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

IN THE

United States Court of Appeals for the Ninth Circuit

COUNTY OF SAN MATEO, Plaintiff-Appellee, v. CHEVRON CORPORATION, *et al.*, 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, *et al.*, 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, *et al.*, 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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INTRODUCTION

This Court should reverse the remand order because these actions were properly removed and there is no bar to appellate review.

The plain language of 28 U.S.C. § 1447(d) authorizes appellate review of remand "orders" in cases removed under the federal officer removal statute—as these cases were. Plaintiffs ignore the text of section 1447(d) and simply invoke *Patel v. Del Taco, Inc.*, 446 F.3d 996 (9th Cir. 2006), even though the jurisdictional question at issue here was not presented or decided in *Patel*. Neither *Patel* nor any other controlling precedent precludes this Court from reviewing every ground for removal and reversing on any one of them.

Plaintiffs argue that these cases belong in state court because they have "asserted well-established California law causes of action." Answering Brief ("Ans.Br.") at 1. But Plaintiffs' transboundary claims undeniably "deal with air and water in their ambient or interstate aspects," *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972) ("*Milwaukee I*"), which necessarily is a "matter of federal, not state, law," *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987); *see Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 420-21 (2011) ("*AEP*"). That Plaintiffs purport to be asserting "state law claims" does not alter the analysis because "[w]hen federal law applies," as it does here, "it follows that the question arises under federal

law." *New SD, Inc. v. Rockwell Int'l. Corp.*, 79 F.3d 953, 955 (9th Cir. 1996). Furthermore, the nationwide and worldwide scope of Plaintiffs' claims creates removal jurisdiction on numerous other grounds. Because these uniquely federal cases require a federal forum, the Court should reverse the remand order.

ARGUMENT

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

The text of 28 U.S.C. § 1447(d) is unambiguous: "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." Because Defendants removed these cases under the federal officer removal statute (28 U.S.C. § 1442), the district court's remand "order" is "reviewable by appeal." *See Lu Junhong v. Boeing Co.*, 792 F.3d 805, 811 (7th Cir. 2015) ("To 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."); *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 673 (9th Cir. 2012) (recognizing appellate jurisdiction "to 'address any issue fairly included within the certified order because it is the *order* that is appealable'") (quoting *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 205 (1996)).

Ignoring precedent and section 1447(d)'s plain text, Plaintiffs assert that *Patel* limits appellate review "to the propriety of the district court's rejection of removal

under federal-officer jurisdiction." Ans.Br.11.[1] But the question presented here—whether the entire remand order is reviewable on appeal when a defendant removes under the federal officer statute and other grounds—was not briefed, analyzed, or decided in *Patel*. AOB.23. Unlike here, the Patels did not file a notice of removal asserting federal jurisdiction under Section 1442 and multiple other grounds. *Patel*, 446 F.3d at 998. Indeed, "they did not file a separate removal petition" at all, but rather included their request for removal as the "fourth claim for relief in their federal complaint." *Id.* And that claim alleged only "that the state court arbitration petition was removable under 28 U.S.C. § 1443(1)"—without invoking any other grounds for removal. *Id.* As a result, *Patel* did not decide (and could not have decided) the relevant issue.[2]

Because "stare decisis is not applicable unless the issue was 'squarely addressed' in a prior decision," *Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926,

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[1] Although Plaintiffs recognize that section 1447(d) makes "certain remand orders … 'reviewable,'" they contend that a "'decision' reviewable on appeal does not mean that every issue is open to review on appeal." No. 18-15503, ECF No. 43 at 3-4. But section 1447(d) is the only barrier to review of remand orders (otherwise they would be reviewable under 28 U.S.C. § 1291), and section 1447(d) lifts that barrier for orders remanding a case "removed pursuant to section 1442 or 1443."

[2] *Patel* is also non-binding because it predated the Removal Clarification Act of 2011, which first authorized review of remand orders in cases removed under section 1442. AOB.21-22.

