

Nos. 18-15499, 18-15502, 18-15503, 18-16376

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IN THE  
**United States Court of Appeals for the Ninth Circuit**

COUNTY OF SAN MATEO, Plaintiff-Appellee, v. CHEVRON CORPORATION, <i>et al.</i> , Defendants-Appellants.	No. 18-15499 No. 17-cv-4929-VC N.D. Cal., San Francisco Hon. Vince Chhabria presiding
CITY OF IMPERIAL BEACH, Plaintiff-Appellee, v. CHEVRON CORPORATION, <i>et al.</i> , Defendants-Appellants.	No. 18-15502 No. 17-cv-4934-VC N.D. Cal., San Francisco Hon. Vince Chhabria presiding
COUNTY OF MARIN, Plaintiff-Appellee, v. CHEVRON CORPORATION, <i>et al.</i> , Defendants-Appellants.	No. 18-15503 No. 17-cv-4935-VC N.D. Cal., San Francisco Hon. Vince Chhabria presiding
COUNTY OF SANTA CRUZ; et al., Plaintiffs-Appellees v. CHEVRON CORPORATION; et al. Defendants-Appellants.	No. 18-16376 Nos. 18-cv-00450-VC; 18-cv-00458-VC; 18-cv-00732-VC N.D. Cal., San Francisco Hon. Vince Chhabria presiding

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APPELLANTS' OPENING BRIEF

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Defendants submit the following statement:

Anadarko Petroleum Corporation is a publicly traded corporation that has no corporate parent. No corporation owns 10% or more of Anadarko's stock.

Apache Corp. does not have a parent corporation, and there is no publicly-held corporation that owns 10% or more of Apache Corp's stock.

Arch Coal, Inc. has no parent corporation, and there is no publicly held corporation that owns 10% or more of Arch Coal, Inc.'s stock.

BP p.l.c., a publicly traded corporation organized under the laws of England and Wales, has no parent corporation, and there is no publicly held corporation that owns 10% or more of BP p.l.c.'s stock. BP America Inc. is a 100% wholly owned indirect subsidiary of BP p.l.c., and no intermediate parent of BP America Inc. is a publicly traded corporation.

Chevron Corporation has no parent corporation, and there is no publicly held corporation that owns 10% or more of Chevron Corporation's stock. Chevron U.S.A. Inc. is a wholly owned subsidiary of Chevron Corporation.

CITGO Petroleum Corporation's ("CITGO") parent corporation is CITGO Holding, Inc., which is a wholly-owned subsidiary of PDV Holding, Inc., which is a wholly-owned subsidiary of Petróleos de Venezuela S.A. No publicly held

corporation owns 10% or more of CITGO's stock;

ConocoPhillips has no parent corporation, and there is no publicly held corporation that owns 10% or more of ConocoPhillips's stock. ConocoPhillips Company is a wholly owned operating subsidiary of ConocoPhillips.

Devon Energy Corporation has no parent corporation, and there is no publicly held corporation that owns 10% or more of Devon Energy Corporation's stock. Devon Energy Production Company, L.P. is a wholly owned subsidiary of Devon Energy Corporation.

Encana Corporation, a publicly traded corporation incorporated under the Canada Business Corporations Act, has no parent corporation, and there is no publicly held corporation that owns 10% or more of Encana Corporation's stock.

Eni Oil & Gas Inc. is a wholly-owned subsidiary whose ultimate parent corporation is Eni S.p.A. Eni S.p.A. is a company incorporated and headquartered in Italy. Eni S.p.A. has no parent corporation and there is no publicly traded company that owns 10% or more of Eni S.p.A.'s stock.

Exxon Mobil Corporation is a publicly traded corporation and it has no corporate parent. No publicly held corporation owns 10% or more of Exxon Mobil Corporation's stock.

Hess Corporation has no parent corporation, and there is no publicly held corporation that owns 10% or more of Hess Corporation's stock.

Marathon Oil Corporation has no parent corporation, and there is no publicly held corporation that owns 10% or more of Marathon Oil Corporation's stock. Marathon Oil Company is a wholly owned subsidiary of Marathon Oil Corporation.

Marathon Petroleum Corporation has no parent corporation, and there is no publicly held corporation that owns 10% or more of Marathon Petroleum Corporation's stock.

Occidental Petroleum Corporation, a publicly traded company, has no parent company, and no publicly held company owns more than 10% of its stock. Occidental Chemical Corporation is wholly owned by Occidental Chemical Holding Corporation.

Peabody Energy Corporation has no parent corporation and is not aware of any publicly held corporation that owns 10% or more of its stock.

Phillips 66 does not have a parent corporation, and there is no publicly-held corporation that owns 10% or more of Phillips 66's stock.

Repsol Energy North America Corp. is a subsidiary whose ultimate parent corporation is Repsol, S.A. Repsol Trading USA Corp. is a subsidiary whose ultimate parent corporation is also Repsol, S.A. Repsol S.A. is a company incorporated and headquartered in Spain. Repsol S.A. has no parent corporation and there is no publicly traded company that owns 10% or more of Repsol S.A.'s stock.

Rio Tinto plc has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock. Rio Tinto Ltd. has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock. Rio Tinto Minerals Inc. is a wholly-owned subsidiary whose ultimate parent corporation is Rio Tinto plc, a publicly held corporation. Rio Tinto Energy America Inc. is a wholly-owned subsidiary whose ultimate parent corporation is Rio Tinto plc, a publicly held corporation. Rio Tinto Services Inc. is a wholly-owned subsidiary whose ultimate parent corporation is Rio Tinto plc, a publicly held corporation.

Royal Dutch Shell plc, a publicly held UK company, has no parent corporation, and there is no publicly held corporation that owns 10% or more of Royal Dutch Shell plc's stock. Shell Oil Products Company LLC is a wholly owned indirect subsidiary of Royal Dutch Shell plc.

TOTAL E&P USA ("TEPUSA") states that TOTAL Delaware, Inc. owns 76.39% of the stock of TEPUSA, and Elf Aquitaine, Inc. owns the remaining 23.61% of the stock of TEPUSA. TOTAL Delaware, Inc. owns 100% of the stock of Elf Aquitaine, Inc. TOTAL Holdings USA, Inc. owns 100% of the stock of TOTAL Delaware, Inc. TOTAL GESTION USA owns 100% of the stock of TOTAL Holdings USA, Inc. TOTAL, S.A. owns 100% of the stock of TOTAL GESTION USA. TOTAL, S.A. is a publicly held corporation that indirectly holds more than

10% of TEPUSA's stock.

TOTAL Specialties USA, Inc. ("Total Specialties") states that TOTAL MARKETING SERVICES S.A. owns 100% of the stock of Total Specialties. TOTAL S.A. owns 100% of the stock of TOTAL MARKETING SERVICES S.A. TOTAL, S.A. is a publicly held corporation that indirectly holds more than 10% of Total Specialties' stock.

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## INTRODUCTION

These consolidated cases raise federal claims that belong in federal court.<sup>1</sup> Plaintiffs—three California cities and three California counties—seek to reshape the nation’s longstanding environmental, economic, energy, and foreign policies by holding a selected group of energy companies liable for harms allegedly caused by worldwide fossil fuel production and global greenhouse gas emissions from countless nonparties. Although Plaintiffs’ claims are based on worldwide conduct of foreign and domestic energy companies that are heavily regulated by the United States and numerous foreign countries, Plaintiffs seek to litigate these global climate-change actions in state court as if they were governed by state law.

The district court recognized that Plaintiffs’ sweeping “claims raise national and perhaps global questions,” but it nevertheless granted Plaintiffs’ motions to remand. That ruling was error. Global-warming based tort claims are governed by federal common law—not state law—as has been recognized by the Supreme Court, *see Am. Elec. Power Co., Inc. v. Connecticut* (“AEP”), 564 U.S. 410 (2011), this Court, *see Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th

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<sup>1</sup> Several Defendants contend they are not subject to personal jurisdiction in California. Defendants submit this brief subject to, and without waiver of, these jurisdictional objections.

Cir. 2012), and two district courts adjudicating similar claims, *see California v. BP p.l.c.*, 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018); *City of New York v. BP p.l.c.*, 325 F. Supp. 3d 466 (S.D.N.Y. 2018). Plaintiffs' claims therefore "arise under" federal law for purposes of removal jurisdiction. *See New SD, Inc. v. Rockwell Int'l, Corp.*, 79 F.3d 953, 954-55 (9th Cir. 1996).

Plaintiffs' claims are also removable on several other grounds: They necessarily raise disputed, substantial questions of federal law and thus are removable under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 314 (2005). They are completely preempted by the Clean Air Act. *See Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 23-24 (1983). They arise out of Defendants' substantial operations on the Outer Continental Shelf, 43 U.S.C. § 1349(b), conduct occurring on federal enclaves, *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1250 (9th Cir. 2006), and activity taken at the direction of federal officers, 28 U.S.C. § 1442(a). They are "related to" certain bankruptcy cases and thus are removable under 28 U.S.C. §§ 1452(a) and 1334(b). And they fall within the district court's admiralty jurisdiction under 28 U.S.C. § 1333.

Plaintiffs try to prevent this Court from reaching these issues by arguing in their motion for partial dismissal that most of the remand order is unreviewable on appeal under 28 U.S.C. § 1447(d). But §1447(d) is clear: Because Defendants removed these actions, in part, under §1442(a), this Court has jurisdiction to review the entire remand “order.” In addition, the district court remanded in part because, in its view, the displacement of federal common law by the Clean Air Act left Plaintiffs without a federal remedy. But that was a *merits* determination that did not disturb the district court’s jurisdiction. Accordingly, even if Defendants’ removal under §1442(a) did not authorize this Court to review the entire remand orders, they are reviewable on appeal, notwithstanding §1447(d).

This Court should reverse the district court’s remand orders so Plaintiffs’ global warming claims can be resolved in federal court where they belong.

### **JURISDICTIONAL STATEMENT**

The district court had jurisdiction under 28 U.S.C. §§ 1331, 1334, 1441(a), 1442, 1452, and 1367(a), and 43 U.S.C. § 1349(b). This Court has jurisdiction under 28 U.S.C. §§ 1291 and 1447(d).

On March 16, 2018, the district court entered orders in Nos. 17-cv-04929, 17-cv-04934, and 17-cv-04935 granting Plaintiffs’ motions to remand these cases to state court. *See* ER3.

On March 26, 2018, Defendants timely filed notices of appeal under 28 U.S.C. §§ 1291 and 1447(a) of the district court's remand orders. *See* ER44.

On July 10, 2018, the district court entered orders in Nos. 18-cv-00450, 18-cv-00458, and 18-cv-00732, granting Plaintiffs' motions to remand these cases to state court. ER1.

On July 18, 2018, Defendants timely filed notices of appeal under 28 U.S.C. §§ 1291 and 1447(a) of the district court's remand orders. ER9, ER20, ER31.

