to the Philippine government, Philippine law, and the government's complicity in the claimed damage," "a general invocation of international law or foreign relations [does not] mean that an act of state is an essential element of a claim." *Id.* at 1091; *see also Patrickson v. Dole Food Co.*, 251 F.3d 795, 804 (9th Cir. 2001), *aff'd in part, cert. dismissed in part*, 538 U.S. 468 (2003) ("If federal courts are so much better suited than state courts for handling cases that might raise foreign policy concerns, Congress will surely pass a statute giving us that jurisdiction."). Likewise here, Defendants invoke the foreign relations doctrine as a defense, and no essential element of any of the City's claims depends on its application.

Even if their caricature of the Complaint were accurate, the few cases Defendants cite do not support the foreign affairs doctrine as a predicate "federal issue" under *Grable*. *See San Mateo*, 294 F. Supp. 3d at 938 ("The mere potential for foreign policy implications . . . does not raise the

sources. *See id.* Ex. 11 (introducing rules to "move our economy toward American-made clean energy sources"); *id.* Ex. 8 ("It's in our vital interest to diversify America's energy supply" through increased use of "solar and wind energy, and clean, safe nuclear power.") (George W. Bush); *see also id.* Exs. 3, 4 & 11 (emphasizing energy conservation and efficiency).

kind of actually disputed, substantial issue necessary for *Grable* jurisdiction."). When raised by a defendant and not on the face of the complaint, the doctrine at most serves as an ordinary preemption defense. Unsurprisingly, none of Defendants' cited cases involved *Grable* or any question of removal. All were initiated in federal court under expressly federal law theories, and in each the *plaintiff* expressly raised the foreign affairs doctrine in its complaint, seeking to invalidate state legislation under the Supremacy Clause. Neither *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), nor *American Insurance Association v. Garamendi*, 539 U.S. 396, 412–14 (2003), addressed the threshold "necessary element" question presented here. To the contrary, each involved a federal constitutional challenge, brought in federal court, to a state's explicit attempts to legislate in foreign affairs, and no state law claims were before the Court.[7]

b. The City's Claims Do Not "Require Federal-Law-Based" Cost-Benefit Balancing.

Defendants doggedly insist that federal regulations inject federal issues into the City's case, but none of their citations demonstrates that a "question of federal law is a necessary element of one of the well-pleaded state claims." *Franchise Tax Bd. of State of Cal.*, 463 U.S. at 13. Even assuming Defendants were correct that "[f]ederal law would necessarily govern the cost-benefit analysis required by Plaintiff's nuisance claims," Opp. 34—a position the City strongly rejects, *see* Mot. 25–28—that contention at most presents yet another ordinary conflict preemption defense to be argued in state court. This is so even if the "weighing were to implicate the defendants' dual

[7] In *Crosby*, 530 U.S. 363, a trade association sued in federal court to enjoin enforcement of Massachusetts legislation that penalized companies doing business in Burma (Myanmar). The Court found the legislation was preempted by federal statutes imposing sanctions on Burma and by executive orders implementing those statutes. *Id.* at 386–88. The claims were expressly framed as federal constitutional challenges to the Massachusetts legislation, and no question of jurisdiction—let alone removal jurisdiction—was raised or adjudicated. Similarly, in *Garamendi*, 539 U.S. at 412–14 (2003), the plaintiffs sued in federal court to enjoin enforcement of a California statute directed at recovering insurance assets seized from Holocaust victims, arguing that the statute was preempted by executive agreements between the United States and German, Austria, and France under multiple Presidents, addressing recovery of the very same assets. The Court found the challenged California statute conflicted with the President's conduct of foreign affairs and was therefore preempted. *Id.* at 429.

obligations under federal and state law." *San Mateo*, 294 F. Supp. 3d at 938; *see also* Mot. 25. Defendants' semantic manipulations and laundry list of regulations resembling Maryland tort duties, Opp. 31–35, do not change that the City's right to relief arises under Maryland law. *See* Mot. 24 n.10 (listing Maryland law bases for elements of the City's claims).

The few cases Defendants cite are readily distinguished, because each depended on federal law to prove an essential element of a state law claim. *Bd. of Commissioners of Se. Louisiana Flood Prot. Auth.-E. v. Tennessee Gas Pipeline Co.*, 850 F.3d 714, 722–24 (5th Cir. 2017) ("*Tenn. Gas*"), involved negligence and nuisance claims nominally under Louisiana law that nonetheless "dr[ew] on federal law as the exclusive basis for holding Defendants liable for some of their actions." The court found removal proper because the claims "cannot be resolved without a determination whether multiple federal statutes create a duty of care that *does not otherwise exist* under state law," and federal law therefore formed an essential element. *Id.* at 723 (emphasis added). Here, Maryland law recognizes causes of action against a defendant that knowingly produces and promotes a product for a use that presents a hazard to the environment and public health. *See* Mot. 4, 21–22. Federal law is not "required" here to establish a basis for liability that "does not otherwise exist under state law." *See Tenn. Gas*, 850 F.3d at 723; Mot. 24–25.

In contrast, cases in which federal statutes or regulations are not necessary elements of a plaintiff's affirmative claims do not satisfy *Grable*. Defendants' tepid attempt to distinguish this case from *Pinney* (Opp. 37) only underscores that here, just as in *Pinney*, no element of the City's claims raises a disputed question of federal law. *See Pinney*, 402 F.3d at 442–46. Defendants identify no specific element of any of the City's eight causes of action that meets that standard. The *San Mateo* court recognized the slippery slope of drawing all state law claims touching upon federal standards into federal court: "On the defendants' theory, many (if not all) state tort claims that involve the balancing of interests and are brought against federally regulated entities would be removable. *Grable* does not sweep so broadly." 294 F. Supp. 3d at 938. For the reasons stated in the City's Motion, the regulatory balancing Defendants invoke is different in kind from any

balancing required by traditional state tort law. Mot. 22–24. And regardless, the statutes and regulations Defendants cite are not necessary elements of the City's claims.[8]

c. The City's Claims Are Not Collateral Attacks on Federal Regulation.

This case does not seek to attack, modify, or evade federal regulations any more than it seeks to alter U.S. foreign relations. The City only seeks to protect its residents and resources from climate change harms using existing state laws and remedies. In *Pinney*, the Fourth Circuit foreclosed the very argument Defendants now assert, rejecting as "inconsistent with Supreme Court precedent" the notion that a "sufficient connection" between a plaintiff's claims and a federal regulatory scheme could establish removal jurisdiction. 402 F.3d at 448–49; *see also* Mot. 22–23.

Defendants' cited cases all involved facial attacks on federal regulation. In *McKay v. City & Cty. of San Francisco*, No. 16-CV-03561 NC, 2016 WL 7425927 (N.D. Cal. Dec. 23, 2016), residents brought state law nuisance claims in state court to enjoin use of flightpaths approved by the Federal Aviation Administration ("FAA"), alleging that they created unreasonable noise. *Id.* at *1–2. The court denied remand not because the case presented issues within the FAA's purview, but because the injunctive relief sought was "tantamount to asking the Court to second guess the validity of the FAA's decision." *Id.* at *4. Because the complaint expressly asked the court to invalidate federal regulation, a substantial and disputed federal issue was necessarily presented on the face of the complaint. *Id.* at *4–5.

[8] Courts have rejected such arguments in numerous regulatory contexts. *Ware v. N. Cent. Indus., Inc.*, No. 6:17-CV-01287-MC, 2017 WL 5569258, at *4 (D. Or. Nov. 20, 2017) (remanding state law negligence and product liability claims against fireworks manufacturer, "despite the fact that warnings for fireworks are proscribed by federal law," because complaint did not challenge adequacy of federally mandated warnings and "the dispute here is whether the warnings were appropriate considering [defendant]'s knowledge of the defect"); *In re Roundup Prods. Liab. Litig.*, No. 16-MD-02741-VC, 2017 WL 3129098 (N.D. Cal. July 5, 2017) (even where federal law defined state-law obligations regarding herbicides, "[i]f that alone sufficed for federal jurisdiction, routine applications of the Supremacy Clause could be grounds for removal," which is "not what *Grable* stands for"); *McCarty v. Precision Airmotive Corp.*, No. 8:06-cv-1391, 2006 WL 2644921, at *1 (M.D. Fla. Sept. 14, 2006) ("FAA rules and regulations may be relevant to defining the duty of care in a negligence case or the standard in a products liability case, [but do] not elevate a typical state-law tort claim to one requiring resolution in a federal forum.").

