UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

STATE OF RHODE ISLAND, Plaintiff, v. CHEVRON CORP.; CHEVRON USA, INC.; EXXONMOBIL CORP.; BP, PLC; BP AMERICA, INC.; BP PRODUCTS NORTH AMERICA, INC.; ROYAL DUTCH SHELL, PLC; MOTIVA ENTERPRISES, LLC; SHELL OIL PRODUCTS COMPANY, LLC; CITGO PETROLEUM CORP.; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66; MARATHON OIL COMPANY; MARATHON OIL CORPORATION; MARATHON PETROLEUM CORP.; MARATHON PETROLEUM COMPANY, LP; SPEEDWAY, LLC; HESS CORP.; LUKOIL PAN AMERICAS, LLC; GETTY PETROLEUM MARKETING, INC.; AND DOES 1 through 100, inclusive Defendants.	C.A. No. 18-cv-00395-WES-LDA **DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO REMAND TO STATE COURT** [Removal from the Providence Superior Court of Rhode Island, C.A. No. PC-2018-4716] Action Filed: July 2, 2018

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I. INTRODUCTION

This case raises federal claims that belong in federal court.[1] Plaintiff, the State of Rhode Island, seeks to reshape the nation's longstanding environmental, economic, energy, and foreign policies by holding a selected group of energy companies liable for harms alleged to have been caused by worldwide fossil fuel production and global greenhouse gas emissions from countless nonparties. Through selective pleading and strategic omission, Plaintiff endeavors to deprive Defendants of a federal forum. But Plaintiff cannot avoid the comprehensive role federal law plays in Plaintiff's core allegations.

This case threatens to interfere with longstanding federal policies over matters of uniquely national importance, including energy policy, environmental protection, and foreign affairs. A stable energy supply is critical for the preservation of our general welfare, economy, and national security. Accordingly, for more than a century, Congress has enacted laws promoting the production of fossil fuels, and for nearly half a century, the federal government has aimed to decrease our country's reliance on foreign oil imports.[2] The federal government has opened federal lands and coastal areas to fossil fuel extraction, established strategic petroleum reserves, contracted with fossil fuel providers to develop those federal resources, and consumed a large volume of fossil fuels, with the Department of Defense being the United States' largest user of fossil fuels. During this time, the U.S. has enacted a series of environmental statutes and regulations designed to strike an appropriate—and evolving—balance between protecting the environment while ensuring a stable energy supply to serve our country's economic and national security needs. The U.S. has also engaged in extensive, ongoing negotiations with other nations to craft a workable international framework for responding to global warming, carefully researching and evaluating how government regulations and

[1] Several Defendants contend that they are not subject to personal jurisdiction in Rhode Island. Defendants submit this opposition brief subject to, and without waiver of, these jurisdictional objections.

[2] *See*, *e.g.*, Lipshutz Decl. ¶¶ 3–12 & Exs. 1–10.

international commitments could affect the economy, national security, and foreign relations without crippling economic growth. Yet this lawsuit takes issue with these federal decisions and threatens to upend the federal government's longstanding energy and environmental policies and to "compromise[] the very capacity of the President to speak for the Nation with one voice in dealing with other governments" about climate change. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 424 (2003) (internal quotation marks omitted).

At bottom, Plaintiff's theories are premised on the cumulative effects of *global* emissions. In seeking remand, Plaintiff asserts that its requested remedies—"money damages and equitable abatement"—redress only alleged injuries "within its geographic boundaries," and it disclaims any intent "to regulate conduct across the globe." Plaintiff's Motion to Remand, ECF No. 40-1 at 1, 6, 31 (hereinafter "Mot."). But Plaintiff seeks to hold Defendants liable for their global conduct, alleging harms resulting from decades of accumulation of greenhouse gases in the Earth's atmosphere, the vast majority of which occurs outside of Rhode Island and has no relation to Defendants. Plaintiff alleges that "Defendants, through their extraction, promotion, marketing, and sale of their fossil fuel products, caused over 14.5% of global fossil fuel product-related CO_2 between 1965 and 2015, with contributions currently continuing unabated." Complaint, ECF No. 3-1 ("Compl.") ¶ 97. Plaintiff admits that "it is not possible to determine the source of any particular individual molecule of CO_2 in the atmosphere . . . because greenhouse gases quickly diffuse and comingle in the atmosphere." *Id*. ¶ 235. Plaintiff claims, however, that "ambient air and ocean temperature, sea level, and hydrologic cycle responses to those emissions" can somehow "be attributed to Defendants on an individual and aggregate basis," *id*. ¶ 98, through "cumulative carbon analysis," which they claim "allows an accurate calculation of net annual CO_2 and methane emissions attributable to each Defendant by quantifying the amount and type of fossil fuels products each Defendant extracted and placed into the stream of commerce," *id*. ¶ 96. Plaintiff thus purports to attribute to each Defendant the greenhouse gas emissions for *all* fossil fuels extracted and sold by that Defendant and its affiliates, no matter where in the world the conduct occurred.

Plaintiff's claims are therefore in no way limited to harms caused by fossil fuels extracted, refined, sold, marketed, or consumed in Rhode Island. In fact, Plaintiff has not even attempted to plead facts that would permit the Court to make these distinctions. Rather, Plaintiff's claims depend on Defendants' nationwide and global activities and the activities of consumers of fossil fuels worldwide, which include not only entities like the federal government, U.S. military, foreign governments, and state governments (such as Rhode Island), but also hospitals, schools, factories, and individual households. Thus, Plaintiff's claims require adjudication of whether the costs allegedly imposed on Rhode Island are outweighed by "the social utility of Defendants' conduct"—and not just the social benefit provided to Rhode Island (which is substantial), but to the United States and the entire world. *Id.* ¶ 232. Thus, "[t]he rights and duties the State seeks to vindicate, and its entitlement to relief" cannot and do not "stem entirely from Rhode Island law," as Plaintiff contends. Mot. 22. After all, Plaintiff targets *global* warming, and the transnational conduct that this term entails. That is why plaintiffs who brought similar lawsuits under federal law never pursued their claims in state courts under state law upon dismissal from federal court. *See, e.g.*, *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011); *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012); *California v. Gen. Motors Corp*., 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007). Defendants properly removed this action, and the Court should deny the motion to remand.

***First,* federal common law necessarily governs Plaintiff's claims**. Even "[p]ost-*Erie*, federal common law includes the general subject of environmental law and specifically includes ambient or interstate air and water pollution." *Kivalina*, 696 F.3d at 855. The Supreme Court has held for decades that cases like this one, which implicate "'uniquely federal interests,'" "are governed exclusively by federal law." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988). Federal courts have original jurisdiction over "'claims founded upon federal common law,'" and so removal is proper. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 850 (1985) (quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972) ("*Milwaukee I*")). That is true regardless of whether these claims are ultimately viable; for now, the only question

is whether this uniquely federal case belongs in federal court. *See United States v. Standard Oil Co.*, 332 U.S. 301, 309–10 (1947) ("state law" cannot "control" where "the question is one of federal policy," due to "considerations of federal supremacy in the performance of federal functions, [and] of the need for uniformity"). Plaintiff's claims here implicate uniquely federal interests and thus are governed by federal common law, as two other district courts have recently concluded. *See California v. BP P.L.C.*, 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018) ("*BP*"); *City of New York v. BP P.L.C.*, 2018 WL 3475470 (S.D.N.Y. July 19, 2018) ("*City of New York*").

***Second*, in any event, lawsuits facially alleging only state-law claims "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 & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005). Although nominally focused on the alleged consequences of rising ocean levels on a discrete portion of the U.S. coast, Plaintiff seeks to predicate liability on the emissions resulting from Defendants' *worldwide* fossil-fuel extraction and promotion. As a result, Plaintiff's purported state-law nuisance claim unavoidably second-guesses the reasonableness of the balance struck by federal energy policy, specifically as it pertains to carbon dioxide emissions, and also seeks to supplant federal domestic and regulatory policy on greenhouse gas emissions. Moreover, greenhouse gas emissions, global warming, and rising sea levels are not unique to Rhode Island, or even to the United States. Thus, "the scope and limitations of a complex federal regulatory framework are at stake in this case." *Bd. of Comm'rs of the Se. La. Flood Prot. Auth.-E. v. Tenn. Gas Pipeline Co., LLC*, 850 F.3d 714, 725 (5th Cir. 2017).

***Third*, Plaintiff's claims are completely preempted by the Clean Air Act ("CAA") and other federal statutes**, which provide an exclusive federal remedy for stricter regulation of nationwide and worldwide greenhouse gas emissions. Federal courts have jurisdiction over 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). Congress allows parties to seek stricter nationwide emission standards by petitioning the Environmental Protection Agency ("EPA"), and that is the exclusive means by which a party can seek such relief. And although the CAA reserves to the states some authority to regulate certain emissions within their own borders, Plaintiff's claims, which seek to impose liability for worldwide or national emissions, exceed that limited authority. Because these claims would "duplicate[], supplement[], or supplant[]" federal law, they are completely preempted. *Aetna Health Inc. v. Davila*, 542 U.S. 200, 209 (2004).

***Fourth*, this Court has jurisdiction under various jurisdiction-granting statutes and doctrines,** including the Outer Continental Shelf Lands Act ("**OCSLA**"), 43 U.S.C. § 1349(b), a statute with its own removal provision that federal courts interpret "broadly," reflecting the Act's "expansive substantive reach." *EP Operating Ltd. P'ship v. Placid Oil Co.*, 26 F.3d 563, 568–69 (5th Cir. 1994). 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). Many Defendants have contracted with the federal government to develop and extract minerals from federal lands under federal leases and to sell fuel and associated products to the federal government. It is similarly well settled that federal courts have federal question jurisdiction over claims arising on **federal enclaves**, *Humble Pipe Line Co. v. Waggoner*, 376 U.S. 369, 372–73 (1964), and much of the oil and gas extraction undertaken by Defendants or their affiliates occurred on federal lands. Some of the allegedly injured lands within Rhode Island's geographic boundaries are also federal enclaves. Plaintiff's claims are also "related to" cases under Title II of the United States Code **(bankruptcy)** and thus removable under 28 U.S.C. §§ 1334(b) and 1452(a) because Plaintiff has purported to base liability on the activities of Defendants' unnamed worldwide and historical subsidiaries and affiliates and "DOES 1 through 100," many of which are currently, or have recently been, bankrupt. Plaintiff's claims also fall within this Court's **admiralty**

jurisdiction because much of the allegedly tortious conduct occurred on "vessels," such as floating oil rigs. The claims are thus removable under 28 U.S.C. §§ 1333 and 1441(a).

In sum, the Complaint implicates fundamentally federal issues of national energy and environmental policy and foreign affairs. Federal jurisdiction is present and removal was proper.

II. LEGAL STANDARD

"The removal process was created by Congress to protect defendants." *Legg v. Wyeth*, 428 F.3d 1317, 1325 (11th Cir. 2005). "[T]he Federal courts should not sanction devices intended to prevent the removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction." *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 573 (5th Cir. 2004) (en banc) (citation omitted). A "removing party bears the burden of persuasion vis-à-vis the existence of federal jurisdiction." *BIW Deceived v. Local S6, Indus. Union of Marine and Shipbuilding Workers of Am.*, 132 F.3d 824, 831 (1st Cir. 1997). But because district courts have supplemental jurisdiction over related claims, 28 U.S.C. § 1367(a), the removing party need only show that there is federal jurisdiction over a single claim. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 563 (2005).

Although, "[a]s a general matter," the well-pleaded complaint rule "envisions 'that the plaintiff is master of his complaint and that a case cannot be removed if the complaint's allegations are premised only on local law[,]'" the "artful pleading doctrine" is an "exception[]" to that rule "designed to prevent a plaintiff from unfairly placing a thumb on the jurisdictional scales." *Lopez-Munoz v. Triple-S Salud, Inc.*, 754 F.3d 1, 4–5 (1st Cir. 2014). Under the "artful pleading doctrine," the court should deny a motion to remand when "'the federal district court would have had original jurisdiction of the case had it been filed in that court.'" *BIW Deceived*, 132 F.3d at 832 (quoting *Grubbs v. Gen. Elec. Credit Corp.*, 405 U.S. 699, 702 (1972)). The doctrine thus "allows a federal court to peer beneath the local-law veneer of a plaintiff's complaint in order to glean the true nature of the claims presented." *Lopez-Munoz*, 754 F.3d at

5. "If the claim appears to be federal in nature—that is, if it meets the applicable test for one that arises under federal law—then the federal court must recharacterize the complaint to reflect that reality and affirm the removal despite the plaintiff's professed intent to pursue only state-law claims." *BIW Deceived*, 132 F.3d at 831; *see also Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 9–11 (1983). "When conducting this inquiry, the court only asks whether the complaint, on its face, asserts a colorable federal claim." *BIW Deceived*, 132 F.3d at 832. "A claim is 'colorable' if it is 'seemingly valid or genuine,' as opposed to 'wholly insubstantial, immaterial, or frivolous.'" *Lawless v. Steward Health Care Sys., LLC*, 894 F.3d 9, 18 (1st Cir. 2018) (citations omitted). Thus, removal jurisdiction exists over what a complaint labels "purely state law claims" if federal common law actually governs the dispute, because "[w]hen federal law applies, . . . it follows that the question arises under federal law, and federal question jurisdiction exists." *New SD, Inc. v. Rockwell Int'l Corp.*, 79 F.3d 953, 954–55 (9th Cir. 1996).

Removal is also proper "where a 'state-law claim necessarily raise[s] 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.'" *One and Ken Valley Housing Group v. Maine State Housing Auth.*, 716 F.3d 218, 224 (1st Cir. 2013) (quoting *Gunn v. Minton*, 568 U.S. 251, 258 (2013)).

Further, various statutes have their own removal standards. Courts broadly construe the right to removal under OCSLA, the federal officer removal statute, and the federal enclave doctrine. *See*, *e.g.*, *The Taxpayer Citizens Group v. Cape Wind Assocs., LLC*, 373 F.3d 183, 188 (1st Cir. 2004) (OCSLA is "a sweeping assertion of federal supremacy over the submerged lands outside of the three-mile SLA boundary"); *In re DEEPWATER HORIZON*, 745 F.3d 157, 163 (5th Cir. 2014) (breadth of federal OCSLA jurisdiction reflects the Act's "expansive substantive reach"); *Jefferson County v. Acker*, 527 U.S. 423, 431 (1999) (federal courts should not take a "narrow, grudging interpretation" of the federal officer removal statute"); *Goncalves By and Through Goncalves v. Rady Children's Hosp. San Diego*, 865 F.3d 1237, 1244 (9th Cir. 2017)

(federal officer removal "interpret[ed] . . . broadly in favor of removal"); *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'"); *Rivera de Leon v. Maxon Eng. Servs., Inc.*, 283 F. Supp. 2d 550, 558–61 (D.P.R. 2003) (discussing federal enclave jurisdiction); *see also* U.S. CONST. art. I § 8, cl. 17.

Federal district courts also have original jurisdiction over proceedings "related to" bankruptcy cases. 28 U.S.C. § 1334(b); *see Gupta v. Quincy Medical Center*, 858 F.3d 657, 663 (1st Cir. 2017) ("related to" jurisdiction exists before confirmation of a bankruptcy plan when an action could "potentially have some effect on the bankruptcy estate, such as altering debtor's rights, liabilities, options, or freedom of action, or otherwise have an impact upon the handling and administration of the bankrupt estate.") (citation omitted); *In re Boston Regional Medical Center, Inc.*, 410 F.3d 100, 107 (1st Cir. 2005) (there are even "situations in which the fact that particular litigation arises after confirmation of a reorganization plan will not defeat an attempted exercise of bankruptcy jurisdiction"). Finally, federal district courts have original jurisdiction of any "civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333(1).

Although a state assuredly has a "strong sovereign interest in enforcing its state laws . . . in the courts of its own state," the mere presence of the state as a plaintiff will not bar removal when there is "'an overriding federal interest'" or where a "'clear rule demands'" removal. *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 676 (9th Cir. 2012) (citations omitted). The removal statute states: "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[.]" 28 U.S.C. § 1441(a) (emphasis added). No Act of Congress "provides otherwise" for state civil plaintiffs that, as here, plead claims within the original jurisdiction of the federal courts.

III. ARGUMENT

"At first blush," the well-pleaded complaint "rule appears to augur well for the plaintiff[], who maintain[s] that [its] complaint alleges only state-law claims. Appearances, however, often are deceiving." *BIW Deceived v. Local S6, Indus. Union of Marine and Shipbuilding Workers of Am.*, 132 F. 3d 824, 831 (1st Cir. 1997). Here, the Complaint pleads claims that arise, if at all, under federal common law, that raise disputed and substantial federal issues, and that are removable under several jurisdiction-granting statutes and doctrines. For any one of these reasons, removal is proper and Plaintiff's motion to remand should be denied.

A. Plaintiff's Claims Arise, If at All, Under Federal Common Law

Supreme Court precedent confirms that Plaintiff's global-warming-based public nuisance claim is governed by federal common law. *See Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 421–22 (2011) ("*AEP*"). Because federal common law governs this "transboundary pollution suit" regardless of how Plaintiff pleads its claims, this action is within this Court's original jurisdiction. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 855 (9th Cir. 2012); *California v. BP P.L.C.*, 2018 WL 1064293, at *2 (N.D. Cal. Feb. 27, 2018) ("Plaintiffs' nuisance claims—which address the national and international geophysical phenomenon of global warming—are necessarily governed by federal common law."); *City of New York v. BP P.L.C.*, 2018 WL 3475470 at *4 (S.D.N.Y. July 19, 2018) ("[T]he City's claims are ultimately based on the 'transboundary' emission of greenhouse gases, indicating that these claims arise under federal common law and require a uniform standard of decision.").

1. The Supreme Court, Ninth Circuit, and Two District Courts Have Concluded that Public Nuisance Claims Based on Global Warming Are Governed by Federal Common Law

Although "[t]here is no federal general common law," *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), there remain "some limited areas" in which the governing legal rules will be supplied, not by state law, but by "what has come to be known as 'federal common law.'" *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (quoting *United States v. Standard Oil of Cal.*, 332 U.S. 301, 308 (1947)). One such area is where "our federal system

does not permit the controversy to be resolved under state law" because the subject matter implicates "uniquely federal interests," including where "*the interstate or international nature of the controversy makes it inappropriate for state law to control*." *Id.* at 640–41 (emphasis added); *see also AEP*, 564 U.S. at 421 (federal common law applies to those subjects "where the basic scheme of the Constitution so demands").

The paradigmatic example of such an inherently interstate or international controversy, in which federal common law rather than state law will control, is a "transboundary pollution suit[]" brought by one state to address pollution emanating from other states. *See Kivalina*, 696 F.3d at 855; *see also Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972) (*Milwaukee I*) ("When we deal with air and water in their ambient or interstate aspects, there is a federal common law."). Indeed, federal common law has applied to such suits for over 100 years. *See Missouri v. Illinois*, 180 U.S. 208 (1901) (applying federal common law to cross-boundary water pollution case). Before the Supreme Court's seminal decision in *Erie*, there was no question that "federal common law governed" interstate pollution. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 487 (1987) (citing *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938); *Missouri v. Illinois*, 200 U.S. 496 (1906); *North Dakota v. Minnesota*, 263 U.S. 365 (1923); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907)). Following *Erie*, however, "[t]his principle was called into question in the context of water pollution in 1971, when the Court suggested in dicta that an interstate dispute between a State and a private company should be resolved by reference to state nuisance law." *Ouellette*, 479 U.S. at 487 (citing *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 499 n.3 (1971)). But the confusion was short-lived, as the Court soon after "affirmed the view that the regulation of interstate water pollution is a matter of federal, not state, law, thus overruling the contrary suggestion in *Wyandotte*." *Id.* at 488 (citing *Milwaukee I*, 406 U.S. at 102 n.3)).