### **ISSUES PRESENTED**

1. Whether 28 U.S.C. § 1447(d), which states that “an order remanding a case to the State court from which it was removed pursuant to section 1442 ... of this title shall be reviewable by appeal or otherwise,” permits this Court to review the entirety of the district court's remand orders, where the cases were removed on bases including 28 U.S.C. § 1442(a)(1), the federal officer removal statute;

2. Whether this Court has jurisdiction to review the district court's remand orders notwithstanding 28 U.S.C. § 1447(d) because the district court's rulings were based on a merits determination, not an absence of subject matter jurisdiction;

3. Whether there is federal jurisdiction over Plaintiffs' global-warming based tort claims.

[An addendum of pertinent statutory provisions is included at the end of the brief]

## STATEMENT OF THE CASE

I. As an issue of national and international significance, global warming has for decades been the subject of federal laws and regulations, political negotiations, and diplomatic engagement with other countries. As early as 1978, Congress established a “national climate program” to improve the country’s understanding of global warming through enhanced research, information collection and dissemination, and international cooperation. *See* National Climate Program Act of 1978, 15 U.S.C. § 2901 *et seq.* Nine years later, in the Global Climate Protection Act of 1987, Congress recognized the uniquely international character of global warming and directed the Secretary of State to coordinate negotiations on the issue. *See* 15 U.S.C. § 2901 note; *see also* 15 U.S.C. § 2952(a).<sup>2</sup>

In the Clean Air Act (“CAA”), Congress established a comprehensive scheme to promote and balance multiple objectives, deploying resources to

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<sup>2</sup> Congress has since revisited global warming. *See, e.g.*, Global Change Research Act of 1990, 15 U.S.C. § 2921 *et seq.* (establishing research program for global climate issues); Energy Policy Act of 1992, 42 U.S.C. § 13384 (directing Secretary of Energy to conduct greenhouse gas assessments and report to Congress); Energy Policy Act of 2005, 42 U.S.C. § 13389(c)(1) (seeking further reductions of greenhouse gas emissions at national level); Energy Independence and Security Act of 2007, 42 U.S.C. § 17001 *et seq.* (same).

“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); *id.* § 7411 (providing for uniform national emission standards); *id.* § 7521 (vehicle emissions). Congress authorized the United States Environmental Protection Agency (“EPA”) to regulate air pollutants such as greenhouse gas emissions, and the EPA has exercised this authority on its own and with other federal agencies. *Id.* § 7601; *Regulations for Greenhouse Gas Emissions from Passenger Cars and Trucks*, U.S. EPA, <http://bit.ly/2EWvcKK>.

**II.** On July 17, 2017, the County of San Mateo, the County of Marin, and the City of Imperial Beach filed materially identical complaints in state court against more than 30 energy companies, alleging that Defendants’ “extraction, refining, and/or formulation of fossil fuel products . . . is a substantial factor in causing the increase in global mean temperature and consequent increase in global mean sea surface height.” ER286 ¶164. Plaintiffs assert that “the dominant cause of global warming and sea level rise” is worldwide “greenhouse gas pollution.” ER216 ¶3. They allege that global consumers’ “continued high use and combustion of [fossil fuels]” has resulted in a “buildup of CO<sub>2</sub> in the environment” that allegedly “drives sea level rise.” ER217 ¶6. And they claim that “Defendants, through their extraction, promotion, marketing, and sale of their fossil fuel

products, caused approximately 20% of global fossil fuel product-related CO<sub>2</sub> between 1965 and 2015, with contributions currently continuing unabated.” ER247 ¶75.

Plaintiffs allege they “have already incurred, and will foreseeably continue to incur, injuries and damages because of sea level rise caused by Defendants’ conduct.” ER286 ¶166. Plaintiffs assert causes of action for public and private nuisance, strict liability for failure to warn, strict liability for design defect, negligence, negligent failure to warn, and trespass. ER292-311 ¶¶179-267. They demand compensatory and punitive damages, disgorgement of profits, equitable relief to abate the alleged nuisances, and other relief. ER312.

Defendants removed the San Mateo, Marin, and Imperial Beach actions to the Northern District of California on August 24, 2017. *See, e.g.*, ER141. The notices of removal asserted that Plaintiffs’ claims: (1) “are governed by federal common law”; (2) “raise[] disputed and substantial federal questions”; (3) “are completely preempted by the CAA and/or other federal statutes and the United States Constitution”; (4) warrant original federal jurisdiction under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1349; (5) allege actions “taken pursuant to a federal officer’s directions”; (6) “are based on alleged injuries to and/or

conduct on federal enclaves”; and (7) “are related to cases under Title 11 of the United States Code.” ER145-47.

On September 12, 2017, these three actions were related and assigned to Judge Vince Chhabria.

On December 20, 2017, the City of Santa Cruz and the County of Santa Cruz filed separate actions in Santa Cruz Superior Court against many of the same Defendants named in the initial three actions. *See* No. 18-cv-00450 (N.D. Cal.) ECF No. 1; No. 18-cv-00458 (N.D. Cal.) ECF No. 1. On January 22, 2018, the City of Richmond filed a similar action in Contra Costa Superior Court against these same Defendants. No. 18-cv-00732 (N.D. Cal.) ECF No. 1. Defendants removed the actions brought by the County of Santa Cruz and the City of Santa Cruz on January 19, 2018, and removed the action brought by the City of Richmond on February 2, 2018. The notices of removal in those three cases were substantively identical to the notices filed in the first three actions. On March 2, 2018, Defendant Marathon Petroleum Corporation filed a separate notice of removal in the Santa Cruz and Richmond actions asserting additional grounds for removal. ER55.

On February 14, 2018, the district court related the three later-removed actions to the three earlier-removed actions and assigned all six actions to Judge

Chhabria. All six municipalities in the related actions are represented by Sher Edling LLP.

Meanwhile, on September 19, 2017, the Cities of San Francisco and Oakland, represented by a different private firm, Hagens Berman Sobol Shapiro LLP, filed separate global-warming tort claims in state court against several of the largest Defendants named in the other six complaints. The complaints filed by San Francisco and Oakland allege that five Defendants “produced massive amounts of fossil fuels for many years” and promoted their products “even in the face of overwhelming scientific evidence that fossil fuels are altering the climate and global warming has become an existential threat to modern life.” *E.g.*, No. 17-cv-06011 (N.D. Cal.) ECF No. 1-2, ¶¶2-5. The cities assert a single claim for public nuisance on behalf of the People of the State of California, *id.* ¶¶93-98, and seek an “abatement fund remedy to be paid for by Defendants to provide infrastructure,” *e.g.*, *id.* Relief Requested.

The Defendants involved removed the San Francisco and Oakland actions on October 20, 2017. *E.g.*, *id.* ECF No. 1. Those two actions were held to be related to each other, but not to the other six actions, and assigned to Judge William Alsup. *Id.* ECF No. 26.

**III.** Plaintiffs in both sets of actions moved to remand. Judge Alsup ruled first. On February 27, 2018, he denied San Francisco and Oakland’s motions, holding that “Plaintiffs’ nuisance claims—which address the national and international geophysical phenomenon of global warming—are necessarily governed by federal common law.” *BP*, 2018 WL 1064293, at \*2 (emphasis added). Judge Alsup held that, as in “*AEP* and *Kivalina*, a uniform standard of decision is necessary to deal with the issues raised in plaintiffs’ complaints,” and that “[i]f ever a problem cried out for a uniform and comprehensive solution, it is the geophysical problem described by the complaints.” *Id.* at \*3. As Judge Alsup explained, “the scope of the worldwide predicament” alleged in the complaints “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.*<sup>3</sup>

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<sup>3</sup> On June 25, 2018, Judge Alsup granted Defendants’ motion to dismiss for failure to state a claim. *City of Oakland v. BP p.l.c.*, 325 F. Supp. 3d 1017 (N.D. Cal. 2018). On July 27, 2018, he granted motions of the four out-of-state Defendants to dismiss for lack of personal jurisdiction. *City of Oakland v. BP p.l.c.*, 2018 WL 3609055 (N.D. Cal. July 27, 2018).

One month later, on March 16, 2018, Judge Chhabria explicitly “disagreed” with Judge Alsup and granted Plaintiffs’ motions to remand the San Mateo, Marin, and Imperial Beach actions. ER4. Judge Chhabria concluded that “federal common law does not govern the plaintiffs’ claims” because the Clean Air Act has displaced federal common law claims “against energy producers[]” based on their alleged “contributions to global warming and rising sea levels.” ER4-5. He thus concluded that federal common law “does not preclude [Plaintiffs] from asserting the state law claims in these lawsuits.” ER5.

Judge Chhabria further held that (1) removal was not “warranted on the basis of *Grable*”; (2) the CAA does not completely preempt Plaintiffs’ claims; and (3) the “cases were not removable under any of the specialized statutory removal provisions cited by the defendants.” ER5-6.

Judge Chhabria stayed the remand orders pending appeal, finding that *all* of Defendants’ bases for removal presented “substantial ground for difference of opinion.” ER42-43. The court’s stay order also *sua sponte* certified the remand orders for interlocutory review “in case it’s necessary.” ER42. Defendants petitioned for interlocutory review, but this Court denied the petition. *See* No. 18-80049.

On March 26, 2018, Defendants filed notices of appeal, stating that “because section 1447(d) expressly authorizes review of the *order* remanding these actions to state court, the Court of Appeals may review the *whole order* to determine whether removal was proper under any of Defendants’ [] grounds of removal.” ER46 (emphases in original). These appeals were docketed as Nos. 18-15499, 18-15502, and 18-15503.

On July 10, 2018, Judge Chhabria granted motions to remand filed by the County of Santa Cruz, the City of Santa Cruz, and the City of Richmond, “[f]or the reasons stated in th[e] Court’s prior order, ... as well as for the reasons stated in *Coronel v. AK Victory*, 1 F. Supp. 3d 1175, 1178-79 (W.D. Wash. 2014),” again staying the remand orders pending appeal. ER1-2.<sup>4</sup> Defendants filed notices of appeal on July 18, 2018. ER9, ER20, ER31. These appeals were docketed as No. 18-16376.

**IV.** On June 6, 2018, Plaintiffs moved in this Court for partial dismissal in Nos. 18-15499, 18-15502, and 18-15503, asserting that §1447(d) bars this Court from reviewing any of Defendants’ grounds for removal except for removal under 28 U.S.C. § 1442(a), the federal officer removal statute.

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<sup>4</sup> The two sets of remand orders are collectively referred to as the “Remand Order.”

On August 20, 2018, the Court referred Plaintiffs’ motion to the merits panel “for whatever consideration the panel deems appropriate,” and granted the parties’ joint motion to consolidate the appeals in Nos. 18-15499, 18-15502, and 18-15503 with the appeal in 18-16376.

### STANDARD OF REVIEW

This Court “review[s] questions of statutory construction *de novo*.” *United States v. Kaplan*, 836 F.3d 1199, 1208 (9th Cir. 2016). It likewise “review[s] whether an action was properly remanded to the state court from which it was removed *de novo*.” *Jordan v. Nationstar Mortg. LLC*, 781 F.3d 1178, 1181 (9th Cir. 2015).

### SUMMARY OF THE ARGUMENT

I. This Court has jurisdiction under §1447(d) to review the whole Remand Order. The plain text of §1447(d) makes *orders*—not issues—reviewable on appeal. Thus, as several circuit courts have recently recognized, “[t]o say that a district court’s ‘order’ is reviewable is to allow appellate review of the *whole* order, not just of particular issues or reasons.” *Lu Junhong v. Boeing Co.*, 792 F.3d 805, 811 (7th Cir. 2015); *see also Mays v. City of Flint, Michigan*, 871 F.3d 437, 442 (6th Cir. 2017) (following *Lu Junhong*); *cf. Decatur Hosp. Auth’y v. Aetna Health, Inc.*, 854 F.3d 292, 296 (5th Cir. 2017) (same). This conclusion accords

with the Supreme Court’s decision in *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996), which held that when an order is certified for interlocutory review under 28 U.S.C. § 1292(b), “appellate jurisdiction applies to the *order* certified to the court of appeals, and is not tied to the particular question formulated by the district court.” *Id.* at 205.