Pet Quarters, Inc. v. Depository Trust & Clearing Corp., 559 F.3d 772 (8th Cir. 2009), is equally inapposite. The plaintiff there filed an action in state court alleging that the defendants' stock borrowing program drove down the price of the plaintiff's stock, putting it out of business. *Id.* at 775. The court affirmed an order denying remand because the complaint expressly alleged that the stock borrowing program—which had been approved and regulated by the Securities and Exchange Commission pursuant to federal statute—hindered competition "by its mere existence." *Id.* at 779. The court affirmed removal because those allegations necessarily challenged "actions taken by the Commission in approving the . . . Program and the rules governing it." *Id.* The City's claims here do not challenge any federal agency decisions, explicitly or implicitly, and the Complaint in no way mirrors the key language in the *Pet Quarters* complaint.[9]

d. The City's Claims Do Not "Implicate" Federal Duties to Disclose.

The City has no cause of action for "fraud on the EPA" or any similar claim requiring proof that a federal regulator was defrauded—nor any fraud cause of action at all. Defendants nevertheless argue that the City's claims "implicate duties to disclose imposed by federal law," and attempt to graft a fraud claim that does not exist onto the Complaint. Opp. 39, 40. But Defendants' failure to disclose known harms to both regulators and the public is merely *relevant evidence* to show that they violated Maryland tort duties—evidence, for example, tending to prove their knowledge that their products were defective. It does not follow that federal disclosure duties are essential elements of any of the City's claims under *Grable*. *See In re Roundup Prods. Liab. Litig.*, 2017 WL 3129098, at *1 ("To be sure, evidence that Monsanto influenced the EPA may be

[9] Defendants' citation to *Bennett v. Sw. Airlines Co.*, 484 F.3d 907, 910 (7th Cir. 2007), fares no better. The court there observed that federal jurisdiction was proper in *Grable* because there "the state proceeding amounted to a collateral attack on a federal agency's action," and the relief sought required the federal government to reimburse parties affected by the action. The *Bennett* plaintiff, by contrast, asserted traditional state law tort claims against an airline arising out of a crash, and the Seventh Circuit had already "held many times that claims related to air transport may be litigated in state court," notwithstanding federal regulation of the industry. *See id.* at 912. The court found no *Grable* jurisdiction, and ordered remand to state court. *Id.*

indirectly relevant to the carcinogenicity inquiry, as collusion could undermine the value of the EPA's scientific conclusions. . . . But an issue is not 'necessary' to resolve for the purposes of federal-question jurisdiction simply because it has relevance.").[10]

Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341 (2001), and other cases Defendants cite involve express "fraud on the government" claims and are inapposite. In *Buckman*, the plaintiffs brought a state law claim for "fraud-on-the-FDA," for alleged misrepresentations resulting in FDA's approval of dangerous medical devices. *Id.* at 346–47. The Court held that preemption barred their state law fraud-on-the-FDA claim because the "federal statutory scheme amply empowers the FDA to punish and deter fraud." *Id.* at 347–48, 353. The case did not consider any question of removability or jurisdiction, and the Court's holding only reinforces the conclusion that any federal duties in this case are better raised as part of a preemption defense on remand.

Bader Farms, Inc. v. Monsanto Co., No. 1:16-CV-299 SNLJ, 2017 WL 633815 (E.D. Mo. Feb. 16, 2017), is likewise distinguishable. There, the plaintiff brought a fraudulent concealment claim that turned on the defendants' violation of a duty established under federal law. The plaintiff alleged that the defendants' misrepresentations to the federal Animal and Plant Health Inspection Service ("APHIS") about a genetically modified seed led to widespread illegal use of an unapproved herbicide on crops grown from those modified seeds. *Id*. at *1–2. The court determined that the fraud claim turned on the defendant's duty under the Federal Plant Protection Act to inform APHIS that releasing the seed for use could lead to illegal use of the herbicide. *Id*. at *3. The court found that because the fraudulent concealment claim expressly relied on a federal law duty to inform a federal agency, those federal duties were necessary elements of the plaintiff's

[10] *See also Organic Consumers Ass'n v. Gen. Mills, Inc.*, 235 F. Supp. 3d 226, 232 (D.D.C. 2017) (remanding case concerning improper labeling of granola bars containing herbicide where federal law did not require disclosure of herbicide's presence, because "[a]lthough the complaint includes these allegations, plaintiffs' legal claim is that it is the undisclosed presence of glyphosate *in conjunction with* labels or advertisements of the products as 'natural' and 'healthy' that violates [District of Columbia law]" and "[t]hat claim does not require the application of existing federal disclosure regulations" (emphasis added)).

claim, and removal was proper. *Id.* Because there is no fraud claim in this case, and no claim for fraud against a federal agency, no duty to disclose to any federal agency is necessarily raised.

Finally, *Tennnessee Gas* has no application here because, as discussed above, the state law tort claims there could not be resolved without determining whether "multiple federal statutes create[d] a duty of care that d[id] not otherwise exist under state law." Opp. 40 (quoting *Tenn. Gas*, 850 F.3d at 723). The specific duties alleged by the plaintiffs existed, if at all, under the federal Clean Water Act and Rivers & Harbors Act, and were not independently recognized under Louisiana tort law; therefore, the complaint alleged a federal question on its face. *Tenn. Gas*, 850 F.3d at 722. For all the reasons discussed above, Maryland law imposes independent duties on Defendants, and, unlike *Tennessee Gas*, the Complaint does not depend on any federal law duties.

2. Federal Questions Are Not Disputed in the Complaint, and Would Not Meet *Grable*'s Substantiality Requirement If They Were.

a. There Are No Disputed Federal Questions.

Because the Complaint raises no federal questions, there are no *disputed* federal questions. *Cf. Shanks v. Dressel*, 540 F.3d 1082, 1093 (9th Cir. 2008) (no *Grable* jurisdiction where plaintiff alleged defendant city violated its own municipal code with respect to building permit at federally registered historic place, but claim turned on compliance with municipal code only, and building's listing as federal historic place was "not controverted"). Defendants' generalized insistence that "Plaintiff's entire pleading" seeks to subvert foreign policy, national security, and virtually all environmental regulation, Opp. 40–41, does not make it so.

b. No Substantial Federal Question Is Raised.

None of the three factors the Supreme Court has identified to determine the *Grable* "substantiality" element is present here, *see* Mot. 28, and Defendants ignore them entirely in their Opposition. *See MDS (Canada) Inc. v. Rad Source Techs., Inc.*, 720 F.3d 833, 842 (11th Cir. 2013) (listing factors). First, Defendants have not shown that the City's claims turn on pure questions of federal law, despite characterizing numerous federal issues as "implicated." Indeed, all of the City's causes of action depend on fact-bound questions under Maryland law. Second, Defendants

have not shown that decisions here will control other cases, but speculate ominously that the City's claims will upend swaths of federal law. Third, the federal government is not a party to this case.

There is no blanket exception to *Grable*'s substantiality requirement for cases that may bear on certain federal concerns. Defendants point menacingly at broad federal policy considerations, namely foreign policy and national security, and pronounce that this case will impact "the intersection of federal energy and environmental regulations," to suggest that federal issues are *per se* substantial. Opp. 41. But none of their citations stand for the proposition that cases "implicating" pollution, foreign affairs, or energy are automatically removable under *Grable*.

Rather, their cases are inapposite. The court in *In re National Security Agency Telecommunications Records Litigation*, 483 F. Supp. 2d 934 (N.D. Cal. 2007), held that the state secrets privilege "require[d] dismissal if national security concerns prevent plaintiffs from proving [their claims'] *prima facie* elements" and observed that the federal government had already stated its intention to assert the privilege. *Id.* at 942. Under those unique circumstances, removal was proper. *Id.* at 943. Defendants here have not asserted that the state secrets doctrine applies. *Grynberg Production Corp. v. British Gas, p.l.c.*, 817 F. Supp. 1338 (E.D. Tex. 1993), also rested on unique facts. There, the court found the complaint "necessarily" alleged "issues of federal international relations law" by seeking specific performance of a mineral rights contract in Kazakhstan. *Id.* at 1358–59. The facts here are worlds apart from those cases. Defendants' incantation of foreign relations, national security, and federal regulations does confer jurisdiction.

c. Federal Jurisdiction Here Would Upset Principles of Federalism.

