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October 8, 2019

VIA ECF

Hon. Catherine O'Hagan Wolfe
Clerk of the Court
U.S. Court of Appeals for the Second Circuit
40 Foley Square
New York, New York 10007

Re: *City of New York v. BP P.L.C., et al.*
Docket No. 18-2188

Dear Ms. Wolfe,

The City of New York submits this letter under Rule 28(j) to address authority handed down after the briefing was completed in this case.

Both the district court in its order and the appellees in their brief before this Court relied on *California v. BP P.L.C.*, 2018 U.S. Dist. LEXIS 32990 (N.D. Cal. Feb. 27, 2018), for the proposition that the City's claims arise under federal common law (Special Appendix 12–13, 14; Appellees' Brief 17–18, 20, 24). But three recent decisions, considering similar claims under state law, have rejected the *California* district court's reasoning. *See Bd. of Cty. Comm'rs v. Suncor Energy (U.S.A.) Inc.*, 2019 U.S. Dist. LEXIS 151578 (D. Colo. Sep. 5, 2019); *Rhode Island v. Chevron Corp.*, 2019 U.S. Dist. LEXIS 121349 (D.R.I. July 22, 2019); *Mayor of Balt. v. BP P.L.C.*, 388 F. Supp. 3d 538, 556 (D. Md. 2019).

In each of these cases the district court remanded state-law claims to state court on the ground that the claims were not completely preempted by federal common law, the Clean Air Act, or the president's foreign affairs powers. These three decisions are now (like *California*) under appeal, but they highlight the serious flaws that render the *California* decision a poor source of persuasive authority.

A copy of the recent decisions is attached for the Court's convenience.

Respectfully submitted,

/s/ John Moore

John Moore

cc: all counsel (via ECF)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martínez

Civil Action No. 18-cv-01672-WJM-SKC

BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY;
BOARD OF COUNTY COMMISSIONERS OF SAN MIGUEL COUNTY; and
CITY OF BOULDER,

Plaintiffs,

v.

SUNCOR ENERGY (U.S.A.) INC.;
SUNCOR ENERGY SALES INC.;
SUNCOR ENERGY INC.; and
EXXON MOBIL CORPORATION,

Defendants.

ORDER

Plaintiffs brought Colorado common law and statutory claims in Boulder County, Colorado District Court for injuries occurring to their property and citizens of their jurisdictions, allegedly resulting from the effects of climate change. Plaintiffs sue Defendants in the Amended Complaint ("Complaint") "for the substantial role they played and continue to play in causing, contributing to and exacerbating climate change." (ECF No. 7 ¶ 2.) Defendants filed a Notice of Removal (ECF No. 1) on June 29, 2018. Plaintiffs filed a Motion to Remand (ECF No. 34) on July 30, 2018.

For the reasons explained below, the Court grants Plaintiffs' Motion to Remand. Defendants' Motion to Reschedule Oral Argument on Plaintiffs' Motion to Remand (ECF No. 67), is denied as the Court finds that a hearing is not necessary.

I. BACKGROUND

Plaintiffs assert six state law claims: public nuisance, private nuisance, trespass, unjust enrichment, violation of the Colorado Consumer Protection Act, and civil conspiracy. The Complaint alleges that Plaintiffs face substantial and rising costs to protect people and property within their jurisdictions from the dangers of climate alteration. (ECF No. 7 ¶¶ 1–4, 11, 221–320.) Plaintiffs allege that Defendants substantially contributed to the harm through selling fossil fuels and promoting their unchecked use while concealing and misrepresenting their dangers. (*Id*. ¶¶ 2, 5, 13–18, 321–435.) The fossil fuel activities have raised the emission and concentration of greenhouse gases ("GHGs") in the atmosphere. (*Id*. ¶¶ 7, 15, 123–138, 321–38.)

As a result of the climate alterations caused and contributed to by Defendants' fossil fuel activities, Plaintiffs allege that they are experiencing and will continue to experience rising average temperatures and harmful changes in precipitation patterns and water availability, with extreme weather events and increased floods, drought, and wild fires. (ECF No. 7 ¶¶ 145–179.) These changes pose a threat to health, property, infrastructure, and agriculture. (*Id*. ¶¶ 1–4, 180–196.) Plaintiffs allege that they are sustaining damage because of services they must provide and costs they must incur to mitigate or abate those impacts. (*Id*. ¶¶ 1, 4–5, 221–320.) Plaintiffs seek monetary damages from Defendants, requiring them to pay their *pro rata* share of the costs of abating the impacts on climate change they have allegedly caused through their tortious conduct. (*Id*. at ¶ 6.) Plaintiffs do not ask the Court to stop or regulate Defendants' emissions of fossil fuels (*id*. at ¶¶ 6, 542), and do not seek injunctive relief.

Defendants' Notice of Removal asserts the following: (1) federal question jurisdiction— that Plaintiffs' claims arise under federal common law, and that this action necessarily and unavoidably raises disputed and substantial federal issues that give rise to jurisdiction under *Grable & Sons Metal Products, Inc.* v. *Darue Eng'g & Mfg.*, 545 U.S. 308 (2005) ("*Grable*"); (2) complete preemption; (3) federal enclave jurisdiction; (4) jurisdiction because the allegations arise from action taken at the direction of federal officers; (5) jurisdiction under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(b); and (6) jurisdiction under 28 U.S.C. § 1452(a) because the claims are related to bankruptcy proceedings.

While there are no dispositive cases from the Supreme Court, the United States Court of Appeals for the Tenth Circuit, or other United States Courts of Appeal, United States District Court cases throughout the country are divided on whether federal courts have jurisdiction over state law claims related to climate change, such as raised in this case. *Compare California* v. *BP p.l.c.* ("*CA I*"), 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018); *City of Oakland* v. *BP p.l.c. ("CA II*), 325 F. Supp. 3d 1017 (N.D. Cal. June 25, 2018); *City of New York v. BP p.l.c.*, 325 F. Supp. 3d 466 (S.D.N.Y. July 19, 2018) with *State of Rhode Island v. Chevron Corp.*, 2019 WL 3282007 (D. R.I. July 22, 2019); *Mayor and City Council of Baltimore v. BP P.L.C.* ("*Baltimore*"), 2019 WL 2436848 (D. Md. June 10, 2019), *appeal docketed*, No. 19-1644 (4th Cir. June 18, 2019); and *Cnty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal. 2018), *appeal docketed*, No. 18-15499 (9th Cir. May 27, 2018).

II. LEGAL STANDARD

Plaintiffs' Motion to Remand is brought pursuant to 28 U.S.C. § 1447(c). The Motion to Remand asserts that the Court lacks subject matter jurisdiction over the claims in this case, which Plaintiffs contend are state law claims governed by state law.

Federal courts are courts of limited jurisdiction, "possessing 'only that power authorized by Congress and statute.'" *Gunn v. Minton*, 568 U.S. 251, 256 (2013) (citation omitted). Thus, "[f]ederal subject matter jurisdiction is elemental." *Firstenberg v. City of Santa Fe*, 696 F.3d 1018, 1022 (10th Cir. 2012). "It cannot be consented to or waived, and its presence must be established" in every case in federal court. *Id*.

Here, Defendants predicate removal on the ground that the federal court has original jurisdiction over the claims. 28 U.S.C. § 1441(a). Diversity jurisdiction has not been invoked. Removal is appropriate "if, but only if, 'federal subject-matter jurisdiction would exist over the claim.'" *Firstenberg*, 696 F.3d at 1023 (citation omitted). If a court finds that it lacks subject matter jurisdiction at any time before final judgment is entered, it must remand the case to state court. 28 U.S.C. § 1447(c).

The burden of establishing subject matter jurisdiction is on the party seeking removal to federal court, and there is a presumption against its existence. *Salzer v. SSM Health Care of Okla. Inc.*, 762 F.3d 1130, 1134 (10th Cir. 2014). "Removal statutes are to be strictly construed,. . . and all doubts are to be resolved against removal." *Fajen v. Found. Reserve Ins. Co.*, 683 F.2d 331, 333 (10th Cir. 1982). The party seeking removal must show that jurisdiction exists by a preponderance of the evidence. *Dutcher v. Matheson*, 840 F.3d 1183, 1189 (10th Cir. 2016).

III. ANALYSIS

A. Federal Question Jurisdiction

Defendants first argue that federal question jurisdiction exists. Federal question jurisdiction exists for "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. In determining whether such jurisdiction exists, a court must "look to the 'face of the complaint'" and ask whether it is "'drawn so as to claim a right to recover under the Constitution and laws of the United States'[.]" *Firstenberg*, 696 F.3d at 1023 (quoting *Bell v. Hood*, 327 U.S. 678, 681 (1946)).

"[T]he presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule', which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987) (citation omitted). Under this rule, a case arises under federal law 'only when the plaintiff's statement of his own cause of action shows that it is based' on federal law." *Devon Energy Prod. Co., L.P. v. Mosaic Potash Carlsbad, Inc.*, 693 F.3d 1195, 1202 (10th Cir. 2012) (citation omitted). The court need only examine "the well-pleaded allegations of the complaint and ignore potential defenses. . . ." *Id*. (citation omitted).

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*, 482 U.S. at 392; *see also Devon Energy*, 693 F.3d at 1202 ("By omitting federal claims from a complaint, a plaintiff can generally guarantee an action will be heard in state court.") (internal quotation marks omitted). While the plaintiff may not circumvent

federal jurisdiction by artfully drafting the complaint to omit federal claims that are essential to the claim, *Caterpillar*, 482 U.S. at 392, the plaintiff "can elect the judicial forum–state of federal" depending on how the plaintiff drafts the complaint. *Firstenberg*, 696 F.3d at 1023. "Neither the plaintiff's anticipation of a federal defense nor the defendant's assertion of a federal defense is sufficient to make the case arise under federal law." *Id*. (internal quotation marks omitted).

For a plaintiff's well-pleaded complaint to establish that the claims arise under federal law within the meaning of § 1331, it "must establish one of two things: 'either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on a resolution of a substantial question of federal law.'" *Firstenberg*, 696 F.3d at 1023 (citation omitted). The "creation' test" in the first prong accounts for the majority of suits that raise under federal law." *See Gunn*, 568 U.S. at 257. However, where a claim finds its origins in state law, the Supreme Court has identified a "'special and small category' of cases" in which jurisdiction lies under the substantial question prong as they "implicate significant federal interests." *Id*. at 258; *see also Grable*, 545 U.S. at 312.

Defendants argue that both prongs of federal question jurisdiction are met. The Court will address each of these arguments in turn.

1. Whether Federal Law Creates the Cause of Action

Defendants first assert that federal question jurisdiction exists because Plaintiffs' claims arise under federal law; namely, federal common law, such that federal law creates the cause of action. The Supreme Court has "held that a few areas, involving

'uniquely federal interests,' . . . are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts—so-called 'federal common law.'" *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988) (citations omitted); *see also Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians,* 471 U.S. 845, 850 (1985). The issue must involve "an area of uniquely federal interest", and federal common law will displace state law only where "a 'significant conflict' exists between an identifiable 'federal policy or interest and the [operation] of state law,' . . or the application of state law would 'frustrate specific objectives' of federal legislation." *Boyle*, 487 U.S. at 507 (citations omitted).

Defendants assert that this case belongs in federal court because it threatens to interfere with longstanding federal policies over matters of uniquely national importance, including energy policy, environmental protection, and foreign affairs. They note that two courts have held that claims akin to those brought by Plaintiffs are governed by federal common law, citing the decisions in *CA I*, *CA II*, and *City of New York*.[1]

a. *Relevant Case Law*

Defendants state over the past century that the federal government has recognized that a stable energy supply is critical for the preservation of our economy

[1] Notably, in another case ExxonMobil appeared to argue the opposite of what it argues here: that there is no uniquely federal interest in this type of case and a suit does not require "'the application of federal common law, merely because the conflict is not confined within the boundaries of a single state.'" (*See* ECF No. 50-1 at 55–60) (citation omitted). Instead, it asserted that "only suits by [states] *implicating a sovereign interest* in abating interstate pollution give rise to federal common law." (*Id*. at 58–60) (emphasis added).

and national security, taken steps to promote fossil fuel production, and worked to decrease reliance on foreign oil. The government has also worked with other nations to craft a workable international framework for responding to global warming. This suit purportedly challenges those decisions by requiring the court to delve into the thicket of the "worldwide problem of global warming"— the solutions to which Defendants assert for "sound reasons" should be "determined by our political branches, not by our judiciary." *See CA II*, 2018 WL 3109726, at *9.

Plaintiffs thus target *global* warming, and the transnational conduct that term entails. (ECF No. 7 ¶¶ 125–38.) Defendants contend that the claims unavoidably require adjudication of whether the benefits of fossil fuel use outweigh its costs—not just in Plaintiffs' jurisdictions, or even in Colorado, but on a global scale. They argue that these claims do not arise out of state common law. Defendants further assert that this is why similar lawsuits have been brought in federal court, under federal law, and why, when those claims were dismissed, the plaintiffs made no effort to pursue their claims in state courts. *See, e.g.*, *Am. Elec. Power Co., Inc.* v. *Connecticut* ("*AEP*"), 564 U.S. 410 (2011); *Kivalina* v. *ExxonMobil Corp.* ("*Kivalina*"), 696 F.3d 849 (9th Cir. 2012). Defendants thus contend that the court has federal question jurisdiction because federal law creates the cause of action.

The Court first addresses the cases relied on by Defendants that address similar claims involving injury from global warming, beginning its analysis with the Supreme Court's decision in *AEP*. The *AEP* plaintiffs brought suit in federal court against five domestic emitters of carbon dioxide, alleging that by contributing to global warming,

they had violated the federal common law of interstate nuisance, or, in the alternative, state tort law. 564 U.S. at 418 (citation omitted). They brought both federal and state claims, and asked for "a decree setting carbon-dioxide emission for each defendant." *Id*. The plaintiffs did not seek damages.

The Court in *AEP* stated what while there is no federal general common law, there is an "emergence of a federal decisional law in areas of national concern", the "new" federal common law. 564 U.S. at 421 (internal quotation marks omitted). This law "addresses 'subjects within national legislative power where Congress has so directed' or where the basic scheme of the Constitution so demands." *Id*. (citation omitted). The Court found that environmental protection is "undoubtedly an area within national legislative power, one in which federal courts may fill in statutory interstices, and, if necessary, even fashion federal law." *Id*. (internal quotation marks omitted). It further stated that when the court "deal[s] with air and water in their ambient or interstate aspects, there is federal common law.'" *Id*. (*quoting Illinois v. City of Milwaukee*, 406 US. 91, 103 (1972)).

AEP also found that when Congress addresses a question previously governed by federal common law, "'the need for such an unusual exercise of law-making by federal courts disappears.'" 564 U.S. at 423 (citation omitted). The test for whether congressional legislation excludes the declaration of federal common law is "whether the statute 'speak[s] directly to [the] questions at issue." *Id*. at 424 (citation omitted). The Court concluded 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," *i.e.,* the Clean Air Act spoke directly "to emissions of carbon dioxide from the defendants' plants." *Id*. Since it found that federal common law was displaced, *AEP* did not decide the scope of federal common law, or whether the plaintiffs had stated a claim under it. *Id.* at 423 (describing the question as "academic"). It also did not address the state law claims. *Id*. at 429.

In *Kivalina*, the plaintiffs alleged that massive greenhouse gas emissions by the defendants resulted in global warming which, in turn, severely eroded the land where the City of Kivalina sat and threatened it with imminent destruction. 696 F.3d at 853. Relying on *AEP*, the Ninth Circuit found that the Clean Air Act displaced federal common law nuisance claims for damages caused by global warming. *Id*. at 856. It recognized that "federal common law includes the general subject of environmental law and specifically includes ambient or interstate air and water pollution." *Id*. at 855 (citing *City of Milwaukee*, 406 US. at 103). Thus, *Kivalina* stated that "federal common law can apply to transboundary pollution suits," and noted that most often such suits are, as in that case, founded on a theory of public nuisance. *Id*. The *Kivalina* court found that the case was governed by *AEP* and the finding that Congress had "directly addressed the issue of greenhouse gas commissions from stationary sources," thereby displacing federal common law. *Id*. at 856. The fact that the plaintiffs sought damages rather than an abatement of emissions did not impact the analysis, according to *Kivalina*, because "the type of remedy asserted is not relevant to the applicability of the doctrine of displacement." *Id*. at 857. The *Kivalina* court affirmed the district court's dismissal of plaintiffs' claims. *Id*. at 858.

Both *AEP* and *Kivalina* were brought in federal court and asserted federal law claims. They did not address the viability of state claims involving climate change that were removed to federal court, as is the case here. This issue was addressed by the United States District Court for the Northern District of California in *CA I* and *CA II*. In the *CA* cases, the Cities of Oakland and San Francisco asserted a state law public nuisance claim against ExxonMobil and a number of other worldwide producers of fossil fuels, asserting that the combustion of fossil fuels produced by the defendants had increased atmospheric levels of carbon dioxide, causing a rise in sea levels with resultant flooding in the cities. *CA I*, 2018 WL 1064293, at *1. Like the instant case, the plaintiffs did not seek to impose liability for direct emissions of carbon dioxide. Instead, they alleged "that—despite long-knowing that their products posed severe risks to the global climate—defendants produced fossil fuels while simultaneously engaging in large scale advertising and public relations campaigns to discredit scientific research on global warming, to downplay the risks of global warming, and to portray fossil fuels as environmentally responsible and essential to human well-being." *Id*. The plaintiffs sought an abatement fund to pay for infrastructure necessary to address rising sea levels. *Id*.

CA I found that the plaintiffs' state law "nuisance claims—which address the national and international geophysical phenomenon of global warming—are necessarily governed by federal common law," citing *AEP*, *City of Milwaukee*, and *Kivalina*. *CA I*, 2018 WL 1064293, at *2–3. It stated that, as in those cases, "a uniform standard of decision is necessary to deal with the issues," explaining:

> If ever a problem cried out for a uniform and comprehensive solution, it is the geophysical problem described by the complaints, a problem centuries in the making (and studying) with causes [including] the combustion of fossil fuels. The range of consequences is likewise universal—warmer weather in some places that may benefit agriculture but worse weather in others, . . . and—as here specifically alleged—the melting of the ice caps, the rising of the oceans, and the inevitable flooding of coastal lands. . . . [T]he scope of the worldwide predicament demands the most comprehensive view available, which in our American court system means our federal courts and our federal common law. A patchwork of fifty different answers to the same fundamental global issue would be unworkable.

Id. at *3.

The *CA I* court also found that federal common law applied despite the fact that "plaintiffs assert a novel theory of liability," *i.e.,* against the *sellers* of a product rather than direct *dischargers* of interstate pollutants. *CA I*, 2018 WL 1064293, at *3 (emphasis in original). Again, that is the situation in this case. The *CA I* court stated that "the transboundary problem of global warming raises exactly the sort of federal interests that necessitate a uniform solution," which is no " less true because plaintiffs' theory mirrors the sort of state-law claims that are traditionally applied to products made in other states and sold nationally." *Id*. The court found, however, that federal common law was not displaced by the Clean Air Act and the EPA as in *AEP* and *Kivalina* because the plaintiffs there sought only to reach domestic conduct, whereas the plaintiffs' claims in *CA I* "attack behavior worldwide." *Id*. at 4. It stated that those "foreign emissions are outside of the EPA and Clean Air Acts' reach." *Id*. Nonetheless, as the claims were based in federal law, the court found that federal jurisdiction existed and denied the plaintiffs' motions to remand. *Id*. at 5.

In *CA II*, the court granted the defendants' motion to dismiss. 325 F. Supp. 3d at 1019. It reaffirmed that the plaintiffs' nuisance claims "must stand or fall under federal common law," including the state law claims. *CA II*, 325 F. Supp. 3d at 1024. It then held that the claims must be dismissed because they ran counter to the presumption against extraterritoriality and were "foreclosed by the need for federal courts to defer to the legislative and executive branches when it comes to such international problems." *Id*. at 1024–25. The *CA II* court concluded that "[i]t may seem peculiar that an earlier order refused to remand this action to state court on the ground that plaintiffs' claims were necessarily governed by federal law, while the current order concludes that federal common law should not be extended to provide relief." *Id*. at 1028. But it found "no inconsistency," as "[i]t remains proper for the scope of plaintiffs' claims to be decided under federal law, given the international reach" of the claims. *Id*. at 1028–29.

The *City of New York* case followed the rationale of *CA I* and *CA II*, and dismissed New York City's claims of public and private nuisance and trespass against multinational oil and gas companies related to the sale and production of fossil fuels. 325 F. Supp. 3d at 471–76. On a motion to dismiss, the court found that the City's claims were governed by federal common law, not state tort law, because they were "based on the 'transboundary' emission of greenhouse gases" which "require a uniform standard of decision." *Id*. at 472 (citing *CA I*, 2018 WL 10649293, at *3). It also found that to the extent the claims involved domestic greenhouse emissions, the Clean Air Act displaced the federal common law claims pursuant to *AEP*. *Id.* To the extent the claims implicated foreign greenhouse emissions, they were "barred by the presumption

against extraterritoriality and the need for judicial caution in the face of 'serious foreign policy consequences.'" *Id*. at 475 (citation omitted). The court in *City of New York* did not address federal jurisdiction or removal jurisdiction.

In summary, the above cases suggest that claims related to the emission or sale, production, or manufacture of fossil fuels are governed by federal common law, even if they are asserted under state law, but may displaced by the Clean Air Act and the EPA. At first blush these cases appear to support Defendants' assertion that Plaintiffs' claims arise under federal law and should be adjudicated in federal court, particularly given the international scope of global warming that is at issue.

However, the Court finds that *AEP* and *Kivalina* are not dispositive. Moreover, while the *CA I* decision has a certain logic, the Court ultimately finds that it is not persuasive. Instead, the Court finds that federal jurisdiction does not exist under the creation prong of federal question jurisdiction, consistent with *San Mateo* and the two most recent cases that have addressed the applicable issues, as explained below.

The Court first notes that in *AEP* and *Kivalina*, the plaintiffs expressly invoked federal claims, and removal was neither implicated nor discussed. Moreover, both cases addressed interstate emissions, which are not at issue here. Finally, the cases did not address whether the state law claims were governed by federal common law. The *AEP* Court explained that "the availability *vel non* of a state lawsuit depend[ed], *inter alia*, on the preemptive effect of the federal Act," and left the matter open for consideration on remand. 564 U.S. at 429. Thus, "[f]ar from holding (as the defendants bravely assert) that state claims related to global warming are superseded

by federal common law, the Supreme Court [in *AIG*] 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)." *San Mateo*, 294 F. Supp. 3d at 937.

Moreover, while *AEP* found that federal common law governs suits brought by a state to enjoin emitters of pollution in another state, it noted that the Court had never decided whether federal common law governs similar claims to abate out-of-state pollution brought by "political subdivisions" of a State, such as in this case. 564 U.S. at 421–22. Thus, *AEP* does not address whether state law claims, such as those asserted in this case and brought by political subdivisions of a state, arise under federal law for purposes of removal jurisdiction. The Ninth Circuit in *Kivalina* also did not address this issue.

