

Nos. 18-15499, 18-15502, 18-15503

IN THE
United States Court of Appeals for the Ninth Circuit

COUNTY OF SAN MATEO, Plaintiff–Appellee, v. CHEVRON CORPORATION, <i>et al.</i> , Defendants–Appellants.	Appeal No. 18-15499 No. 17-cv-4929-VC N.D. Cal., San Francisco Hon. Vince Chhabria presiding
CITY OF IMPERIAL BEACH, Plaintiff–Appellee, v. CHEVRON CORPORATION, <i>et al.</i> , Defendants–Appellants.	Appeal No. 18-15502 No. 17-cv-4934-VC N.D. Cal., San Francisco Hon. Vince Chhabria presiding
COUNTY OF MARIN, Plaintiff–Appellee, v. CHEVRON CORPORATION, <i>et al.</i> , Defendants–Appellants.	Appeal No. 18-15503 No. 17-cv-4935-VC N.D. Cal., San Francisco Hon. Vince Chhabria presiding

PLAINTIFFS-APPELLEES’ MOTION FOR PARTIAL DISMISSAL

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MOTION FOR PARTIAL DISMISSAL

Pursuant to Fed. R. App. P. 27, Plaintiffs-Appellees move to dismiss portions of these appeals from the district court's remand of these cases to state court.¹

Ordinarily, an “order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise” if the district court remands for lack of subject matter jurisdiction over the claims or because the case was otherwise improperly removed. 28 U.S.C. § 1447(d); *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336 (1976). This general bar is subject only to the limited exception for “an order remanding a case to the State court from which it was removed pursuant to section 1442 [federal officer removal] or 1443 [civil rights removal] of this title.” 28 U.S.C. § 1447(d). In this case, Defendants asserted seven grounds for removal, all of which the district court rejected. Six of those grounds were rejected for lack of subject matter jurisdiction and therefore fall within Section 1447(d)'s general bar against appellate review. The sole remaining ground for removal—what the district court referred to as Defendants “dubious assertion of federal officer removal,” Remand Order at 5 (attached as Exhibit A)—falls within Section 1447(d)'s exception.

¹ Pursuant to 9th Cir. R. 27-1, Plaintiffs' counsel has discussed this motion with Defendants' counsel, who oppose it.

This Court has held that in these circumstances, appellate jurisdiction is limited to reviewing the ground for removal falling within Section 1447(d)'s exception (here, federal officer removal). *See Patel v. Del Taco, Inc.*, 446 F.3d 996 (9th Cir. 2006). Defendants nonetheless have stated in their notice of appeal that they intend to ask this Court to “review the *entire order* to determine whether removal was proper under *any* of Defendants’ other grounds of removal.” Notice of Appeal at 1 (attached as Exhibit B) (second emphasis added). Binding circuit precedent precludes that request. Plaintiffs therefore file this motion for partial dismissal to avoid wasting the parties’ and this Court’s resources addressing the multitude of arguments Defendants plan to raise, but this Court lacks jurisdiction to consider.

BACKGROUND

I. Legal Background

A case originally filed in state court may be removed to federal court under certain circumstances. The principal removal provision, 28 U.S.C. § 1441, authorizes removal of any civil action over which a federal district court would have original jurisdiction—*e.g.*, because the complaint gives rise to federal question jurisdiction. As relevant here, three other statutes provide additional grounds for removal. The federal officer removal statute permits removal by the “United States or any agency thereof or any officer (or any person acting under that officer) of the

United States or of any agency thereof . . . for or relating to any act under color of such office.” 28 U.S.C. § 1442(a)(1). The civil rights removal provision allows removal by plaintiffs unable to enforce federal civil rights in state court or sued for “any act under color of authority derived from any law providing for equal rights.” 28 U.S.C. § 1443. Finally, the Bankruptcy Act permits removal of “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).

The district court to which a case is removed may remand the case back to state court if it decides, among other things, that it lacks jurisdiction over the case or that the asserted ground for removal does not exist. *See* 28 U.S.C. § 1447(c). Appellate review of a remand order is strictly limited by Section 1447(d), which provides:

An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 [federal officer removal provision] or 1443 [civil rights removal provision] of this title shall be reviewable by appeal or otherwise.

The Supreme Court has held that this provision “must be read *in pari materia* with § 1447(c), so that only remands based on grounds specified in § 1447(c), are immune

from review under § 1447(d).” *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995) (citing *Thermtron Prods.*, 423 U.S. 336). As a result, so “long as a district court’s remand is based on a timely raised defect in removal procedure or on lack of subject-matter jurisdiction—the grounds for remand recognized by § 1447(c)—a court of appeals lacks jurisdiction to entertain an appeal of the remand order under § 1447(d).” *Id.* at 127–28.

II. Factual And Procedural Background

A. Complaints

Plaintiffs, two coastal California counties and one city, filed three separate lawsuits in California state court, asserting state-law claims against Defendants, major corporate members of the fossil fuel industry. Plaintiffs allege that Defendants have known for decades that the unrestricted use of their products was disrupting the planet’s climate with potentially catastrophic effects, particularly on coastal communities due to rising sea levels caused by global warming. Plaintiffs further allege that despite this knowledge, Defendants engaged in a coordinated effort to conceal this truth, to discredit the growing body of scientific evidence, and to promote continued and expanded use of their products without warning consumers or the public about the dangers inherent in their products. Plaintiffs and their residents are now facing enormous costs associated with rising sea levels and a changing climate. These lawsuits seek to require Defendants to internalize some of

the cost of that conduct by paying for the damage to Plaintiffs' infrastructure produced by rising sea levels.

B. Removal

Shortly after Plaintiffs filed suit in state court, Defendants removed the cases to federal district court, asserting seven grounds for removal. Five of the seven grounds relied on 28 U.S.C. § 1441(a), asserting that although the complaints pleaded only state law claims, they nonetheless fell within the district court's original federal question jurisdiction. *See* Notice of Removal ¶¶ 5–8, 10 (attached as Exhibit C). These grounds ranged from the assertion that Plaintiffs' state law claims were actually federal common law claims (albeit claims under a federal common law that, Defendants say, no longer exists) to invocations of the Outer Continental Shelf Lands Act and federal enclave jurisdiction. *See id.*

Fifth on the list was federal officer removal pursuant to 28 U.S.C. § 1442(a)(1). Defendants asserted that all of the claims relating to all Defendants were removable under this provision because: (a) some Defendants produced fuel pursuant to leases on federal lands; (b) Chevron's predecessor jointly operated a particular oil reserve with the Navy from 1944 to 1997; and (c) Citgo had a series of contracts to sell gasoline and diesel fuel to gas stations on Navy bases from 1988 to 2012. *See* Notice of Removal ¶¶ 9, 56–64.

The final ground cited the federal bankruptcy removal provision, 28 U.S.C. § 1452(a), asserting that the district court had original bankruptcy jurisdiction under 28 U.S.C. § 1334 because two Defendants (and, possibly, other unidentified “non-joined necessary and indispensable parties”) had undergone Chapter 11 proceedings in the past. *See* Notice of Removal ¶ 11.

C. Remand

After extensive briefing and oral argument, the district court remanded the cases to state court. The court found there was no federal question jurisdiction under Defendants’ principal theories of removal. Remand Order at 1–5. It further found that the cases did not qualify for removal under the federal officer provision. *Id.* at 5. And it held that the court lacked original jurisdiction under the Bankruptcy Act because there was “no sufficiently close nexus between the plaintiffs’ lawsuits and these defendants’ plans.” *Id.*² The district court further held that bankruptcy removal was independently barred because Plaintiffs’ claims fell within the exception for “a

² Bankruptcy removal is only permitted if the removed claims fall within a district court’s jurisdiction under 28 U.S.C. § 1334, which, as relevant here, encompasses claims “arising in or related to a case under title 11.” *Id.* § 1334(b). A case is “related to” a title 11 proceeding if there is a “close nexus” between the claims and a confirmed bankruptcy plan. *In re Wilshire Courtyard*, 729 F.3d 1279, 1287 (9th Cir. 2013) (internal quotation marks omitted). When, as here, a district court rejects bankruptcy removal for lack of subject matter jurisdiction under Section 1334, that remand is subject to Section 1447(d)’s bar on appellate review. *See Things Remembered*, 516 U.S. at 128.

civil action by a governmental unit to enforce such governmental unit's police or regulatory power." 28 U.S.C. § 1452(a); *see* Remand Order at 5.

Defendants filed notices of appeal, in which they acknowledged that "Section 1447(d) generally prohibits appellate review of remand orders," subject to the exception for federal officer removal. Notice of Appeal at 1. Under that exception, they explained, "the Court of Appeals has jurisdiction to review the district court's remand order, which concluded, *inter alia*, that removal was not warranted under the federal officer removal statute." *Id.* Defendants then asserted that they nonetheless intend to seek reversal of the district court's rejection of *all* of their bases for removal, arguing that "because section 1447(d) expressly authorizes review of the *order* remanding these actions to state court, the Court of Appeals may review the *entire order* to determine whether removal was proper under any of Defendants' other grounds of removal." *Id.*

Defendants subsequently asked the district court for a stay pending this appeal, reiterating that their appeal would encompass all asserted grounds for removal. Stay Motion at 3–6 (attached as Exhibit D). The district court granted the stay and certified the order for interlocutory review pursuant to 28 U.S.C. § 1292(b). Stay Order (attached as Exhibit E).

D. Denial of Defendants' Section 1292(b) Appeal

On May 22, 2018, this Court denied Defendants' petition for interlocutory review under Section 1292(b), Order, No. 18-80049 (9th Cir. May 22, 2018) (attached as Exhibit F), citing *Krangel v. Gen. Dynamics Corp.*, 968 F.2d 914 (9th Cir. 1992) (per curiam), which held that Section 1292(b) may not be used to circumvent the limitations on appellate review in Section 1447(d)).

ARGUMENT

Defendants acknowledge that Section 1447(d) ordinarily precludes review of any remand for lack of subject matter jurisdiction or other removal defect. They nonetheless insist that they have avoided that restriction by appending a reviewable federal officer removal claim to their otherwise unreviewable grounds for removal. That gambit is barred by settled circuit precedent, and rightly so. The Court should grant this motion and dismiss the appeal to the extent it seeks review of removal theories subject to Section 1447(d)'s bar, as other courts have done in similar circumstances. *See, e.g., Baylor v. Day-Petrano*, 596 Fed. Appx. 741, 742 n.2 (11th Cir. 2014) (per curiam) (noting earlier order partially dismissing appeal under Section 1447(d) prior to briefing); *Alabama v. Conley*, 245 F.3d 1292, 1293 n.1 (11th Cir. 2001) (per curiam) (same); *see also* Fed. R. App. P. 2. Doing so would limit the

briefing on appeal to the federal officer removal question, the only ground for removal within this Court's jurisdiction.³

I. Under Settled Circuit Precedent, This Court Lacks Jurisdiction To Review The District Court's Rejection Of Defendants' Principal Grounds For Removal.

Review of the district court's determination that it lacked jurisdiction is barred by *Patel v. Del Taco, Inc.*, 446 F.3d 996 (9th Cir. 2006). There, the defendant attempted to remove a case under both 28 U.S.C. § 1441, asserting federal question jurisdiction, and 28 U.S.C. § 1443, the civil rights removal provision. This Court held:

The district court determined that removal was not proper under either 28 U.S.C. § 1441 or § 1443(1). We lack jurisdiction to review the remand order based on § 1441. *See* 28 U.S.C. § 1447(d) ("order remanding a case to the State court from which it was removed is not reviewable on appeal"). *Accordingly, the Patels' appeal from the remand order based on § 1441 is dismissed.*

446 F.3d at 998 (emphasis added). The Court explained, however, that it did "have jurisdiction to review the remand order based on 28 U.S.C. § 1443(1)." *Id.*

³ Plaintiffs file this motion approximately one month before Defendants' opening brief is due under the current briefing schedule, and approximately two weeks after the Court denied Defendants' petition under Section 1292(b) which, if granted, would have rendered this motion irrelevant. Under this Court's rules, the briefing schedule will be stayed pending resolution of this motion. *See* 9th Cir. R. 27-11(a)(1).

This Court has consistently applied *Patel*'s interpretation of Section 1447(d) for more than a decade, dismissing appeals to the extent they challenge the district court's conclusion that it lacked jurisdiction and limiting review to the ground falling within Section 1447(d)'s exception clause. *See Clark v. Kempton*, 593 Fed. Appx. 667, 668 (9th Cir. 2015) (citing *Patel*, holding "[w]e lack jurisdiction over this appeal to the extent that it pertains to removal under § 1441," but reviewing removability under Section 1443); *Carter v. Evans*, 601 Fed. Appx. 527, 528 (9th Cir. 2015) (citing *Patel*, affirming case not removable under Section 1443, and holding that "[w]e lack jurisdiction to consider [the] contention that the district court erred by failing to consider whether it had subject matter jurisdiction" under bankruptcy removal statute); *McCullough v. Evans*, 600 Fed. Appx. 577, 578 (9th Cir. 2015) (same); *U.S. Bank Nat'l Ass'n. v. Azam*, 582 Fed. Appx. 710, 711 (9th Cir. 2014) (citing Section 1447(d), stating "[w]e do not consider [the] contentions regarding removal on the basis of 28 U.S.C. §§ 1334 [bankruptcy removal] and 1441 because they are beyond the scope of review," but considering Section 1443 arguments).

The rule is so well settled that, after *Patel*, decisions applying the rule have not required publication. *See* 9th Cir. R. 36-2(a) (an opinion must be published if it "[e]stablishes, alters, modifies or clarifies a rule of federal law").

Defendants insist that *Patel* is wrong. They cite the Seventh Circuit’s decision in *Lu Junhong v. Boeing Co.*, 792 F.3d 805 (7th Cir. 2015), which pointed out that Section 1447(d) provides that an “*order* remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise.” 28 U.S.C. § 1447(d) (emphasis added). By making the “order” reviewable, the Seventh Circuit concluded, Congress authorized review of every ground for removal addressed in that “order,” including grounds that would otherwise be unreviewable under Section 1447(d)’s main prohibition. 792 F.4d at 811. As discussed below, that reasoning is flawed. *See infra* § II.B. More importantly, it is not an argument any panel of this Court can accept, because *Patel* remains binding. *See, e.g., Gen. Constr. Co. v. Castro*, 401 F.3d 963, 975 (9th Cir. 2005) (three-judge panels are “bound by decisions of prior panels unless an en banc decision, Supreme Court decision or subsequent legislation undermines those decisions.”) (citation omitted). Recognizing as much, Defendants argued in the district court that *Patel* is not controlling for several reasons, none of them persuasive.

First, Defendants observed that “*Patel* did not involve appeal of a remand order from a case removed under section 1442, but dealt exclusively with removal under Section 1443.” Stay Motion at 6. But that distinction is immaterial and, therefore, no basis for distinguishing the prior precedent. *See, e.g., Prison Legal*

News v. Schwarzenegger, 608 F.3d 446, 451 (9th Cir. 2010). Defendants’ entire argument is premised on the word “order,” which applies identically to cases involving Section 1442 or Section 1443. *See* 28 U.S.C. § 1447(d) (providing that “*an order* remanding a case to the State court from which it was removed pursuant to *section 1442 or 1443* of this title shall be reviewable by appeal or otherwise” (emphasis added)). Accordingly, none of the cases Defendants cite have applied different rules to Section 1442 and 1443 cases.

Second, Defendants assert that the defendants in *Patel* removed the case “*solely* under Section 1443” and therefore “did not invoke any other federal statute in their notice of removal.” Stay Motion at 6 (emphasis added). But the *Patel* defendants *did* invoke Section 1441 in defending removal, arguing that because they had appended their removal notice to a complaint alleging federal causes of action, the district court had original federal question jurisdiction over the removed case. They therefore insisted on appeal that “[i]ndependent of the scope of removal under § 1443(1), a basis exists for removal under 28 U.S.C. §§ 1441(c) and 1367 since the state court petition was not removed in and of itself but was joined to the federal question claims.” Appellants’ Opening Brief, *Patel*, 2004 WL 3250818 (Dec. 21, 2004). Before addressing that argument on the merits, this Court properly considered whether it had jurisdiction to consider the question at all. In any event, *Patel*’s holding would remain binding on subsequent panels even if Defendants were right

that the court could have resolved the appeal on other grounds. *See United States v. Johnson*, 256 F.3d 895, 914 (9th Cir. 2001) (en banc).

Third, Defendants insist that the “defendants in *Patel* did not argue that review of the entire remand order was authorized by the plain language of Section 1447(d).” Stay Motion at 6. But the fact that a party has a new argument about why a prior panel’s decision is wrong does not authorize a subsequent panel to set prior precedent aside. *See, e.g., United States v. Boitano*, 796 F.3d 1160, 1163–64 (9th Cir. 2015).

Finally, Defendants have suggested that the Removal Clarification Act of 2011, Pub. L. No. 112-51, 125 Stat. 545, somehow abrogated *Patel*. Stay Motion at 5–6. At the time of *Patel*, Section 1447(d)’s exception referred solely to the civil rights removal provision, Section 1443. The 2011 Act added federal officer removal to the exception, inserting the words “1442 or” into the final clause of the provision. *See* § 2(d), 125 Stat. at 546. But that change has no bearing on the jurisdictional question at issue here. Again, Defendants’ theory turns on the word “order,” which was in the statute at the time of *Patel* and was unchanged by the 2011 amendment. *See Patel*, 446 F.3d at 998 (quoting Section 1447(d)). For that reason, no court adopting Defendants’ interpretation has treated the Removal Clarification Act as relevant.

II. This Court's Interpretation Of Section 1447(d) Accords With The Majority View In The Circuits, And Is Correct.

While the panel must follow *Patel* as controlling precedent, this Circuit's interpretation also represents the majority view across the circuits and best comports with the text and purposes of Section 1447(d).

A. *Patel* Applied The Majority Rule.

Contrary to Defendants' claim below, this Court's precedent is no "outlier." Stay Motion at 6. The majority of circuits that have considered the question apply the same rule. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Baasch*, 644 F.2d 94, 96 (2d Cir. 1981) (per curiam) (reviewing propriety of removal under Section 1443, but holding that "insofar as the appeal challenges the court's rulings that the action was not one 'of which the district courts have original jurisdiction . . .' the appeal must be dismissed for want of appellate jurisdiction" (citation omitted)); *Davis v. Glanton*, 107 F.3d 1044 (3d Cir. 1997) ("Section 1447(d) thus expressly authorizes appellate review of remand orders in cases that were originally removed to federal court under § 1443. However, it follows from the clear text of § 1447(d) that, insofar as the Trustees' appeal challenges the district court's rulings under 28 U.S.C. § 1441, we must dismiss the appeal for want of appellate jurisdiction."); *Noel v. McCain*, 538 F.2d 633, 635 (4th Cir. 1976) ("Jurisdiction to review remand of a § 1441(a) removal is not supplied by also seeking removal under § 1443(1)."); *Jacks v. Meridian Res. Co.*, 701 F.3d 1224, 1229 (8th Cir. 2012) (holding court "lack[ed]

jurisdiction to review the district court’s determination concerning the availability of federal common law to resolve this suit . . . as it is a remand based upon the court’s determination that it lacked subject matter jurisdiction,” but concluding that it “retain[ed] jurisdiction to review the district court’s remand on the issue of whether the federal officer removal statute, 28 U.S.C. § 1442(a)(1), applies”); *Conley*, 245 F.3d at 1293 n.1 (“An order remanding a civil action to state court for lack of subject matter jurisdiction pursuant to §§ 1441 and 1447(c) is not reviewable. Hence, in a prior order of this Court, we dismissed Conley’s appeal to the extent it challenges the district court’s remand order based on §§ 1441 and 1447(c), but allowed Conley’s appeal to proceed to the extent he is challenging the district court’s implicit determination that removal based on § 1443 was improper.” (citations omitted)).