938 (9th Cir. 2007), *Patel* does not, as Plaintiffs contend, constitute "settled Ninth Circuit precedent," Ans.Br.11, as to the proper interpretation of Section 1447(d). "[U]nstated assumptions on non-litigated issues are not precedential holdings binding future decisions." *Id.* (quoting *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1288 (9th Cir. 1985)). Nor is the Court required to adhere to the four unpublished decisions that Plaintiffs cite (at 11-12), which "erroneously rel[ied] on [*Patel*] for their implicit assumptions." *Id.* at 937. Moreover, the question presented here was not raised or decided in any of those cases, because removal in each case was based on Section 1443, not the federal officer removal statute. *See Clark v. Kempton*, 593 F. App'x 667, 668 (9th Cir. 2015); *Carter v. Evans*, 601 F. App'x 527, 528 (9th Cir. 2015); *McCullough v. Evans*, 600 F. App'x 577, 578 (9th Cir. 2015); *U.S. Bank Nat'l Ass'n v. Azam*, 582 F. App'x 710, 711 (9th Cir. 2014). Accordingly, neither *Patel* nor any other decision of this Court prevents the panel from reviewing the entire remand order.[3]

[3] In contending that section 1447(d) should be "strictly construe[d]" to "preserve[] the balance of federalism," NLC Br. at 10-12, Plaintiffs' amici conflate limits on *removal jurisdiction* with limits on *appellate jurisdiction*. Section 1447(d) was not enacted to promote federalism but to "prevent appellate delay in determining where litigation will occur." *Lu Junhong*, 792 F.3d at 813. "[O]nce Congress has authorized appellate review of a remand order … [t]he marginal delay from adding an extra issue to a case where the time for briefing, argument, and decision has

Plaintiffs ignore Defendants' argument that Judge Chhabria made a merits determination, not a jurisdictional determination, when he concluded that the Clean Air Act ("CAA") displaces Plaintiffs' federal common law claims. In briefing their Motion for Partial Dismissal, Plaintiffs argued that displacement has jurisdictional consequences. No. 18-15503, ECF No. 43 at 10-11. That is incorrect. *See* AOB.27-29; *infra* at II.A.3. Because displacement merely affects the availability of a remedy—not a court's jurisdiction—Judge Chhabria's characterization of his remand order as founded on lack of subject-matter jurisdiction was not "colorable." *Atl. Nat'l Trust LLC v. Mt. Hawley Ins. Co.*, 621 F.3d 931, 938 (9th Cir. 2010). Judge Chhabria's order is thus a final decision under 28 U.S.C. § 1291, and section 1447(d) does not bar review. *See id.* at 935; *see also Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 230 (2007) (section 1447(d) "preclude[s] review only of remands for lack of subject matter jurisdiction and for defects in removal procedure").

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already been accepted is likely to be small." *Id.* There is little risk that parties will "cite § 1442 or § 1443 in a notice of removal when all they really want is a hook to allow appeal of some different subject" because "a frivolous removal leads to sanctions, potentially including fee-shifting." *Id.* (citing 28 U.S.C. § 1447(c)).

II. Plaintiffs' Global Warming Claims Were Properly Removed

Plaintiffs' claims are based on worldwide greenhouse gas emissions allegedly resulting from Defendants' lawful, heavily regulated worldwide conduct during the relevant period—much of which occurred on the Outer Continental Shelf, floating oil rigs, and federal enclaves, and at the direction of federal officers. The claims thus arise under federal common law, raise numerous disputed and substantial federal issues, and are removable on other statutory grounds.

A. Plaintiffs' Claims Arise Under Federal Common Law

As the Supreme Court and this Court have made clear, federal common law governs "transboundary pollution suits." *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 855 (9th Cir. 2012); *see AEP*, 564 U.S. at 420-21. This is because "[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law." *AEP*, 564 U.S. at 421 (quoting *Milwaukee I*, 406 U.S. at 103). In light of the federal interests implicated by interstate pollution claims, "borrowing the law of a particular State would be inappropriate." *AEP*, 564 U.S. at 422; *see also Ouellette*, 479 U.S. at 488, 492; *Nat'l Audubon Soc'y v. Dep't of Water*, 869 F.2d 1196, 1204-05 (9th Cir. 1988) ("interstate disputes [concerning pollution] require application of federal common law" to "the exclusion of state law"). Because Plaintiffs' global-warming claims are based on nationwide (and worldwide)

greenhouse gas emissions and energy production, they are governed by federal common law and thus are removable. AOB.31-38.[4]

1. Plaintiffs contend that federal common law is merely a preemption defense and that the "well-pleaded complaint rule" guarantees them a state-court forum. Ans.Br.25-26. But while the well-pleaded complaint rule allows a plaintiff to "avoid federal jurisdiction by exclusive reliance on state law," *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987), it does not allow a plaintiff to "exalt form over substance," *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 595 (2013), by affixing a state-law label to what is necessarily a *federal claim*. *See Torres-Aguilar v. I.N.S.*, 246 F.3d 1267, 1271 (9th Cir. 2001) (to assess jurisdiction courts "must look beyond" a litigant's chosen "label[s]"). On the contrary, "[w]hen federal law applies," as it plainly does here, "it follows that the question arises under federal law, and federal question jurisdiction exists." *New SD*, 79 F.3d at 955; *see also Wayne v. DHL Worldwide Express*, 294 F.3d 1179, 1184 (9th Cir. 2002) ("Federal jurisdiction