Under the final *Grable* element, the balance struck by Congress favors state court jurisdiction. As they do with all other elements of the *Grable* analysis, Defendants wholly misrepresent the substance of the Complaint and ignore applicable legal standards. Opp. 42.

The Supreme Court has instructed that "the combination of no federal cause of action and no preemption of state remedies" indicates that state courts may take jurisdiction over those claims. *Grable*, 545 U.S. at 318. Here, there is no federal remedy for the tortious conduct alleged in the Complaint, no federal cause of action for the damages and abatement the City seeks, and the state

law claims are not preempted. Moreover, local governments have an obvious interest in responding to climate change. *See* Mot. 17–18 (citing Maryland and other state laws addressing climate change, as well as case law recognizing those legitimate interests). And even the CAA (which this case is not premised upon) emphasizes states' "primary" role in protecting air quality (42 U.S.C. § 7401(a)(3)), and explicitly saved state law private rights of action for remedies unavailable under the CAA's citizen suit provision. 42 U.S.C. §§ 7416, 7604(e). Here, the City is protecting its residents by exercising rights unencumbered and untouched by Congress. *See, e.g.*, *Nat'l Audubon Soc'y v. Dep't of Water*, 869 F.2d 1196, 1203 (9th Cir. 1988) ("the primary responsibility for maintaining the air quality rests on the states"); *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 725 F.3d 65, 96 (2d Cir. 2013) ("[T]he presumption that Congress did not intend [under the CAA] to preempt state law tort verdicts is particularly strong.").[11]

In sum, the City's remedies are limited in scope. The City seeks only damages and abatement, only within its geographic boundaries. The City seeks no injunctive relief. It does not seek to regulate conduct across the globe, and would not have the authority to do so if it tried. There is no basis to conclude that the balance struck by Congress favors federal jurisdiction.

C. No Federal Statute Completely Preempts the City's State Law Claims.[12]

In determining whether a claim is removable on grounds of complete preemption, the Fourth Circuit has made clear that a court's "basic inquiry is whether the [federal statute]

[11] Defendants again cite inapposite cases. *Kurns v. R.R. Friction Prod. Corp.*, 565 U.S. 625, 637 (2012), did not analyze *Grable*, and held that the state common law claims were substantively preempted the federal Locomotive Inspection Act, which does not preserve state law tort claims. *Massachusetts v. E.P.A.*, 549 U.S. 497, 505 (2007), also did not involve a *Grable* analysis, and involved a direct challenge to EPA's conduct, asking the court expressly to determine "whether EPA has the statutory authority to regulate greenhouse gas emissions from new motor vehicles; and if so, whether its stated reasons for refusing to do so are consistent with the statute." Finally, *McKay*, 2016 WL 7425927, at *4, involved a challenge to a specific FAA order changing the flightpath of commercial planes over the plaintiffs' houses, and thus a "collateral challenge to the final decision of the FAA" approving the flight plan, which was properly heard in federal court.

[12] Defendants' continued argument for application of complete preemption under the judicially created foreign affairs doctrine is inconsistent with the fundamental operation of complete preemption, which requires a federal *statute* to convey Congress's intent. *See supra* Part II. As in

established the exclusive cause of action." *Pinney*, 402 F.3d at 449. As discussed at length in the City's motion, the CAA cannot completely preempt the City's claims for the simple reason that Congress intended to preserve the role of the states in controlling air pollution, as evidenced by the congressional findings and two savings clauses in the Act. *See* Mot. 37–39; *see also Pinney*, 402 F.3d at 450 ("The presence of a savings clause counsels against a finding that Congress intended to sweep aside all state claims in a particular area."); *San Mateo*, 294 F. Supp. 3d at 938 (the savings clauses "suggest that Congress did not intend the federal causes of action under [the Act] 'to be exclusive'"). Even if Defendants could overcome these facts, the CAA's preemptive force would not apply to the City's claims, which are not within the CAA's scope. Defendants' arguments mischaracterize the City's claims and boil down to another ordinary preemption defense, which, yet again, cannot confer federal jurisdiction.

1. Complete Preemption Does Not Apply Because the City's Claims Are Outside the Scope of the Clean Air Act.

When Congress intends a federal statute to completely preempt state law claims—which is not the case with the CAA—only those state law claims "within the scope" of the federal statute are so preempted. *See Aetna Health Inc. v. Davila*, 542 U.S. 200, 210 (2004). Despite Defendants' attempt to recast the nature and purpose of the City's claims, they do not fall within the scope of the CAA. A claim is only "within the scope" of a federal statute if (1) the plaintiff could have brought its claim under the federal statute, and (2) there is "no other independent legal duty that is implicated by a defendant's actions." *Id.*

The City's claims could not have been brought under the CAA. "[A] vital feature of complete preemption is the existence of a federal cause of action that replaces the preempted state

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their Notice of Removal, Defendants rely on irrelevant cases that did not even address complete preemption, but instead considered the foreign affairs doctrine on motions to dismiss. *See* Opp. 44 (citing *Garamendi*, 539 U.S. at 418, *People of State of California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871, at *14 (N.D. Cal. Sept. 17, 2007), *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1025–26 (N.D. Cal. 2018), *appeal docketed*, No. 18-16663 (9th Cir. Sept. 4, 2018), and *City of New York v. B.P. P.L.C.*, 325 F. Supp. 3d 466,475 (S.D.N.Y. 2018), *appeal docketed*, No. 18-2188 (2d Cir. July 26, 2018)).

cause of action." *King v. Marriott Int'l Inc.*, 337 F.3d 421, 425 (4th Cir. 2003) (removal on complete preemption grounds inappropriate where ERISA did not provide a federal cause of action for plaintiff's claims). As Defendants acknowledge, emissions limits and permitting schemes are "the heart" of the CAA. *See* Opp. 45. Consistent with this focus, the CAA provides a right of action for violations of emissions standards or of an EPA order. 42 U.S.C. § 7607(e). Defendants' complete preemption argument rests on the false premise that this lawsuit is a backdoor attempt "to impose nationwide and even international emission standards." Opp. 48; *see also id.* at 44. But the City's claims rest on Defendants' wrongful marketing and promotion of fossil fuels products, the defective nature of those products, and their failure to warn of the known effects of those defective products. Compl. ¶¶ 218–98. The CAA provides no right of action for wrongful promotion of defective products; does not regulate the marketing, promotion, or sale of defective products, even if they lead to greenhouse gas emissions; and does not authorize recovery of damages or equitable abatement against producers. The relief sought would not impact the rights of *any* source permitted under the CAA or otherwise interfere with the CAA's regulatory framework. Put simply, the CAA lacks a "discernible federal claim" for the conduct and harms alleged in the Complaint, and the City's claims are outside its scope. *Pinney*, 402 F.3d at 449.[13]

The CAA's exclusion of a private right for compensatory damages is not merely a "gap in the relief available," as Defendants argue, Opp. 48 (citing *Prince v. Sears Holdings Corp*., 848 F.3d 173, 178 (4th Cir. 2017)), but a limit on the available causes of action themselves. The Iowa Supreme Court emphasized this very distinction in *Freeman v. Grain Processing Corp.*, the 848 N.W.2d 58 (Iowa 2014). Plaintiffs there brought state common law claims against a corn milling facility causing pollution and noxious odors. *Id.* Rejecting the defendant's ordinary preemption arguments, the court emphasized that unlike the generalized, prospective remedies available under

[13] Similarly, Defendants' portrayal of the Complaint as suggesting that the Court set the global cap at 15 percent annual reduction, Opp. 45, is an egregious mischaracterization. In describing the harms caused by Defendants' conduct, the Complaint merely provides an estimation of reductions that would be necessary to avert dangerous climate change if mitigation efforts do not begin before 2020. Compl. ¶ 180. Nowhere does the Complaint request such relief.

in the CAA, which "deal with general emissions standards to prospectively protect the public," common law actions "retrospectively focus on individual tort remedies . . . for actual harms." *Id.* at 69. The interest in preserving the City's state law claims is even more compelling here, because the claims do not implicate emissions from any particular source but rather Defendants' wrongful marketing and promotion of their products, which is not regulated under the CAA.