The Seventh Circuit has reached the contrary conclusion. *See Lu Junhong*, 792 F.3d at 810–13. Defendants claim that the Fifth and Sixth Circuits “are in agreement” with the Seventh, Stay Motion at 4, but in fact, both circuits have precedents pointing in opposite directions. *Compare Decatur Hosp. Auth. v. Aetna Health, Inc.*, 854 F.3d 292, 296 (5th Cir. 2017) (jurisdiction over all removal grounds), and *Mays v. City of Flint*, 871 F.3d 437, 442 (6th Cir. 2017) (same), *cert. denied*, 138 S. Ct. 1557 (2018), with *City of Walker v. Louisiana*, 877 F.3d 563, 566–67 (5th Cir. 2017) (rejecting this interpretation of “order” for Class Action Fairness

Act of 2005 removal provision, 28 U.S.C. § 1453(c)(1)), *Detroit Police Lieutenants & Sergeants Ass’n v. City of Detroit*, 597 F.2d 566, 567–68 (6th Cir. 1979) (per curiam) (“We conclude that, to the extent that removal is based upon Section 1441, the remand order of the district court is not reviewable on appeal,” but reviewing Section 1443 removal), and *Appalachian Volunteers, Inc. v. Clark*, 432 F.2d 530, 534 (6th Cir. 1970) (same); see also *Darrah v. City of Oak Park*, 255 F.3d 301, 310 (6th Cir. 2001) (“[W]hen a later decision of this court conflicts with one of our prior published decisions, we are still bound by the holding of the earlier case.”).

B. Patel’s Interpretation Is Consistent With The Text And Purpose of The Removal Statute.

In addition to being the majority position, interpreting federal officer removal as not conferring jurisdiction over otherwise non-reviewable bases for removal best comports with the text and purposes of the federal removal statute. In contrast, Defendants’ position leads to absurd results. If a court of appeals found removal proper under Section 1442, Defendants’ rule would be irrelevant because there usually would be no reason to decide whether removal was proper on *additional* grounds as well. Therefore, the only function of Defendants’ rule would be to allow broader appeal rights for defendants who make *meritless* assertions of federal officer removal, even while denying that privilege to defendants who have the good sense not to supplement their Section 1441 removal claims with baseless federal officer assertions. Even worse, Defendants’ rule would not simply provide courts

discretionary authority to allow *early* review of an otherwise appealable ruling (as can happen when an order is certified for interlocutory appeal under 28 U.S.C. § 1292(b)). It would give defendants an appeal *as of right* to challenge rulings Congress decided should be *completely unreviewable* in normal circumstances. Neither the text nor purposes of the statute require that improbable result.

Defendants’ textual argument overlooks that the statute simply provides that an order denying federal officer removal “shall be *reviewable* by appeal or otherwise.” 28 U.S.C. § 1447(d) (emphasis added). That is, the exception does not in itself authorize an appeal, much less address the scope of that appeal. (The provision does not, for example, state whether the order may be reviewed by direct appeal or, instead, through a petition for a writ of mandamus). The statute simply exempts the identified orders from the general bar against any appellate review whatsoever. Authorization for appeal of reviewable remand orders must be found elsewhere—generally in 28 U.S.C. § 1291, which permits appeals from “final decisions” of a district court. *See Harmston v. City & County of San Francisco*, 627 F.3d 1273, 1278 (9th Cir. 2010). And the case law addressing the scope of review under Section 1291 makes clear that just because an order is reviewable on appeal does not mean every issue decided in the order is subject to review.

For example, the Supreme Court has held that an order denying claims of qualified immunity counts as a “final decision” under Section 1291, subject to

immediate review under the collateral order doctrine. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). But treating that order as a “final decision” does not mean that there is jurisdiction to decide the correctness of every aspect of that “decision.” Instead, the Supreme Court has held that jurisdiction extends only to the district court’s determination whether the defendant’s conduct violated clearly established law, not to any “portion of a district court’s summary judgment order that, though entered in a ‘qualified immunity’ case, determines only a question of ‘evidentiary sufficiency.’” *Johnson v. Jones*, 515 U.S. 304, 313 (1995). Nor is there jurisdiction to review other defenses, or claims asserted by other parties, addressed in the qualified immunity “decision.” *See Swint v. Chambers Cty. Comm’n*, 514 U.S. 35, 43–51 (1995) (rejecting claims of “pendent party” or “pendent appellate jurisdiction”); *see also Abney v. United States*, 431 U.S. 651, 662–63 (1977) (interlocutory appeal permitted to challenge denial of double jeopardy defense does not authorize review of court’s denial, in the same order, of defendants’ challenge to the sufficiency of the indictment to charge an offense).

The Supreme Court’s reasoning, which tailors the scope of review to the circumstances justifying the special exception to general rules otherwise prohibiting appeal, decisively supports this Court’s precedent. *See Johnson*, 515 U.S. at 314–15; *Swint*, 514 U.S. at 49–51; *Abney*, 431 U.S. at 662–63. Here, Congress has made appellate review of remand orders the exception, not the rule. It has specifically

forbidden appellate review of a district court's determination that original subject matter jurisdiction is lacking. Congress authorized a limited exception for cases asserting federal officer removal to "ensure that any individual drawn into a State legal proceeding based on that individual's status as a Federal officer has the right to remove the proceeding to a U.S. district court for adjudication." H.R. REP. NO. 112-17, pt. 1, at 1 (2011); *see also, e.g., Mesa v. California*, 489 U.S. 121, 137 (1989) (purpose of federal officer removal is to "provide a federal forum for cases where federal officials must raise defenses arising from their official duties") (citation omitted). When a court of appeals has determined that the defendant is not entitled to federal officer removal, those purposes no longer support exceptional treatment. Indeed, absent a meritorious federal officer removal claim, there is nothing to distinguish the case from the many others in which Congress has decided that district courts can be trusted to decide whether other grounds for removal are presented and that, even if a case is erroneously remanded, state courts can be trusted to fairly evaluate the defendant's federal defenses. *See, e.g., Mesa*, 489 U.S. at 138.

Defendants' rule would encourage defendants to assert and appeal baseless federal officer removal claims in order to "to bring more serious, but otherwise nonappealable questions to the attention of the courts of appeals," a risk the Supreme Court has found intolerable in related contexts. *Swint*, 514 U.S. at 49 (quoting *Abney*, 431 U.S. at 663). The Supreme Court has likewise rejected the suggestion that so

long as a court is taking up a part of the case on appeal, “there is no cause to resist the economy that” broader review “promotes.” *Id.* at 45; *contra Lu Junhong*, 792 F.3d at 813. “These arguments drift away from the statutory instructions Congress has given to control” the appellate process. *Swint*, 514 U.S. at 45. If Defendants believe those restrictions inefficient, their appeal lies to Congress, not this Court.

The Supreme Court’s decision in *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996), is not to the contrary. *Contra* Stay Motion at 5. In that case, the Court construed the scope of appeals permitted under 28 U.S.C. § 1292(b), which provides:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals . . . may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order.

The Supreme Court held that Section 1292(b) appeals are not limited to the questions identified by the district court. *See* 516 U.S. at 205. While the Court placed weight on the word “order,” it did so to distinguish the “controlling question of law” (which is a prerequisite to appeal) from the portion of Section 1292(b) identifying

what may be appealed (the “order,” not the questions). *See id.* Having rejected the certified-questions limitation, the Court had no need to go further.

Certainly, the Court did not purport to establish some general rule regarding the proper scope of appeal in every statute using the word “order.” The Court has often “affirmed that identical language may convey varying content when used in different statutes,” and must be construed in light of the specific context of each use. *Yates v. United States*, 135 S. Ct. 1074, 1082 (2015) (plurality) (“In law as in life . . . the same words, placed in different contexts, sometimes mean different things.”). Here, the text, structure, and purposes of Section 1447(d) are very different from the provision the Court confronted in *Yamaha*. As noted, Section 1447(d) makes certain remand orders merely “reviewable,” removing a barrier to an appeal that must be authorized and delimited by other provisions of law. Section 1292(b), in contrast, directly authorizes the appeal of the certified order. In addition, even if Section 1292(b) may open a range of issues to appeal, it does so in drastically narrower circumstances than Section 1447(d). That is, a Section 1292(b) appeal is permitted only upon the concurrence of both the district court and the court of appeals, and only when specific conditions are met. Defendants’ interpretation of Section 1447(d), by contrast, would allow an appeal *as of right*, with no gatekeeping performed by any court. Finally, Section 1292(b) has nothing like Section 1447(d)’s express bar on any appellate review of remands based on lack of federal subject

matter jurisdiction. While interlocutory appeals allow review of issues *earlier* than normally permitted, Defendants’ interpretation would permit review of issues that are ordinarily not subject to appellate review *at all*.

III. Even If This Court Had Jurisdiction To Review The Full Scope Of The Remand Order, It Should Exercise Its Discretion To Limit This Appeal.

Finally, even if *Yamaha* controlled this appeal, this Court would have discretion whether to entertain issues outside the federal officer removal ground that justified the appeal. *See Yamaha*, 516 U.S. at 205 (under Section 1292(b), the “appellate court *may* address any issue fairly included within the certified order”) (emphasis added); 28 U.S.C. § 1447(d) (providing that order is “reviewable,” not that every issue in order must be reviewed). The Court should decline to exercise that discretion to broaden the appeal in this case.

There is no valid reason to reward parties who make meritless federal officer removal claims with expanded rights of appeal, and sound reasons not to. The district court described Defendants’ claim of federal officer removal “dubious,” and rejected it. Remand Order at 5. And the federal officer removal claim is substantively distinct from the multitude of other issues Defendants hope to raise in this appeal. *Cf. Cunningham v. Gates*, 229 F.3d 1271, 1284 (9th Cir. 2000) (pendant appellate jurisdiction allowed only when issues are “inextricably intertwined” or “if review of the pendent issue [is] necessary to ensure meaningful review of the independently reviewable issue”) (citation omitted).

CONCLUSION

As it did in *Patel*, this Court should dismiss Defendants' appeal to the extent it challenges the district court's remand for lack of original subject matter jurisdiction. *See* 446 F.3d at 998. Doing so will prevent unnecessary briefing and argument on six of Defendants' seven grounds for removal, leaving only federal officer removal for briefing and decision in this appeal. *See* Remand Order at 1–5 (rejecting every removal ground, other than federal officer removal, for lack of jurisdiction).

Respectfully submitted,

Dated: June 6, 2018

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitation of Circuit Rules 27-1(d) and 32-3(2) because the document contains 5,482 words, excluding the parts of the brief exempted by Federal Rules of Appellate Procedure 27(a)(2)(B) and 32(f) and Circuit Rule 27-1(d).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 Times New Roman 14-point font.

/s/ Kevin K. Russell

Kevin K. Russell

CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2018, I caused a copy of the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Kevin K. Russell

Kevin K. Russell

EXHIBIT A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

COUNTY OF SAN MATEO, Plaintiff, v. CHEVRON CORP., et al., Defendants.	Case No. 17-cv-04929-VC Re: Dkt. No. 144
CITY OF IMPERIAL BEACH, Plaintiff, v. CHEVRON CORP., et al., Defendants.	Case No. 17-cv-04934-VC Re: Dkt. No. 140
COUNTY OF MARIN, Plaintiff, v. CHEVRON CORP., et al., Defendants.	Case No. 17-cv-04935-VC ORDER GRANTING MOTIONS TO REMAND Re: Dkt. No. 140

The plaintiffs' motions to remand are granted.

1. Removal based on federal common law was not warranted. In *American Electric Power Co., Inc. v. Connecticut*, the Supreme Court held that the Clean Air Act displaces federal common law claims that seek the abatement of greenhouse gas emissions. 564 U.S. 410, 424 (2011). Far from holding (as the defendants bravely assert) that state law claims relating to

global warming are superseded by federal common law, the Supreme Court 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). *Id.* at 429. This seems to reflect the Court's view that once federal common law is displaced by a federal statute, there is no longer a possibility that state law claims could be superseded by the previously-operative federal common law.

Applying *American Electric Power*, the Ninth Circuit concluded in *Native Village of Kivalina v. ExxonMobil Corp.* that federal common law is displaced by the Clean Air Act not only when plaintiffs seek injunctive relief to curb emissions but also when they seek damages for a defendant's contribution to global warming. 696 F.3d 849, 857-58 (9th Cir. 2012). The plaintiffs in the current cases are seeking similar relief based on similar conduct, which means that federal common law does not govern their claims. In this respect, the Court disagrees with *People of the State of California v. BP P.L.C.*, Nos. C 17-06011 WHA, C 17-06012 WHA (N.D. Cal. Feb. 27, 2018), which concluded that San Francisco and Oakland's current lawsuits are materially different from *Kivalina* such that federal common law could play a role in the current lawsuits brought by the localities even while it could not in *Kivalina*. Like the localities in the current cases, the *Kivalina* plaintiffs sought damages resulting from rising sea levels and land erosion. Not coincidentally, there is significant overlap between the defendants in *Kivalina* and the defendants in the current cases. 696 F.3d at 853-54 & n.1. The description of the claims asserted was also nearly identical in *Kivalina* and the current cases: that the defendants' contributions to greenhouse gas emissions constituted "a substantial and unreasonable interference with public rights." *Id.* at 854. Given these facts, *Kivalina* stands for the proposition that federal common law is not just displaced when it comes to claims against domestic sources of emissions but also when it comes to claims against energy producers' contributions to global warming and rising sea levels. *Id.* at 854-58. Put another way, *American Electric Power* did not confine its holding about the displacement of federal common law to particular sources of emissions, and *Kivalina* did not apply *American Electric Power* in such a

limited way.

Because federal common law does not govern the plaintiffs' claims, it also does not preclude them from asserting the state law claims in these lawsuits. Simply put, these cases should not have been removed to federal court on the basis of federal common law that no longer exists.

2. Nor was removal warranted under the doctrine of complete preemption. State law claims are often preempted by federal law, but preemption alone seldom justifies removing a case from state court to federal court. Usually, state courts are left to decide whether state law claims are preempted by federal law under principles of "express preemption," "conflict preemption" or "field preemption." And state courts are entirely capable of adjudicating that sort of question. *See, e.g., Smith v. Wells Fargo Bank, N.A.*, 38 Cal. Rptr. 3d 653, 665-73 (Cal. Ct. App. 2005), *as modified on denial of reh'g* (Jan. 26, 2006); *Carpenters Health & Welfare Trust Fund for California v. McCracken*, 100 Cal. Rptr. 2d 473, 474-77 (Cal. Ct. App. 2000). A defendant may only remove a case to federal court in the rare circumstance where a state law claim is "completely preempted" by a specific federal statute – for example, section 301 of the Labor Management Relations Act, section 502 of the Employment Retirement Income Security Act, or sections 85 and 86 of the National Bank Act. *See Sullivan v. American Airlines, Inc.*, 424 F.3d 267, 271-73 (2d Cir. 2005). The defendants do not point to any applicable statutory provision that involves complete preemption. 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." 42 U.S.C. §§ 7604(e), 7416; 33 U.S.C. §§ 1365(e), 1370; *Beneficial National Bank v. Anderson*, 539 U.S. 1, 9 n.5 (2003); *Bell v. Cheswick Generating Station*, 734 F.3d 188, 194-97 (3d Cir. 2013). There may be important questions of ordinary preemption, but those are for the state courts to decide upon remand.

3. Nor was removal warranted on the basis of *Grable* jurisdiction. The defendants have not pointed to a specific issue of federal law that must necessarily be resolved to adjudicate the

state law claims. *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 314 (2005); *see also Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 700 (2006). Instead, the defendants mostly gesture to federal law and federal concerns in a generalized way. The mere potential for foreign policy implications (resulting from the plaintiffs succeeding on their claims at an unknown future date) does not raise the kind of actually disputed, substantial federal issue necessary for *Grable* jurisdiction. Nor does the mere existence of a federal regulatory regime mean that these cases fall under *Grable*. *See Empire Healthchoice*, 547 U.S. at 701 ("[I]t takes more than a federal element 'to open the 'arising under' door.'" (quoting *Grable*, 545 U.S. at 313)). Moreover, even if deciding the nuisance claims were to involve a weighing of costs and benefits, and even if the weighing were to implicate the defendants' dual obligations under federal and state law, that would not be enough to invoke *Grable* jurisdiction. On the defendants' theory, many (if not all) state tort claims that involve the balancing of interests and are brought against federally regulated entities would be removable. *Grable* does not sweep so broadly. *See Empire Healthchoice*, 547 U.S. at 701 (describing *Grable* as identifying no more than a "slim category" of removable cases); *Grable*, 545 U.S. at 313-14, 319.

4. These cases were not removable under any of the specialized statutory removal provisions cited by the defendants. Removal under the Outer Continental Shelf Lands Act was not warranted because even if some of the activities that caused the alleged injuries stemmed from operations on the Outer Continental Shelf, the defendants have not shown that the plaintiffs' causes of action would not have accrued *but for* the defendants' activities on the shelf. *See In re Deepwater Horizon*, 745 F.3d 157, 163 (5th Cir. 2014). Nor was federal enclave jurisdiction appropriate, since federal land was not the "locus in which the claim arose." *In re High-Tech Employee Antitrust Litigation*, 856 F. Supp. 2d 1103, 1125 (N.D. Cal. 2012) (quoting *Alvares v. Erickson*, 514 F.2d 156, 160 (9th Cir. 1975)); *see also Ballard v. Ameron International Corp.*, No. 16-CV-06074-JSC, 2016 WL 6216194, at *3 (N.D. Cal. Oct. 25, 2016); *Klausner v. Lucas Film Entertainment Co, Ltd.*, No. 09-03502 CW, 2010 WL 1038228, at *4 (N.D. Cal. Mar. 19,

2010); *Rosseter v. Industrial Light & Magic*, No. C 08-04545 WHA, 2009 WL 210452, at *2 (N.D. Cal. Jan. 27, 2009). Nor was there a reasonable basis for federal officer removal, because the defendants have not shown a "causal nexus" between the work performed under federal direction and the plaintiffs' claims, which are based on a wider range of conduct. *See Cabalce v. Thomas E. Blanchard & Associates, Inc.*, 797 F.3d 720, 727 (9th Cir. 2015); *see also Watson v. Philip Morris Companies, Inc.*, 551 U.S. 142, 157 (2007). And bankruptcy removal did not apply because these suits are aimed at protecting the public safety and welfare and brought on behalf of the public. *See City & Cty. of San Francisco v. PG & E Corp.*, 433 F.3d 1115, 1123-24 (9th Cir. 2006); *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1108-09 (9th Cir. 2005). To the extent two defendants' bankruptcy plans are relevant, there is no sufficiently close nexus between the plaintiffs' lawsuits and these defendants' plans. *See In re Wilshire Courtyard*, 729 F.3d 1279, 1287 (9th Cir. 2013).

* * *

As the defendants note, these state law claims raise national and perhaps global questions. It may even be that these local actions are federally preempted. But to justify removal from state court to federal court, a defendant must be able to show that the case being removed fits within one of a small handful of small boxes. Because these lawsuits do not fit within any of those boxes, they were properly filed in state court and improperly removed to federal court. Therefore, the motions to remand are granted. The Court will issue a separate order in each case to remand it to the state court that it came from.

At the hearing, the defendants requested a short stay of the remand orders to sort out whether a longer stay pending appeal is warranted. A short stay is appropriate to consider whether the matter should be certified for interlocutory appeal, whether the defendants have the right to appeal based on their dubious assertion of federal officer removal, or whether the remand orders should be stayed pending the appeal of Judge Alsup's ruling. Therefore, the remand orders are stayed until 42 days of this ruling. Within 7 days of this ruling, the parties must submit a stipulated briefing schedule for addressing the propriety of a stay pending appeal. The

parties should assume that any further stay request will be decided on the papers; the Court will schedule a hearing if necessary.

IT IS SO ORDERED.

Dated: March 16, 2018



VINCE CHHABRIA
United States District Judge

EXHIBIT B

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

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

Plaintiff,

v.

CHEVRON CORP., et al.,

Defendants.

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

**DEFENDANTS' NOTICE OF APPEAL AND
 REPRESENTATION STATEMENT**

CASE NO. 3:17-CV-4929-VC

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

Plaintiff,

v.

CHEVRON CORP., et al.,

Defendants.

CASE NO. 3:17-CV-4934-VC

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

Plaintiff,

v.

CHEVRON CORP., et al.,

Defendants.