Plaintiffs’ motion for partial dismissal contends that this argument is foreclosed by *Patel v. Del Taco, Inc.*, 446 F.3d 996 (9th Cir. 2006), a case involving a failed attempt to join the opposing party’s state-court arbitration petition to a civil rights action filed in federal court by frivolously removing the state-court petition under 28 U.S.C. § 1443. But *Patel* is not controlling here because the question of whether §1447(d) authorizes review of the whole order when a case is removed under §1442(a) was neither presented nor decided in that case. Moreover, five years after *Patel*, Congress enacted the Removal Clarification Act of 2011, which first authorized review of remand orders in cases removed under §1442(a). Although Congress was aware of how expansively the Supreme Court in *Yamaha* had interpreted the term “order” in the context of §1292(b) appeals, Congress did not include in §1447(d) any limitation on the reviewability of “orders.” In light of that intervening authority, *Patel* is not controlling law.

In addition, this Court has jurisdiction to review the entire Remand Order under §1291 because, although Judge Chhabria characterized his remand order as being for lack of subject matter jurisdiction, that characterization was not “colorable.” *Atl. Nat’l Trust LLC v. Mt. Hawley Ins. Co.*, 621 F.3d 931, 938 (9th Cir. 2010) (citing *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 234 (2007)). In fact, Judge Chhabria’s determination that Plaintiffs’ claims are not governed by federal common law was based on his conclusion that the CAA *displaced* the relevant federal common law. That was a merits determination because “displacement of a federal common law right of action means displacement of *remedies*”—not the absence of jurisdiction. *Kivalina*, 696 F.3d at 857 (emphasis added).

**II.** The actions were properly removed on multiple grounds. As this Court has recognized, “transboundary pollution suits” brought by one state to address pollution emanating from other states are governed by federal common law and thus are within the district court’s original jurisdiction. *Kivalina*, 696 F.3d at 855. Federal common law, not state law, must govern such disputes because of the “overriding federal interest in the need for a uniform rule of decision.” *Illinois v. City of Milwaukee*, 406 U.S. 91, 105 n.6 (1972) (“*Milwaukee I*”). Plaintiffs’ claims here require a uniform rule of decision because they target fossil-fuel extraction—

and greenhouse gas emissions resulting from fossil-fuel use—occurring around the world. Because a “patchwork of fifty different answers to the same fundamental global issue would be unworkable,” *BP*, 2018 WL 1064293, at \*3, Plaintiffs’ claims must be governed by federal common law.

Judge Chhabria concluded that Congress’s displacement of federal common law somehow transformed Plaintiffs’ federal common law claims into state law claims. But displacement in no way suggests that state common law applies—it merely means that federal courts cannot provide a federal common law *remedy* for injuries allegedly caused by greenhouse gas emissions, because Congress has empowered the EPA to set emissions limits. *See AEP*, 564 U.S. at 429; *Kivalina*, 696 F.3d at 857. The absence of a federal common law remedy does not affect subject matter jurisdiction. *Allen v. Milas*, 896 F.3d 1094, 1101 (9th Cir. 2018).

Removal was also proper on several other grounds. Plaintiffs’ claims arise under federal law because they depend on resolving substantial, disputed federal questions relating to the extraction, processing, promotion, and consumption of global energy resources. *See Grable*, 545 U.S. at 313-14. Specifically, to prevail on their claims, Plaintiffs would need a fact-finder to strike a different balance between energy production and greenhouse gas regulation than Congress and various federal agencies have struck. Claims constituting “a collateral attack on a

federal regulatory scheme ... premised on the notion that [the scheme] provides inadequate protection” raise substantial federal issues sufficient to satisfy federal jurisdiction. *Bd. of Comm’rs v. Tenn. Gas Pipeline Co., L.L.C.*, 850 F.3d 714, 724-26 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 420 (2017). Plaintiffs’ claims also “touch[] on foreign relations” and “must yield to the National Government’s policy[.]” *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 413 (2003). Moreover, because the Army Corps of Engineers (“Corps”) has authority to address flooding involving the navigable waters of the United States, a fact-finder would need to determine whether those claims are compatible with the Corps’s authority and the remedial actions it has already taken to prevent injury from rising sea levels.

Plaintiffs’ claims also are removable because they are completely preempted by the CAA, which provides the exclusive vehicle for regulating nationwide emissions, *see, e.g.*, 42 U.S.C. §§ 7401(b)(1), 7607(b), and which “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). The actions are removable under the Outer Continental Shelf Lands Act (“OCSLA”) because Plaintiffs’ claims “aris[e] out of, or in connection with ... operation[s] conducted on the Outer Continental Shelf” (“OCS”). 43 U.S.C. § 1349(b). They are removable because they are “tort claims

that arise on ‘federal enclaves.’” *Durham*, 445 F.3d at 1250. They are removable under 28 U.S.C. § 1442(a) because there is a “causal nexus” between the claims and actions by the Defendants “taken pursuant to a federal officer’s directions.” *Id.* at 1251. They are removable under the federal bankruptcy statutes—28 U.S.C. §§ 1452(a) and 1334(b)—because Plaintiffs’ claims are “related to” the bankruptcy cases of Defendants Peabody Energy and Arch Coal, as well as those of numerous bankruptcies of defendants and related entities whose activities the claims also encompass. 28 U.S.C. § 1452(a). Finally, the claims fall within the district court’s admiralty jurisdiction, *see* 28 U.S.C. § 1333; 46 U.S.C. § 30101(a), because much of the allegedly tortious fossil-fuel extraction occurs on vessels engaged in maritime activities.

## **ARGUMENT**

### **I. The Court Has Jurisdiction to Review the Entire Remand Order**

Plaintiffs’ motion for partial dismissal contends that federal officer removal is the only ground of removal the Court is authorized to review under §1447(d). But §1447(d)’s plain language refutes Plaintiffs’ arguments and the weight of recent authority confirms that the entire remand order is reviewable on appeal. Moreover, §1447(d) bars appellate review only where the remand order is based on a lack of jurisdiction or a defect in removal procedure. Because the district court’s

remand order was premised on a *merits* determination that Plaintiffs' claims are displaced, the remand was not for lack of jurisdiction, and thus §1447(d) is no obstacle to review.

**A. Section 1447(d) Authorizes Review of “Orders”**

Although remand orders are generally not appealable, “Congress has, when it wished, expressly made 28 U.S.C. § 1447(d) inapplicable to particular remand orders.” *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 641 n.8 (2006). One such exception appears in §1447(d) itself, which provides that “an *order* remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise.” 28 U.S.C. § 1447(d) (emphasis added).<sup>5</sup> As the Seventh Circuit explained in a thorough opinion authored by Judge Easterbrook, “[t]o say that a district court’s ‘order’ is reviewable is to allow appellate review of the *whole* order, not just of particular issues or reasons.” *Lu Junhong*, 792 F.3d at 811. In other words, “when a statute provides appellate jurisdiction over an order, ‘the thing under review is the order,’

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<sup>5</sup> Before 2011, §1447(d) authorized appellate review of remand orders in cases removed pursuant to §1443 only. In the Removal Clarification Act of 2011, Congress amended §1447(d) to allow review of orders in cases removed under §1442. Pub. L. No. 112-51, 125 Stat. 545.

and the court of appeals is not limited to reviewing particular ‘questions’ underlying the ‘order.’” *Id.*

The Seventh Circuit further noted that, “[i]f we go beyond the text of § 1447(d) to the reasons that led to its enactment, we reach the same conclusion.” *Id.* at 813. Section 1447(d) “was enacted to prevent appellate delay in determining where litigation will occur,” “[b]ut once Congress has authorized appellate review of a remand order—as it has authorized review of suits removed on the authority of § 1442—a court of appeals has been authorized to take the time necessary to determine the right forum.” *Id.* In such cases, “[t]he marginal delay from adding an extra issue to a case where the time for briefing, argument, and decision has already been accepted is likely to be small.” *Id.*

The Sixth Circuit has similarly held that where an “appeal of the remand order is authorized by 28 U.S.C. § 1447(d) because the ... Defendant[] removed the case under 28 U.S.C. § 1442,” the court’s “jurisdiction to review the remand order also encompasses review of the district court’s decision on ... alternative ground[s] for removal [such as] 28 U.S.C. § 1441.” *Mays*, 871 F.3d at 442 (citing

*Lu Junhong*, 792 F.3d at 811-13).<sup>6</sup> The leading treatise on federal jurisdiction agrees that appellate review of a remand order made reviewable under § 1447(d) “should ... be extended to all possible grounds for removal underlying the order. Once an appeal is taken there is very little to be gained by limiting review[.]” 15A Wright et al., Fed. Prac. & P. § 3914.11 (2d ed.).

Although other circuits have concluded that appellate jurisdiction is limited to reviewing the propriety of removal under sections 1442 and 1443, all but one of those decisions predate the Removal Clarification Act of 2011—which authorized review of remand orders in cases removed under §1442—and none undertook the

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<sup>6</sup> See also *Decatur Hospital Authority*, 854 F.3d at 296 (“Like the Seventh Circuit, ‘[w]e take both Congress and *Kircher* at their word in saying that, if appellate review of an ‘order’ has been authorized, that means review of the ‘order.’ Not particular reasons for an order, but the order itself.”) (quoting *Lu Junhong*, 792 F.3d at 812); but see *City of Walker v. Louisiana*, 877 F.3d 563, 566 n.2 & n.4 (5th Cir. 2017) (reading *Decatur* narrowly in a case where the appellants did “not argue that the § 1447(d) exception for federal officer jurisdiction allow[ed] [the court] to review the entire remand order” and where even if the “entire order were properly before [the court] for review” it “would find no error in the district court’s analysis and conclusion that it lacked federal question jurisdiction”).

type of comprehensive analysis undertaken in *Lu Junhong*.<sup>7</sup> The Eighth Circuit’s opinion in *Jacks*, the only decision post-dating the Removal Clarification Act of 2011, should be given little weight because it cited “nothing” to support its holding, and “neither [party] cited authority or made a coherent argument.” *Lu Junhong*, 792 F.3d at 805 (distinguishing *Jacks*, 701 F.3d at 1229).

The Supreme Court’s decision in *Yamaha* supports the Seventh Circuit’s interpretation of §1447(d). That case involved the proper interpretation of 28 U.S.C. § 1292(b), which provides that when an “order involves a controlling question of law as to which there is substantial ground for difference of opinion,” the court of appeals may “permit an appeal to be taken from such order.” The Court granted certiorari to consider whether “the courts of appeals [can] exercise jurisdiction over any question that is included within the order that contains the controlling question of law identified by the district court[.]” *Yamaha*, 516 U.S. at 204. It answered in the affirmative: “As the text of § 1292(b) indicates, appellate jurisdiction applies to the *order* certified to the court of appeals, and is not tied to

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<sup>7</sup> See, e.g., *Noel v. McCain*, 538 F.2d 633, 635 (4th Cir. 1976); *State Farm Mut. Auto. Ins. Co. v. Baasch*, 644 F.2d 94, 96 (2d Cir. 1981) (per curiam); *Davis v. Glanton*, 107 F.3d 1044, 1047 (3d Cir. 1997); *Alabama v. Conley*, 245 F.3d 1292, 1293 n.1 (11th Cir. 2001); *Jacks v. Meridian Res. Co.*, 701 F.3d 1224, 1229 (8th Cir. 2012).

the particular question formulated by the district court.” *Id.* at 205. As a result, “the appellate court may address any issue fairly included within the certified order because ‘it is the *order* that is appealable, and not the controlling question identified by the district court.’” *Id.* (quoting 9 J. Moore & B. Ward, *Moore’s Fed. Prac.* ¶ 110.25[1], p. 300 (2d ed. 1995)).