The Court disagrees with the finding in *CA I* that removal jurisdiction is proper because the case arises under federal common law. *CA I* found that the well-pleaded complaint rule did not apply and that federal jurisdiction exists "if the claims necessarily arise under federal common law. 2018 WL 1064293, at *5. It based this finding on a citation to a single Ninth Circuit case, *Wayne v. DHL Worldwide Express*, 294 F.3d 1179, 1184–85 (9th Cir. 2002). *Id*. *Wayne*, however, recognized the well-pleaded complaint rule, and did not address whether a claim that arises under federal common law is an exception to the rule. 294 F.3d at 1183-85. Moreover, *Wayne* cited *City of Milwaukee* in support of its finding that federal jurisdiction would exist if the claims arose under federal law. *City of Milwaukee* was, however, filed in federal court and

invoked federal jurisdiction such that the well-pleaded complaint rule was not at issue.

Thus, *CA I* failed to discuss or note the significance of the difference between removal jurisdiction, which implicates the well pleaded complaint rule, and federal jurisdiction that is invoked at the outset such as in *AEP* and *Kivalina*. This distinction was recognized by the recent decision in *Baltimore*, which involved similar state law claims as to climate change that were removed to federal court. 2019 WL 2436848, at *1. *Baltimore* found *CA I* was "well stated and presents an appealing logic," but disagreed with it because the court looked beyond the face of the plaintiffs' well pleaded complaint. *Id*. at *7–8. It also noted that *CA I* "did not find that the plaintiffs' state law claims fell within either of the carefully delineated exceptions to the well-pleaded complaint rule—*i.e.*, that they were completely preempted by federal law or necessarily raised substantial, disputed issues of federal law." *Id*. at *8. *Baltimore* found that the well-pleaded complaint rule was plainly not satisfied in that case because the City did not plead any claims under federal law. *Id*. at *6.

b. *The Well-Pleaded Complaint Rule as Applied to Plaintiffs' Claims*

In a case that is removed to federal court, the presence or absence of federal-question jurisdiction is governed by the well-pleaded complaint rule, which gives rise to federal jurisdiction only when a federal question is presented on the face of the complaint. *Caterpillar*, 482 U.S. at 392. The Tenth Circuit has held that to support removal jurisdiction, "the required federal right or immunity must be an essential element of the plaintiff's cause of action, and . . . the federal controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for

removal." *Fajen*, 683 F.2d at 333 (citation and internal quotation marks omitted).

In this case, the Complaint on its face pleads only state law claims and issues, and no federal law or issue is raised in the allegations. While Defendants argue that the Complaint raises inherently federal questions about energy, the environment, and national security, removal is not appropriate under the well-pleaded complaint rule because these federal issues are not raised or at issue in Plaintiffs' claims. A defendant cannot transform the action into one arising under federal law, thereby selecting the forum in which the claim will be litigated, as to do so would contradict the well-pleaded complaint rule. *Caterpillar*, 489 U.S. at 399. Defendants, "in essence, want the Court to peek beneath the purported state-law facade of the State's public nuisance claim, see the claim for what it would need to be to have a chance at viability, and convert it to that (i.e., into a claim based on federal common law) for purposes of the present jurisdiction analysis." *State of Rhode Island*, 2019 WL 3282007, at *2. That court found nothing in the artful-pleading doctrine which sanctioned the defendants' desired outcome. *Id*.

Defendants cite no controlling authority for the proposition that removal may be based on the existence of an unplead federal common law claim—much less based on one that is questionable and not settled under controlling law. Defendants rely on the Supreme Court's holding that the statutory grant of jurisdiction over cases arising under the laws of the United States "will support claims founded upon federal common law." *Nat'l I Farmers Union Ins. Cos.*, 471 U.S. at 850–53. However, the plaintiffs invoked federal jurisdiction in that case. The same is true in other cases cited by Defendants,

including *City of Milwaukee* and *Boyle*, both of which were filed by plaintiffs in federal court and invoked federal jurisdiction. *See, e.g.*, *State of Rhode Island*, 2019 WL 3282007, at *2 n. 2 (*Boyle* "does not help Defendants" as it "was not a removal case, but rather one brought in diversity"); *Arnold by and Through Arnold v. Blue Cross & Blue Shield*, 973 F. Supp. 726, 737 (S.D. Tex. 1997) (*Boyle* did not address removal jurisdiction, nor did it modify the *Caterpillar* rule that federal preemption of state law, even when asserted as an inevitable defense to a . . . state law claim, does not provide a basis for removal"), *overruled on other grounds*, *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387 (5th Cir. 1997). Removal based on federal common law being implicated by state claims was not discussed or sanctioned in Defendants' cases.

A thoughtful analysis of the limits that removal jurisdiction poses on federal question jurisdiction was conducted in *E. States Health & Welfare Fund v. Philip Morris, Inc.*, 11 F. Supp. 2d 384 (S.D.N.Y. 1998). That court noted that removal jurisdiction is "a somewhat different animal than original federal question jurisdiction—i.e., where the plaintiff files originally in federal court." *Id*. at 389. It explained:

> When a plaintiff files in federal court, there is no clash between the principle that the plaintiff can control the complaint—and therefore, the choice between state and federal forums—and the principle that federal courts have jurisdiction over federal claims; the plaintiff, after all, by filing in a federal forum is asserting reliance upon both principles, and the only question a defendant can raise is whether plaintiff has a federal claim.
>
> On the other hand, when a plaintiff files in state court and purports to only raise state law claims, for the federal court to assert jurisdiction it has to look beyond the complaint and partially recharacterize the plaintiffs' claims—which places the assertion of jurisdiction directly at odds with the principle of plaintiff as the master of the complaint. It is for this reason that removal jurisdiction must be viewed with a somewhat more skeptical eye; the

> fact that a plaintiff in one case chooses to bring a claim as a federal one and thus invoke federal jurisdiction does not mean that federal *removal* jurisdiction will lie in an identical case if the plaintiff chooses not to file a federal claim.

Id. at 389–90. The Court agrees with this well-reasoned analysis.

The cases cited by Defendants from other jurisdictions that found removal of state law claims to federal court was appropriate because the claims arose under or were necessarily governed by federal common law are not persuasive. *See Wayne*, 294 F.3d at 1184–85; *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 926 (5th Cir. 1997); *CA I*, 2018 WL 1064293, at *2; *Blanco v. Fed. Express Corp*., No. 16-561, 2016 WL 4921437, at *2–3 (W.D. Okla. Sept. 15, 2016). Those cases contradict *Caterpillar* and the tenets of the well-pleaded complaint rule. They also fail to cite any Supreme Court or other controlling authority authorizing removal based on state law claims implicating federal common law. While many of those cases relied on *City of Milwaukee* as authority for their holdings, the plaintiff in that case invoked federal common law and federal jurisdiction. *City of Milwaukee* does not support a finding that a defendant can create federal jurisdiction by re-characterizing a state claim.

c. *Ordinary Preemption*

Ultimately, Defendants' argument that Plaintiffs' state law claims are governed by federal common law appears to be a matter of ordinary preemption which—in contrast to complete preemption, which is discussed in Section III.B, *infra*,–would not provide a basis for federal jurisdiction. *See Geddes v. Am. Airlines, Inc.*, 321 F.3d 1349, 1352

(11th Cir. 2003) (cited with approval in *Devon Energy*, 693 F.3d at 1203).[2] "Ordinary preemption 'regulates the interplay between federal and state laws when they conflict or appear to conflict . . . .'" *Baltimore*, 2019 WL 2436848, at *6 (citation omitted). The distinction between ordinary and complete preemption "is important because if complete preemption does not apply, but the plaintiff's state law claim is arguably preempted . . . the district court, being without removal jurisdiction, cannot resolve the dispute regarding preemption." *Colbert v. Union Pac. R. Co.*, 485 F. Supp. 2d 1236, 1243 (D. Kan. 2007) (internal quotation marks omitted).

When ordinary preemption applies, the federal court "'lacks the power to do anything other than remand to the state court where the preemption issue can be addressed and resolved.'" *Colbert*, 485 S. Supp. 2d at 1243 (citation omitted). Ordinary preemption is thus a defense to the complaint, and does not render a state-law claim removable to federal court. *Hansen v. Harper Excavating, Inc.*, 641 F.3d 1216, 1221 (10th Cir. 2011); *see also Caterpillar*, 482 U.S. at 392–93 (under the well-pleaded complaint rule, courts must ignore potential defenses such as preemption).

Thus, the fact that a defendant asserts that federal common law is applicable "does not mean the plaintiffs' state law claims 'arise under' federal law for purposes of jurisdictional purposes." *E. States Health*, 11 F. Supp. 2d at 394. As that court explained, "[c]ouch it as they will in 'arising under' language, the defendants fail to explain why their assertion that federal common law governs . . . is not simply a

[2] The three forms of preemption that are frequently discussed in judicial opinions—express preemption, conflict preemption, and field preemption—are characterized as ordinary preemption. *Devon Energy*, 693 F.3d at 1203 n. 4.

preemption defense which, while it may very well be a winning argument on a motion to dismiss in the state court, will not support removal jurisdiction." *Id*.

This finding is consistent with the decision in *Baltimore*. The court there found the defendants' assertion that federal question jurisdiction existed because the City's nuisance claim "is in fact 'governed by federal common law'" was "'a cleverly veiled [ordinary] preemption argument." *Baltimore*, 2019 WL 2436848, at *6 (citing *Boyle*, 487 U.S. at 504). As the *Baltimore* defendants' argument amounted to an ordinary preemption defense, it did "not allow the Court to treat the City's public nuisance claim as if it had been pleaded under federal law for jurisdictional purposes." *Id*. The court also found that the *CA I* ruling was "at odds with the firmly established principle that ordinary preemption does not give rise to federal question jurisdiction." *Id*. at *8.

Because an ordinary preemption defense does not support remand, Defendants' federal common law argument could only prevail under the doctrine of complete preemption. Unlike ordinary preemption, complete preemption "is so 'extraordinary' that it 'converts an ordinary state law common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" *Caterpillar*, 482 U.S. at 393 (citation omitted).

2. Whether Plaintiffs' Right to Relief Necessarily Depends on Resolution of a Substantial Question of Federal Law (*Grable* Jurisdiction)

Defendants also argue that federal jurisdiction exists under the second prong of the "arising under" jurisdiction, as Plaintiffs' claims necessarily depend on a resolution of a substantial question of federal law under *Grable*. They contend that the Complaint

raises federal issues under *Grable* "because it seeks to have a court determine for the entire United States, as well as Canada and other foreign actors, the appropriate balance between the production, sale, and use of fossil fuels and addressing the risks of climate change." (ECF No. 1 ¶ 37.) Such an inquiry, according to Defendants, "necessarily entails the resolution of substantial federal questions concerning important federal regulations, contracting, and diplomacy." (*Id.*) Thus, they assert that the "state-law claim[s] necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing . . . federal and state judicial responsibilities." *Grable*, 545 U.S. at 313–14.

The substantial question doctrine "captures the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues." *Grable*, 545 U.S. at 312. To invoke this branch of federal question jurisdiction, the Defendants must show that "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.

Jurisdiction under the substantial question doctrine "is exceedingly narrow—a special and small category of cases." *Firstenberg*, 696 F.3d at 1023 (citation and internal quotation marks omitted). "[M]ere need to apply federal law in a state-law claim will not suffice to open the 'arising under' door" of jurisdiction. *Grable*, 545 U.S. at 313. Instead, "'federal jurisdiction demands not only on a contested federal issue, but a

substantial one, indicating a serious federal interest in claiming the advantages thought to be inherent in a federal forum.'" *Id*. (citation omitted).

a. *Necessarily Raised*

The Court finds that the first prong of substantial question jurisdiction is not met because Plaintiffs' claims do not necessarily raise or depend on issues of federal law. The discussion of this issue in *Baltimore* is instructive. In that case, the defendants contended that *Grable* jurisdiction existed because the claims raised a host of federal issues. *Baltimore*, 2019 WL 2436848, at *9. For example, the defendants asserted that the claims "'intrude upon both foreign policy and carefully balanced regulatory considerations at the national level, including the foreign affairs doctrine.'" *Id*. (citation omitted). They also asserted that the claims "'have a significant impact on foreign affairs,' 'require federal-law-based cost-benefit analyses,'" and "'amount to a collateral attack on federal regulatory oversight of energy and the environment.'" *Id*. (citation omitted). These allegations are almost identical to what Defendants assert in this case. (*See* ECF No. 48 at 22—"Plaintiffs' claims gravely impact foreign affairs"; 24—"Plaintiffs' claims require reassessment of cost-benefit analyses committed to, and already conducted by the Government"; 26—the claims "are a collateral attack on federal regulatory oversight of energy and the environment").

Baltimore found that these issues were not "'necessarily raised' by the City's claims, as required for *Grable* jurisdiction." 2019 WL 2436848, at *9–10. As to the alleged significant effect on foreign affairs, the court agreed that "[c]limate change is certainly a matter of serious national and international concern." *Id*. at *10. But it found

that defendants did "not actually identify any foreign policy that was implicated by the City's claims, much less one that is necessarily raised." *Id*. "They merely point out that climate change '*has* been the subject of international negotiations for decades.'" *Id*. *Baltimore* found that "defendants' generalized references to foreign policy wholly fail to demonstrate that a federal question is 'essential to resolving' the City's state law claims." *Id*. (citation omitted).

The Court finds the analysis in *Baltimore* equally persuasive as to Defendants' reliance on foreign affairs in this case, as they point to no specific foreign policy that is essential to resolving the Plaintiffs' claims. Instead, they cite only generally to non-binding, international agreements that do not apply to private parties, and do not explain how this case could supplant the structure of such foreign policy arrangements. Certainly Defendants have not shown that any interpretation of foreign policy is an essential element of Plaintiffs' claims. *Gilmore v. Weatherford*, 694 F.3d 1160, 1173 (10th Cir. 2012).

The *CA I* and *City of New York* decisions do not support Defendants' argument that the foreign policy issues raise substantial questions of law. Defendants note, for example, that the *City of New York* court dismissed the claims there on the merits "for severely infring[ing] upon the foreign-policy decisions that are squarely within the purview of the political branches of the U.S. Government." 325 F. Supp. 3d at 476. But as Defendants have acknowledged, at least at this stage of these proceedings, the Court is not considering the merits of Plaintiffs' claims or whether they would survive a motion to dismiss, only whether there is a basis for federal jurisdiction. (*See* ECF No. 1

¶ 20.) While *CA I* and *City of New York* may ultimately be relevant to whether Plaintiffs' claims should be dismissed, they do not provide a basis for *Grable* jurisdiction. *See Becker v. Ute Indian Tribe of the Uintah and Ouray Reservation*, 770 F.3d 944, 948 (10th Cir. 2014) (federal law that is alleged as a barrier to the success of a state law claim "is not a sufficient basis from which to conclude that the questions are 'necessarily raised'") (citation omitted).

Baltimore also rejected cost-benefit analysis and collateral attack arguments as a basis for *Grable* jurisdiction, finding that they "miss[ ] the mark." 2019 WL 2436848, at *10. This is because the nuisance claims were, as here, based on the "extraction, production, promotion, and sale of fossil fuel products without warning consumers and the public of their known risks", and did "not rely on any federal statutes or regulations" or violations thereof. *Id*. "Although federal laws and regulations governing energy production and air pollution may supply potential defenses," the court found that federal law was "plainly not an element" of the City's state law nuisance claims. *Id*.

The same analysis surely applies here. Plaintiffs' state law claims do not have as an element any aspect of federal law or regulations. Plaintiffs do not allege that any federal regulation or decision is unlawful, or a factor in their claims, nor are they asking the Court to consider whether the government's decisions to permit fossil fuel use and sale are appropriate.

As to jurisdiction under *Grable*, the Baltimore court concluded that, "[t]o be sure, there are federal *interests* in addressing climate change." 2019 WL 2436848, at *11 (emphasis in original). "Defendants have failed to establish, however, that a federal

issue is a 'necessary element' of the City's state law claims." *Id*. (citation omitted) (emphasis in original). Thus, even without considering the remaining requirements for *Grable* jurisdiction, the *Baltimore* court rejected the defendants' assertion that the case fell within "the 'special and small category' of cases in which federal question jurisdiction exists over a state law claim. *Id*. (citation omitted).

Two other courts have recently arrived at the same conclusion. The court in *State of Rhode Island* found that the defendants had not shown that federal law was "'an element and an essential one, of the [State]'s cause[s] of action.'" 2019 WL 3282007, at *4 (citation omitted). Instead, the court noted that the State's claims "are thoroughly state-law claims", and "[t]he rights, duties, and rules of decision implicated by the complaint are all supplied by state law, without reference to anything federal." *Id*. The court concluded:

> By mentioning foreign affairs, federal regulations, and the navigable waters of the United States, Defendants seek to raise issues that they may press in the course of this litigation, but that are not perforce presented by the State's claims. . . .These are, if anything, premature defenses, which even if ultimately decisive, cannot support removal.

Id. (internal citations omitted).

Similarly, the court in *San Mateo* found that the defendants had not pointed to a specific issue of federal law that necessarily had to be resolved to adjudicate the state law claims. 294 F. Supp. 3d at 938. Instead, "the defendants mostly gesture to federal law and federal concerns in a generalized way." *Id*. The court found that "[t]he mere potential for foreign policy implications", the "mere existence of a federal regulatory regime", or the possibility that the claims involved a weighing of costs and benefits did

not raise the kind of actually disputed, substantial federal issue necessary for *Grable* jurisdiction. *Id*. *San Mateo* concluded, "[o]n 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", and "*Grable* does not sweep so broadly." *Id*.

The Court agrees with the well-reasoned analyses in *Baltimore*, *State of Rhode Island*, and *San Mateo*, and adopts the reasoning of those decisions. To the extent Defendants raise other issues not addressed in those cases, the Court finds that they also are not necessarily raised in Plaintiffs' Complaint.

Defendants here assert that Plaintiffs' claims raise a significant issue under *Grable* because they attack the decision of the federal government to enter into contracts with Defendant ExxonMobil to develop and sell fossil fuels. (ECF No. 1 ¶ 43.) Further, they argue that the Complaint seeks to deprive the federal government of a mechanism for carrying out vital governmental functions, and frustrates federal objectives. (*Id*. ¶ 44.)

Plaintiffs' claims, however, assert no rights under the contracts referenced by Defendants. Nor do they challenge the contracts' validity, or require a court to interpret their meaning or importance. The Complaint does not even mention the contracts. Defendants' argument appears to be based solely on their unsupported speculation about the potential impact that Plaintiffs' success would have on the government's ability to continue purchasing fossil fuels. (*Id*. ¶¶ 43–44.) Even if Defendants' speculation was well-founded, this would be relevant only to the substantiality prong of the *Grable* analysis. *See Bennett v. Sw. Airlines Co.*, 484 F.3d 907, 910 (10th Cir.

2007). Defendants have not established the first requirement—that the issue is necessarily raised by the Plaintiffs.

b. *Substantiality*

The Court also finds that the second prong, substantiality, is not met. To determine substantiality, courts "look[] to whether the federal law issue is central to the case." *Gilmore*, 694 F.3d at 1175. Courts distinguish "between 'a nearly pure issue of law' that would govern 'numerous' cases and issues that are 'fact-bound and situation-specific.'" *Id*. at 1174 (quoting *Empire Healthchoice Assurance, Inc. v. McVeigh,* 547 U.S. 677, 700–11 (2006)). When a case "'involve[s] substantial questions of state as well as federal law,' this factor weighs against asserting federal jurisdiction." *Id.* at 1175 (citation omitted).

The Court finds that the issues raised by Defendants are not central to Plaintiffs' claims, and the claims are "rife with legal and factual issues that are not related" to the federal issues. *See Stark-Romero v. Nat'l R.R. Passenger Co. (Amtrak)*, No. CIV-09-295, 2010 WL 11602777, at *8 (D.N.M. Mar. 31, 2010). This case is quite different from those where jurisdiction was found under the substantial question prong of jurisdiction. For example, in *Grable*, "the meaning of the federal statute . . . appear[ed] to be the only legal or factual issue contested in the case." 545 U.S. at 315. Similarly, in a Tenth Circuit case finding jurisdiction under *Grable*, "construction of the federal land grant" at issue "appear[ed] to be the only legal or factual issue contested in the case." *Nicodemus v. Union Pac. Corp.,* 440 F.3d 1227, 1236 (10th Cir. 2006). Here, it is plainly apparent that the federal issues raised by Defendants are not the only legal or

factual issue contested in the case. Plaintiffs' claims also do not involve a discrete legal question, and are "fact-bound and situation-specific," unlike *Grable*. *See Empire Healthchoice Assurance*, 547 U.S. at 701; *Bennett*, 484 F.3d at 910–11. Finally, the case does not involve a state-law cause of action that "is 'brought to enforce' a duty created by [a federal statute]," where "the claim's very success depends on giving effect to a federal requirement." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Manning*, ___ U.S. ___, 136 S. Ct. 1562, 1570 (2016).

The cases relied upon by Defendants are distinguishable, as Plaintiffs have shown in their briefing. For example, while Defendants cite *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), that case involved preemption under the Supremacy Clause because of a conflict between a state law and Congress's imposition of sanctions. It did not address *Grable* jurisdiction, and thus does not support Defendants' assertion that it is "irrelevant" to the jurisdictional issue that the "foreign agreements are not 'essential elements of any claim.'" (ECF No. 48 at 23.)

Based on the foregoing, the Court finds that federal jurisdiction does not exist under the second prong of the "arising under" jurisdiction, because Plaintiffs' claims do not necessarily depend on a resolution of a substantial question of federal law. As Defendants have not met the first two prongs of the test for such jurisdiction under *Grable*, the Court need not address the remaining prongs.

B. Jurisdiction Through Complete Preemption

Defendants also rely on the doctrine of complete preemption to authorize removal. Defendants argue that Plaintiffs' claims are completely preempted by the

government's foreign affairs power and the Clean Air Act, which they claim govern the United States' participation in worldwide climate policy efforts and national regulation of GHG emissions.

The complete preemption doctrine is an "independent corollary'" to the well-pleaded complaint rule. *Caterpillar*, 482 U.S. at 393. "Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted claim is considered, from its inception, a federal claim, and therefore arises under federal law." *Id*. The complete preemption exception to the well-pleaded complaint rule is "quite rare," *Dutcher*, 733 F.3d at 985, representing "extraordinary pre-emptive power." *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987). The Supreme Court and the Tenth Circuit have only recognized statutes as the basis for complete preemption. *See, e.g.*, *Caterpillar*, 482 U.S. at 393 (the doctrine "is applied primarily in cases raising claims pre-empted by § 301 of the" Labor Management Relations Act ("LMRA")); *Devon Energy*, 693 F.3d at 1204–05 (complete preemption is "so rare that the Supreme Court has recognized compete preemption in only three areas: § 301 of the [LMRA], § 502 of [the Employee Retirement Income Security Act]," and actions for usery under the National Bank Act).