CASE NO. 3:17-CV-4935-VC

[Additional Counsel Listed on Signature Page]

NOTICE OF APPEAL *

Pursuant to 28 U.S.C. §§ 1291 and 1447(d), notice is hereby given that Defendants in the above-named cases hereby appeal to the United States Court of Appeals for the Ninth Circuit from the orders entered on March 16, 2018 granting Plaintiffs' motions to remand these actions to state court. *See* 3:17-cv-04929, ECF No. 223; 3:17-cv-04934, ECF No. 207; 3:17-cv-04935, ECF No. 208. Defendants removed these cases from state court pursuant to, *inter alia*, 28 U.S.C. § 1442 (the federal officer removal statute). *See, e.g.*, No. 17-cv-04929, ECF No. 1 at 1. Although Section 1447(d) generally prohibits appellate review of remand orders, it provides that "an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise." 28 U.S.C. § 1447(d). Accordingly, the Court of Appeals has jurisdiction to review the district court's remand order, which concluded, *inter alia*, that removal was not warranted under the federal officer removal statute. No. 17-cv-04929, ECF No. 223 at 5. In addition, because section 1447(d) expressly authorizes review of the *order* remanding these actions to state court, the Court of Appeals may review the *entire order* to determine whether removal was proper under any of Defendants' other grounds of removal.

March 26, 2018

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* This Notice of Appeal is submitted subject to and without waiver of any defense, affirmative defense, or objection, including personal jurisdiction, insufficient process, or insufficient service of process.

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Pursuant to Rule 12(b) of the Federal Rules of Appellate Procedure and Circuit Rules 3-2(b) and 12-2, Defendants submit this Representation Statement. The following list identifies all parties to the action, and also identifies their respective counsel by name, firm, address, telephone number, and email, where appropriate.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

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

Plaintiff,

v.

CHEVRON CORP.; CHEVRON U.S.A.,
INC.; EXXONMOBIL CORP.; BP P.L.C.; BP
AMERICA, INC.; ROYAL DUTCH SHELL
PLC; SHELL OIL PRODUCTS COMPANY
LLC; CITGO PETROLEUM CORP.;
CONOCOPHILLIPS; CONOCOPHILLIPS
COMPANY; PHILLIPS 66; PEABODY
ENERGY CORP.; TOTAL E&P USA INC.;
TOTAL SPECIALTIES USA INC.; ARCH
COAL, INC.; ENI S.p.A.; ENI OIL & GAS
INC.; RIO TINTO P.C; RIO TINTO LTD.;
RIO TINTO ENERGY AMERICA INC.; RIO
TINTO MINERALS, INC.; RIO TINTO
SERVICES INC.; STATOIL ASA;

CASE NO. _____

**NOTICE OF REMOVAL BY DEFENDANTS
CHEVRON CORPORATION AND
CHEVRON U.S.A., INC.**

[Removal from the Superior Court of the State of
California, County of Contra Costa, Case No.
C17-01227]

Action Filed: July 17, 2017

ANADARKO PETROLEUM CORP.;
OCCIDENTAL PETROLEUM CORP.;
OCCIDENTAL CHEMICAL CORP.;
REPSOL S.A.; REPSOL ENERGY NORTH
AMERICA CORP.; REPSOL TRADING USA
CORP.; MARATHON OIL COMPANY;
MARATHON OIL CORPORATION;
MARATHON PETROLEUM CORP.; HESS
CORP.; DEVON ENERGY CORP.; DEVON
ENERGY PRODUCTION COMPANY, L.P.;
ENCANA CORP.; APACHE CORP.; and
DOES 1 through 100, inclusive,

Defendants.

**TO THE CLERK OF THE ABOVE-TITLED COURT AND TO PLAINTIFF THE CITY OF
IMPERIAL BEACH AND ITS COUNSEL OF RECORD:**

PLEASE TAKE NOTICE THAT Defendants Chevron Corp. and Chevron U.S.A., Inc. (collectively, “the Chevron Parties”), remove this action—with reservation of all defenses and rights—from the Superior Court of the State of California for the County of Contra Costa, Case No. C17-01227, to the United States District Court for the Northern District of California pursuant to 28 U.S.C. §§ 1331, 1334, 1441(a), 1442, 1452, and 1367(a), and 43 U.S.C. § 1349(b). All other defendants that have been properly joined and served (collectively, “Defendants”) join in or have consented to this Notice of Removal.

This Court has original federal question jurisdiction under 28 U.S.C. § 1331, because the Complaint arises under federal laws and treaties, and presents substantial federal questions as well as claims that are completely preempted by federal law. This Court has supplemental jurisdiction under 28 U.S.C. § 1367(a) over any claims over which it does not have original federal question jurisdiction because they form part of the same case or controversy as those claims over which the Court has original jurisdiction. As set forth below, removal is proper pursuant to 28 U.S.C. §§ 1441, 1442, 1446, and 1452, and 43 U.S.C. § 1349(b).

In addition, the Complaint is legally without merit, and, at the appropriate time, Defendants will move to dismiss Plaintiff’s claims pursuant to Rule 12 of the Federal Rules of Civil Procedure.

Through its Complaint, the City of Imperial Beach calls into question longstanding decisions by the Federal Government regarding, among other things, national security, national energy policy, environmental protection, development of outer continental shelf lands, the maintenance of a national petroleum reserve, mineral extraction on federal lands (which has produced billions of dollars for the Federal Government), and the negotiation of international agreements bearing on the development and use of fossil fuels. Many of the Defendants have contracts with the Federal Government to develop and extract minerals from federal lands and to sell fuel and associated products to the Federal Government for the Nation’s defense. The gravamen of the Complaint seeks either to undo all of those Federal Government policies or to extract “compensation” and force Defendants to relinquish

the profits they obtained by having contracted with the Federal Government or relied upon national policies to develop fossil fuel resources.

In the Complaint's view, a state court, on petition by a city, may regulate the nationwide—and indeed worldwide—economic activity of key sectors of the American economy, those that supply the fuels that power production and innovation, keep the lights on, and that form the basic materials from which innumerable consumer, technological, and medical devices are themselves fashioned. Though nominally asserted under state law, the Complaint puts at issue long-established federal statutory, regulatory, and constitutional issues and frameworks. It implicates bedrock federal-state divisions of responsibility, and appropriates to itself the direction of such federal spheres as nationwide economic development, international relations, and America's national security. Reflecting the uniquely federal interests posed by greenhouse gas claims like these, the Ninth Circuit has recognized that causes of action of the types asserted here are governed by federal common law, not state law.

The Complaint has no basis in law and is inconsistent with serious attempts to address important issues of national and international policy. Accordingly, Plaintiff's Complaint should be heard in this federal forum to protect the national interest by its prompt dismissal.

I. TIMELINESS OF REMOVAL

1. Plaintiff the City of Imperial Beach filed a Complaint against the Chevron Parties and other named Defendants in the Superior Court for Contra Costa County, California, Case No. C17-01227, on July 17, 2017. The Chevron Parties were served on August 3, 2017. A copy of all process, pleadings, or orders served upon the Chevron Parties is attached as Exhibit A to the Declaration of William E. Thomson, filed concurrently herewith.

2. This notice of removal is timely under 28 U.S.C. § 1446(b) because it is filed fewer than 30 days after service. 28 U.S.C. § 1446(b). All Defendants that have been served as of this date either join in or have consented to this removal. *See* Thomson Decl. ¶ 4. In addition, consent to this

removal petition is not required as removal does not proceed “solely under 28 U.S.C. § 1441.” 28 U.S.C. § 1446(b)(2)(A); *see also, e.g.*, 28 U.S.C. § 1452.¹

II. SUMMARY OF ALLEGATIONS AND GROUNDS FOR REMOVAL

3. Plaintiff is the City of Imperial Beach, California. Plaintiff brings claims against Defendants for alleged injuries relating to climate change, including damages and injunctive relief from alleged sea level rise, storms, and other natural phenomena. Plaintiff asserts the following claims on behalf of itself: public nuisance; private nuisance; strict liability for failure to warn; strict liability for design defect; negligence; negligence for failure to warn; and trespass. Plaintiff also purports to assert a public nuisance claim on behalf of the People of the State of California. In addition to compensatory and punitive damages, Plaintiff seeks the “equitable disgorgement of all profits Defendants obtained” through their business of manufacturing, producing, and/or promoting the sale of fossil fuel products (Compl. ¶ 183), as well as “equitable relief to abate the nuisances complained of” in the Complaint (Compl., Prayer for Relief).

4. Multiple Defendants will deny any California court has personal jurisdiction, and those Defendants properly before the Court will deny any liability as to Plaintiff’s individual claims and as to the claim brought on behalf of the People of California. Defendants expressly reserve all rights in this regard. For purposes of meeting the jurisdictional requirements for removal only, however, Defendants submit that removal is proper on at least seven independent and alternative grounds.

5. **First**, the action is removable under 28 U.S.C. § 1441(a) and 28 U.S.C. § 1331 because Plaintiff’s claims, to the extent that such claims exist, implicate uniquely federal interests and are governed by federal common law, and not state common law. *See Nat’l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 847, 850 (1985). The Ninth Circuit has held that comparable claims, in which a municipality alleged that the defendants’ greenhouse gas emissions led to global

¹ In filing or consenting to this Notice of Removal, Defendants do not waive, and expressly preserve, their right to challenge personal jurisdiction in any federal or state court with respect to this action. A number of Defendants contend that personal jurisdiction in California is lacking over them, and these Defendants will move to dismiss for lack of personal jurisdiction at the appropriate time. *See, e.g., Carter v. Bldg. Material & Const. Teamsters’ Union Local 216*, 928 F. Supp. 997, 1000-01 (N.D. Cal. 1996) (“A petition for removal affects only the forum in which the action will be heard; it does not affect personal jurisdiction.”).

warming-related injuries such as coastal erosion, were governed by federal common law. *See Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 855 (9th Cir. 2012) (“*Kivalina*”). Federal common law applies only in those few areas of the law that so implicate “uniquely federal interests” that application of state law is affirmatively inappropriate. *See, e.g., Boyle v. United Techs. Corp.*, 487 U.S. 500, 504, 507 (1988); *Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 424 (2011) (“*AEP*”) (“borrowing the law of a particular State would be inappropriate”). As a result, the Ninth Circuit’s determination in *Kivalina* that federal common law applies to comparable claims of global warming-related tort claims necessarily means that state law should not apply to those types of claims. Plaintiff’s claims, therefore, (to the extent they exist at all) arise under federal common law, not state law, and are properly removed to this Court.

6. **Second**, removal is authorized under 28 U.S.C. § 1441(a) and 28 U.S.C. § 1331 because the action necessarily raises disputed and substantial federal questions that a federal forum may entertain without disturbing a congressionally approved balance of responsibilities between the federal and state judiciaries. *See Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308 (2005). In fact, the causes of action as alleged in the Complaint attack federal policy decisions and threaten to upset longstanding federal-state relations, second-guess policy decisions made by Congress and the Executive Branch, and skew divisions of responsibility set forth in federal statutes and the United States Constitution.

7. **Third**, removal is authorized under 28 U.S.C. § 1441(a) and 28 U.S.C. § 1331 because Plaintiff’s claims are completely preempted by the Clean Air Act and/or other federal statutes and the United States Constitution, which provide an exclusive federal remedy for plaintiffs seeking stricter regulations regarding the nationwide and worldwide greenhouse gas emissions put at issue in the Complaint.

8. **Fourth**, this Court has original jurisdiction over this lawsuit and removal is proper pursuant to the Outer Continental Shelf Lands Act (“OCSLA”), because this action “aris[es] out of, or in connection with (A) any operation conducted on the outer Continental Shelf which involves ex-

ploration, development, or production of the minerals, or the subsoil or seabed of the outer Continental Shelf, or which involves rights to such minerals.” 43 U.S.C. § 1349(b); *see also Tenn. Gas Pipeline v. Houston Cas. Ins. Co.*, 87 F.3d 150, 155 (5th Cir. 1996).

9. **Fifth**, Defendants are authorized to remove this action under 28 U.S.C. § 1442(a)(1) because, assuming the truth of Plaintiff’s allegations, a causal nexus exists between their actions, taken pursuant to a federal officer’s directions, and Plaintiff’s claims; they are “persons” within the meaning of the statute; and can assert several colorable federal defenses. *See Leite v. Crane Co.*, 749 F.3d 1117 (9th Cir. 2014).

10. **Sixth**, removal is authorized under 28 U.S.C. § 1441(a) and 28 U.S.C. § 1331 because Plaintiff’s claims are based on alleged injuries to and/or conduct on federal enclaves. As such, Plaintiff’s claims arise under federal-question jurisdiction and are removable to this Court. *See U.S. Const.*, art. I, § 8, cl. 17; *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.’”).

11. **Seventh and finally**, removal is authorized under 28 U.S.C. § 1452(a) and 28 U.S.C. § 1334(b) because Plaintiff’s state-law claims are related to cases under Title 11 of the United States Code. Plaintiff alleges that Defendants (defined by Plaintiff to include certain of Defendants’ subsidiaries named in the Complaint) engaged in tortious conduct from 1965 to the present, and at least two Defendants, which consent to this Notice of Removal, emerged from Chapter 11 bankruptcy less than a year ago and continue to implement their Chapter 11 plans. *See PDG Arcos, LLC v. Adams*, 436 F. App’x 739 (9th Cir. 2011). And because Plaintiff’s claims are predicated on historical activities of the Defendants, including predecessor companies and companies that they may have acquired or with which they may have merged, and because there are hundreds of non-joined necessary and indispensable parties, there are many other Title 11 cases that may be related.

12. For the convenience of the Court and all parties, Defendants will address each of these grounds in additional detail. Should Plaintiff challenge this Court’s jurisdiction, Defendants will further elaborate on these grounds and will not be limited to the specific articulations in this Notice.

III. THIS COURT HAS FEDERAL-QUESTION JURISDICTION BECAUSE PLAINTIFF’S CLAIMS ARISE, IF AT ALL, UNDER FEDERAL COMMON LAW

13. This action is removable because Plaintiff’s claims, to the extent that such claims exist, necessarily are governed by federal common law, and not state common law. 28 U.S.C. § 1331 grants federal courts original jurisdiction over “‘claims founded upon federal common law as well as those of a statutory origin.’” *Nat’l Farmers Union*, 471 U.S. at 850 (quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972) (“*Milwaukee I*)). As the Ninth Circuit explained in holding that similar claims for injuries caused by global warming were governed by federal common law, even “[p]ost-*Erie*, federal common law includes the general subject of environmental law and specifically includes ambient or interstate air or water pollution.” *Kivalina*, 696 F.3d at 855. As Plaintiff’s claims arise under federal common law, this Court has federal-question jurisdiction and removal is proper. That remains true even though Plaintiff’s claims in the final analysis fail to state a claim: among other deficiencies, any such federal common law claim has been displaced by the Clean Air Act. *See, e.g., AEP*, 564 U.S. at 424; *Kivalina*, 696 F.3d at 856-67.

14. Though “[t]here is no federal *general* common law,” *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (emphasis added), federal common law continues to exist, and to govern, in a few subject areas in which there are “uniquely federal interests,” *Boyle*, 487 U.S. at 504. *See generally* Henry J. Friendly, *In Praise of Erie—and the New Federal Common Law*, 39 N.Y.U. L. Rev. 383 (1964). Such uniquely federal interests will require the application of federal common law where, for example, the issue is one that by its nature, is “‘within national legislative power’” and there is “a demonstrated need for a federal rule of decision” with respect to that issue. *AEP*, 564 U.S. at 421 (citation omitted). Federal common law therefore applies, in the post-*Erie* era, in those discrete areas in which application of state law would be inappropriate and would contravene federal interests. *Boyle*, 487 U.S. at 504-07. The decision that federal common law applies to a particular issue thus inherently reflects a determination that state law does *not* apply. *Nat’l Audubon Soc’y v. Dep’t of Water*, 869 F.2d 1196, 1204 (9th Cir. 1988); *see also City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 312 n.7 (1981) (“*Milwaukee II*”) (“[I]f federal common law exists, it is because state law cannot be used.”).

15. In *Kivalina*, the Ninth Circuit, quoting the Supreme Court’s decision in *AEP*, reiterated that federal common law applies to “‘subjects within the national legislative power where Congress has so directed or where the basic scheme of the Constitution so demands.’” 696 F.3d at 855 (quoting *AEP*, 564 U.S. at 421) (further citation and internal quotation marks omitted). Although Congress thus sometimes affirmatively directs the application of federal common law, the *Kivalina* court noted that, “[m]ore often, federal common law develops when courts must consider *federal* questions that are not answered by statutes.” *Id.* (emphasis added). Given that claims asserting injuries from global warming have an intrinsic interstate and transnational character, the Ninth Circuit held that such claims inherently raise federal questions and fall within the settled rule that federal common law governs “the general subject of environmental law and specifically includes ambient or interstate air and water pollution.” *Id.* at 855; *see also id.* (“federal common law can apply to transboundary pollution suits” such as the plaintiff’s); *AEP*, 564 U.S. at 421 (“Environmental protection is undoubtedly an area within national legislative power, [and] one in which federal courts may fill in statutory interstices.”). Thus, while the Ninth Circuit had previously expressed skepticism that federal common law, as opposed to state law, would govern a localized claim for air pollution arising from a specific source within a single state, *see Nat’l Audubon Soc’y*, 869 F.2d at 1203-04, the court in *Kivalina* found that claims arising from injuries allegedly caused by *global* warming implicate interstate and, indeed, international aspects that inherently invoke uniquely federal interests and responsibilities. *See Kivalina*, 696 F.3d at 856-57; *see also Massachusetts v. EPA*, 549 U.S. 497, 498 (2007) (“The sovereign prerogatives to force reductions in greenhouse gas emissions, to negotiate emissions treaties with developing countries, and (in some circumstances) to exercise the police power to reduce motor-vehicle emissions are now lodged in the Federal Government.”); *United States v. Solvents Recovery Serv.*, 496 F. Supp. 1127, 1134 (D. Conn. 1980) (describing Supreme Court jurisprudence recognizing “the strong federal interest in controlling certain types of pollution and protecting the environment”).

16. Although *Kivalina* did not expressly address the viability of the plaintiff’s purported alternative common law claims resting on state law (which the district court dismissed without prejudice), the *Kivalina* court’s finding that federal common law applied to the municipality’s global

warming claims means that state law *cannot* be applied to such claims. The conclusion that federal common law governs an issue rests, not on a discretionary choice between federal law and state law, but on a determination that the issue is so distinctively federal in nature that application of state law to the issue would risk impairing uniquely federal interests. *Boyle*, 487 U.S. at 506-07; *see also, e.g., Caltex Plastics, Inc. v. Lockheed Martin Corp.*, 824 F.3d 1156, 1159-60 (9th Cir. 2016) (liability of defense contractor to third party under government contract for weapons systems implicated “uniquely federal interests” in national security that would be impaired if disparate state-law rules were applied); *Nat’l Audubon Soc’y*, 869 F.3d at 1204 (“[I]t is inconsistent to argue ‘that both federal and state nuisance law apply to this case. If state law can be applied, there is no need for federal common law; if federal common law exists, *it is because state law cannot be used.*’”) (emphasis added).

17. Accordingly, the Ninth Circuit’s holding in *Kivalina* that federal common law governs global warming-related tort claims such as Plaintiff’s here necessarily means that state law cannot govern such claims. Although Plaintiff purports to style its nuisance and other common law claims as arising under state law, the question of whether a particular common law claim is controlled by federal common law rather than state law is itself a question of law that is governed by federal law as set forth in *Erie* and its progeny. While Plaintiff contends that its claims arise under California law, the question of which state, if any, may apply its law to address global climate-change issues is a question that is itself a matter of federal law, given the paramount federal interest in avoiding conflicts of law in connection with ambient air and water. Moreover, the law is well settled that, in determining whether a case arises under federal law and is properly removable, the Plaintiff’s proffered position on a question of law is not entitled to any deference but is instead subject to independent and *de novo* review by the court. *See, e.g., United States v. California*, 932 F.2d 1346, 1349 (9th Cir. 1991) (“The issue of whether state or federal [common] law governs is a question of law and is reviewable *de novo*.”); *Flagstaff Med. Ctr., Inc. v. Sullivan*, 962 F.2d 879, 884, 889-91 (9th Cir. 1992) (same); *see also Provincial Gov’t of Marinduque v. Placer Dome, Inc.*, 582 F.3d 1083, 1086-87 (9th Cir. 2009) (applying *de novo* review to removal based on federal common law).