In *Milwaukee I*, the Court explained that nuisance claims alleging pollution from multiple states call "for applying federal law," because such claims involve "an overriding federal interest in the need for a uniform rule of decision." *Milwaukee I*, 406 U.S. at 105 n.6; *see Ouellette*, 479

U.S. at 488 (noting that *Milwaukee I* held that interstate water pollution "cases should be resolved by reference to federal common law" because the 1972 version of the Clean Water Act "was not sufficiently comprehensive to resolve all interstate disputes that were likely to arise").[3] The "implicit corollary of this ruling was that state common law was preempted." *Ouellette*, 479 U.S. at 488. In short, the Supreme Court has consistently held that "the control of interstate pollution is primarily a matter of federal law." *Id*. at 492 (citing *Milwaukee I*, 406 U.S. at 107). In fact, the uniquely federal interest in interstate and international environmental matters is so strong and pervasive that federal common law must be applied not merely to a single element or issue in such cases, but to define the underlying cause of action. *See Milwaukee I*, 406 U.S. at 98–101 (public nuisance claims concerning interstate emissions arise under federal common law and fall within the district courts' original federal question jurisdiction under § 1331); *Kivalina*, 696 F.3d at 855 (outlining the elements of a "public nuisance" claim "[u]nder federal common law").

Public nuisance claims asserting global-warming-related injuries are inherently "interstate" (and international) because the alleged injuries necessarily arise from nationwide (and worldwide) activities and emissions. *See AEP*, 564 U.S. at 421; *Kivalina*, 696 F.3d at 855–56. Adhering to this longstanding line of cases, the Supreme Court, the Ninth Circuit, and two district courts have squarely held that public nuisance claims asserting global-warming-related injuries—like those asserted by Plaintiff here—are governed by federal common law.

AEP. In *AEP*, plaintiffs, including Rhode Island and seven other states, sued five electric utilities, contending that "defendants' carbon-dioxide emissions" substantially contributed to global warming and created a 'substantial and unreasonable interference with public rights,' in

[3] Congress extensively amended the Clean Water Act shortly after the Court decided *Milwaukee I*, and the Court subsequently recognized that, through these amendments, Congress had "occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency" and had thereby displaced federal common law in that field. *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) ("*Milwaukee II*"); *see also Ouellette*, 479 U.S. at 489. This holding about the scope of the remedies available under federal law simply recognizes that it is ultimately for "Congress, not the federal courts, to prescribe national policy *in areas of special federal interest*"; it does not alter the inherently *federal* nature of claims involving such "areas of special federal interest." *AEP*, 564 U.S. at 423–24 (emphasis added); *see infra* § III(A)(5).

violation of the federal common law of interstate nuisance, or, in the alternative, of state tort law." 564 U.S. at 418. Like Plaintiff here, the *AEP* plaintiffs "alleged that public lands, infrastructure, and health were at risk from climate change," and they sought to hold defendants liable for contributing to climate change. *Id.* at 418–19. The district court dismissed the claims as raising nonjusticiable political questions, but the Second Circuit reversed, holding that federal common law governed and that plaintiffs had stated a claim. *Id*. at 419. The Supreme Court agreed that federal common law governs a public nuisance claim involving "'air and water in their ambient or interstate aspects,'" and it flatly rejected the notion that global warming nuisance claims could be governed by state law rather than uniform federal law: "[B]orrowing the law of a particular State would be inappropriate." *AEP*, 564 U.S. at 421–22.

Kivalina. In *Kivalina*, the Ninth Circuit held that federal common law governed a public nuisance claim nearly identical to Plaintiff's claim here. 696 F.3d at 855–56. An Alaskan village asserted a public nuisance claim for damages to village property and infrastructure as a result of "sea levels ris[ing]" and other impacts allegedly resulting from the defendant energy companies' "emissions of large quantities of greenhouse gases." *Id*. at 853–54. The village asserted this public nuisance claim under federal common law and, in the alternative, state law. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 869 (N.D. Cal. 2009). The district court dismissed the federal claims and declined to exercise supplemental jurisdiction over the state-law claims. *Kivalina*, 696 F.3d at 854–55.

On appeal, a threshold issue was whether federal common law applied to the plaintiffs' nuisance case. The Ninth Circuit, citing *AEP* and *Milwaukee I*, held that it did: "[F]ederal common law includes the general subject of environmental law and specifically includes ambient or interstate air and water pollution." *Id*. at 855. Given the interstate and transnational character of any claim asserting damage from the worldwide accumulation of carbon dioxide emissions, the suit fell within the rule that "transboundary pollution suits" are governed by "federal common law." *Id*.

BP. In *BP*, Judge Alsup of the Northern District of California denied motions to remand global-warming-based nuisance claims brought by the cities of Oakland and San Francisco. The court held that nuisance claims addressing "the national and international geophysical phenomenon of global warming" "are necessarily governed by federal common law." 2018 WL 1064293, at *2. Citing *AEP*, the court explained that "federal common law includes the subject of environmental law and specifically includes ambient or interstate air and water pollution." *Id.* The court held that:

> as in *Milwaukee I*, *AEP*, and *Kivalina*, a uniform standard of decision is necessary to deal with the issues raised in plaintiffs' complaints. If ever a problem cried out for a uniform and comprehensive solution, it is the geophysical problem described by the complaints[.] . . . Taking 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. A patchwork of fifty different answers to the same fundamental global issue would be unworkable.

Id. at *3

City of New York. In *City of New York*, the court similarly held that the plaintiff's global-warming based nuisance claims—although purportedly pleaded under state law—were governed by federal common law because "a federal rule of decision [was] 'necessary to protect uniquely federal interests.'" 2018 WL 3475470, at *3 (quoting *Texas Indus.*, 451 U.S. at 640). The court explained: "Federal common law and not the varying common law of the individual States is . . . necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of a State against improper impairment by sources outside its domain." *Id.* (quoting *Milwaukee I*, 406 U.S. at 107 n.9). The City's claims, as here, were "based on Defendants' worldwide fossil fuel production and 'the use of their fossil fuel products [which] continue[] to emit greenhouse gases and exacerbate global warming." *Id.* at *4 (alterations in original). These greenhouse gases are emitted from billions of points around the world and are dispersed across the globe. *Id.* "Widespread global dispersal is exactly the type of

'transboundary pollution suit[]' to which federal common law should apply." *Id.* (quoting *Kivalina*, 69 F.3d at 855–58).

Although the City contended that its claims were based on "defendants' production and sale of fossil fuels—not defendants' direct emissions of [greenhouse gases]," the court observed that the City was "seeking damages for global-warming related injuries resulting from greenhouse gas emissions, and not only the production of Defendants' fossil fuels." *Id.* Because the City's claims were "ultimately based on the 'transboundary' emission of greenhouse gases," the court concluded that the "claims ar[o]se under federal common law and require[d] a uniform standard of decision." *Id.*

2. Federal Common Law Governs Plaintiff's Claims

Under *AEP* and its progeny, federal common law governs Plaintiff's public nuisance claim for global-warming-related injuries, which allegedly arise from the interstate and worldwide emissions associated with the use of fossil fuel products extracted, produced, and promoted by Defendants and their subsidiaries. *See* Compl. ¶¶ 1–4.[4] Federal common law applies to claims like these because they implicate interstate and international concerns and thereby invoke uniquely federal interests and responsibilities. *See Kivalina*, 696 F.3d at 855–56; *see also Massachusetts v. EPA*, 549 U.S. 497, 519–20 (2007) (holding that the "sovereign prerogatives" to force other states' reductions in greenhouse gas emissions, negotiate emissions treaties, and in some circumstances exercise the police power to reduce motor-vehicle emissions are "lodged in the federal government"). Plaintiff's public nuisance claim, which inescapably requires a global assessment of the reasonableness of Defendants' worldwide production, sale, and use of fossil fuels, is a quintessential "transboundary pollution suit[]," *Kivalina*, 696 F.3d at 855, and is therefore governed by federal common law. Indeed, Plaintiff's global-warming-

[4] Defendants do not concede that, as a substantive matter, Plaintiff has adequately pleaded that each Defendant is liable for the actions of its separate subsidiaries and affiliates. For purposes of assessing this Court's *jurisdiction*, however, the substantive adequacy of the Complaints is irrelevant. *See Bell v. Hood*, 327 U.S. 678, 682 (1946) ("Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover."); *BIW Deceived*, 132 F.3d at 832. Accordingly, for purposes of this motion only, Defendants assume *arguendo* Plaintiff's theory and, in describing the actions of "Defendants" herein, include the actions of their subsidiaries and affiliates.

related claims are facially based on the worldwide accumulation of greenhouse gas emissions over the course of decades and even centuries, resulting in part from the use of fossil fuel products extracted by Defendants anywhere in the world and consumed anywhere in the world. *See, e.g.*, Compl. ¶¶ 37–46.

Adjudicating Plaintiff's nuisance claim would necessarily require determining "what amount of carbon dioxide emissions is unreasonable" in light of what is "practical, feasible and economically viable." *AEP*, 564 U.S. at 428. Given the "national and international" nature of the "phenomenon" at the crux of Plaintiff's claim and the boundless scope of potential defendants and plaintiffs, this analysis differs substantially from the analysis that would govern an "abatement" action under state nuisance law. *BP*, 2018 WL 1064293, at *2. Any judgment as to whether the alleged harm caused by Defendants' contribution to worldwide emissions "outweighs the social utility of Defendants' conduct," Compl. ¶ 232, raises an inherently federal question implicating the federal government's unique interests in setting national and international policy regarding energy, the environment, the economy, and national security. *See AEP*, 564 U.S. at 427.

Moreover, allowing Plaintiff's claims to be governed by state law would permit any plaintiff alleging injury due to global warming to proceed under each or all of the nation's 50 different state laws. As the Solicitor General explained in *AEP*, "resolving such claims would require each court to consider numerous and far-reaching technological, economic, scientific, and policy issues" to decide "whether and to what extent each defendant should be deemed liable under general principles of nuisance law for some share of the injuries associated with global climate change." Br. for the TVA as Resp't Supporting Pet'rs, *AEP*, 564 U.S. 410 (2011) (No. 10-174), 2011 WL 317143, at *37. Such consideration could lead to "widely divergent results" based on "different assessments of what is 'reasonable.'" *Id.*; *see also Ouellette*, 479 U.S. at 496–97 ("[d]ischargers would be forced to meet not only the statutory limitations of all states potentially affected by their discharges but also the common law standards developed through case law of those states," making it "virtually impossible to predict the standard for a lawful

discharge"). Such a result would run counter to *Ouellette*, which warned against subjecting out-of-state sources "to a variety of" "vague and indeterminate" state common law nuisance standards and allowing states to "do indirectly what they could not do directly—regulate the conduct of out-of-state sources." *Ouellette*, 479 U.S. at 482, 495 (citations omitted); *see also BP*, 2018 WL 1064293, at *3 ("A patchwork of fifty different answers to the same fundamental global issue would be unworkable.").

Plaintiff contends that federal law does not govern its claims because "[c]limate change is far from a 'uniquely federal interest.'" Mot. 17. But the question is not whether other entities besides the federal government have an interest in climate change—of course they do—but whether, in the context of a *particular* claim involving global climate change, a "federal rule of decision is 'necessary to protect uniquely federal interests.'" *Texas Indus.*, 451 U.S. at 640 (citation omitted). There are indeed uniquely federal interests implicated here that necessitate a federal rule of decision. For example, there is a uniquely federal interest in ensuring that decisions in cases seeking to deem worldwide fossil-fuel production and promotion a public nuisance do not undermine the federal government's ability and authority to negotiate with foreign nations to address the threat of global warming. There is also a uniquely federal interest in ensuring a stable energy supply, both for the military and for the national economy, as evidenced repeatedly in U.S. energy policy.[5]

[5] In furtherance of this interest, Congress has repeatedly acted to promote domestic oil and gas production. *See*, *e.g.*, 42 U.S.C. § 13401 ("It is the goal of the United States in carrying out energy supply and energy conservation research and development . . . to strengthen national energy security by reducing dependence on imported oil."); *id.* § 13411(a) (directing Secretary of Energy "to increase the recoverability of domestic oil resources"); *id.* § 13415(b)-(c) (authorizing creation of a research center to "increase ultimate petroleum recovery"); 42 U.S.C. § 15927 (declaring it "the policy of the United States that . . . oil shale, tar sands, and other unconventional fuels are strategically important domestic resources that should be developed to reduce the growing dependence of the United States on politically and economically unstable sources of foreign oil imports."); 30 U.S.C. § 21a ("it is the continuing policy of the Federal Government in the national interest to foster and encourage . . . economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help assure satisfaction of industrial, security and environmental needs."); 43 U.S.C. § 1701(a)(12) ("it is the policy of the United States that . . . the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals . . . from the public lands.").

Plaintiff asserts that its claims do not implicate any of these interests because it seeks only "damages and abatement—the cost for adaptation and mitigation measures within its geographic boundaries." Mot. 17. But even if this were true,[6] it is well established that "[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Bldg. Trade Council v. Garmon*, 359 U.S. 236, 247 (1959); *see also Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 637 (2012) ("[S]tate regulation can be . . . effectively exerted through an award of damages, and the obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."); *BMW of N. Am. v. Gore*, 517 U.S. 559, 572 n.17 (1996) ("State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute."). Because the federal government has a unique interest both in promoting fossil-fuel production and in crafting multilateral agreements with foreign nations to address global warming, claims seeking to punish fossil fuel manufacturers for alleged global-warming-related harms implicate "uniquely federal interests" and demand a uniform federal rule.[7]

Plaintiff also contends that claims against "sellers and manufacturers of products do not present 'uniquely federal interests.'" Mot. 18–19. But the examples that Plaintiff cites involved traditional products liability claims based on personal injuries caused by a specific product, not public nuisance claims based on transboundary pollution. *See Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314 (5th Cir. 1985) (en banc) (failure to warn claim against asbestos manufacturer for injuries caused by exposure to asbestos); *In re Agent Orange Prod. Liab. Litig.*,

[6] Throughout its Complaint, the State has repeatedly evinced its motive to compel defendants to take *action* to reduce emissions*: See* Compl. ¶ 187 ("If [mitigation] efforts do not begin until 2020, however, a 15% annual reduction will be required to restore the Earth's energy balance by the end of the century."), ¶ 255 (h) (complaining of "unchecked extraction"), ¶ 267(b) ("unabated extraction"), ¶ 267(c)(complaining of defendants' failure to take a variety of actions including but not limited to "shifting to non-fossil fuel products.")

[7] These uniquely federal interests do not prevent states from taking action within their proper scope of authority to address the threat of global warming. Though states may have an "interest[] in combatting climate change," Mot. 18, federal common law must govern claims seeking to attach tort liability for alleged injuries arising from global warming. The cases that Plaintiff cites, which involve state fuel efficiency standards on fuels and automobiles *sold within that state*, are not to the contrary. *See* Mot. 18 (citing *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013); *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007); *Am. Fuel & Petrochem. Mfrs. v. O'Keeffe*, 134 F. Supp. 3d 1270 (D. Or. 2015)).

635 F.2d 987 (2d Cir. 1980) (product liability, negligence, and breach of warranty claims against manufacturer of Agent Orange based on injuries sustained due to exposure to Agent Orange). Here, although Plaintiff has sued manufacturers of fossil-fuels, the gravamen of the claim is that "greenhouse gas pollution" is causing global warming, which in turn results in rising sea levels and other environmental changes—including "ocean acidification, melting polar ice caps and glaciers, more extreme and volatile weather, drought, and sea level rise"—that are allegedly harming Rhode Island. Compl. ¶ 1. In other words, although Plaintiff has "fixated on an earlier moment in the train of industry, the earlier moment of production and sale of fossil fuels, not their combustion," *BP*, 2018 WL 1064293 at *4, this is nevertheless the type of "transboundary pollution suit" that has historically been governed by federal common law, *Kivalina*, 696 F.3d at 855.

Confirming that this case is about *emissions*, not production, Plaintiff contends that there "is no 'uniquely federal interest' merely because the injury results from *emissions of a pollutant* regulated by the Clean Air Act." Mot. 19 (emphasis added). Plaintiff also notes that courts have allowed state law claims against manufacturers of products regulated under the CAA. *Id.* That argument is a red herring because Plaintiff is not seeking to address localized pollution caused by localized emissions, and Defendants have not argued that federal common law governs these claims merely because greenhouse gases are regulated by the Clean Air Act.[8] Notwithstanding

[8] The cases that Plaintiff cites are thus inapposite. For example, the question in *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 725 F.3d 65 (2d Cir. 2013), was whether certain claims arising out of MTBE spills in New York were preempted by a federal statute identifying MTBE as one of several additives that gasoline suppliers could use to satisfy the Clean Air Act's oxygenate requirements. *Id.* at 78. The case involved localized pollution caused by local use of MTBE-containing products; it did not involve transboundary or transnational pollution, and no party suggested that federal common law governed the plaintiffs' claims. And tellingly, while the City of New York featured the *MTBE* case in its parallel global warming case, the federal district court had no trouble concluding that the federal common law governed the City's claims. *City of New York*, 2018 WL 347570, at *5. The decision of the Virginia Circuit Court in *In re Volkswagen "Clean Diesel" Litigation*, 2016 WL 10880209 (Va. Cir. Ct. 2016), is even further afield. The issue there was whether claims based on allegations of fraud, Virginia Consumer Protection Act violations, and breach of warranty—based on Volkswagen's alleged misrepresentations about the performance of its vehicles—were preempted by the Clean Air Act. *Id.* at *2–3. There obviously was not (and could not be) any allegation that Volkswagen's conduct caused tortious injury only as a result of an *inherently worldwide phenomenon* such as global warming (which is what triggers the uniquely federal interests at issue here), and no party even suggested that the claims at issue were governed by federal common law.

Plaintiff's attempt to keep these claims in state court, the claims are governed by federal common law and thus are within the original jurisdiction of this Court.

3. *AEP* and *Kivalina* Did Not Authorize Transboundary Pollution Suits to be Decided under State Law

Plaintiff tries to distinguish *AEP* and *Kivalina* on the ground that those cases did not expressly "consider[] the relationship between federal common law and state law." Mot. 12. Plaintiff further contends that *AEP* and *Kivalina* left open the possibility that *some* global-warming-based public nuisance claims might be governed by state law, and that they have pleaded such claims. Mot. 12–14. Plaintiff is wrong for several reasons.

First, the decision that federal common law applies to a particular cause of action *necessarily* reflects a determination that state law does *not* apply. "[I]f federal common law exists, it is because state law cannot be used." *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 n.7 (1981) ("*Milwaukee II*"); *see also Nat'l Audubon Soc'y v. Dep't of Water*, 869 F.2d 1196, 1204–05 (9th Cir. 1988) ("true interstate disputes [concerning pollution] *require* application of federal common law" to "the exclusion of state law") (emphasis added). Accordingly, by holding that a global-warming-related public nuisance claim was governed by federal common law, *AEP* and *Kivalina* necessarily establish that state law *cannot* be applied. Thus, despite the state-law label Plaintiff affixes to its claims, they are *necessarily* governed by federal common law.