Defendants' citations to *Prince v. Sears Holdings Corp.*, 848 F.3d 173 (4th Cir. 2017), Opp. 48, is inapposite. There, the plaintiff brought state law claims for "damages" against life insurance fund administrators. The court found the claims completely preempted by ERISA, because the life insurance was provided through an ERISA plan and the plaintiff was only entitled to benefits to the extent required under the ERISA plan. *Id.* at 177. The fund administrators had no legal duties to the plaintiff independent of the plan, and the plaintiff's claims "concern[ed] only the way in which Sears assertedly breached these duties while administering his benefits." *Id.* at 178. The court rejected the plaintiff's attempt to circumvent ERISA by characterizing its claim as one for "damages" when in fact the plaintiff sought benefits due under the plan. *Id.* at 179. Unlike *Prince*, Maryland law here *does* impose an independent duty not to promote and sell unreasonably dangerous products or contribute to nuisances, while the CAA does not. *See, e.g.*, *Phipps v. Gen. Motors Corp.*, 363 A.2d 955 (Md. 1976) (recognizing cause of action based on strict products liability in tort for injuries incurred from car accident due to unreasonably dangerous condition of vehicle).

Even if the City's claims could impact sources regulated under the CAA (which they do not), a comprehensive regulatory scheme does not *per se* have complete preemptive force. In *Pinney*, the Fourth Circuit held that while the Federal Communications Act ("FCA") heavily regulated cellular service provided by "common carriers" and provided claims against "common carriers," the plaintiffs' state law claims were not completely preempted because (1) the FCA did not provide a claim based on the defendant wireless companies' "design, manufacture, marketing, and sale of" cellphones; and (2) the inclusion of a savings clause evidenced "that Congress intended to preserve state law claims such as the ones asserted" there. *Id.* at 450. Just as in *Pinney*,

the CAA does not provide a cause of action for Defendants' wrongful overpromotion, marketing, and sale of dangerous fossil fuel products, and includes a savings clause demonstrating Congress's intent not to preempt state law claims. *See* Mot. 37–42.

Defendants' inflated portrayal of the CAA's scope ignores cases that allowed state law claims for deceptive marketing against manufacturers, even where those products caused regulated emissions. *See* Mot. 19–20. In *In re Volkswagen "Clean Diesel" Litig.*, No. CL-2016-9917, 2016 WL 10880209 (Va. Cir. Ct. 2016) ("*Volkswagen*"), and *Counts v. Gen. Motors, LLC*, 237 F. Supp. 3d 572 (E.D. Mich. 2017), vehicle owners asserted state law claims for deceptive advertising and fraud based on manufacturers' false statements about their vehicles' emissions rates. The defendants argued that the claims were preempted by CAA provisions prohibiting states from "enforc[ing] any standards relating to the control of emissions from new motor vehicles." 42 U.S.C. § 7543(a). Rejecting the argument, both courts held that the state tort claims arose out of tortious behavior beyond the scope of emissions control. *Volkswagen*, 2016 WL 10880209, at *5–6 (distinguishing state law claims based on tortious behavior from mere noncompliance with emissions standards); *Counts*, 237 F. Supp. 3d at 591–92 (no preemption where "the gravamen of Plaintiffs' claims, like in *Volkswagen*, focus on 'the deceit about compliance, rather than the need to enforce compliance'"). Tort duties regarding deceptive marketing claims, as opposed to claims concerning emissions standards, permits, or control, are outside the CAA's scope.[14]

Because the City's claims fall outside the scope of the Act, the procedures for challenging EPA actions set out in 42 U.S.C. § 7607(e) to which Defendants allude, Opp. 45, are irrelevant. Defendants' cases—all of which concern ordinary and not complete preemption—do not hold otherwise. In *California Dump Truck Owners Ass'n v. Nichols*, 784 F.3d 500, 507 (9th Cir. 2015), the plaintiff, "as a practical matter," challenged EPA's approval of a provision of California's

[14] In contrast to *Volkswagen* and *Counts*, in *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 264 F. Supp. 3d 1040, 1057 (N.D. Cal. 2017), the court held that Wyoming was preempted from enforcing its SIP provisions in a way that effectively attempted to enforce a "standard relating to the control of emissions from new motor vehicles," in violation of 42 U.S.C. § 7543(a), a portion of the CAA that is entirely inapplicable here.

Clean Air Act State Implementation Plan ("SIP"). Similarly, in *Commonwealth of Virginia* v. *United States*, 74 F.3d 517 (4th Cir. 1996), the State alleged provisions of the CAA violated the Constitution. Again, in *New England Legal Found. v. Costle*, 666 F.2d 30, 31–32 (2d Cir. 1981), the alleged nuisance claim was "in effect, an attack upon the validity of the EPA-approved variance" to an SIP and was therefore preempted by the procedures set out in 42 U.S.C. § 7607(e). The present lawsuit, in contrast, does not challenge any action taken by the EPA. EPA has not approved Defendants' practices for marketing or promotion of fossil fuels, nor could it for the simple reason that such practices are outside the scope of the Act.

2. Defendants' Ordinary Preemption Arguments Do Not Give Rise to Removal Jurisdiction.

Even if the City's claims fell within the scope of the CAA, which they do not, Defendants' arguments founder on the cases cited in the City's Motion—all of which either reject the CAA's complete preemption of state law nuisance claims against point sources, or reject ordinary preemption of such claims. *See* Mot. 37 & nn. 17 & 18. Attempting to distinguish those cases, Defendants emphasize that under the "source state rule," those plaintiffs are preempted from bringing nuisance claims under the law of state in which the injury occurs. Opp. 46–47. But as explained in Part III.A.1.d, *supra*, the source state rule is an ordinary preemption defense. Defendants have cited no case where a court found *complete* preemption under the CAA, and the City is aware of none.

Defendants' argument that the CAA's savings clauses, 42 U.S.C. §§ 7416 & 7604(e), do not apply here also conflates complete preemption with ordinary preemption. Opp. 46–48. Indeed, *North Carolina ex rel Cooper v. Tennessee Valley Authority*, 615 F.3d 291, 303 (4th Cir. 2010), cited by Defendants, explicitly refers to "field and conflict preemption," two ordinary preemption principles. In allowing state law claims against permitted emitters, courts have relied on the Act's express savings clauses, which emphasize the primary role of state law in the preservation of air quality. *See, e.g.*, *Merrick*, 805 F.3d at 690 ("The states' rights savings clause of the Clean Air Act expressly preserves the state common law standards on which plaintiffs sue."); *Bell*, 734 F.3d at

190–91 (finding no preemption of state tort claims after considering the CAA savings clauses). *AEP* did nothing to negate the cooperative federalism framework established by the CAA, but rather highlighted congressional intent that federal air pollution regulation be conducted "in combination with state regulators." *AEP*, 564 U.S. at 427. The Act envisions states as primarily responsible for maintaining air quality, undermining arguments that Congress intended to completely preempt state law. *See* Mot. 37 (citing 42 U.S.C. § 7401(a) (3)). Moreover, the Supreme Court's concern with setting emissions standards is irrelevant to the present litigation because, as explained *supra* Part III.C.1, the City does not seek to regulate sources.

D. The Claims Are Not Based on Defendants' Activities on Federal Lands or at the Direction of the Federal Government.

1. There Is No Outer Continental Shelf Lands Act Jurisdiction.

The harms the City has suffered were not caused by "injurious physical acts" on the Outer Continental Shelf ("OCS") and cannot give rise to Outer Continental Shelf Lands Act ("OCSLA") jurisdiction. *Par. of Plaquemines v. Total Petrochem. & Ref. USA, Inc*., 64 F. Supp. 3d 872, 895 (E.D. La. 2014); *Tenn. Gas Pipeline v. Houston Cas. Ins. Co.*, 87 F.3d 150, 154 (5th Cir. 1996) (defining "operation" as "the doing of some physical act" on the OCS). The City's injuries arise from the nature of Defendants' fossil fuel products, no matter where they are extracted, and from Defendants' promotion of them—not from the physical acts any Defendant conducted on the OCS. *See Parish of Plaquemines*, 64 F. Supp. 3d at 894–96 (no OCSLA jurisdiction over pollution claims from oil and gas exploration and production in Louisiana waters, even though some claims "involved pipelines that ultimately stretch to the OCS"); *see also* Mot. 44 n.19 (collecting cases).