Complete preemption is ultimately a matter of Congressional intent. Courts must decipher whether Congress intended a statute to provide the exclusive cause of action. *See Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 9 (2003); *Metro. Life Ins. Co.*, 481 U.S. at 66 ("the touchstone of the federal district court's removal jurisdiction is not the 'obviousness' of the pre-emption defense, but the intent of Congress"). If

Congress intends preemption "completely to displace ordinarily applicable state law, and to confer federal jurisdiction thereby, it may be expected to make that atypical intention clear." *Empire Healthchoice Assurance*, 547 U.S. at 698.

"Thus, a state claim may be removed to federal courts in only two circumstances": "when Congress expressly so provides,. . . or when a federal statute wholly displaces the state law cause of action through complete pre-emption." *Beneficial Nat'l Bank*, 539 U.S. at 8. The court must ask, first, whether the federal question at issue preempts the state law relied on by the plaintiff and, second, whether Congress intended to allow removal in such a case, as manifested by the provision of a federal cause of action. *Devon Energy*, 693 F.3d at 1205.

1. Complete Preemption Based on Emissions Standards

Defendants argue that Congress allows parties to seek stricter nationwide emissions standards by petitioning the EPA, which is the exclusive means by which a party can seek such relief. *See* 42 U.S.C. § 7426(b). They assert that Plaintiffs' claims go far beyond the authority that the Clean Air Act reserves to states to regulate certain emissions within their own borders; Plaintiffs seek instead to impose liability for global emissions. Because these claims do not duplicate, supplement, or supplant federal law, *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 209 (2004), Defendants argue they are completely preempted.

The Court rejects Defendants' argument. First, Defendants mischaracterize Plaintiffs' claims. Plaintiffs do not challenge or seek to impose federal emissions regulations, and do not seek to impose liability on emitters. They are also not seeking

review of EPA regulatory actions related to GHGs, even those emissions created by the burning of Defendants' products, and are not seeking injunctive relief. Plaintiffs sue for harms caused by Defendants' sale of fossil fuels. The Clean Air Act is silent on that issue; it does not remedy Plaintiffs' harms or address Defendants' conduct. And neither EPA action, nor a cause of action against EPA, could provide the compensation Plaintiffs seek for the injuries suffered as a result of Defendants' actions.

For a statute to form the basis for complete preemption, it must provide a "replacement cause of action" that "substitute[s]" for the state cause of action. *Schmeling v. NORDAM*, 97 F.3d 1336, 1342–43 (10th Cir. 1996). "[T]he federal remedy at issue must vindicate the same basic right or interest that would otherwise be vindicated under state law." *Devon Energy*, 693 F.3d at 1207. The Clean Air Act provides no federal cause of action for damages, let alone one by a plaintiff claiming economic losses against a private defendant for tortious conduct. Moreover, the Clean Air Act expressly preserves many state common law causes of action, including tort actions for damages. *See* 42 U.S.C. § 7604(e) ("Nothing in this section shall restrict any right . . . under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief"). From this, it is apparent that Congress did not intend the Act to provide exclusive remedies in these circumstances, or to be a basis for removal under the complete preemption doctrine.

To the extent Defendants rely on *AEP*, the Supreme Court there held only that the Clean Air Act displaced federal common law nuisance action related to climate change; it did not review whether the Clean Air Act would preempt state nuisance law.

564 U.S. at 429. In fact, the Court stated that "[n]one of the parties have briefed preemption or otherwise addressed the availability of a claim under state nuisance law," and the Court thus left "the matter open for consideration" by the state court on remand. *Id*. Every court that has considered complete preemption in this type of climate change case has rejected it, including the Baltimore, *State of Rhode Island*, and *San Mateo* courts.

In *Baltimore*, the court stated that while the Clean Air Act provides for private enforcement in certain situations, there was "an absence of any indication that Congress intended for these causes of action . . . to be the exclusive remedy for injuries stemming from air pollution." 2019 WL 2436848, at *13. To the contrary, it noted that the Clean Air Act "contains a savings clause that specifically preserves other causes of action." *Id*.

Similarly, the *State of Rhode Island* court stated, "statutes that have been found to completely preempt state-law causes of action . . . all do two things: They 'provide[] the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action.'" 2019 WL 3282007, at *3 (citation omitted). The court found that the defendants failed to show that the Clean Air Act does these things, and stated that "[a]s far as the Court can tell, the [Act] authorizes nothing like the State's claims, much less to the exclusion of those sounding in state law." *Id*. Further, it noted that the Act "itself says that controlling air pollution is 'the primary responsibility of States and local governments,'" and that the Act has a savings clause for citizen suits. *Id*. at *3–4 (citation omitted). The court concluded:

> A statute that goes so far out of its way to preserve state prerogatives cannot be said to be an expression of Congress's 'extraordinary pre-emptive power' to convert state-law claims into federal-law claims. *Metro. Life Ins. Co.*, 481 U.S. at 65. No court has so held, and neither will this one.

Id. at *4.

Finally, the *San Mateo* court noted that the defendants did "not point to any applicable statutory provision that involves complete preemption." 294 F. Supp. 3d at 938. To the contrary, the Clean Air Act and the Clean Water Act both contain savings clauses that preserve state causes of action and suggest that Congress did not intend the federal causes of action under those statutes 'to be exclusive.'" *Id*. (citations omitted).

Other courts have held similarly, rejecting federal jurisdiction on the basis of complete preemption of state law claims by the Clean Air Act. The United States District Court for the Southern District of New York held that the Clean Air Act did not completely preempt the plaintiffs' state law claims for temporary nuisance, trespass, and negligence arising from alleged contamination from a steel mill, and thus did not provide a basis for federal jurisdiction. *Keltner v. SunCoke Energy, Inc.*, 2015 WL 3400234, at *4–5 (S.D. Ill. May 26, 2015). Similarly, the Northern District of Alabama found that federal jurisdiction did not exist because the Clean Air Act did not completely preempt the plaintiff's state law claims arising out of the operation of a coke plant. *Morrison v. Drummond Co.*, 2013 WL 1345721, at *3–4 (N.D. Ala. Mar. 23, 2015). *See also Cerny v. Marathon Oil Corp.*, 2013 WL 5560483, at *3–8 (W.D. Tex. Oct. 7, 2013) (complete preemption did not apply to the plaintiffs' state law claims arising from the

defendants' oil field operations so as to create federal jurisdiction).

While Defendants argue that Plaintiffs are attempting to do indirectly what they could not do directly, *i.e.,* "regulate the conduct of out-of-state sources," *Int'l Paper Co. v. Oulette*, 479 U.S. 481, 495 (1987), that is not an accurate characterization of the Plaintiffs' claims. Plaintiffs do not seek to regulate the conduct of the Defendants or their emissions, nor do they seek injunctive relief to induce Defendants to take action to reduce emissions. Defendants also rely on *Oulette* in arguing that suits such as this seeking damages, whether punitive or compensatory, can compel producers to "adopt different or additional means of pollution control" than those contemplated by Congress's regulatory scheme. 479 U.S. at 498 n.19. For these reasons, Defendants assert that the Supreme Court recognized in *Oulette* that damages claims against producers of interstate products would be "irreconcilable" with the Clean Water Act (which Defendants analogize to the Clean Air Act), and the uniquely federal interests involved in regulating interstate emissions. *Id.*

Oulette appears to involve only ordinary preemption, however, as there is no discussion of complete preemption.[3] The same is true of another case relied on by Defendants, *North Carolina v. Tenn. Valley Auth.*, 615 F.3d 291 (4th Cir. 2010). Indeed, the Fourth Circuit stated that it "need not hold flatly that Congress has entirely preempted the field of emissions regulation." *Id*. at 302. Moreover, *Oulette* allowed state law claims based on the law of the source state under the saving clause, since the

[3] "Complete preemption is a term of art for an exception to the well-pleaded complaint rule." *Meyer v. Conlon*, 162 F.3d 1264, 1268 n. 2 (10th Cir. 1998). The Tenth Circuit has held that the doctrines of ordinary and complete preemption are not fungible. *Id*.

Clean Water Act expressly allows source states to enact more stringent standards. 479 U.S. at 498–99.

Here, Defendants have not cited to any portion of the Clean Air Act or other statute that regulates the conduct at issue or allows states to enact more stringent regulations, such that similar restrictions on application of state law would apply. And Plaintiffs note that there no federal programs that govern or dictate how much fossil fuel Defendants produce and sell, or whether they can mislead the public when doing do. Plaintiffs assert that the EPA does not determine how much fossil fuel is sold in the United States or how it is marketed, nor does it issue permits to companies that market or sell fossil fuels. Rather, the EPA regulates sources that emit pollution and sets emission "floors," which states can exceed. *See* 42 U.S.C. § 7416. Defendants have not shown that the conduct alleged in this case conflicts with any of those efforts.

Plaintiffs' claims also do not relate to or impact Defendants' emissions, and the claims for monetary relief presents no danger of inconsistent state (or state and federal) emission standards. *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 489 n. 7 (2008) ("private claims for economic injury do not threaten similar interference with federal regulatory goals," unlike cases where nuisance claims seeking injunctive relief amounted to arguments for discharge standards different that those provided by statute). In any event, the issues raised by Defendants need to be resolved in connection with an ordinary preemption defense, a matter that does not give rise to federal jurisdiction.

2. Complete Preemption Based on the Foreign Affairs Doctrine

Defendants also argue that complete preemption is appropriate based on the foreign affairs doctrine. They assert that litigating inherently transnational activities intrudes on the government's foreign affairs power. See *Am. Ins. Assoc. v. Garamendi*, 539 U.S. 396, 418 (2003) ("[S]tate action with more than incidental effect on foreign affairs is preempted, even absent any affirmative federal activity in the subject area of the state [action], and hence without any showing of conflict.").

Defendants also cite *California v. GMC*, 2007 WL 2726871, at *14 (N.D. Cal. Sept. 17, 2007) (dismissing claims where the government "ha[d] made foreign policy determinations regarding the [U.S.'s] role in the international concern about global warming," and stating, a "global warming nuisance tort would have an inextricable effect on . . . foreign policy"); *CA II*, 2018 WL 3109726, at *7 ("[n]uisance suits in various United States judicial districts regarding conduct worldwide are far less likely to solve the problem and, indeed, could interfere with reaching a worldwide consensus."); and *New York City*, 2018 WL 3475470, at *6 ("[T]he City's claims are barred by the presumption against extraterritoriality and the need for judicial caution in the face of serious foreign policy consequences."). Complete preemption is implicated, according to Defendants, because the government has exclusive power over foreign affairs.

The Court finds that Defendants' argument is without merit. First, none of the above cases cited by Defendants dealt with or addressed complete preemption, and they do not support Defendants' arguments. The Supreme Court in *Garamendi* discussed only conflict or field preemption. 539 U.S. at 419. As the *Baltimore* court

noted, those types of preemption are "forms of ordinary preemption that serve only as federal defenses to a state law claim." 2019 WL 2436848, at *5 (internal quotation marks omitted). In addition, the *GMC, CA II*, and *City of New York* cases did not address preemption at all, and certainly not complete preemption as providing a basis for removal jurisdiction.

Moreover, *Garamendi* is distinguishable. It dealt with the executive authority of the President to decide the policy regarding foreign relations and to make executive agreements with foreign countries or corporations. 539 U.S. at 413–15. The Court found that federal executive power preempted state law where, as in that case, "there is evidence of clear conflict between the policies adopted by the two." *Id*. at 420–21. The Court stated, "[t]he question relevant to preemption in this case is conflict, and the evidence here is 'more than sufficient to demonstrate that the state Act stands in the way of [the President's] diplomatic objectives.'" *Id*. at 427 (citation omitted). Here, no executive action is at issue, and Defendants have not demonstrated a clear conflict between Plaintiffs' claims and any particular foreign policy.

Accordingly, Defendants have not met their burden of showing that complete preemption applies based on the foreign affairs doctrine. While they suggest there might be an unspecified conflict with some unidentified specific policy, they have not shown that Congress expressly provided for complete preemption under the foreign-affairs doctrine, or that a federal statute wholly displaces the state law cause of action on this issue. *Beneficial Nat'l Bank*, 539 U.S. at 8.

The Court's finding that the foreign affairs doctrine does not completely preempt

Plaintiffs' claims is also supported by the *Baltimore* and *State of Rhode Island* cases. In *Baltimore*, the court held that the foreign affairs doctrine is "inapposite in the complete preemption context." 2019 WL 2436848, at *12. It explained that "complete preemption occurs only when Congress intended for federal law to provide the 'exclusive cause of action' for the claim asserted." *Id*. "That does not exist here." *Id*. "That is, there is no congressional intent regarding the preemptive force of the judicially-crafted foreign affairs doctrine, and the doctrine obviously does not supply any substitute causes of action." *Id*. The *State of Rhode Island* court also rejected complete preemption under the foreign affairs doctrine, relying on *Baltimore* and finding the argument to be "without a plausible legal basis." 2019 WL 3282007, at *4 n. 3.

3. Complete Preemption Under Federal Common Law

Finally, while Defendants do not rely on federal common law as the basis for their complete preemption argument, federal common law would not provide a ground for such preemption. As one court persuasively noted, "[w]hen the defendant asserts that federal common law preempts the plaintiff's claim, there is no congressional intent which the court may examine—and therefore congressional intent to make the action removable to federal court cannot exist." *Merkel v. Fed. Express Corp.*, 886 F. Supp. 561, 566 (N.D. Miss. 1995) (emphasis omitted); *see also Singer v. DHL Worldwide Express, Inc.*, No. 06-cv-61932, 2007 U.S. Dist. LEXIS 37120, at *13-14 (S.D. Fla. May 22, 2007) (same).

Based on the foregoing, the Court rejects complete preemption as a basis for federal jurisdiction.

C. Federal Enclave Jurisdiction

Causes of action "which arise from incidents occurring in federal enclaves" may also be removed as a part of federal question jurisdiction. *Akin* v. *Ashland Chem. Co.*, 156 F.3d 1030, 1034 (10th Cir. 1998). "The United States has power and exclusive authority 'in all Cases whatsoever . . . over all places purchased' by the government 'or the erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings.'" *Id*. (quoting U.S. Const. art. I, § 8, cl. 17.) These are federal enclaves within which the United States has exclusive jurisdiction. *Id*.

Here, Plaintiffs seek relief for injuries occurring "within their respective jurisdictions" (ECF No. 7 ¶ 4), and allege that they "do not seek damages or abatement relief for injuries to or occurring on federal lands." (*Id.* at ¶ 542.) Plaintiffs assert that ends the inquiry. *See, e.g.*, *Washington v. Monsanto Co.,* 274 F. Supp. 3d 1125, 1132 (W.D. Wash. 2017) (because plaintiff "assert[ed] that it does not seek damages for contamination to waters and land within federal territory, . . . none of its claims arise on federal enclaves").

Defendants argue, however, that Plaintiffs have alleged injuries in federal enclaves including: (i) an insect infestation across Rocky Mountain National Park (ECF No. 7 ¶183), that Defendants assert is partially within Boulder County; (ii) increased flood risk in the San Miguel River in San Miguel County (*id.* ¶¶ 31, 236), which Defendants assert is located in the Uncompahgre National Forest ("Uncompahgre"); and (iii) "heat waves, wildfires, droughts, and floods" which Defendants assert occur in Rocky Mountain National Park and Uncompahgre (*id.* ¶¶ 3, 162–63). Plaintiffs do not

dispute that Rocky Mountain National Park and Uncompahgre are federal enclaves, but argue that the injury they have alleged did not occur there such that there is no federal enclave jurisdiction.

The Court finds that Defendants have not met their burden of showing that subject matter jurisdiction exists under the federal enclave doctrine. Uncompahgre National Forest is not mentioned in the Complaint. Rocky Mountain National Park is referenced only as a descriptive landmark (*see* ECF No. 7 ¶¶ 20, 30, 35), and to provide an example of the regional trends that have resulted from Defendants' climate alteration. (*Id.* ¶ 183.) The actual injury for which Plaintiffs seek compensation is injury to "their property" and "their residents," occurring "within their respective jurisdictions." (*See, e.g., id*. ¶¶ 1-4, 10, 11, 532-33.) They specifically allege that they "**do not** seek damages or abatement relief for injuries to or occurring to federal lands." (*Id*. ¶ 542 (emphasis in original).)

"[T]he location where Plaintiff was injured" determines whether "the right to removal exists." *Ramos v. C. Ortiz Corp.*, 2016 WL 10571684, at *3 (D.N.M. May 20, 2016). It is not the defendant's conduct, but the injury, that matters. *See Akin,* 156 F.3d at 1034–35 & n.5 (action against chemical manufacturers fell within enclave jurisdiction where the claimed exposure to the chemicals, not their manufacture or sale, "occurred within the confines" of U.S. Air Force base); *Baltimore*, 2019 WL 2436848, at *15 ("courts have only found that claims arise on federal enclaves, and thus fall within federal question jurisdiction, when all or most of the pertinent events occurred there").

Federal enclave jurisdiction thus does not exist here because Plaintiffs' claims

and injuries are alleged to have arisen exclusively on non-federal land. That the alleged climate alteration by Defendants may have caused similar injuries to federal property does not speak to the nature of Plaintiffs' alleged injuries for which they seek compensation, and does not provide a basis for removal. *See State of Rhode Island*, 2019 WL 3282007, at *5 (finding no federal enclave jurisdiction because while federal land that met the definition of a federal enclave in Rhode Island and elsewhere "may have been the site of Defendants' activities, the State's claims did not arise there, especially since its complaint avoids seeking relief for damages to any federal lands"); *Baltimore*, 2019 WL 2436848, at *15 ("The Complaint does not contain any allegations concerning defendants' conduct on federal enclaves and in fact, it expressly defines the scope of injury to exclude any federal territory . . . . [I]t cannot be said that federal enclaves were the 'locus' in which the City's claims arose merely because one of the twenty-six defendants . . . conducted some operations on federal enclaves for some unspecified period of time.").

D. Federal Officer Jurisdiction

Defendants also argue that removal is appropriate under 28 U.S.C. § 1442 because the conduct that forms the basis of Plaintiffs' claims was undertaken at the direction of federal officers. Section 1442(a)(1) provides that a civil action that is commenced in a State Court may be removed to the district court of the United States if the suit is "against or directed to . . . the United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agent thereof in an official or individual capacity, for or related to any act under color of such

office. . . ."

For § 1442(a)(1) to constitute a basis for removal, a private corporation must show: "(1) that it acted under the direction of a federal officer; (2) that there is a causal nexus between the plaintiff's claims and the acts the private corporation performed under the federal officer's direction; and (3) that there is a colorable federal defense to the plaintiff's claims." *Greene v. Citigroup, Inc.*, 2000 WL 647190, at *6 (10th Cir. May 19, 2000). "The words 'acting under' are broad," and § 1442(a)(1) must be construed liberally. *Watson* v. *Phillip Morris Co., Inc.*, 551 U.S. 142, 147 (2007). "At the very least, it is broad enough to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law." *Willingham v. Morgan*, 395 U.S. 402, 406–07 (1969).

Thus, the federal officer removal statute should not be read in a "narrow" manner, nor should the policy underlying it "be frustrated by a narrow, grudging interpretation." *Willingham*, 395 U.S. at 406; *Jefferson Cnty., Ala. v. Acker*, 527 U.S. 423, 431 (1999). Under the statute, "suits against federal officers may be removed despite the nonfederal cast of the complaint; the federal-question element is met if the defense depends on federal law." *Acker*, 527 U.S. at 431. Such jurisdiction is thus an exception to the rule that the federal question ordinarily must appear on the face of a properly pleaded complaint. *Id*. "Federal jurisdiction rests on a 'federal interest in the matter', . . . the very basic interest in the enforcement of federal law through federal officials." *Willingham*, 395 U.S. at 406.

Private actors invoking the statute bear a special burden of establishing the

official nature of their activities. *See Freiberg v. Swinerton & Walberg Prop. Servs.*, 245 F. Supp. 2d 1144, 1150 (D. Colo. 2002). The federal officer removal statute "authorizes removal by private parties 'only' if they were 'authorized to act with or for [federal officers or agents] in affirmatively executing duties under . . . federal law." *Watson*, 551 U.S. at 151 (quoting *City of Greenwood v. Peacock*, 384 U.S. 808, 824 (1966)). "That relationship typically involves 'subjection, guidance, or control.'" *Id*. (citation omitted). "[T]he private person's 'acting under' must involve an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior." *Id*. at 152 (emphasis in original). This "does *not* include simply *complying* with the law." *Id*. (emphasis in original). As the *Watson* court stated:

> it is a matter of statutory purpose. When a company subject to a regulatory order (even a highly complex order) complies with the order, it does not ordinarily create a significant risk of state-court "prejudice.". . . . Nor is a state-court lawsuit brought against such a company likely to disable federal officials from taking necessary action to enforce federal law. . . . Nor is such a lawsuit likely to deny a federal forum to an individual entitled to assert a federal claim of immunity.

Id. (internal citations omitted).

Here, Defendants assert that the conduct at issue in Plaintiffs' claims was undertaken, in part, while acting under the direction of federal officials. Specifically, Defendants assert that federal officers exercised control over ExxonMobil through government leases issued to it. (*See* ECF No. 1 ¶¶ 60, 69, 70–73, Exs. B and C.) Under these leases, ExxonMobil contends that it was required to explore, develop, and produce fossil fuels. (ECF No 1, Ex. C § 9.)

For example, Defendants assert that leases related to the outer Continental

Shelf ("OCS") obligated ExxonMobil to diligently develop the leased area, which included—under the direction of Department of the Interior ("DOI") officials—carrying out exploration, development, and production activities for the express purpose of maximizing the ultimate recovery of hydrocarbons from the leased area.[4] Defendants argue that those leases provide that ExxonMobil "*shall*" drill for oil and gas pursuant to government-approved exploration plans (ECF No. 1, Ex. C § 9), and that the DOI may cancel the leases if ExxonMobil does not comply with federal terms governing land use. Given these directives and obligations, Defendants submit that ExxonMobil has acted under a federal officer's direction within the meaning of § 1442(a)(1).

The Court rejects Defendants' argument, finding that Defendants have not shown that they acted under the direction of a federal officer, or that there is a causal connection between the work performed under the leases and Plaintiffs' claims. The federal leases were commercial leases whereby ExxonMobil contracted "for the exclusive right to drill for, develop, and produce oil and gas resources. . . ." (*See* ECF No. 1, Ex. B, p. 1) While the leases require that ExxonMobil, like other OCS lessees, comply with federal law and regulations (*see* ECF No. 1, Ex. B ¶ 10, Ex. C §§ 10, 11), compliance with federal law is not enough for "acting under" removal, even if the company is "subjected to intense regulation." *Watson*, 551 U.S. at 152-53. Defendants also point to the fact that the leases require the timely drilling of wells and production

[4] Defendants cite *California* v. *Watt*, 668 F.2d 1290, 1316 (D.C. Cir. 1981) (the Outer Continental Shelf Lands Act "has an objective—the expeditious development of OCS resources"). They further note that the Secretary of the Interior must develop serial leasing schedules that "he determines will best meet national energy needs for the five-year period" following the schedule's approval. 43 U.S.C. §1344(a).

(ECF No. 1, Ex. B ¶ 10, Ex. C §§ 10, 11), but the government does not control the manner in which Defendants drill for oil and gas, or develop and produce the product.