Second, *AEP* held that "borrowing the law of a particular State would be *inappropriate*" to adjudicate an interstate and transnational global-warming-related public nuisance claim; such a claim could *only* be governed by a uniform "*federal* rule of decision." 564 U.S. at 422 (emphases added). Plaintiff contends that the Court was merely acknowledging that no single state law could control because the claims in that case involved multiple states suing emitters holding permits in other states. Mot. 13 n.4. That is incorrect.[9] The Court held that federal

[9] Plaintiff's argument is also self-defeating. Here, Plaintiff seeks to apply state law to claims against more than 20 Defendants, which operate in various states and countries around the world. Applying Rhode Island law here would thus be just as "inappropriate" as applying the law of a single state in *AEP*.

common law continued to govern interstate pollution cases post-*Erie* because "[e]nvironmental protection is undoubtedly an area 'within national legislative power," one in which federal courts may fill in 'statutory interstices,' and, if necessary, even 'fashion federal law.'" *AEP*, 564 U.S. at 421. The court noted, however, that "[r]ecognition that a subject is meet for federal law governance . . . does not necessarily mean that federal courts should create the controlling law. Absent a demonstrated need for a federal rule of decision, the Court has taken 'the prudent course' of 'adopt[ing] the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation.'" *Id.* at 422 (citation omitted). It was in that context that the Court stated that "borrowing the law of a particular State" to govern global-warming-based nuisance claims "would be inappropriate." *Id.* In other words, the Court determined *both* that global warming claims were governed by federal law *and* that a federal rule of decision—not a borrowed state rule—was required.

Third, although Plaintiff contends that *AEP* "explicitly left open the viability of state law claims addressing harms related to climate change," Mot. 14, the Court in fact left "open for consideration on remand" only the narrow question of whether state law claims based on "*the law of each State where the defendants operate power plants*" were preempted by the Clean Air Act. 564 U.S. at 429 (emphasis added) (citing *Ouellette*, 479 U.S. at 488). That theory, derived from *Ouellette*, has no relevance here because Plaintiff's claim is not based on Defendants' Rhode Island-based conduct. The question in *Ouellette* was whether the CWA preempted a public nuisance claim brought by Vermont plaintiffs in Vermont court under Vermont law to abate a nuisance in New York. The Court explained that "[i]n light of [the CWA's] pervasive regulation and the fact that the control of interstate pollution is primarily a matter of federal law, it is clear that the only state suits that remain available are those specifically preserved by the Act." *Id.* at 492. The Court concluded that "[n]othing in the Act gives each affected State th[e] power to regulate discharges" in other states through nuisance actions. *Id*. at 497; *see also id.* at 494 ("[T]he CWA precludes a court from applying the law of an affected State against an out-of-state source."). The Court recognized, however, that the CWA did not preclude "aggrieved

individuals from bringing a nuisance claim pursuant to the law of the *source* State[,]" because the "CWA allows States such as New York to impose higher standards on their own point sources[.]" *Id.* at 497; *see also id.* at 498 ("An action brought against [the New York defendant] under New York nuisance law would not frustrate the goals of the CWA as would a suit governed by Vermont law.").[10]

That narrow carve-out for state law claims is inapplicable here, because Plaintiff has not pleaded claims under the laws of the states in which the emissions occurred—or where the fossil-fuel extraction took place. *See N.C. ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 306 (4th Cir. 2010) (agreeing that *Ouellette's* "holding is equally applicable to the Clean Air Act"). Rather, Plaintiff has pleaded an omnibus public nuisance claim *under Rhode Island law* addressing all production and emissions in *all jurisdictions—i.e.*, it has pleaded *precisely* the claim that *AEP* and *Kivalina* held must be governed by federal common law. Nor could Plaintiff do otherwise given the nature of the phenomenon at issue. Plaintiff's theory is, and by its nature must be, that "greenhouse gasses [*sic*] quickly diffuse and commingle in the atmosphere," and emissions resulting from the use of Defendants' products indiscriminately combine with all of the other emissions from all other worldwide sources over the last several centuries, such that it is "not possible to determine the source of any particular individual molecule of CO_2 in the atmosphere." Compl. ¶ 235. Plaintiff's claimed injuries necessarily hinge on the collective effect of worldwide emissions, thereby implicating the kind of "interstate dispute previously recognized as requiring resolution under federal law," such that it would be "inappropriate for state law to control." *Nat'l Audubon Soc'y*, 869 F.2d at 1204. Accordingly, even though *AEP* left open the possibility that a narrow type of state-law nuisance claim might be viable, that ruling has no relevance here because Plaintiff has not pleaded such a claim.[11]

[10] The Sixth Circuit has similarly concluded that the Clean Air Act reserves for the states "the right to prescribe requirements more stringent than those set under the Clean Air Act." *Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685, 693 (6th Cir. 2015). But contrary to Plaintiff's suggestion (Mot. 14 n.5), *Merrick* did not suggest that a state may prescribe more stringent requirements *in other states*, as Plaintiff seeks to do here.

[11] Plaintiff's contention that *Kivalina* also "explicitly" left open the viability of state claims addressing harms resulting from global warming is also incorrect. Mot. 14. In *Kivalina* the district court declined to exercise

Plaintiff relies on the district court's flawed decision in *San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal. 2018), which disagreed with *BP*'s decision not to remand. Mot. 14–15. But the *San Mateo* court failed to appreciate the difference between the type of claims that the plaintiffs were alleging and the narrow state-law claims that *AEP* suggested could be viable if not preempted by the Clean Air Act. *See San Mateo*, 294 F. Supp. 3d at 937 (incorrectly holding that "the question of whether" "state law claims relating to global warming" "survived would depend on whether they are preempted by the federal statute that had displaced federal common law") (citing *AEP*, 564 U.S. at 429). As explained above, in an effort to fit within the narrow allowance for state-law regulation of in-state emissions under *Ouellette*, the alternative state-law claims asserted by the *AEP* plaintiffs purported to separately invoke "the law of each State where the defendants operate power plants" in order to set limits on such in-state plants. 564 U.S. at 429; *see also Ouellette*, 479 U.S. at 492 (stating that suits applying state law only to in-state sources are "the only state suits that remain available" under the Clean Air Act). The *San Mateo* court failed to recognize that the narrow category of state-law claims left open in *Ouellette* were inapposite, because the plaintiffs in *San Mateo*, like Plaintiff here, did not argue that the Clean Air Act authorizes state-law nuisance suits against out-of-state sources of pollution—nor could they. As even the *San Mateo* court recognized, the plaintiffs' global-warming based "claims raise[d] national and perhaps global questions." 294 F. Supp. 3d at 939. Under *AEP*, the sort of inherently transboundary and transnational nuisance claim asserted here—if it exists at all—could only be governed by federal common law. *See City of New York*, 2018 WL 3475470 at *4 ("the City's claims are ultimately based on the 'transboundary' emission of greenhouse gases, indicating that these claims arise under federal common law and require a uniform standard of decision"); *BP*, 2018 WL 1064293 at *3 ("as in *Milwaukee I*, *AEP*, and *Kivalina*, a uniform standard of decision is necessary to deal with the issues raised in plaintiffs' complaints").

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supplemental jurisdiction over the state law claims after it dismissed the federal common law claim, 696 F.3d at 854–55, and the plaintiff did not appeal the court's dismissal of the state law claims. Although the concurrence mused that the plaintiff could refile its state law claims in state court, the viability of the state law claims was neither presented to nor addressed by the panel majority.

4. Federal Common Law Is Not a "Preemption Defense"; It Provides an Independent Basis for Federal-Question Jurisdiction

Because Plaintiff's public nuisance claims are governed by federal common law, those claims "aris[e] under the 'laws' of the United States within the meaning of § 1331(a)." *Milwaukee I*, 406 U.S. at 99. As the Supreme Court explained, § 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 Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 850 (1985); *see also Woodward Governor Co. v. Curtiss Wright Flight Sys., Inc.*, 164 F.3d 123, 126 (2d Cir. 1999) ("It is beyond dispute that if federal common law governs a case, that case presents a federal question within the subject matter jurisdiction of the federal courts").

Plaintiff contends that Defendants' argument "reduces to an ordinary preemption defense," which does not "confer removal jurisdiction on this Court." Mot. 10. But that simply mischaracterizes Defendants' argument. As Plaintiff concedes, an "ordinary preemption" defense is generally raised when a plaintiff pleads a *state law claim* that arguably "conflicts with a federal statute." *Fayard v. Ne. Vehicle Servs., LLC*, 533 F.3d 42, 45 (1st Cir. 2008) (quoted in Mot. 11). Here, Defendants are not contending that Plaintiff's state-law nuisance claim addressing transboundary pollution *conflicts* with federal law—the point is that the claims *arise under* federal common law. It is irrelevant that Plaintiff has attempted to cloak these interstate and transboundary emissions suits with state-law labels, because the well-pleaded complaint rule does not prevent removal where, as here, a federal question is presented on the face of the complaint. *See, e.g.*, *New SD*, 79 F.3d at 954–55 (holding that removal jurisdiction existed over plaintiff's purported "purely state law claims" because "[w]hen federal law applies, … it follows that the question arises under federal law"); *Wayne v. DHL Worldwide Express*, 294 F.3d 1179, 1184 (9th Cir. 2002) (noting that despite pleading state-law claims, "[f]ederal jurisdiction would exist in this case if the claims arise under federal common law"); *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 928–29 (5th Cir. 1997) (removal of state-law negligence claim was appropriate because "federal common law governed the liability of air carriers for lost or

damaged goods"). Accordingly, these actions may be removed. 28 U.S.C. § 1441(a). *See BP*, 2018 WL 1064293, at *5 (holding that the well-pleaded complaint rule [did] not bar removal of the[] actions," because "federal jurisdiction exists . . . if the claims necessarily arise under federal common law"); *cf. City of New York*, 2018 WL 3475470, at *4 (holding that the City's "transboundary" nuisance "claims arise under federal common law and require a uniform standard of decision").

Plaintiff inappropriately faults the courts in *BP* and *City of New York* for failing to apply the Supreme Court's decision in *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & MFG.*, 545 U.S. 308 (2005), contending that "there is no exception to *Grable* for questions that 'should be uniform across the nation.'" Mot. at 11; *id.* at 12 n.3. But there was no need for either court to apply *Grable*—which provides federal jurisdiction over state-law-created causes of action that involve disputed and substantial federal questions—because both courts concluded that the plaintiffs' claims, if they existed at all, asserted a *federal cause of action*. *See*, *e.g.*, *BP*, 2018 WL 1064293, at *5. As the *BP* court explained, the plaintiffs' "claims for public nuisance, though pled as state-law claims, depend on a global complex of geophysical cause and effect involving all nations of the planet (and the oceans and atmosphere). It necessarily involves the relationships between the United States and all other nations." *Id.* Because the claims themselves were federal in nature, it was unnecessary to ask whether they involved a disputed, substantial federal question. The decision not to discuss *Grable* was thus entirely proper.

5. Any Displacement of Federal Common Law by Statute Would Not Create State Common-Law Claims

Plaintiff wrongly asserts that, because *AEP* and *Kivalina* held that the CAA displaced federal common law remedies, state law may take the place of the now-displaced federal common law. Mot. 9. This argument would turn *Erie* on its head. As discussed above, federal common law governs a claim when, *inter alia*, the claim implicates "uniquely federal interests" that make it "inappropriate for state law to control." *Tex. Indus.*, 451 U.S. at 640–41. That Congress then enacts a statutory scheme that so comprehensively addresses the subject as to

leave no room for federal common law remedies does not mean that *state* common law remedies suddenly become viable. If anything, the enactment of a comprehensive federal statutory framework in an area previously occupied by federal common law—especially in an area like interstate pollution where state law has *never* applied—underscores the federal nature of the field and reinforces the notion that it would be "inappropriate for state law to control" except to the extent that Congress authorizes it. *Id.* at 641; *see also Ouellette*, 479 U.S. at 492 ("it is clear that the only state suits that remain available are those specifically preserved by the Act."). Plaintiff's nuisance claims can arise only under federal common law—not state law.

Moreover, displacement of federal common law affects only the availability of a federal *remedy*—not the court's *jurisdiction*. As the Court explained in *AEP*, "the Clean Air Act and the EPA actions it authorizes displace any federal common law *right to seek abatement*" of greenhouse gas emissions that allegedly cause global warming. 564 U.S. at 424. Because Congress removed the right to seek abatement, federal courts cannot "set limits on greenhouse gas emissions in the face of law empowering EPA to set the same limits." *Id.* at 429. That holding is consistent with the axiom that "[j]udicial power can afford no remedy unless a right that is subject to that power is present." *Kivalina*, 696 F.3d at 857. Thus, to say that federal common law has been "displaced" is simply to say that there is no longer any right to a judicial *remedy* under federal common law. *See id.* at 856 ("[W]hen federal statutes directly answer the federal question, federal common law does not provide a remedy because legislative action has displaced the common law."). In short, "displacement of a federal common law right of action means *displacement of remedies*." *Id.* at 857.

But the absence of a valid cause of action under federal common law neither affects subject matter jurisdiction nor alters the federal character of the Plaintiff's claims. *See 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 (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction . . . ."); *Lawless v. Steward Health Care Sys., LLC*, 894 F.3d 9, 18 (1st Cir. 2018) ("A court surveying its subject-matter jurisdiction 'reviews a plaintiff's complaint not to judge

the merits, but to determine whether [it] has the authority to proceed.'") (quoting *BIW*, 132 F.3d at 832 n.4). Neither *AEP* nor *Kivalina* suggested that the Clean Air Act converted plaintiffs' federal common law claims into state law claims. On the contrary, the effect of Congress enacting the Clean Air Act was to refine and focus the available remedies for interstate and global environmental problems. And far from holding that the Clean Air Act obliterated federal common law so as to deprive them of jurisdiction, both the Supreme Court in *AEP* and the Ninth Circuit in *Kivalina* held only that the plaintiffs' necessarily federal claims were invalid.

AEP and *Kivalina* thus direct a two-step analysis to determine *first* whether, given the nature of the claims, federal law governs, and *second* whether Plaintiff has stated claims upon which relief may be granted. *See AEP*, 564 U.S. at 422; *Kivalina*, 696 F.3d at 855. This is precisely the approach the Ninth Circuit followed in *Kivalina*. First, in Section II.A of the opinion, it addressed the "threshold question[] of whether [the plaintiffs' nuisance theory was] viable under federal common law in the first instance." *Id.* Second, after answering that question in the affirmative, it determined, in Sections II.B and II.C, that dismissal was required because a federal statute had displaced the remedy the plaintiffs sought. *Id.* at 856–58; *see also California v. Gen. Motors Corp.*, 2007 WL 2726871, at *16 (N.D. Cal. Sept. 17, 2007) (explaining that if the case were justiciable the first inquiry would be "whether there exists a federal common law claim for nuisance that would authorize Plaintiff's action for damages against the Defendant automakers for creating and contributing to global warming," and that if "such a common law claim exists, the next step in the inquiry would be to determine whether the available statutory guidelines speak sufficiently to the issue so as to displace the common law claim").

Plaintiff's motion to remand implicates the first (jurisdictional) step of the analysis, not the second. And, as Defendants have explained, Plaintiff's claims arise under federal common law because disputes about global climate change are inherently federal in nature. Here, Plaintiff asks the Court to assess the reasonableness of Defendants' worldwide fossil fuel production insofar as those activities have led to greenhouse gas emissions by billions of third parties around

the world, which, in turn, have allegedly increased global temperatures and contributed to rising seas that have purportedly harmed Plaintiff. *See Kivalina*, 696 F.3d at 855 ("[F]ederal common law includes the general subject of environmental law and specifically includes ambient or interstate air and water pollution."). Accordingly, Plaintiff's nuisance claim arises under federal common law, whether or not the Clean Air Act has displaced any federal common law remedy Plaintiff might otherwise be able to obtain.[12]

B. By Seeking to Second-Guess and Undo Federal Regulations and Cost-Benefit Analyses, Plaintiff's Claims Raise Disputed, Substantial Federal Interests Under *Grable*

Even if Plaintiff's claims did not arise under federal common law (which they do), the Court should deny the remand motion because the claims depend on the resolution of disputed, substantial federal questions relating to the extraction, processing, promotion, and consumption of global energy resources. The Supreme Court has "recognized for nearly 100 years that in certain cases federal-question jurisdiction will lie over state-law claims that implicate significant federal issues." *Grable*, 545 U.S. at 312.

"[F]ederal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn v. Minton*, 568 U.S. 251, 258 (2013) (citing *Grable*, 545 U.S. at 313–14). Applying this test "calls for a 'common-sense accommodation of judgment to [the] kaleidoscopic situations' that present a federal issue" and thus "justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues." *Grable*, 545 U.S. at 312–13 (quoting *Gully v. First Nat'l Bank in Meridian*, 299 U.S. 109, 117 (1936)); *see also* R.H. Fallon, Jr. et al., Hart & Wechsler's The

[12] In *San Mateo* the court erred by leaping to answer the step-two question in the context of a remand motion. 294 F. Supp. 3d at 937. The court compounded that error when it held that displacement meant "federal common law . . . no longer exists" and thus "does not govern the plaintiffs' claims[.]" *Id.* As Defendants have explained, displacement merely eliminates an otherwise available *remedy*—it does not create a jurisdictional vacuum that state common law can then fill. And whether or not any vestigial state law claims remain, the federal court has jurisdiction over them at the time of removal pursuant to 28 U.S.C. § 1367. The decision whether to exercise supplemental jurisdiction necessarily requires federal jurisdiction in the first instance.

Federal Courts & the Federal System 832 (7th ed. 2015) (under *Grable*, the Court exercises discretion "to tailor jurisdiction to the practical needs of the particular situation"). Plaintiff's claims necessarily raise federal issues, including federal regulatory authority over national security, foreign affairs, energy policy (including the relative costs and benefits of the production and use of fossil fuels), environmental protection, and the navigable waters of the United States.

1. Plaintiff's Claims Necessarily Raise Multiple Federal Issues

Plaintiff argues that its claims concerning the extraction and promotion of fossil fuels do not necessarily raise federal issues because, supposedly, "[n]one . . . depends on federal law to create the right to relief, none incorporates a federal tort duty that Defendants allegedly violated, and none turns on the application or interpretation of federal law in any way." Mot. 22. Plaintiff's contention that *no* element of their *global*-warming-based liability claims entails analysis of *any* significant federal issue is self-evidently wrong. Plaintiff's claims have a significant impact on foreign affairs, necessarily depend on the reasonableness of Defendants' actions under federal cost-benefit analyses, are thinly veiled attacks on federal foreign relations and regulatory decisions, and implicate duties to disclose imposed by federal statutes and regulations. Any one of these issues suffices under *Grable*. And, when these issues are considered together "[b]ased on the totality of the circumstances," it is plain that "the federal ingredients of the case predominate." *One & Ken Valley Hous. Grp. v. Maine State Hous. Auth.*, 716 F.3d 218, 224 (1st Cir. 2013).[13]

a. Plaintiff's Claims Have a Significant Impact on Foreign Affairs

Plaintiff's claims raise substantial federal issues because they have far "more than [an] incidental effect on foreign affairs." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 424 (2003); *see also Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 374–80 (2000). Indeed, in the *BP* order denying remand, the court held that climate change litigation "necessarily involves the

[13] In the First Circuit, *Grable* "federal ingredient jurisdiction is determined by the totality of the circumstances, not by a single-factor test." *One & Ken Valley Hous. Grp.*, 716 F.3d at 224. Yet the court in *San Mateo*—a case on which Plaintiff heavily relies—failed to holistically consider the numerous federal issues implicated by plaintiffs' claims.

relationships between the United States and all other nations" because the claims, "though pled as state-law claims, depend on a global complex of geophysical cause and effect involving all nations on the planet." *BP*, 2018 WL 1064293, at *5. It is thus no surprise that both courts to consider the merits of these claims have dismissed them because they "severely infringe upon the foreign-policy decisions that are squarely within the purview of the political branches of the U.S. Government." *City of New York*, 2018 WL 3475470, at *7; *see also City of Oakland v. BP P.L.C.*, 2018 WL 3109726, at *7 (N.D. Cal. June 25, 2018) (Judge Alsup dismissing climate change nuisance claims on same grounds). Because Plaintiff's claims implicate the "exercise of state power that touches on foreign relations" in a significant way, the state law basis "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." *Garamendi*, 539 U.S. at 413 (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964)).