[4] Plaintiffs note that some of the same Defendants here argued in *Kivalina* that the non-state plaintiffs in that case could not bring viable federal common law claims. Ans.Br.24 n.8. Plaintiffs again confuse the viability of their claims with the law under which they must arise. Moreover, that argument was raised before the Supreme Court confirmed in *AEP* that global warming claims are governed by federal common law, and is consistent with the arguments Defendants raise here: Even if Plaintiffs do not have a remedy, the claims arise under federal common law.

[exists] … if the claims arise under federal common law."); *Treiber & Straub, Inc. v. U.P.S., Inc.*, 474 F.3d 379, 383 (7th Cir. 2007) (a claim that "arise[s] under federal common law … is a permissible basis for jurisdiction based on a federal question"); *Woodward Governor Co. v. Curtiss Wright Flight Sys., Inc.*, 164 F.3d 123, 126 (2d Cir. 1999) ("[I]f federal common law governs a case, that case [is] within the subject matter jurisdiction of the federal courts."); *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 926 (5th Cir. 1997) ("Federal jurisdiction exists if the claims arise under federal common law.").

As the Supreme Court has long recognized, regardless of how they are pled, tort claims addressing "matters essentially of federal character" must be governed by federal common law, not state law, because such claims "so vitally affect[] interests, powers and relations of the Federal Government as to require uniform national disposition rather than diversified state rulings." *United States v. Standard Oil Co.*, 332 U.S. 301, 307 (1947). This does not mean that federal common law provides a remedy for all such claims. In *Standard Oil* the court declined to "exercise" the "judicial power to establish the new liability" requested by the government to avoid "intruding within a field properly within Congress' control." *Id.* at 316. *Standard Oil* illustrates that the jurisdictional question (which law governs?) is separate from the merits question (is the claim viable?).

The Court reached the same conclusion in *Milwaukee I* and *Ouellette*. The question in *Milwaukee I* was "whether pollution of interstate or navigable waters creates actions arising under the 'laws' of the United States within the meaning of § 1331(a)." 406 U.S. at 99. The Court answered in the affirmative, "conclud[ing] that § 1331 jurisdiction will support claims founded upon federal common law." *Id.* at 100. This is because "a cause of action … 'arises under' federal law if the dispositive issues stated in the complaint *require the application of federal common law*." *Id.* (quoting *Ivy Broad. Co. v. Am. Tel. & Tel. Co.*, 391 F.2d 486, 492 (2d Cir. 1968)) (emphasis added). The court proceeded to determine that federal common law governed the transboundary pollution dispute involving four states bordering Lake Michigan. *Id.* at 105 n.6. In short, *Milwaukee I* "held" that interstate pollution "cases should be resolved by reference to federal common law." *Ouellette*, 479 U.S. at 488 (citing *Milwaukee I*, 406 U.S. at 107 n.9).

In *Ouellette*, the Court confirmed that state law cannot be used to "regulate the conduct of out-of-state sources," because "[a]pplication of an affected State's law to an out-of-state source … would undermine the important goals of efficiency and predictability." *Id.* at 495-96. *Milwaukee I* and *Ouellette* thus make clear that Plaintiffs' claims, which are based on greenhouse-gas pollution of the global atmosphere, arise under federal common law. And, as in *Standard Oil*, that

conclusion follows regardless of whether Plaintiffs' claims are viable under federal common law. Because federal courts have subject-matter jurisdiction over Plaintiffs' claims under Section 1331, the claims are removable under Section 1441. Plaintiffs are thus incorrect in asserting that *Ouellette* and *Milwaukee I* "have nothing to do with the removability of well-pled state law claims." Ans.Br.28.