Similarly, Defendants have not shown that a federal officer instructed them how much fossil fuel to sell or to conceal or misrepresent the dangers of its use, as alleged in this case. They also have not shown that federal officer directed them to market fossil fuels at levels they knew would allegedly cause harm to the environment. At most, the leases appear to represent arms-length commercial transactions whereby ExxonMobil agreed to certain terms (that are not in issue in this case) in exchange for the right to use government-owned land for their own commercial purposes. Defendants have not shown that this is sufficient for federal officer jurisdiction. Defendants have also not shown that this lawsuit is "likely to disable federal officers from taking necessary action designed to enforce federal law", or "to deny a federal forum to an individual entitled to assert a federal claim of immunity." *Watson*, 551 U.S. at 152.

To the extent Defendants claim there is jurisdiction because ExxonMobil is "helping the government to produce an item that it needs," *Watson*, 551 U.S. at 153, this also does not suffice to provide jurisdiction in this Court. Federal officer jurisdiction requires an "unusually close" relationship between the government and the contractor. In *Watson*, the Supreme Court noted an example of a company that produced a chemical for the government for use in a war. *Id*. (discussing *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387 (5th Cir. 1998)). As *Winters* explained in more detail, the Defense Department contracted with chemical companies "for a specific

mixture of herbicides, which eventually became known as Agent Orange"; required the companies to produce and provide the chemical "under threat of criminal sanctions"; "maintained strict control over the development and subsequent production" of the chemical; and required that it "be produced to its specifications." 149 F.3d at 398–99. The circumstances in *Winters* were far different than the circumstances in this case, and Defendants have thus not shown an unusually close relationship between ExxonMobil and the government.

Defendants also cite no support for their assertion that the government "specifically dictated much of ExxonMobil's production, extraction, and refinement of fossil fuels" (ECF No. 48 at 35), much less that it rises to the level of government control set forth in *Winters*. As Plaintiffs note, under Defendants' argument, "any state suit against a manufacturer whose product has at one time been averted and adapted for [government] use . . . would potentially be subject to removal, seriously undercutting the power of state courts to hear and decide basic tort law." *See Ryan v. Dow Chem. Co.*, 781 F. Supp. 934, 951 (E.D.N.Y. 1992).

Baltimore also counsels against finding federal jurisdiction under the federal officer removal statute. It found that the defendants failed plausibly to show that the charged conduct was carried out "for or relating to" the alleged official authority, as they did not show "that a federal officer controlled their total production and sales of fossil fuels, nor is there any indication that the federal government directed them to conceal the hazards of fossil fuels or prohibited them from providing warnings to consumers." *Baltimore*, 2019 WL 2436848, at *17. The court concluded, "[c]ase law makes clear

that this attenuated connection between the wide array of conduct for which defendants have been sued and the asserted official authority is not enough to support removal under § 1442(a)." *Id*.; *see also State of Rhode Island*, 2019 WL 3282007, at *5 (finding no causal connection between any actions Defendants took while "acting under" federal officers or agencies, and thus no grounds for federal-officer removal); *San Mateo*, 294 F. Supp. 3d at 939 (defendants failed to show a "causal nexus" between the work performed under federal direction and the plaintiffs' claims for injuries stemming from climate change because the plaintiffs' claims were "based on a wider range of conduct").

E. Jurisdiction Under the Outer Continental Shelf Lands Act

Defendants next argue that Plaintiffs' claims arise out of Defendants' operations on the OCS. Federal courts have jurisdiction "of cases and controversies rising out of, or in connection with (A) any operation conducted on the [OCS] which involves exploration, development, or production of the minerals, of the subsoil and seabed of the [OCS], or which involves rights to such minerals. . . ." 43 U.S.C. § 1349(b)(1). When assessing jurisdiction under the Outer Continental Shelf Lands Act ("OCSLA"), courts consider whether "(1) the activities that caused the injury constituted an operation conducted on the [OCS] that involved the exploration and production of minerals, and (2) the case arises out of, or in connection with the operation." *In Re Deepwater Horizon*, 745 F.3d 157, 163 (5th Cir. 2014) (internal quotation marks omitted).

Here, Defendants assert that jurisdiction is established because the case arises

out of or in connection with an operation conducted on the OCS in connection with the OCSLA leasing program in which ExxonMobil participated. Plaintiffs seek potentially billions of dollars in abatement funds that inevitably would, according to Defendants, discourage OCS production and substantially interfere with the congressionally mandated goal of recovery of the federally-owned minerals. ExxonMobil has participated in the OCSLA leasing program for decades, and continues to conduct oil and gas operations on the OCS. By making all of Defendants' conduct the subject of their lawsuit, Defendants argue that Plaintiffs necessarily sweep in ExxonMobil's activities on the OCS. Plaintiffs purportedly do not dispute that ExxonMobil operates extensively on the OCS, and Plaintiffs' claims do not distinguish between fossil fuels extracted from the OCS and those found elsewhere. Thus, Defendants assert that at least some of the activities at issue arguably came from an operation conducted on the OCS. The Court rejects Defendants' argument, as they have not shown that the case arose out of, or in connection with an operation conducted on the OCS.

The Court agrees with Plaintiffs that for jurisdiction to lie, a case must arise directly out of OCS operations. For example, courts have found OCSLA jurisdiction where a person is injured on an OCS oil rig "exploring, developing or producing oil in the subsoil and seabed of the continental shelf." *Various Plaintiffs v. Various Defendants ("Oil Field Cases")*, 673 F. Supp. 2d 358, 370 (E.D. Pa. 2009); where oil was spilled from such a rig, *Deepwater Horizon*, 745 F.3d at 162, or in contract disputes directly relating to OCS operations, *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*, 754 F.2d 1223, 1225 (5th Cir. 1985); *cf. Fairfield Indus., Inc. v. EP Energy E&P Co.*,

2013 WL 12145968, at *5 (S.D. Texas May 2, 2013) (finding claims involving performance of contracts "would not influence activity on the OCS, nor require either party to perform physical acts on the OCS", and that the claims thus did not "have a sufficient nexus to an operation on the OCS to fall within the jurisdictional reach of OCSLA"). The fact that some of ExxonMobil's oil was apparently sourced from the OCS does not create the required direct connection.

As the *Baltimore* court found, "[e]ven under a 'broad' reading of the OCSLA jurisdictional grant endorsed by the Fifth Circuit [in *Deepwater Horizon*], defendants fail to demonstrate that OCSLA jurisdiction exists." 2019 WL 2436848, at *16. "Defendants were not sued merely for producing fossil fuel products, let alone for merely producing them on the OCS." *Id*. "Rather, the City's claims are based on a broad array of conduct, including defendants' failure to warn consumers and the public of the known dangers associated with fossil fuel products, all of which occurred globally." *Id*. The defendants there offered "no basis to enable th[e] Court to conclude that the City's claims for injuries stemming from climate change would not have occurred but for defendants' extraction activities on the OCS." *Id.*; *see also San Mateo*, 294 F. Supp. 3d at 938–39 ("Removal under OCSLA was not warranted because even if some of the activities that caused the alleged injuries stemmed from operations on the [OCS], the defendants have not shown that the plaintiffs' causes of action would not have accrued *but for* the defendants' activities on the shelf" (emphasis in original)).

Defendants cite no case authority holding that injuries associated with downstream uses of OCS-derived oil and gas products creates OCSLA jurisdiction.

The cases cited by Defendants instead involved a more direct connection. *See*, *e.g., Amoco Prod. Co. v. Sea Robin Pipeline Co.*, 844 F.2d 1202, 1210 (5th Cir. 1988) (finding that the exercise of take-or-pay rights, minimum-take rights, or both, by Sea Robin necessarily and physically had an immediate bearing on the production of the particular well at issue, "certainly in the sense of the volume of gas actually produced", and would have consequences as to production of the well).

Moreover, as Plaintiffs note, jurisdiction under OCSLA makes little sense for injuries in a landlocked state that are alleged to be caused by conduct that is not specifically related to the OCS. No court has read OCSLA so expansively. Defendants' argument would arguably lead to the removal of state claims that are only "tangentially related" to the OCS. *See Plains Gas Solutions, LLC v. Tenn. Gas Pipeline Co.*, 46 F. Supp. 3d 701, 704–05 (S.D. Texas 2014) (recognizing that the "but-for" test articulated by the Fifth Circuit in the *Deepwater Horizon* case "is not limitless," and that "a blind application of this test would result in federal court jurisdiction over all state law claims even tangentially related to offshore oil production on the OCS"; "Defendants' argument that the 'but-for' test extends jurisdiction to any claim that would not exist but for offshore production lends itself to absurd results").

The downstream impacts of fossil fuels produced offshore also does not create jurisdiction under OCSLA because Plaintiffs do not challenge conduct on any offshore "submerged lands." 43 U.S.C. § 1331(a). Defendants' argument that there is federal jurisdiction if any oil *sourced* from the OCS is some *part* of the conduct that creates the injury would, again, dramatically expand the statute's scope. Any spillage of oil or

gasoline involving some fraction of OCS-sourced oil—or any commercial claim over such a commodity—could be removed to federal court. It cannot be presumed that Congress intended such an absurd result. Plaintiffs' claims concern Defendants' overall conduct, not whatever unknown fraction of their fossil fuels was produced on the OCS. No case holds removal is appropriate if some fuels from the OCS *contribute* to the harm. A case cannot be removed under OCSLA based on speculative impacts; immediate and physical impact is needed. *See Amoco Prod. Co.*, 844 F.2d at 1222–23. Accordingly, the Court does not have jurisdiction under OCSLA.

F. Jurisdiction as the Claims Relate to Bankruptcy Proceedings

Finally, Defendants argue that this Court has jurisdiction and this action is removable because Plaintiffs' claims are related to bankruptcy proceedings within the meaning of 28 U.S.C. §§ 1452(a). Subject to certain exceptions, that statute allows a party to remove any claim or cause of action in a civil action . . . to the district court where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title." Section 1334(b) of the Bankruptcy Code states that "the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11."

The Tenth Circuit has held that an action is "related to" bankruptcy if it "'could conceivably have any effect on the estate being administered in bankruptcy.'" *In re Gardner*, 913 F.2d 1515, 1518 (10th Cir. 1990) (citation omitted). "Although the proceeding need not be against the debtor or his property, the proceeding is related to the bankruptcy if the outcome could alter the debtor''s rights, liabilities, options, or

freedom of action in any way, thereby impacting on the handling and administration of the bankruptcy estate." *Id*. Removal is proper even after a bankruptcy plan has been confirmed if the case would impact a creditor's recovery under the reorganization plan. *In re CF & I Fabricators of Utah, Inc.*, 150 F.3d 1233, 1237 (10th Cir. 1998).

Defendants assert that Plaintiffs' claims relate to ongoing bankruptcy proceedings because they could impact the estates of other bankrupt entities that are necessary and indispensable parties to this case. They note in that regard that 134 oil and gas producers filed for bankruptcy in the United States between 2015 and 2017. Peabody Energy and Arch Coal ("Peabody"), in particular, is alleged to have emerged from Chapter 11 bankruptcy in 2016. Defendants argue that the types of claims brought by Plaintiffs are irreconcilable with the "implementation," "execution," and "administration" of Peabody's "confirmed plan," citing *In Re Wiltshire Courtyard*, 729 F.3d 1279, 1289 (9th Cir. 2013). Defendants thus assert that this case is related to a bankruptcy proceeding and is therefore removable.

The Court, too, rejects Defendants' final argument. As the Ninth Circuit noted in the *Wiltshire Courtyard* case, "'to support jurisdiction, there must be a close nexus connecting a proposed [bankruptcy proceeding] with some demonstrable effect on the debtor or the plan of reorganization.'" 729 F.3d at 1289 (citation omitted). "[A] close nexus exists between a post-confirmation matter and a closed bankruptcy proceeding sufficient to support jurisdiction when the matter 'affect[s] the interpretation, implementation, consummation, execution, or administration of the confirmed plan.'" *Id*. (citation omitted).

Here, none of the Defendants have filed for bankruptcy. To the extent Defendants argue that this case may effect other oil and gas producers who filed for bankruptcy, including Peabody or other unspecified bankrupt entities, this is entirely speculative. Defendants have not shown any nexus, let alone a close nexus, between the claims in this case and a bankruptcy proceeding. Thus, Defendants offer no evidence of how Plaintiffs' claims relate to any estate or affect any creditor's recovery, including Peabody. Defendants suggest bankrupt entities are indispensable parties, but joint tortfeasors are not indispensable. *See Temple v. Synthes Corp.*, 498 U.S. 5, 7 (1990). Nor would it matter if Defendants have third-party claims against bankruptcy estates. *See Pacor, Inc. v. Higgins*, 743 F.2d 984, 995 (3d Cir. 1984); *Union Oil Co. of California v. Shaffer*, 563 B.R. 191, 198–200 (E.D. La. 2016). Plaintiffs do not seek any relief from a debtor in bankruptcy, advantage over creditors, or to protect any interest in the debtor's property. *City & Cnty. of San Francisco v. PG & E Corp.*, 433 F.3d 1115, 1124–25 (9th Cir. 2006). Thus, Defendants have failed to show that jurisdiction is proper under the bankruptcy removal statute.

As discussed in *Baltimore*, "Defendants fail to demonstrate that there is a 'close nexus' between this action and any bankruptcy proceedings . . . at most, defendants have only established that some day a question *might* arise as to whether a previous bankruptcy discharge precludes the enforcement of a portion of the judgment in this case against" the defendant. 2019 WL 2436848, at *19 (emphasis in original). "This remote connection does not bring this case within the Court's "related to" jurisdiction under 28 U.S.C. § 1334(b). *Id*.

Moreover, one of the exceptions to removal are proceedings "by a governmental unit to enforce such governmental unit's police or regulatory powers." 28 U.S.C. § 1452(a). *Baltimore* noted that an action such as this where the plaintiffs "assert claims for injuries stemming from climate change" are actions "on behalf of the public to remedy and prevent environmental damage, punish wrongdoers, and deter illegal activity." 2019 WL 2436848, at *19. It found that "[a]s other courts have recognized, such an action falls squarely within the police or regulatory exception to § 1452." *Id*. *See also Rhode Island*, 2019 WL 3282007, at *5; *San Mateo*, 294 F. Supp. 3d at 939. This Court agrees and adopts the *Baltimore* court's analysis on this point. Accordingly, removal is also inappropriate because this case is a proceeding "by a governmental unit to enforce such governmental unit's police or regulatory powers." 28 U.S.C. § 1452.

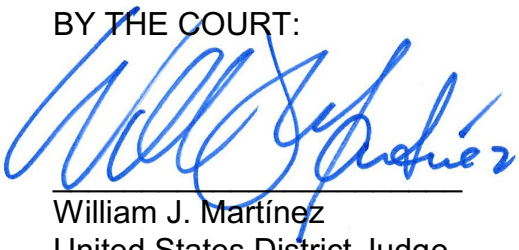
IV. CONCLUSION

Plaintiffs' claims implicate important issues involving global climate change caused in part by the burning of fossil fuels. While Defendants assert, maybe correctly, that this type of case would benefit from a uniform standard of decision, they have not met their burden of showing that federal jurisdiction exists. Accordingly, the Court ORDERS as follows:

1. Defendants' Motion to Reschedule Oral Argument on Plaintiffs' Motion to Remand (ECF No. 67) is DENIED.
2. Plaintiffs' Motion to Remand (ECF No. 34) is GRANTED; and
3. The Clerk shall REMAND this case to Boulder County District Court, and shall terminate this action.

Dated this 5th day of September, 2019.

BY THE COURT:



William J. Martínez
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

STATE OF RHODE ISLAND, Plaintiff, v. CHEVRON CORP. et al., Defendants.	C.A. No. 18-395 WES

OPINION AND ORDER

WILLIAM E. SMITH, Chief Judge.

The State of Rhode Island brings this suit against energy companies it says are partly responsible for our once and future climate crisis. It does so under state law and, at least initially, in state court. Defendants removed the case here; the State asks that it go back. Because there is no federal jurisdiction under the various statutes and doctrines adverted to by Defendants, the Court GRANTS the State's Motion to Remand, ECF No. 40.

I. Background[1]

Climate change is expensive, and the State wants help paying for it. Compl. ¶¶ 8, 12. Specifically from Defendants in this case, who together have extracted, advertised, and sold a

[1] As given in the State's complaint. See Ten Taxpayer Citizens Grp. v. Cape Wind Assocs., 373 F.3d 183, 186 (1st Cir. 2004).

substantial percentage of the fossil fuels burned globally since the 1960s. Id. ¶¶ 7, 12, 19, 97. This activity has released an immense amount of greenhouse gas into the Earth's atmosphere, id., changing its climate and leading to all kinds of displacement, death (extinctions, even), and destruction, id. ¶¶ 53, 89–90, 199–213, 216. What is more, Defendants understood the consequences of their activity decades ago, when transitioning from fossil fuels to renewable sources of energy would have saved a world of trouble. Id. ¶¶ 106–46; 184–96. But instead of sounding the alarm, Defendants went out of their way to becloud the emerging scientific consensus and further delay changes — however existentially necessary — that would in any way interfere with their multi-billion-dollar profits. Id. ¶¶ 147–77. All while quietly readying their capital for the coming fallout. Id. ¶¶ 178–83.

Pleading eight state-law causes of action, the State prays in law and equity to relieve the damage Defendants have and will inflict upon all the non-federal property and natural resources in Rhode Island. Id. ¶¶ 225–315. Casualties are expected to include the State's manmade infrastructure, its roads, bridges, railroads, dams, homes, businesses, and electric grid; the location and integrity of the State's expansive coastline, along with the wildlife who call it home; the mild summers and the winters that are already barely tolerable; the State fisc, as vast sums are expended to fortify before and rebuild after the increasing and

increasingly severe weather events; and Rhode Islanders themselves, who will be injured or worse by these events. Id. ¶¶ 8, 12, 15–18, 88–93, 197–218. The State says it will have more to bear than most: Sea levels in New England are increasing three to four times faster than the global average, and many of the State's municipalities lie below the floodplain. Id. ¶¶ 59–61, 76.

This is, needless to say, an important suit for both sides. The question presently before the Court is where in our federal system it will be decided.

II. Discussion

Invented to protect nonresidents from state-court tribalism, 14C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3721 (rev. 4th ed. 2018), the right to remove is found in various statutes, which courts have taken to construing narrowly and against removal. Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108–09 (1941); Esposito v. Home Depot U.S.A., Inc., 590 F.3d 72, 76 (1st Cir. 2009); Rosselló–González v. Calderón-Serra, 398 F.3d 1, 11 (1st. Cir. 2004). Defendants cite several of these in their notice as bases for federal-court jurisdiction. Notice of Removal, ECF No. 1. None, however, allows Defendants to carry their burden of showing the case belongs here. See Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 97 (1921) ("[D]efendant must take and carry the burden of proof, he being the actor in the removal proceeding.").

A. General Removal

The first Defendants invoke is the general removal statute. 28 U.S.C. § 1441. Section 1441 allows a defendant to remove "any civil action brought in a State court of which the district courts of the United States have original jurisdiction." The species of original jurisdiction Defendants claim exists in this case is federal-question jurisdiction. 28 U.S.C. § 1331. They argue, in other words, that Plaintiff's case arises under federal law. Whether a case arises under federal law is governed by the well-pleaded complaint rule. Vaden v. Discover Bank, 556 U.S. 49, 60 (2009). The rule states that removal based on federal-question jurisdiction is only proper where a federal question appears on the face of a well-pleaded complaint. Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987). This rule operationalizes the maxim that a plaintiff is the master of her complaint: She may assert certain causes of action and omit others (even ones obviously available), and thereby appeal to the jurisdiction of her choice. Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 809 n.6 (1986); Caterpillar Inc., 482 U.S. at 392 ("[Plaintiff] may avoid federal jurisdiction by exclusive reliance on state law.").

The State's complaint, on its face, contains no federal question, relying as it does on only state-law causes of action. See Compl. ¶¶ 225–315. Defendants nevertheless insist that the

complaint is not well-pleaded, and that if it were, it would, in fact, evince a federal question on which to hang federal jurisdiction. Here they invoke the artful-pleading doctrine. "[A]n independent corollary of the well-pleaded complaint rule that a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint," Franchise Tax Bd. v. Constr. Laborers Vacation Tr. for S. Cal., 463 U.S. 1, 22 (1983), the artful-pleading doctrine is "designed to prevent a plaintiff from unfairly placing a thumb on the jurisdictional scales," López-Muñoz v. Triple-S Salud, Inc., 754 F.3d 1, 5 (1st Cir. 2014). See Wright & Miller, supra, § 3722.1. According to Defendants, the State uses two strains of artifice in an attempt to keep its case in state court: one based on complete preemption, the other on a substantial federal question. See Wright & Miller, supra, § 3722.1 (discussing the three types of case in which the artful pleading doctrine has applied).

1. Complete Preemption

Taking these in turn, Defendants first argue — and two district courts have recently held — that a state's public-nuisance claim premised on the effects of climate change is "necessarily governed by federal common law." California v. BP P.L.C., Nos. C 17-06011 WHA, C 17-06012 WHA, 2018 WL 1064293, at *2 (N.D. Cal. Feb. 27, 2018); accord City of New York v. BP P.L.C., 325 F. Supp. 3d 466, 471–72 (S.D.N.Y. 2018). Defendants, in essence, want the

Court to peek beneath the purported state-law façade of the State's public-nuisance claim, see the claim for what it would need to be to have a chance at viability, and convert it to that (i.e., into a claim based on federal common law) for purposes of the present jurisdictional analysis. The problem for Defendants is that there is nothing in the artful-pleading doctrine that sanctions this particular transformation.

The closest the doctrine gets to doing so is called complete preemption. Compare Defs.' Opp'n to Pl.'s Mot. to Remand 9, ECF No. 87 ("[T]he Complaint pleads claims that arise, if at all, under federal common law . . . .") and id. at 19 ("[Plaintiff's claims] are necessarily governed by federal common law."), with Franchise Tax Bd., 463 U.S. at 24 ("[I]f a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law."); see also Mayor of Balt. v. BP P.L.C., Civil Action No. ELH-18-2357, 2019 WL 2436848, at *6–7 (D. Md. June 20, 2019). Complete preemption is different from ordinary preemption, which is a defense and therefore does not provide a basis for removal, "even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case." Franchise Tax Bd., 463 U.S.

at 14, 24.[2] It is a difference of kind, moreover, not degree: complete preemption is jurisdictional. López–Muñoz, 754 F.3d at 5; Lehmann v. Brown, 230 F.3d 916, 919–920 (7th Cir. 2000); Wright & Miller, supra, § 3722.2. When a state-law cause of action is completely preempted, it "transmogrifies" into, Lawless v. Steward Health Care Sys., LLC, 894 F.3d 9, 17–18 (1st Cir. 2018), or less dramatically, "is considered, from its inception, a federal claim, and therefore arises under federal law," Caterpillar Inc., 482 U.S. at 393. The claim is then removable pursuant to Section 1441. Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 8 (2003).