The question of how to address climate change has been the subject of international negotiations for decades, from the adoption of the United Nations Framework Convention on Climate Change in 1992 through the adoption of the Paris Agreement in 2016, and to this day. As President Obama declared in 2013:

> Just as no country is immune from the impacts of climate change, no country can meet this challenge alone. That is why it is imperative for the United States to couple action at home with leadership internationally. America must help forge a truly global solution to this global challenge by galvanizing international action to significantly reduce emissions, prepare for climate impacts, and drive progress through the international negotiations.

Lipshutz Decl., ex. 11.

The United States' role in these delicate negotiations has evolved over time but has always sought to balance environmental policy with economic growth. After President Clinton signed the Kyoto Protocol in 1997, for example, the U.S. Senate rejected it 95-0, out of concern it would seriously harm the economy while not regulating the emissions of developing nations. *See* S. Res. 98, 105th Cong. (1997). Congress enacted a series of laws barring the EPA from

implementing or funding the Protocol. *See* Pub. L. No. 105-276, 112 Stat. 2461, 2496 (1998); Pub. L. No. 106-74, 113 Stat. 1047, 1080 (1999); Pub. L. No. 106-377, 114 Stat. 1441, 1441A-41 (2000). President Trump cited similar economic concerns when he withdrew the United States from the Paris Agreement. Lipshutz Decl., Ex. 12.

Plaintiff seeks to replace these international negotiations and Congressional and Executive decisions with their own preferred foreign policy, using the ill-suited tools of Rhode Island law and private litigation. Plaintiff's claims not only ignore corporate separateness but purport to reach all of Defendants' historical production, much of which has taken place overseas and certainly outside of Rhode Island. *See*, *e.g.*, Lipshutz Decl. ¶¶ 25–31 & Exs. 23–29; *see also City of Oakland*, 2018 WL 3109726, at *7 (these claims "seek to impose liability" for "production and sale of fossil fuels worldwide"). But the Supreme Court has squarely held that states cannot enact or use their laws to supplant or supplement this country's foreign policy.

In *Crosby*, for example, Massachusetts passed a law barring state entities from transacting with companies doing business in Burma to spur that country to improve its human rights record. 530 U.S. at 366–70. But because the law "undermine[d] the President's capacity . . . for effective diplomacy" by "compromis[ing] the very capacity of the President to speak for the Nation," the Supreme Court struck it down. *Id.* at 381, 388. As the Court explained, "the President's maximum power to persuade rests on his capacity to bargain for the benefits of access to the entire national economy without exception for enclaves fenced off willy-nilly by inconsistent political tactics." *Id.* at 381. In other words, the Court held, "the President's effective voice" on matters of foreign affairs must not "be obscured by state or local action." *Id.* Likewise, in *Garamendi*, the Court invalidated California's statutory effort to encourage Holocaust reparations by European insurance carriers based on "the likelihood that state legislation will produce . . . more than incidental effect in conflict with express foreign policy of the National Government . . . ." 539 U.S. at 420. "Quite simply," the Court explained, "if the California law is enforceable the President has less to offer and less economic and diplomatic leverage as a consequence." *Id.* at 424 (alterations omitted).

States and local governments have roles to play in combatting climate change. Yet "federal judicial power" must remain "unimpaired for dealing independently, wherever necessary or appropriate, with essentially federal matters" like the ones at issue here. *See Standard Oil*, 332 U.S. at 307. And there is no denying that Plaintiff's claims implicate substantial federal issues and would substantially interfere with U.S. foreign policy.

b. Plaintiff's Claims Require Federal-Law-Based Cost-Benefit Analyses

Plaintiff's nuisance claims also require determining whether the harms caused by Defendants' conduct in extracting, refining, and promoting fossil fuels outweigh the benefits of that conduct to society. *See State v. Lead Indus., Ass'n, Inc.*, 951 A.2d 428, 446–47 (R.I. 2008) (relying on Restatement (Second) of Torts in holding that an element of a nuisance claim is that the defendant's conduct was "unreasonable," which "is not determined by a simple formula," but which "will depend upon the activity in question and the magnitude of the interference it creates"); *City of Oakland*, 2018 WL 3109726, at *5, *6 ("plaintiffs' claims require a balancing of policy concerns"); *see also* Compl. ¶ 232 ("The seriousness of rising sea levels, higher sea level, more frequent and extreme drought, more frequent and extreme precipitation events, more frequent and extreme heat waves, and the associated consequences . . . is extremely grave and outweighs the social utility of Defendants' conduct").

But Congress has *already* weighed, and continues to weigh, the costs and benefits of fossil fuels, directing federal agencies to permit—and even promote—maximum production of fossil fuels while balancing environmental concerns. *See supra* n. 5. For decades, federal law has required agencies to weigh the costs and benefits of fossil fuel extraction. *See, e.g.*, 42 U.S.C. § 13384 ("[T]he Secretary shall transmit a report to Congress containing a comparative assessment of alternative policy mechanisms for reducing the generation of greenhouse gases. Such assessment shall include a short-run and long-run analysis of the social, economic, energy, environmental, competitive, and agricultural costs and benefits, including costs and benefits for jobs and competition, and the practicality" of various "mechanisms" for reducing greenhouse

gases); *id.* § 13389(c)(1).[14] These federal statutes are not, as Plaintiff contends, merely the "factual backdrop of federal regulation," Mot. 22; rather, these statutes require exactly the kind of cost-benefit analysis that Plaintiff would have the state court undertake. *See AEP*, 564 U.S. at 428–29 (requiring federal judges in public nuisance suits to determine what amount of carbon dioxide emissions is unreasonable "cannot be reconciled with the decisionmaking scheme Congress enacted"); *Kivalina*, 696 F.3d at 857 ("Congress ha[s] acted to empower the EPA to regulate greenhouse gas emissions."); *City of New York*, 2018 WL 3475470, at *5 ("Congress has expressly delegated to the EPA the determination as to what constitutes a reasonable amount of greenhouse gas emission under the Clean Air Act.").[15]

And these congressional directives have regulatory teeth. All federal agencies must assess the costs and benefits of significant regulations, where applicable, and impose a regulation "only upon a reasoned determination that the benefits . . . justify its costs." Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993). But energy production regulation has even more detailed cost-benefit analysis standards. For example, the Bureau of Land Management requires federal oil and gas lessees to drill "in a manner which . . . results in maximum ultimate economic recovery of oil and gas with minimum waste," 43 C.F.R. § 3162.1(a), but reserves the power to

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[14] A non-exhaustive list of federal laws calling for this balancing include: Clean Air Act, 42 U.S.C. § 7401(c) (intent "to encourage or otherwise promote reasonable . . . governmental actions . . . for pollution prevention"); Mining and Minerals Policy Act, 30 U.S.C. § 21a (intent to encourage "economic development of domestic mineral resources" including oil and gas balanced with "environmental needs"); Coastal Zone Management Act, 16 U.S.C. § 1451 (balancing "[t]he national objective of attaining a greater degree of energy self-sufficiency" with "[i]mportant ecological . . . values in the coastal zone"); Federal Lands Policy Management Act, 43 U.S.C. § 1701(a) (requiring "the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals" including oil and gas while "protect[ing] the quality of . . . ecological, environmental, air and atmospheric, water resource, and archeological values"); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 (finding that coal mining is "essential to the national interest" but must be balanced by "effort[s] . . . to prevent or mitigate adverse environmental effects"); National Environmental Policy Act, 42 U.S.C. §§ 4321–70 (requiring disclosure and evaluation of known or foreseeable environmental impacts of federal action).

[15] Plaintiff argues that if the existence of this sort of regulatory cost-benefit analysis were sufficient grounds to remove, then "*any* state law nuisance or products liability case against a company subject to federal regulation would be subject to removal." Mot. 26. But given the *sui generis* nature of these climate change-related tort claims—which inherently entail a uniquely broad cost-benefit analysis that requires economy-wide considerations on a national and international scale—denying Plaintiff's Motion will not lead to a "'horde of cases' wending their way to federal courts." *Rhode Island Fishermen's All., Inc. v. Rhode Island Dep't Of Envtl. Mgmt.*, 585 F.3d 42, 52 (1st Cir. 2009).

impose "reasonable measures" to "minimize adverse impacts to other resource values," including ecological values, *id*. § 3101.1–2. Likewise, regulations governing offshore oil and gas drilling require regulation of leases to maximize recovery of energy resources and prevent waste, while minimizing damage to the environment. *See* 30 C.F.R. § 550.120. And the Interior Secretary must seek "maximum economic recovery" from federal leases, *id*. § 745.13(j), without delegating to states the Secretary's duty to comply with federal laws and regulations, including environmental laws like the CAA. *Id*. § 745.13(b).

Over time, agencies have developed mechanisms to weigh the effect of carbon emissions on the climate, primarily through a "social cost of carbon" metric—which Plaintiff expressly invokes (Compl. ¶ 184)—for regulatory cost-benefit analyses. *See* Notice of Removal, ECF No. 1 ¶ 25.[16] Although the magnitude and methodologies for estimating the social cost of carbon are subject to dispute, and may evolve over time, the fact is that federal agencies routinely incorporate this metric into analysis of regulatory proposals. *See, e.g.*, Lipshutz Decl., Ex. 13 (demonstrating that federal agencies are currently using social cost of carbon estimation methodology in regulatory decisionmaking).[17]

Moreover, the federal government actively participates in promoting fossil fuel exploration and use through its regulatory, taxing, and purchasing powers. As noted above, several federal regulatory regimes require maximum economic recovery of regulated energy resources, or the minimization of waste. *See supra* n.5. For example, the Federal Coal Leasing Act Amendments to the Mineral Leasing Act condition federal leases on "diligent development"

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[16] Exec. Order No. 13,783, Promoting Energy Independence and Economic Growth, § 5 (Mar. 28, 2017), reprinted in 82 Fed. Reg. 16,093 (Mar. 31, 2017) (directing federal agencies to ensure that estimates of the social cost of carbon are conducted consistent with guidance in OMB Circular A-4).

[17] Federal courts have regularly assessed whether agency action adequately accounted for these costs and have set aside agency actions that failed to do so. *See, e.g.*, *WildEarth Guardians v. Jewell*, 738 F.3d 298, 311 (D.C. Cir. 2013); *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1198, 1200 (9th Cir. 2008); *Mont. Envtl. Info. Ctr. v. Office of Surface Mining*, 274 F. Supp. 3d 1074, 1099 (D. Mont. 2017), *amended in part, adhered to in part*, 2017 WL 5047901 (D. Mont. Nov. 3, 2017); *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1196 (D. Colo. 2014).

to achieve "maximum economic recovery of the coal within the proposed leasing tract." 30 U.S.C. §§ 201(a)(3)(C); 207(b)(1); *see also* 43 C.F.R. § 3480.0-5(a)(21) (defining "maximum economic recovery" to mean that "all profitable portions of a leased Federal coal deposit must be mined"). The federal government also maintains the Strategic Petroleum Reserve, purchasing fuel from producers, including some Defendants here. *See* 10 C.F.R. § 626.6.[18] It loans fuel to distributors, again including some Defendants here, to ensure the adequacy of domestic fuel supplies. *See* Energy Policy and Conservation Act of 1975, 42 U.S.C. § 6201 *et seq.*; Lipshutz Decl., Ex. 14.

Federal law would necessarily govern the cost-benefit analysis required by Plaintiff's nuisance claims. Adjudicating these claims would require a court to interpret federal regulations (and the balance they strike between energy and environmental concerns) and to assess Defendants' compliance with the same. The Fifth Circuit recently held that similar claims gave rise to federal jurisdiction. *See Bd. of Comm'rs of the Se. La. Flood Prot. Auth.-E v. Tenn. Gas Pipeline Co.*, 850 F.3d 714, 720 (5th Cir. 2017). In *Tennessee Gas*, the Fifth Circuit determined that a state agency's "state law causes of action" against energy companies for alleged ecological harms "necessarily raise[d] federal issues sufficient to justify federal jurisdiction." *Id.* at 721, 725–26. There, as here, the plaintiff argued that its claims rested on state law. *Id.* at 722–23. The Fifth Circuit rejected that argument because no state court had used the state law on which the plaintiff relied "as the basis for the tort liability[.]" *Id.* at 723. Plaintiff's effort to distinguish this case, Mot. 24–25, fails because it identifies no basis for concluding that Rhode Island law does or could supply adequate standards for determining which persons in the world may be held liable for the effects of global warning. Accordingly, any basis for liability "would have to be drawn from federal law." *Tenn. Gas*, 850 F.3d at 723.

[18] *See, e.g.,* Lucian Pugliaresi, *The Homeland Threat to Affordable US Energy,* The Hill (May 18, 2018) (citing national policy to reduce oil supply disruption costs and ensure security of supply through policy responses such as the Strategic Petroleum Reserve, collective efforts on burden sharing with allies through the International Energy Agency, and the U.S. Fifth Fleet, and noting President Obama's 2012 State of the Union Speech announcing the opening of 75 percent of the U.S. potential offshore oil and gas resources to exploration and production.), *available at* http://thehill.com/opinion/energy-environment/386973-the-homeland-threat-to-affordable-us-energy.

Nor does the applicability of *Grable* turn on whether the cost-benefit analyses required by Plaintiff's claims are "uniquely" federal. *See Tex. Indus.*, 451 U.S. at 640; *AEP*, 564 U.S. at 421. It suffices that the analyses undisputedly implicate "significant" federal issues. Plaintiff argues that remand is required because the Complaint does not expressly invoke governing federal standards. *See id.* 22–26. But the "artful pleading" doctrine "empowers courts to look beneath the face of the complaint . . . to determine whether the plaintiff has sought to defeat removal by asserting a federal claim under state-law colors, and to act accordingly." *BIW Deceived*, 132 F.3d at 831. Therefore "a plaintiff cannot defeat removal by omitting necessary federal questions from a complaint." *LaBelle v. McGonagle*, 2008 WL 3842998, at *2 (D. Mass. Aug. 15, 2008) (denying motion to remand under *Grable*).

c. Plaintiff's Claims Are a Collateral Attack on Federal Regulatory Oversight of Energy and the Environment

Federal jurisdiction under *Grable* also exists where, as here, suits amount to a "collateral attack" on a federal agency's regulatory decisions. *Bader Farms, Inc. v. Monsanto Co.*, 2017 WL 633815, at *3 (E.D. Mo. Feb. 16, 2017). This principle is particularly salient in public nuisance cases, where courts are hesitant to find that conduct undertaken pursuant to "a comprehensive set of legislative acts or administrative regulations" is actionable. Restatement (Second) of Torts § 821B cmt. f (Am. Law Inst. 1977); *see Lead Indus., Ass'n, Inc.*, 951 A.2d at 446 (relying on Restatement to define public nuisance); *see also Richmond Realty, Inc. v. Town of Richmond*, 644 A.2d 831, 832 (R.I. 1994) ("actions . . . authorized by law . . . cannot constitute a public nuisance"). For good reason: In the context of a comprehensive regulatory scheme, nuisance claims amount to "a collateral attack on" that scheme, "premised on the notion that [it] provides inadequate protection." *Tenn. Gas*, 850 F.3d at 724 (alteration in original).

In general, Plaintiff's public nuisance claims seek a different balancing of social harms and benefits than that struck by Congress, pursuant to a comprehensive scheme of federal statutes that empower agencies to regulate the production, marketing, and sale of fossil fuels, as well as the associated environmental impacts. Moreover, to the extent that the Complaint's

claims are based on harms associated with rising sea levels and coastal erosion, these claims amount to a collateral attack on the comprehensive regulatory scheme that Congress established for the protection and preservation of the navigable waters of the United States. *See Tenn. Gas*, 850 F.3d at 724. Congress has vested the Army Corps of Engineers with exclusive jurisdiction over construction and dredging activities in navigable waters, 33 U.S.C. § 403, and numerous federal statutes authorize the Corps to regulate navigable waters. Notably, the Rivers and Harbors Act ("RHA") authorizes the Corps to (among other things) preserve navigation by regulating construction and dredge-and-fill activities in navigable waters, *id*. §§ 401–413, and "to investigate, study, plan, and implement structural and nonstructural measures for the prevention or mitigation of shore damages." *Id.* § 426. Congress, through the RHA and other statutes and appropriations, has charged the Corps with authority and responsibility to undertake civil works activities to protect the navigable waters, including flood risk management, navigation, recreation, infrastructure, environmental stewardship, and emergency response. Plaintiff's claims, and the remedies sought in this action, seek to upend this congressionally-delegated federal regulatory scheme for protecting and preserving the navigable waters of the United States by having a court second-guess decisions made by the Corps.

Federal jurisdiction over these claims, which attack the merits of federal agencies' balancing with respect to fossil fuels and oversight of navigable waters, is required under *Grable*. *See Tenn. Gas*, 850 F.3d at 725 (removal under *Grable* appropriate where "the scope and limitations of a complex federal regulatory framework are at stake" in state law claims).[19] Numerous cases have held that such collateral attacks give rise to federal question jurisdiction.

[19] The similarities between this case and *Tennessee Gas* further reinforce *Grable*'s applicability. There, a plaintiff sought damages and injunctive relief against numerous oil and gas companies whose actions allegedly caused erosion of coastal lands, leaving south Louisiana more vulnerable to hurricanes and tropical storms. *Tenn. Gas Pipeline*, 850 F.3d at 720–21. The Fifth Circuit affirmed the district court's finding that the substantiality test under *Grable* was satisfied because the plaintiff's claims amounted to a "collateral attack on an entire regulatory scheme . , . premised on the notion that [the scheme] provides inadequate protection," particularly because the relevant federal statutes, including the RHA and CWA, "plainly regulate issues of national concern" and "the case affects an entire industry rather than a few parties." *Id.* at 724 (internal quotations omitted). The court noted that the validity of the 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." *Id.*

See Pet Quarters, Inc. v. Depository Tr. & Clearing Corp., 559 F.3d 772, 779 (8th Cir. 2009) (complaint "presents a substantial federal question because it directly implicates actions taken by" a federal agency); *McKay v. City & Cty. of S.F.*, 2016 WL 7425927, at *4–6 (N.D. Cal. Dec. 23, 2016) (denying remand and finding *Grable* jurisdiction because state-law claims were "tantamount to asking the Court to second guess the validity of the FAA's decision"). Plaintiff argues that its claims require "backward-looking" balancing only, as distinguished from federal agencies' "prospective" balancing. Mot. 23. This is a false distinction. Plaintiff's claims hinge on whether federal agencies have struck the proper balance in weighing the competing interests. In fact, Plaintiff would have a state court re-do federal officials' weighing of the costs and benefits of Defendants' activities. Plaintiff's claims are thus a collateral attack on federal regulatory oversight of energy, the environment, and navigable waters.