Defendants go to significant lengths to show that large volumes of oil and gas have been produced from the OCS. Opp. 50, n.23; Declaration of Joshua S. Lipshutz, Dkt. 125, ("Lipshutz Decl.") ¶ 17 & Ex. 15, Dkt. 125-15; Declaration of J. Keith Couvillion, Dkt. 126, ¶¶ 6, 9, 12 & Ex. C, Dkt. 126-03. But Defendants go only so far as to say "some portion of the alleged injuries would not have occurred absent Defendants' operations on the OCS." Opp. 51, n.24. "Some portion" does not establish "but for" causation; the City would still have suffered harms without

extraction on the OCS. This partial attribution is insufficient to meet Defendants' burden on a motion for remand. *See* Mot. 44, n.19 (collecting cases); *San Mateo*, 294 F. Supp. 3d at 938–39 (rejecting OCSLA removal jurisdiction where defendants failed to show plaintiffs' injuries "would not have accrued *but for* the defendants' activities on the [OCS]"). The method of producing fossil fuel products is immaterial to the City's claims, and Defendants' arguments would "open the floodgates to cases that could invoke OCSLA jurisdiction far beyond its intended purpose." *Plaquemines Par. v. Palm Energy Offshore, LLC*, No. CIV.A. 13-6709, 2015 WL 3404032, at *5 (E.D. La. May 26, 2015).

Hammond v. Phillips 66 Co., No. 2:14CV119-KS-MTP, 2015 WL 630918 (S.D. Miss. Feb. 12, 2015), is instructive on this point. The plaintiff there alleged that he suffered asbestosis and related lung disease from exposure to the defendant manufacturers' asbestos-containing products. *Id.* at *1. The defendants removed under OCSLA, arguing that the plaintiff was exposed to asbestos while working on a semi-submersible on the OCS. *Id.* The plaintiff alleged, however, that he spent only nine months of his ten years in the industry employed on the OCS. *Id.* at *3. Because "asbestosis is a cumulative and progressive disease," the court was "unable to conclude that 'a "but-for" connection' exist[ed]" between the plaintiff's injury and his time working on the OCS, and therefore granted remand. *Id.* The court expressly distinguished *In re Deepwater Horizon*, where "it was 'undeniable'" that the pollutants that injured the plaintiff migrated directly from a facility operating on the OCS, and found instead that jurisdiction was inappropriate "given the uncertainty regarding whether [plaintiff's] working offshore for less than one year could have caused him to develop asbestosis." *Id.*[15]

[15] Defendants' contrary citation to *Ronquille v. Aminoil Inc.*, No. CIV.A. 14-164, 2014 WL 4387337, at *2 (E.D. La. Sept. 4, 2014), is also inapposite. There, the asbestos plaintiff alleged that his exposure occurred "as a result of his work at [defendant's] land base," but it was undisputed that his work was done "on and in support of . . . structures and materials" that were ultimately used on OCS platforms. The court found, with no discussion, that because the *only* alleged source of exposure was necessarily directly related to OCS operations, there was a "sufficient connection" to satisfy the but-for test. *Id.* Here, by contrast, it is undisputed that the large majority of Defendants' production, and all of their marketing, promotion, and disinformation activities, were wholly unrelated to operations on the OCS.

As in *Hammond*, Defendants' burden here is to establish that the City would not have been injured but-for Defendants' OCS "operations." Defendants proffer purports to show that "substantial volume[s]" of oil and gas have been extracted from the OCS over time, Opp. 50, but does not quantify any contribution to the City's injuries, let alone argue that the City would not have been injured but-for Defendants' OCS "operations."

2. The City's Claims Do Not "Arise" Within the Federal Enclave.

a. The City's Claims "Arise" Where the City Has Been Injured—on Non-Federal Land.

None of the City's claims "arose on" a federal enclave. *See* Mot. 46–49. Contrary to Defendants' specious argument that references in the Complaint to "Maryland's coast" mean the City seeks to recover for injuries to federal property, Opp. 54–55, the City explicitly disclaims any injuries arising on federal land. *See* Compl. ¶¶ 1, n. 2 & 12; Mot. 43; *see also Washington v. Monsanto Co.*, 274 F. Supp. 3d 1125, 1132 (W.D. Wash. 2017), *aff'd*, 738 Fed. Appx. 553 (9th Cir. 2018) (because State of Washington "assert[ed] that it does not seek damages for contamination to . . . land within federal territory, . . . none of its claims arise on federal enclaves").[16] Resolving all doubts in favor of remand, the injuries alleged in the Complaint have occurred and will occur on non-federal land, and the City's claims therefore arise outside the federal enclave. *Accord San Mateo*, 294 F. Supp. 3d at 939.[17]

[16] In view of this disclaimer, Defendants' argument that the Complaint's citations to reports discussing federal lands implies an effort to recover for injuries on federal enclaves also fails. Defendants' observation that Fort McHenry is a federal enclave, Opp. 56—not identified in the Complaint as a site injury or injurious conduct—has no bearing on the validity of that disclaimer.

[17] Defendants' attacks on the City's cited cases are equally inapplicable. The *Totah* case is not, as Defendants assert, confined to defamation claims. The court there found that, for federal enclave purposes, a tort arises where and when "'last event necessary to render the *tortfeasor* liable'" takes place, and the court did not limit its reasoning to defamation causes of action. Opp. 55 n.28 (quoting *Totah v. Bies*, No. C 10-05956 CW, 2011 WL 1324471, at *2 (N.D. Cal. Apr. 6, 2011) (emphasis added)). Defendants fail to distinguish *Bordetsky v. Akima Linguistics Servs., LLC*, No. CV 14-1786 (NLH/JS), 2016 WL 614408 (D.N.J. Feb. 16, 2016), in which the court remanded because it was unquestioned that the alleged injury—and all others elements going to the

b. Defendants Cannot Show "All Pertinent Events" Occurred on a Federal Enclave.

Defendants' argument that enclave jurisdiction exists whenever "pertinent events" occurred within the federal enclave misstates the law. Opp. 54. Where tortious activities "allegedly occur partially inside and partially outside the boundaries of an enclave," defendants bear a "higher burden" because "the state's interest increases proportionally, while the federal interest decreases." *Ballard v. Ameron Int'l Corp.*, No. 16-CV-06074-JSC, 2016 WL 6216194, at *3 (N.D. Cal. Oct. 25, 2016). Defendants have not shown that all or even a substantial portion of the conduct that allegedly harmed the City occurred within the federal enclave, and a proper reading of the Complaint shows that the vast majority of Defendants' bad conduct, as well as all of the City's injuries, occurred outside it. Federal enclave jurisdiction is absent.

Defendants' citation to *Colon v. United States*, 320 F. Supp. 3d 733 (D. Md. 2018), is inapposite, because that case analyzed the federal enclave doctrine to determine choice of law, not jurisdiction, and the parties did not dispute that the plaintiff's claims arose within a federal enclave. The plaintiff there brought state, federal, and constitutional claims in this Court against the United States, the Department of Defense, and two individuals, arising out of unauthorized access to and use of her medical records. *Id.* at 736. The court's original and supplemental jurisdiction over the plaintiff's state law claims was not in dispute, both because the United States was named as a defendant and because the plaintiff brought explicitly federal claims.[18] Importantly, the parties *agreed* that the alleged torts arose at Fort Meade and the Walter Reed Medical Center, and that "both territories are . . . federal enclaves." *Id.* at 746. The parties disagreed only as to "whether the

defendant's negligence—occurred on private property. Finally, *Amtec Corp. v. U.S. Centrifuge Sys., L.L.C.*, No. CV-12-RRA-1874-NE, 2012 WL 12897212 (N.D. Ala. Dec. 6, 2012), *objections overruled*, 2013 WL 12147712 (N.D. Ala. May 29, 2013), stands for the general rule that in determining where a claim arises for federal enclave jurisdictional purposes, courts look to the state law that created the claim. In Maryland, torts arise where injury occurs—here, the injuries occurred in Baltimore. Mot. 49.