Congress, not the federal courts, initiates this "extreme and unusual" mechanism. Fayard v. Ne. Vehicle Servs., LLC, 533 F.3d 42, 47–49 (1st Cir. 2008); see, e.g., Beneficial Nat'l Bank, 539 U.S. at 8 ("[W]here this Court has found complete pre-emption . . . the federal statutes at issue provided the exclusive cause

[2] Defendants cite Boyle v. United Technologies Corp. early in their brief, and highlighted it at oral argument, as recommending that this Court consider the State's suit as one implicating "uniquely federal interests" and consequently governed by federal common law. 487 U.S. 500, 504 (1988). Boyle was not a removal case, but rather one brought in diversity, where the Court held that federal common law regarding the performance of federal procurement contracts preempts, in the ordinary sense, state tort law. Id. at 502, 507–08, 512. Boyle therefore does not help Defendants. And although of no legal moment, it is nonetheless a matter of historical interest that out of all his opinions, Boyle was the one Justice Scalia would have most liked to have had back. Gil Seinfeld, The Good, the Bad, and the Ugly: Reflections of a Counterclerk, 114 Mich. L. Rev. First Impressions 111, 115 & n. 9 (2016).

of action for the claim asserted and also set forth procedures and remedies governing that cause of action." (emphasis added)); Caterpillar Inc., 482 U.S. at 393 ("On occasion, the Court has concluded that 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 for purposes of the well-pleaded complaint rule." (quotation marks omitted) (emphasis added)); Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63–64 (1987) ("Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." (emphasis added)); López–Muñoz, 754 F.3d at 5 ("The linchpin of the complete preemption analysis is whether Congress intended that federal law provide the exclusive cause of action for the claims asserted by the plaintiff." (emphasis added)); Fayard, 533 F.3d at 45 ("Complete preemption is a short-hand for the doctrine that in certain matters Congress so strongly intended an exclusive federal cause of action that what a plaintiff calls a state law claim is to be recharacterized as a federal claim." (first emphasis added)); Marcus v. AT&T Corp., 138 F.3d 46, 55 (2d Cir. 1998) ("[T]here is no complete preemption without a clear statement to that effect from Congress." (emphasis added)); Wright & Miller, supra, § 3722.2 ("In concluding that a claim is completely preempted, a federal court finds that Congress desired not just to provide a federal defense to a state-law claim but

also to replace the state-law claim with a federal law claim . . . ." (emphasis added)). Without a federal statute wielding — or authorizing the federal courts to wield — "extraordinary pre-emptive power," there can be no complete preemption. Metro. Life Ins. Co., 481 U.S. at 65.

Defendants are right that transborder air and water disputes are one of the limited areas where federal common law survived Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). See, e.g., Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 420–21 (2011); Illinois v. City of Milwaukee, 406 U.S. 91, 103 (1972) ("When we deal with air and water in their ambient or interstate aspects, there is a federal common law."). At least some of it, though, has been displaced by the Clean Air Act ("CAA"). See Am. Elec. Power Co., 564 U.S. at 424 (holding 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"); Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 856–58 (9th Cir. 2012). But whether displaced or not, environmental federal common law does not — absent congressional say-so — completely preempt the State's public-nuisance claim, and therefore provides no basis for removal. Cf. Marcus, 138 F.3d at 54 ("After Metropolitan Life, it would be disingenuous to maintain that, while the [Federal Communications Act of 1934] does not preempt state law claims directly, it manages

to do so indirectly under the guise of federal common law.").

With respect to the CAA, Defendants argue it too completely preempts the State's claims. The statutes that have been found to completely preempt state-law causes of action – the Employee Retirement Income Security Act, for example, see Metro. Life Ins. Co., 481 U.S. at 67 – all do two things: They "provide[] the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action." Beneficial Nat'l Bank, 539 U.S. at 8; Fayard, 533 F.3d at 47 ("For complete preemption, the critical question is whether federal law provides an exclusive substitute federal cause of action that a federal court (or possibly a federal agency) can employ for the kind of claim or wrong at issue."). Defendants fail to point to where in the CAA this happens. As far as the Court can tell, the CAA authorizes nothing like the State's claims, much less to the exclusion of those sounding in state law. In fact, the CAA itself says that controlling air pollution "is the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3); see Am. Elec. Power Co., 564 U.S. at 428 ("The Act envisions extensive cooperation between federal and state authorities . . . ."); EPA v. EME Homer City Generation, L.P., 572 U.S. 489, 537 (2014) (Scalia, J., dissenting) ("Down to its very core, the Clean Air Act sets forth a federalism-focused regulatory strategy.").

Furthermore, in its section providing for citizen suits, the

CAA saves "any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief." 42 U.S.C. § 7604(e). One circuit court has taken this language as an indication that "Congress did not wish to abolish state control" over remediating air pollution. Her Majesty the Queen in Right v. City of Detroit, 874 F.2d 332, 343 (6th Cir. 1989); see also Am. Fuel & Petrochemical Mfrs. v. O'Keefe, 903 F.3d 903 (9th Cir. 2018) ("Air pollution prevention falls under the broad police powers of the states, which include the power to protect the health of citizens in the state." (quotation marks omitted)). Elsewhere, the Act protects "the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution . . . ." 42 U.S.C. § 7416. A statute that goes so far out of its way to preserve state prerogatives cannot be said to be an expression of Congress's "extraordinary pre-emptive power" to convert state-law into federal-law claims. Metro. Life Ins. Co., 481 U.S. at 65. No court has so held, and neither will this one.[3]

[3] Defendants toss in an argument that the foreign-affairs doctrine completely preempts the State's claims. The Court finds this argument without a plausible legal basis. See Mayor of Balt., 2019 WL 2436848, at *12 ("[T]he foreign affairs doctrine is inapposite in the complete preemption context." (quotation marks omitted)).

2. Grable Jurisdiction

There is, as mentioned above, a second brand of artful pleading of which Defendants accuse the State. They aver the State has hid within their state-law claims a "federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 314 (2005). If complete preemption is a state-law cloche covering a federal-law dish, Grable jurisdiction is a state-law recipe requiring a federal-law ingredient. Although the latter, like the former, is rare. See Empire Healthchoice Assurance, Inc. v. McVeigh, 547 U.S. 677, 699 (2006) (describing Grable jurisdiction as lying in a "special and small category" of cases). And it too does not exist here, because Defendants have not located "a right or immunity created by the Constitution or laws of the United States" that is "an element and an essential one, of the [State]'s cause[s] of action." Gully v. First Nat. Bank in Meridian, 299 U.S. 109, 112 (1936).

The State's are thoroughly state-law claims. Compl ¶¶ 225–315. The rights, duties, and rules of decision implicated by the complaint are all supplied by state law, without reference to anything federal. See id. Defendants' best cases are all distinguishable on this point. See Gunn v. Minton, 568 U.S. 251, 259 (2013) (finding Grable jurisdiction lies where "[t]o prevail

on his legal malpractice claim . . . [plaintiff] must show that he would have prevailed in his federal patent infringement case . . . [which] will necessarily require application of patent law to the facts of [his] case"); Grable, 545 U.S. at 314–15 (same where plaintiff "premised its superior title claim on a failure by the IRS to give it adequate notice, as defined by federal law"); Bd. of Comm'rs v. Tenn. Gas Pipeline Co., 850 F.3d 714, 722 (5th Cir. 2017) (same where "[plaintiff's] complaint draws on federal law as the exclusive basis for holding [d]efendants liable for some of their actions"); One & Ken Valley Hous. Grp. v. Me. State Hous. Auth., 716 F.3d 218, 225 (1st Cir. 2013) (same where "the "dispute . . . turn[s] on the interpretation of a contract provision approved by a federal agency pursuant to a federal statutory scheme" (quotation marks omitted)); R.I. Fishermen's All., Inc. v. R.I. Dep't of Envtl. Mgmt., 585 F.3d 42, 50 (1st Cir. 2009) (same where the federal question "is inherent in the state-law question itself because the state statute expressly references federal law").

By mentioning foreign affairs, federal regulations, and the navigable waters of the United States, Defendants seek to raise issues that they may press in the course of this litigation, but that are not perforce presented by the State's claims. Accord Cty. of San Mateo v. Chevron Corp., 294 F. Supp. 3d 934, 938 (N.D. Cal. 2018) (declining to exercise Grable jurisdiction where

"defendants have not pointed to a specific issue of federal law that must necessarily be resolved to adjudicate the state law claims" and instead "mostly gesture to federal law and federal concerns in a generalized way"); cf. R.I. Fishermen's All., 585 F.3d at 49 (upholding exercise of Grable jurisdiction where it was "not logically possible for the plaintiffs to prevail on [their] cause of action without affirmatively answering the embedded question of . . . federal law"). These are, if anything, premature defenses, which even if ultimately decisive, cannot support removal. See Merrell Dow, 478 U.S. at 808 ("A defense that raises a federal question is inadequate to confer federal jurisdiction."); Franchise Tax Bd., 463 U.S. at 13 (holding that state-law claim did not support federal jurisdiction where "California law establish[ed] . . . [the relevant] set of conditions, without reference to federal law . . . [which would] become[] relevant only by way of a defense to an obligation created entirely by state law, and then only if appellant has made out a valid claim for relief under state law"). Nor, for that matter, can the novelty of this suite of issues as applied to claims like the State's. Merrell Dow, 478 U.S. at 817.

B. Less-General Removal

The Court will be brief in dismissing Defendants' arguments under bespoke jurisdictional law. The Outer Continental Shelf Lands Act does not grant federal jurisdiction here, see 43 U.S.C.

§ 1349(b): Defendants' operations on the Outer Continental Shelf may have contributed to the State's injuries; however, Defendants have not shown that these injuries would not have occurred but for those operations. See In re DEEPWATER HORIZON, 745 F.3d 157, 163–64 (5th Cir. 2014). There is no federal-enclave jurisdiction: Although federal land used "for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings," U.S. Const. art. I, § 8, cl. 17, exists in Rhode Island, and elsewhere may have been the site of Defendants' activities, the State's claims did not arise there, especially since its complaint avoids seeking relief for damages to any federal lands. See Washington v. Monsanto Co., 274 F. Supp. 3d 1125, 1132 (W.D. Wash. 2017) (holding that exercise of federal-enclave jurisdiction improper where "Washington avowedly does not seek relief for [toxic-chemical] contamination of federal territories").

No causal connection between any actions Defendants took while "acting under" federal officers or agencies and the allegations supporting the State's claims means there are not grounds for federal-officer removal, 28 U.S.C. § 1442(a)(1): Defendants cannot show the alleged promotion and sale of fossil fuels abetted by a sophisticated misinformation campaign were "justified by [their] federal duty." Mesa v. California, 489 U.S. 121, 131–32 (1989). They are also unable to show removal is proper under the bankruptcy-removal statute, 28 U.S.C. § 1452(a), or

because of admiralty jurisdiction, 28 U.S.C. § 1333(1). Not the former because this is an action "designed primarily to protect the public safety and welfare." McMullen v. Sevigny (In re McMullen), 386 F.3d 320, 325 (1st Cir. 2004); see 28 U.S.C. § 1452(a) (excepting from bankruptcy removal any "civil action by a governmental unit to enforce such governmental unit's police or regulatory power"); In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 488 F.3d 112, 133 (2d Cir. 2007) (rejecting bankruptcy removal in cases whose "clear goal . . . [was] to remedy and prevent environmental damage with potentially serious consequences for public health, a significant area of state policy"). And not the latter either because state-law claims cannot be removed based solely on federal admiralty jurisdiction. See, e.g., Coronel v. AK Victory, 1 F. Supp. 3d 1175, 1187–88 (W.D. Wash. 2014); Gonzalez v. Red Hook Container Terminal LLC, 16-CV-5104 (NGG) (RER), 2016 WL 7322335, at *3 (E.D.N.Y. Dec. 15, 2016) (relying on "longstanding precedent holding that admiralty issues, standing alone, are insufficient to make a case removable").

III. Conclusion

Federal jurisdiction is finite. See, e.g., U.S. Const. art. III, § 2, cl. 1. So while this Court thinks itself a fine place to litigate, the law is clear that the State can take its business elsewhere if it wants — by pleading around federal jurisdiction — unless Defendants provide a valid reason to force removal under

statutes "strictly construed." Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28, 32 (2002); Great N. Ry. Co. v. Alexander, 246 U.S. 276, 280 (1918) ("[A] suit commenced in a state court must remain there until cause is shown for its transfer under some act of Congress."). Because Defendants' attempts in this regard fall short, the State's Motion to Remand, ECF No. 40, is GRANTED. The remand order shall be stayed for sixty days, however, giving the parties time to brief and the Court to decide whether a further stay pending appeal is warranted.

IT IS SO ORDERED.

William E. Smith
Chief Judge
Date: July 22, 2019

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MAYOR AND CITY COUNCIL OF BALTIMORE,
Plaintiff,

v.

BP P.L.C., et al.,
Defendants.

Civil Action No. ELH-18-2357

MEMORANDUM OPINION

In this Memorandum Opinion, the Court determines whether a suit concerning climate change was properly removed from a Maryland state court to federal court.

The Mayor and City Council of Baltimore (the "City") filed suit in the Circuit Court for Baltimore City against twenty-six multinational oil and gas companies. *See* ECF 42 (Complaint). The City alleges that defendants have substantially contributed to greenhouse gas pollution, global warming, and climate change by extracting, producing, promoting, refining, distributing, and selling fossil fuel products (*i.e.*, coal, oil, and natural gas), while simultaneously deceiving consumers and the public about the dangers associated with those products. *Id.* ¶¶ 1–8. As a result of such conduct, the City claims that it has sustained and will sustain "climate change-related injuries." *Id.* ¶ 102. According to the City, the injuries from "[a]nthropogenic (human-caused) greenhouse gas pollution," *id.* ¶ 3, include a rise in sea level along Maryland's coast, as well as an increase in storms, floods, heatwaves, drought, extreme precipitation, and other conditions. *Id.* ¶ 8.

The Complaint asserts eight causes of action, all founded on Maryland law: public nuisance (Count I); private nuisance (Count II); strict liability for failure to warn (Count III); strict liability

for design defect (Count IV); negligent design defect (Count V); negligent failure to warn (Count VI); trespass (Count VII); and violations of the Maryland Consumer Protection Act, Md. Code (2013 Repl. Vol., 2019 Supp.), Com. Law §§ 13–101 to 13–501 (Count VIII). *Id.* ¶¶ 218–98. The City seeks monetary damages, civil penalties, and equitable relief. *Id.*

Two of the defendants, Chevron Corp. and Chevron U.S.A., Inc. (collectively, "Chevron"), timely removed the case to this Court. ECF 1 (Notice of Removal).[1] Asserting a battery of grounds for removal, Chevron underscores that the case concerns "*global* emissions" (*id.* at 3) with "uniquely federal interests" (*id.* at 6) that implicate "bedrock federal-state divisions of responsibility[.]" *Id.* at 3.

The eight grounds for removal are as follows: (1) the case is removable under 28 U.S.C. § 1441(a) and § 1331, because the City's claims are governed by federal common law, not state common law; (2) the action raises disputed and substantial issues of federal law that must be adjudicated in a federal forum; (3) the City's claims are completely preempted by the Clean Air Act ("CAA"), 42 U.S.C. § 7401 *et seq.*, and/or other federal statutes and the Constitution; (4) this Court has original jurisdiction under the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1349(b); (5) removal is authorized under the federal officer removal statute, 28 U.S.C. § 1442(a)(1); (6) this Court has federal question jurisdiction under 28 U.S.C. § 1331 because the City's claims are based on alleged injuries to and/or conduct on federal enclaves; (7) removal is authorized under 28 U.S.C. § 1452(a) and 28 U.S.C. § 1334(b), because the City's claims are

[1] Chevron alleged that no other defendants had been served prior to the removal. ECF 28 (Chevron's Statement in Response to Standing Order Concerning Removal). The Notice of Removal was timely. *See* 28 U.S.C. § 1446(b) (defendant must remove within thirty days after service). And, because the action was not removed "solely under section 1441(a)," the consent of the other defendants was not required. *See* 28 U.S.C. § 1446(b)(2)(A) ("When a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action.").

related to federal bankruptcy cases; and (8) the City's claims fall within the Court's original admiralty jurisdiction under 28 U.S.C. § 1333. ECF 1 at 6–12, ¶¶ 5–12.

Thereafter, the City filed a motion to remand the case to state court, pursuant to 28 U.S.C. § 1447(c). ECF 111. The motion is supported by a memorandum of law (ECF 111-1) (collectively, "Remand Motion"). Defendants filed a joint opposition to the Remand Motion (ECF 124, "Opposition"), along with three supplements containing numerous exhibits. ECF 125; ECF 126; ECF 127.[2] The City replied. ECF 133.

Defendants also filed a conditional motion to stay the execution of any remand order. ECF 161. They ask that, in the event the Court grants the City's Remand Motion, the Court issue an order staying execution of the remand for thirty days to allow them to appeal the ruling. *Id*. at 1–2. The City initially opposed that motion (ECF 162), but subsequently stipulated to the requested stay. ECF 170. This Court accepted the parties' stipulation by Consent Order of April 22, 2019. ECF 171.

No hearing is necessary to resolve the Remand Motion. *See* Local Rule 105.6. For the reasons that follow, I conclude that removal was improper. Therefore, I shall grant the Remand Motion. However, I shall stay execution of the remand for thirty days, in accordance with the parties' joint stipulation and the Court's prior Order.

[2] The following defendants did not join in the Opposition to the City's Remand Motion: Crown Central Petroleum Corp.; Louisiana Land & Exploration Co.; Phillips 66 Co.; Marathon Oil Co.; and Marathon Oil Corp. *See* ECF 124; ECF 42. However, it appears that three of these defendants were not properly named in the Complaint. *See* ECF 14 (Local Rule 103.3 Disclosure Statement by Louisiana Land and Exploration Co. LLC, stating that defendant Louisiana Land & Exploration Co. no longer exists); ECF 40 (Local Rule 103.3 Disclosure Statement by Crown Central LLC and Crown Central New Holdings LLC, stating that defendant Crown Central Petroleum Corp. no longer exists); ECF 108 (Local Rule 103.3 Disclosure Statement by Phillips 66 does not identify Phillips 66 Co.).

I. Discussion

A. The Contours of Removal

This matter presents a primer on removal jurisdiction; defendants rely on the proverbial "laundry list" of grounds for removal. I begin by outlining the general contours of removal jurisdiction and then turn to the specific bases for removal on which defendants rely.

District courts of the United States are courts of limited jurisdiction and possess only the "power authorized by Constitution and statute." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552 (2005) (citation omitted); *see Home Buyers Warranty Corp. v. Hanna*, 750 F.3d 727, 432 (4th Cir. 2014). They "may not exercise jurisdiction absent a statutory basis . . . ." *Exxon Mobil Corp*, 545 U.S. at 552. Indeed, a federal court must presume that a case lies outside its limited jurisdiction unless and until jurisdiction has been shown to be proper. *United States v. Poole*, 531 F.3d 263, 274 (4th Cir. 2008) (citing *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994)).

Under § 28 U.S.C. § 1441, the general removal statute, "any civil action brought in a State court of which the district courts of the United States have original jurisdiction" may be "removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." *Id.* § 1441(a). Congress has conferred jurisdiction on the federal courts in several ways. Of relevance here, to provide a federal forum for plaintiffs who seek to vindicate federal rights, Congress has conferred on the district courts original jurisdiction over civil actions that arise under the Constitution, laws, or treaties of the United States. *See* U.S. Const. art. III, § 2 ("The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made . . .");

see also 28 U.S.C. § 1331; *Exxon Mobil Corp.*, 545 U.S. at 552. This is sometimes called federal question jurisdiction.[3]

The burden of demonstrating jurisdiction and the propriety of removal rests with the removing party. *See McBurney v. Cuccinelli*, 616 F.3d 393, 408 (4th Cir. 2010); *Robb Evans & Assocs. v. Holibaugh*, 609 F.3d 359, 362 (4th Cir. 2010); *Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811, 816 (4th Cir. 2004) (en banc). Therefore, "[i]f a plaintiff files suit in state court and the defendant seeks to adjudicate the matter in federal court through removal, it is the defendant who carries the burden of alleging in his notice of removal and, if challenged, demonstrating the court's jurisdiction over the matter." *Strawn v. AT & T Mobility LLC*, 530 F.3d 293, 296 (4th Cir. 2008). And, if "a case was not properly removed, because it was not within the original jurisdiction" of the federal court, then "the district court must remand [the case] to the state court from which it was removed." *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 8 (1983) (citing 28 U.S.C. § 1447(c)).

Courts are required to construe removal statutes narrowly. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108–09 (1941). This is because "the removal of cases from state to federal

[3] In addition, "Congress . . . has granted district courts original jurisdiction in civil actions between citizens of different States, between U.S. citizens and foreign citizens, or by foreign states against U.S. citizens," so long as the amount in controversy exceeds $75,000. *Exxon Mobil Corp.*, 545 U.S. at 552; *see* 28 U.S.C. § 1332. Diversity jurisdiction "requires complete diversity among parties, meaning that the citizenship of *every* plaintiff must be different from the citizenship of *every* defendant." *Cent. W. Va. Energy Co., Inc. v. Mountain State Carbon, LLC*, 636 F.3d 101, 103 (4th Cir. 2011) (emphasis added); *see Strawbridge v. Curtiss*, 7 U.S. 267 (1806). Under 28 U.S.C. § 1367(a), district courts are also granted "supplemental jurisdiction over all other claims that are so related to claims in the action within [the courts'] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."

Although defendants do not argue otherwise, the Court observes that removal of this case was not based on diversity jurisdiction. Presumably, this is because BP Products North America Inc. is domiciled in Maryland. ECF 42, ¶ 20(e); *see* 28 U.S.C. § 1332; 28 U.S.C. § 1441(b).

court raises significant federalism concerns." *Barbour v. Int'l Union*, 640 F.3d 599, 605 (4th Cir. 2011) (en banc), *abrogated in part on other grounds by* the Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, 125 Stat. 758 (2011); *see also Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir. 1994) ("Because removal jurisdiction raises significant federalism concerns, [courts] must strictly construe removal jurisdiction.") (citing *Shamrock*, 313 U.S. at 108–09). Thus, "any doubts" about removal must be "resolved in favor of state court jurisdiction." *Barbour*, 640 F.3d at 617; *see also Cohn v. Charles*, 857 F. Supp. 2d 544, 547 (D. Md. 2012) ("Doubts about the propriety of removal are to be resolved in favor of remanding the case to state court.").

Defendants assert a host of grounds for removal; four of their eight grounds are premised on federal question jurisdiction under 28 U.S.C. § 1331. These grounds are as follows: (1) the City's public nuisance claim is necessarily governed by federal common law; (2) the City's claims raise disputed and substantial issues of federal law; (3) the City's claims are completely preempted by the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, and the foreign affairs doctrine; and (4) the City's claims are based on conduct or injuries that occurred on federal enclaves. ECF 1, ¶¶ 5–7; ECF 124 at 8–49. I shall address each of these arguments in turn and then consider defendants' alternative bases for removal.