2. This Court has adopted the same choice-of-law analysis. In *New SD*, the plaintiff filed a state-law breach of contract claim which the defendant removed on the ground that "contracts connected with national security[] are governed by federal law." 79 F.3d at 954. In affirming the order denying remand, this Court held that "the federal interest" implicated by the claim "requires that 'the rule [of decision] must be uniform throughout the country.'" *Id.* at 955 (quoting *Am. Pipe & Steel Corp. v. Firestone Tire & Rubber Co.*, 292 F.2d 640, 643 (9th Cir. 1961)). In sum, the claim was not "a 'state law breach of contract claim,'" and jurisdiction "existed under § 1331 because the claim arose under federal common law." *Gallo v. Unknown No. of Identity Thieves*, 254 F. Supp. 3d 1096, 1102 (N.D. Cal. 2017) (discussing *New SD*, 79 F.3d at 955); *see also Sam L. Majors Jeweler*, 117 F.3d at 928-29 (removal of state-law claims was proper because federal common law governed liability of air carriers).

Plaintiffs assert that *New SD* is "no longer sound," Ans.Br.27 n.9, but this

Court continues to cite it approvingly. In *Caltex Plastics, Inc. v. Lockheed Martin Corp.*, 824 F.3d 1156 (9th Cir. 2016), the Court explained that, "[o]ccasionally, a 'federal interest [is] so dominant'" that state law cannot apply. *Id.* at 1159-60 (quoting *New SD*, 79 F.3d at 955). Echoing *New SD*, the Court held that claims requiring such a "uniform rule of decision" are "governed by federal common law." *Id.* 1160.[5] In short, as Judge Alsup recognized, the "well-pleaded complaint rule does not bar removal" of global warming actions because "the claims necessarily arise under federal common law." *California v. BP p.l.c.*, 2018 WL 1064293, at *5 (N.D. Cal. Feb. 27, 2018); *cf. City of New York v. BP p.l.c.*, 325 F. Supp. 3d 466, 472 (S.D.N.Y. 2018) (plaintiffs' claims are "ultimately based on the 'transboundary' emission of greenhouse gases" and thus "arise under federal common law and

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[5] The district court opinions that Plaintiffs cite questioned the "sound[ness]" of *New SD* only because it did not "address[] the potential for disruption of the balance of power between state and federal government." *Raytheon Co. v. Alliant Techsystems, Inc.*, 2014 WL 29106, at *5 (D. Ariz. Jan. 3, 2014); *see also Babcock Servs., Inc. v. CH2M Hill Plateau Remediation Co.*, 2013 WL 5724465, at *4 (E.D. Wash. Oct. 21, 2013). But *Raytheon* and *Babcock* apparently misunderstood *New SD* to be applying a test similar to the one announced in *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005). Moreover, even if it were necessary to address the potential disruption of removing Plaintiffs' global warming claims, the result would be the same. Federal common law governed interstate pollution claims for more than a century, and adjudicating those claims in federal court today would preserve, not disrupt, the balance of power between the states and federal government.

require a uniform standard of decision").

Plaintiffs cite two Third Circuit decisions for the proposition that the "only state claims that are 'really' federal claims" are those "preempted completely by federal law." Ans.Br.26-27 (quoting *Goepel v. Nat'l Postal Mail Handlers Union, a Div. of LIUNA*, 36 F.3d 306, 311-12 (3d Cir. 1994); *Allstate Ins. Co. v. 65 Sec. Plan*, 879 F.2d 90, 94 (3d Cir. 1989)). But defendants in *Goepel* and *Allstate* both sought to remove on the basis of a *federal statute*—not federal common law. And *this Court* has held that state law claims are removable under Section 1331 where federal common law governs the subject matter. *See New SD*, 79 F.3d at 955.

3. Even Judge Chhabria did not appear to agree with Plaintiffs' "well-pleaded complaint" argument. Rather, he seemed to assume that the claims would be removable if federal common law governed, but remanded because he understood *AEP*'s displacement holding to mean that "federal common law does *not* govern" the claims. ER5 (emphasis added). That conclusion is incorrect because "displacement of a federal common law right of action means displacement of *remedies*," *Kivalina*, 696 F.3d at 857 (emphasis added), and the absence of a remedy "does not implicate subject-matter jurisdiction," *Allen v. Milas*, 896 F.3d 1094, 1101 (9th Cir. 2018). Indeed, *AEP* and *Kivalina* both held that the CAA displaced federal

common law remedies, yet neither court suggested that it lacked subject-matter jurisdiction.