The same logic applies to §1447(d). Although removal under §1442 is a necessary predicate for an appeal—just as a controlling question of law is a necessary predicate for an appeal under §1292(b)—once this predicate is satisfied, the court of appeals has jurisdiction to review the whole “order.”

#### **B. No Precedent of this Court Bars Review of the Whole “Order”**

In their motion for partial dismissal, Plaintiffs argue that this Court should reject the weight of recent circuit authority, the leading treatise on federal jurisdiction, the Supreme Court’s *Yamaha* decision, and the plain language of §1447(d) itself because, in their view, this Court’s decision in *Patel* requires partial dismissal of these appeals. But a “prior decision” is not binding on a point “unless the issue was ‘squarely addressed’” in that decision, *Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926, 938 (9th Cir. 2007), and the issue presented here was not briefed, analyzed, or decided in *Patel*.

In *Patel*, Del Taco filed a state court petition to confirm an arbitration award against the Patels. 446 F.3d at 998. While that action was pending, the Patels filed a federal civil rights action against Del Taco and also “sought to remove to federal court Del Taco’s pending state court petition[.]” *Id.* The Patels asserted that the “arbitration petition was removable under 28 U.S.C. § 1443(1),” which authorizes removal of certain civil rights actions. *Id.* They also alleged that the district court had supplemental jurisdiction over the arbitration petition under 28 U.S.C. §§ 1441(c) and 1367 because they “joined their removal petition to their federal civil rights complaint.” *Id.* at 998-99.

The district court held that removal was “not proper under either 28 U.S.C. § 1441 or § 1443(1),” and it awarded attorney’s fees as a sanction for the Patels’ objectively unreasonable removal. *Id.* at 998. On appeal, this Court determined, without any analysis, that it “lack[ed] jurisdiction to review the remand order based on § 1441.” *Id.* (citing 28 U.S.C. § 1447(d)). The Court thus “dismissed” the “Patels’ appeal from the remand order based on § 1441.” *Id.*

*Patel* does not bar review of the remand order here for several reasons. First, the defendants in *Patel* did not argue that review of the entire remand order was authorized by the plain language of §1447(d). *See* Appellants’ Opening Br., *Patel*, Nos. 04-16208 and 04-16604, 2004 WL 3250818 (9th Cir.).

Second, *Patel* involved a very different procedural posture that did not require the Court even to address the plain language of §1447(d) because the Patels argued on appeal that they removed only under §1443. *Id.* (“This case was not removed from state court on the basis of federal question jurisdiction,” but rather “was removed under the specific grant given by Congress under 28 U.S.C. § 1443(1).”). The propriety of “removal” under §1441 arose only because the Patels argued that joining the state-court petition to their federal civil rights complaint—filed in federal court—somehow created supplemental jurisdiction over the state-court petition under sections 1367 and 1441, an argument this Court deemed “frivolous.” *Patel*, 446 F.3d at 999. Here, by contrast, Defendants invoked numerous grounds for federal jurisdiction in their Notices of Removal in addition to §1442—none of them frivolous. Moreover, whereas the Patels’ removal under §1443 was deemed “objectively” unreasonable, *id.*, Judge Chhabria concluded that there is a “substantial ground for difference of opinion” as to whether removal was proper here. ER42-43.

Third, after *Patel*, Congress amended §1447(d) to allow review of remand orders in cases removed under §1442 (previously, only cases removed under §1443 were reviewable). This Court “presume[s] that Congress acts ‘with awareness of relevant judicial decisions.’” *United States v. Alvarez-Hernandez*, 478 F.3d 1060,

1065 (9th Cir. 2007). The fact that Congress retained §1447(d)’s reference to reviewable “orders” (while informed of *Yamaha*’s holding that appellate jurisdiction applies to entire *orders*, not particular questions) confirms that Congress intended to authorize plenary review of such orders. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 697-98 (1979) (“[W]e are especially justified in presuming both that [Congress was] aware of the prior interpretation of Title VI and that that interpretation reflects [its] intent with respect to Title IX.”).

Because *Patel* did not address (much less decide) the question of whether §1447(d) authorizes review of the entire remand “order” when a case is removed based on §1442(a) and on other non-frivolous grounds for removal, the Court should resolve this issue of first impression consistent with the reasoned position recently taken by the Sixth and Seventh Circuits—a position consistent with the plain text of §1447(d) and that will conserve judicial resources.<sup>8</sup>

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<sup>8</sup> If this Court determines it is bound by *Patel*, Defendants request that the panel call for *en banc* review of this important question of federal law, which has divided the federal courts of appeal. Ninth Cir. G.O. 5.2(b). As noted above, *Patel*’s interpretation of §1447(d) conflicts with both Supreme Court precedent and recent decisions by other circuits, justifying *en banc* review under both FRAP 35(b)(1)(A) and FRAP 35(b)(1)(B).

**C. The Remand Order Is Reviewable Because the Court’s Ruling Rested on a Merits Determination Rather than a Threshold Lack of Jurisdiction**

Section “1447(d)’s bar on appellate review is limited to remands based on subject matter jurisdiction and nonjurisdictional defects.” *Atl. Nat’l Trust*, 621 F.3d at 935 (citing *Powerex*, 551 U.S. at 230). Although Judge Chhabria *characterized* his remand order as founded on a lack of subject matter jurisdiction, this Court should “look behind the district court’s characterization of its basis for remand” and “determine whether th[at] ground was colorable.” *Id.* at 938 (quoting *Powerex*, 551 U.S. at 234). It was not.

Judge Chhabria did not disagree with Judge Alsup’s conclusion that Plaintiffs’ ostensibly state-law causes of action arise under federal common law. *See BP*, 2018 WL 1064293, at \*3. On the contrary, he recognized that these claims are functionally indistinguishable from the global-warming-based claims asserted against greenhouse gas emitters in *Kivalina*—claims that this Court held were governed by federal common law. ER4 (noting that Plaintiffs “are seeking similar relief” as that sought in *Kivalina* “based on similar conduct”). Because *Kivalina* held that global-warming-based nuisance claims against emitters have been displaced by the CAA, Judge Chhabria concluded that Plaintiffs’ federal common law claims are likewise displaced by the CAA. ER4-5.

Judge Chhabria’s determination that Plaintiffs’ claims are displaced was a non-jurisdictional determination that Plaintiffs’ inherently federal common-law claims fail as a matter of law—not that there was no federal claim in the first place. *AEP* and *Kivalina* underscore this point. In both cases, the courts *first* recognized that pollution claims involving “air and water in their ambient or interstate aspects” are governed by federal common law, and *then* concluded that no relief was available because the federal common law claims were displaced by the CAA. *AEP*, 564 U.S. at 421, 424; *Kivalina*, 696 F.3d at 855, 857-858; *see also* Part II.A.1-2, *infra*. As both cases make clear, far from divesting the federal court of jurisdiction, “displacement of a federal common law right of action means displacement of *remedies*.” *Kivalina*, 696 F.3d at 857 (emphasis added).

“Simply because a cause of action is pre-empted does not mean that judicial jurisdiction over the claim is affected as well.” *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 499-500 (1987). An act of Congress “pre-empts laws, not courts.” *Id.* at 500. Displacement, like certain types of federal preemption, is merely a *defense* to federal common law claims. “[T]he existence of federal jurisdiction depends solely on the plaintiff’s claims for relief and not on anticipated defenses to those claims.” *ARCO Env’tl. Remediation, L.L.C. v. Dep’t of Health & Env’tl. Quality*, 213 F.3d 1108, 1113 (9th Cir. 2000). Accordingly, to the extent the CAA

displaces the federal common law claims asserted here, it simply means that Plaintiffs do not have viable claims—it has no bearing on whether there is federal “jurisdiction over the claim[s].” *Ouellette*, 479 U.S. at 499. Because Judge Chhabria’s remand order “dresse[d] in jurisdictional clothing a patently nonjurisdictional ground,” the remand order is reviewable under §1291. *See Atl. Nat’l Trust*, 621 F.3d at 937-38.

Moreover, Judge Chhabria apparently concluded that because federal common law has been displaced, Plaintiffs’ claims can be governed by state law. ER5. Defendants disagree that state law springs back to life when federal common law is displaced, but even if Judge Chhabria were correct, the district court had supplemental jurisdiction over any such reinstated state-law claims. *See* 28 U.S.C. § 1367(a); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006). Because an “order remanding a case to state court after declining to exercise supplemental jurisdiction” is not “a remand for lack of subject-matter jurisdiction,” “appellate review is [not] barred by §§ 1447(c) and (d).” *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 637 (2009).

## **II. Plaintiffs’ Global Warming Claims Were Properly Removed**

Although Plaintiffs purport to assert only state-law claims, the Complaints assert claims that arise under federal common law, raise disputed and substantial

federal issues, are completely preempted by federal statute, and are removable under several jurisdiction-granting statutes and doctrines. For any one of these reasons, removal was proper and this Court should reverse the district court's decision to remand.

#### **A. Plaintiffs' Claims Arise Under Federal Common Law**

Supreme Court and Ninth Circuit precedent confirm that Plaintiffs' global-warming-based public nuisance claims are governed by federal common law. *See AEP*, 564 U.S. at 421-22; *Kivalina*, 696 F.3d at 855. Because federal common law governs this "transboundary pollution suit" regardless of how Plaintiffs plead their claims, these actions "arise under" federal law and thus are within the district court's original jurisdiction. *See New SD, Inc. v. Rockwell Int'l. Corp.*, 79 F.3d 953, 954-55 (9th Cir. 1996) (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"); *BP*, 2018 WL 1064293, at \*5 ("[F]ederal jurisdiction exists ... if the claims necessarily arise under federal common law[.]"). Accordingly, contrary to the assertion in Plaintiffs' motion to

remand, federal common law is *not* “an ordinary preemption defense,” No. 17-cv-04929, ECF No. 157 at 12, but rather an independent basis for federal jurisdiction.

Furthermore, contrary to the district court’s conclusion, any displacement of the federal common law does not affect subject matter jurisdiction or the propriety of removal. Nor does displacement transform federal claims into state-law claims.

**1. Global-Warming Based Nuisance Claims 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 Co.*, 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; *see also AEP*, 564 U.S. at 421 (federal common law applies to those subjects “where the basic scheme of the Constitution so demands”). This is because the “federal judicial power” must remain “unimpaired for dealing independently,

wherever necessary or appropriate, with essentially federal matters.” *Standard Oil Co.*, 332 U.S. at 307.

The paradigmatic example of such an inherently interstate or international controversy is a “transboundary pollution suit[]” brought by one state to address pollution emanating from another state. *Kivalina*, 696 F.3d at 855; *see also Milwaukee I*, 406 U.S. at 103 (“When we deal with air and water in their ambient or interstate aspects, there is a federal common law[.]”); *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. *Ouellette*, 479 U.S. at 487; *see, e.g., Missouri v. Illinois*, 200 U.S. 496 (1906) (applying federal common law to interstate pollution dispute); *North Dakota v. Minnesota*, 263 U.S. 365 (1923) (same); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907) (same). 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 short, the Supreme Court has consistently held that “control of interstate pollution is primarily a matter of federal law.” *Ouellette*, 479 U.S. 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. *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 855-56 (outlining the elements of a “public nuisance” claim “[u]nder federal common law”).

Adhering to this longstanding line of cases, the Supreme Court, the Ninth Circuit, and two district courts have held that public nuisance claims asserting global-warming-related injuries—like those asserted by Plaintiffs here—are governed by federal common law.