Moreover, Rhode Island law confirms that such substantial federal issues are "necessarily raised" by Plaintiff's nuisance claims. It is firmly established that a defendant's actions "authorized by law cannot be held to be a public nuisance." *State v. Barnes*, 40 A. 374, 375 (R.I. 1898); *see also Richmond Realty, Inc. v. Town of Richmond*, 644 A.2d 831, 832 (R.I. 1994) (defendant's "actions were authorized by law and cannot constitute a public nuisance"). Accordingly, Plaintiff's nuisance claims necessarily raise substantial federal questions, notably, whether and to what extent the levels of global emissions to which Plaintiff alleges Defendants substantially contributed exceed the levels authorized by the CAA and other statutes.

d. Plaintiff's Claims Necessarily Implicate Federal Issues Related to the Navigable Waters of the United States

The Corps' authority over issues on which Plaintiff's claims are based—namely navigable waters and the degree to which they are rising—underscores the need for a court to evaluate the federal regulations under which the Corps operates to assess Plaintiff's assertions regarding present and future injury. To succeed on its public nuisance claim, Plaintiff will be required to prove causation. *See Lead Indus. Ass'n*, 951 A.2d at 450. A necessary and critical element of Plaintiff's theory of causation is the rising sea levels in the areas alleged to be

impacted. To evaluate whether Defendants' extraction, processing, and promotion of global energy resources is the proximate or legal cause of the alleged sea level rise and increased flooding, a court will have to evaluate the adequacy of the federal protections and infrastructure to protect navigable waters and guard against sea level rise.

Determining whether (and to what extent) Plaintiff will suffer injury—and evaluating the remedies it seeks—will also require interpretation of federal law. Plaintiff asks this Court for "[e]quitable relief, including abatement of the nuisances." *See* Compl., Prayer for Relief. But the RHA states that "it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any . . . water of the United States . . . except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army." 33 U.S.C. § 403. Thus, Plaintiff will have to show that the remedy it seeks is consistent with federal action and will be authorized by the Corps. This will require a court to interpret an extensive web of federal regulations. For example, before approving a project "[t]he benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments." 33 C.F.R. § 320.4(a)(1). And "in the evaluation of every application" to undertake a project in navigable waters, the Corps must also assess "the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work." *Id*. at § 320.4(a)(2). Even attempts by Plaintiff to modify or alter existing flood-mitigation structures require approval of the Corps, and the Corps cannot grant such approval if the project will be "injurious to the public interest." 33 U.S.C. § 408(a).

In short, Congress has vested the Corps with jurisdiction over navigable waters of the United States, and the Corps exercises that authority pursuant to a comprehensive regulatory scheme. Because Plaintiff's claims are based on the relationship between Defendants' activities and navigable waters, and because Plaintiff's requested remedies would affect navigable waters, this case presents numerous substantial and disputed federal issues that provide a basis for federal jurisdiction.

e. Plaintiff's Promotion Claims Implicate Federal Law Duties To Disclose

Plaintiff attempts to sidestep *Grable* by alleging that the entire federal balancing of harms and benefits is a sham because Defendants failed to disclose material facts to federal regulators. Compl. ¶ 1 (alleging a "coordinated, multi-front effort to conceal and deny their own knowledge of [fossil fuel] threats, discredit the growing body of publicly available scientific evidence, and persistently create doubt in the minds of . . . regulators" and others); *see also id.* ¶¶ 105, 148–49, 167, 177. The purported goal of this effort was to fool those federal agencies and avoid regulation that might have curtailed Defendants' activities and avoided the alleged impacts to Plaintiff. *See, e.g.*, *id.* ¶¶ 186, 229(d) (Defendants "disseminat[ed] and fund[ed] the dissemination of information intended to mislead . . . regulators" thereby "delay[ing] efforts to curb those emissions").

This alleged deception is central to Plaintiff's allegations. *See, e.g.*, Compl. ¶ 105 (Defendants' "dogged campaign against regulation of [fossil fuel] products based on falsehoods, omissions, and deceptions" and other acts "have substantially and measurably contributed to the State's climate change-related injuries"); *id.* ¶ 177 ("As a result of Defendants' tortious, misleading conduct, . . . policy-makers[] have been deliberately and unnecessarily deceived about" the effects of Defendants' products on climate change and sea levels). Put another way, Plaintiff's claims rest on the premise that Defendants had a duty to inform federal regulators about known harms; that their statements were material to the regulators' decision not to curtail Defendants' conduct; and that Defendants' omissions impeded regulators' ability to perform their duties. These questions of duty, materiality, and foreseeable impact necessarily give rise to federal questions. Federal law governs claims of fraud on federal agencies, and "the relationship between a federal agency and the entity it regulates is inherently federal in character because the relationship originates from, is governed by, and terminates according to federal law." *Buckman Co. v. Pls.' Legal Comm.*, 531 U.S. 341, 347 (2001); *see also Grable*, 545 U.S. at 314–15 (removal of state law claim challenging compatibility of agency action with federal statute).

Plaintiff argues that remand is required because it has not alleged any duty to disclose based on federal statutes or regulations. Mot. 22. But Plaintiff's allegations implicate duties to disclose imposed by federal law. For example, OCSLA requires the Secretary of the Interior to promulgate and administer regulations that comply with the CAA's National Ambient Air Quality Standards ("NAAQS") to govern offshore activities. *See* 43 U.S.C. § 1334(a)(8). These regulations are found at 30 C.F.R. §§ 550.302–04 and govern the disclosure of information to federal regulators about air emissions.

To understand if Defendants' alleged misrepresentations and omissions affected their relationship with their federal regulators will require a court to construe federal law to determine what Defendants should have told regulators and how the regulators would have responded. *See Tenn. Gas*, 850 F.3d at 723 (finding necessary and disputed federal issue because state tort claims could not "be resolved without a determination whether multiple federal statutes create a duty of care that does not otherwise exist under state law"); *Bader Farms*, 2017 WL 633815, at *3 (denying remand where plaintiff alleged federal agency failed to regulate "due to defendant's fraudulent concealment," since federal law "identifies the duty to provide information [to federal regulators] and the materiality of that information"); *Boyeson v. S.C. Elec. & Gas Co.*, 2016 WL 1578950, at *5 (D.S.C. Apr. 20, 2016) (removal proper where "allegations of negligence appear on their face to not reference federal law, [but] federal issues are cognizable as the source for the duty of care . . . ").[20]

2. The Federal Issues Are Disputed and Substantial

Plaintiff cannot deny that the federal questions presented here are actually disputed. The Complaint makes the presence of these disputes plain. *See, e.g.*, Compl. ¶¶ 232, 257. Plaintiff

[20] The court reached a similar conclusion in *County of Santa Clara v. Astra USA, Inc.*, 401 F. Supp. 2d 1022 (N.D. Cal. 2005). There, Santa Clara sued pharmaceutical companies in state court, alleging that the companies had overcharged for drugs. *Id.* at 1024. To skirt the federal statutes, regulations, and contracts controlling lawful drug prices—and thereby avoid litigating in federal court—the County argued that its claims required only a determination of whether the companies "acted unfairly and fraudulently when they allegedly 'misrepresented and failed to disclose . . . the true facts regarding their prices.'" *Id.* at 1026. The court concluded that federal-question jurisdiction under *Grable* supported removal because "[t]here is simply no way to ignore federal law." *Id.* at 1027. Because federal law is the standard by which Plaintiff's allegations of duty, materiality, and causation must be judged, federal jurisdiction lies.

mischaracterizes its Complaint, saying that it "does not ask that th[e] federal regulatory decisions" cited in the Notice of Removal "be amended or supplanted in any regard." Mot. 27. But Plaintiff's entire pleading—which is premised on the notion that federal regulators have struck the wrong balance between the costs and benefits of Defendants' conduct—is a collateral attack on federal energy policy that expressly encouraged activities that now form the basis for Plaintiff's public nuisance claim. *See supra* n.5.

The necessary federal questions raised in this case are substantial issues and warrant a federal forum under *Grable*. As Plaintiff acknowledges, Mot. 26, the Court must consider "the importance of the issue to the federal system as a whole." *Gunn*, 568 U.S. at 260. The issues here are of great importance: This case sits at the intersection of federal energy and environmental regulations, and implicates foreign policy and national security. The substantiality inquiry is satisfied when the federal issues in a case concern even one of those subjects. *See Bennett*, 484 F.3d at 910 (*Grable* "thought a federal forum especially appropriate for contests arising from a federal agency's performance of duties under federal law, doubly so given the effect on the federal Treasury"); *In re Nat'l Sec. Agency Telecomms. Records Litig.*, 483 F. Supp. 2d 934, 943 (N.D. Cal. 2007) (state-law privacy claims conferred federal jurisdiction because of the application of the state secrets doctrine); *Grynberg Prod. Corp. v. British Gas, p.l.c.*, 817 F. Supp. 1338, 1356 (E.D. Tex. 1993) ("[Q]uestions of international relations are almost always substantial."). That the federal issues in this case concern all three subjects leaves no doubt that the issues are substantial enough to support federal jurisdiction.

Contrary to Plaintiff's assertion, Mot. 26–27, the federal issues in this case are nothing like the "fact-bound and situation-specific" legal malpractice question at issue in *Gunn*. 568 U.S. at 263. Plaintiff's position is particularly baffling given that the courts in *City of New York* and *City of Oakland* dismissed those climate change cases for failure to state a claim, which demonstrates that Plaintiff's claims raise precisely the "pure issue of law" that Plaintiff suggests is lacking here. Mot. 26. Moreover, Plaintiff's effort to hold a selection of large energy companies liable for the effects of global climate change, given decades of federal policy that has

encouraged Defendants' conduct, would have effects far beyond Rhode Island. The issues raised by this case are of great "importance . . . to the federal system as a whole," making federal jurisdiction appropriate. *Gunn*, 568 U.S. at 260. As in *Tennessee Gas*, "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." 850 F.3d at 724. "The implications for the federal regulatory scheme of the sort of holding that [Plaintiff] seeks would be significant, and thus the issues are substantial." *Id.*

3. Federal Jurisdiction Does Not Upset Principles of Federalism

Federal jurisdiction here is fully "consistent with congressional judgment about the sound division of labor between state and federal courts." *Grable*, 545 U.S. at 313. The issues embedded in Plaintiff's claims are traditional federal issues: specifically, regulation of vital national resources, foreign policy and national security, and federal revenue collection. Federal courts are the traditional forums for adjudicating such claims. And the sheer volume of significant federal issues that must be adjudicated if Plaintiff's claims proceed reinforces the propriety of federal jurisdiction here. *See* NOR ¶ 31.

In fact, permitting state law to control these claims would threaten the balance in federal-state relations. "Power over external affairs is not shared by the States; it is vested in the national government exclusively." *United States v. Pink*, 315 U.S. 203, 233 (1942). State governments must yield to the federal government in foreign affairs so that this exclusively national power is "entirely free from local interference." *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941); *see also Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 49 (1st Cir. 1999) ("[P]ower over foreign affairs is vested exclusively in the federal government."). It is even more important that foreign policy matters be free from state *judicial* interference. Indeed, it would be inappropriate for the Supreme Court—let alone a state court—"to judge the wisdom of the National Government's [foreign] policy; dissatisfaction should be addressed to the President or, perhaps, Congress." *Garamendi*, 539 U.S. at 427.

Plaintiff denies that it seeks "to govern extraterritorial conduct," asserting that it "seeks only damages and abatement of the nuisance within Rhode Island." Mot. 30–31. But the liability Plaintiff seeks to impose is without question intended to have a regulatory effect on Defendants' worldwide conduct. *See Kurns*, 565 U.S. at 637. Because the "sovereign prerogatives" to force reductions in greenhouse gas emissions, negotiate emissions agreements, and exercise the police power to reduce emissions "are now lodged in the Federal Government," *Massachusetts*, 549 U.S. at 519, the "balance of federal and state judicial responsibilities" requires a federal forum here, *Grable*, 545 U.S. at 314. And Plaintiff's contention that "redressing the kinds of deceptive marketing and promotion campaigns Defendants undertook here falls directly within the traditional police power of the states," Mot. 28, ignores that Congress intended federal courts to resolve claims substantially similar to those asserted here.[21]

C. This Action Is Removable Because Plaintiff's Claims Are Completely Preempted by Federal Law

"One corollary of the well-pleaded complaint rule . . . is that Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63–64 (1987). A claim that is completely preempted by an act of Congress "'arises under the . . . laws . . . of the United States,'" and thus is "removable to federal court," even if it "purports to raise only state law claims." *Id.* at 67 (brackets omitted) (quoting 28 U.S.C. § 1331). Complete preemption provides two separate bases for removal here.

To begin, there is complete preemption based on the foreign affairs doctrine. For the reasons set forth above, *supra* Section III.B.1(a), litigating in state court the inherently transnational activity challenged by the Complaint would inevitably intrude on the foreign affairs power of the federal government and is completely preempted. *See Garamendi*, 539 U.S. at 418

[21] *Grable* rejected the notion that because no federal cause of action was available, "no federal jurisdiction" existed. 545 U.S. at 317. While the absence of a federal claim might weigh against federal jurisdiction in a "garden variety state tort" suit, *id*. at 318, this is not such a case. Denying a federal forum here would entail "threatening structural consequences," *id.* at 319, for the federal system.

("[S]tate action with more than incidental effect on foreign affairs is preempted, even absent any affirmative federal activity in the subject area of the state [action], and hence without any showing of conflict."); *see also Gen. Motors Corp.*, 2007 WL 2726871, at *14 (dismissing claims against automakers because the federal government "ha[s] made foreign policy determinations regarding the United States' role in the international concern about global warming," and a "global warming nuisance tort would have an inextricable effect on . . . foreign policy"); *City of Oakland*, 2018 WL 3109726, at *7 ("Nuisance suits in various United States judicial districts regarding conduct worldwide are far less likely to solve the problem and, indeed, could interfere with reaching a worldwide consensus."); *City of New York*, 2018 WL 3475470, at *6 ("[T]o the extent that the City seeks to hold Defendants liable for damages stemming from foreign greenhouse gas emissions, the City's claims are barred by the presumption against extraterritoriality and the need for judicial caution in the face of serious foreign policy consequences.") (quotation marks omitted).

Plaintiff's claims are also completely preempted by the CAA, which "provide[s] the exclusive cause of action for the claim asserted." *See Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003). Permitting a state-law cause of action here "would pose an obstacle to the purposes and objectives of Congress," by "duplicat[ing], supplement[ing], or supplant[ing] the [pre-emptive] civil enforcement remedy." *See Aetna Health Inc. v. Davila*, 542 U.S. 200, 209, 217 (2004).

Plaintiff contends its claims are outside the CAA because it "does not seek to enjoin any emissions from any source regulated under the Act, enforce or invalidate any Clean Air Act permit, nor create any other restriction whatsoever on air pollution conceivably governed by the Act." Mot. 37. However, the undeniable goal of Plaintiff's claims is to compel action to curb *nationwide and global* emissions. *See supra*, n.6. Accordingly, any state-law liability would necessarily require a finding that billions of actors produced emissions exceeding some "acceptable" or "reasonable" global level as a result of Defendants' production and promotion of fossil fuels. This Court would thus be required to determine the level at which global emissions

become actionable. Plaintiff has even suggested that the Court set the *global cap* at "a 15% annual reduction [in CO_2 emissions]," which they say "will be required to restore the Earth's energy balance" and thus stop the growth of the alleged nuisance. *See* Compl. ¶ 187. Because Rhode Island does not account for 15% of such emissions, Plaintiff necessarily seeks significant reductions from sources *outside of Rhode Island*.

The CAA provides the *exclusive vehicle* for regulating nationwide emissions. It establishes a system by which federal and state resources are deployed to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1). At the heart of this system are the emission limits, permitting, and related programs set by EPA, which reflect the CAA's dual goals of protecting both public health and welfare and the nation's productive capacity. Where, as here, a state is dissatisfied with the EPA's existing emissions standards, it "may petition for a rulemaking on the matter, and EPA's response will be reviewable in federal court." *AEP*, 564 U.S. at 425; *see also* 5 U.S.C. § 553(e); 42 U.S.C. § 7607(b)(1). And once the EPA establishes a nationwide emissions standard, the CAA provides specific procedures for any person, including a State, to challenge or change that standard. 42 U.S.C. § 7607(b), (d).[22]

These procedures are the *exclusive means for judicial review*. 42 U.S.C. § 7607(e). As the Ninth Circuit explained: The CAA "channels review of final EPA action exclusively to the courts of appeals, *regardless of how the grounds for review are framed*." *Cal. Dump Truck Owners Ass'n v. Nichols*, 784 F.3d 500, 506 (9th Cir. 2015) (emphasis in original); *see also Danca v. Private Health Care Sys., Inc.*, 185 F.3d 1, 4 (1st Cir. 1999) ("Where a claim, though couched in the language of state law, implicates an area of federal law for which Congress intended a particularly powerful preemptive sweep, the cause is deemed federal no matter how pleaded."). Following this logic, the Second Circuit rejected an action "alleg[ing] that [a power

[22] Indeed, Rhode Island has recently exercised these rights. *See*, *e.g.*, *State of New York et al. v. EPA*, Case No. 17-1185 (D.C. Cir. Aug. 1, 2017) (challenge filed by 15 states—including Rhode Island—to EPA decision extending deadline for promulgating initial area designations for the 2015 ozone NAAQS); *S. Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 886 (D.C. Cir. 2006) (challenge brought to EPA's 2004 ozone NAAQS implementation rule).

company] maintained a common law nuisance by burning oil containing 2.8% sulphur" when the "use of high sulphur fuel was authorized specifically by the EPA," because "[a]ll claims against the validity of performance standards approved by final decision of the Administrator must be addressed to the courts of appeals on direct appeal." *New Eng. Legal Found. v. Costle*, 666 F.2d 30, 31, 33 (2d Cir. 1981).

Although the CAA's cooperative federalism approach authorizes states to establish standards and set certain requirements in state implementation plans and federally-enforceable state permits for the purpose of attaining and maintaining the CAA's air quality goals, those standards can only be applied within state boundaries. "Application of an affected State's law to an out-of-state source . . . would undermine the important goals of efficiency and predictability" underlying the federal regulatory system. *See Ouellette*, 479 U.S. at 496. This is the core insight of *Ouellette*, which held that Vermont landowners could not sue under Vermont law for harm from water pollution discharged by a New York source. Applying Vermont law to the New York source "would compel the source to adopt different control standards and a different compliance schedule from those approved by the EPA, even though the affected State had not engaged in the same weighing of the costs and benefits." *Id.* at 495. "The inevitable result of such suits would be that Vermont and other States could do indirectly what they could not do directly—regulate the conduct of out-of-state sources"—because defendants "would have to change [their] methods of doing business and controlling pollution to avoid the threat of ongoing liability." *Id.* That is exactly what Plaintiff is seeking to do here.

The Fourth Circuit described the problem: "If courts across the nation were to use the vagaries of public nuisance doctrine to overturn the carefully enacted rules governing airborne emissions, it would be increasingly difficult to determine what standards govern." *N.C. ex rel. Cooper*, 615 F.3d at 298. "An EPA-sanctioned state permit may set one standard, a judge in a nearby state another, and a judge in another state a third. Which standard is the hapless source to follow?" *Id.* at 302. Because the global emissions at issue here indisputably cross state lines, allowing any state to regulate the effects of such emissions would allow the most restrictive state

to impose new standards on the whole nation, rendering the CAA superfluous. Indeed, there would be *no* effective federal standard.