[18] The court dismissed the plaintiff's federal claims under Fed. R. Civ. P. 12(b)(1) for reasons not relevant here, namely that they were barred by the "*Feres* doctrine" and "intra-military immunity doctrine," which preclude recovery for injuries "aris[ing] out of or are in the course of activity incident to [military] service." *Id.* at 739–43 (citing *Feres v. United States*, 340 U.S. 135 (1950)).

federal government has decided to make the state laws at issue applicable on these two federal enclaves." *Id.* The court observed that "once the federal enclave has been ceded *the federal government* has exclusive authority to determine the choice of law on that federal enclave" and held that the federal government had not "specifically authorize[d] the enforcement of either of these state laws on either Fort Meade or the Walter Reed Medical Center." *Id.* at 747. It therefore dismissed the plaintiff's state law causes of action for failure to state a claim under Rule 12(b)(6). *Id.* at 746–47. The case did not address—and the parties did not argue—the central issue here: whether the plaintiff's state law claims accrued and arose within or outside the federal enclave for purposes of federal question jurisdiction under 28 U.S.C. § 1331.

Defendants' remaining cited cases stand at most for the proposition that enclave jurisdiction will lie where "*all* pertinent events," *Rosseter v. Indus. Light & Magic*, No. C 08-04545 WHA, 2009 WL 210452, at *2 (N.D. Cal. Jan. 27, 2009) (emphasis added), or at least "*the vast majority* of the alleged [tortious] acts," *Klausner v. Lucas Film Entm't Co.*, No. 09-03502 CW, 2010 WL 1038228, at *4 (N.D. Cal. Mar. 19, 2010) (emphasis added), occurred within the federal enclave. Indeed, each of these cases cites to *Snow v. Bechtel Const. Inc.*, 647 F. Supp. 1514, 1521 (C.D. Cal. 1986), in which it was "concede[d]" that "*all* pertinent events occurred on a federal enclave" (emphasis added), and federal jurisdiction therefore existed over the action. None of these cases support the Defendants' position that federal jurisdiction is implicated where, as here, all or the vast majority of the allegedly tortious conduct occurs *outside* the federal enclave.[19]

The Complaint contains no allegation that any "pertinent event" occurred within a federal enclave; at most, Defendants have shown that one Defendant operated at the Elk Hills Naval

[19] Nor do *Corley v. Long-Lewis, Inc.*, 688 F. Supp. 2d 1315, 1328–29 (N.D. Ala. 2010), and *Reed v. Fina Oil & Chem. Co.*, 995 F. Supp. 705 (E.D. Tex. 1998), support Defendants' position. In *Corley*, the court emphasized that a substantial amount of plaintiffs' exposure to asbestos occurred on federal enclaves, and found removal proper because the injury occurred there. *Id.* In *Reed*, the plaintiff alleged a "single, indivisible [toxic exposure] injury" while working at a manufacturing plant, which for a portion of plaintiff's tenure was a federal enclave. *Id.* at 710, 713. Because a substantial portion of the injury occurred on a federal enclave and the plaintiff did not distinguish between exposure before and after the plant became private, the court was compelled to find jurisdiction. *Id.* at 713.

Petroleum Reserve for some period of time, and that one Defendant sold oil and gas to the Navy Exchange Service Command. *See* Opp. 58–62; *see also* Mot. 53–55. The overwhelming majority of the conduct at issue occurred on non-federal land—in Defendants' corporate offices, research facilities, and production facilities outside the federal enclave. *Cf. Ballard*, 2016 WL 6216194, at *3 (remanding state law asbestos-related claims where plaintiff worked for defendant on military base, but asbestos exposure there was "just a small portion of the total exposure: one of 17 locations and during six months of the years-long exposure period"). Even under Defendants' "pertinent acts" theory—which is not the correct standard—Defendants have not met their burden.

E. Defendants Were Not "Acting Under" Federal Officers in Their Tortious Conduct.

To invoke federal officer removal, private companies bear the burden to establish that (1) they acted under the government's "subjection, guidance, or control," *Watson v. Philip Morris Companies, Inc.*, 551 U.S. 142, 151 (2007), and (2) there was a "causal nexus" between the plaintiff's claims and the conduct done under federal control, *Ripley v. Foster Wheeler LLC*, 841 F.3d 207, 210 (4th Cir. 2016). The various contractual agreements with the federal government that Defendants offer do not satisfy either element. Confronting the exact same exhibits, the *San Mateo* court properly concluded that the defendants' "dubious assertion of federal officer removal" failed because they had "not shown a 'causal nexus' between the work performed under federal direction and the plaintiffs' claims, which are based on a wider range of conduct." 294 F. Supp. 3d at 939.

Nor do Defendants demonstrate that "the Government itself would have had to perform" the conduct that caused the City's injuries in Defendants' absence. *See Watson*, 551 U.S. at 153–54. Defendants' evidence at best shows mutually beneficial procurement contracts and leases that allow them to profit privately from the exploitation of public resources, or from commodity sales to the government. Nothing in the materials demonstrates government control over the Defendants'

boardroom decisions to withhold information about the dangers inherent in their products. No evidence shows the government directed them to do so, or would have done so itself.[20]

1. Standard Oil's Operations Under the Elk Hills Reserve Contract Have No Causal Nexus to the City's Injuries.

Defendants rely heavily on the Unit Plan Contract ("UPC") between defendant Chevron's predecessor Standard Oil and the U.S. Navy to argue that Standard Oil acted under a federal officer. But the UPC was just that—a negotiated contract governing the rights of Standard Oil and the Navy in a shared oil field. The Elk Hills Reserve was "expressly made subject to pre-existing private ownership," and the contract settled the government and Standard Oil's respective ownership in the field. *See United States v. Standard Oil Co. of Cal.*, 545 F.2d 624, 626 (9th Cir. 1976); Not. of Rem. Ex. D § 2(d). This type of agreement "was at that time and still is a common arrangement in the petroleum industry where two or more owners have interests in a common pool." *Standard Oil*, 545 F.2d at 626. In "consideration for Standard curtailing its production" to retain the oil reserve for a time of emergency, Standard was permitted under the contract to extract the lesser of 25 million barrels or one-third of its owned interest in the reserve's "Shallow Oil Zone." *Id.* at 627–28.

The UPC's terms fall far short of demonstrating the control that gives rise to federal officer jurisdiction, and the contract grants far more freedom than Defendants admit. First, as already

[20] Defendants' citations are distinguishable from the facts here. In *Benson v. Russell's Cuthand Creek Ranch, Ltd.*, 183 F. Supp. 3d 795, 198–99 (E.D. Tex. 2016), the National Resources Conservation Service ("NRCS") partnered with the defendant to construct levees and perform other tasks pursuant to NRCS's Wetland Reserve Program. The court found that the defendant "was a partner with NRCS and in many ways stood fully in the place of the government" in executing plans under the Wetland Reserve Program, which were controlled in every detail by the government, and which the government would have had to do absent the defendant's participation. *Id.* at 802. Similarly, *Takacs v. Am. Eurocopter, L.L.C.*, 656 F. Supp. 2d 640, 643 (W.D. Tex. 2009), stemmed from the crash of a U.S. Customs and Border Protection ("CBP") helicopter manned by government personnel. The defendant helicopter company was "responsible for performing program management, aircraft maintenance, logistics, supply, and electronic data processing support to ensure that CBP's aircraft are operational and ready," which the court found with "little doubt" assisted CBP in its duties and provided services CBP otherwise would have performed itself. *Id.* at 645. Those facts are a far cry from Defendants' contentions here.

explained in the City's Motion, Mot. 54 & n. 28, the UPC does not *require* production of 15,000 barrels of oil per day from the reserve, as Defendants assert. Opp. 58. To the contrary, it requires that the reserve be "developed and operated in a manner and to such extent as will . . . *permit* production . . . at a rate sufficient to produce therefore not less than 15,000 barrels per day." Not. of Rem. Ex. D § 4(b). Next, it explains that "Standard shall be *permitted* to receive from production . . . 15,000 barrels of oil per day," until certain conditions were met. *Id.* at Ex. D § 5(d). That is, 15,000 barrels of oil per day was essentially the in-kind rate at which Standard would be compensated under the contract, until its ceiling was reached. Rather than mandating minimum production, the contract represented a *curtailment* of Standard's production. Standard could have performed under the contract by producing no oil at all. Mot. 54.

Other terms also make clear that Standard was not compelled to manage and develop the reserve in place of the government. For example, if either party desired to drill an exploratory well in the Reserve, the proposal went first before an Engineering Committee composed of three representatives from Standard and three from the Navy, any non-unanimous decision of which was reviewable by the Secretary of the Navy. Not. of Rem. Ex. D § 4(e)(1), (e)(2). If the Secretary denied the proposal, "the party proposing the drilling of such well shall, notwithstanding such determination, be entitled to have such well drilled but the cost of drilling and equipping such well shall be borne solely be such party." *Id.* Finally, Standard had "the right to take delivery, and make such disposition, of the production allocated to it [t]hereunder as it may desire," and "[n]either Navy nor Standard [had] any preferential right to purchase any portion of the other's share of such production." *Id.* § 7; Mot. 54 n. 28.