18. The extent to which the global warming-related tort claims in this case and in *Kivalina* would impair uniquely federal interests is confirmed by comparing these inherently interstate and transnational claims to the more localized pollution claims that the Ninth Circuit in *National Audubon* held were governed by state law. In *National Audubon*, the claims at issue involved a challenge to the Los Angeles Department of Water and Power’s diversion of “four freshwater streams that would otherwise flow into Mono Lake.” 869 F.2d at 1198. This discrete conduct in California allegedly exposed part of Mono Lake’s lake bed, increased the lake’s “salinity and ion concentration,” and led to “air pollution in the form of alkali dust storms from the newly exposed lake bed.” *Id.* at 1198-99. The Ninth Circuit held that the allegation that some of the dust reached Nevada was not enough to show that the case involved the sort of “interstate dispute previously recognized as requiring resolution under federal law,” such that it was “inappropriate for state law to control.” *Id.* at 1204. Given their essentially localized nature, the claims involved only a “domestic dispute” that did not fit within the interstate paradigms that the Supreme Court had to that point recognized as properly governed by federal common law. *Id.* at 1205; *cf. Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 497-98 (1987) (holding that New York law applied to pollution claims arising from discharges from a lakeside New York business, even though those effluents flowed to Vermont side of the lake and caused injury there).

19. In light of the federal nature of the issues raised by global warming, as described in *AEP* and in *Massachusetts v. EPA*, the *Kivalina* court correctly reached a different conclusion with respect to global warming-related tort claims such as those presented here. Because (as Plaintiff concedes, Compl. ¶ 74) global warming occurs only as the result of the undifferentiated accumulated emissions of all emitters in the world over an extended period of time, any judgment as to the reasonableness of particular emissions, or as to their causal contribution to the overall phenomenon of global warming, inherently requires an evaluation at an interstate and, indeed, transnational level. Thus, even assuming that state tort law may properly address local source emissions within that specific state, the imposition of tort liability for allegedly unreasonably contributing to *global* warming would require an over-arching consideration of *all* of the emissions traceable to sales of Defendants’

products in each of the states, and, in fact, in the more than 180 nations of the world. Given the Federal Government’s exclusive authority over foreign affairs and foreign commerce, and its preeminent authority over interstate commerce, tort claims concerning global warming directly implicate uniquely federal interests, and a patchwork of 50 state’s common law rules cannot properly be applied to such claims without impairing those interests. Indeed, the Supreme Court expressly held in *AEP* that in cases like this, “borrowing the law of a particular State would be inappropriate.” 564 U.S. at 422. Such global warming-related tort claims, to the extent they exist, are therefore governed by federal common law. *Kivalina*, 696 F.3d at 855-56.

20. Under the principles set forth above, Plaintiff’s claims, to the extent they exist at all, are governed by federal common law. The gravamen of Plaintiff’s claims is that “production and use of Defendants’ fossil fuel products plays a direct and substantial role in the emissions of greenhouse gas pollution.” Compl. ¶ 2; *see, e.g., id.* ¶¶ 53-54, 58, 75, 78, 178, 204, 217, 251, 258. Plaintiff’s Complaint alleges that Defendants are responsible for “more than one in every five tons of carbon dioxide and methane emitted worldwide,” *id.* ¶ 14, and that “greenhouse gas pollution is the dominant factor in each of the independent causes of [global] sea level rise,” *id.* ¶ 58; *see also id.* ¶ 78. As evident from the term “global warming” itself, both the causes and the injuries Plaintiff identifies are not constrained to particular sources, cities, counties, or even states, but rather implicate inherently national and international interests, including treaty obligations and federal and international regulatory schemes. *See id.* ¶ 3 n.5 (describing other sources of emissions); ¶ 7 (only “20.3%” of CO₂ emissions allegedly caused by Defendants); ¶ 78 (CO₂ emissions cause “*global* sea level rise”) (emphasis added); *see, e.g., Massachusetts*, 549 U.S. at 509, 523-24 (describing Senate rejection of the Kyoto Protocol because emissions-reduction targets did not apply to “heavily polluting nations such as China and India,” and EPA’s determination that predicted magnitude of future Chinese and Indian emissions “offset any marginal domestic decrease”); *AEP*, 564 U.S. at 427-29 (describing regulatory scheme of the Clean Air Act and role of the EPA); *see also* The White House, Statement by President Trump on the Paris Climate Accord (June 1, 2017), *available at* <https://www.whitehouse.gov/the-press-office/2017/06/01/statement-president-trump-paris-climate-accord> (announcing United States

withdrawal from Paris Climate Accord based on financial burdens, energy restrictions, and failure to impose proportionate restrictions on Chinese emissions).

21. Indeed, the Complaint itself demonstrates that the unbounded nature of greenhouse gas emissions, diversity of sources, and magnitude of the attendant consequences have catalyzed myriad federal and international efforts to understand and address such emissions. *See, e.g.*, Compl. ¶ 112. The paramount federal interest in addressing the worldwide effect of greenhouse gas emissions is manifested in the regulatory scheme set forth in the Clean Air Act as construed in *Massachusetts v. EPA*. *See AEP*, 564 U.S. at 427-29. Federal legislation regarding greenhouse gas emissions reflects the understanding that “[t]he appropriate amount of regulation in any particular greenhouse gas-producing sector cannot be prescribed in a vacuum: as with other questions of national or international policy, informed assessment of competing interests is required. Along with the environmental benefit potentially achievable, our Nation’s energy needs and the possibility of economic disruption must weigh in the balance.” *Id.* at 427. As a “question[] of national or international policy,” the question of how to address greenhouse gas emissions that underlies the requested relief at the heart of Plaintiff’s claims implicates inherently federal concerns and is therefore governed by federal common law. *See id.*; *see also Milwaukee II*, 451 U.S. at 312 n.7 (“[I]f federal common law exists, it is because state law cannot be used.”). Because common law claims that rest on injuries allegedly caused by global warming implicate uniquely federal interests, such claims (to the extent they exist at all) must necessarily be governed by federal common law. This Court therefore has original jurisdiction over this action.

IV. THE ACTION IS REMOVABLE BECAUSE IT RAISES DISPUTED AND SUBSTANTIAL FEDERAL ISSUES.

22. “Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed . . . to the district court of the United States for the district and division embracing the place where such action is pending.” 28 U.S.C. § 1441(a). Federal district courts, in turn, “have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331. The Supreme Court has held that suits apparently alleging only state-law causes of

action nevertheless “arise under” federal law if the “state-law claim[s] necessarily raise a stated 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*, 545 U.S. at 314. Applying this test “calls for a common-sense accommodation of judgment to the kaleidoscopic situations that present a federal issue.” *Id.* at 313.

23. Plaintiff’s Complaint attempts to undermine and supplant federal regulation of greenhouse gas emissions and hold a national industry responsible for the alleged consequences of rising ocean levels allegedly caused by global climate change. There is no question that Plaintiff’s claims raise a “federal issue, actually disputed and substantial,” for which federal jurisdiction would not upset “any congressionally approved balance of federal and state judicial responsibilities.”

24. The issues of greenhouse gas emissions, global warming, and sea level rising are not unique to the City of Imperial Beach, the State of California, or even the United States. Yet what the Complaint attempts to do is to supplant decades of national energy, economic development, and federal environmental protection and regulatory policies by prompting a California state court to take control over an entire industry and its interstate commercial activities, and impose massive damages contrary to the federal regulatory scheme.

25. Collectively as well as individually, Plaintiff’s causes of action depend on the resolution of disputed and substantial federal questions in light of complex national considerations. For example, the Complaint’s first, second, and fifth causes of action all seek relief for an alleged nuisance. Indeed, “the scope and limitations of a complex federal regulatory framework are at stake in this case. And disposition of whether that framework may give rise to state law claims as an initial matter will ultimately have implications for the federal docket one way or the other.” *Bd. of Comm’rs of Se. La. Flood Protection Auth. v. Tenn. Gas Pipeline Co.*, 850 F.3d 714, 723 (5th Cir. 2017) (cert. petition pending) (“*Flood Protection Authority*”).

26. Under federal law, federal agencies must “assess both the costs and benefits of [an] intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.” Executive Order 12866, 58 Fed. Reg. 190. In 2010, an interagency working group

published *Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866*, which was designed “to allow agencies to incorporate the social benefits of reducing carbon dioxide (CO₂) emissions into cost-benefit analyses of regulatory actions that have small, or ‘marginal,’ impacts on cumulative global emissions.” The interagency working group published updates in 2013, 2015, and 2016. These measures were used by EPA in formulating various regulations regarding emission of greenhouse gases. *See, e.g.*, Final Carbon Pollution Standards for New, Modified and Reconstructed Power Plants, 80 Fed. Reg. 64662, 64751 (Oct. 23, 2015) (supporting its final rule by explaining that “the costs . . . are less than the central estimates of the social cost of carbon” as calculated by the interagency working group). Under California law, were it to apply, nuisance claims require a plaintiff to prove that the defendant’s conduct is “unreasonable”: in other words, “the gravity of the harm [must] outweigh[] the social utility of the defendant’s conduct.” *San Diego Gas & Elec. Co. v. Superior Ct.*, 13 Cal. 4th 893, 938 (1996). Plaintiff alleges that Defendants, through their national and, indeed, global activities, “have created, contributed to, and assisted in creating, a condition in City of Imperial Beach, and permitted that condition to persist, which constitutes a nuisance by, *inter alia*, increasing local sea level, increasing the frequency and intensity of flooding, and increasing the frequency and intensity and frequency of storms and storm-related damage to the City and its residents.” Compl. ¶ 177; *see also id.* ¶¶ 190, 227. Plaintiff alleges that “[t]he seriousness of rising sea levels and increased weather volatility and flooding is extremely grave, and outweighs the social utility of Defendants’ conduct.” *Id.* ¶¶ 181, 193, 232. Plaintiff’s product liability claims require a similar risk-utility balancing. *See Barker v. Lull Eng’g Co., Inc.*, 20 Cal. 3d 413, 427 (1978).

27. But Congress has directed a number of federal agencies to regulate Defendants’ conduct, and in doing so to conduct the same analysis of benefits and impacts that Plaintiff would have the state court undertake in analyzing Plaintiff’s claims. The benefits and harms of Defendants’ conduct are broadly distributed throughout the Nation, to all residents as well as all state and government entities. Given this diffuse and broad impact, Congress has acted through a variety of federal statutes—primarily but not exclusively the Clean Air Act—to strike the balance between energy extraction and production and environmental protections. *See Clean Air Act*, 42 U.S.C. § 7401(c) (Con-

gressional statement that the goal of the Clean Air Act is “to encourage or otherwise promote reasonable Federal, State, and local governmental actions . . . for pollution prevention”); *see also, e.g.*, Energy Reorganization Act of 1974, 42 U.S.C. § 5801 (Congressional purpose to “develop, and increase the efficiency and reliability of use of, all energy sources” while “restoring, protecting, and enhancing environmental quality”); Mining and Minerals Policy Act, 30 U.S.C. § 1201 (Congressional purpose to encourage “economic development of domestic mineral resources” balanced with “environmental needs”); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 (Congressional findings that coal mining operations are “essential to the national interest” but must be balanced by “cooperative effort[s] . . . to prevent or mitigate adverse environmental effects”).

28. The question of whether the federal agencies charged by Congress to balance energy and environmental needs for the entire Nation have struck that balance in an appropriate way is “inherently federal in character” and gives rise to federal question jurisdiction. *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 347 (2001); *see also Pet Quarters, Inc. v. Depository Trust & Clearing Corp.*, 559 F.3d 772, 779 (8th Cir. 2009) (affirming federal question jurisdiction where claims implicated federal agency’s acts implementing federal law); *Bennett v. Southwest Airlines Co.*, 484 F.3d 907, 909 (7th Cir. 2007) (federal removal under *Grable* appropriate where claims were “a collateral attack on the validity of” agency action under a highly reticulated regulatory scheme). Adjudicating these claims in federal court, including whether private rights of action are even cognizable, is appropriate because the relief sought by Plaintiff would necessarily alter the regulatory regime designed by Congress, impacting residents of the Nation far outside the state court’s jurisdiction. *See, e.g., Grable*, 545 U.S. at 312 (claims that turn on substantial federal questions “justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues”); *West Virginia ex rel. McGraw v. Eli Lilly & Co.*, 476 F. Supp. 2d 230, 234 (E.D.N.Y. 2007) (removal under *Grable* is appropriate where state common law claims implicate “an intricate federal regulatory scheme . . . requiring some degree of national uniformity in interpretation”).

29. The Complaint also calls into question Federal Government decisions to contract with defendants for the extraction, development, and sale of fossil fuel resources on federal lands. Such

national policy decisions have expanded fossil fuel production and use, and produced billions of dollars in revenue to the federal treasury. Available, affordable energy is fundamental to economic growth and prosperity generally, as well as to national security and other issues that have long been the domain of the Federal Government. Yet, Plaintiff’s claims require a determination that the complained-of conduct—the lawful activity of placing fossil fuels into the stream of interstate and foreign commerce—is unreasonable, and that determination raises a policy question that, under the Constitution and the applicable statutes, treaties, and regulations, is a federal question. *See In re Nat’l Sec. Agency Telecommc’ns*, 483 F. Supp. 2d 934, 943 (N.D. Cal. 2007) (holding that removal jurisdiction existed over case that implicated state-secrets privilege because “the privilege is ‘not only a contested federal issue, but a substantial one,’ for which there is ‘a serious federal interest in claiming the advantages thought to be inherent in a federal forum’” (quoting *Grable*, 545 U.S. at 313)). The cost-benefit analysis required by the claims asserted in the Complaint would thus necessarily entail a usurpation by the state court of the federal regulatory structure of an essential, national industry. “The validity of [Plaintiff’s] claims would require that conduct subject to an extensive federal permitting scheme is in fact subject to implicit restraints that are created by state law.” *Flood Control Authority*, 850 F.3d at 724; *see also Bader Farms, Inc. v. Monsanto Co.*, No. 16-cv-299, 2017 WL 633815, at *3 (E.D. Mo. Feb. 16, 2017) (“Count VII is in a way a collateral attack on the validity of APHIS’s decision to deregulate the new seeds”); *Bennett*, 484 F.3d at 909 (holding that federal removal is proper under *Grable* “when the state proceeding amounted to a collateral attack on a federal agency’s action”).

30. Plaintiff’s claims also necessarily implicate substantial federal questions by seeking to hold Defendants liable for compensatory and punitive damages, as well as injunctive relief, based on allegations that Defendants have waged a “campaign to obscure the science of climate change” and “disseminat[ed] and funded the dissemination of information intended to mislead elected officials and regulators,” which Plaintiff alleges defrauded and interfered with federal decision-making, thereby “delay[ing] efforts to curb these emissions.” Compl. ¶ 150; *see also id.* ¶¶ 200-24, 236-64.

31. To show causation, Plaintiff must establish that federal regulators were misled *and* would have adopted different energy and climate policies absent the alleged misrepresentations.

Such a liability determination would require a court to construe federal regulatory decision-making standards, and determine how federal regulators would have applied those standards under counterfactual circumstances. *See id.* ¶ 129 (“GCC and its cohorts staved off greenhouse gas regulation in the U.S., as indicated by U.S. Undersecretary of State Paula Dobriansky’s talking points compiled before a 2001 meeting with GCC representations.”); *see also Flood Protection Authority*, 850 F.3d at 723 (finding necessary and disputed federal issue in plaintiffs’ state-law tort claims because they could not “be resolved without a determination whether multiple federal statutes create a duty of care that does not otherwise exist under state law”).

32. Additionally, Plaintiff alleges that Defendants failed to comply with their duties under the Toxic Substances Control Act, 55 U.S.C. § 1601 *et seq.*: “Although greenhouse gases are human health hazards (because they have serious consequences in terms of global food production, disease virulence, and sanitation infrastructure, among other impacts), neither Imperial, Exxon, nor any other Defendant has ever filed a disclosure with the U.S. Environmental Protection Agency pursuant to the Toxic Substances Control Act.” Compl. ¶ 96; *see also Boyeson v. S. Carolina Elec. & Gas Co.*, No. 15-cv-4920, 2016 WL 1578950, at *5 (D.S.C. Apr. 20, 2016) (“While Plaintiffs’ allegations of negligence appear on their face to not reference federal law, federal issues are cognizable as the source for the duty of care resulting from SCE&G’s operation and management of water levels at the Lake Murray Dam, and not from the alleged failure to warn.”).

33. Plaintiff’s Complaint, which seeks to hold Defendants liable for “billions of dollars” in damages (Compl. ¶ 193) and requests equitable relief requiring Defendants to “abate the nuisance[]” of rising sea levels (*id.*, Prayer for Relief)—despite Defendants’ uncontested compliance with state and federal law—necessarily implicates numerous other disputed and substantial federal issues. Beyond the strictly jurisdictional character of the points addressed above and herein, it is notable that this litigation places at issue multiple significant federal issues, including but not limited to: (1) whether Defendants can be held liable consistent with the First Amendment for purportedly “championing . . . anti-regulation and anti-science campaigns” that Plaintiff alleges deceived federal agencies (Compl. ¶ 9); (2) whether a state court may hold Defendants liable for conduct that was

global in scale (production of fossil fuels), that allegedly produced effects that are global in scale (increased CO₂ levels and rising sea levels), and on that basis, order Defendants to modify their conduct on a global scale (abating rising sea levels), consistent with the constitutional principles limiting the jurisdictional and geographic reach of state law and guaranteeing due process; (3) whether fossil fuel *producers* may be held liable, consistent with the Due Process Clause, for climate change when it is the combustion of fossil fuels—including by Plaintiff and the People of the State of California themselves—that leads to the release of greenhouse gases into the atmosphere; (4) whether a state may impose liability under state common law when the Supreme Court has held that the very same *federal* common law claims are displaced by federal statute, and notwithstanding the commonsense principle that “[i]f a federal common law cause of action has been extinguished by Congressional displacement, it would be incongruous to allow it to be revived *in any form*,” *Kivalina*, 696 F.3d at 857 (emphasis added); (5) whether a state court may regulate and burden on a global scale the sale and use of what federal policy has deemed an essential resource, consistent with the United States Constitution’s Commerce Clause and foreign affairs doctrine, as well as other constitutional principles; (6) whether a state court may review and assess the validity of acts of foreign states in enacting and enforcing their own regulatory frameworks; and (7) whether a state court may determine the ability to sue based on alleged damages to land, such as coastal property and interstate highways (*see* Compl. ¶ 170), which depends on the interpretation of federal laws relating to the ownership and control of property.

34. Plaintiff’s Complaint also raises substantial federal issues because the asserted claims intrude upon both foreign policy and carefully balanced regulatory considerations at the national level, including the foreign affairs doctrine. Plaintiff seeks to govern extraterritorial conduct and encroach on the foreign policy prerogative of the Federal Government’s executive branch as to climate change treaties. “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.” *Am. Ins. Assoc. v. Garamendi*, 539 U.S. 396, 413 (2003). Yet, this is the precise nature of Plaintiff’s action brought in state court. *See United States v. Belmont*, 301 U.S. 324, 331 (1937) (“The external powers of the United

States are to be exercised without regard to state laws or policies... [I]n respect of our foreign relations generally, state lines disappear.”); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) (“Our system of government . . . requires that federal power in the field affecting foreign relations be left entirely free from local interference.”).

35. Through its action, Plaintiff seeks to regulate greenhouse gas emissions worldwide, far beyond the borders of the United States. This is premised in part, according to Plaintiff, on Defendants’ purported campaign to undermine national and international efforts, like the Kyoto Protocol, to rein in greenhouse gas emissions. Compl. ¶¶ 114, 128-29. Plaintiff alleges that its injuries are caused by global weather phenomena, such as increases in the Earth’s ambient temperatures, ocean temperature, sea level, and extreme storm events, and that Defendants are a substantial contributing factor to such climate change as a result of their collective operations on a worldwide basis, which Plaintiff claims accounts for one-fifth of total global greenhouse gas emissions. *Id.* ¶¶ 14, 164-65. But “[n]o State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively. It need not be so exercised as to conform to State laws or State policies, whether they be expressed in constitutions, statutes, or judicial decrees.” *United States v. Pink*, 315 U.S. 203, 233-34 (1942). States have no authority to impose remedial schemes or regulations to address what are matters of foreign affairs. *Ginergy v. City of Glendale*, 831 F.3d 1222, 1228-29 (9th Cir. 2016) (“It is well established that the federal government holds the exclusive authority to administer foreign affairs.”).