Plaintiff's arguments to the contrary are unpersuasive. *First*, Plaintiff notes that the Supreme Court has recognized complete preemption in only three contexts. Mot. 33–34 & n.16. But federal courts, including in Rhode Island, have found other statutes to completely preempt state-law causes of action.[23] And although Plaintiff points to cases that declined to find that the CAA completely preempted particular state-law claims, *see* Mot. 34 n.17, those cases are distinguishable because, unlike Plaintiff's claims here, the claims in those cases sought to regulate only *in-state* emissions. *See, e.g.*, *Her Majesty The Queen In Right of the Province of Ont. v. City of Detroit*, 874 F.2d 332, 343 (6th Cir. 1989) ("[P]laintiffs are suing a Michigan facility under Michigan law."); *Cerny v. Marathon Oil Corp.*, 2013 WL 5560483, at *8 (W.D. Tex. Oct. 7, 2013) ("[S]ource state nuisance claims are not preempted."); *Gutierrez v. Mobil Oil Corp.*, 798 F. Supp. 1280, 1284 (W.D. Tex. 1992) ("[S]tates have the right and jurisdiction to regulate activities occurring within the confines of the state.").

Second, Plaintiff contends that its claims are not completely preempted because "Congress intended to preserve state law remedies for air pollution, to permit *more stringent* regulation than the Act's baseline." Mot. 35. This misreads the CAA's savings clauses. As explained earlier, the CAA permits only a limited role for state common law, and it cannot extend to the sort of inherently multi-state and multi-national emissions issues that Plaintiff seeks to address here. The CAA "entrusts such complex balancing to EPA in the first instance, in combination with state regulators." *AEP*, 564 U.S. at 427. This is sensible: "The expert agency is surely better equipped to do the job than individual . . . judges issuing ad hoc, case-by-case injunctions." *Id*. at 428. "Where Congress has chosen to grant states an extensive role in the [CAA's] regulatory regime . . . , field and conflict preemption principles caution at a minimum

[23] *See*, *e.g.*, *York v. Day Transfer Co.*, 525 F. Supp. 2d 289, 296 (D.R.I. 2007) (Carmack Amendment); *In re Miles*, 430 F.3d 1083, 1092 (9th Cir. 2005) (Section 303(i) of the Bankruptcy Code); *Botsford v. Blue Cross & Blue Shield of Mont., Inc.*, 314 F.3d 390, 399 (9th Cir. 2002) (Federal Employees Health Benefits Act); *Fadhliah v. Societe Air Fr.*, 987 F. Supp. 2d 1057, 1064 (C.D. Cal. 2013) (Montreal Convention).

against according states a wholly different role and allowing state nuisance law to contradict joint federal-state rules so meticulously drafted." *N.C. ex rel. Cooper*, 615 F.3d at 303.

Third, Plaintiff contends that the CAA does not completely preempt its claims because it does not provide a right to compensatory damages. Mot. 39. But "[f]or complete preemption to operate, the federal claim need not be co-extensive with the ousted state claim. On the contrary, the superseding federal scheme may be more limited or different in its scope and still completely preempt." *Fayard*, 533 F.3d at 46. And while Plaintiff insists that "the Clean Air Act does *not* contain[] a private cause of action that could encompass the state law tort claims the State maintains," Mot. 38, it is immaterial whether the CAA "encompass[es]" the state-law cause of action, so long as it provides an exclusive federal remedy. *See Cal. Dump Truck Owners*, 784 F.3d at 506 (the CAA was designed to "channel[] review of final EPA action exclusively to the courts of appeals, *regardless of how the grounds for review are framed*" (emphasis in original)); *see also Danca*, 185 F.3d at 4 ("Where a claim, though couched in the language of state law, implicates an area of federal law for which Congress intended a particularly powerful preemptive sweep, the cause is deemed federal no matter how pleaded.").[24]

Because this case necessarily aims to impose nationwide and even international emission standards, it falls within the completely preemptive scope of the foreign affairs doctrine and the CAA. This case therefore "arises under" federal law, and removal is proper.

[24] To the extent Plaintiff suggests that the CAA cannot completely preempt its state-law claims because the CAA provides only for administrative relief, *see* Mot. 37–38, at least one court has flatly rejected that position, and the First Circuit has not yet decided whether a federal cause of action is required for complete preemption. *See Botsford,* 314 F.3d at 397 (Federal Employees Health Benefits Act completely preempted state-law claim due to "[t]he existence of a detailed administrative enforcement scheme, coupled with Congress's decision to vest [an agency] with the power to enforce remedies"); *cf. Fayard*, 533 F.3d at 47 n.5 ("There is disagreement whether non-judicial claims alone can trigger complete preemption; this turns in part on the weight given to conceptual as opposed to prudential underpinnings of the doctrine.").

D. The Action Is Removable Because It Is Based on Defendants' Activities on Federal Lands and at the Direction of the Federal Government

Plaintiff's claims are removable because they arise out of oil and gas extraction that occurred on the Outer Continental Shelf and federal enclaves, and that was undertaken at the direction of federal officers.

1. The Claims Arise out of Operations on the Outer Continental Shelf

This Court has jurisdiction over these cases under OCSLA, 43 U.S.C. § 1331, *et seq.*, which grants federal district courts original jurisdiction over actions that "aris[e] out of, or in connection with . . . *any operation* conducted on the outer Continental Shelf which *involves exploration, development, or production* of the minerals, of the subsoil and seabed of the [OCS], or which involves rights to such minerals." 43 U.S.C. § 1349(b) (emphasis added). Courts have adopted a "broad reading of the jurisdictional grant of section 1349." *EP Operating Ltd. P'ship v. Placid Oil Co.*, 26 F.3d 563, 569 (5th Cir. 1994); *see also Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*, 754 F.2d 1223, 1228–29 (5th Cir. 1985) (finding OCSLA jurisdiction over dispute involving nonpayment of contract for construction of OCS platform); *Amoco Prod. Co. v. Sea Robin Pipeline Co.*, 844 F.2d 1202, 1203–04 (5th Cir. 1988) (finding OCSLA jurisdiction over contract dispute involving sale of natural gas from the OCS). Plaintiff does not dispute that Defendants have significant operations on the OCS. Indeed, it specifically identifies some of those activities and alleges that *all* of Defendants' extraction and production activities—which necessarily include those on the OCS—were a factor that caused Plaintiff's injuries. *See, e.g.*, Compl. ¶¶ 19, 21(b), 104. Accordingly, both elements of OCSLA jurisdiction are satisfied: (1) Defendants' complained-of activities "constituted an 'operation' 'conducted on the [OCS]' that involved the exploration and production of minerals," and (2) the "case 'arises out of, or in connection with' the operation." *Deepwater Horizon*, 745 F.3d at 163.

Defendants easily satisfy the first prong of OCSLA's jurisdictional test. Defendants and/or their affiliates operate a large share of the "more than 5,000 active oil and gas leases on nearly 27 million OCS acres" administered by the Department of the Interior ("DOI") under

OCSLA. NOR ¶ 51. Defendants historically have produced a substantial volume of oil and gas from the OCS; federal data suggests as much as a third of domestic production in some years. *See id.*[25] And Plaintiff concedes that its Complaint "does not distinguish between fossil fuels by location of extraction." Mot. 41; *see* Compl. ¶¶ 19 ("[B]etween 1965 and 2015, the named Defendants extracted from the earth enough fossil fuel materials . . . to account for more than one in every five tons of CO2 and methane emitted worldwide."), 104 (asserting that analysis of Defendants' contributions to global warming "considers only the volume of raw material actually extracted from the Earth by these Defendants."); *see also id.* ¶¶ 21(b), 23(e), 29(b), 178, 180–81 (identifying OCS operations of various Defendants). The allegedly tortious activities thus indisputably include operations conducted on the OCS that involve the "exploration and production of minerals." *Deepwater Horizon*, 745 F.3d at 163.

The second prong of the jurisdictional test is also easily satisfied because, under Plaintiff's own theory, its claims arise out of or in connection with OCS operations. The Complaint claims much more than a "mere connection," Mot. 41, between Plaintiff's alleged injuries and Defendants' OCS activities. On the contrary, Plaintiff alleges that its injuries are the direct result of Defendants' *fossil-fuel extraction* because those fuels, when combusted, emit greenhouse gases that accumulate in the atmosphere and lead to global warming, which, in turn, causes rising sea levels that have allegedly injured Plaintiff. Compl. ¶¶ 7–8. Plaintiff alleges that its injuries are caused by *all* Defendants' "extraction [and] production . . . of coal, oil and natural gas," no matter where it occurs. *Id.* ¶ 3. Plaintiff's "attribution" analysis sweeps in all of Defendants' oil and gas production, including that on the OCS, in establishing each Defendant's purported liability. *Id.* ¶¶ 54–55, 94, 96–98, 199. A significant portion of Defendants' extraction occurred on the OCS, and Plaintiff's allegations specifically incorporate, and rely upon, some of those operations. *See, e.g.*, *id.* ¶ 23(b) (noting that BP operates oil and gas

[25] In 2005, a DOI official testified before Congress that leases on the OCS accounted for 30 percent of America's domestic oil production. Lipshutz Decl., Ex. 15. For example, BOEM data suggests that active producing leases on the OCS associated with subsidiaries or affiliates of Defendants Chevron, Shell, Exxon, and BP have produced over 4 billion barrels of crude oil and over 29 billion MCF of natural gas. Couvillion Decl. ¶¶ 9, 12 & Ex. C.

exploration projects in the Gulf of Mexico); *id.* ¶¶ 178, 180–181 (discussing arctic offshore drilling equipment and patents which may be relevant to conduct near Alaskan OCS). Plaintiff's alleged injuries thus "occurred because of the [Defendants'] 'operations' in exploring for and producing oil on the [OCS]." *Deepwater Horizon*, 745 F.3d at 163.[26]

Plaintiff's contention that the second prong requires two findings—that "the plaintiff 'would not have been injured but for the operation'" *and* that "granting relief 'thus threatens to impair the total recovery of the federally-owned minerals' from the OCS"—is mistaken. Mot. 40 (citing *Recar v. CNG Producing Co.*, 853 F.2d 367, 369 (5th Cir. 1988); *EP Operating Ltd. P'ship*, 26 F.3d at 570). The case law does not support that formulation. In fact, courts have held that OCSLA jurisdiction is proper where *either* the "but for test" *or* the "impaired recovery" test is satisfied. *Compare Deepwater Horizon*, 745 F.3d at 163 ("[T]his Court deems § 1349 to require only a 'but-for' connection."), *and Tenn. Gas Pipeline v. Hous. Cas. Ins. Co.*, 87 F.3d 150, 155 (5th Cir. 1996) ("use of the but-for test implies a broad jurisdictional grant under § 1349"), *with EP Operating Ltd. P'ship*, 26 F.3d at 570 (applying "impaired recovery" test), *United Offshore Co. v. S. Deepwater Pipeline Co.*, 899 F.2d 405, 407 (5th Cir. 1990) (same), *and Amoco Prod. Co.*, 844 F.2d at 1210 (same). In any event, Plaintiff's attack on nationwide extraction and production of fossil fuels easily satisfies both tests.

Given the "the expansive substantive reach of the OCSLA," the alleged causal link between Defendants' operations on the OCS and Plaintiff's alleged injuries satisfies the "broad" "jurisdictional grant of section 1349." *EP Operating Ltd. P'ship*, 26 F.3d at 569; *Texaco Expl. & Prod., Inc. v. AmClyde Engineered Prod. Co.*, 448 F.3d 760, 768 (5th Cir. 2006) ("We have recognized that OCSLA's jurisdictional grant is broad."); *Deepwater Horizon*, 745 F.3d at 163–64 (finding federal jurisdiction under OCSLA in case where the oil and gas alleged to have

[26] The "arises out of, or in connection with" test "implies a broad jurisdictional grant under § 1349," and by Plaintiff's own causal theory, some portion of its alleged injuries would not have occurred absent Defendants' operations on the OCS. *Tenn. Gas Pipeline v. Hous. Cas. Ins. Co.*, 87 F.3d 150, 155 (5th Cir. 1996); *see also Ronquille v. Aminoil Inc.*, 2014 WL 4387337, at *2 (E.D. La. Sept. 4, 2014) ("at least part of the work that Plaintiff allege[d] caused his exposure to asbestos arose out of or in connection with Shell's OCS operations").

caused harm "'would not have entered into the State of Louisiana's territorial waters 'but for' [Defendants' OCS] drilling and exploration operation[s]'" (internal citation omitted)).

Indeed, Plaintiff acknowledges that "[t]he OCSLA vests original jurisdiction in the district courts . . . where the dispute 'alters the progress of production activities on the OCS and thus threatens to impair the total recovery of the federally-owned minerals.'" Mot. 40 (quoting *EP Operating Ltd. P'ship*, 26 F.3d at 570). Plaintiff's claims threaten to do just that. Indeed, Plaintiff seeks potentially billions of dollars in damages and disgorgement of profits, together with equitable relief to abate the alleged nuisances. *See, e.g.*, Compl. ¶¶ 208, 218–220, Prayer for Relief. Such relief—which could force Defendants to reduce emissions to some "acceptable" or "reasonable" cap imposed by a court—would not only discourage substantial OCS production, but would likely impact the future viability of the federal OCS leasing program, potentially costing the federal government hundreds of millions of dollars. *See San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) ("[R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief."); *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 521 (1992) (same). The requested relief would thus substantially interfere with OCSLA's congressionally-mandated goal of obtaining the largest "total recovery of the federally-owned minerals" underlying the OCS. *Amoco*, 844 F.2d at 1210; *see also* 43 U.S.C. §§ 1802(1), (2). Accordingly, this action falls squarely within the "legal disputes . . . relating to resource development on the [OCS]" that Congress intended to be heard in the federal courts. *Laredo Offshore*, 754 F.2d at 1228; *cf.* Compl., Prayer for Relief.

Moreover, permitting the removal of this case would not expand OCSLA jurisdiction to "any case involving facts traceable to deep sea oil drilling," such as Plaintiff's hypothetical personal injury action against the driver of a tanker truck carrying OCS-extracted gasoline. Mot. 39. Unlike Plaintiff's scenario, the claims here purportedly arise directly from Defendants' extraction activities—a substantial portion of which took place on the OCS. And although Plaintiff now contends that its claims "stem from the nature of the products themselves, and Defendants' knowledge of their dangerous effects, not from the 'operations' used to extract them

in raw form," *id.* 41–42, the Complaint belies that argument. Indeed, the Complaint ties Defendants' alleged liability directly to their fossil-fuel production. *See* Compl. ¶ 7 ("Defendants are directly responsible for 182.9 gigatons of CO_2 emissions between 1965 and 2015, representing 14.81% of total emissions of that potent greenhouse gas during that period. Accordingly, Defendants are directly responsible for a substantial portion of past and committed sea level rise . . . because of the consumption of their fossil fuel products."). Thus, as in *Deepwater Horizon* and the other cases that Defendants have cited, the alleged injuries here arose out of, or in connection with, "physical activity actually occurring on the OCS related to oil and natural gas extraction." Mot. 42.

2. Plaintiff's Claims Arise on Federal Enclaves

"[F]ederal courts have federal question jurisdiction over tort claims that arise on 'federal enclaves.'" *Serrano v. Consol. Waste Servs. Corp.*, 2017 WL 1097061, at *1 (D.P.R. Mar. 23, 2017) (quoting *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1250 (9th Cir. 2006)); *see also Totah v. Bies*, 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).

Plaintiff does not challenge the federal enclave status of the property at issue. Nor could it: Some Defendants maintained production operations on federal enclaves and sold fossil fuels across the country, including on military bases and other federal enclaves. For example, Standard Oil Co. (Chevron's predecessor) operated Elk Hills Naval Petroleum Reserve (the "Reserve"), a federal enclave, for most of the twentieth century. *See* NOR, Ex. D; Lipshutz Decl., Exs. 16–18 (Executive Order and California statutes relating to federal jurisdiction); *Azhocar v. Coastal Marine Servs., Inc.*, 2013 WL 2177784, at *1 (S.D. Cal. May 20, 2013) (federal enclaves include military bases, federal facilities, and some national forests and parks) (quoting *Allison v. Boeing Laser Technical Servs.*, 689 F.3d 1234, 1235 (10th Cir. 2012)). Moreover, as further detailed below, CITGO distributed gasoline and diesel under its contracts with the Navy Exchange Service Command ("NEXCOM") to multiple Naval installations, *see* Walton Decl. ¶ 6 & Exs. A–G, that have been identified as federal enclaves by either a state or

federal court or a state attorney general.[27] Plaintiff also alleges that Defendants engaged in tortious conduct in the District of Columbia, a federal enclave, such as lobbying activities and other purported misinformation campaigns. Compl. ¶¶ 166–167, 177. These allegations also support federal jurisdiction here. *See, e.g.*, *Collier v. District of Columbia*, 46 F. Supp. 3d 6, 20 n.8 (D.D.C. 2014).

Federal enclave jurisdiction will lie as long as "pertinent events" on which liability is based took place on a federal enclave. *See Rosseter v. Indus. Light & Magic*, 2009 WL 210452, at *2 (N.D. Cal. Jan. 27, 2009); *see also Corley v. Long–Lewis, Inc.*, 688 F. Supp. 2d 1315, 1336 (N.D. Ala. 2010) (finding jurisdiction where "some of the events alleged . . . occurred on a federal enclave"); *Stiefel v. Bechtel Corp.*, 497 F. Supp. 2d 1138, 1148 (S.D. Cal. 2007); *Klausner v. Lucas Film Ent. Co.*, 2010 WL 1038228, at *1, *4 (N.D. Cal. Mar. 19, 2010) (finding federal enclave jurisdiction for employment discrimination claim where "alleged unlawful acts" took place on the federal enclave even though plaintiffs' employment was based elsewhere).