In *AEP*, the plaintiffs sued five electric utilities, contending that “defendants’ carbon-dioxide emissions” substantially contributed to global warming in violation of the federal common law of interstate nuisance, or, in the

alternative, of state tort law.” 564 U.S. at 418. The district court dismissed the claims as raising nonjusticiable political questions, but the Second Circuit reversed and went on to hold that federal common law governed the plaintiffs’ claims. *Id.* at 419. The Supreme Court agreed that federal common law governs public nuisance claims involving “‘air and water in their ambient or interstate aspects,’” and it rejected the notion that global warming nuisance claims could be governed by state law rather than uniform federal law, holding that “‘borrowing the law of a particular State would be inappropriate.” *Id.* at 421-22.

In *Kivalina*, 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 effects allegedly resulting from the defendant energy companies’ “emissions of large quantities of greenhouse gases.” 696 F.3d at 853-54. The village asserted this claim under federal common law and, in the alternative, state law, but the district court dismissed the federal claims and declined to exercise supplemental jurisdiction over the state-law claims. *Id.* at 854-55.

On appeal, a threshold issue was whether federal common law applied to the plaintiffs’ nuisance claim. The Ninth Circuit, citing *AEP* and *Milwaukee I*, held that it did because “federal 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 was precisely the sort of “transboundary pollution suit[]” that was properly governed by “federal common law.” *Id.*

Two district courts have recently held that similar global-warming based claims against energy producers—including several of the Defendants in these actions—are governed by federal common law. *See BP*, 2018 WL 1064293, at \*2 (holding that nuisance claims addressing “the national and international geophysical phenomenon of global warming” “are necessarily governed by federal common law.”); *City of New York*, 325 F. Supp. 3d at 471 (holding 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’”) (quoting *Texas Indus.*, 451 U.S. at 640).

Plaintiffs’ claims—like those in *AEP*, *Kivalina*, *BP*, and *City of New York*—are quintessential “transboundary pollution suits” that implicate interstate and international concerns and thereby invoke uniquely federal interests and

responsibilities. *Kivalina*, 696 F.3d at 855-56.<sup>9</sup> A uniform rule of decision is necessary because allowing state law to govern would permit plaintiffs alleging injury due to global warming to proceed under each or all of the nation’s 50 different state laws, thus 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 495-96. 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*, No. 10-174, 2011 WL 317143, at \*37 (S. Ct.). Such consideration could lead to “widely divergent results” based on “different assessments of what is ‘reasonable.’” *Id.*

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<sup>9</sup> Not only do Plaintiffs’ claims involve transboundary emissions, but the very “instrumentality of plaintiffs’ alleged injury—the flooding of coastal lands—is, by definition, the navigable waters of the United States.” *BP*, 2018 WL 1064293, at \*5. As Judge Alsup concluded, global-warming claims based on rising sea levels “therefore necessarily implicate an area quintessentially within the province of the federal courts.” *Id.*

As the Fourth Circuit recognized in reversing an injunction capping emissions from out-of-state sources, “[i]f 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 for anyone to determine what standards govern.” *N.C., ex. rel. Cooper v. TVA*, 615 F.3d 291, 298 (4th Cir. 2010) (“*Cooper*”). And as the U.S. Department of Justice recently highlighted in the *San Francisco* and *Oakland* cases, the problems of applying state-law to out-of-state sources “are magnified here, where the sources of emissions alleged to have contributed to climate change span the globe.” *Amicus Curiae* Br. for the United States, No. 17-cv-06011 (N.D. Cal.), ECF No. 245 at 11; *see id.* at 10 (noting that adjudicating a global warming nuisance “claim under California law flies directly into the headwinds of *Ouellette*”). Fundamentally, a “patchwork of fifty different answers to the same fundamental global issue would be unworkable.” *BP*, 2018 WL 1064293, at \*3.

Moreover, any judgment as to whether the alleged harm caused by Defendants’ production of fossil fuels that contribute to worldwide emissions “outweighs the social utility of Defendants’ conduct,” ER293 ¶184, 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.<sup>10</sup> Plaintiffs' claims also implicate the 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 global warming. *See Garamendi*, 539 U.S. at 413.

Accordingly, federal common law, not state law, governs Plaintiffs' claims.

## **2. Displacement of Federal Common Law Does Not Eliminate Federal Jurisdiction Over Federal Common Law Claims**

The district court held that Plaintiffs' claims do not arise under federal common law because Congress has displaced global-warming based federal common law nuisance claims against fossil-fuel producers. ER4-5. But even if the Clean Air Act has displaced federal common law remedies for these types of claims, the district court erred in concluding that displacement somehow transformed Plaintiffs' global-warming claims into state-law tort claims. Displacement of federal common law in this instance means that there is *no*

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<sup>10</sup> In furtherance of these federal interests, Congress has repeatedly acted *to promote* domestic oil and gas production, including on federal land. *See, e.g.*, 42 U.S.C. § 13401; *id.* § 13411(a); *id.* § 13415(b)-(c); *id.* § 15927; 30 U.S.C. § 21a; 43 U.S.C. § 1701(a)(12).

*common law remedy*, not that state common law springs to life to fill a perceived void. No void exists.

In *AEP*, the Court held that the “Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants.” 564 U.S. at 424. In *Kivalina*, this Court extended that holding to global-warming claims seeking damages, because “the type of remedy asserted is not relevant to the applicability of the doctrine of displacement.” 696 F.3d at 857 (citing *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 484 (2008)). In granting Plaintiffs’ motions to remand, the district court extended *Kivalina*, reasoning that it “stands for the proposition that federal common law is not just displaced when it comes to claims against domestic sources of emissions but also when it comes to claims against energy producers’ contributions to global warming and rising sea levels.” ER4; *see also* ER4-5 (“Put another way, [*AEP*] did not confine its holding about the displacement of federal common law to particular sources of emissions, and *Kivalina* did not apply [*AEP*] in such a limited way.”). Accordingly, the district court held that Plaintiffs’ global-warming-based nuisance claims are displaced by the CAA, even though they target fossil-fuel producers rather than greenhouse gas emitters. ER4.

Even assuming *arguendo* that the district court was correct about the scope of displacement,<sup>11</sup> the court made a serious analytical error by concluding that the viability of Plaintiffs’ claims under federal common law dictates the court’s subject matter jurisdiction. It concluded, incorrectly, that “federal common law *does not govern the plaintiffs’ claims*.” ER5 (emphasis added). As explained above, *supra* I.C, 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 Kivalina*, 696 F.3d 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 (emphasis added).

But the absence of a federal common law remedy neither affects subject matter jurisdiction nor alters the federal character of Plaintiffs’ claims. *See Allen*,

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<sup>11</sup> Judge Alsup took a different view, concluding that the global-warming claims asserted by San Francisco and Oakland are not displaced because, “unlike *AEP* and *Kivalina*, which sought only to reach domestic conduct, plaintiffs’ claims ... attack behavior worldwide.” *BP*, 2018 WL 1064293, at \*4. Because “these foreign emissions are out of the EPA and the [CAA’s] reach,” Judge Alsup reasoned that “the [CAA] does not provide a sufficient legislative solution to the nuisance alleged to warrant” displacement. *Id.*

896 F.3d at 1101 (“[T]he absence of a valid ... cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts’ statutory or constitutional *power* to adjudicate the case.”) (quoting *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 89 (1998)) (alterations in original); *see also Morrison v. Nat’l Australia Bank Ltd.*, 561 U.S. 247, 254 (2010) (“Subject matter jurisdiction ... refers to a tribunal’s power to hear a case .... [and] presents an issue quite separate from the question whether the allegations the plaintiff makes entitle him to relief.”) (citations, alterations, and quotation marks omitted). Neither *AEP* nor *Kivalina* suggested that, by displacing federal common law remedies, the CAA somehow converted the plaintiffs’ inherently transnational global-warming based tort claims into the type of claims that could be governed by state law. On the contrary, the effect of Congress enacting the CAA was to refine and focus the available remedies for interstate and global environmental problems. And far from holding that the CAA deprived them of jurisdiction, both the Supreme Court and Ninth Circuit held only that the plaintiffs’ necessarily federal claims failed on the merits.

*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 Plaintiffs have stated claims upon which relief may be granted. *See AEP*, 564 U.S. at 422; *Kivalina*, 696 F.3d at 855 (applying this two-step approach). Plaintiffs’ motions to

remand implicate the first (jurisdictional) step of the analysis, while the question of displacement implicates the second (viability) step. *See Steel Co.*, 523 U.S. at 98 (noting that “two centuries of jurisprudence affirm[] the necessity of determining jurisdiction before proceeding to the merits”); *Ruhrgas AG v. Marathon Oil, Co.*, 526 U.S. 574 (1999) (“The requirement that jurisdiction be established as a threshold matter ... is ‘inflexible and without exception’”). The district court erred by leaping to answer the step-two question in the context of these remand motions. Because Plaintiffs’ global-warming-based public nuisance claims are necessarily governed by federal law, removal was proper regardless of whether the CAA displaces their federal common law remedies.<sup>12</sup>

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<sup>12</sup> Judge Alsup correctly applied this two-step approach. After holding that federal common law governed substantially similar claims and warranted removal, he later dismissed them, explaining:

It may seem peculiar that an earlier order refused to remand this action to state court on the ground that plaintiffs’ claims were necessarily governed by federal law, while the current order concludes that federal common law should not be extended to provide relief. There is, however, no inconsistency. It remains proper for the scope of plaintiffs’ claims to be decided under federal law[.]

*City of Oakland v. BP p.l.c.*, 325 F. Supp. 3d 1017, 1028 (N.D. Cal. 2018).

**3. *AEP* and *Kivalina* Did Not Authorize Application of State Law to Global-Warming Tort Suits**

Plaintiffs also argued below that *AEP* and *Kivalina* did not “consider[] the relationship between federal common law and state law” and that those cases “explicitly left open the viability of state law claims addressing harms related to climate change.” No. 17-cv-04929, Dkt. 157 at 8-9. Plaintiffs are wrong for several reasons.

*First*, the decision that federal common law governs a particular cause of action necessarily means that state common law does not—and *cannot*—apply. “[I]f federal common law exists, it is because state law cannot be used.” *Milwaukee II*, 451 U.S. at 313 n.7; *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 imply that state law *cannot* be applied.

*Second*, *AEP* held that “borrowing the law of a particular State” to adjudicate an interstate and transnational global-warming-related public nuisance

claim “would be *inappropriate*”; such a claim could *only* be governed by a uniform “*federal* rule of decision.” 564 U.S. at 422 (emphases added).

*Third*, the question *AEP* left “open for consideration on remand” was 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 CAA. 564 U.S. at 429 (emphasis added) (citing *Ouellette*, 479 U.S. at 488). That theory, derived from *Ouellette*, has no relevance here. The question in *Ouellette* was whether the Clean Water Act (“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 held 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.” 479 U.S. at 492. Because “[n]othing in the Act gives each affected State th[e] power to regulate discharges” in other states through nuisance actions, the Court concluded that “the CWA precludes a court from applying the law of an affected State against an out-of-state source.” *Id.* at 494, 497. 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.

That narrow carve-out for state-law claims is inapplicable here because Plaintiffs have not pleaded claims exclusively under the laws of the states in which the emissions occurred—or where the fossil-fuel extraction took place. *See Cooper*, 615 F.3d at 306 (agreeing that *Ouellette*’s “holding is equally applicable to the Clean Air Act”). Rather, Plaintiffs have pleaded omnibus public nuisance claims *under California law* addressing all production and emissions in *all jurisdictions*—*i.e.*, they have pleaded precisely the type of claims that *AEP* and *Kivalina* held must be governed by federal common law.