As alternative grounds, defendants assert that this Court has original jurisdiction under the OCSLA, 43 U.S.C. § 1349(b); removal is authorized under the federal officer removal statute, 28 U.S.C. § 1442(a)(1); removal is authorized under 28 U.S.C. § 1452(a) and 28 U.S.C. § 1334(b) because the City's claims are related to bankruptcy cases; and the City's claims fall within the Court's original admiralty jurisdiction under 28 U.S.C. § 1333.

B. Federal Question Jurisdiction

Article III of the United States Constitution provides: "The judicial Power shall extend to all Cases, in Law and Equity, arising under . . . the Laws of the United States[.]" U.S. Const. art. III, § 2, cl. 1. Section 1331 of 28 U.S.C. grants federal district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." "Article III 'arising under' jurisdiction is broader than federal question jurisdiction under [28 U.S.C. § 1331]." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 495 (1983). Although Congress has the power to prescribe the jurisdiction of federal courts under U.S. Const. art. I, § 8, cl. 9, it "may not expand the jurisdiction of the federal courts beyond the bounds established by the Constitution." *Verlinden*, 461 U.S. at 491.

The "propriety" of removal on the basis of federal question jurisdiction "depends on whether the claims 'aris[e] under' federal law." *Pinney v. Nokia, Inc.*, 402 F.3d 430, 441 (4th Cir. 2005) (citation omitted). And, when jurisdiction is based on a claim "arising under the Constitution, treaties or laws of the United States," the case is "removable without regard to the citizenship or residence of the parties." 28 U.S.C. § 1441(b).

A case "'aris[es] under' federal law in two ways." *Gunn v. Minton*, 568 U.S. 251, 257 (2013); *see Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003). First, and most commonly, "a case arises under federal law when federal law creates the cause of action asserted." *Gunn*, 568 U.S. at 257; *see also Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) (stating that a "suit arises under the law that creates the cause of action"). Second, a claim is deemed to arise under federal law for purposes of § 1331 when, although it finds its origins in state law, "the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law."

Empire Healthchoice Assurance Inc. v. McVeigh, 547 U.S. 677, 690 (2006); *see Franchise Tax Bd.*, 463 U.S. at 13.

This latter set of circumstances arises only in a "'special and small category' of cases." *Gunn*, 568 U.S. at 258 (quoting *Empire Healthchoice*, 547 U.S. at 699). Specifically, jurisdiction exists under this category only when "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." *Id.*; *see Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 313–14 (2005); *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 808 (1988); *Flying Pigs, LLC v. RRAJ Franchising, LLC*, 757 F.3d 177, 181 (4th Cir. 2014).

The "presence or absence of federal question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Rivet v. Regions Bank of La.*, 522 U.S. 470, 475 (1998) (citation omitted); *see Pressl v. Appalachian Power Co.*, 842 F.3d 299, 302 (4th Cir. 2016). This "makes the plaintiff the master of [its] claim," because in drafting the complaint, the plaintiff may "avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987); *see Pinney*, 402 F.3d at 442.

However, even when a well-pleaded complaint sets forth a state law claim, there are instances when federal law "is a necessary element" of the claim. *Christianson*, 486 U.S. at 808. Under certain circumstances, such a case may be removed to federal court. The *Pinney* Court explained, 402 F.3d at 442 (internal citation omitted):

> Under the substantial federal question doctrine, 'a defendant seeking to remove a case in which state law creates the plaintiff's cause of action must establish two elements: (1) that the plaintiff's right to relief necessarily depends on a question of federal law, and (2) that the question of federal law is substantial.' If the defendant

> fails to establish either of these elements, the claim does not arise under federal law pursuant to the substantial federal question doctrine, and removal cannot be justified under this doctrine.

(internal citations omitted).

A case may also be removed from state court to federal court based on the doctrine of complete preemption. The complete preemption doctrine is a "corollary of the well-pleaded complaint rule." *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987); *see In re Blackwater Sec. Consulting, LLC*, 460 F.3d 576, 584 (4th Cir. 2006). The Supreme Court has explained: "When [a] federal statute *completely* pre-empts [a] state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law." *Beneficial*, 539 U.S. at 8 (emphasis added). Therefore, federal question jurisdiction is satisfied "when a federal statute wholly displaces the state-law cause of action through *complete* pre-emption." *Id.* (emphasis added); *see also Vaden v. Discover Bank*, 556 U.S. 49, 61 (2009); *Aetna Health Inc. v. Davila*, 542 U.S. 200, 207–08 (2004).

Complete preemption is a jurisdictional doctrine that "'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule."' *Caterpillar Inc.*, 482 U.S. at 393 (quoting *Metro. Life Ins.*, 481 U.S. at 65); *see Pinney*, 402 F.3d at 449. But, to remove an action on the basis of complete preemption, a defendant must show that Congress intended for federal law to provide the "exclusive cause of action" for the claim asserted. *Beneficial*, 539 U.S. at 9; *see also Barbour*, 640 F.3d at 631.

Moreover, it is "settled law that a case may not be removed to federal court on the basis of a federal defense, *including the defense of pre-emption*, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." *Caterpillar Inc.*, 482 U.S. at 393 (emphasis added); *see Vaden*, 556 U.S. at 60.

Therefore, in examining the well pleaded allegations in the complaint for purposes of removal, the court must "ignore potential defenses." *Beneficial*, 539 U.S. at 6. Put another way, when preemption is a defense, it "does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to federal court." *Metro. Life Ins.*, 481 U.S. at 63; *see Pinney*, 402 F.3d at 449.

Defendants seem to conflate complete preemption with the defense of ordinary preemption. *See Caterpillar Inc.*, 482 U.S. at 392. The "existence of a federal defense normally does not create statutory 'arising under' jurisdiction, and 'a defendant [generally] may not remove a case to federal court unless the *plaintiff's* complaint establishes that the case 'arises under' federal law.'" *Davila*, 542 U.S. at 207 (internal citations omitted).

"Federal law may preempt state law under the Supremacy Clause in three ways—by 'express preemption,' by 'field preemption,' or by 'conflict preemption.'" *Anderson v. Sara Lee Corp.*, 508 F.3d 181, 191 (4th Cir. 2007) (citation omitted); *see also Decohen v. Capital One, N.A.*, 703 F.3d 216, 223 (4th Cir. 2012). These three types of preemption, however, are forms of "ordinary preemption" that serve only as federal defenses to a state law claim. *Lontz v. Tharp*, 413 F.3d 435, 441 (4th Cir. 2005); *see Wurtz v. Rawlings Co., LLC*, 761 F.3d 232, 238 (2d Cir. 2014). As one federal court recently explained: "The doctrine of complete preemption should not be confused with ordinary preemption, which occurs when there is the defense of 'express preemption,' 'conflict preemption,' or 'field preemption' to state law claims." *Meade v. Avant of Colorado, LLC*, 307 F. Supp. 3d 1134, 1140 (D. Colo. 2018). Unlike the doctrine of complete preemption, these forms of preemption do not appear on the face of a well-pleaded complaint and therefore they do not support removal. *Lontz*, 413 F.3d at 440; *Wurtz*, 761 F.3d at 238.

Ordinary preemption "regulates the interplay between federal and state laws when they conflict or appear to conflict . . . ." *Decohen*, 703 F.3d at 222. "[S]tate law is naturally preempted to the extent of any conflict with a federal statute," *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000), because the Supremacy Clause of the Constitution, U.S. Const. art. VI, cl. 2, provides that a federal enactment is superior to a state law. As a result, pursuant to the Supremacy Clause, "[w]here state and federal law 'directly conflict,' state law must give way." *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 617 (2011) (citation omitted); *see also Merck Sharp & Dohme Corp. v. Albrecht*, ___ U.S. ___, 2019 WL 2166393, at *8 (May 20, 2019) (discussing impossibility or conflict preemption, and reiterating that "'state laws that conflict with federal law are without effect,'" but noting that the "'possibility of impossibility [is] not enough'") (citations omitted); *Mutual Pharm. Co., Inc. v. Bartlett*, 570 U.S. 472, 480 (2013). In *Drager v. PLIVA USA, Inc.*, 741 F.3d 470 (4th Cir. 2014), the Fourth Circuit stated: "The Supreme Court has held that state and federal law conflict when it is impossible for a private party to simultaneously comply with both state and federal requirements.[] In such circumstances, the state law is preempted and without effect." *Id.* at 475. [4]

"Federal preemption of state law under the Supremacy Clause – including state causes of action – is 'fundamentally . . . a question of congressional intent.'" *Cox v. Duke Energy, Inc.*, 876 F.3d 625, 635 (4th Cir. 2017) (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990)); *see also Beneficial*, 539 U.S. at 9. Congress manifests its intent in three ways: (1) when Congress explicitly defines the extent to which its enactment preempts state law (express preemption); (2) when state

[4] In his concurrence in *Albrecht*, Justice Thomas observed that a defense based on conflict preemption fails as a matter of law in the absence of a statute, regulations, or other agency action "with the force of law that would have prohibited [the defendant] from complying with its alleged state-law duties. . . ." 2019 WL 2166393, at *12.

law "regulates conduct in a field that Congress intended the Federal Government to occupy exclusively" (field preemption); and (3) when state law "actually conflicts with federal law" (conflict or impossibility preemption). *English*, 496 U.S. at 78–79.

1. Federal Common Law

Defendants first argue that federal question jurisdiction exists because the City's public nuisance claim implicates "uniquely federal interests" and thus "is governed by federal common law." ECF 124 at 9–11. According to defendants, the federal government has a unique interest both in promoting fossil fuel production and in crafting multilateral agreements with foreign nations to address global warming. *Id.* at 16. Therefore, they insist that federal common law supports removal. *Id.*

The City counters that this argument is no more than an ordinary preemption defense. ECF 111-1 at 9. In effect, argues the City, defendants contend that federal common law applies to any cause of action "touching on climate change, such that state law claims under any theory have been obliterated . . . ." ECF 111-1 at 8. In the City's view, federal common law does not provide a proper basis for removal. *Id.* I agree.

It is true that federal question jurisdiction exists over claims "founded upon" federal common law. *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972) (stating that 28 U.S.C. § 1331 "will support claims founded upon federal common law as well as those of a statutory origin"). It is also true, however, that the presence of federal question jurisdiction is governed by the well-pleaded complaint rule. *Rivet*, 522 U.S. at 475. The well-pleaded complaint rule is plainly not satisfied here because the City does not plead any claims under federal law. *See* ECF 42.

Defendants' assertion that the City's public nuisance claim under Maryland law is in fact "governed by federal common law" is a cleverly veiled preemption argument. *See Boyle v. United*

Tech. Corp., 487 U.S. 500, 504 (1988) (finding that a state law claim against a federal government contractor that involved "uniquely federal interests" was governed exclusively by federal common law and, thus, state law was preempted); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987) (stating that if a case "should be resolved by reference to federal common law … state common law [is] preempted"); *see also Merkel v. Fed. Exp. Corp.*, 886 F. Supp. 561, 564–65 (N.D. Miss. 1995) (stating that if "plaintiff's claims are governed by federal common law," as defendant argued to support removal, "then [defendant] is entitled to assert the defense of preemption against the plaintiff's state law claims"). Unfortunately for defendants, ordinary preemption does not allow the Court to treat the City's public nuisance claim as if it had been pleaded under federal law for jurisdictional purposes. *See Franchise Tax Bd.*, 463 U.S. at 14.

As indicated, unlike ordinary preemption, complete preemption *does* "'convert[] an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" *Caterpillar Inc.*, 482 U.S. at 393 (quoting *Metro. Life Ins.*, 481 U.S. at 65); *see Lontz*, 413 F.3d at 439 (noting that the complete preemption doctrine is the only "exception" to the well-pleaded complaint rule); *Goepel v. Nat'l Postal Mail Handlers Union*, 36 F.3d 306, 311–12 (3d Cir. 1994) ("[T]he only state claims that are 'really' federal claims and thus removable to federal court are those that are preempted completely by federal law.") (citations omitted); *see also Hannibal v. Fed. Exp. Corp.*, 266 F. Supp. 2d 466, 469 (E.D. Va. 2003) (observing that, where the defendant argued that removal was proper because the plaintiff's contract claim was governed exclusively by federal common law, "the Defendant is attempting to argue that federal common law completely preempts the Plaintiff's state breach of contract claim"). But, defendants do not argue that the City's public nuisance claim is completely preempted by federal common law. Rather, they contend only that the City's claims are

completely preempted by the Clean Air Act and the foreign affairs doctrine. *See* ECF 124 at 43–48.

As I see it, defendants' assertion that federal common law supports removal is without merit, even if construed as a complete preemption argument.

Two district judges in the Northern District of California considered the matter of removal in cases similar to the one sub judice. They reached opposing conclusions as to removal.

In *County of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal. 2018), plaintiffs lodged tort claims against fossil fuel producers for injuries stemming from climate change. *Id.* at 937. Judge Chhabria expressly determined that "federal common law does not govern plaintiffs' claims" and thus the cases "should not have been removed to federal court on the basis of federal common law . . . ." *Id.* He considered almost every ground for removal that has been asserted here, and rejected each one. He concluded that removal was not warranted under the doctrine of complete preemption, *id.*, or on the basis of *Grable* jurisdiction, *id.* at 938, or under the Outer Continental Shelf Lands Act, *id.*, or because two of the defendants had earlier bankruptcy proceedings. *Id.* at 939. An appeal is pending. *See County of Marin v. Chevron Corp*., Appeal No. 18-15503 (9th Cir. Mar. 27, 2018).

Conversely, in *California v. BP P.L.C.*, Civ. No. WHA-16-6011, 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018), *appeal docketed sub. nom.*, *City of Oakland v. BP, P.L.C.*, No. 18-16663 (9th Cir. Sept. 4, 2018), Judge Alsup ruled in favor of removal. I pause to review that opinion and to elucidate my point of disagreement.

The State of California and the cities of Oakland and San Francisco asserted public nuisance claims against energy producers – many of whom are defendants in this action – for injuries stemming from climate change. *Id.* at *1. The plaintiffs alleged that the defendants

produced and sold fossil fuels while simultaneously deceiving the public regarding the dangers of global warming and the benefits of fossil fuels. *Id.* at *1, 4. After the defendants removed the action to federal court, the plaintiffs moved to remand. *Id.* Although the plaintiffs' public nuisance claims were pleaded under California law, the court found that federal question jurisdiction existed because the claims were "necessarily governed by federal common law." *Id.* at *2.

The court reasoned that "a uniform standard of decision is necessary to deal with the issues raised" in the suits, in light of the "worldwide predicament . . . ." *Id.* at *3. The court explained, *id.*: "A patchwork of fifty different answers to the same fundamental global issue would be unworkable." Further, the court observed that the plaintiffs' claims "depend on a global complex of geophysical cause and effect involving all nations of the planets," and that "the transboundary problem of global warming raises exactly the sort of federal interests that necessitate a uniform solution." *Id.* at *3, 5. Accordingly, the court denied the plaintiffs' motion to remand. *Id.* at *5.

The court's reasoning was well stated and presents an appealing logic. Nevertheless, the court did not find that the plaintiffs' state law claims fell within either of the carefully delineated exceptions to the well-pleaded complaint rule – *i.e.*, that they were completely preempted by federal law or necessarily raised substantial, disputed issues of federal law. *See Gunn*, 568 U.S. at 257–58; *Caterpillar Inc.*, 482 U.S. at 393. Instead, the court looked beyond the face of the plaintiffs' well-pleaded complaint and authorized removal because it found that the plaintiffs' public nuisance claims were "governed by federal common law." *BP*, 2018 WL 1064293, at *5. But, the ruling is at odds with the firmly established principle that ordinary preemption does not give rise to federal question jurisdiction. *See Caterpillar Inc.*, 482 U.S. at 393; *Marcus v. AT & T Corp.*, 138 F.3d 46, 53–54 (2d Cir. 1998) (rejecting the defendants' argument that federal common law provided a basis for removal of plaintiff's state law claims where federal common

law did not completely preempt plaintiff's claims); *Hannibal*, 266 F. Supp. 2d at 469 (holding that federal common law did not support removal where it did not completely preempt the plaintiff's state law claim).

Indeed, the ruling has been harshly criticized by at least one law professor. *See* Gil Seinfeld, *Climate Change Litigation in the Federal Courts: Jurisdictional Lessons from California v. BP*, 117 MICH. L. REV. ONLINE 25, 32–35 (2018) (asserting that the decision "disregards" and "transgresses the venerable rule that the plaintiff is the master of her complaint," including whether "to eschew federal claims in favor of ones grounded in state law alone"; stating that the case is "best understood as a complete preemption case" because that is the "only doctrine that is … capable of justifying the holding"; observing that the dist

rict court's application of the preemption doctrine was "unorthodox," as congressional intent was "out of the picture"; and stating that the ruling "is out of step with prevailing doctrine").

Defendants also rely on *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466 (S.D.N.Y. 2018), *appeal docketed*, No. 18-2188 (2d Cir. July 26, 2018), to support their argument that federal common law provides an independent basis for removal. There, the plaintiffs brought claims for nuisance and trespass under state law against oil companies for producing and selling fossil fuel products that contributed to global warming. *Id*. at 468. In their motion to dismiss the complaint, the defendants argued that the plaintiffs' claims were governed by federal common law rather than state law. *Id*. at 470. After concluding that the plaintiffs' claims were "ultimately based on the 'transboundary' emission of greenhouse gases," the court agreed. *Id*. at 472 (citing *BP*, 2018 WL 1064293, at *3). Significantly, however, the court did not consider whether this finding conferred federal question jurisdiction because the plaintiffs originally filed their complaint in federal court

based on diversity jurisdiction. *See id*. Accordingly, this case is of no help to defendants here, at the threshold jurisdictional stage.

In sum, defendants have framed their argument to allege that federal common law governs the City's public nuisance claim. In actuality, however, they present a veiled complete preemption argument. As noted, complete preemption occurs only when Congress intended for federal law to provide the "exclusive cause of action" for the claim asserted. *Beneficial*, 539 U.S. at 9; *see also Barbour,* 640 F.3d at 631. Defendants have not shown that any federal common law claim for public nuisance is available to the City here, and case law suggests that any such federal common law claim has been displaced by the Clean Air Act. *See Am. Elec. Power Co. v. Connecticut* ("*AEP*"), 564 U.S. 410, 424 (2011) (holding that the CAA displaced plaintiffs' federal common law claim for public nuisance against power plants seeking abatement of their carbon dioxide emissions); *Native Village of Kivalina v. Exxonmobil Corp.*, 696 F.3d 849, 857–58 (9th Cir. 2012) (holding that the CAA displaced the plaintiffs' federal common law claim for public nuisance seeking damages for past greenhouse gas emissions).

It may be true that the City's public nuisance claim is not viable under Maryland law. But, this Court need not – and, indeed, cannot – make that determination. The well-pleaded complaint rule confines the Court's inquiry to the face of the Complaint and demands the conclusion that no federal question jurisdiction exists over the City's public nuisance claim, which is founded on Maryland law. *See Caterpillar Inc.*, 482 U.S. at 392. Authorizing removal on the basis of a preemption defense hijacks this rule and, in turn, enhances federal judicial power at the expense of plaintiffs and state courts. In the absence of any controlling authority, I decline to endorse such an extension of removal jurisdiction.

2. Disputed, Substantial Federal Interests

Defendants next assert that, even if removal is not appropriate on the basis of federal common law, removal is nonetheless proper because the City's claims raise substantial and disputed federal issues. ECF 124 at 27.

As noted, there is a "slim category" of cases in which federal question jurisdiction exists even though the claim "finds its origins in state rather than federal law." *Gunn*, 568 U.S. at 258. A state law claim falls within this category of jurisdiction, often referred to as *Grable* jurisdiction because of the Supreme Court's seminal opinion on the topic in *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005), only when four requirements are satisfied. "That is, federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Id.*; *see Grable*, 545 U.S. at 313–14. The Supreme Court has emphasized that courts are to be cautious in exercising jurisdiction of this type because it lies at "the outer reaches of § 1331." *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 810 (1986).

Defendants contend that *Grable* jurisdiction exists because the City's claims raise a host of federal issues. ECF 124 at 28–39. For example, they assert that the City's claims "intrude upon both foreign policy and carefully balanced regulatory considerations at the national level, including the foreign affairs doctrine." ECF 1 at 21–22, ¶ 34. Further, they assert that the City's claims "have a significant impact on foreign affairs," "require federal-law-based cost-benefit analyses," "amount to a collateral attack on federal regulatory oversight of energy and the environment," "implicate federal issues related to the navigable waters of the United States," and "implicate

federal duties to disclose." ECF 124 at 28–39. Accordingly, defendants argue that *Grable* jurisdiction supports removal. *Id.*

I begin by considering whether any of these issues are "necessarily raised" by the City's claims, as required for *Grable* jurisdiction. *See Gunn*, 568 U.S. at 258; *Grable*, 545 U.S. at 314. "A federal question is 'necessarily raised' for purposes of § 1331 only if it is a 'necessary element of one of the well-pleaded state claims.'" *Burrell v. Bayer Corp.*, 918 F.3d 372, 381 (4th Cir. 2019) (quoting *Franchise Tax Bd.*, 463 U.S. at 13). It is not enough that "federal law becomes relevant only by way of a defense to an obligation created entirely by state law." *Franchise Tax Bd.*, 463 U.S. at 13. Rather, "a plaintiff's right to relief for a given claim necessarily depends on a question of federal law only when *every* legal theory supporting the claim requires the resolution of a federal issue." *Flying Pigs, LLC*, 757 F.3d at 182 (quoting *Dixon*, 369 F.3d at 816).

Defendants first argue that the City's claims have a "significant impact" on foreign affairs. ECF 124 at 28. They assert that addressing climate change has been the subject of international negotiations for decades and that the City's claims "seek to supplant these international negotiations and Congressional and Executive branch decisions, using the ill-suited tools of Maryland law and private state-court litigation." *Id.* at 30. Thus, according to defendants, the City's claims raise substantial federal issues and removal is proper. *Id.* at 28.

Climate change is certainly a matter of serious national and international concern. But, defendants do not actually identify any foreign policy that is implicated by the City's claims, much less one that is necessarily raised. *See* ECF 124 at 31. They merely point out that climate change "*has* been the subject of international negotiations for decades," as most recently evidenced by the adoption of the Paris Agreement in 2016. *Id.* at 29, 31 (emphasis added). Putting aside the fact that President Trump has announced his intention to withdraw the United States from the Paris

Agreement, defendants' generalized references to foreign policy wholly fail to demonstrate that a federal question is "essential to resolving" the City's state law claims. *Burrell*, 918 F.3d at 383; *see also President Trump Announces U.S. Withdrawal from the Paris Climate Accord*, WhiteHouse.gov (June 1, 2017), https://www.whitehouse.gov/articles/president-trump-announces-u-s-withdrawal-paris-climate-accord/.

Defendants' next argument for *Grable* jurisdiction is slightly more specific, but nonetheless misses the mark. They assert that the City's nuisance claims require the same cost-benefit analysis of fossil fuels that federal agencies conduct and, thus, that adjudicating these claims will require a court to interpret various federal regulations. ECF 124 at 34. Further, defendants contend that, because the City's nuisance claims seek a different balancing of social harms and benefits than that struck by Congress, they "amount to a collateral attack on federal regulatory oversight of energy and the environment." *Id*. at 35.