V. THE ACTION IS REMOVABLE BECAUSE IT IS COMPLETELY PREEMPTED BY FEDERAL LAW

36. This Court also has original jurisdiction over this lawsuit because Plaintiff requests relief that would alter or amend the rules regarding nationwide—and even worldwide—regulation of greenhouse gas emissions. This action is completely preempted by federal law.

37. The Supreme Court has held that a federal court will have jurisdiction over an action alleging only state-law claims where “the extraordinary pre-emptive power [of federal law] converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.” *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987).

38. A state cause of action is preempted under this “complete preemption” doctrine where a federal statutory scheme “provide[s] the exclusive cause of action for the claim asserted and also set[s] forth procedures and remedies governing that cause of action.” *Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1, 8 (2003). It also requires a determination that the state-law cause of action falls within the scope of the federal cause of action, including where it “duplicates, supplements, or supplants” that cause of action. *Aetna Health Inc. v. Davila*, 542 U.S. 200, 209 (2004).

39. Both requirements for complete preemption are present here. Among other things, Plaintiff’s Complaint seeks an “abatement” of a nuisance it alleges Defendants have caused—namely, a rise in sea levels, an increase in the frequency and intensity of flooding, and an increase in the intensity and frequency of storms and storm-related damages. As such, it seeks regulation of greenhouse gas emissions far beyond the borders of California and even the borders of the United States. This can be accomplished only by a nationwide and global reduction in the emission of greenhouse gases. Even assuming that such relief can be ordered against Defendants for their production and sale of fossil fuels, which are then combusted by others at a rate Plaintiff claims causes the alleged injuries, this claim must be decided in federal court because Congress has created a cause of action by which a party can seek the creation or modification of nationwide emission standards by petitioning the EPA. That federal cause of action was designed to provide the exclusive means by which a party can seek nationwide emission regulations. Because Plaintiff’s state causes of action would “duplicate[], supplement[], or supplant[]” that exclusive federal cause of action, they are completely preempted. “If a federal common law cause of action has been extinguished by Congressional displacement, it would be incongruous to allow it to be revived in any form.” *Kivalina*, 696 F.3d at 857.

A. The Clean Air Act Provides the Exclusive Cause of Action for Challenging EPA Rulemakings.

40. The Clean Air Act permits private parties, as well as state and municipal governments, to challenge EPA rulemakings (or the absence of such) and to petition the EPA to undertake new rulemakings. *See Massachusetts*, 549 U.S. at 516-17. In addition, Congress created an independent scientific review committee, to include at least one person representing State air pollution control agencies, with a statutory role in the rulemaking process. *See* 42 U.S.C. § 7409(d)(2)(A).

41. With regard to new rulemakings, the Clean Air Act provides that “any person may petition the Administrator to modify the list of hazardous air pollutants under this subsection by adding or deleting a substance.” 42 U.S.C. § 7412(b)(3). “Within 18 months after receipt of a petition, the Administrator shall either grant or deny the petition by publishing a written explanation of the reasons for the Administrator’s decision.” *Id.* In the event of an unfavorable decision, “[a] petition for review . . . may be filed only in the United States Court of Appeals for the District of Columbia.” 42 U.S.C. § 7607(b)(1). This petition for review “shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register.” *Id.*

42. Rulemakings (and petitions for rulemaking) regarding the regulation of nationwide greenhouse gas emissions are subject to the federal statutory and regulatory scheme outlined in detail by the Clean Air Act. *See Massachusetts*, 549 U.S. at 516-17.

43. Congress manifested a clear intent that the procedure outlined above regarding petitions for EPA rulemaking be exclusive: “Action of the Administrator with respect to which review could have been obtained . . . shall not be subject to judicial review in civil or criminal proceedings for enforcement.” 42 U.S.C. § 7607(b)(2).

44. This congressionally provided statutory and regulatory scheme is thus the “exclusive” means for seeking the nationwide regulation of greenhouse gas emissions and “set[s] forth procedures and remedies” for that relief, *Beneficial Nat’l Bank*, 539 U.S. at 8, irrespective of the savings clauses applicable to some other types of claims. Moreover, in addition to states’ ability to participate in the comment process on federal regulations, Congress created a mechanism whereby states can contribute to the rulemaking process. *See* 42 U.S.C. § 7409(d)(2)(A).

B. Plaintiff’s Asserted State-Law Causes of Action Duplicate, Supplement, and/or Supplant the Federal Cause of Action.

45. Plaintiff asks the Court to order Defendants to “abate the nuisance caused by sea level rise in the City’s jurisdiction.” Compl. ¶ 12; *see also id.*, Prayer for Relief (requesting “[e]quitable relief to abate the nuisances complained of herein”).

46. According to Plaintiff’s own allegations, the alleged nuisances can be abated only by a global—or at the very least national—reduction in greenhouse gas emissions. *See* Compl. ¶ 74 (“[I]t

is not possible to determine the source of any particular individual molecule of CO₂ in the atmosphere attributable to anthropogenic sources because such greenhouse gas molecules do not bear markers that permit tracing them to their source, and because greenhouse gases quickly diffuse and comeingle in the atmosphere.”); *id.* ¶ 75 (describing “global” greenhouse gas emissions relating to fossil fuel products). Indeed, Plaintiff’s allegations purport to show that Defendants “undertook a momentous effort to evade *international* and *national* regulation of greenhouse gas emissions”—*not* state or local regulations. *Id.* ¶ 140 (emphases added); *see also id.* ¶ 114 (“Defendants embarked on a decades-long campaign designed to . . . undermine national and international efforts like the Kyoto Protocol to rein in greenhouse gas emissions.”); *id.* ¶ 112 (acknowledging, *inter alia*, federal legislative efforts to regulate CO₂ and other greenhouse gases that allegedly “prompted Defendants to change their tactics . . . to a public campaign aimed at evading regulation”); *id.* ¶¶ 125, 126(a), 128, 129 (describing alleged efforts to encourage the United States to reject the international Kyoto Protocol); *id.* ¶¶ 134-35 (describing Defendants’ alleged lobbying efforts against the federal American Clean Energy and Security Act of 2009, which would have imposed a U.S. cap-and-trade program).

47. Plaintiff’s state-law tort claims are effectively an end-run around a petition for a rule-making regarding greenhouse gas emissions because they seek to regulate nationwide emissions that Plaintiff concedes conform to EPA’s emission standards. *See, e.g., San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959); *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 539 (1992). The claims would require precisely the cost-benefit analysis of emissions that the EPA is charged with undertaking and would directly interfere with the EPA’s determinations. *See supra* ¶ 26. Because Congress has established a clear and detailed process by which a party can petition the EPA to establish stricter nationwide emissions standards, Plaintiff’s claims are completely preempted by the Clean Air Act.

48. Because Congress has provided an exclusive statutory remedy for the regulation of greenhouse gas emissions which provides federal procedures and remedies for that cause of action, and because Plaintiff’s claims fall within the scope of the federal cause of action, Plaintiff’s claims are completely preempted by federal law and this Court has federal-question jurisdiction.

VI. THE ACTION IS REMOVABLE UNDER THE OUTER CONTINENTAL SHELF LANDS ACT

49. This Court also has original jurisdiction pursuant to the Outer Continental Shelf Lands Act (“OCSLA”). 43 U.S.C. § 1349(b); *see Tenn. Gas Pipeline*, 87 F.3d at 155. This action “aris[es] out of, or in connection with (A) any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, or the subsoil or seabed of the outer Continental Shelf, or which involves rights to such minerals.” 43 U.S.C. § 1349(b); *In re Deepwater Horizon*, 745 F.3d 157, 163 (5th Cir. 2014) (“th[e] language [of § 1349(b)(1)] [i]s straightforward and broad”). The outer continental shelf (“OCS”) includes all submerged lands that belong to the United States but are not part of any State. 43 U.S.C. §§ 1301, 1331.

50. The breadth of federal jurisdiction granted by OCSLA reflects the Act’s “expansive substantive reach.” *See EP Operating Ltd. P’ship v. Placid Oil Co.*, 26 F.3d 563, 569 (5th Cir. 1994). “OCSLA was passed . . . to establish federal ownership and control over the mineral wealth of the OCS and to provide for the development of those natural resources.” *Id.* at 566. “[T]he efficient exploitation of the minerals of the OCS . . . was . . . a primary purpose for OCSLA.” *Amoco Prod. Co. v. Sea Robin Pipeline Co.*, 844 F.2d 1202, 1210 (5th Cir. 1988). Indeed, OCSLA declares it “to be the policy of the United States that . . . the outer Continental Shelf . . . should be made available for expeditious and orderly development.” 43 U.S.C. § 1332(3). It further provides that “since exploration, development, and production of the minerals of the outer Continental Shelf will have significant impacts on coastal and non-coastal areas of the coastal States . . . such States, and through such States, affected local governments, are entitled to an opportunity to participate, *to the extent consistent with the national interest*, in the policy and planning decisions made by the Federal Government relating to exploration for, and development and production of, minerals of the outer Continental Shelf.” *Id.* § 1332(4) (emphasis added).

51. When enacting Section 1349(b)(1), “Congress intended for the judicial power of the United States to be extended to the entire range of legal disputes that it knew would arise relating to resource development on the [OCS].” *Laredo Offshore Constructors, Inc. v. Hunt Oil. Co.*, 754 F.2d 1223, 1228 (5th Cir. 1985). Consistent with Congress’ intent, courts repeatedly have found OCSLA

jurisdiction where resolution of the dispute foreseeably could affect the efficient exploitation of minerals from the OCS.² *See, e.g., EP Operating*, 26 F.3d at 569-70; *United Offshore v. S. Deepwater Pipeline*, 899 F.2d 405, 407 (5th Cir. 1990).

52. OCSLA jurisdiction exists even if the Complaint pleads no substantive OCSLA claims. *See, e.g., In re Deepwater Horizon*, 745 F.3d at 163. The Court, moreover, may look beyond the facts alleged in the Complaint to determine that OCSLA jurisdiction exists. *See, e.g., Plains Gas Solutions, LLC v. Tenn. Gas Pipeline Co., LLC*, 46 F. Supp. 3d 701, 703 (S.D. Tex. 2014); *St. Joe Co. v. Transocean Offshore Deepwater Drilling Inc.*, 774 F. Supp. 2d 596, 2011 A.M.C. 2624, 2640 (D. Del. 2011) (citing *Amoco Prod. Co. v. Sea Robin Pipeline Co.*, 844 F.2d 1202, 1205 (5th Cir. 1998)).

53. Under OCSLA, the Department of Interior administers an extensive federal leasing program aiming to develop and exploit the oil and gas resources of the federal Continental Shelf. 43 U.S.C. § 1334 *et seq.* Pursuant to this authority, the Interior Department “administers more than 5,000 active oil and gas leases on nearly 27 million OCS acres. In FY 2015, production from these leases generated \$4.4 billion in leasing revenue . . . [and] provided more than 550 million barrels of oil and 1.35 trillion cubic feet of natural gas, accounting for about sixteen percent of the Nation’s oil production and about five percent of domestic natural gas production.” Statement of Abigail Ross Hopper, Director, Bureau of Ocean Energy Management, Before the House Committee on Natural Resources (Mar. 2, 2016), *available at* <https://www.boem.gov/FY2017-Budget-Testimony-03-01-2016>. Certain Defendants here, of course, participate very substantially in the federal OCS leasing program. For example, from 1947 to 1995, Chevron U.S.A. Inc. produced 1.9 billion barrels of crude oil and 11 billion barrels of natural gas from the federal outer continental shelf in the Gulf of Mexico alone. U.S. Dep’t of Int., Minerals Mgmt. Serv., Gulf of Mex. Region, Prod. by Operator Ranked by

² As stated in 43 U.S.C. § 1333(a)(1): “The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed . . . for the purpose of exploring for, developing, or producing resources therefrom . . . to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State”

Vol. (1947–1995), *available at* <https://www.data.boem.gov/Production/Files/Rank%20File%20Gas%201947%-20-%201995.pdf>. In 2016, Chevron U.S.A. produced over 49 million barrels of crude oil and 50 million barrels of natural gas from the outer continental shelf on the Gulf of Mexico. U.S. Dep’t of Int., Bureau of Safety & Envtl. Enf’t, Gulf of Mex. Region, Prod. by Operator Ranked by Vol. (2016), *available at* <https://www.data.boem.gov/Production/Files/Rank%20File%20Gas%202016.pdf>. Numerous other Defendants conduct, and have for decades conducted, similar oil and gas operations on the federal OCS; indeed, Defendants and their affiliated companies presently hold approximately 32.95% of all outer continental shelf leases. *See* Bureau of Ocean Energy Management, Lease Owner Information, *available at* <https://www.data.boem.gov/Leasing/LeaseOwner/Default.aspx>. For example, certain BP companies and Exxon Mobil currently own lease interests in, and the BP companies operate, “one of the largest deepwater producing fields in the Gulf of Mexico,” which is capable of producing up to 250,000 barrels of oil per day. *See* Thunder Horse Field Fact Sheet (last visited Aug. 21, 2017), *available at* http://www.bp.com/content/dam/bp-country/en_us/PDF/Thunder_Horse_Fact_Sheet_6_14_2013.pdf. And as noted on the BP website, production from this and other OCS activities will continue into the future. *Id.* (“BP intends to sustain its leading position as an active participant in all facets of the Deepwater US Gulf of Mexico—as an explorer, developer, and operator.”). A substantial portion of the national consumption of fossil fuel products stems from production on federal lands, as approved by Congress and Executive Branch decision-makers.

54. The Complaint itself makes clear that a substantial part of Plaintiff’s claims “‘arise[] out of, or in connection with,” Defendants’ “operation[s] ‘conducted on the outer Continental Shelf’ that involve “the exploration and production of minerals.” *In re Deepwater Horizon*, 745 F.3d at 163. Plaintiff, in fact, challenges *all of* Defendants’ “extraction . . . of coal, oil, and natural gas” activities, *e.g.*, Compl. ¶¶ 3, 14, a substantial quantum of which arise from outer continental shelf operations, *see* Ranking Operator by Oil, Bureau of Ocean Energy Mgmt., *available at* <https://www.data.boem.gov/Main/HtmlPage.aspx?page=rankOil> (documenting Chevron’s oil and natural gas production on the federal outer continental shelf from 1947 to 2017). Plaintiff alleges that emissions have risen due to increased outer continental shelf extraction technologies. *See, e.g.*,

Compl. ¶¶ 143-44 (discussing arctic offshore drilling equipment and patents which may be relevant to conduct near Alaskan outer continental shelf). And Plaintiff challenges energy projects that occurred in Canadian waters. Compl. ¶¶ 105, 107. Defendants conduct similar activity in American waters and many of the emissions Plaintiff challenges necessarily arise from the use of fossil fuels extracted from the OCS.

55. The relief sought also arises out of and impacts OCS extraction and development. *See, e.g.*, Compl., Prayer for Relief (seeking damages designed to cripple the energy industry and equitable relief that would no doubt rein in extraction, including that on the OCS). And “any dispute that alters the progress of production activities on the OCS threatens to impair the total recovery of the federally-owned minerals from the reservoir or reservoirs underlying the OCS. Congress intended such a dispute to be within the grant of federal jurisdiction contained in § 1349.” *Amoco Prod. Co.*, 844 F.2d at 1211.

VII. THE ACTION IS REMOVABLE UNDER THE FEDERAL OFFICER REMOVAL STATUTE

56. The Federal Officer Removal statute allows removal of an action against “any officer (or any person acting under that officer) of the United States or of any agency thereof . . . for or relating to any act under color of such office.” 28 U.S.C. § 1442(a)(1). “A party seeking removal under section 1442 must demonstrate that (a) it is a ‘person’ within the meaning of the statute; (b) there is a causal nexus between its actions, taken pursuant to a federal officer’s directions, and plaintiff’s claims; and (c) it can assert a ‘colorable federal defense.’” *Durham*, 445 F.3d at 1251 (citations omitted). All three elements are satisfied here for the Chevron Parties and many other Defendants, which have engaged in activities pursuant to the directions of federal officers that, assuming the truth of Plaintiff’s allegations, have a causal nexus to Plaintiff’s claims, and which have colorable federal defenses to Plaintiff’s claims, including, for example, performing pursuant to government mandates and contracts, performing functions for the U.S. military, and engaging in activities on federal lands pursuant to federal leases.

57. First, Defendants are “persons” within the meaning of the statute. The Complaint alleges that Defendants are corporations (Compl. ¶ 16), which the Ninth Circuit has held qualify as “person[s]” under the statute. *See Leite*, 749 F.3d at 1122 n.4.

58. Second, assuming the truth of Plaintiff’s allegations, there is a causal nexus between Defendants’ alleged actions, taken pursuant to a federal officer’s direction, and Plaintiff’s claims. In *Leite*, the Ninth Circuit held removal proper where a military contractor, which was sued for failing to warn about asbestos in military equipment, showed extensive evidence of federal control over its activities. This included “detailed specifications governing the form and content of all warnings that equipment manufacturers were required to provide,” which the Navy was directly involved in preparing and which could not be altered. 749 F.3d at 1123. Here, Plaintiff’s causation and damages allegations depend on the activities of Defendants over the past decades—many of which were undertaken at the direction of, and under close supervision and control by, federal officials.

59. To take only one example, the Chevron Parties and other Defendants have long explored for and produced minerals, oil and gas on federal lands pursuant to leases governed by the Outer Continental Shelf Lands Act as described above. *E.g.*, Exs. B, C. In doing so, those Defendants were “‘acting under’ a federal ‘official’” within the meaning of Section 1442(a)(1). *Watson v. Philip Morris Cos., Inc.*, 551 U.S. 142, 153 (2007). Under OCSLA, the Interior Department is charged with “manag[ing] access to, and . . . receiv[ing] a fair return for, the energy and mineral resources of the Outer Continental Shelf.” Statement of Walter Cruickshank, Deputy Director, Bureau of Ocean Energy Management, Before The Committee On Natural Resources, July, 6, 2016, *available at* <https://www.boem.gov/Congressional-Testimony-Cruickshank-07062016/>. To fulfill this statutory obligation, the Interior officials maintain and administer the OCS leasing program, under which parties such as Defendants are required to conduct exploration, development and production activities that, “in the absence of a contract with a private firm, the Government itself would have had to perform.” *Watson*, 551 U.S. at 154.

60. OCS leases obligate lessees like Defendants to “develop[] . . . the leased area” diligently, including carrying out exploration, development and production activities approved by Inte-

rior Department officials for the express purpose of “maximiz[ing] the ultimate recovery of hydrocarbons from the leased area.” Ex. C § 10. Indeed, for decades Defendants’ OCSLA leases have instructed that “[t]he Lessee *shall comply* with all applicable regulations, orders, written instructions, and the terms and conditions set forth in this lease” and that “[a]fter due notice in writing, the Lessee *shall conduct* such OCS mining activities at such rates as the Lessor may require in order that the Leased Area or any part thereof may be properly and timely developed and produced in accordance with sound operating principles.” Ex. B § 10 (emphasis added). All drilling takes place “in accordance with an approved exploration plan (EP), development and production plan (DPP) or development operations coordination document (DOCD) [as well as] approval conditions”—all of which must undergo extensive review and approval by federal authorities, and all of which further had to conform to “diligence” and “sound conservation practices.” Ex. C §§ 9, 10. Federal officers further have reserved the rights to control the rates of mining (Ex. B § 10) and to obtain “prompt access” to facilities and records (Ex. B § 11, Ex. C § 12). The government also maintains certain controls over how the leased oil/gas/minerals are disposed of once they are removed from the ground, as by preconditioning the lease on a right of first refusal to purchase all materials “[i]n time of war or when the President of the United States shall so prescribe” (Ex. B § 14, Ex. C § 15(d)), and mandating that 20% of all crude and natural gas produced pursuant to drilling leases be offered “to small or independent refiners” (Ex. C § 15(c)). The Federal Treasury has reaped enormous financial benefits from those policy decisions in the form of statutory and regulatory royalty regimes that have resulted in billions of dollars of revenue to the Federal Government.