**B. Plaintiffs’ Claims Raise Disputed and Substantial Federal Issues**

“[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. Even assuming

*arguendo* that Plaintiffs’ claims were governed by state law, several aspects of those state-law claims—and, in particular, the balancing element of their nuisance claims—are inextricably bound up with uniquely federal interests involving national security, foreign affairs, energy policy, and environmental regulation. If these cases do not “justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues,” it is hard to imagine one that does. *Grable*, 545 U.S. at 312.

### **1. Plaintiffs’ Claims Necessarily Raise Federal Issues**

***Foreign Affairs.*** The question of how to address climate change has been the subject of international negotiations for decades. The United States’ role in these delicate negotiations has evolved over time but has always sought to balance environmental policy with robust economic growth. After President Clinton signed the Kyoto Protocol in 1997, for example, the U.S. Senate expressed its view (by a vote of 95-0) that the United States should not be signatory to any protocol that “would cause serious harm to the economy” or fail to regulate the emissions of developing nations. *See* S. Res. 98, 105th Cong. (1997). Congress then enacted a series of laws barring 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 U.S. from the Paris Agreement. ER102-09.

Plaintiffs seek to replace these international negotiations and Congressional and Executive decisions using the ill-suited tools of California common law and private litigation. Their claims purport to reach all of Defendants’ and their affiliates’ fossil-fuel production, much of which occurs overseas and certainly outside of California. *See* ER86-99 ¶¶ 30-40. Even when *states*—as opposed to municipalities—have enacted laws seeking to supplant or supplement foreign policy, the Supreme Court has held that state law can play no such role. *See, e.g., Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 381, 388 (2000); *Garamendi*, 539 U.S. at 420. Here, Plaintiffs seek to “exercise” California law in a way that “touches on foreign relations.” *Garamendi*, 539 U.S. at 413. Such claims “must yield to the National Government’s policy, given the ‘concern for uniformity in this country’s dealings with foreign nations.’” *Id.*

***Collateral Attack on Federal Regulatory Decisions.*** Plaintiffs’ nuisance claims require a determination as to whether the harms allegedly caused by Defendants’ extraction, production, and promotion of fossil fuels outweigh the benefits of that conduct to society. *See City of Oakland*, 325 F. Supp. 3d at 1026 (holding that resolving plaintiffs’ claim would require weighing the “conflicting

pros and cons” of fossil fuel consumption and global warming); *San Diego Gas & Elec. Co. v. Super. Ct.*, 13 Cal. 4th 893, 938 (1996) (an element of a nuisance claim is that the defendant’s conduct was “unreasonable” because “the gravity of the harm outweighs the social utility of the defendant’s conduct”) (citing Restatement (Second) of Torts §§826-31 (1979)); *see also* ER293 ¶184 (“The seriousness of rising sea levels and increased weather volatility and flooding is extremely grave, and outweighs the social utility of Defendants’ conduct[.]”); ER296 ¶196; ER302 ¶222.

But federal law has for decades required agencies to weigh the costs and benefits of fossil fuel extraction. *See, e.g.*, 42 U.S.C. § 13384; *id.* § 13389(c)(1).<sup>13</sup> An agency may impose a significant 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). Federal agencies have developed mechanisms to incorporate the impact of carbon emissions on climate change for regulatory cost-benefit analyses, including through a “social cost of carbon”

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<sup>13</sup> Other federal laws calling for this balancing include: Clean Air Act, 42 U.S.C. § 7401(c); Mining and Minerals Policy Act, 30 U.S.C. § 21a; Coastal Zone Management Act, 16 U.S.C. § 1451; Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201.

metric—which Plaintiffs expressly invoke (ER279 ¶148). *See* ER154-55 ¶26; Exec. Order No. 13783, Promoting Energy Independence and Economic Growth, § 5 (Mar. 28, 2017), 82 Fed. Reg. 16,093 (Mar. 31, 2017). Although methodologies for estimating the social cost of carbon may evolve, the fact is that federal agencies have incorporated this metric into their analyses of regulatory proposals. *See, e.g.*, ER117-24 (discussing social cost of carbon estimation methodology). Plaintiffs would have a state court second-guess these federal agencies’ balancing of harms and benefits.

The district court held that “even if deciding the nuisance claims were to involve a weighing of costs and benefits, and even if the weighing were to implicate the defendants’ dual obligations under federal and state law, that would not be enough to invoke *Grable* jurisdiction.” ER6. But Plaintiffs’ claims do not merely implicate Defendants’ obligations under federal law—they hinge on a different balancing than that struck by Congress and the various federal agencies tasked with executing energy and environmental policy. In other words, these actions amount to “collateral attack[s]” on federal agencies’ regulatory decisions. *Bader Farms, Inc. v. Monsanto Co.*, 2017 WL 633815, at \*3 (E.D. Mo. Feb. 16, 2017). As the Fifth Circuit recently explained in a case also involving nuisance claims against energy companies for alleged ecological harms, a state-law claim

that draws on federal law raises a substantial federal issue where it amounts to “a collateral attack on an entire regulatory scheme ... premised on the notion that [the scheme] provides inadequate protection.” *Tenn. Gas*, 850 F.3d at 724-26 (alteration in original); *see also Pet Quarters, Inc. v. Depository Trust and Clearing Corp.*, 559 F.3d 772, 779 (8th Cir. 2009) (complaint “presents a substantial federal question because it directly implicates actions of” federal agency); *McKay v. City and Cty. of San Francisco*, 2016 WL 7425927, at \*4 (N.D. Cal. Dec. 23, 2016) (finding federal jurisdiction under *Grable* because state-law claims were “tantamount to asking the Court to second guess the validity of the FAA’s decision”); *cf. Bennett v. Sw. Airlines Co.*, 484 F.3d 907, 909 (7th Cir. 2007) (recognizing federal jurisdiction “when the state proceeding amounted to a collateral attack on a federal agency’s action”).

Plaintiffs’ claims also amount to a collateral attack on the comprehensive regulatory scheme Congress has established for navigable waters of the United States. As Judge Alsup observed, “a necessary and critical element” of Plaintiffs’ causation theory “is the rising sea level along the Pacific coast and in the San Francisco Bay, both of which are navigable waters of the United States.” *BP*, 2018 WL 1064293, at \*5. Indeed, Plaintiffs’ alleged chain of causation is that: (1) Defendants extract, manufacture, market and sell fossil fuels; (2) combustion of

fossil fuels releases greenhouse gases; (3) which increase global temperatures; (4) which causes thermal expansion of “navigable waters” and melting of land-based ice therein; (5) which accelerates rise of “navigable waters”; (6) Plaintiffs’ infrastructure is inadequate; and, therefore, (7) these “navigable waters” will encroach upon Plaintiffs’ land, causing damage.

Congress and, by delegation, the Army Corps of Engineers maintain authority over these navigable waters. The Corps has considered sea-level change since 1986 and, in the San Francisco Bay Area (which borders Marin, Richmond, and San Mateo), “ha[s] proposed a nearly \$175 million plan to help protect” against the “significant risk of flooding because of climate change and predicted sea level rise.” Nicholas Simeone, *Army Corps of Engineers presents plan to reduce threat of flooding triggered by climate change along San Francisco Bay* (U.S. Army Corps of Engineers Sept. 16, 2015), *available at* <https://tinyurl.com/y7habowz>. The Corps regulated construction of the seawall system surrounding Santa Cruz and the San Lorenzo River Flood Control and Environmental Restoration Project to raise levee heights, replace storm drains, combat stream bank erosion and revegetate levee slopes. *Id.* at 1-8.

Moreover, the Corps has authorized Defendants’ navigable waters-based activities and infrastructure after: (1) considering whether such structures are in the

public interest, which requires balancing numerous factors including energy needs and environmental concerns, *see* 33 C.F.R. § 325.3(c); and (2) evaluating environmental effects and alternatives under the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*; 33 C.F.R. Part 325, Appendix B. In each instance, the Corps was required to assess “[t]he benefits” of the project “balanced against its reasonably foreseeable detriments.” 33 C.F.R. § 320.4(a)(1); *see also* 33 U.S.C. § 403; *id.* § 426 (shoreline protection and erosion prevention); *id.* § 426g(a) (shore restoration); *id.* § 426g(b) (erosion control); Pub. L. 99-662, Title VII, § 731, 100 Stat. 4165 (Nov. 17, 1986) (study of shoreline protection and erosion control given potential rising sea levels). To adjudicate Plaintiffs’ claims, a court would need to judge the adequacy of multiple complex and intertwined decisions by Congress and the Corps, decide whether those decisions, including various levee and seawall projects, unreasonably have failed to prevent Plaintiffs’ injuries, and determine whether the additional projects for which they seek recompense are, or will be, authorized by the Corps.

***The Need for Uniform Federal Standards.*** In this global-warming case, the “overriding federal interest in the need for a uniform rule of decision” is so strong that Plaintiffs’ claims arise under federal common law. *Milwaukee I*, 406 n.6; *see* Part II.A, *supra*. But even if Plaintiffs had pleaded claims under the laws of each

of the various source states and countries in accordance with *Ouellette* (which they have not), Plaintiffs’ public nuisance claims would still require one or more rules of decision providing an overarching framework for determining liability. These rules of decision could only be governed by federal law. *Cf. AEP*, 564 U.S. at 421-22 (where uniform rule of decision is needed, “borrowing the law of a particular state would be inappropriate”). For example, it would be impossible to apply the laws of 50 states to determine whether Plaintiffs meet every element of their public nuisance claim—*e.g.* whether Defendants’ conduct was “unreasonable” or whether that conduct was the proximate cause of Defendants’ alleged injuries.

Accordingly, a uniform federal standard would be needed to resolve these issues. Thus, even if the federal interest in uniformity does not supersede the *entire* body of state law on which Plaintiffs attempt to rely for their global-warming claims, there is no doubt that a federal standard must apply to “*particular* elements” of Plaintiffs’ “state law” claims. *Boyle v. United Techs.*, 487 U.S. 500, 508 (1988) (emphasis added).

Moreover, state choice-of-law rules never apply in interstate and international environmental disputes, even in the few circumstances where substantive state law applies. *See Ouellette*, 479 U.S. at 499 n.20. So, even if

Plaintiffs are right that Congress has let state law apply to global climate change, federal law decides *which* state law applies.

## **2. The Federal Issues Are Disputed and Substantial**

Plaintiffs cannot deny that the federal questions raised in these actions are disputed and are substantial issues of “importance ... to the federal system as a whole.” *Gunn*, 568 U.S. at 260. 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 federal issues in a case concern just one of those subjects, let alone all three. *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”); *In re Nat’l Sec. Agency Telecomms. Records Litig.*, 483 F. Supp. 2d 934, 943 (N.D. Cal. 2007) (federal jurisdiction exists over state-law privacy claims implicating 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.”).

## **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. Federal courts are the traditional fora for cases raising federal questions addressing the regulation of vital national resources, foreign policy, and national security. “Power over external affairs is not shared by the States,” *United States v. Pink*, 315 U.S. 203, 233 (1942), and the federal government’s exclusive power over foreign affairs must be “entirely free from local interference,” *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941).

Allowing a state court to adjudicate Plaintiffs’ claims would upset this “balance of federal and state judicial responsibilities,” *Grable*, 545 U.S. at 314, because Plaintiffs’ requested “relief would effectively allow plaintiffs to govern conduct and control energy policy on foreign soil[.]” *City of Oakland*, 325 F. Supp. 3d at 1026 (observing that efforts “to impose liability on [energy] companies for their production and sale of fossil fuels worldwide ... undoubtedly implicate the interests of countless governments, both foreign and domestic”); *see also City of New York*, 325 F. Supp. 3d at 475 (holding that plaintiff’s global-warming based claims “implicate countless foreign governments and their laws and policies”). 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 v. EPA*, 549 U.S. 497, 519 (2007), Plaintiffs’ claims require a federal forum.