Plaintiff claims that only the place of injury determines federal enclave jurisdiction. Mot. 45–47. But this would lead to the absurd result that federal jurisdiction does not exist over claims where all of the relevant conduct occurred on a federal enclave, but the plaintiff happened to be outside the enclave at the time of injury. Courts have rejected that strained interpretation. *See*, *e.g.*, *Reed v. Fina Oil & Chem. Co.*, 995 F. Supp. 705, 713 (E.D. Tex. 1998) (finding federal

[27] *See, e.g.*, (1) Naval Battalion Center Gulfport, Walton Decl. ¶ 6, Exs. F–G, *United States v. State Tax Comm'n of Miss.*, 412 U.S. 363, 371–73 (1973); (2) Naval Air Station Corpus Christi, Walton Decl. ¶ 6, Ex. D, *Humble Oil & Ref. Co. v. Calvert*, 464 S.W.2d 170, 172–73 (Tex. Civ. App. 1971); (3) Washington D.C. Navy Yard, Walton Decl. ¶ 6, Ex. C, *Jograj v. Enter. Servs., LLC*, 2017 WL 3841833, at *3 (D.D.C. Sept. 1, 2017); (4) Naval Air Station Key West, Walton Decl. ¶ 6, Exs. E–G, *see United States v. Gaskell*, 134 F.3d 1039, 1041–42 (11th Cir. 1998); (5) Naval Air Station at Belle Chasse, Walton Decl. ¶ 6, Ex. D, *United States v. Hollingsworth*, 783 F.3d 556, 558 (5th Cir. 2015); (6) Fleet Training Center Dam Neck, Walton Decl. ¶ 6, Ex. D, *United States v. Robertson*, 638 F. Supp. 1202, 1202–03 (E.D. Va. 1986); (7) Norfolk Naval Shipyard Portsmouth, Walton Decl. ¶ 6, Exs. A, B, D, *Anderson v. Crown Cork & Seal*, 93 F. Supp. 2d 697, 700 n.2 (E.D. Va. 2000); (8) Naval Medical Center Bethesda, Walton Decl. ¶ 6, Exs. C, F, G, 61 Op. Att'y Gen. Md. 441, 445 (1976); (9) Naval Air Station Brunswick, Walton Decl. ¶ 6, Ex. F, 80 Op. Att'y Gen. Me. 15 (1980); (10) Naval Weapon Station Yorktown, Walton Decl. ¶ 6, Exs. A–B, 1975–1976 Op. Atty. Gen. 6; and (11) Naval Air Station Pensacola, Walton Decl. ¶ 6, Exs. E–G, 75 Op. Att'y Gen. Fla. 198 (1975).

enclave jurisdiction where plaintiff was exposed to leukemia-producing agents over a 35 year period of employment at a factory that was a federal enclave the first 11 of those years). Moreover, "[d]etermining where a given claim 'arose' in the context of federal enclave jurisdiction depends upon the nature of the specific claim at issue." *Cramer v. Logistics Co.*, 2015 WL 222347, at *2 (W.D. Tex. Jan. 14, 2015).[28]

In any event, Plaintiff asserts numerous injuries on federal enclaves. For example, Plaintiff broadly alleges that "Rhode Island's coast" will experience extreme weather and flooding events, including sea level rise and that it has suffered damage to its "real property and other assets that are essential to community health, safety, and well-being." Compl. ¶ 8. Such broad allegations necessarily include the federal enclaves "within the State's boundaries," *see* Mot. 45, which, according to public records, include at least the following major sites: Ninigret National Wildlife Refuge, Trustom Pond National Wildlife Refuge, John H. Chafee National Wildlife Refuge, Sachuest Point National Wildlife Refuge, the Newport Naval Educational and Training Center, the Davisville Naval Construction Battalion Center, as well as other, smaller sites, including the Army Corps of Engineers site referenced below. Lipshutz Decl. Exs. 30–31.

Indeed, various reports and assessments incorporated by the Complaint, which purport to quantify Plaintiff's injuries, expressly refer to federal enclaves.[29] *See, e.g.*, R.I. Statewide Planning Program, Vulnerability of Transportation Assets to Sea Level Rise 19 (Jan. 2015)

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[28] The cases that Plaintiff cites (Mot. 45–46) are not to the contrary. In *Totah* the court held that because publication is the "last event necessary to render the torfeasor liable" for *defamation*, the plaintiff's claim was subject to federal enclave jurisdiction because the defamatory material was communicated to a third party "on the Presidio"—a federal enclave. 2011 WL 1324471 at *2. That holding has little relevance here, where Plaintiff has not alleged defamation. Plaintiff also cites *Bordetsky v. Akima Logistics Servs., LLC*, 2016 WL 614408 (D.N.J. Feb. 16, 2016), but there the court held that "*none* of the facts giving rise to Plaintiff's . . . claim arose on a federal enclave." *Id.* at *2 (emphasis added). Here, by contrast, Plaintiff specifically complains of actions that took place on federal enclaves. Further, *Amtec Corp. v. U.S. Centrifuge Sys., L.L.C.*, 2012 WL 12897212 (N.D. Ala. Dec. 6, 2012), is also inapposite. There, the court *denied* a motion to remand a case triggered by an explosion on a federal enclave, and which involved claims for acts and omissions (failure to warn, negligence, and others) that occurred off of the federal enclave. *Id.* at *11, *objections overruled sub nom. Amtec Corp. v. US Centrifuge Sys. LLC*, 2013 WL 12147712 (N.D. Ala. May 29, 2013). But here the Complaint alleges injuries felt both on and off federal enclaves based on acts and omissions alleged to have occurred both on and off federal enclaves.

[29] These reports, which are expressly incorporated into the Complaint and highlight the federal properties at issue, "effectively merge[] into the pleadings[.]" *See Beddall v. State St. Bank & Tr. Co.*, 137 F.3d 12, 17 (1st Cir. 1998).

(noting the United States Coast Guard's Bristol facility's purported vulnerability to sea-level rise); Special House Commission to Study Economic Risk Due to Flooding and Sea Level Rise, Final Report 8-9, 11 (May 12, 2016) (recommending that "municipal, state, and federal officials work with the Army Corps of Engineers and other federal agencies to review the [Army Corps of Engineers's Fox Point] Hurricane Barrier's structural sufficiency").

Plaintiff's reliance on *State v. Monsanto Co.*, 274 F. Supp. 3d 1125 (W.D. Wash. 2017), is misplaced and cannot defeat federal jurisdiction. First, *Monsanto* speaks only to injuries allegedly suffered within state boundaries, *see id.* at 1132, and does not apply to the federal enclaves on which Defendants maintained production activities or promoted the use of fossil fuels. Second, the plaintiff in *Monsanto* conceded that it "would not have standing" to seek those damages, which Plaintiff has not done here. *See id.* To be sure, the Complaint includes a footnote purporting to define "Rhode Island" and "State" to refer to all "non-federal lands within the geographic boundaries of the State of Rhode Island," Compl. ¶ 1. n.2; Mot. 44. But Plaintiff has expressly cited reports that include federal property in the assessment of injuries and damages, and Plaintiff has not stipulated that it will not seek damages occurring on federal property, or made such a representation on the record. Thus, federal jurisdiction is appropriate.

3. The Action Is Removable Under the Federal Officer Removal Statute

This action is also removable under the federal officer removal statute because Plaintiff bases liability on activities undertaken at the direction of the federal government. The federal officer removal statute permits removal where an action is brought 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), and "represent[s] a legislatively-spawned value judgment that a federal forum should be available when particular litigation implicates a cognizable federal interest." *Camacho v. Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482, 487 (1st Cir. 1989). The statute "should not be read in a 'narrow' or 'limited' manner, nor should the policy underlying it 'be frustrated by a narrow, grudging interpretation.'" *Id.* (quoting *Willingham v. Morgan*, 395 U.S. 402, 406–07 (1969)); *see also Arizona v.*

Manypenny, 451 U.S. 232, 242 (1981) ("[T]he right of removal is absolute for conduct performed under color of federal office," and "the policy favoring removal should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1)" (quotation omitted)).

A party "seeking federal officer removal must demonstrate that (1) it was acting under the direction of a federal officer; (2) it has a colorable federal defense; and (3) there is a causal connection between the acts taken under federal direction and a plaintiff's claim(s) against it." *Shepherd v. Air & Liquid Sys. Corp.*, 2012 WL 5874781, at *2 (D.R.I. Nov. 20, 2012). Plaintiff does not dispute that the second element is satisfied. *See* Mot. 47–54. The remaining elements are easily satisfied, as well.

First, Defendants acted under the direction of a federal officer. As the Supreme Court has made clear, "[t]he words 'acting under are broad," *Watson v. Phillip Morris Cos.*, 551 U.S. 142, 147 (2007), and a private actor satisfies this element so long as it is subject to federal "subjection, guidance, or control" in "an effort to *assist* or to help *carry out*, the duties or tasks of the federal superior." *Id.* at 151–52. Plaintiff, however, attempts to show that this precedent is inapplicable, arguing that Defendants' conduct falls outside the scope of *Watson* because Defendants "ma[de] an uncoerced decision to enter into" relationships with the government. Mot. 49. Thus, in Plaintiff's view, any subsequent conduct pursuant to those relationships was necessarily "free from the 'subjection, guidance, or control,' of the federal government." *Id.* at 50 (quoting *Watson*, 551 U.S. at 152). Further, Plaintiff argues that the degree of control that the federal government has exercised over Defendants does not rise to the "type of detailed direction that could demonstrate the necessary federal 'subjection, guidance, or control.'" *Id.* (quoting *Watson*, 551 U.S. at 152). But *Watson* provides no support for Plaintiff's "narrow, grudging" interpretation of the federal officer removal statute. *See Jefferson County*, 527 U.S. at 431 (quotation omitted). That case merely held that "the help or assistance necessary to bring a private person within the scope of the statute does *not* include simply *complying* with the law." *Watson*, 551 U.S. at 152. And in doing so, the Court made clear that voluntary dealings with the government—even those in which the private entity maintains some discretion—do not defeat

federal jurisdiction. On the contrary, the Court confirmed a long line of cases finding that private contractors "act[] under" the direction of federal officers because "the private contractor in such cases is helping the Government to produce an item that it needs," and therefore "[t]he assistance that private contractors provide federal officers goes beyond simple compliance with the law and helps officers fulfill other basic governmental tasks." *Id.* at 153. This is especially relevant where, "in the absence of a contract with a private firm, the Government itself would have had to perform" the job. *Id.* at 154.

When the federal officer removal statute's "acting under" requirement is properly construed, there are numerous grounds for exercising federal jurisdiction over this case. *See Savoie v. Huntington Ingalls, Inc.*, 817 F.3d 457, 465 (5th Cir. 2016) ("[R]emoval of the entire case is appropriate so long as a single claim satisfies the federal officer removal statute.").

As an initial matter, Chevron's predecessor, Standard Oil, extracted oil for the Elk Hills Naval Petroleum Reserve (the "Reserve") under the direct supervision and control of the Navy, providing the government with oil it needed for national security in wartime. *See* NOR, Ex. D. This Unit Plan Contract ("UPC"), which President Franklin D. Roosevelt personally approved, obligated Standard Oil to produce oil, stating that "the Reserve *shall* be developed and operated" to produce "not less than 15,000 barrels of oil per day," subject to the Navy's discretion to change that amount. *Id.*, Ex. D § 4(b) (emphasis added).[30] Several UPC provisions make clear that the federal government exercised complete control over fossil fuel exploration, production, and sales made at the Reserve. For example, these provisions stated as follows:

- The UPC was designed to "[a]fford [the] Navy a means of acquiring *complete control over* the development of the entire Reserve *and the production of oil therefrom*." *Id.*, Ex. D, Recitals § 6(d)(i) (emphases added).

[30] Plaintiff erroneously claims that Standard "could have complied with the contract by extracting, producing, and selling *no oil at all*." Mot. 52. The UPC set a minimum floor of oil production at 15,000 barrels on average per day until Standard had received its share of production with provisions thereafter requiring production in an amount sufficient to cover Standard's operating costs, *see* Not. of Removal, Ex. D § 4(b), and only the Navy could change that amount, *see id.*, Ex. D § 4(a).

- "[The] Navy shall, subject to the provisions hereof, *have the exclusive control over the exploration, prospecting development and operation of the Reserve . . . .*" *Id.*, Ex. D § 3(a) (emphasis added).
- "[The] Navy shall have *full and absolute power* to determine from time to time the rate of prospecting and development on, and the quantity and rate of production from, the Reserve, and may from time to time shut in wells on the Reserve if it so desires." *Id.*, Ex. D § 4(a) (emphasis added).
- "All exploration, prospecting, development, and producing operations on the Reserve" occurred "under the supervision and direction of an Operating Committee" tasked with "supervis[ing]" operations and "requir[ing] the use of sound oil field engineering practices designed to achieve the maximum economic recovery of oil from the Reserve." *Id.*, Ex. D § 3(b). In the event of disagreement, "such matter shall be referred to the Secretary of the Navy for determination; and his decision in each such instance shall be final and shall be binding upon Navy and Standard." *Id.*, Ex. D § 9(a). *Accord United States v. Standard Oil Co. of Cal.*, 545 F.2d 624, 628 (9th Cir. 1976) (confirming this arrangement).
- The Navy retained ultimate and even "absolute" discretion to suspend production, decrease the minimum amount of production per day that Standard was entitled to receive, or increase the rate of production. NOR, Ex. D §§ 4(b), 5(d)(1).

The UPC belies Plaintiff's assertion that "[n]othing in [this contract] provides even a whiff of 'subjection, guidance, or control.'" Mot. 52. Indeed, it conclusively demonstrates that Defendants did not simply comply with the law in a regulated industry, but were instead under the complete control of the federal government. And if that were not enough, Chevron's Elk Hills activity increased as directed by the federal government in response to the 1970s' energy crisis. Specifically, in 1976, Congress enacted the Naval Petroleum Reserves Production Act, *see Chevron U.S.A., Inc. v. United States*, 110 Fed. Cl. 747, 754 (2013)), which "directed" the Secretary of the Navy to produce oil from Elk Hills "at the maximum efficient rate consistent with sound engineering practices for a period not to exceed six years after the date of enactment

of such Act." Pub. L. No. 94-258, 90 Stat. 303 (1976) (codified as amended at 10 U.S.C. § 7422(c)(1)(B)). Here, too, Chevron "performed a job 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, by helping the Navy fulfill this directive from Congress. *Accord Chevron U.S.A., Inc.*, 110 Fed. Cl. at 754.

Defendants also "acted under" federal officers as part of their role in extracting and selling oil from OCSLA leases or strategic petroleum reserve leases. *See* NOR ¶¶ 56–57. OCSLA "has an objective—the expeditious development of OCS resources." *California v. Watt*, 668 F.2d 1290, 1316 (D.C. Cir. 1981). In keeping with that purpose, the Secretary of the Interior is mandated to develop serial leasing schedules "indicating, as precisely as possible, the size, timing, and location of leasing activity which he determines will best meet national energy needs for the five-year period" following the schedule's approval. 43 U.S.C. § 1344(a). Those leases provide that the Defendants "*shall*" drill for oil and gas pursuant to *government approved* exploration plans, NOR, Ex. C § 9 (emphasis added), and that DOI may cancel the leases for non-compliance. 30 C.F.R. § 550.185; *see also* 30 C.F.R. § 250.180 (permitting DOI to grant a suspension of production for a lessee to avoid cancellation); *ExxonMobil Corp. v. Salazar*, 2011 WL 3612296 (W.D. La. Aug. 12, 2011) (suit brought by Defendant Exxon challenging DOI refusal to grant suspension); *ExxonMobil v. Salazar*, Settlement Agreement, No. 2:11-cv-01474, § 5 (Jan. 17, 2012), Dkt. 18 (granting suspension after Exxon agreed to a specific Activity Schedule set by DOI). In addition, DOI leases identify to whom Defendants *must* sell oil and gas (such as small or independent refiners and the Bureau of Land Management). NOR, Ex. C § 15. And the terms of the leases require minimum royalty payments on the total value of oil and gas produced. *Id.*, Ex. C. §§ 5–6. The Strategic Petroleum Reserve, which the DOE is required to maintain as insurance against "the short-term consequences of interruptions in supplies of petroleum products," is supported by both monetary and "in-kind" royalties. 42 U.S.C. §§ 6231(a), 6234, 6240; *see also* Lipshutz Decl. Ex. 19. Plaintiff's insistence that this extensive direction and control is simply a product of generally applicable *laws or regulations* is simply

incorrect; the restrictions arise from *particular leases* executed between the government and the respective Defendants, rather than statutory or regulatory authority applicable to all energy producers. *Cf.* Mot. 50. Plaintiff's suggestion that these regulations were somehow not an exercise of the government's direction and control (because Defendants were not compelled to sign the leases, *see* Mot. 49–50) misconstrues both the letter and spirit of the federal officer removal statute, as Defendants were performing activities on the government's behalf that it otherwise would have performed.

Finally, pursuant to and in compliance with the detailed requirements of CITGO's fuel supply agreements with the Navy, between 1988 and 2012, CITGO advertised, supplied, and distributed gasoline and diesel fuel to NEXCOM. Walton Decl. ¶¶ 5, 6(a)–(g); Ex. F § C.11 (CITGO-0424), Ex. G § C.9 (CITGO-0509); NOR ¶ 65. The NEXCOM Agreements (1) set forth detailed "fuel specifications"[31]; (2) required NEXCOM to "have a qualified source analyze the product" for compliance with those specifications[32]; (3) reserved to the Contracting Officer the right to inspect the delivery, site, and CITGO's operations[33]; (4) designated the quantity of fuel to be delivered[34]; and (5) established detailed branding and advertising requirements, including reserving to the Navy the right to (a) determine whether NEXCOM would market the supplied product under CITGO's name and (b) perform "branding inspections."[35] Under these contracts, and in compliance with their contractual requirements, CITGO provided the

[31] *See* Walton Decl. ¶¶ 6(a)–(g), Ex. A §§ 10-11 (CITGO-0012 to-0013), Ex. B § I.C.5 (CITGO-0043), Ex. C §§ I.C.4–7 (CITGO-00110 to -00112), Ex. D §§ C.6–10 (CITGO-0231, -0235 to -0236), Ex. E §§ C.1–4 (CITGO-0372 to -0374), Ex. F §§ C.1-4 (CITGO-0419 to -0422), Ex. G §§ C.1–4 (CITGO-0506 to -0508).

[32] *See* Walton Decl. ¶¶ 6(a)–(d), Ex. A § 10.I (CITGO-0013), Ex. B § I.C.5 (CITGO-0043), Ex. C § I.C.4(c) (CITGO-0110); Ex. D § C.6.a (CITGO-0231).

[33] *See* Walton Decl. ¶¶ 6(a), (e), (g), Ex. A § 19 (CITGO-0017 to -0018); Ex. E § F.3 (CITGO-00376 to -00378); Ex. G § D "Inspection and Acceptance" (CITGO-0509).

[34] *See* Walton Decl. ¶¶ 6(a)–(c), Ex. A (Attachment A, CITGO-0025 to -0027), Ex. B § B.2(a) (CITGO-0035), Ex. C, Part III § J (CITGO-0091, -0171); *id.* ¶ 6(d), Ex. D § A.1 (CITGO-0205), Attachment 1 (CITGO-0297), Attachment 4 (CITGO-0307 to -0314); *id.* ¶ 6(e), Ex. E § A.5 (CITGO-0366), Attachment 2 (CITGO-0359, -0389); *id.* ¶ 6(f), Ex. F (CITGO-0403), Attachment 1 (CITGO-0456 to -0460, -0463); *id.* ¶ 6(g), Ex. G (CITGO-0496), Attachment 1 (CITGO-0533 to -0536, -0539).

[35] *See* Walton Decl. ¶¶ 6(f)–(g), Ex. F § C.11 (CITGO-0424), Ex. G § C.9 (CITGO-0509).

government with access to fuel that it needed for resale to active and former military personnel and their families.

In short, there is no question that Defendants assist the government in "produc[ing] an item that it needs," and "perform[ing] a job that," in Defendants' absence, "the Government itself would have had to perform." *Watson*, 551 U.S. at 153–54. By aiding federal officials in exploring for and extracting fossil fuels on federal lands, Defendants assist the government in achieving its objectives of, among other things, promoting "expedited exploration and development of the [OCS] in order to achieve national economic and energy policy goals [and] assure national security." 43 U.S.C. § 1802(1); *Natural Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 291–92 (D.C. Cir. 1988) (same). By contracting with the government to perform these vital services, Defendants saved the government from expending resources to perform such tasks itself. *See Watson*, 551 U.S. at 153–54. By entering into federal reserve and OCSLA leases, the government delegated energy exploration and production functions to Defendants. Lawsuits against Defendants based on these activities warrant removal. *See, e.g.*, *Ruppel v. CBS Corp.*, 701 F.3d 1176, 1181 (7th Cir. 2012) (holding removal was proper where private company supplied the Navy with turbines built with asbestos).[36] Even Plaintiff's own authority recognizes that a private entity can "act under" the federal government when it sells "directly to the government, or to others at the direction of the government," which CITGO did here. *Bailey v. Monsanto Co.*, 176 F. Supp. 3d 853, 870 (E.D. Mo. 2016).