Critically, none of the aspects of the Elk Hills Reserve over which the Navy *did* exert control—principally its decision to dramatically *restrict* production from the reserve for more than 30 years—has the necessary "causal nexus" to the City's injuries. The UPC did not require Standard or any Defendant to produce massive volumes of fossil fuel, did not dictate how Standard or any Defendant sold or marketed fossil fuels, and did not require or in any way even authorize Standard or any Defendant to withhold known risks inherent in its products. And in any event, the

amount of oil Standard may have produced from the Elk Hills Reserve is vanishingly small compared to Defendants' total production, and is too small to satisfy the required "causal nexus between the charged conduct and the asserted official authority." *Ripley*, 841 F.3d at 210.

2. Defendants' Conduct Under to OCS Leases or NEXCOM Contracts Was Not Controlled by the Federal Government and Has No Causal Nexus with the City's Injuries.

Defendants' leases of OCS territory for oil and gas production also do not confer federal officer jurisdiction, because they are commercial oil and gas leases that do not direct the conduct the City alleges caused its injuries. The leases and leasing scheme at most show that some Defendants have profitably leased federal lands; critically, they do not show any "effort to assist, or to help carry out, the duties or tasks of [a] federal superior." *Watson*, 551 U.S. at 152. Defendants cite no case where an OCSLA lease was held to give rise to federal officer removal jurisdiction, because no court has ever so held.[21]

More importantly, the terms of the example lease Defendants provide and the regulations they cite do not show that the government required the Defendant lessees to commit the acts that harmed the City: promoting, marketing, and selling massive amounts of fossil fuels knowing those products were dangerous; failing to warn of known risks; and misleading the public regarding those risks. The City does not allege that Defendants' compliance or non-compliance with the terms of any OCS lease caused its injuries. Merely contracting with the government does not give rise to federal officer removal where, as here, the conduct that *caused injury* was in no way directed by the government. *See, e.g.*, *Parlin v. DynCorp Int'l, Inc.*, 579 F. Supp. 2d 629, 635–36 (D. Del. 2008) (remanding state law wrongful death case against contractor providing police services to Department of State in Baghdad, where claim arose from defendant's alleged failure to provide

[21] Defendants' representation that the sample OCSLA lease mandated drilling, Opp. 60, mischaracterizes the text of the lease, which merely requires that the lessee's exploration plan obtain a government blessing before any exploration occurs. *See* Not. of Rem. Ex. C § 9. Defendants do not point to an Exploration Plan or other document that mandates drilling.

adequate security for job applicants, and defendant did not show alleged tortious behavior was done at government's behest).[22]

The contracts between NEXCOM and Defendant CITGO are commercial contracts for procurement of retail-quality, commodity gasoline and diesel. By their own terms, they call for provision of fuel identical or comparable to that sold at retail by CITGO,[23] that "compl[ies] with standard specification for automotive gasoline" and "standard specification for diesel fuel,"[24] and that complies with environmental laws and regulations.[25] The defective nature of Defendants' products, Defendants' failure to warn of known risks, and Defendants' massive production, sale,

[22] *Natural Resources Defense Council, Inc. v. Hodel*, 865 F.2d 288, 291–92 (D.C. Cir. 1988), cited at Opp. 62, does not establish that all conduct pursuant to OCSLA leases satisfies "acting under" jurisdiction. That case merely recites the purposes of the OCSLA, but does not show that the government itself would engage in oil and gas exploration on the OCS but for the OCSLA leases. Defendants still are unable to cite any case where a court has found "acting under" jurisdiction based on the presence of an OCSLA lease.

[23] *See* Declaration of Arnold Walton in Support of Defendants' Joint Opposition to Motion to Remand ("Walton Decl."), Dkt. 195, Ex. A, at 13 (CITGO-000012) ("The Contractor must provide high quality product identical to or the same product as supplied [at] the Contractors commercially operated service stations."); *Id.* Ex. B, at 14 (CITGO-000043) ("Gasoline products supplied by CITGO under this contract shall be comparable to gasoline products supplied to other retail gasoline facilities owned, operated, or bearing the same name as CITGO marketed in the same geographic area"); *Id.* Ex. C, at 14 (CITGO-000103 ("The Contractor shall furnish branded motor fuel products of the same type, grade, and octane that are furnished to commercial retail facilities owned, operated, or bearing the same name as the Contractor"); *Id.* Ex. D, at 42 (CITGO-000235) (purchased fuel "shall be comparable to motor fuel products supplied to commercial retail gasoline sales facilities supplied by the Contractor"); *Id.* Ex. E, at 21 (CITGO-000373) (same); *Id.* Ex. F, at 19 (CITGO-000420) (same); *Id.* Ex. G, at 12 (CITGO-000506) (same).

[24] Walton Decl. Ex. D, at 38, 42 (CITGO-000231, 000235) ("Gasoline products provided will comply with 'standard specification for automotive gasoline . . . and diesel fuel with standard specification for diesel fuel"); *Id.* Ex. E, at 21 (CITGO-000373) (same); *Id.* Ex. F, at 19 (CITGO-000420) ("Gasoline and petroleum fuel products will comply with standard specification for automotive gasoline"); *Id.* Ex. G, at 19 (CITGO-000506) (same).

[25] Walton Decl., Dkt. 195, Ex. D, at 38 (CITGO-000243) ("Supplies delivered under this contract shall conform to all federal, state, and local environmental requirements applicable to the geographic location of the receiving activity on the date of delivery."); *Id.* Ex. E, at 20 (CITGO-000372) (same); *Id*. Ex. F, at 18 (CITGO-000419) (same); *Id.* Ex. G, at 12 (CITGO-000506) (same).

and wrongful promotion of fossil fuels are not directed by the government's purchase of gasoline and diesel under the NEXCOM contracts.[26]

F. This Court Lacks Jurisdiction Under the Bankruptcy Removal Statutes.

1. The City Brings This Action to Enforce Its Police and Regulatory Powers Under Both the Public Policy and Pecuniary Interest Tests.

Bankruptcy jurisdiction expressly does not extend to this exercise of the City's police or regulatory powers. Mot. 56–58; *see also San Mateo*, 294 F. Supp. 3d at 939 (no removal for suit "aimed at protecting the public safety and welfare . . . on behalf of the public"). Defendants' only argument—that certain damages the City seeks are evidence of a pecuniary purpose, Opp. 64–65—ignores the unanimous caselaw explaining that government actions seeking pecuniary relief, including money damages, are not mutually exclusive with the exercise of police power. *See* Mot. 56–58. Here, the City, acting on behalf of the public, brought this action to recover costs associated with the impacts of Defendants' defective products on the City's residents, infrastructure, and public resources. *See, e.g.*, Compl. ¶¶ 1, 8, 18, 212. The City seeks to vindicate those clear public purposes, and as such, this lawsuit is exempted from bankruptcy removal.

2. The City's Action Is Not "Relate[d] to" Any Bankruptcy Proceedings.

Defendants' recital of the "any conceivable effect" test for "related to" jurisdiction, Opp. 65, is misleading and irrelevant because that test applies only *before* a bankruptcy plan is

[26] Defendants cite *Bailey v. Monsanto Co.*, 176 F. Supp. 3d 853, 870 (E.D. Mo. 2016), for the proposition that a defendant is always "acting under" a government agent when it sells a product "directly to the government." But the *Bailey* court found Monsanto was acting under a government agent "only with respect to the PCBs that Monsanto sold directly to the government, or to others at the direction of the government," not because the government was the buyer, but because "the government *required* the use of PCBs in certain products during the relevant time period." *Id.* The court ultimately granted remand in any event, because the volume of PCBs Monsanto sold to the government constituted just "slightly more than one one-hundredth of a percent" of Monsanto's total PCB sales, which under the circumstances was insufficient to show a causal nexus with the alleged injuries. *Savoie v. Huntington Ingalls, Inc.*, 817 F.3d 457, 465 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 339 (2016), is distinguishable for the same reason. There, the defendant shipyard was subject to "detailed specifications" from the Navy, "that required the use of asbestos," and therefore was acting under its federal superior when it exposed the plaintiff to asbestos, causing his mesothelioma.

confirmed. In this case, that test's applicability expired more than 30 years ago when the bankruptcy plan was confirmed for Texaco, Inc. (a subsidiary of Defendant Chevron, Inc.). *See* Mot. 59. Defendants do not dispute that the stricter "particularly close nexus" test applies to determine post-confirmation "related to" jurisdiction. *See* Mot. 59–60.