**C. Plaintiffs' Claims Are Completely Preempted by Federal Law**

Complete preemption occurs when federal law has a “preemptive force ... so powerful as to displace entirely any state cause of action,” such that “any complaint that comes within the scope of the federal cause of action necessarily ‘arises under’ federal law,” even if it asserts only state-law claims. *Franchise Tax Bd.*, 463 U.S. at 23-24. Plaintiffs’ claims are completely preempted because the CAA provides the *exclusive vehicle* for regulating nationwide emissions. The district court improperly remanded because it failed to recognize the breadth of the CAA.

The CAA establishes a system by which federal and state resources are used 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 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. Once set, the CAA provides specific procedures for any person, including private parties and state and local governments, to challenge or change nationwide emissions standards or permitting requirements. 42 U.S.C. § 7607(b), (d).

These procedures are the *exclusive means for judicial review*. 42 U.S.C. § 7607(e). As this Court 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*, 784 F.3d at 506 (emphasis added); *see New Eng. Legal Found. v. Costle*, 666 F.2d 30, 31, 33 (2d Cir. 1981) (rejecting action alleging that power company “maintained a common law nuisance by burning oil containing 2.8% sulphur” because “[a]ll claims against the validity of performance standards ... must be addressed to the courts of appeals on direct appeal”). Plaintiffs’ claims would contravene the CAA’s carefully crafted regulatory scheme by curbing *nationwide and global* emissions. *See City of Oakland*, 325 F. Supp. 3d at 1024.

The district court faulted Defendants for failing to identify a “specific” statutory section of the CAA that completely preempted Plaintiffs’ claims ER5, but it is precisely where federal law “as a whole” regulates a particular subject matter that complete preemption is *most likely* to be found. *See Fossen v. Blue Cross & Blue Shield of Mont., Inc.*, 660 F.3d 1102, 1107 (9th Cir. 2011) (complete preemption where Congress “sets forth a comprehensive civil enforcement scheme that completely preempts state-law causes of action within the scope of these civil enforcement provisions” (alterations omitted)).

The district court also rejected complete preemption because the CAA—like the CWA—“contain[s] [a] savings clause[] that preserve[s] state causes of action and suggest[s] that Congress did not intend the federal causes of action under those statutes ‘to be exclusive.’” ER5. But that misreads the CAA’s savings clause, which preserves “any right which any person ... may have under ... common law to seek enforcement of any emission standard or limitation or to seek any other relief[.]” 42 U.S.C. § 7604(e). State common law cannot extend to the sort of inherently multi-state and multi-national emissions that Plaintiffs seek to address here. *See Ouellette*, 479 U.S. at 496 (“Application of an affected State’s law to an out-of-state source ... would undermine the important goals of efficiency and predictability”); *Cooper*, 615 F.3d at 298. Because these California Plaintiffs do not have a “right” to seek abatement of out-of-state emissions under California common law, the CAA’s savings clause is irrelevant. *See* Part II.A.3, *supra*. Plaintiffs’ claims are thus completely preempted.

**D. The Actions Are Removable Because They Are Based on Defendants’ Activities on Federal Lands and at the Direction of Federal Officers**

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

The Outer Continental Shelf Lands Act (“OCSLA”) grants federal courts original jurisdiction over actions “arising out of, or in connection with ... *any*

*operation* conducted on the outer Continental Shelf which *involves exploration, development, or production* of the minerals, of the subsoil and seabed of the [OCS].” 43 U.S.C. § 1349(b)(1) (emphasis added). Plaintiffs’ claims fall within the “broad ... jurisdictional grant of section 1349.” *EP Operating Ltd. P’ship v. Placid Oil Co.*, 26 F.3d 563, 569 (5th Cir. 1994). Certain Defendants have conducted (and continue to conduct) significant petroleum exploration, development, and production operations on the OCS, and Plaintiffs allege that *all* of Defendants’ fossil-fuel extraction—which includes Defendants’ OCS operations—contributed to their alleged injuries.

Certain Defendants and 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 under OCSLA and have historically produced as much as *one-third* of domestic oil and gas from the OCS in some years. ER165 ¶53; *see also* ER166-67 ¶¶53-54. Because Plaintiffs seek to hold Defendants liable for their cumulative fossil-fuel extraction, *see* ER247-48 ¶¶74-77; ER248 ¶79, Defendants’ allegedly tortious activities indisputably include all of their

“exploration and production of minerals” on the OCS. *Deepwater Horizon*, 745 F.3d at 163.<sup>14</sup>

The district court held that “even if some of the activities that caused the alleged injuries stemmed from operations on the [OCS],” removal was not warranted because “the defendants have not shown that the plaintiffs’ causes of action would not have accrued *but for* the defendants’ activities on the shelf.” ER6. But Plaintiffs allege that the *cumulative* activity of Defendants and their affiliates over many decades was the “but for” cause of their injuries—and part of that “but for” cause is Defendants’ activity on the OCS. Nothing more is required. *See Tenn. Gas Pipeline v. Hous. Cas. Ins. Co.*, 87 F.3d 150, 155 (5th Cir. 1996); *Ronquille v. Aminoil Inc.*, 2014 WL 4387337, at \*2 (E.D. La. Sept. 4, 2014) (finding second prong satisfied because “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”).

Moreover, even where but-for causation would be difficult to establish, courts have held that OCSLA confers jurisdiction where the plaintiff’s claims

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<sup>14</sup> Plaintiffs’ allegations also specifically incorporate, and rely upon, certain of Defendants’ OCS operations. *See, e.g.*, ER222 ¶18(b) (noting BP operates oil and gas exploration projects in Gulf of Mexico); ER277 ¶¶142, 144-45 (discussing arctic offshore drilling equipment and patents).

threaten to “impair the total recovery of the federally-owned minerals from the [OCS].” *Amoco*, 844 F.2d at 1210; *see also 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). Here, Plaintiffs seek billions of dollars in damages and disgorgement of profits, together with equitable relief to abate the alleged nuisances. *See, e.g.*, ER291 ¶175; ER297 ¶197; ER312. Such relief would substantially discourage OCS production and likely impact the future viability of the federal OCS leasing program, potentially costing the federal government hundreds of millions of dollars. 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 Prod. Co. v. Sea Robin Pipeline Co.*, 844 F.2d 1202, 1210 (5th Cir. 1988); *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 Constructors, Inc. v. Hunt Oil Co.*, 754 F.2d 1223, 1228 (5th Cir. 1985).

## **2. The Claims Arise on Federal Enclaves**

“Federal courts have federal question jurisdiction over tort claims that arise on ‘federal enclaves.’” *Durham*, 445 F.3d at 1250. A tort claim is thus removable

when “pertinent events” took place on a federal enclave. *Jamil v. Workforce Res., LLC*, 2018 WL 2298119, at \*4 (S.D. Cal. May 21, 2018); *Kerr v. Del. N. Cos., Inc.*, 2017 WL 880409, at \*4 (E.D. Cal. Mar. 6, 2017); *Rosseter v. Indus. Light & Magic*, 2009 WL 210452, at \*2 (N.D. Cal. Jan. 27, 2009).

Here, substantial events occurred on federal enclaves. For example, some Defendants maintained production operations on federal enclaves and/or sold fossil fuels across the country, including on military bases and other federal enclaves. *See 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). Standard Oil Co. (Chevron’s predecessor) operated Elk Hills Naval Petroleum Reserve (the “Reserve”), a federal enclave, for most of the twentieth century. *See* ER126-35 (Executive Order and California statutes relating to federal jurisdiction). CITGO distributed gasoline and diesel under its contracts with the Navy Exchange Service Command (“NEXCOM”) to multiple Naval installations, *see* ER138-39 ¶6, that have been identified as federal enclaves by either a state or federal court or a state attorney general.

The district court, citing *In re High-Tech Empl. Antitrust Litig.*, 856 F. Supp. 2d 1103, 1125 (N.D. Cal. 2012), held that the claims were not removable because “federal land was not the ‘locus in which the claim arose.’” ER6. But *High-Tech*

*Employees* is inapposite because there “all three elements of [plaintiff’s claim] arose outside” the federal enclave, 856 F. Supp. 2d at 1126, whereas here substantial amounts of Defendants’ fossil-fuel extraction occurred on federal enclaves. It is “sufficient for federal jurisdiction” that “[Plaintiffs’] allegations stem from” conduct on federal enclaves. *Jamil*, 2018 WL 2298119 at \*4. “The fact that [Defendants] maintain[] operations outside the enclave is [] not pertinent[.]” *Rosseter*, 2009 WL 210452, at \*2.<sup>15</sup>

### **3. The Actions Are Removable Under the Federal Officer Removal Statute**

The actions are also removable under the Federal Officer Removal Statute, which provides for removal of suits brought against “any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office.” 28 U.S.C. § 1442(a)(1). As this Court has explained, “[a] party seeking removal

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<sup>15</sup> The district court also cited *Klausner v. LucasFilm Entertainment Co, Ltd.*, 2010 WL 1038228, at \*4 (N.D. Cal. Mar. 19, 2010), *Rosseter*, 2009 WL 210452 at \*2, and *Ballard v. Ameron International Corp.*, 2016 WL 6216194 (N.D. Cal. Oct. 25, 2016), but none of those cases supports its conclusion. In *Klausner* and *Rosseter* removal was allowed because, as here, the relevant claims pertained to enclaves. And in *Ballard* the defendant failed to “offer[] any facts” to establish a “federal interest” in regulating the relevant conduct. 2016 WL 6216194, at \*3. Here, by contrast, Defendants have identified several powerful federal interests, from federalism to foreign affairs.

under section 1442 must demonstrate that (a) it is a ‘person’ within the meaning of the statute; (b) there is a causal nexus between its actions, taken pursuant to a federal officer’s directions, and plaintiff’s claims; and (c) it can assert a ‘colorable federal defense.’” *Durham*, 445 F.3d at 1251.

Plaintiffs did not dispute below that the first and third prongs are met. Nor could they. It is equally clear that there is a causal nexus between conduct undertaken by Defendants pursuant to federal direction and the claims Plaintiffs now assert. Indeed, certain Defendants produced and distributed fossil fuels under at least three distinct federal programs.

*First*, the U.S. Navy supervised Standard Oil’s extraction from the Elk Hills Naval Petroleum Reserve for use by the government in wartime. ER196 ¶4. The contract between the government and Standard Oil mandated that “the Reserve *shall* be developed and operated,” ER197-98 §1.a, and *required* Standard Oil to produce “not less than 15,000 barrels oil per day” until the Navy had received its share of production, and enough thereafter to cover Standard Oil’s operating costs, ER201 §4(b). *Second*, certain Defendants extracted oil pursuant to OCSLA and strategic petroleum reserve leases in which the government mandated that Defendants “shall” drill for oil and gas pursuant to government-approved exploration plans and that they *must* sell it to certain specified buyers. ER186-87.

And *third*, CITGO executed fuel supply agreements with the U.S. Navy that required CITGO to advertise, supply, and distribute gasoline and diesel fuel to NEXCOM. ER138-39 ¶¶5-6.