Plaintiffs and their amici contend that federal common law cannot govern their claims because, when displaced, federal common law "no longer provides any substantive rules governing conduct." Ans.Br.30-31 (citing *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 n.7 (1981) ("*Milwaukee II*")); *see also* NRDC Br. at 9-18. But far from supporting that assertion, *Milwaukee II* refutes it. There, Illinois argued that both federal and state nuisance law applied, but the Court disagreed, explaining that "[i]f state law can be applied, there is no need for federal common law; if federal common law exists, it is because state law *cannot be used*." 451 U.S. at 313 n.7 (emphasis added). Here, it is evident that California law cannot be used to govern nationwide (and worldwide) emissions—regardless of whether any federal common law remedies remain available—because the Supreme Court has repeatedly held that federal common law, not state common law, governs transboundary pollution claims.

In short, displacement is a merits issue that does not alter the fundamentally federal nature of Plaintiffs' claims. If anything, enactment of a comprehensive federal statutory framework in an area long governed by federal common law only underscores the federal character of the field and reinforces that it is "inappropriate

for state law to control." *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981).[6]

Accordingly, even assuming *arguendo* that the district court was correct about the scope of displacement, it erred in concluding that the unavailability of a federal remedy somehow divested it of jurisdiction. Indeed, it was error even to reach the displacement issue in the context of deciding the remand motion. Statutory displacement of federal common law is a *defense* to Plaintiffs' claims. In jumping

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[6] Plaintiffs and their amici assert that federal common law would not apply even absent the CAA because there is no "uniquely federal interest" or "significant conflict" between federal energy and environmental policy and state law. Ans.Br.32 n.11; NRDC Br. at 29-31; States Br. at 14-23; NLC Br. at 15-19. But the cases that they cite stand only for the unremarkable proposition that states have an interest in addressing *in-state* emissions. *See Am. Fuel & Petrochem. Mfrs. v. O'Keeffe*, 903 F.3d 903, 907-08 (9th Cir. 2018) (addressing Oregon rules designed to decrease "greenhouse gas emissions from transportation fuels produced in or imported into Oregon"); *Rocky Mountain Farmers Union v. Corey*, 913 F.3d 940, 946 (9th Cir. 2019) ("*Rocky Mountain II*") (addressing California fuel standards "aimed at accomplishing the goal of reducing the rate of greenhouse gas emissions in California's transportation sector"). This Court's decision in *National Audubon* is also more off-point, as that case involved an effort to stop diverting "to Los Angeles … four freshwater streams that would otherwise flow into Mono Lake." 869 F.2d at 1198. The court held that the case was "essentially a domestic dispute and therefore [was] not the sort of interstate controversy which makes application of state law inappropriate." *Id.* at 1205. Unlike those cases, Plaintiffs here are seeking to apply state law not to limit emissions from in-state sources, but rather to hold Defendants liable for costs that are, by definition, allegedly caused only by collective, worldwide production and combustion.

ahead to decide the viability of Plaintiffs' claims, the district court flouted "two centuries of jurisprudence affirming the necessity of determining jurisdiction *before* proceeding to the merits." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 98 (1998) (emphasis added).[7]

4. Finally, Plaintiffs repeat the district court's error when they contend that *AEP* opened the floodgates to state-law claims. Ans.Br.29-30. In *AEP*, the plaintiffs' state-law claims were asserted *only* under "the law of each State where the defendants operate power plants." *AEP*, 564 U.S. at 429. The Court remanded for the lower court to determine whether those *Ouellette*-style claims brought under the laws of the source states were preempted by the CAA or otherwise barred. *Id.*

[7] Two federal judges have held, in the context of motions to dismiss, that the CAA does *not* displace global warming claims to the extent those claims are premised, in part, on a defendant's contribution to emissions occurring overseas—though the overseas component of Plaintiffs' claims are non-viable for other reasons. *See City of Oakland v. BP p.l.c.*, 325 F. Supp. 3d 1017, 1024 (N.D. Cal. 2018) (Alsup, J.) ("[B]ecause foreign emissions are out of the EPA and [CAA's] reach, the [CAA] d[oes] not necessarily displace plaintiffs' federal common law claims"); *City of New York*, 325 F. Supp. 3d at 472, 475 (Keenan, J.) (CAA displaces "federal common law claims under [*AEP*]" "[t]o the extent that the City brings nuisance and trespass claims against Defendants for *domestic* greenhouse gas emissions"; "to the extent that the City seeks to hold Defendants liable for damages stemming from foreign greenhouse gas emissions, the City's claims are barred by the presumption against extraterritoriality and the need for judicial caution in the face of 'serious foreign policy consequences'").