Defendants offer no authority for the proposition that reviewing a provision in a bankruptcy discharge document magically converts exclusively state law tort claims into "substantial questions of bankruptcy law," that "affect an integral aspect of the bankruptcy process." *See In re Ray*, 624 F.3d 1124, 1135 (9th Cir. 2010); *Valley Hist. Ltd. P'ship v. Bank of N.Y.*, 486 F.3d 831, 836 (4th Cir. 2007) (no post-confirmation jurisdiction over claims that could have existed outside of the bankruptcy). Further, Defendants' argument that the City's claims inevitably target Arch Coal, Peabody Energy, and other unidentified Doe defendants' bankruptcy proceedings is similarly specious, and ignores the well-pleaded complaint rule. *See* Opp. 66. The "close nexus" test "must be applied on a case-by-case basis, and that outcome often turns on a rather fact-intensive inquiry." *In re Air Cargo, Inc.*, CCB-08-587, 2008 WL 2415039, *3 (D. Md. June 11, 2008). Defendants point to no facts, either in their brief or evidentiary proffer (*see* Lipshutz Decl. Exs. 20–22 (describing fossil fuel industry bankruptcy trends)), that the City's claims sufficiently "relate to" any fossil fuel company's confirmed bankruptcy. Such speculation cannot support removal.

3. Equitable Remand Is Appropriate.

Finally, 28 U.S.C. § 1452(b) compels equitable remand here. Defendants do not seriously contend otherwise, and merely incant, to no effect, the axiom that federal courts should decide cases within their jurisdiction (citing a case discussing *Younger* abstention, not bankruptcy removal), and allude to hypothetical worldwide ramifications of this case. Opp. 66–67. They cite no other case supporting their position, nor do they rebut the City's cited cases indicating the propriety of equitable remand. Most importantly, they make no attempt to refute that every equitable factor weighs in favor of remand here. *See* Mot. 61 (discussing factors present here). Even if bankruptcy removal were proper—which it is not—equity would compel remand.

G. Admiralty Jurisdiction Is Not Grounds for Removal.

1. Admiralty Jurisdiction Alone Cannot Serve as Grounds for Removal.

District courts across the country have overwhelmingly concluded that the 2011 amendments to 28 U.S.C. § 1441 do not affect the longstanding rule that state law claims cannot be removed absent a non-admiralty ground for jurisdiction. *See, e.g.*, *Cassidy v. Murray*, 34 F. Supp. 3d 579, 584 (D. Md. 2014) ("The Court is not inclined to reject decades of well-established law to adopt an unsettled attempt to alter the course of removal procedures without clear, binding, precedent."); *Boudreaux v. Global Offshore Res., LLC*, No. 14–2507, 2015 WL 419002, at *3 (W.D. La. Jan. 30, 2015) (collecting cases and siding with majority rule that maritime cases are not removable); *Moreno v. Ross Island Sand & Gravel Co.*, No. 2:13-CV-00691-KJM, 2015 WL 5604443, at *19 (E.D. Cal. Sept. 23, 2015) ("District courts in [the Ninth C]ircuit agree with this majority view.").

Defendants cherry pick out-of-circuit district court cases, primarily *Genusa v. Asbestos Corp.*, 18 F. Supp. 3d 773, 790 (M.D. La. 2014) and *Ryan v. Hercules Offshore, Inc.*, 945 F. Supp. 2d 772 (S.D. Tex. 2013), to argue the 2011 amendments upset well-established precedent by allowing for removal of maritime claims. *See* Opp. 67–68. Defendants ignore that most courts to consider *Ryan* question its validity. *E.g.*, *Cassidy*, 34 F. Supp. 3d at 584; *Gonzalez v. Red Hook Container Terminal LLC*, No. 16:CV-5104 (NGG), 2016 WL 7322335, at *3 (E.D.N.Y. Dec. 15, 2016) ("Courts in this jurisdiction and elsewhere have predominantly rejected the *Ryan* interpretation."). Most glaringly, Defendants ignore decisions within the Fourth Circuit, including this Court, that reject the minority view. In *Cassidy*, this court refused to adopt *Ryan*, explaining that "the removal of admiralty cases without an independent jurisdictional basis permits the very occurrence the Supreme Court attempted to avoid in *Romero*—the evisceration of the savings clause." 34 F. Supp. 3d at 583 (remanding the case to state court); *see also Progressive Mtn. Ins. Co. v. Dana C. McLendon Co.*, No. 2:14-CV-04413-DCN, 2015 WL 925932 (D.S.C. Mar. 4, 2015) (remanding case "[i]n light of the relevant case law within the Fourth Circuit and the persuasive weight of authority from other jurisdictions finding that general maritime law claims are not

removable"); *A.E.A. ex rel. Angelopoulos v. Volvo Penda of the Americas, LLC*, 77 F. Supp. 3d 481, 491 (E.D. Va. 2015) (remanding case and "respect[ing] Plaintiff's right to choose a forum under the savings to suitor clause").

2. The City's Claims Are Not Governed by Admiralty.

Admiralty law was "designed and molded to handle problems of vessels relegated to ply the waterways of the world." *Exec. Jet Aviation, Inc. v. City of Cleveland, Ohio*, 409 U.S. 249, 269 (1972). Far from addressing "problems of vessels," the City's claims arise out of Defendants' wrongful marketing and promotion of fossil fuels. *E.g.*, Compl. ¶ 1. Defendants cannot satisfy either the "location" test or the "substantial relationship to traditional maritime activity" tests required under *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995).

The location test requires that the "tort occurred on navigable waters" or if "injury suffered on land was caused by a vessel on navigable water." *Grubart*, 513 U.S. at 534. Defendants do not dispute that the torts here occurred on land, nor can they, because the location of a tort for purposes of admiralty jurisdiction is "the place where the injury occurs." *Tobar v. United States*, 639 F.3d 1191, 1197 (9th Cir. 2011) (quotations omitted). Instead, Defendants argue, under the second prong of the *Grubart* location test, the City's injuries are caused by vessels. But there is no allegation in the Complaint that offshore extraction on vessels is the proximate cause of the City's injuries on land. That some unspecified amount of fossil fuels was extracted via offshore oil extraction vessels as opposed to any other method of extraction, is irrelevant to the City's case.

Defendants also fail to meet *Grubart*'s "connection to maritime activity" test, which requires that "the general character of the activity giving rise to the incident show[] a substantial relationship to traditional maritime activity." *Grubart*, 513 U.S. at 534 (quotations omitted). That oil and gas production from a vessel may be in certain circumstances a traditional maritime activity, does not mean that in this the "general character" of Defendants' tortious conduct is "substantially related" to traditional maritime activity. For example, in *In re Katrina Canal Breaches Litig.*, 324 Fed. App'x 370, 380 (5th Cir. 2009), the Fifth Circuit found that a flooding injury caused by a vessel associated with a canal dredging project was "wholly fortuitous" and

could have resulted from the same efforts being performed from land, and thus did not implicate "the expertise of an admiralty court as to navigation or water-based commerce." In reaching its conclusion, the court emphasized that the plaintiffs did "not raise issues of navigation or the more traditional maritime activities," nor did they "allege injuries to seamen" or "claim a violation of a duty to provide a safe workplace aboard a vessel." *Id.* Analogously, the City's injuries from Defendants' tortious conduct here are wholly independent from the specific means of extraction selected by the Defendants—the injuries would have occurred whether fossil fuels were extracted offshore or on land. In sum, Defendants scurry to admiralty jurisdiction as a lifeboat for their sinking removal ship, but it cannot save them.

IV. CONCLUSION

For the reasons explained above, this Court lacks jurisdiction over this action, and should remand it to the Circuit Court of Maryland for Baltimore City.

Dated: October 25, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of October 2018, the foregoing document was filed through the ECF system and will be sent electronically to the registered participants identified on the Notice of Electronic Filing.

/s/ Victor M. Sher