The City's nuisance claims are based on defendants' extraction, production, promotion, and sale of fossil fuel products without warning consumers and the public of their known risks. *See* ECF 42, ¶¶ 218–36. The City does not rely on any federal statutes or regulations in asserting its nuisance claims; in fact, it nowhere even alleges that defendants violated any federal statutes or regulations. Rather, it relies exclusively on state nuisance law, which prohibits "substantial and unreasonable" interferences with the use and enjoyment of property. *Washington Suburban Sanitary Comm'n v. CAE-Link Corp.*, 330 Md. 115, 125, 622 A.2d 745, 750 (1993); *see also Burley v. City of Annapolis*, 182 Md. 307, 312, 34 A.2d 603, 605 (1943) (stating that a public nuisance is one that "ha[s] a common effect and produce[s] a common damage"). Although federal laws and regulations governing energy production and air pollution may supply potential defenses, federal law is plainly not an element of the City's state law nuisance claims.

Moreover, the City does not seek to modify any regulations, laws, or treaties, or to establish national or global standards for greenhouse gas emissions. Rather, as the City observes, it seeks damages and abatement of the nuisance within Baltimore. ECF 111-1 at 32 (citing ECF 42, ¶¶ 12, 228).[5]

Nor is removal proper because the City's claims amount to a "collateral attack on the federal regulatory scheme." ECF 124 at 35. Indeed, defendants do not identify any regulation or statute that is actually attacked by the City's claims. Rather, defendants make only vague references to a "comprehensive regulatory scheme." *Id*. The mere existence of a federal regulatory regime, however, does not confer federal question jurisdiction over a state cause of action. *See Pinney*, 402 F.3d at 449 (finding that a "connection between the federal scheme regulating wireless telecommunications and the [plaintiffs'] state claims" was not enough to establish federal question jurisdiction).

In addition, defendants contend that the City's public nuisance claim "implicate[s] federal issues related to the navigable waters of the United States." ECF 124 at 37. They assert that a necessary element of the City's theory of causation is the rising sea levels and that, to assess whether defendants' conduct is the proximate cause of the sea level rise, a court will have to evaluate the adequacy of the federal infrastructure in place to protect navigable waters. *Id.* Further, defendants argue that the equitable relief sought by the City will require approval of the U.S. Army Corps of Engineers ("Army Corps") and will require a court to interpret an extensive web of regulations issued by the Army Corps governing the construction of structures on navigable waters. *Id*. at 35.

[5] The City asserts in its Remand Motion that it does not seek to enjoin any party. ECF 111-1 at 32. But, in its Complaint it does seek to "enjoin" defendants from "creating future common-law nuisances." ECF 42, ¶ 228.

The argument, although creative, would lead the court into unchartered waters. The Complaint does not challenge the adequacy of any federal action taken over navigable waters, and the requested relief nowhere mentions the construction or modification of any infrastructure on navigable waters. *See* ECF 42, ¶¶ 218–28. That the City's hypothetical remedy *might* include some construction of infrastructure on navigable waters, and thus require the approval of the Army Corps, does not mean that an issue of federal law is necessarily raised by the City's claims. *See K2 Am. Corp. v. Roland Oil & Gas, LLC*, 653 F.3d 1024, 1032 (9th Cir. 2011) (stating that, where the plaintiff brought an action seeking ownership of an oil and gas lease, "[t]he mere fact that the Secretary of the Interior must approve oil and gas leases does not raise a federal question").

Finally, defendants assert that the City's claims "implicate" federal duties to disclose because their alleged deception of federal regulators is "central to [the City's] allegations." ECF 124 at 39. And, because federal law governs claims of fraud on federal agencies, defendants argue that the City's claims "give rise to federal questions." *Id.*

This argument rests on a mischaracterization of the City's claims. The Complaint does not allege that defendants violated any duties to disclose imposed by federal law. Rather, it alleges that defendants breached various duties under state law by, *inter alia*, failing to warn consumers, retailers, regulators, public officials, and the City of the risks posed by their fossil fuel products. *See, e.g.*, ECF 42, ¶¶ 221–22, 241, 259. These duties, imposed by state law, exist separate and apart from any duties to disclose imposed by federal law. *See, e.g.*, *Gourdine v. Crews*, 405 Md. 722, 738–54, 955 A.2d 769, 779–89 (2008) (describing duty in failure to warn cases); *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 446–48, 601 A.2d 633, 645–47 (1992). Thus, I reject defendants' attempt to inject a federal issue into the City's state law public nuisance claim where one simply does not exist.

To be sure, there are federal *interests* in addressing climate change. Defendants have failed to establish, however, that a federal *issue* is a "necessary element" of the City's state law claims. *Franchise Tax Bd.*, 463 U.S. at 13. Accordingly, even without considering the remaining requirements for *Grable* jurisdiction, I reject defendants' assertion that this action falls within the "special and small category" of cases in which federal question jurisdiction exists over a state law claim. *Empire Healthchoice*, 547 U.S. at 699.

3. Complete Preemption

Defendants contend that removal is proper because the City's claims are completely preempted by both the foreign affairs doctrine and the Clean Air Act. ECF 124 at 43–44. The Court has previously addressed preemption principles. As noted, federal question jurisdiction exists "when a federal statute wholly displaces the state-law cause of action through complete pre-emption.[]" *Beneficial*, 539 U.S. at 8.

To remove an action on the basis of complete preemption, a defendant must show that Congress intended for federal law to provide the "exclusive cause of action" for the claim asserted. *Id.* at 9; *see also Barbour*, 640 F.3d at 631. The Fourth Circuit recognizes a presumption against complete preemption that may only be rebutted in the rare circumstances where "federal law 'displace[s] entirely any state cause of action.'" *Lontz*, 413 F.3d at 440 (quoting *Franchise Tax Bd.*, 463 U.S. at 23).

Complete preemption is rare. To my knowledge, the Supreme Court has, in fact, found complete preemption in regard to only three statutes. *See Beneficial*, 539 U.S. at 10–11 (National Bank Act); *Metro. Life Ins.*, 481 U.S. at 66–67 (ERISA § 502(a)); *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists*, 390 U.S. 557, 560 (1968) (Labor Management Relations Act § 301). This is unsurprising because the doctrine represents a significant departure from the general rule

that the plaintiff is "the master" of its claim, and it "may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar Inc.*, 482 U.S. at 392; *see also Lontz*, 413 F.3d at 441 (noting that complete preemption "undermines the plaintiff's traditional ability to plead under the law of his choosing").

Defendants first argue that the City's claims are completely preempted by the foreign affairs doctrine, because "litigating in state court the inherently transnational activity challenged by the Complaint would inevitably intrude on the foreign affairs power of the federal government." ECF 124 at 44. I disagree.

The federal government has the exclusive authority to act on matters of foreign policy. *Crosby*, 530 U.S. at 380; *United States v. Pink*, 315 U.S. 203, 233 (1942). Accordingly, state laws that conflict with the federal government's foreign policy are preempted. In *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003), the Court said: "There is, of course, no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the 'concern for uniformity in this country's dealings with foreign nations' that animated the Constitution's allocation of the foreign relations power to the National Government in the first place." *Id.* at 413 (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427, n.25 (1964)); *see Crosby*, 530 U.S. at 380; *Gingery v. City of Glendale*, 831 F.3d 1222, 1228 (9th Cir. 2016).

But, defendants' reliance on this principle, often referred to as the "foreign affairs doctrine," *Gingery*, 831 F.3d at 1228, is inapposite in the complete preemption context. As indicated, complete preemption occurs only when Congress intended for federal law to provide the "exclusive cause of action" for the claim asserted. *Beneficial*, 539 U.S. at 9; *see also Barbour*, 640 F.3d at 631. That does not exist here. That is, there is no congressional intent regarding the

preemptive force of the judicially-crafted foreign affairs doctrine, and the doctrine obviously does not supply any substitute causes of action. Therefore, I am not convinced by defendants' argument that the City's claims are completely preempted by the foreign affairs doctrine.

Defendants also assert that the City's claims are completely preempted by the Clean Air Act. ECF 124 at 44–48. They contend that the Clean Air Act provides the exclusive cause of action for regulating nationwide emissions and that permitting the City's state law claims against out-of-state sources would pose an obstacle to the objectives of Congress. *Id.*

The CAA was enacted in 1963. Clean Air Act, Pub. L. No. 88–206, 77 Stat. 392–401 (1963). Among other purposes, the CAA aims "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population[.]" 42 U.S.C. § 7401(b)(1). It is an expansive statute separated into six Titles. It addresses pollution from stationary sources (Title I, 42 U.S.C. §§ 7401–7431, 7470–7479, 7491–7492, 7501–7515); pollution from moving sources (Title II, 42 U.S.C. §§ 7521–7554, 7571–7574, 7581–7590); noise pollution and acid rain control (Title IV, 42 U.S.C. §§ 7641–7642 and 7651–7651o); and stratospheric ozone protection (Title VI, 42 U.S.C. §§ 7671–7671q). Title III contains general provisions, including definitions, citizen suits, and other administrative matters, and Title V governs permits.

It is true, as defendants point out, that the Clean Air Act provides for private enforcement. Specifically, it creates a federal private right of action "against any person . . . who is alleged to have violated . . . or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation." 42 U.S.C. § 7604(a)(1). The CAA also creates a federal private right of action against the

Environmental Protection Agency "where there is alleged a failure … to perform any act or duty under this chapter which is not discretionary." 42 U.S.C. § 7604(a)(2).

Fatal to defendants' argument, however, is the absence of any indication that Congress intended for these causes of action in the CAA to be the exclusive remedy for injuries stemming from air pollution. *See Beneficial*, 539 U.S. at 9 (stating that complete preemption occurs "[o]nly if Congress intended [the statute] to provide the exclusive cause of action"). To the contrary, the CAA contains a savings clause that specifically preserves other causes of action. That provision states, in relevant part, 42 U.S.C. § 7604(e):

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency). Nothing in this section or in any other law of the United States shall be construed to prohibit, exclude, or restrict any State, local, or interstate authority from--
>
> > (1) bringing any enforcement action or obtaining any judicial remedy or sanction in any State or local court, or
> >
> > (2) bringing any administrative enforcement action or obtaining any administrative remedy or sanction in any State or local administrative agency, department or instrumentality,
>
> against the United States, any department, agency, or instrumentality thereof, or any officer, agent, or employee thereof under State or local law respecting control and abatement of air pollution.

The CAA also includes the following provision regarding state regulation of hazardous air pollutants, 42 U.S.C. § 7412(r)(11):

> Nothing in this subsection shall preclude, deny or limit any right of a State or political subdivision thereof to adopt or enforce any regulation, requirement, limitation or standard (including any procedural requirement) that is more stringent than a regulation, requirement, limitation or standard in effect under this subsection or that applies to a substance not subject to this subsection.

The language of these provisions unequivocally demonstrates that "Congress did not intend the federal causes of action under [the Clean Air Act] 'to be exclusive.'" *County of San Mateo*, 294 F. Supp. 3d at 938 (quoting *Beneficial*, 539 U.S. at 9 n.5); *see also Her Majesty the Queen in*

Right of the Province of Ontario v. City of Detroit, 874 F.2d 332, 342–43 (6th Cir. 1989) (holding that the plaintiffs' claims for violation of state air pollution standards were not completely preempted by the CAA because the CAA's savings clause "clearly indicates that Congress did not wish to abolish state control"). Accordingly, I conclude that the CAA does not completely preempt the City's claims.

In sum, I disagree with defendants' contention that removal is proper on the grounds that the City's state law claims are completely preempted by the foreign affairs doctrine and the CAA. However, this Memorandum Opinion does not foreclose the defense of preemption in state court. *See In re Blackwater Sec. Consulting, LLC*, 460 F.3d at 590 (holding that "the district court's finding that complete preemption did not create federal removal jurisdiction will have no preclusive effect on a subsequent state-court defense of federal preemption").

4. Federal Enclaves

Defendants offer one final theory for federal question jurisdiction. That is, they contend that the City's claims arise under federal law because they are based on events that occurred on military bases and other federal enclaves. ECF 124 at 53.

The parameters of this contention are unclear, and defendants eschew mention of any controlling authority. Indeed, defendants only support their argument with a few cases from various district courts, most of which are unpublished. The Court's research reveals, however, that this theory of federal question jurisdiction arises from Article I, Section 8, Clause 17 of the United States Constitution. *See, e.g., Willis v. Craig*, 555 F.2d 724, 726 (9th Cir. 1977); *Mater v. Holley*, 200 F.2d 123 (5th Cir. 1952). In relevant part, that section provides:

> Congress shall have Power … to exercise exclusive legislation in all cases whatsoever, over the [District of Columbia], and to exercise like authority over all places purchased by the consent of the legislature of the state in which the [place is

> located], for the erection of forts, magazines, arsenals, dockyards, and other needful buildings.

U.S. Const. art. I, § 8, cl. 17.

This provision grants the federal government exclusive legislative jurisdiction over lands obtained pursuant to this clause, or "enclaves." In *Surplus Trading Co. v. Cook*, 281 U.S. 647 (1930), the Court said: "It has long been settled that where lands for such a purpose are purchased by the United States with the consent of the State legislature, the jurisdiction theretofore residing in the state passes, in virtue of the constitutional provision, to the United States, thereby making the jurisdiction of the latter the sole jurisdiction." *Id.* at 652; *see Akin v. Ashland Chem. Co.*, 156 F.3d 1030, 1034 (10th Cir. 1998).

Courts have held that federal question jurisdiction exists over claims that arise on federal enclaves. *See Stokes v. Adair*, 265 F.2d 662, 666 (4th Cir. 1959); *see also Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1250 (9th Cir. 2006) ("Federal courts have federal question jurisdiction over tort claims that arise on 'federal enclaves.'") (citations omitted); *Akin*, 156 F.3d at 1034 ("Personal injury actions which arise from incidents occurring in federal enclaves may be removed to federal district court as a part of federal question jurisdiction."); *Willis*, 555 F.2d at 726; *Mater*, 200 F.2d at 124; *Hall v. Coca-Cola Co.*, Civ. No. MSD-18-0244, 2018 WL 4928976, at *2–3 (E.D. Va. Oct. 11, 2018); *Federico v. Lincoln Military Hous.*, 901 F. Supp. 2d 654, 664 (E.D. Va. 2012). The general reasoning of these courts is that any claim that arises on a federal enclave is necessarily a creature of federal law because, quite simply, there is no other law. *See Mater*, 200 F.2d at 124 ("[A]ny law existing in territory over which the United States has exclusive sovereignty must derive its authority and force from the United States and is for that reason federal law."); *Hall*, 2018 WL 4928976, at *2.

Defendants argue that federal question jurisdiction exists because "[s]ome" of them maintain production operations and sell fossil fuels on military bases and other federal enclaves. ECF 124 at 53. Specifically, they assert: "Standard Oil Co. (Chevron's predecessor) operated Elk Hills Naval Petroleum Reserve, a federal enclave, for most of the twentieth century." *Id.* In addition, they allege that defendant CITGO distributed gasoline and diesel under contracts with the Navy to multiple Naval installations. *Id.* at 54. Finally, defendants contend that federal enclave jurisdiction exists because the City alleges tortious conduct, such as lobbying activities, that occurred in the District of Columbia. *Id.*

At the outset, I reject defendants' argument that removal is proper because some of the allegedly tortious conduct occurred in the District of Columbia. Congress established a code and a local court system for the District of Columbia and, in doing so, "divested the federal courts of jurisdiction over local matters." *Andrade v. Jackson*, 401 A.2d 990, 992 (D.C. 1979) (observing that, in establishing a unified local court system under the Court Reform Act of 1973, "Congress divested the federal courts of jurisdiction over local matters, restricting those courts to those matters generally viewed as federal business"); D.C. Code § 11-501 (2012) (civil jurisdiction of the United States District Court for the District of Columbia); D.C. Code § 11-921 (2012) (civil jurisdiction of the Superior Court for the District of Columbia). *See also Palmore v. United States*, 411 U.S. 389, 408–09 (1973) (explaining that Congress established the local court system for the District of Columbia so that Article III courts can be "devoted to matters of national concern"); *McEachin v. United States*, 432 A.2d 1212, 1215 (D.C. 1981). That a claim is based on conduct that occurred in the District of Columbia, therefore, does not *ipso facto* make it a federal claim over which federal question jurisdiction lies. Rather, it must arise under federal law – as distinct

from the local law of the District of Columbia or that of another state – to fall within the scope of federal question jurisdiction.

Defendants' contention that federal question jurisdiction exists because CITGO and Chevron's predecessor, Standard Oil, conducted fossil fuel operations on federal enclaves is also without merit. As the dearth of case law illustrates, courts have only relied on this "federal enclave" theory to exercise federal question jurisdiction in limited circumstances. Specifically, courts have only found that claims arise on federal enclaves, and thus fall within federal question jurisdiction, when all or most of the pertinent events occurred there. *See, e.g.*, *Stokes*, 265 F.2d at 665–66 (finding jurisdiction existed over a personal injury suit where the injury occurred at a U.S. Army post); *Mater*, 200 F.2d at 124 (holding that the district court had jurisdiction over plaintiff's claim for personal injuries sustained on a military base); *Norair Eng'g Corp. v. URS Fed. Servs., Inc.*, Civ. No. RDB-16-1440, 2016 WL 7228861, at *3 (D. Md. Dec. 14, 2016) (finding removal proper where plaintiff's cause of action arose out of work performed exclusively on a federal enclave); *see also In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d 1103, 1125 (N.D. Cal. 2012) (stating that federal jurisdiction exists in federal enclave cases "when the locus in which the claim arose is the federal enclave itself"); *Totah v. Bies*, Civ. No. CW-10-05956, 2011 WL 1324471, at *2 (N.D. Cal. Apr. 6, 2011) (upholding removal where the "substance and consummation of the tort" occurred on a federal enclave).

Those circumstances do not exist here. The City seeks relief for conduct that occurred globally over a fifty-year period – that is, defendants' contribution to global warming through their extraction, production, and sale of fossil fuel products. ECF 42, ¶¶ 5–7, 18, 20, 191. The Complaint does not contain any allegations concerning defendants' conduct on federal enclaves and, in fact, it expressly defines the scope of injury to exclude any federal territory. *Id.* ¶¶ 1 n.2,

195–217. Accordingly, it cannot be said that federal enclaves were the "locus" in which the City's claims arose merely because one of the twenty-six defendants, and the predecessor of another defendant, conducted some operations on federal enclaves for some unspecified period of time. *See County of San Mateo*, 294 F. Supp. 3d at 939 (finding no federal enclave jurisdiction over plaintiffs' claim against oil companies for injuries stemming from climate change "since federal land was not the 'locus in which the claim arose'") (quoting *In re High-Tech*, 856 F. Supp. 2d at 1125); *see also Washington v. Monsanto Co.*, 274 F. Supp. 3d 1125, 1132 (W.D. Wash. 2017) (stating that, "because [plaintiff] avowedly does not seek relief for contamination of federal territories, none of its claims arise on federal enclaves"); *Bd. of Comm'rs of the Se. La. Flood Prot. Auth. v. Tenn. Gas Pipeline Co.*, 29 F. Supp. 3d 808, 831 (E.D. La. 2014) (finding no enclave jurisdiction where plaintiff stipulated that it would not seek damages for injuries sustained in federal wildlife reserve).

As the City observes, ECF 111-1 at 49, under Maryland law, when events giving rise to a suit occur in multiple jurisdictions, generally "the place of the tort is considered to be the place of injury." *Philip Morris Inc. v. Angeletti*, 358 Md. 689, 745, 752 A.2d 200, 231 (2000); *see also Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 511 (4th Cir. 1986). Here, the claims appear to arise in Baltimore, where the City allegedly suffered and will suffer harm.

I conclude that removal is not warranted on the ground that the City's claims arose on federal enclaves.

C. Alternative Bases for Removal

I turn to the defendants' alternative bases for removal.

1. Outer Continental Shelf Lands Act

Defendants argue that removal is proper because the Court has jurisdiction over the City's claims under the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. §§ 1331–1356b (2012). ECF 124 at 49. Specifically, defendants assert that this case falls within the jurisdictional grant of the OCSLA because they produce a substantial volume of oil and gas on the Outer Continental Shelf ("OCS") and the City's claims arise out of those operations. *Id*. at 50.

The OCSLA provides, in pertinent part: "The subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition …" 43 U.S.C. § 1332(a). The OCSLA contains a jurisdictional grant which states:

> [T]he district courts of the United States shall have jurisdiction of cases and controversies arising out of, or in connection with ... any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals …

43 U.S.C. § 1349(b)(1).

The Fifth Circuit has found that the OCSLA jurisdictional grant is "broad" and requires only a "'but-for' connection" between the cause of action and the OCS operation. *In re Deepwater Horizon*, 745 F.3d 157, 163 (5th Cir. 2014) (quoting *Hufnagel v. Omega Serv. Indus., Inc*., 182 F.3d 340, 350 (5th Cir. 1999)); *see also Barker v. Hercules Offshore, Inc*., 713 F.3d 208, 213 (5th Cir. 2013). The Fifth Circuit has also said: "A plaintiff does not need to expressly invoke OCSLA in order for it to apply." *Barker*, 713 F.3d at 213 (upholding removal where OCSLA jurisdiction existed even though the plaintiff did not specifically invoke it). Defendants do not cite to cases from any other circuit courts applying the OCSLA jurisdictional grant, and this Court is only aware of one. *See Shell Oil Co. v. F.E.R.C*., 47 F.3d 1186, 1192 (D.C. Cir. 1995) (summarily finding that OCSLA jurisdiction existed over action brought by operator of oil pipeline on OCS

challenging FERC order ruling that pipeline was required to provide oil company with access and transportation services).

Even under a "broad" reading of the OCSLA jurisdictional grant endorsed by the Fifth Circuit, defendants fail to demonstrate that OCSLA jurisdiction exists. *In re Deepwater Horizon*, 745 F.3d at 163 (citations omitted). Defendants were not sued merely for producing fossil fuel products, let alone for merely producing them on the OCS. Rather, the City's claims are based on a broad array of conduct, including defendants' failure to warn consumers and the public of the known dangers associated with fossil fuel products, all of which occurred globally. *See* ECF 42, ¶¶ 5–7, 18, 20, 191. And, defendants offer no basis to enable this Court to conclude that the City's claims for injuries stemming from climate change would not have occurred but for defendants' extraction activities on the OCS. *See County of San Mateo*, 294 F. Supp. 3d at 938–39 (finding that removal under the OCSLA was not warranted where, even though some of the activities that caused the plaintiffs' climate change related injuries stemmed from operations on the OCS, defendants failed to show that the plaintiffs' causes of action would not have accrued but for their activities on the OCS); *see also Matte v. Mobile Expl. & Prod. North Am. Inc.*, Civ. No. BWA-18-7446, 2018 WL 5023729, at *4–5 (E.D. La. Oct. 17, 2018) (no OCSLA jurisdiction where defendants failed to show that plaintiff's injury, leukemia as a result of benzene exposure, would not have occurred but for his three-month employment on the OCS, where plaintiff alleged that he was exposed to benzene for seven years); *Hammond v. Phillips 66 Co.*, Civ. No. KS-14-0119, 2015 WL 630918, at *4 (S.D. Miss. Feb. 12, 2015). *Cf. In re Deepwater Horizon*, 745 F.3d at 163–64 (finding the but for test satisfied where Louisiana sued defendants for pollution damage to its waters and coastline caused by a massive oil spill and it was "undeniable that the oil and other contaminants would not have entered into the State of Louisiana's territorial waters but for

[defendants'] drilling and exploration operation" on the OCS) (internal quotation marks and citation omitted).