61. Certain Defendants have also engaged in the exploration and production of fossil fuels pursuant to agreements with federal agencies. For example, in June 1944, the Standard Oil Company (a Chevron predecessor) and the U.S. Navy entered into a contract “to govern the joint operation and production of the oil and gas deposits . . . of the Elk Hills Reserve,” a strategic petroleum reserve maintained by the Navy. *Chevron U.S.A., Inc. v. United States*, 116 Fed. Cl. 202, 205 (Fed. Cl. 2014). “The Elk Hills Naval Petroleum Reserve (NPR-1) . . . was originally established in 1912 to provide a source of liquid fuels for the armed forces during national emergencies.” GAO Fact Sheet, Naval Petroleum Reserves – Oil Sales Procedures and Prices at Elk Hills, April Through December

1986 (Jan. 1987) (“GAO Fact Sheet”), *available at* <http://www.gao.gov/assets/90/87497.pdf>. In response to the OPEC oil embargo in 1973-74, the Naval Petroleum Reserves Production Act of 1976 (Public Law 94-258, April 5, 1976) was enacted, which “authorized and directed that NPR-1 be produced at the maximum efficient rate for 6 years.” *Id.* In 1977, Congress “transferred the Navy’s interests and management obligations to [the Department of Energy],” and Chevron continued its interest in the joint operation until 1997. *Id.* That contract governing Standard’s rights in the reserve granted the Navy authority over how much would be produced from the joint operating area, and when it would be produced. Indeed, the contract “afford[ed] Navy a means of acquiring complete control over the development of the entire Reserve and the production of oil therefrom” (Ex. D at Recital 6(d)(ii)), as well as “exclusive control over the exploration, prospecting, development, and operation of the Reserve” (*id.* § 3(a)). One of the goals of the contract was to “place the Reserve in a condition of readiness whereby it will be able promptly to produce oil in substantial quantities whenever the strategic situation of the United States in the future may so require.” *Id.* at Recital 6(d)(iii). Finally, the contract was meant to “result in securing the maximum ultimate recovery of oil, gas, natural gasoline and associated hydrocarbons from the Reserve.” *Id.* at Recital 6(d)(vi). “In accordance with the [Naval Petroleum Reserves Production] [A]ct, the president . . . certifi[ed] that it [was] in the national interest to continue production of NPR-1 at the maximum efficient rate through a second 3-year period ending on April 5, 1988.” GAO Fact Sheet at 3.

62. Defendants also have supplied motor vehicle fuels under agreements with the federal government, including the Armed Forces. For instance, CITGO Petroleum Corporation (“CITGO”) was a party to fuel supply agreements with the Navy Exchange Service Command (“NEXCOM”), which is a department of the Naval Supply Systems Command of the U.S. Navy. Among other things, NEXCOM sells goods and services at a savings to active duty military, retirees, reservists, and their families. Starting in approximately 1988 through approximately 2012, pursuant to its agreements with NEXCOM, CITGO supplied CITGO branded gasoline and diesel fuel to NEXCOM for service stations operated by NEXCOM on Navy bases located in a number of states across the country. The NEXCOM agreements contained detailed fuel specifications, and CITGO complied with these government specifications in supplying the fuel to NEXCOM. CITGO also contracted with

NEXCOM to provide demolition, site preparation, design, construction, and related financing services to build new gasoline service stations on Navy bases in the 1990s.

63. These and other federal activities are encompassed in Plaintiff's Complaint. *See supra* ¶¶ 49-62. Plaintiff alleges that the drilling and mining operations Defendants performed led to the sale of fossil fuels—including to the Federal Government—which led to the release of greenhouse gases by end-users. Furthermore, the oil and gas Defendants extracted—which the Federal Government (i) reserved the right to buy in total in the event of a time of war or whenever the President so prescribed and (ii) has purchased from Defendants to fuel its military operations—is the very same oil and gas that Plaintiff alleges is a defective product giving rise to strict liability. Accordingly, Plaintiff seeks to hold Defendants liable for the very activities Defendants performed under the control of a federal official, and thus the nexus element has been satisfied.

64. Third, Defendants intend to raise numerous meritorious federal defenses, including preemption, *see Goncalves By & Through Goncalves v. Rady Children's Hosp. San Diego*, No. 15-55010, --- F.3d ---, 2017 WL 3273868, at *8 (9th Cir. Aug. 2, 2017), the government contractor defense, *see Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988); *Gertz v. Boeing*, 654 F.3d 852 (9th Cir. 2011), and others. In addition, Plaintiff's claims are barred by the United States Constitution, including the Commerce and Due Process clauses, as well as the First Amendment and the foreign affairs doctrine. These and other federal defenses are more than colorable. *See Willingham v. Morgan*, 395 U.S. 402, 407 (1969) (a defendant invoking section 1442(a)(1) "need not win his case before he can have it removed"). Accordingly, removal under Section 1442 is proper.

VIII. THE ACTION IS REMOVABLE BECAUSE THIS CASE ARISES FROM ACTS ARISING FROM MULTIPLE FEDERAL ENCLAVES

65. This Court also has original jurisdiction under the federal enclave doctrine. The Constitution authorizes Congress to "exercise exclusive legislation in all cases whatsoever" over all places purchased with the consent of a state "for the erection of forts, magazines, arsenals, dockyards, and other needful buildings." U.S. Const., art. I, § 8, cl. 17. "Federal courts have federal question jurisdiction over tort claims that arise on 'federal enclaves.'" *Durham*, 445 F.3d at 1250; *see also Totah v. Bies*, No. C 10-05956 CW, 2011 WL 1324471, at *2 (N.D. Cal. Apr. 6, 2011) (denying

motion to remand where defamation claim arose in the Presidio in San Francisco, a federal enclave). The “key factor” in determining whether a federal court has federal enclave jurisdiction “is the location of the plaintiff’s injury or where the specific cause of action arose.” *Sparling v. Doyle*, 2014 WL 2448926, at *3 (W.D. Tex. May 30, 2014); *see also Fung v. Abex Corp.*, 816 F. Supp. 569, 571 (N.D. Cal. 1992) (“Failure to indicate the federal enclave status and location of the exposure will not shield plaintiffs from the consequences of this federal enclave status.”); *Bd. of Comm’rs of Se. La. Flood Protection Auth.-E. v. Tenn. Gas Pipeline Co., LLC*, 29 F. Supp. 3d 808, 831 (E.D. La. 2014) (noting that defendants’ “conduct” or “the damage complained of” must occur on a federal enclave). Federal jurisdiction is available if some of the events or damages alleged in the complaint occurred on a federal enclave. *See Durham*, 445 F.3d at 1250; *Bell v. Arvin Meritor, Inc.*, No. 12-00131-SC, 2012 WL 1110001, at *2 (N.D. Cal. Apr. 2, 2012) (finding federal enclave jurisdiction where “some of the[] locations ... are federal enclaves”); *Total*, 2011 WL 1324471, at *2 (holding that court can “exercise supplemental jurisdiction over related claims” that did not arise on federal enclave).

66. Three requirements exist for land to be a federal enclave: (1) the United States must have acquired the land from a state; (2) the state legislature must have consented to the jurisdiction of the Federal Government; and (3) the United States must have accepted jurisdiction. *Wood v. Am. Crescent Elevator Corp.*, No. 11-397, 2011 WL 1870218, at *2 (E.D. La. May 16, 2011).

67. Upon information and belief, the federal government owns federal enclaves in the area at issue where Plaintiff’s “damage complained of” allegedly occurs. *Tenn. Gas Pipeline*, 29 F. Supp. 3d at 831. Indeed, Plaintiff broadly alleges injuries to huge swaths of the City, *see* Compl. ¶¶ 170-71, and “[f]ailure to indicate the federal enclave status and location of the exposure will not shield plaintiffs from the consequences of this federal enclave status,” *Fung*, 816 F. Supp. at 571. Additionally, the “Vulnerability Analysis” on which Plaintiff bases its claims, which ostensibly “identif[ies] actual risks to the City . . . and the consequences associated with taking no action to prevent or mitigate the expected impacts” (Compl. ¶ 169 & n.172), expressly includes potential damage to federal lands. *See, e.g.*, 2016 City of Imperial Beach Sea Level Rise Assessment at 7-2 (Sept. 2016) (the “Assessment”). Moreover, upon information and belief, federal property along the coastline in the City of

Imperial Beach, such as the San Diego Bay National Wildlife Refuge and the Tijuana Slough National Wildlife Refuge, qualify as federal enclaves. Additionally, the Naval Outlying Landing Field Imperial Beach, a U.S. Navy facility, is located in the City of Imperial Beach and is specifically referenced as an “existing” vulnerability in the Assessment relied on by Plaintiff. *See* Assessment at 7-2. As “[f]ederal enclaves include ‘numerous military bases, federal facilities, and even some national forests and parks,’” federal jurisdiction exists over Plaintiff’s claims. *Azhocar v. Coastal Marine Servs., Inc.*, No. 13-cv-155, 2013 WL 2177784, at *1 (S.D. Cal. May 20, 2013) (quoting *Allison v. Boeing Laser Tech. Servs.*, 689 F.3d 1234, 1235 (10th Cir. 2012)).

68. On information and belief, Defendants maintain or maintained oil and gas operations on military bases or other federal enclaves such that the Complaint, which bases the claims on the “extracting, refining, processing, producing, promoting and[/or] marketing of fossil fuel products” (Compl. ¶ 14), arises under federal law. *See, e.g., Humble Pipe Line Co. v. Waggoner*, 376 U.S. 369, 372 (1964) (noting that the United States exercises exclusive jurisdiction over oil and gas rights within Barksdale Air Force Base in Louisiana); *see also Mississippi River Fuel Corp. v. Cocreham*, 390 F.2d 34, 35 (5th Cir. 1968) (on Barksdale AFB, “the reduction of fugitive oil and gas to possession and ownership[] takes place within the exclusive jurisdiction of the United States”). Indeed, as of 2000, approximately 14% of the National Wildlife Refuge System “had oil or gas activities on their land,” and these activities were spread across 22 different states. *See* GAO, *U.S. Fish and Wildlife Service: Information on Oil and Gas Activities in the National Wildlife Refuge* (Oct. 30, 2001), available at <http://www.gao.gov/new.items/d0264r.pdf>. Furthermore, Chevron and its predecessor companies for many years engaged in production activities on the Elk Hills Reserve—a strategic oil reserve maintained by the Naval Department—pursuant to a joint operating agreement with the Navy. *See Chevron U.S.A.*, 116 Fed. Cl. at 205. Pursuant to that agreement, Standard Oil “operat[ed] the lands of Navy and Standard in the Reserve.” Ex. D at 4.

69. In addition, the Complaint relies upon conduct occurring in the District of Columbia—itsself a federal enclave, *see, e.g., Collier v. District of Columbia*, 46 F. Supp. 3d 6 (D.D.C. 2014); *Hobson v. Hansen*, 265 F. Supp. 902, 930 (D.D.C. 1967)—as a basis for Plaintiff’s claims. Indeed, Plaintiff complains that Defendants’ supposedly wrongful conduct included a meeting between an

industry organization and federal government officials that purportedly contributed to the rejection of the Kyoto Protocol (Compl. ¶ 129) and the “sen[ding of] letters to persuade members of Congress to vote against the American Clean Energy and Security Act of 2009” (*id.* ¶ 134). The Complaint also points to Defendants’ purported funding of “lobbyists” to influence legislation and legislative priorities. Here, too, “some of the[] locations” giving rise to Plaintiff’s claims “are federal enclaves,” further underscoring the presence of federal jurisdiction. *Bell*, 2012 WL 1110001, at *2. As the Ninth Circuit contemplated in *Jacobson v. U.S. Postal Serv.*, 993 F.2d 649, 657 (9th Cir. 1992), free speech placed at issue in a federal enclave falls under the jurisdiction of the federal courts. *Id.* (observing that newspaper vendors were required to obtain permits pursuant to a federal statute to sell newspapers in front of U.S. post office locations, which the Court deemed to be “within the federal enclave”). Because Plaintiff claims that Defendants’ speech within the federal enclave of the District of Columbia was, among other alleged causes, the basis of its injury, this Court is the only forum suited to adjudicate the merits of this dispute.

IX. THE ACTION IS REMOVABLE UNDER THE BANKRUPTCY REMOVAL STATUTE

70. The Bankruptcy Removal Statute allows removal of “any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or 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, provides 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” of the United States Code. 28 U.S.C. § 1334(b). The Ninth Circuit has emphasized that “‘related to’ jurisdiction is very broad, including nearly every matter directly or indirectly related to the bankruptcy.” *Sasson v. Sokoloff (In re Sasson)*, 424 F.3d 864, 868 (9th Cir. 2005). An action is thus “related to” a bankruptcy case if it “‘could conceivably have any effect on the estate being administered in bankruptcy.’” *PDG Arcos, LLC*, 436 F. App’x at 742 (quoting *In re Feitz*, 852 F.2d 455, 457 (9th Cir. 1988)). Where a Chapter 11 plan has been confirmed, there must be a “close nexus” between the post-confirmation case and

the bankruptcy plan for related-to jurisdiction to exist. *In re Pegasus Gold Corp.*, 394 F.3d 1189, 1194 (9th Cir. 2005) (citing *In re Resorts Int’l, Inc.*, 372 F.3d 154, 166-67 (3d Cir. 2004)). “[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.’” *In re Wilshire Courtyard*, 729 F.3d 1279, 1289 (9th Cir. 2013) (quoting *Pegasus Gold*, 394 F.3d at 1194).

71. At least two of the Defendants in this case—Peabody Energy Corporation (“Peabody”) and Arch Coal, Inc. (“Arch”) (Compl. ¶¶ 22, 24)—emerged from Chapter 11 bankruptcy in the United States Bankruptcy Court for the Eastern District of Missouri (the “Bankruptcy Court”) less than one year ago and are implementing their confirmed bankruptcy plans. Arch and its subsidiaries filed for Chapter 11 bankruptcy protection on January 11, 2016, and their plan of reorganization was confirmed on September 15, 2016 and became effective on October 5, 2016. *See generally In re Arch Coal, Inc.*, Case No. 16-40120, Dkt. 1334 (Bankr. E.D. Mo. Sept. 15, 2016). The plan continues to be administered in the Bankruptcy Court. Upon information and belief, given that all of Plaintiff’s claims relate to conduct “between 1965 and 2015” (Compl. ¶ 7), prior to Arch’s bankruptcy filing, Arch contends that all of Plaintiff’s claims were discharged by the plan and that Plaintiff has violated the Bankruptcy Court’s order confirming the plan. In similar fashion, Plaintiff’s claims against Peabody were discharged by its confirmed Chapter 11 plan. *See generally In re Peabody Energy Corp.*, Case No. 16-42529, Dkt. 2763 (Bankr. E.D. Mo. Mar. 15, 2017). The Bankruptcy Courts in both Chapter 11 cases have retained exclusive jurisdiction to hear and determine all such matters. As a result, there is federal jurisdiction under 28 U.S.C. § 1334(b).

72. Plaintiff also alleges that it will have to “diver[t] . . . tax dollars away from other public services to [address] sea level rise” and that it will incur “costs associated with addressing sea level rise caused by Defendants” totaling “*billions of dollars* over the next several decades.” Compl. ¶¶ 193(c), 193(e), 232(c), 232(e) (emphasis added). Plaintiff alleges that “Defendants, individually *and together*, have substantially and measurably contributed to Plaintiff’s sea level rise-related injuries, *id.* ¶ 80, and seeks compensatory damages, punitive damages, disgorgement of profits, costs of suit, and attorneys’ fees based on alleged conduct dating back to 1965. *See, e.g., id.* ¶¶ 183, 195,

209-10, 220-22, 240-42, 244, 247, 254, 260-61, 263; *see also id.*, Prayer for Relief. Accordingly, and without conceding that Plaintiff's allegations have any substantive merit, Plaintiff's broad claims have the required "close nexus" with Peabody's and Arch's bankruptcy plans to support federal jurisdiction. *Wilshire Courtyard*, 729 F.3d at 1289; *see also In re Dow Corning Corp.*, 86 F.3d 482, 493-94 (6th Cir. 1996).

73. Additionally, Plaintiff's claims are predicated on historical activities of Defendants, including predecessor companies and companies that Defendants may have acquired or with which they may have merged, as well as numerous unnamed but now bankrupt entities. Because there are hundreds of non-joined necessary and indispensable parties, there are many other Title 11 cases that may be related.

74. Finally, Plaintiff's action is not one to enforce its police or regulatory powers, but rather one to protect its "pecuniary interest." *City & Cnty. of San Francisco v. PG&E Corp.*, 433 F.3d 1115, 1124 (9th Cir. 2006). As demonstrated by Plaintiff's request for "billions of dollars" in compensatory damages, "punitive and exemplary damages," and "equitable disgorgement of all profits Defendants obtained through their" alleged conduct (*see, e.g.*, Compl. ¶¶ 183, 193(e), 232(e)), Plaintiff's action is pecuniary. *See also id.* ¶¶ 181(c), 193(c), 232(c) (alleging the substantial "tax dollars" diverted to addressing sea level rise).³ These allegations, along with the Complaint's extensive allegations regarding private property (*see id.* ¶¶ 64, 170, 172, 172, 193(d), 217(e), 221, 232(b)-(d), 261), make clear that Plaintiff's action is brought to reap a financial windfall for discrete and identifiable individuals or entities. *See PG&E Corp.*, 433 F.3d at 1125 n.11.

³ The pecuniary nature of the case is further highlighted by the fact that Plaintiff has entered into a contingency-fee arrangement with a private law firm. As counsel for plaintiffs in a copycat lawsuit admitted, "[t]axpayers are not being asked to bear the risks of this lawsuit." Jenna Greene, The Recorder, "New Tactic in Climate Change Litigation Could Cost Energy Companies Billions. Or Not" (June 20, 2017), *available at* <http://www.therecorder.com/id=1202793545435/New-Tactic-in-Climate-Change-Litigation-Could-Cost-Energy-Companies-Billions-Or-Not?slreturn=20170703142614>.

X. THIS COURT HAS JURISDICTION AND REMOVAL IS PROPER

75. Based on the foregoing allegations from the Complaint, this Court has original jurisdiction over this action under 28 U.S.C. § 1331. Accordingly, removal of this action is proper under 28 U.S.C. §§ 1334, 1441, 1442, 1452, and 1446, as well as 43 U.S.C. § 1349(b).

76. The United States District Court for the Northern District of California is the appropriate venue for removal pursuant to 28 U.S.C. § 1441(a) because it embraces the place where Plaintiff originally filed this case, in the Superior Court of California for the County of Contra Costa. *See* 28 U.S.C. § 84(a); 28 U.S.C. § 1441(a). Pursuant to Local Rule 3-2(d), the action should be assigned to either the San Francisco or Oakland divisions of this Court.

77. All defendants that have been properly joined and served have consented to the removal of the action, *see* Thomson Decl., ¶ 4, and there is no requirement that any party not properly joined and served consent. *See City of Ann Arbor Employees' Ret. Sys. v. Gecht*, No. C-06-7453EMC, 2007 WL 760568, at *8 (N.D. Cal. Mar. 9, 2007); 28 U.S.C. § 1446(b)(2)(A) (requiring consent only from "all defendants who have been properly joined and served").⁴ Pursuant to 28 U.S.C. § 1446(a), a copy of all process, pleadings, and orders served on the Chevron Parties is attached as Exhibit A to the Thomson Declaration.

78. Upon filing this Notice of Removal, Defendants will furnish written notice to Plaintiff's counsel, and will file and serve a copy of this Notice with the Clerk of the Superior Court of California for the County of Contra Costa, pursuant to 28 U.S.C. § 1446(d).

Accordingly, Defendants remove to this Court the above action pending against them in the Superior Court of California for the County of Contra Costa.

Respectfully submitted,

Dated: August 24, 2017

GIBSON, DUNN & CRUTCHER LLP

By: /s/ Theodore J. Boutrous, Jr.
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⁴ In addition, bankruptcy removal under 28 U.S.C. § 1452 and federal officer removal "represent[] an exception to the general rule . . . that all defendants must join in the removal petition." *Ely Valley Mines, Inc. v. Hartford Accident & Indem. Co.*, 644 F.2d 1310, 1315 (9th Cir. 1981).