Second, Defendants' actions taken pursuant to the directive of a federal officer have a "causal connection" to Plaintiff's claims. Plaintiff alleges that "[t]he primary source of [greenhouse gas] pollution is the extraction, production, and consumption of coal, oil, and

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[36] *See also*, *e.g.*, *Int'l Primate v. Adm'rs of Tulane Educ. Fund*, 22 F.3d 1094 (5th Cir. 1994) (unpublished) (per curiam) (education fund assisting the government in euthanizing monkeys); *Benson v. Russell's Cuthand Creek Ranch, Ltd.*, 183 F. Supp. 3d 795, 802 (E.D. Tex. 2016) (federal government delegated authority to non-profit to construct levee on private land pursuant to government's easement); *Stephenson v. Nassif*, 160 F. Supp. 3d 884, 889 (E.D. Va. 2015) (defendants engaged in monitoring that would otherwise be conducted by the government); *Takacs v. Am. Eurocopter, L.L.C.*, 656 F. Supp. 2d 640, 645 (W.D. Tex. 2009) (performance of contract with government assisted in fulfilling government's duties and provided "maintenance services that [it] would be required to otherwise provide for itself").

natural gas," Compl. ¶ 3, that "Defendants are directly responsible for . . . 14.81% of total emissions of [CO2]" between 1965 and 2015, *id.* ¶ 7, and that "[a]s a direct and proximate consequence of Defendants' wrongful conduct . . . , average sea level will rise substantially along Rhode Island's coast; average temperatures and extreme heat days will increase; flooding, extreme precipitation events such as tropical storms and hurricanes, and drought will become more frequent and more severe; and the ocean will warm and become more acidic." *Id.* ¶ 8. And this is not all. Among other things, Plaintiff asserts causes of action for public nuisance—alleging that Defendants "created . . . [a] public nuisance by . . . [c]ontrolling every step of the fossil fuel product supply chain, *including the extraction of raw fossil fuel products*," *id.* ¶ 229 (emphasis added)—and trespass, alleging that Defendants "have intentionally, recklessly, or negligently caused flood waters, extreme precipitation, landslides, saltwater, and other materials, to enter Plaintiff's property, by *extracting, refining, [and] formulating* . . . fossil fuel products." *Id.* ¶ 287 (emphasis added). Given that the federal government specifically dictated much of Defendants' extraction, refinement, and formulation of fossil fuels, there is a clear "causal connection between what the officer has done under asserted official authority and the state prosecution." *Mesa v. California*, 489 U.S. 121, 131 (1989) (quotation marks omitted).

Tellingly, Plaintiff's entire argument to the contrary turns on its assertion that "Defendants have not demonstrated that the government had any role in Defendants' promotion and marketing of fossil fuel products, along with simultaneous concealment of the known hazards." Mot. 54. Even if this were true, however, the Complaint is hardly limited to this conduct, and many of the activities that form the basis for Plaintiff's claims were undertaken at the direction of federal officers, which is sufficient to establish a causal nexus between Defendants' actions and Plaintiff's claims.

E. The Action Is Removable Under the Bankruptcy Removal Statute

The bankruptcy removal statute permits removal of "any claim or cause of action in a civil action other than . . . a civil action by a governmental unit to enforce . . . police or regulatory power, to the district court for the district where such civil action is pending, if such

district has jurisdiction . . . under section 1334 of this title." 28 U.S.C. § 1452(a). Section 1334, in turn, gives district courts original jurisdiction "of all civil proceedings . . . related to cases under title 11." 28 U.S.C. § 1334(b). This action, which seeks a windfall for the state's coffers, is related to countless bankruptcy cases.

1. Plaintiff's Police Powers Arguments Fail

Plaintiff contends that this case is not removable because it "seeks to protect public safety and welfare," not to "'reap[] a financial windfall[.]'" Mot. 55. However, the exemption for government exercises of police power "is intended to be given a narrow construction," *City & Cty. of S.F. v. PG&E Corp.*, 433 F.3d 1115, 1124 n.9 (9th Cir. 2006), and does not apply where a "regulatory proceeding . . . is designed . . . to recover property of the debtor estate[.]" *In re McMullen*, 386 F.3d 320, 325 (1st Cir. 2004); *see also PG&E*, 433 F.3d at 1124 n.9 (police power exemption does not apply where the government entity "primarily seeks to protect the government's pecuniary interest").

Here, although Plaintiff asserts that it seeks an "equitable" remedy, it also requests compensatory and punitive damages, as well as disgorgement of profits. Compl. ¶ 315, Prayer for Relief. In particular, the State alleges that it has "incurred and will continue to incur expenses in planning, preparing for, and treating the public health impacts associated with anthropogenic global warming," *id*. ¶ 213, that it must spend public funds on "mitigation of and/or adaptation to climate change impacts," *id*. ¶ 232(c), and that it "has sustained and will sustain other substantial expenses and damages . . . including damage to publicly owned infrastructure and real property." *Id*. ¶ 247. Plaintiff attempts to foist these alleged costs on to Defendants through a massive damages judgment. Its claims are thus in the nature of a "private right[]" of contribution or indemnity rather than an effort to "effectuate [any] public policy." *PG&E*, 433 F.3d at 1125. Because Plaintiff's primary motivation is to "protect the government's pecuniary interest," *id.* at 1124, the "police power" exemption does not apply.

2. Plaintiff's Lawsuit is "Related to" Bankruptcy Proceedings

"[T]he test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." *In re G.S.F. Corp.*, 938 F.2d 1467, 1475 (1st Cir. 1991) (quoting *Pacor v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)). The "statutory grant of 'related to' jurisdiction is quite broad." *In re Boston Regional Medical Center, Inc.*, 410 F.3d 100, 105 (1st Cir. 2005). Here, Plaintiff contends that its claims are not "related to" any bankruptcy proceedings, Mot. 56, but the Complaint explicitly seeks to hold Defendants liable for conduct occurring *before* bankruptcy proceedings involving two predecessor entities—Texaco Inc. and Getty Petroleum.

Plaintiff contends that there is no "close nexus" between the confirmed plans for Texaco and Getty and the claims in this case, Mot. 57–58, but that argument cannot be squared with the allegations in the Complaint. For Texaco, the confirmed Chapter 11 plan bars certain claims against it arising prior to March 15, 1988. *In re Texaco Inc.*, 87 B 20142 (Bankr. S.D.N.Y. 1987) Dkt. 1743.5.[37] Yet Plaintiff's Complaint alleges that Texaco, as well as unnamed Chevron "predecessors" and "subsidiaries" in general, engaged in culpable conduct before March 15, 1988, which is attributable to Chevron. *See* Compl. ¶ 21. Plaintiff's decision to include these entities in the Complaint—by seeking to hold Defendants liable for the conduct of their affiliates and subsidiaries—thus requires the Court to decide whether the claims against these entities have been discharged. Because adjudication of Plaintiff's claims would "affect the interpretation, implementation, consummation, execution, or administration of the confirmed plan," there is a "close nexus" between the claims and the confirmed plans. *In re Wilshire Courtyard*, 729 F.3d 1279, 1289, 1292–93 (9th Cir. 2013) (quoting *In re Pegasus Gold Corp.*, 394 F.3d 1189, 1194 (9th Cir. 2005)). The claims are thus "related to" Texaco's confirmed plan, "despite the fact that the Plan transactions have been long since consummated." *Id*. at 1292.

[37] Getty's chapter 11 plan was confirmed even more recently, in 2012. *See In re Getty Petroleum Marketing Inc. et al.*, No. 11-15606 (Bankr S.D.N.Y. Aug. 24, 2012), Dkt. 714.

Moreover, Texaco and Getty are not the only two relevant bankruptcy matters. Plaintiff explicitly premises its theories of liability on the actions of Defendants' predecessors, subsidiaries, and affiliates. *See, e.g.*, Compl ¶¶ 156, 183, 190(a), 241, 254. Many of these unnamed entities are now bankrupt. Further, Plaintiff alludes to the liability of additional energy companies by naming numerous Doe defendants. A substantial number of companies which have been engaged in the "production and promotion" of fossil fuels are now, or have previously been, in bankruptcy—thus exposing their estates to liability.[38] Two such companies—Arch Coal and Peabody Energy—are defending against indistinguishable climate-change claims in parallel litigation and have already sought relief from the courts administering their bankruptcy proceedings. *See In re Arch Coal, Inc.*, No. 16-40120 (Bankr. E.D. Mo. Oct. 4, 2017), ECF No. 1598; *In re Peabody Energy Corp.*, No. 16-42529 (Bankr. E.D. Mo. Aug. 28, 2017), ECF No. 3362. As Peabody successfully argued, Plaintiff's claims are irreconcilable with the "implementation, consummation, execution, [and] administration of [Peabody's] confirmed plan." *In re Wilshire*, 729 F.3d at 1289; *In re Peabody Energy*, No. 16-42529, ECF No. 3514. Plaintiff's sweeping allegations of misconduct dating back decades all but ensures that other bankruptcy plans will have to be interpreted as well.

3. The Court Should Decline To Relinquish Jurisdiction on Equitable Grounds

Finally, Plaintiff's request that the Court relinquish jurisdiction under so-called equitable principles pursuant to 28 U.S.C. § 1452(b) is unavailing. The Supreme Court has cautioned that "[i]n the main, federal courts are obliged to decide cases within the scope of federal jurisdiction." *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 72 (2013). Plaintiff asserts that this case is an exception because its claims are "based entirely on state law claims," and because concerns

[38] Lipshutz Decl. Ex. 20 at 2 (observing that 134 North American oil and gas producers filed for bankruptcy protection since the beginning of 2015); *id.*, Ex. 21 at 2 (observing that 21 midstream companies filed for bankruptcy protection since the beginning of 2015); *id.*, Ex. 22 at 2 (observing that 155 oilfield services companies filed for bankruptcy protection since the beginning of 2015).

about "comity" militate against removal. Mot. 59. But this case has potentially worldwide impact, and Plaintiff's purported state law claims are governed by federal law.

F. The Action Is Removable Under Admiralty Jurisdiction

"[T]he current version of 28 U.S.C. § 1441 allows removal of general maritime claims without requiring an additional source of federal jurisdiction." *Genusa v. Asbestos Corp.*, 18 F. Supp. 3d 773, 790 (M.D. La. 2014). In arguing that admiralty jurisdiction provides no basis for removal, Plaintiff ignores the plain language of the removal statute and the "saving-to-suitors" clause of 28 U.S.C. § 1333, as well as a host of relevant Supreme Court decisions.

The 2011 Venue Clarification Act of 2011 ("VCA") eliminated a key portion of section 1441(b), which courts had interpreted to block the removal of admiralty claims absent another basis for federal jurisdiction. *See In re Dutile*, 935 F.2d 61, 62–63 (5th Cir. 1991); Pub. L. 112-63, Title I, § 103, 125 Stat. 759 (2011). Though section 1441(a) has always permitted removal of claims arising under the federal courts' original jurisdiction—which, under Section 1333, includes admiralty claims—courts interpreted the previous version of section 1441(b) to permit removal in admiralty cases only if no defendant was a citizen of the state in which the action was filed. *See Lu Junhong v. Boeing Co.*, 792 F.3d 805, 817–18 (7th Cir. 2015). So construed, section 1441(b) was an "Act of Congress" expressly prohibiting removal of most admiralty cases (thereby triggering the exceptions clause of 1441(a)). Thus, the "practical effect" of section 1441(b) was to make diversity of citizenship a prerequisite for removal of admiralty cases. *Dutile*, 935 F.2d at 63. The VCA eliminated the language in section 1441(b) that had been construed to cover admiralty cases; instead, section 1441(b) now states that the presence of a local defendant will bar removal *only* in cases arising under *diversity* jurisdiction. 28 U.S.C. § 1441(b)(2). Accordingly, section 1441(b) is no longer an 'Act of Congress' prohibiting that exercise [of removal jurisdiction] in admiralty cases involving non-diverse parties." *Ryan v. Hercules Offshore, Inc.*, 945 F. Supp. 2d 772, 777–78 (S.D. Tex. 2013).[39] As amended, "the

[39] Plaintiff contests the validity of *Ryan*, pointing to cases where certain judges hypothesized that admiralty claims brought in state court somehow "transform[]" into claims at law, thus falling outside the admiralty jurisdiction of the

statute's language is plain, [and] the sole function of the courts . . . is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (citations and quotations omitted).

Nothing about the "saving-to-suitors" clause of Section 1333 alters this conclusion. Section 1333 grants original jurisdiction to the federal courts over "[a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other *remedies* to which they are otherwise entitled." 28 U.S.C. § 1333 (emphasis added). Far from guaranteeing a state court *forum* as Plaintiff claims, the unambiguous text of the saving-to-suitor clause merely grants claimants the option to pursue common law *remedies*, whether they be in state or federal court. Indeed, for the past 150 years, the Supreme Court and the courts of appeals have held that "[i]t is not a remedy in the common-law courts which is saved, but a common-law remedy." *The Moses Taylor*, 71 U.S. 411, 431 (1866); *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372, 383 (1918); *see also Tenn. Gas Pipeline*, 87 F.3d at 153 ("The 'saving to suitors' clause does no more than preserve the right of maritime suitors to pursue nonmaritime remedies."); *Ryan*, 945 F. Supp. 2d at 777 ("the saving to suitors clause does not preclude federal courts from exercising jurisdiction over admiralty claims originally brought in state court").

Read this way, removal simply does not impinge on any right granted by the saving-to-suitors clause. Plaintiff retains the right to file in personam admiralty claims in state court, as the saving-to-suitors clause "leaves state courts competent to adjudicate maritime causes of action." Mot. 60–61. However, defendants are thereafter free to invoke the federal removal statute in

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federal courts. *Sanders v. Cambrian Consultants*, 132 F. Supp. 3d 853, 858 (S.D. Tex. 2015). However, the Supreme Court rejected this argument in *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354 (1959), which held that "[*a*]*ll* suits involving maritime claims, regardless of the remedy sought, are cases of admiralty and maritime jurisdiction within the meaning of Article III whether they are asserted in the federal courts or, under the saving clause, in the state courts." *Id.* at 367 n.23, *superseded by statute on other grounds* (emphasis added); *see also Genusa*, 18 F. Supp. 3d at 790 ("The 2011 amendments . . . removed the statutory basis for the Fifth Circuit's conclusion . . . that admiralty actions were non-removable."); *Exxon Mobil Corp. v. Starr Indem. & Liab. Co.*, 2014 WL 2739309 (S.D. Tex. June 17, 2014), *rev'd on on other grounds*, 2014 WL 4167807 (S.D. Tex. Aug. 20, 2014); *Provost v. Offshore Serv. Vessels*, LLC, 2014 WL 2515412 (M.D. La. June 4, 2014); *Garza v. Phillips 66 Co.*, 2014 WL 1330547 (M.D. La. Apr. 1, 2014); *Carrigan v. M/V AMC Ambassador*, 2014 WL 358353 (S.D. Tex. Jan. 31, 2014); *Wells v. Abe's Boat Rentals Inc.*, 2013 AMC 2208 (S.D. Tex. 2013); *Bridges v. Phillips 66 Co.*, 2013 WL 6092803 (M.D. La. Nov. 19, 2013).

accordance with its plain terms. *See Ryan*, 945 F. Supp. 2d at 778; *Genusa*, 18 F. Supp. 3d at 790. As the Supreme Court has held with regard to admiralty claims, "[t]he prospect that a vessel owner may remove a state court action to federal court . . . does not limit a claimant's forum choice under the saving to suitors clause any more than other litigants' forum choices may be limited." *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 455 (2001).

A claim falls within a federal court's admiralty jurisdiction if "the tort occurred on navigable water" or if an "injury suffered on land was caused by a vessel on navigable water." *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995). Plaintiff argues that the location test is not satisfied because Defendants' *promotion* of petroleum products—which did not occur aboard a vessel—constitutes "*the* proximate cause" of the State's injuries. Mot. 63. But this argument simply ignores the numerous portions of the complaint that allege injury based on the exploration, extraction, and production of fossil fuels. *See, e.g.*, Compl. ¶¶ 1, 3–4, 10, 49, 98, 103, 175, 199. These activities occurred aboard "vessel[s] on navigable water" within the meaning of 46 U.S.C. § 30101(a).[40] Taking Plaintiff's complaint at face value, the allegedly tortious conduct satisfies the "location" test for maritime jurisdiction.

Plaintiff advances two arguments in an attempt to show that the alleged activities have no "substantial relationship" to traditional maritime activity. First, Plaintiff claims that offshore oil and gas drilling from vessels "is not itself a 'traditional maritime activity.'" Mot. 63. But courts have consistently held that the drilling and production of oil and gas from a vessel—such as a floating oil rig—is in fact maritime activity. *See In re Crescent Energy Servs., L.L.C. for Exoneration from or Limitation of Liab.*, 896 F.3d 350, 356 (5th Cir. 2018); *In re DEEPWATER HORIZON*, 745 F.3d 157, 166 (5th Cir. 2014).[41] As the Fifth Circuit recently explained, "vessel-

[40] *See In re Oil Spill*, 808 F. Supp. 2d 943, 949 (E.D. La. 2011); *Barker v. Hercules Offshore, Inc.*, 713 F.3d 208, 215 (5th Cir. 2013); *Demette v. Falcon Drilling Co., Inc.*, 280 F.3d 492, 498 n.18 (5th Cir. 2002) *overruled in part, on other grounds by Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 589 F.3d 778 (5th Cir. 2009) (en banc); *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 417 n.2 (1985).

[41] *Herb's Welding* (cited at Mot. 63–64) did not address whether oil and gas extraction from a vessel can be termed maritime activity. Less than a year after *Herb's Welding*, the Fifth Circuit explained: "The Supreme Court did not hold therein that oil and gas production from a vessel can no longer be termed maritime commerce, but held instead

related oil and gas drilling and production 'is a major industry with peculiar maritime-related problems.'" *In re Larry Doiron, Inc.*, 879 F.3d 568, 575 n.46 (5th Cir. 2018), *cert. denied sub nom. Larry Doiron, Inc. v. Specialty Rental Tools & Supply, L.L.P.*, 138 S. Ct. 2033 (2018) (quoting *Boudreaux v. Am. Workover, Inc.*, 664 F.2d 463, 466 (5th Cir. Unit A Dec. 1981)).

Second, Plaintiff contends that even if offshore oil and gas drilling from vessels is a traditional maritime activity, it has "not alleged [such activities] to be the proximate cause of the State's injuries." Mot. 64. But once again, that contention is inconsistent with allegations in the Complaint. *E.g.*, Compl. ¶¶ 10, 19, 23(a), 24(a), 25(a), 27(b), 28(a), 29(a), 97, 98, 103, 178-81, 183. Indeed, the Complaint *specifically alleges* that "Defendants' production . . . of fossil fuel products . . . proximately caused Rhode Island's injuries," *id.* ¶ 10, and also *specifically alleges* that some of those activities have been maritime. *Id.* ¶¶ 141, 178-81, 183.

These claims are thus removable under the Court's admiralty jurisdiction.

IV. CONCLUSION

For the foregoing reasons, and those set forth in Defendants' Notice of Removal and Marathon Petroleum Company LP's Supplemental Notice of Removal, the Court should deny Plaintiff's motion to remand.

Dated: September 14, 2018

Respectfully submitted,

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that not every worker performing a task in oil and gas production from fixed platforms is engaged in maritime employment." *Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 539 (5th Cir. 1986).

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed through the ECF system on the 14th day of September, 2018, and will be sent electronically to the registered participants identified on the Notice of Electronic Filing.

/s/ *Gerald J. Petros*