Although “a private actor” may qualify as a federal officer by “‘helping the Government to produce an item that it needs’ pursuant to a federal contract,” *see Fidelitad, Inc. v. Insitu, Inc.*, 904 F.3d 1095, 1101 n.3 (9th Cir. 2018), the district court summarily concluded that Defendants’ conduct under federal direction was not sufficiently connected to “plaintiffs’ claims, which are based on a wider range of conduct.” ER7. In so doing, the district court erroneously elevated the causal nexus requirement to something approaching but-for causation. Such an interpretation plainly contravenes this Court’s clear instruction that the “hurdle erected by [the causal-connection] requirement is quite low.” *In re Goncalves v. Rady Children’s Hosp. San Diego*, 865 F.3d 1237, 1244 (9th Cir. 2017). The Supreme Court has also emphasized that “the policy favoring removal ‘should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1).’” *Arizona v. Manypenny*, 451 U.S. 232, 242 (1981); *see also Durham*, 445 F.3d at 1252 (“[T]he Supreme Court has mandated a generous interpretation of the federal officer removal statute.”).

Moreover, the district court overlooked that Plaintiffs assert a claim for “Strict Liability—Design Defect” on the ground that “Defendants ... extracted, refined, formulated, designed, packaged, [and] distributed ... fossil fuel products,” and that those “fossil fuel products have not performed as safely as an ordinary consumer would expect them to.” ER300 ¶218; ER301 ¶220. This claim does not turn on the relative proportion of greenhouse-gas emissions attributable to federal and non-federal production or those sources’ respective impacts on net global climate change; to the contrary, if Plaintiffs were to prove their strict liability design defect claim, any distribution of fossil fuels—including distribution of fuels produced under federal direction—could give rise to liability. *See Barker v. Lull Eng’g Co.*, 20 Cal.3d 413, 430-32 (1978). Because “removal of the entire case is appropriate so long as *a single claim* satisfies the federal officer removal statute,” Defendants properly removed these actions. *Savoie v. Huntington Ingalls, Inc.*, 817 F.3d 457, 463 (5th Cir. 2016) (emphasis added).

#### **E. The Actions Were Properly Removed 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 court 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) (emphasis added). These actions, which seek billions of dollars for Plaintiffs’ coffers, are related to numerous bankruptcy cases.

Before confirmation of a bankruptcy plan, an action is “related to” a bankruptcy case if it “‘could conceivably have any effect on [an] estate being administered in bankruptcy.’” *In re Fietz*, 852 F.2d 455, 457 (9th Cir. 1988). After a plan has been confirmed, “related to” jurisdiction exists where “there is a sufficiently close nexus ... between the [case to be removed] and the original bankruptcy proceeding,” *In re Pegasus Gold Corp.*, 394 F.3d 1189, 1191 (9th Cir. 2005), such as where the case “‘affects the interpretation, implementation, consummation, execution, or administration of the confirmed plan,’” *In re Wilshire Courtyard*, 729 F.3d 1279, 1289 (9th Cir. 2013).

Here, Plaintiffs’ claims have already required the bankruptcy court overseeing the reorganization of two of the Defendants here—Peabody Energy and Arch Coal—to interpret Peabody’s bankruptcy plan. Because Plaintiffs’ claims are irreconcilable with the “implementation, consummation, execution, [and] administration of [Peabody’s] confirmed plan,” *In re Wilshire*, 729 F.3d at 1289,

the bankruptcy court concluded that Plaintiffs' claims against Peabody had been discharged, *see* Mem. Op., *In re Peabody Energy Corp.*, No. 16-42529 (Bankr. E.D. Mo. Oct. 24, 2017), ECF No. 3514; *see also In re Peabody Energy Corp.*, No. 4:17 CV 2886 RWS (E.D. Mo. Sept. 20, 2018) ECF No 32 at 3 (denying motion to stay the Bankruptcy Court's order pending appeal because "Appellants have not established that they are likely to succeed on the merits of their claim").

Plaintiffs' claims also have a "close nexus" with the confirmed plans of various Defendants, as well as their subsidiaries, affiliates, and predecessors-in-interest. *See Pegasus Gold*, 394 F.3d at 1194. For example, the Complaints allege that Chevron's "subsidiaries" engaged in culpable conduct as far back as the 1960s, and that this conduct is attributed to "Chevron." ER220-21 ¶16(d). Texaco Inc. (a Chevron subsidiary) filed for bankruptcy in the 1980s, and its confirmed plan bars various claims arising against Texaco prior to March 15, 1988. *In re Texaco Inc.*, 87 B 20142 (Bankr. S.D.N.Y. 1987) Dkt. 1743.5. Accordingly, "a court must interpret the bankruptcy plan and confirmation order to determine whether," and to what extent, Plaintiffs' "claims were discharged or [Plaintiffs] are enjoined from bringing suit." *In re Valley Health Sys.*, 584 F. App'x 477, 479 (9th Cir. 2014).

Moreover, the district court’s conclusion that Plaintiffs’ “suits are aimed at protecting the public safety and welfare,” is belied by the fact that Plaintiffs seek “billions of dollars” in compensatory damages, plus untold “punitive and exemplary damages”—as well as “all profits Defendants obtained” from fossil fuel-related business conducted since 1965. ER7; ER305 ¶235; ER308 ¶247. Because Plaintiffs primarily seek an economic windfall, these claims do not fall within the narrowly construed police-power exemption. *See City & Cty. of S.F. v. PG&E Corp.*, 433 F.3d 1115, 1124 & n.9 (9th Cir. 2006).

#### **F. Plaintiffs’ Claims Are Within the Court’s Admiralty Jurisdiction**

Finally, because the commercial activity at the heart of this case—fossil fuel extraction—occurs on vessels engaged in maritime activities, these actions fall within the Constitution’s grant of original jurisdiction over “all Cases of admiralty and maritime Jurisdiction.” U.S. Const. Art. III, § 2; *see* 28 U.S.C. § 1333(1). Admiralty jurisdiction “extends to ... cases of injury or damage, to person or property, caused by a vessel on navigable waters, even though the injury or damage is done or consummated on land,” 46 U.S.C. § 30101(a).

As this Court emphasized, “‘virtually every activity involving a vessel on navigable waters’ is a ‘traditional maritime activity sufficient to invoke maritime jurisdiction.’” *Taghadomi v. United States*, 401 F.3d 1080, 1087 (9th Cir. 2005)

(quoting *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 542 (1995)). “Oil and gas drilling on navigable waters aboard a vessel is recognized to be maritime commerce.” *Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 538-39 (5th Cir. 1986); *In re Oil Spill by the Oil Rig Deepwater Horizon*, 808 F. Supp. 2d 943, 949 (E.D. La. 2011) (“Under clearly established law,” a floating drilling platform is “a vessel, not a fixed platform.”); *Barker v. Hercules Offshore, Inc.* 713 F.3d 208, 215 (5th Cir. 2013) (“[J]ack-up drilling platforms ... considered vessels under maritime law.”).<sup>16</sup> And because Plaintiffs allege that Defendants’ fossil-fuel extraction will dramatically alter the earth’s seas, ER217 ¶8, the alleged

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<sup>16</sup> For example, Chevron’s “Jack and St. Malo fields were co-developed with subsea completions flowing to a single host floating production unit[.]” <https://tinyurl.com/yby4dkmk>. See also, e.g., *Atlantis Field: Fact Sheet 1*, <https://tinyurl.com/y7zeat85> (BP’s Atlantis Field a “Floating Offshore Installation”); Offshore Technology, *Magnolia Deepwater Oil and Gas Field, Gulf of Mexico*, <https://tinyurl.com/y9mcyu98> (ConocoPhillips’ Magnolia field “developed by a tension leg platform (TLP), installed in 4,700 ft. of water, a record depth for this type of floating structure”); *Safety and Security*, <https://tinyurl.com/ya5zpdpr> (ExxonMobil’s Hoover-Diana field “the first floating drilling and production platform to develop two fields simultaneously at a depth of 4,800 feet of water”); *Auger: From Deep-Water Pioneer to New Energy Giant*, <https://tinyurl.com/yap47fvv> (Shell’s Auger “was the first to float in water, moored to the sea floor 830 metres (2,720 feet) below”).

conduct plainly has the “potential to disrupt maritime commerce” under Plaintiffs’ theory of liability. *Grubart*, 513 U.S. at 538.<sup>17</sup>

### **CONCLUSION**

For the foregoing reasons, Defendants respectfully request that the Court reverse the district court’s orders remanding these actions.

Dated: November 21, 2018

Respectfully submitted,

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<sup>17</sup> The savings-to-suitors clause, 28 U.S.C. § 1331(1), does not defeat removal jurisdiction. *Ryan v. Hercules Offshore, Inc.*, 945 F. Supp. 2d 772, 778 (S.D. Tex. 2013) (2011 amendments to §1441 permit removal of maritime claims notwithstanding the savings-to-suitors clause).

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**STATEMENT OF RELATED CASES**

Other than cases identified on the cover page of this brief, Defendants are aware of the following related cases: *City of Oakland, et al. v. BP p.l.c., et al.*, No. 3:17-cv-06011-WHA (N.D. Cal.); *City and County of San Francisco, et al. v. BP p.l.c. et al.*, No. 3:17-cv-06012 (N.D. Cal.). The appeals in these cases are docketed together as *City of Oakland, et al. v. BP p.l.c.*, No. 18-16663 (9th Cir.)

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. App. P. 32(g), I certify that:

This brief complies with the length limits permitted by Ninth Circuit Rules 32-1(a) and 32-2(b). This brief contains 15,393 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), and is filed by separately represented parties.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2016, Times New Roman 14-point font.

/s/ Theodore J. Boutrous, Jr.  
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**CERTIFICATE OF SERVICE**

I hereby certify that on November 21, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: November 21, 2018

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**ADDENDUM**

Pursuant to Ninth Circuit Rule 28-2.7, this addendum includes pertinent statutes, reproduced verbatim:

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## **28 U.S.C. § 1291. Final decisions of district courts**

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

## **28 U.S.C. § 1292. Interlocutory decisions**

....

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

....

### **28 U.S.C. § 1333. Admiralty Jurisdiction**

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

- (1) 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. § 1334. Bankruptcy cases and proceedings**

....

(b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

### **28 U.S.C. § 1442. Federal officers or agencies sued or prosecuted**

(a) A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

- (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.
- (2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

- (3) Any officer of the courts of the United States, for or relating to any act under color of office or in the performance of his duties;
- (4) Any officer of either House of Congress, for or relating to any act in the discharge of his official duty under an order of such House.

....

#### **28 U.S.C. § 1447. Procedure after removal generally**

....

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise.

#### **28 U.S.C. § 1452. Removal of claims related to bankruptcy cases**

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

....

#### **43 U.S.C. § 1349. Citizen suits, jurisdiction and judicial review**

....

##### **(b) Jurisdiction and venue of actions**

- (1) Except as provided in subsection (c) of this section, the district courts of the United States shall have jurisdiction of cases and controversies arising out of, or in connection with (A) any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals, or (B) the cancellation, suspension, or termination of a lease or permit under this subchapter. Proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the State nearest the place the cause of action arose.
- (2) Any resident of the United States who is injured in any manner through the failure of any operator to comply with any rule, regulation, order, or permit issued pursuant to this subchapter may bring an action for damages (including reasonable attorney and expert witness fees) only in the judicial district having jurisdiction under paragraph (1) of this subsection.

....

#### **46 U.S.C. § 30101. Admiralty Jurisdiction**

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

**Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number** 18-15499, 18-15502, 18-15503, and 18-16376

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

- ☐ This brief complies with the length limits permitted by Ninth Circuit Rule 28.1-1.  
The brief is  words or  pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
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The brief is  15,393 words or  pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1) ☒ separately represented parties; (2) ☐ a party or parties filing a single brief in response to multiple briefs; or (3) ☐ a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
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- ☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is  words or  pages, excluding the portions exempted by Fed. R. App. P. 32 (f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
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Signature of Attorney or  
Unrepresented Litigant

s/ Theodore J. Boutrous, Jr.

Date

11/21/2018

("s/" plus typed name is acceptable for electronically-filed documents)