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

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

Plaintiff,

v.

CHEVRON CORP., et al.,

Defendants.

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

**DEFENDANTS' MOTION TO STAY
PENDING APPEAL OF REMAND ORDER;
MEMORANDUM OF POINTS AND
AUTHORITIES**

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

THE HONORABLE VINCE CHHABRIA

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

Plaintiff,

v.

CHEVRON CORP., et al.,

Defendants.

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

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

Plaintiff,

v.

CHEVRON CORP., et al.,

Defendants.

Case No. 3:17-cv-4935-VC

This Motion is based upon this Notice of Motion and Motion to Stay, the Memorandum of Points and Authorities in support of the Motion, the papers on file in this case, any oral argument that may be heard by the Court, and any other matters that the Court deems appropriate.

March 26, 2018

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MEMORANDUM OF POINTS AND AUTHORITIES¹

I. INTRODUCTION

Less than one month before this Court ordered these cases back to state court for lack of federal jurisdiction, Judge Alsup declined to remand nearly identical claims. As Judge Alsup concluded, “the scope of the worldwide predicament [addressed in these cases] demands the most comprehensive view available, which in our American court system means our federal courts and our federal common law.” No. 17-cv-06011, ECF No. 134 (“Alsup Order”) at 5. And now that the plaintiffs have decided *not* to seek interlocutory appeal of Judge Alsup’s ruling, those cases will proceed in federal court. Thus, this Court’s Remand Order provides the only avenue for immediate appellate review of these important and complex questions of federal jurisdiction.

Although appellate review of remand orders is typically unavailable under 28 U.S.C. § 1447(d), an appeal as-of-right *is* available where, as here, removal was based in part on the federal officer removal statute, Section 1442. Moreover, on appeal, the Ninth Circuit has jurisdiction to review the entire Remand Order, including the other grounds for removal. *See Lu Junhong v. Boeing Co.*, 792 F.3d 805, 811 (7th Cir. 2015); *Decatur Hosp. Auth. v. Aetna Health, Inc.*, 854 F.3d 292, 296 (5th Cir. 2017); *Mays v. City of Flint, Mich.*, 871 F.3d 437, 442 (6th Cir. 2017); *see also* 15A Wright et al., *Federal Practice & Procedure* § 3914.11 (2d ed.) (updated Apr. 2017) (“Review should . . . be extended to all possible grounds for removal underlying the order.”) (surveying the case law on this point). The appeal of this Court’s Remand Order will therefore present the Ninth Circuit with critical questions of federal jurisdiction that will affect global warming-related claims nationwide, including: (1) whether nuisance claims addressing the national and international phenomenon of global warming are necessarily governed by federal common law; and (2) if so, whether federal courts retain jurisdiction over such federal common law claims notwithstanding Congressional displacement of federal common law remedies.

In entering their divergent remand orders, *both* this Court and Judge Alsup recognized the

¹ This motion is submitted subject to and without waiver of any defense, affirmative defense, or objection, including personal jurisdiction, insufficient process, or insufficient service of process.

critical importance of the jurisdictional issues at stake in these cases, as well as the substantial benefits of immediate appellate review. Judge Alsup certified his order for interlocutory review under Section 1292 *sua sponte*, noting that “the issue of whether plaintiffs’ nuisance claims are removable on the ground that such claims are governed by federal common law” is “a controlling question of law as to which there is substantial ground for difference of opinion and that its resolution by the court of appeals will materially advance the litigation.” Alsup Order at 8–9. And this Court stayed its Remand Order for 42 days so the parties could “address[] the propriety of a stay pending appeal.”² Remand Order at 5. Given the global implications of the lawsuits and the billions of dollars at stake, it would make no sense for both sets of cases to proceed simultaneously, with one set in state court and one set in federal court. Indeed, if the remand is carried out, there is a “real chance that [Defendants’] right to meaningful appeal will be permanently destroyed by an intervening state court judgment.” *Northrop Grumman Tech. Servs., Inc. v. DynCorp Int’l LLC*, 2016 WL 3346349, at *4 (E.D. Va. June 16, 2016).

In short, these cases “raise national and perhaps global questions,” Remand Order at 5, that should be decided by the Ninth Circuit to avoid piecemeal litigation in state and federal court. A stay of the Remand Order pending appeal is the only way to ensure the uniformity these cases demand.³

II. LEGAL STANDARD

District courts have the inherent power to stay proceedings pending before them. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936). This includes the authority to stay remand orders pending appeal. *See, e.g., Manier v. Medtech Prods., Inc.*, 29 F. Supp. 3d 1284, 1287 (S.D. Cal. 2014). In deciding whether to enter a stay, courts consider the following factors: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant

² This Court also offered the parties an opportunity to address “whether the matter should be certified for interlocutory appeal.” Remand Order at 5. Section 1292 certification is not needed in this case, however, because Defendants have a right to appeal under 1447(d) because they removed under Section 1442. Also, if the Remand Order, or any issues therein, were determined *not* to be reviewable on appeal due to Section 1447(d), Section 1292 certification would not overcome the bar to appellate review. *See Krangel v. Gen. Dynamics Corp.*, 968 F.2d 914, 914 (9th Cir. 1992) (per curiam) (“We hold that 28 U.S.C. § 1447(d) bars this court from granting review under section 1292(b).”).

³ At minimum, the Court should extend the temporary stay to preserve Defendants’ right to seek a prompt stay from the Ninth Circuit. *See* 9th Cir. R. 27-2 (where district court stays order pending disposition of application for stay in the Ninth Circuit, such application must be filed within 7 days).

will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Leiva-Perez v. Holder*, 640 F.3d 962, 964 (9th Cir. 2011) (per curiam) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)). To establish that they are “likely to succeed on the merits,” Defendants need show only that their appeal raises “serious legal questions”; Defendants “need not demonstrate that it is more likely than not that they will win on the merits.” *Id.* at 966–68. The Ninth Circuit also uses the following “essentially interchangeable” formulations for satisfying this prong: a “substantial case on the merits,” a “reasonable probability” of success, or a “fair prospect” of success. *Id.* at 967–68. While “[t]he first two factors . . . are the most critical,” *Nken*, 556 U.S. at 434, the Ninth Circuit balances each of these factors using a flexible “sliding scale” approach such that ““a stronger showing of one element may offset a weaker showing of another.”” *See Leiva-Perez*, 640 F.3d at 964 (quoting *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011)).

III. ARGUMENT

A. Defendants’ Appeal Raises Many Serious Legal Questions About Federal Jurisdiction Over Global Warming-Related Nuisance Claims

Defendants’ appeal undoubtedly raises serious legal questions regarding this Court’s subject matter jurisdiction—complex and novel issues that have already divided two jurists in this district. Moreover, Defendants’ appeal of this Court’s remand order allows the Ninth Circuit to address these issues *now*, before these cases go back to state court, raising the risk of inconsistent outcomes in these cases and the nearly identical cases being litigated on the merits before Judge Alsup.

1. This Court’s Remand Order Is Appealable As Of Right

Defendants have a clear right to appeal the Remand Order because they removed these cases under the Federal Officer Removal Statute, 28 U.S.C. § 1442. ECF No. 1 at 1 (San Mateo). While normally “[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal,” an “order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title *shall be* reviewable by appeal or otherwise.” 28 U.S.C. § 1447(d) (emphasis added); *see Cabalce v. Thomas E. Blanchard & Assocs., Inc.*, 797 F.3d 720, 727 n. 1 (9th Cir. 2015) (“Because this case was removed from state court pursuant to 28 U.S.C. § 1442, we have jurisdiction to review the order remanding the action to state court.”).

On appeal, the Ninth Circuit may consider all bases for removal advanced by the removing parties. The plain language of 28 U.S.C. § 1447(d) authorizes review of the *order* remanding a case removed under Section 1442, not a portion of the order. 28 U.S.C. § 1447(d) (“An *order* remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an *order* remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise.”) (emphasis added); *see also Kircher v. Putnam Funds Trust*, 547 U.S. 633, 641 n.8 (2006) (“Congress has, when it wished, expressly made 28 U.S.C. § 1447(d) inapplicable to particular remand *orders*.”) (emphasis added).

As the Seventh Circuit held in a thorough and well-reasoned opinion based on the plain language of Section 1447(d), “[t]o say that a district court’s ‘order’ is reviewable is to allow appellate review of the *whole* order, not just of particular issues or reasons.” *Lu Junhong*, 792 F.3d at 811. The court further noted that “[i]f we go beyond the text of § 1447(d) to the reasons that led to its enactment, we reach the same conclusion” because Section 1447(d) “was enacted to prevent appellate delay in determining where litigation will occur.” *Id.* at 813 (citing *Kircher*, 547 U.S. at 640). And “[s]ince the suit must be litigated somewhere, it is usually best to get on with the main event.” *Id.* “The marginal delay from adding an extra issue to a case where the time for briefing, argument, and decision has already been accepted is likely to be small.” *Id.*

The Fifth and Sixth Circuits are in agreement that the entire remand order is appealable under these circumstances. In *Decatur Hospital Authority*, the Fifth Circuit expressly adopted the Seventh Circuit’s reasoning: “Like the Seventh Circuit, ‘[w]e take both Congress and *Kircher* at their word in saying that, if appellate review of an ‘order’ has been authorized, that means review of the ‘order.’ Not particular reasons *for* an order, but the order itself.” 854 F.3d at 296 (quoting *Lu Junhong*, 792 F.3d at 812). And in *Mays*, the Sixth Circuit held that where an “appeal of the remand order is authorized by 28 U.S.C. § 1447(d) because the . . . Defendant[] removed the case under 28 U.S.C. § 1442,” the court’s “jurisdiction to review the remand order also encompasses review of the district court’s decision on . . . alternative ground[s] for removal [such as] 28 U.S.C. § 1441.” 871 F.3d at 442 (citing *Lu Junhong*, 792 F.3d at 811–13). In addition, the leading treatise on federal jurisdiction

1 agrees that appellate review of a remand order made reviewable under § 1447(d) “should . . . be ex-
 2 tended to all possible grounds for removal underlying the order. Once an appeal is taken there is very
 3 little to be gained by limiting review[.]” 15A Wright et al., Federal Practice & Procedure § 3914.11.
 4 In short, “once Congress has authorized appellate review of a remand order—as it has authorized re-
 5 view of suits removed on the authority of § 1442—a court of appeals has been authorized to take the
 6 time necessary to determine the right forum.” *Lu Junhong*, 792 F.3d at 813.

7 The Supreme Court has reached the same conclusion in the directly analogous context of in-
 8 terlocutory review under 28 U.S.C. § 1292(b). *See Yamaha Motor Corp., U.S.A. v. Calhoun*, 516
 9 U.S. 199, 205 (1996). In *Yamaha*, the Court observed that “the text of § 1292(b) indicates” that “ap-
 10 pellate jurisdiction applies to the *order* certified to the court of appeals, and is not tied to the particu-
 11 lar question formulated by the district court.” *Id.* at 205. Taking that language at face value, the
 12 Court explained that “the appellate court may address any issue fairly included within the certified
 13 order because ‘it is the *order* that is appealable, and not the controlling question identified by the dis-
 14 trict court.’” *Id.* (quoting 9 J. Moore & B. Ward, Moore’s Federal Practice ¶ 110.25[1], p. 300 (2d
 15 ed. 1995)); *see also* 16C Wright et al., Federal Practice & Procedure § 3929 (“[T]he court of appeals
 16 may review the entire order, either to consider a question different than the one certified as control-
 17 ling or to decide the case despite the lack of any identified controlling question.”). The Court’s rea-
 18 soning in *Yamaha* applies with equal force to Section 1447(d), which likewise authorizes appellate
 19 review of remand “orders” in cases removed under Section 1442.⁴

20 The Ninth Circuit has not yet considered the scope of review of a remand order in a case re-
 21 moved, in part, under section 1442. It has, however, briefly addressed the issue in a case predating
 22 the Removal Clarification Act of 2011, which authorized review of remand orders in cases removed
 23 under Section 1442. In *Patel v. Del Taco*, 446 F.3d 996 (9th Cir. 2006), the court held, without any
 24 reasoning or analysis, that it “lack[ed] jurisdiction to review the remand order based on § 1441,” even

25 ⁴ Nevertheless, at least one other court has “come to a contrary conclusion.” *Lu Junhong*, 792
 26 F.3d at 811 (citing *Jacks v. Meridian Res. Co., LLC*, 701 F.3d 1224, 1229 (8th Cir. 2012), which held
 27 that Section 1447(d) precluded it from reviewing whether removal was proper under federal common
 28 law, even though the case was also removed under § 1442 and CAFA). However, “*Jacks* did not dis-
 cuss the significance of the statutory reference to review of an ‘order,’” and neither party in *Jacks*
 “made a coherent argument” as to the reviewability of the entire order. *Lu Junhong*, 792 F.3d at 812.

though it had “jurisdiction to review the remand order based on 28 U.S.C. § 1443(1).” *Id.* at 998.⁵ *Patel* is not controlling here, however, for several reasons. First, *Patel* did not involve appeal of a remand order from a case removed under section 1442, but dealt exclusively with removal under Section 1443. *Id.* at 998–99. Second, the defendants in *Patel* removed plaintiff’s petition to confirm arbitration solely under Section 1443—they did not invoke any other federal statute in their notice of removal. *Id.* at 998; see Appellants’ Opening Brief (“AOB”), *Patel v. Del Taco, Inc.*, 2004 WL 3250818 (Dec. 21, 2004) (“[T]his case was not removed from state court on the basis of federal question jurisdiction. Rather it was removed under the specific grant given by Congress under 28 U.S.C. § 1443(1).”).⁶ And, third, the defendants in *Patel* did not argue that review of the entire remand order was authorized by the plain language of Section 1447(d). See AOB, 2004 WL 3250818. In short, the question whether Section 1447(d) authorizes review of the entire remand “order” in cases removed under Section 1442 was neither argued nor presented in *Patel*, and intervening law—the Removal Clarification Act of 2011—makes *Patel* an outdated outlier in any event.⁷

2. There Are Several Compelling Grounds For Federal Jurisdiction

With the entire Remand Order before the Ninth Circuit, Defendants have a substantial likelihood of success on several removal grounds, including the very issues of federal common law jurisdiction that divided two judges in this district.

First, as Judge Alsup’s order denying remand confirms, Defendants have a “reasonable probability” of demonstrating that removal was proper under Section 1441 because Plaintiffs’ claims are

⁵ *Patel* has been cited for that proposition in four subsequent decisions, all of them unpublished. See *Clark v. Kempton*, 593 Fed. App’x 667, 668 (9th Cir. 2015); *U.S. Bank Nat. Ass’n v. Azam*, 582 Fed. App’x 710, 711 (9th Cir. 2014); *Carter v. Evans*, 601 Fed. App’x 527, 528 (9th Cir. 2015); *McCullough v. Evans*, 600 Fed. App’x 577, 578 (9th Cir. 2015).

⁶ The propriety of removal under Section 1441 arose because, rather than filing a separate petition of removal, the defendants “joined their removal petition to [a] federal civil rights complaint” they had separately filed in federal court. *Patel*, 446 F.3d at 998. The defendants contended that “a basis exists for removal under 28 U.S.C. §§ 1441(c) and 1367 since the state court petition was not removed in and of itself but was joined to the federal question claims brought [directly in district court] under 42 U.S.C. §§ 1981, 1983, 1985(3), and 3604[.]” AOB, *Patel*, 2004 WL 3250818.

⁷ To the extent there is any doubt about the reviewability on appeal of the entire order, that question is itself a substantial question of law on which the federal circuit courts are split—another reason to grant a stay. See *In re Cintas Corp. Overtime Pay Arbitration Litig.*, 2007 WL 1302496, at *2–3 (N.D. Cal. May 2, 2007) (granting stay where “there [was] a substantial circuit split on this jurisdictional issue”). Indeed, the circuit split makes the issue ripe for *en banc* or Supreme Court review. See Fed. R. App. P. 35(a)-(b); 9th Cir. L.R. 35-1; S. Ct. R. 10(a).

“necessarily governed by federal common law.” Alsup Order at 3. In *Am. Elec. Power Co., Inc. v Connecticut*, 564 U.S. 410 (2011) (“*AEP*”), an action also involving global warming-based nuisance claims, the Supreme Court reaffirmed that federal common law governs public nuisance claims involving “‘air and water in their ambient or interstate aspects.’” *Id.* at 421–22 (2011) (citation omitted). Following *AEP*, the Ninth Circuit held that public nuisance claims seeking damages for rising sea levels resulting from global warming were properly brought under federal common law. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 855–56 (9th Cir. 2012) (“federal common law can apply to transboundary pollution suits”). Relying on these precedents, Judge Alsup concluded that, “[t]aking the complaints at face value, the 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.” Alsup Order at 4–5.

Although this Court held that “federal common law does *not* govern [Plaintiffs’ claims],” Remand Order at 2, it did not disagree that the cases are inherently federal in nature. Indeed, the Court recognized that “plaintiffs in the current cases are seeking similar relief based on similar conduct” to the plaintiffs in *AEP* and *Kivalina*. *Id.* at 2. This Court thus apparently agrees that these cases *would* be governed by federal common in the absence of federal legislation displacing it. But whereas this Court held that Plaintiffs’ claims were entirely displaced by the Clean Air Act (“CAA”), *id.*, Judge Alsup concluded—for two independent reasons—that *AEP* and *Kivalina* “did not recognize the displacement of the [plaintiffs’] federal common law claims[.]” Alsup Order at 6.

First, according to Judge Alsup, the plaintiffs’ claims were distinguishable from the displaced claims in *AEP* and *Kivalina* because rather than directly targeting emissions, the plaintiffs had “fixated on an earlier moment in the train of industry, the earlier moment of production and sale of fossil fuels, not their combustion.” Alsup Order at 6. And although the CAA “spoke directly” to “domestic emissions of greenhouse gas,” the Act did not speak directly to the issue of fossil fuel extraction and production. *Id.* at 7. This Court disagreed, concluding that “*Kivalina* stands for the proposition that federal common law is not just displaced when it comes to claims against domestic sources of emissions but also when it comes to claims against energy producers’ contributions to global warming and rising sea levels.” Remand Order at 2.

Second, Judge Alsup held that, “unlike *AEP* and *Kivalina*, which sought only to reach *domestic* conduct, plaintiffs’ claims here attack behavior *worldwide*.” Alsup Order at 7 (emphasis added). Judge Alsup reasoned that because “some of the fuel produced by defendants” is consumed outside the United States, “greenhouse gases emanating from overseas sources are equally guilty (perhaps more so) of causing plaintiffs’ harm.” *Id.* “Yet these foreign emissions are out of the EPA and Clean Air Act’s reach[,]” and thus, Judge Alsup held, the “Clean Air Act does not provide a sufficient legislative solution to the nuisance alleged to warrant a conclusion that this legislation has occupied the field to the exclusion of federal common law.” *Id.* This Court apparently disagreed, holding that *AEP* “did not confine its holding about the displacement of federal common law to particular sources of emissions, and *Kivalina* did not apply [*AEP*] in such a limited way.” Remand Order at 2–3.

A stay is thus warranted because Defendants’ appeal presents the “serious legal question” of whether federal common law nuisance claims alleging that the defendants’ *worldwide extraction* of fossil fuels contributed to global warming are displaced by federal legislation addressing *domestic emissions*. See *Brown v. Wal-Mart*, 2012 WL 5818300, at *3 (N.D. Cal. Nov. 15, 2012) (granting stay where the district courts were split); *In re Friedman*, 2011 WL 1193470 (D. Ariz. Mar. 29, 2011) (“Appellants have a reasonable chance of prevailing on appeal” given “split of trial court authority”).