(citing *Ouellette*, 479 U.S. at 488). AEP did not suggest that, by displacing federal common law remedies, Congress somehow authorized state law to govern claims targeting *out-of-state emissions*.[8] Because Plaintiffs here purport to assert omnibus claims under California law based on *global* emissions resulting from Defendants' worldwide conduct, the claims do not fit the *Ouellette* mold. AOB.44-45.

B. Plaintiffs' Claims Raise Disputed and Substantial Federal Issues

Federal question jurisdiction also exists for the independent reason that Plaintiffs' claims necessarily raise disputed and substantial federal issues. *See Grable*, 545 U.S. 308.

First, Plaintiffs' claims necessarily present numerous federal issues. A nuisance claim under California law requires showing that "[t]he interference with the protected interest … [is] unreasonable,'" and "[t]he primary test for determining whether the invasion is unreasonable is whether the gravity of the harm outweighs the social utility of the defendant's conduct." *San Diego Gas & Elec. Co. v. Superior Court*, 13 Cal. 4th 893, 938 (1996). But federal agencies—including the Army

[8] Unlike Plaintiffs' claims, the cases Plaintiffs cite at note 10 of their Answering Brief each involved a claim "brought against an emitter based on the *law of the state in which the emitter operates*." *Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685, 686 (6th Cir. 2015) (emphasis added); *see also Bell v. Cheswick Generating Station*, 734 F.3d 188, 190 (3d Cir. 2013) ("claims brought by private property owners against a source of pollution located within the state.").

Corps of Engineers and the EPA—have been weighing the costs and benefits of fossil-fuel production for decades, and any judicial balancing here would necessarily amount to a "collateral attack" on these agencies' decisions. *Bader Farms, Inc. v. Monsanto Co.*, 2017 WL 633815, at *3 (E.D. Mo. Feb. 16, 2017); *see also Bd. of Comm'rs v. Tenn. Gas Pipeline Co., LLC*, 850 F.3d 714, 724 (5th Cir. 2017), *cert denied*, 138 S. Ct. 420 (2017).[9] Plaintiffs contend that their claims do not "depend on federal law to create the right to relief," Ans.Br.42, but a court could not evaluate the benefit of fossil fuels without interpreting and applying the numerous federal statutes and regulations that speak directly to the nationwide benefits of fossil fuel production.[10]

Plaintiffs contend that, because agencies make forward-looking policy determinations, while courts make backward-looking liability determinations, there

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[9] Plaintiffs seek to distinguish *Bader Farms* on the ground that plaintiffs' fraudulent concealment claims there rested on defendant's alleged withholding of material information from the Department of Agriculture, and federal regulations defined "the duty to provide information and the materiality of that information." Ans.Br.42 n.15. But the claims asserted here likewise depend, in part, on Defendants' communications with federal regulators. *See, e.g.*, ER264-65 ¶¶118-119; ER271-72 ¶¶127-29; ER273-74 ¶134. To the extent Defendants owed any particular duty to these regulators, that duty is a creature of federal law.

[10] *See, e.g.*, 10 U.S.C. § 8722(c)(1)(b); 30 U.S.C. § 201(a)(3)(C); 43 U.S.C. § 1802(1); 30 C.F.R. § 550.120.

is no overlap between their claims and the "various regulatory considerations cited by Defendants." Ans.Br.42. But federal agencies have been balancing environmental protection and economic development *for decades*, *see* AOB.48, so any backward-looking determination made in this case will overlap with—and thus second-guess—the forward-looking determinations regulators already made.

The Iowa Supreme Court's decision in *Freeman v. Grain Processing Corp.*, 848 N.W.2d 58 (Iowa 2014), does not suggest otherwise. There, the court noted only that the CAA did not reflect a "congressional intent" "to override or preempt" state common-law claims "caused by pollution at a specific location." *Id.* at 69, 76. But the damages alleged here are not "caused by pollution at a specific location"; rather, they are allegedly caused by the collective actions of Defendants and countless others worldwide. Accordingly, the court must weigh the alleged harms against the worldwide benefit of that conduct—an inquiry that plainly implicates federal statutes and regulations addressing those benefits.

Although Plaintiffs did not sue the Corps or directly challenge any of its regulatory decisions, Ans.Br.43, their claims are predicated on alleged injury from rising sea levels. To the extent such injuries exist, they result from decisions made by the Corps after balancing the "benefits" of potential levee projects against the

"reasonably foreseeable detriments." 33 C.F.R. § 320.4(a)(1). Plaintiffs' claims thus require second-guessing decisions of federal agencies.