Accordingly, I am satisfied that the OCSLA does not support removal.

2. Federal Officer Removal

Defendants assert that this action is removable under the federal officer removal statute, 28 U.S.C. § 1442, because the City "bases liability on activities undertaken at the direction of the federal government." ECF 124 at 56.

In relevant part, the federal officer removal statute authorizes the removal of cases commenced in state court against "any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office…" 28 U.S.C. § 1442(a)(1) (2012). The Supreme Court has explained:

> The [federal officer] removal statute's "basic" purpose is to protect the Federal Government from the interference with its "operations" that would ensue were a State able, for example, to "arrest" and bring "to trial in a State court for an alleged offense against the law of the State," "officers and agents" of the Federal Government "acting … within the scope of their authority."

Watson v. Philip Morris Co., 551 U.S. 142, 150 (2007) (quoting *Willingham v. Morgan*, 395 U.S. 402, 406 (1969)); *see also Maryland v. Soper*, 270 U.S. 9, 32 (1926) ("The constitutional validity of the section rests on the right and power of the United States to secure the efficient execution of its laws and to prevent interference therewith, due to possible local prejudice…").

A defendant who seeks to remove a case under § 1442(a)(1) must satisfy three elements. *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 254 (4th Cir. 2017) (citations omitted). First, it must show that it was an officer of the United States or "acting under" a federal officer within the meaning of the statute. *Id.* (citing *Watson*, 551 U.S. at 147). Second, it must raise "a colorable

federal defense." *Id.* (citing *Jefferson County v. Acker*, 527 U.S. 423, 431 (1999)). Finally, it must establish that the charged conduct was carried out "for or relating to" the asserted official authority. *Id.* (citing 28 U.S.C. § 1442(a)(1)); *see Mesa v. California*, 489 U.S. 121, 139 (1989); *Texas v. Kleinert*, 855 F.3d 305, 311–12 (5th Cir. 2017), *cert. denied*, ___ U.S. ___, 138 S. Ct. 642 (2018).

This is, of course, a civil case. But, by analogy, in a criminal case, to establish that an act arises "under color of such office", the removing defendant "must 'show[ ] a "causal connection" between the charged conduct and asserted official authority.'" *Kleinert*, 855 F.3d at 312 (quoting *Willingham*, 395 U.S. at 409). "'It must appear that the prosecution . . . arise[s] out of the acts done by [the officer] under color of federal authority and in enforcement of federal law . . . .'" *Id.* (alterations in original) (quoting *Mesa*, 489 U.S. at 132–33).

Moreover, invocation of the federal officer removal statute must be "predicated on the allegation of a colorable federal defense by the defendant officer. *Mesa*, 489 U.S. at 129; *see also North Carolina v. Cisneros*, 947 F.2d 1135, 1139 (4th Cir. 1991); *North Carolina v. Ivory*, 906 F.2d 999, 1001 (4th Cir. 1990). A court must construe the defendant's alleged facts as "if those facts were true." *Ivory*, 906 F.2d at 1002. But, the factual allegations must "support" a defense. *Cisneros*, 947 F.2d at 1139 (quoting *Ivory*, 906 F.2d at 1001) (emphasis omitted). That is, they must enable a court to conclude that the "colorable" defense is plausible. *See United States v. Todd*, 245 F.3d 691, 693 (8th Cir. 2001); *Kleinert*, 855 F.3d at 313; *cf. Jefferson Cty.*, 527 U.S. at 432 ("[R]equiring a 'clearly sustainable defense' rather than a colorable defense would defeat the purpose of the removal statue").

Defendants rely on three relationships with the federal government to support their argument that the federal officer removal statute authorizes removal of this action. First, they point out that the predecessor of defendant Chevron, Standard Oil, extracted oil for the United States

Navy. ECF 1, ¶ 63; ECF 2-4 (Unit Plan Contract of 06/19/1944 between Navy Department and Standard Oil). In addition, defendant CITGO had fuel supply agreements with the Navy between 1988 and 2012. ECF 1, ¶ 64. Finally, defendants assert that their operations on the OCS were regulated by a leasing program developed by the Secretary of the Interior to promote the development of OCS resources. *Id*. ¶ 61; ECF 2-3 (boilerplate lease issued by the Department of the Interior pursuant to the OCSLA). By contracting with the government to perform these vital services, defendants argue, they were "acting under" federal officials. ECF 124 at 62.

Even assuming that the first two requirements for removal under § 1442 are satisfied, defendants have failed plausibly to assert that the third requirement for removal under this statute is met – *i.e.*, that the charged conduct was carried out "for or relating to" the alleged official authority. 28 U.S.C. §1442(a)(1); *Sawyer*, 860 F.3d at 257–58. Defendants have been sued for their contribution to climate change by producing, promoting, selling, and concealing the dangers of fossil fuel products. *See* ECF 42, ¶¶ 1, 221, 241, 253, 263. They have not shown that a federal officer controlled their total production and sales of fossil fuels, nor is there any indication that the federal government directed them to conceal the hazards of fossil fuels or prohibited them from providing warnings to consumers.

Defendants claim only that the federal government purchased oil and gas from one of the twenty-six defendants, and the predecessor of another defendant, and broadly regulated defendants' extraction on the OCS. Case law makes clear that this attenuated connection between the wide array of conduct for which defendants have been sued and the asserted official authority is not enough to support removal under § 1442(a)(1). *See County of San Mateo*, 294 F. Supp. 3d at 939 (finding that defendants failed to show a "causal nexus" between the work performed under federal direction and the plaintiffs' claims for injuries stemming from climate change because the

plaintiffs' claims were "based on a wider range of conduct"); *In re Wireless Tel.*, 327 F. Supp. 2d 554, 562–63 (D. Md. 2004) (holding that phone manufacturers could not remove pursuant to § 1442(a)(1) where plaintiffs' claims were largely based on their failure to provide warnings to consumers and the manufacturers did not show that the government prohibited them from providing additional safeguards or information to consumers); *Ryan v. Dow Chem. Co.*, 781 F. Supp. 934, 950 (E.D.N.Y. 1992) (finding that defendants could not remove case pursuant to § 1442(a)(1) where they were "being sued for formulating and producing a product all of whose components were developed without direct government control and all of whose methods of manufacture were determined by the defendants"). *Cf. Sawyer*, 860 F.3d at 258 (finding a sufficient connection between the charged conduct and the asserted official authority where the plaintiffs alleged that defendant failed to warn them of asbestos in the boilers it manufactured for the Navy and the Navy dictated the content of the warnings on defendant's boilers).

Therefore, even assuming, *arguendo*, that the defendants were "acting under" federal officials on these occasions and can assert a colorable defense, removal based on the federal officer removal statute is not proper because defendants have failed to plausibly assert that the acts for which they have been sued were carried out "for or relating to" the alleged federal authority. 28 U.S.C. §1442(a)(1); *Sawyer*, 860 F.3d at 254.

3. Bankruptcy Removal Statute

Defendants maintain that the bankruptcy removal statute, 28 U.S.C. § 1452, permits removal. ECF 124 at 64. That statute provides, in relevant part:

> A party may remove any claim or cause of action in a civil action other than ... a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

28 U.S.C. § 1452(a). Section 1334, in turn, grants district courts original but not exclusive jurisdiction "of all civil proceedings … arising in or related to cases under title 11." *Id*. § 1334(b).

According to defendants, this action falls within the Court's original jurisdiction under § 1334 because it is "related to countless bankruptcy cases." ECF 124 at 64. Specifically, they claim that this action is related to bankruptcy proceedings involving the predecessor of defendant Chevron, Texaco, whose Chapter 11 plan was confirmed in 1987. *Id*. at 65. Defendants also assert that Texaco's Chapter 11 plan bars "certain claims" against it arising before March 15, 1988, and, because the City seeks to hold defendant Chevron liable for Texaco's culpable conduct before that date, the adjudication of the City's claims would affect the interpretation or administration of the plan. *Id*. In addition, defendants argue that this case is related to the bankruptcy proceedings of other companies in the fossil fuel industry, such as Peabody Energy. *Id*. Therefore, defendants posit that this case falls within the Court's "related to" jurisdiction and was properly removed under § 1452. *Id*. at 64–65.

The City contends, however, that this action does not fall within the Court's original jurisdiction under § 1334 because it is not related to any bankruptcy proceedings. ECF 111-1 at 59–60. In addition, the City argues that this action is exempt from removal under § 1452 because it represents an exercise of its police and regulatory powers. *Id*. at 56–58.

The Court first considers whether this action is "related to" a bankruptcy proceeding and, thus, subject to removal under the bankruptcy removal statute. 28 U.S.C. § 1334(b); 28 U.S.C. § 1452(a) ("A party may remove … if such district court has jurisdiction of such claim or cause of action under section 1334 of this title."). The "close nexus" test determines the scope of a court's "related to" jurisdiction in the post-confirmation context. *Valley Historic Ltd. P'ship v. Bank of N.Y.*, 486 F.3d 831, 836 (4th Cir. 2007). That is, for "related to" jurisdiction to exist after a Chapter

11 plan is confirmed, "the claim must affect an integral aspect of the bankruptcy process – there must be a close nexus to the bankruptcy plan or proceeding." *Id*. at 836 (quoting *In re Resorts Int'l, Inc*., 372 F.3d 154, 166–67 (3d Cir. 2004)); *see also In re Wilshire Courtyard*, 729 F.3d 1279, 1287 (9th Cir. 2013).

Under this inquiry, "[m]atters that affect the interpretation, implementation, consummation, execution, or administration of the confirmed plan will typically have the requisite close nexus." *Valley Historic*, 486 F.3d at 836–37 (quoting *In re Resorts Int'l*, 372 F.3d at 167). As the Fourth Circuit explained, the "close nexus" requirement "insures that the proceeding serves a bankruptcy administration purpose on the date the bankruptcy court exercises that jurisdiction." *Id*. at 837. *See also In re Pegasus Gold Corp.*, 394 F.3d 1189, 1194 (9th Cir. 2005) (adopting the "close nexus" test for post-confirmation "related to" jurisdiction because it "recognizes the limited nature of post-confirmation jurisdiction but retains a certain flexibility").

Defendants fail to demonstrate that there is a "close nexus" between this action and any bankruptcy proceedings. The only bankruptcy plan that defendants identify was confirmed more than thirty years ago and, although defendants assert that the plan bars "certain claims against [Texaco] arising before March 15, 1988," they do not explain how the City's recently filed claims implicate this provision. ECF 124 at 65. At most, defendants have only established that some day a question *might* arise as to whether a previous bankruptcy discharge precludes the enforcement of a portion of the judgment in this case against defendant Chevron. This remote connection does not bring this case within the Court's "related to" jurisdiction. 28 U.S.C. 1334(b); *see In re Ray*, 624 F.3d 1124, 1135 (9th Cir. 2010) (holding that the bankruptcy court did not have "related to" jurisdiction over breach of contract action that "could have existed entirely apart from the

bankruptcy proceeding and did not necessarily depend upon resolution of a substantial question of bankruptcy law").

Moreover, even assuming, *arguendo*, that this action is within the Court's bankruptcy jurisdiction, it is exempt from removal under § 1452 as an exercise of the City's police or regulatory powers.

To my knowledge, the Fourth Circuit has not considered the parameters of the police or regulatory exception to removal under § 1452. It has, however, construed the phrase "police or regulatory power" in the automatic stay provision of the bankruptcy code. *See Safety-Kleen, Inc. (Pinewood) v. Wyche*, 274 F.3d 846, 865 (4th Cir. 2001). That section, in relevant part, exempts from the automatic stay "the commencement or continuation of an action or proceeding by a governmental unit … to enforce such governmental unit's … power and regulatory power, including the enforcement of a judgment other than a money judgment…" 11 U.S.C. § 362(b)(4). Because "[t]he language of the police and regulatory power exceptions in the automatic stay context and in the removal context is virtually identical, and the purpose behind each exception is the same," it is proper to look to judicial interpretation of § 362 for guidance in applying the exception in the removal context. *City & Cty. of San Francisco v. PG & E Corp*., 433 F.3d 1115, 1123 (9th Cir. 2006), *cert denied*, 549 U.S. 882 (2006); *see also In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 488 F.3d 112, 132 (2d Cir. 2007) (looking to judicial interpretations of § 362(b)(4) for guidance in defining the parameters of a governmental unit's police or regulatory power in the context of § 1452).

The Fourth Circuit looks to the "purpose of the law that the state seeks to enforce" to determine whether an action is an exercise of a governmental entity's police and regulatory power. *Safety-Kleen*, 274 F.3d at 865. In *Safety-Kleen*, it explained the inquiry as follows:

> If the purpose of the law is to promote "public safety and welfare," or to "effectuate public policy," then the exception applies. On the other hand, if the purpose of the law relates "to the protection of the government's pecuniary interest in the debtor's property," or to "adjudicate private rights," then the exception is inapplicable.

Id. (citations omitted). This inquiry is an objective one. *Id*. The court examines "the purpose of the law that the state seeks to enforce rather than the state's intent in enforcing the law in a particular case." *Id*.

The City asserts claims against defendants for injuries stemming from climate change. It brings this action on behalf of the public to remedy and prevent environmental damage, punish wrongdoers, and deter illegal activity. As other courts have recognized, such an action falls squarely within the police or regulatory exception to § 1452. *See County of San Mateo*, 294 F. Supp. 3d at 939 (holding that suits against oil companies for injuries stemming from climate change were exempt from bankruptcy removal statute because they were "aimed at protecting the public safety and welfare and brought on behalf of the public"); *MTBE*, 488 F.3d at 133 (finding that the police power exception prevented the removal of states' claims against corporations that manufactured and distributed gasoline containing MTBE because "the clear goal of these proceedings is to remedy and prevent environmental damage with potentially serious consequences for public health, a significant area of state policy"). *See also Safety-Kleen*, 274 F.3d at 866 (holding that a state environmental agency's attempt to enforce financial assurance requirements was within the regulatory exception because "the regulations serve to promote environmental safety in the design and operation of hazardous waste facilities").

That the relief sought by the City includes a monetary judgment does not alter this conclusion. In *Safety-Kleen*, the Fourth Circuit reasoned: "The fact that one purpose of the law is to protect the state's pecuniary interest does not necessarily mean that the exception is inapplicable. Rather, we must determine the *primary* purpose of the law that the state is attempting to enforce."

274 F.3d at 865. *See also MTBE*, 488 F.3d at 133–34 (rejecting defendants' argument that the police power exception to § 1452 did not apply to suit brought by governmental units for environmental damage merely because they sought money damages).

Accordingly, I reject defendants' argument that removal of this case is proper under § 1452.

4. Admiralty Jurisdiction

Defendants assert that admiralty jurisdiction supports removal of this action. The contention is premised on the fact that, according to defendants, the Complaint alleges injury based on their offshore oil and gas drilling from vessels. ECF 124 at 67.

The Constitution extends the federal judicial power "to all Cases of admiralty and maritime Jurisdiction." U.S. Const. art. III, § 2. Congress codified this power in a statute, 28 U.S.C. § 1333, which grants federal district courts "original jurisdiction, exclusive of the courts of the States, of … [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." *Id.* § 1333(1); *see Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 531 (1995). The latter portion of this jurisdictional grant, often referred to as the "saving to suitors" clause, is a "grant to state courts of *in personam* jurisdiction, concurrent with admiralty courts." *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 445 (2001) (citations omitted).

The City argues that admiralty claims brought in state court are not removable under 28 U.S.C. § 1441 absent some other jurisdictional basis, such as diversity or federal question jurisdiction. ECF 111-1 at 62. Further, it maintains that, even if admiralty jurisdiction *does* supply an independent basis for removal, this action does not fall within the Court's admiralty jurisdiction

because it satisfies neither the "location" test nor the "connection to maritime activity" test articulated by the Supreme Court. *Id*. at 63–64 (citing *Grubart*, 513 U.S. at 534).

The scope of removal jurisdiction over admiralty claims has generated significant confusion over the years. *See* 14A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction* § 3674 (4th ed. 2013) ("Whether an admiralty or maritime matter instituted in a state court falls within the removal jurisdiction of the federal courts is a question that has been beset by confusion and uncertainty over the years, some of which continues to this day.").

To my knowledge, most of the courts that have considered the issue have concluded that admiralty claims are not removable absent an independent basis for federal jurisdiction, such as diversity. *See Cassidy v. Murray*, 34 F. Supp. 3d 579, 583 (D. Md. 2014); *Forde v. Hornblower N.Y., LLC*, 243 F. Supp. 3d 461, 467–68 (S.D.N.Y. 2017) (noting that "the overwhelming majority of district courts" have held that admiralty claims are not removable absent another basis for jurisdiction); *Langlois v. Kirby Inland Marine, LP*, 139 F. Supp. 3d 804, 809–10 (M.D. La. 2015) (citing over forty cases for the proposition that a "growing chorus of district courts that have concluded that the [the 2011 amendment to § 1441] did not upset the long-established rule that general maritime law claims, saved to suitors, are not removable to federal court, absent some basis for original federal jurisdiction other than admiralty"). *See also* 14A WRIGHT & MILLER, *supra*, § 3674 (4th ed. Supp. 2019) (noting that a majority of courts have found that admiralty jurisdiction does not independently support removal). But, as defendants point out, some courts have held otherwise. *See Ryan v. Hercules Offshore, Inc.*, 945 F. Supp. 2d 772, 777–78 (S.D. Tex. 2013) (holding that admiralty claims are freely removable); *see also Exxon Mobil Corp. v. Starr Indem. & Liab. Co.*, Civ. No. NFA-14-1147, 2014 WL 2739309, at *2 (S.D. Tex. June 17, 2014),

remanded on other grounds on reconsideration, 2014 WL 4167807 (S.D. Tex. Aug. 20, 2014); *Carrigan v. M/V AMC Ambassador*, Civ. No. EW-13-3208, 2014 WL 358353, at *2 (S.D. Tex. Jan. 31, 2014).

In my view, this Court need not weigh in on this admittedly complicated issue. I find safe harbor in the view that, even if admiralty jurisdiction *does* provide an independent basis for removal, this case is outside the Court's admiralty jurisdiction.

As to a tort claim, a party seeking to invoke federal admiralty jurisdiction pursuant to 28 U.S.C. §1333(1) must satisfy two tests: the "location test" and the "maritime connection" test. *Grubart*, 513 U.S. at 534, 538. To satisfy the location test, a plaintiff must show that the tort at issue "occurred on navigable water," or if the injury was suffered on land, that it was "caused by a vessel on navigable water" within the meaning of the Admiralty Extension Act. *Id*. at 534 (citing former 46 U.S.C. § 30101(a) (2012)). To satisfy the maritime connection test, a plaintiff must show that the case has "a potentially disruptive impact on maritime commerce" and that the "general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity." *Id*. (internal quotation marks and citations omitted).

The Court's analysis begins and ends with the location test. Defendants do not dispute that the City's injuries occurred on land; they argue only that the location test is satisfied because the City's injuries were caused by vessels on navigable waters within the meaning of the Admiralty Extension Act, 46 U.S.C. § 30101(a). ECF 124 at 69.

The Admiralty Extension Act provides, in relevant part, 46 U.S.C. § 30101(a):

> The admiralty and maritime jurisdiction of the United States extends to and includes cases of injury or damage, to person or property, caused by a vessel on navigable waters, even though the injury or damage is done or consummated on land.

The statute broadened the reach of admiralty jurisdiction to include claims for injuries suffered on land that are caused by vessels. *See id*. Congress passed the Admiralty Extension Act "specifically to overrule or circumvent" a line of Supreme Court cases that had "refused to permit recovery in admiralty even where a ship or its gear, through collision or otherwise, caused damage to persons ashore or to bridges, docks, or other shore-based property." *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 209 (1971); *see also Louisville & N.R. Co. v. M/V Bayou Lacombe*, 597 F.2d 469, 472 (5th Cir. 1979) ("As a result of the Act, a plaintiff is no longer precluded from suing in admiralty when a vessel collides with a land structure, such as a bridge.").

Not all torts involving vessels on navigable waters fall within the Admiralty Extension Act, however. Rather, the Act requires that an injury on land be proximately caused by a vessel or its appurtenances. *Grubart*, 513 U.S. at 536 (holding that the terms "caused by" in the Admiralty Extension Act require proximate causation); *see also Pryor v. Am. President Lines*, 520 F.2d 974, 979 (4th Cir. 1975) (holding that "a ship or its appurtenances must proximately cause an injury on shore" to fall within admiralty jurisdiction), *cert. denied*, 423 U.S. 1055 (1976); *Adamson v. Port of Bellingham*, 907 F.3d 1122, 1131–32 (9th Cir. 2018) (holding that the Admiralty Extension Act applies only when an injury on land is proximately caused by a vessel or its appurtenances, not those performing acts for the vessel); *Scott v. Trump Ind., Inc.*, 337 F.3d 939, 943 (7th Cir. 2003); *Egorov, Puchinsky, Afanasiev & Juring v. Terriberry, Carroll & Yancey*, 183 F.3d 453, 456 (5th Cir. 1999) (stating that "the [Admiralty Extension] Act means the vessel and her appurtenances, and does not include those performing actions for the vessel") (citations omitted).

Even if mobile drilling platforms qualify as "vessels" in admiralty, defendants have failed to demonstrate that the City's injuries were "caused by a vessel on navigable waters," within the meaning of the Admiralty Extension Act. 46 U.S.C. § 30101(a). The City nowhere alleges that

defendants' mobile drilling platforms or their appurtenances caused its injuries. Indeed, the Complaint does not mention any mobile drilling platforms or other vessels. Rather, the City alleges that defendants' worldwide production, wrongful promotion, and sale of fossil fuel products caused its environmental disruptions and their associated impacts.

That some unspecified portion of defendants' production occurred on these vessels, as defendants assert, does not mean that the vessels *themselves* caused the City's injuries, much less proximately caused them. *See Pryor*, 520 F.2d at 982 (finding vessel did not cause plaintiff's injuries on land "[b]ecause it is not conceptually possible to charge the ship with having caused the defective packaging …"). Thus, it cannot be said that the City's injuries were "caused by a vessel on navigable waters," within the meaning of the Admiralty Extension Act. 46 U.S.C. § 30101(a).

II. Conclusion

For the reasons stated above, I conclude that the case was not properly removed to federal court. Therefore, the case must be remanded to the Circuit Court for Baltimore City, pursuant to 28 U.S.C. § 1447(c).

As stipulated by the parties, the Court will stay execution of an order to remand for thirty days.

An Order follows.

Date: June 20, 2019.

/s/
Ellen Lipton Hollander
United States District Judge