Moreover, the appeal presents the related question of whether claims that would be governed by federal common law may be litigated under state law if Congress has displaced the otherwise controlling federal common law. Although this Court held that “these cases should not have been removed to federal court on the basis of federal common law that no longer exists,” Remand Order at 3, that is not how the Supreme Court or Ninth Circuit have described displacement. Rather, the Supreme Court held in *AEP* that “the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement” of domestic greenhouse gas emissions, *id.* at 424, and thus that “federal judges may [not] set limits on greenhouse gas emissions in the face of a law empowering EPA to set the same limits,” *id.* at 429. See *Kivalina*, 696 F.3d at 857 (“Judicial power can afford no remedy unless a right that is subject to that power is present.”). *AEP* and *Kivalina* have thus described displacement as a limitation on the power of federal judges to award remedies—not as altering the basic nature of the displaced claims or affecting the court’s jurisdiction. See *Kivalina*, 696

F.3d at 857 (“[D]isplacement of a federal common law right of action means displacement of remedies.”); *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 89 (1998) (“It is firmly established in our cases that the absence of a valid . . . cause of action does not implicate subject-matter jurisdiction”). Thus, even if Plaintiffs’ global warming claims *are* completely displaced—a disputed issue—there is a serious legal question about whether they can be governed by state law.

Second, there is a legitimate dispute as to whether Plaintiffs’ claims necessarily raise a federal issue by, *inter alia*, calling into question the balance struck by the federal government regarding regulation of carbon-producing energy sources. Under the “common-sense” inquiry set forth in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 312-13 (2005), this action raises substantial federal issues regarding, *inter alia*, the federal government’s foreign affairs powers and regulatory authority over fossil fuel production and emissions. *See* Defendants’ Joint Opposition to Motion to Remand, ECF No. 195 (San Mateo) (“Opp.”) at 14–28. As Defendants have explained, resolution of Plaintiffs’ claims necessarily requires interpreting federal statutes governing Defendants’ conduct, and adjudicating whether the federal agencies implementing those statutes struck the proper cost-benefit balance between promoting energy production, on the one hand, and protecting the environment, on the other. *See id.* at 17–21. Additionally, Plaintiffs’ allegations that Defendants misled regulators about the dangers of fossil fuels necessarily require adjudication of Defendants’ disclosure obligations to those regulators under federal law, including under various federal statutes. *See id.* at 23–25; *see also* ECF No. 194 (arguing Plaintiffs’ claims present choice-of-law question governed exclusively by federal choice-of-law rules).

Third, there is a substantial question whether Plaintiffs’ claims are completely preempted by the CAA, which established a comprehensive regime for the regulation of emissions and which provides the exclusive means of challenging federal regulatory actions. *See Opp.* at 30–31. Because this action effectively seeks to second-guess the federal government’s decisions as to regulation of greenhouse gas emissions, the CAA completely preempts Plaintiffs’ claims. *See id.* at 30–34. Although this Court held that the CAA’s savings clause “suggest[s] that Congress did not intend the federal causes of action under those statutes ‘to be exclusive,’” Remand Order at 3, the CAA’s cooperative federalism approach, which allows states to establish standards applicable within state boundaries, is

1 fully consistent with complete preemption of state law claims effectively challenging federal
 2 emissions standards. Opp. at 30–31; *see Cal. Dump Truck Owners Ass’n v. Nichols*, 784 F.3d 500,
 3 506 (9th Cir. 2015) (CAA “channel[s] review of final EPA action exclusively to the courts of
 4 appeals, regardless of how the grounds for review are framed” (quoting *Virginia v. United States*, 74
 5 F.3d 517, 523 (4th Cir. 1996))). Whether the CAA completely preempts Plaintiffs’ claims is, at
 6 minimum, a serious legal question supporting a stay.

7 **Fourth**, Defendants have a substantial argument that the Outer Continental Shelf Lands Act,
 8 (“OCSLA”), confers federal jurisdiction over this action. OCSLA gives federal district courts origi-
 9 nal jurisdiction over actions that “aris[e] out of, or in connection with . . . any operation conducted on
 10 the Outer Continental Shelf which involves exploration, development, or production of the minerals,
 11 of the subsoil and seabed of the [OCS].” 43 U.S.C. § 1349(b)(1). This Court superimposed a “but
 12 for” causation standard onto OCSLA jurisdiction, Remand Order at 4, but the statutory language says
 13 nothing of the sort. Plaintiffs allege that their injuries were caused by Defendants’ “extraction [and]
 14 production . . . of coal, oil and natural gas,” Compl. ¶ 3, a significant portion of which occurred on
 15 the OCS, *see* Opp. at 34–35. It would be remarkable and inexplicable for a complaint challenging the
 16 legality of *all* OCS activity not to be removable under OCSLA.

17 **Fifth**, there is a causal nexus between at least one of Plaintiffs’ claims and Defendants’ al-
 18 leged activities taken pursuant to a federal officer’s directions. Because “removal of the entire case is
 19 appropriate so long as a single claim satisfies the federal officer removal statute,” Defendants need
 20 not establish a causal nexus to each of Plaintiffs’ claims. *Savoie v. Huntington Ingalls, Inc.*, 817 F.3d
 21 457, 465 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 339 (2016); *see also* 14C Wright et al., Federal
 22 Practice & Procedure § 3726 (“Section 1442(a)(1) authorizes removal of the entire case even if only
 23 one of the controversies it raises involves a federal officer or agency”). Moreover, “the ‘hurdle
 24 erected by the [causal-connection] requirement is quite low,’” and the moving party “need show only
 25 that the challenged acts ‘occurred because of what they were asked to do by the Government.’” *Gon-*
 26 *calves ex rel. Goncalves v. Rady’s Children’s Hosp. San Diego*, 865 F.3d 1237, 1244–45 (9th Cir.
 27 2017) (alteration in original) (citations omitted).

28 As Defendants explained—and the Court has not found otherwise—Defendants extracted,

produced, distributed, advertised, and sold fossil fuels at the direction of federal officers. *See* Opp. at 41–48.⁸ Plaintiffs’ strict liability design defect cause of action targets this *exact* conduct. *See* San Mateo Compl. ¶ 218 (alleging that “Defendants . . . extracted, refined, . . . advertised, promoted, and/or sold fossil fuel products”). The “causal nexus” requirement has thus been satisfied at least as to the strict liability claim. *See Savoie*, 817 F.3d at 465–66 (finding a causal nexus to plaintiff’s strict liability claim where defendant was compelled to use asbestos under its contract with the government and the government exercised control to ensure such compliance). It is thus irrelevant whether some of Plaintiffs’ *other* claims are “based on a wider range of conduct”—such as promotion, lobbying activities, etc. Remand Order at 5.

Nor does the fact that Defendants conducted some of their extraction activities outside the control of federal officers preclude the requisite “causal nexus.” In *Reed v. Fina Oil & Chemical Co.*, 995 F. Supp. 705 (E.D. Tex. 1998), for example, the plaintiff alleged harm due to exposure to a chemical produced by the defendant from 1944 to 1979. Although the defendant had produced the chemical under the direction of the federal government from 1944 to 1955—less than half the duration of the alleged misconduct—the court concluded that the “nexus present during those ten years is sufficient to support § 1442(a)(1) removal.” *Id.* at 712. Similarly, in *Lalonde v. Delta Field Erection*, 1998 WL 34301466 (M.D. La. Aug. 6, 1998), the plaintiff alleged injury resulting from work he performed from 1947 to 1976 on the defendant’s premises. *Id.* at *1. The defendant presented evidence that it had acted under the direction of the government from 1943 to 1955, *id.*, and the court held that this 11-year window of government control established a “causal connection” between the

⁸ For example, the government commanded Chevron Corporation’s predecessor to extract oil from Elk Hills during wartime, with the contract repeatedly emphasizing the government’s control over such activities. *See* Opp. at 42–43. Additionally, Defendants operate under leases governed by the OCSLA, pursuant to which the federal government dictates that Defendants *must* (i) extract fossil fuels, (ii) sell fuel to certain identified entities, and (iii) provide minimum royalty payments. Opp. at 44. Courts have routinely held that these types of contractual obligations support federal officer removal. *See* Opp. at 45–48 (discussing cases). Moreover, under its contracts with the Navy Exchange Service Command, CITGO distributed, advertised, and sold fuels called for under the government’s contractual requirements, which included fuel specifications, designated delivery quantities, and Navy supervision through the analysis of the fuel and inspection of deliveries. Opp. at 45 (discussing these Agreements); *see also Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 400 (5th Cir. 1998) (“the government’s detailed specifications . . . and . . . on-going supervision . . . demonstrate that the defendants acted pursuant to federal direction and that a direct causal nexus exists”).

claims and the defendants' conduct, notwithstanding the two decades during which the defendant was not acting under the control of a federal officer. *Id.* at *5–6.⁹

Finally, Defendants have raised a substantial issue as to whether bankruptcy removal was proper because these cases have a “close nexus” to one or more confirmed bankruptcy plans. *Opp.* at 49. Although this Court held that there was not a “sufficiently close nexus between the plaintiffs’ lawsuits” and the confirmed plans of Peabody Energy Corporation and Arch Coal, Inc., Remand Order at 5, the Bankruptcy Court has already been required to interpret Peabody’s bankruptcy plan in light of Plaintiffs’ claims. *Opp.* at 50.¹⁰ Because “a close nexus” exists where “a court must interpret the bankruptcy plan and confirmation order to determine whether [plaintiffs’] claims were discharged or [plaintiffs] are enjoined from bringing suit,” the close nexus requirement is satisfied here. *In re Valley Health Sys.*, 584 Fed. App’x 477, 479 (9th Cir. 2014). Plaintiffs’ claims also have the requisite nexus with countless other bankruptcy plans that are implicated by Plaintiffs’ claims, as well as plans implicated by the third-party claims that Defendants intend to assert should this action proceed. *See Opp.* at 51–52. Moreover, although this Court held that Plaintiffs “suits are aimed at protecting the public safety and welfare,” there is, at minimum, a serious legal question whether claims brought by Plaintiffs seeking “billions of dollars” in compensatory damages, plus untold “punitive and exem-

⁹ The Court cited *Watson v. Phillip Morris Companies, Inc.*, 551 U.S. 142, 157 (2007), and *Cabalce*, 797 F.3d at 728, but neither case supports remand here. Remand Order at 5. In *Watson*, the defendant argued that it was operating under authority “delegated” by the FTC, but the Court found “no evidence of any delegation of legal authority from the FTC to the industry association to undertake testing on the Government agency’s behalf.” 551 U.S. at 156. Although there was “considerable regulatory detail and supervision,” the Court held there was “nothing that warrant[ed] treating the FTC/Philip Morris relationship as distinct from the usual regulator/regulated relationship.” *Id.* at 157. Here, by contrast, Defendants have acted pursuant to detailed contracts with the government that helped “achieve an end [the government] would have otherwise used its own agents to complete”—i.e., the extraction of fossil fuels from federal lands and the production of fuel for the military. *See Ruppel v. CBS Corp.*, 701 F.3d 1176, 1182 (7th Cir. 2012). The Ninth Circuit’s decision in *Cabalce* is also inapposite, as there the record was “bereft” of any “factual support” for the defendant’s assertion that it was “operat[ing] under federal supervision or control.” 797 F.3d at 728. That is not the case here, where Defendants have submitted detailed evidence demonstrating federal supervision and control over their extraction activities. ECF No. 1 Exs. C, D, F; ECF Nos. 195-6–195-13 (Walton declaration and supporting exhibits).

¹⁰ Arch and Plaintiffs entered into a stipulation providing that any action in the Peabody bankruptcy proceedings that results in dismissal of any of Plaintiffs’ claims against Peabody will also require dismissal of those claims against Arch. *Opp.* at 50.

plary damages”—as well as “all profits Defendants obtained” from fossil fuel-related business conducted since 1965, Compl. ¶¶ 235, 247—are shielded from removal by the public safety exception.

In short, Defendants’ appeal raises many serious legal questions.

B. Defendants Will Suffer Irreparable Harm Absent A Stay

Once the clerk mails the certified copy of the remand order to the State Court, “the State Court may thereupon proceed with such case.” 28 U.S.C. § 1447(c). Absent a stay of the remand order, the parties will therefore proceed simultaneously along at least three tracks: they will brief and argue Defendants’ appeal of the remand order in the Ninth Circuit while litigating Plaintiffs’ nuisance claims in three different state courts (at least until they could be coordinated before a single state court)—all the while litigating nearly identical cases in federal district court before Judge Alsup (not to mention the other nearly identical case pending in the Southern District of New York). This is exactly the “patchwork” approach Judge Alsup explained “would be unworkable.” Alsup Order at 5.

Further, denying the stay motion could potentially render Defendants’ right to appeal hollow if the state court undertakes to issue rulings on the merits. *Cf. Providence Journal Co. v. Fed. Bureau of Investigation*, 595 F.2d 889, 890 (1st Cir. 1979) (“Meaningful review entails having the reviewing court take a fresh look at the decision of the trial court before it becomes irrevocable.”); *Hiken v. Dep’t of Def.*, 2012 WL 1030091, at *2 (N.D. Cal. Mar. 27, 2012) (balance of hardships tipped in favor of granting stay because right to appeal an order to disclose information “would become moot” absent of a stay). Because any “intervening state court judgment or order could render the appeal meaningless,” Defendants face “severe and irreparable harm if no stay is issued.” *Northrop Grumman*, 2016 WL 3346349, at *4.

In addition, Defendants will be irreparably harmed if they are forced to litigate simultaneously their federal appeal and the remanded state court actions. Even if Defendants’ appeal is expedited, the proceedings in the Ninth Circuit will consume some substantial period of time. During that time, the state courts would undoubtedly rule on various motions such as demurrers and discovery motions. There is a concrete and substantial risk that these motions would be decided differently than they would be in federal court. For example, Plaintiffs may argue that California state courts have different pleading standards than federal courts, raising the possibility that the outcome of a demurrer in

state court would be different than a motion to dismiss in federal court. As a result, Defendants may be forced to engage in expensive and burdensome discovery in state court that would have been avoided had the case remained in federal court. There is no way to un-ring the bell as a practical matter because Defendants are unlikely to recover much (if any) of their discovery costs from the governmental Plaintiffs in this case. Such unrecoverable expenses constitute quintessential irreparable harm. *See Raskas v. Johnson & Johnson*, 2013 WL 1818133, at *2 (E.D. Mo. Apr. 29, 2013); *Citibank, N.A. v. Jackson*, 2017 WL 4511348, at *2 (W.D.N.C. Oct. 10, 2017) (granting motion to stay remand and noting litigation costs would be avoided); *cf. Golden Gate Rest. Ass'n v. City & Cty. of S.F.*, 512 F.3d 1112, 1125 (9th Cir. 2008) (considering “otherwise avoidable financial costs” in irreparable harm analysis).

Moreover, if the Ninth Circuit ultimately concludes that Defendants properly removed this action, this Court would have to wrestle with the effects of state court rulings made while the Remand Order was on appeal. This would create a “rat’s nest of comity and federalism issues” that would need to be untangled if the Ninth Circuit reverses. *Northrop Grumman*, 2016 WL 3346349 at *4. District courts routinely grant motions to stay remand orders pending appeal precisely because of the risk of inconsistent outcomes and other burdens posed by simultaneous state and federal court litigation. *See, e.g., id.* at *3 (collecting cases); *Raskas*, 2013 WL 1818133, at *2 (staying remand order due to risk of “inconsistent outcomes if the state court rules on any motions while the case is pending” on appeal); *Dalton v. Walgreen Co.*, 2013 WL 2367837, at *2 (E.D. Mo. May 29, 2013) (granting stay to guard against “potential of inconsistent outcomes if the state court rules on any motions while the appeal is pending”).

C. The Balance Of Harms Tilts Sharply In Defendants’ Favor

“Where, as is the case here, the government is the opposing party,” the third and fourth stay factors (*i.e.*, harm to the opposing party and the public interest) “merge” and should be considered together. *See Leiva-Perez*, 640 F.3d at 970. Plaintiffs will not be harmed if the Court grants Defendants’ Motion. In fact, they will benefit from a stay. With a stay in place, Plaintiffs will avoid the same risk of harm from potentially inconsistent outcomes in remanded state court proceedings as De-

1 defendants. *See Raskas*, 2013 WL 1818133 at *2. Similarly, a stay would conserve Plaintiffs' re-
 2 sources—financial and otherwise—by allowing them to litigate Defendants' appeal without being
 3 saddled with simultaneous state court litigation. *See Dalton*, 2013 WL 2367837 at *2 (“neither party
 4 would be required to incur additional expenses from simultaneous litigation”). Moreover, “conserv-
 5 ing judicial resources and promoting judicial economy” is a recognized ground for a stay, and a stay
 6 here would prevent the state courts from being burdened by potentially unnecessary litigation. *See*
 7 *Raskas*, 2013 WL 1818133 at *2; *see also United States v. Real Prop. & Improv. Located at 2366*
 8 *San Pablo Ave., Berkeley, Cal.*, 2015 WL 525711, at *5 (N.D. Cal. Feb. 6, 2015) (there is “a cogniza-
 9 ble public interest in promoting judicial economy”); *Citibank*, 2017 WL 4511348 at *3.

10 Although proceedings in this case will be delayed pending appeal, Plaintiffs' claimed ability
 11 to recover damages will not be prejudiced by the delay resulting from a stay. This is especially true
 12 given that a substantial amount of the damages Plaintiffs seek to recover would be compensation for
 13 purported costs that they have not yet incurred *and are not even allegedly expected to incur for dec-*
 14 *ades*. *See, e.g., San Mateo Compl.* ¶ 7 (sea level rise “*will occur*” (emphasis added)), *id.* ¶ 8
 15 (“[f]looding and storms *will become more frequent*” (emphasis added)). Assuming *arguendo* that
 16 such damages claims are even proper, a delay cannot possibly harm Plaintiffs with respect to dam-
 17 ages that have yet to materialize. Moreover, a delay cannot harm Plaintiffs in their pursuit of equita-
 18 ble relief to “abate” harms, *id.*, Prayer for Relief, which “will occur even in the absence of any future
 19 emissions,” *id.* ¶ 7, and which cannot be measurably exacerbated during a stay. And while “a stay
 20 would not permanently deprive [Plaintiffs] of access to state court,” Defendants “face[] a real chance
 21 that [their] right to meaningful appeal will be permanently destroyed by an intervening state court
 22 judgment.” *See Northrop Grumman*, 2016 WL 3346349, at *4.

23 IV. CONCLUSION

24 For the foregoing reasons, the Court should grant the Motion and stay the remand order pend-
 25 ing appeal. If the Court decides not to grant a stay pending remand, Defendants ask that it grant a
 26 temporary stay to preserve Defendants' right to seek a stay from the Ninth Circuit.

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EXHIBIT E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

<p>COUNTY OF SAN MATEO, Plaintiff, v. CHEVRON CORP., et al., Defendants.</p>	<p>Case No. 17-cv-04929-VC Re: Dkt. No. 234</p>
<p>CITY OF IMPERIAL BEACH, Plaintiff, v. CHEVRON CORP., et al., Defendants.</p>	<p>Case No. 17-cv-04934-VC Re: Dkt. No. 218</p>
<p>COUNTY OF MARIN, Plaintiff, v. CHEVRON CORP., et al., Defendants.</p>	<p>Case No. 17-cv-04935-VC ORDER GRANTING MOTIONS TO STAY Re: Dkt. No. 219</p>


The motions to stay the remand orders in these three cases pending appeal are granted.

Additionally, in case it's necessary, the Court certifies for interlocutory appeal all the issues addressed by the Court in its order – namely, whether the defendants could remove these cases to federal court on the basis of any of the grounds asserted in their initial notices of removal. The Court finds that these are controlling questions of law as to which there is

substantial ground for difference of opinion and that their resolution by the court of appeals will materially advance the litigation. 28 U.S.C. § 1292(b).

IT IS SO ORDERED.

Dated: April 9, 2018



VINCE CHHABRIA
United States District Judge

EXHIBIT F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAY 22 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

COUNTY OF SAN MATEO, individually
and on behalf of the People of the State of
California; et al.,

Plaintiffs-Respondents,

v.

CHEVRON CORPORATION; et al.,

Defendants-Petitioners.

No. 18-80049

D.C. Nos. 3:17-cv-04929-VC

3:17-cv-04934-VC

3:17-cv-04935-VC

Northern District of California,
San Francisco

ORDER

Before: W. FLETCHER and CALLAHAN, Circuit Judges.

The request to file a reply in support of the petition for permission to appeal
(Docket Entry No. 4) is granted. The reply has been filed.

The petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) is
denied. *See Krangel v. Gen. Dynamics Corp.*, 968 F.2d 914 (9th Cir. 1992).