Moreover, weighing the worldwide harms and benefits of fossil-fuel production would usurp the federal government's foreign affairs power. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003). Plaintiffs contend (at 40) that the foreign affairs doctrine merely presents a federal preemption defense, but Plaintiffs' claims would do more than *interfere* with the operation of foreign affairs. Plaintiffs are seeking to *conduct* foreign affairs via litigation. That effort raises myriad federal issues, including the interpretation of treaties and federal laws dealing with global warming.

As Defendants have explained, even if Plaintiffs had asserted global warming claims under the laws of each source state (which they have not), federal law would govern both liability and choice-of-law issues. AOB.53-54. Plaintiffs do not dispute the need for uniformity, but assert that removal is improper under *Pinney v. Nokia*, 402 F.3d 430 (4th Cir. 2005). Ans.Br.44. In *Pinney*, the court rejected the defendant's argument that the claims were removable because there was a need for "uniform implementation and interpretation" of a particular regulatory regime. 402 F.3d at 448. Here, by contrast, it is the rule of decision that must be uniform, not the interpretation of a federal statute.

Second, the federal issues here are undoubtedly disputed and substantial. If successful, Plaintiffs' suits will abrogate federal environmental regulations, constrain diplomatic efforts to achieve a global solution to climate change, and impose billions of dollars in liability on both domestic and foreign corporations for the extraction, production, sale, and combustion of fossil fuels around the world. That is a far cry from the "'fact-bound and situation-specific'" disputes cited by Plaintiffs. *See* Ans.Br.46-47.

Third, claims alleging that worldwide production and combustion of fossil fuels have caused ambient air pollution fall squarely within the purview of the federal courts. Indeed, such disputes have historically been litigated in federal court, under *federal* law. *See supra* II.A.1. Plaintiffs assert (at 47) that the CAA authorizes states to limit *in-state* emissions, but Plaintiffs' claims are based on *global* fossil-fuel production and emissions. Accordingly, federal courts can resolve Plaintiffs' claims without upsetting the "balance of federal and state judicial responsibilities." *Grable*, 545 U.S. at 314.

C. Plaintiffs' Claims Are Completely Preempted by Federal Law

Because Plaintiffs' claims seek to curb nationwide and global emissions, they are completely preempted by the CAA, which supplies the exclusive vehicle for

challenging or changing nationwide emissions standards or permitting requirements. *See* 42 U.S.C. § 7607.

Although the Supreme Court has recognized complete preemption in only three contexts, federal courts, including the Ninth Circuit, have found many other statutes to have complete preemptive effect.[11] Plaintiffs cite several cases that declined to find complete preemption under the CAA, Ans.Br.34 n.12, but the state action at issue in those cases sought to regulate only *in-state* emissions. It is undisputed that the CAA's savings clauses allow states "to impose higher standards *on their own sources of pollution.*" *Bell*, 734 F.3d 188 at 198 (emphasis added); *see* States Br. at 16-17 (describing states' efforts to reduce *in-state* emissions). But the savings clauses do not, as Plaintiffs contend (at 36), allow states to "create or enforce

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[11] *See, e.g.*, *Hall v. N. Am. Van Lines*, *Inc*., 476 F.3d 683, 688-89 (9th Cir. 2007) (Carmack Amendment); *In re Miles*, 430 F.3d 1083, 1092 (9th Cir. 2005) (Section 303(i) of the Bankruptcy Code); *Botsford v. Blue Cross & Blue Shield*, 314 F.3d 390, 399 (9th Cir. 2002) (Federal Employees Health Benefits Act); *Fadhliah v. Societe Air Fr.*, 987 F. Supp. 2d 1057, 1061 (C.D. Cal. 2013) (Montreal Convention); *Cont'l Ins. Co. v. Kawasaki Kisen Kasha Ltd.*, 542 F. Supp. 2d 1031, 1037 (N.D. Cal. 2008) (federal maritime law and Carriage of Goods by Sea Act); *Asante Techs.*, *Inc. v. PMC-Sierra*, *Inc*., 164 F. Supp. 2d 1142, 1152 (N.D. Cal. 2001) (U.N. Convention on Contracts for the International Sale of Goods); *Worth v. Universal Pictures, Inc*., 5 F. Supp. 2d 816, 823 (C.D. Cal. 1997) (Copyright Act); *see generally* 14C Wright, Miller & Cooper, *Fed. Prac. & Proc.* § 3722.2 nn. 47-57 (4th ed. 2018) (collecting more than 90 cases finding complete preemption based on various federal laws).

stricter" emissions standards *for the whole country* (or for the whole world).[12] The EPA—not any single state or municipality—has authority to set nationwide emissions limits.

Plaintiffs contend that because the CAA does not provide a substitute cause of action, it does not completely preempt their claims. Ans.Br.36-37. But complete preemption does not require a substitute action or remedy. Rather, where a federal statute and regulatory scheme intend that only certain claims or remedies are available, "the federal remedies displace state remedies." *Botsford v. Blue Cross & Blue Shield*, 314 F.3d 390, 398 (9th Cir. 2002), *opinion amended on denial of reh'g*, 319 F.3d 1078 (9th Cir. 2003); *see Prince v. Sears Holdings Corp.*, 848 F.3d 173, 178 (4th Cir. 2017) (statute's "preemptive scope is not diminished simply because a finding of [complete] preemption will leave a gap in the relief available to

[12] It is irrelevant that the CAA does not affirmatively "restrict" "right[s] … under … common law to seek enforcement of any emission standard," 42 U.S.C. § 7604(e), because Plaintiffs did not have a right to seek abatement of nationwide emissions under state common law before the CAA was enacted. Nor is the "states' rights savings clause" relevant, *see* States Br. at 12 (citing 42 U.S.C. § 7416), because it merely preserves state authority to "regulate to minimize the in-state harm *caused by products sold in-state*," *Rocky Mountain II*, 913 F.3d at 952 (emphasis added). It does not authorize states to pursue nationwide or worldwide "climate regulation." NRDC Br. at 25; *cf. Rocky Mountain II*, 913 F.3d at 953 ("Here, the regulated parties, the regulated transactions, and the harms California intended to prevent are all within the state's borders, making the LCFS a classic exercise of police power.")

a plaintiff."); *Fayard v. Ne. Vehicle Servs., LLC*, 533 F.3d 42, 46 (1st Cir. 2008) ("[T]he superseding federal scheme may be more limited or different in its scope and still completely preempt."). In any event, Plaintiffs are incorrect that the CAA does not provide them a remedy—the CAA authorizes Plaintiffs to petition the EPA to set more stringent nationwide emissions standards on greenhouse gases. *See Cal. Dump Truck Owners Ass'n v. Nichols*, 784 F.3d 500, 506 (9th Cir. 2015) (the CAA was designed to "channel[] review of final EPA action exclusively to the courts of appeal, regardless of how the grounds for review are framed"). "[T]hat [Plaintiffs] cannot recover damages does not require a different conclusion or avoid complete preemption." *Prince*, 848 F.3d at 179.

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

Plaintiffs concede that OCSLA jurisdiction covers disputes where "physical activities on the OCS caused the alleged injuries." Ans.Br.48. Here, a principal physical activity that allegedly caused Plaintiffs' injuries is the worldwide extraction of fossil fuels. Plaintiffs cannot (and do not) dispute that much of that extraction occurred on the OCS. Under Plaintiff's theory, Defendants' OCS production is tortious. Plaintiffs' claims thus 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).

Plaintiffs contend that there is no OCSLA jurisdiction because Defendants' activities on the OCS were not the but-for cause of Plaintiffs' alleged injuries. Ans.Br.48-49. But that argument cannot be reconciled with Plaintiffs' own theory of causation. Even though Defendants account for only a small percentage of worldwide production and promotion of fossil-fuel, Plaintiffs allege that "but for Defendants' conduct," Plaintiffs would not have been injured. ER292 ¶167.[13] Having embraced such an expansive theory of causation, Plaintiffs cannot now argue that OCSLA jurisdiction is defeated because Defendants' substantial OCS production is *not* the but-for cause of the alleged injuries.[14]

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[13] Defendants dispute that their conduct was the but-for cause of Plaintiffs' alleged injuries, but they accept Plaintiffs' allegations solely for the purposes of removal.

[14] Plaintiffs rely on *Hammond v. Phillips 66 Co.*, 2015 WL 630918 (S.D. Miss. Feb. 12, 2015), where the court denied OCSLA jurisdiction because only a portion of plaintiff's asbestos exposure occurred while working on the OCS. *Id.* at *3-4. But other courts have upheld OCSLA jurisdiction in nearly identical situations. *See Sheppard v. Liberty Mutual Ins. Co.*, 2016 WL 6803530 (E.D. La. Nov. 17, 2016) (finding OCSLA jurisdiction where plaintiff was exposed to asbestos for two years on OCS facilities, even though he alleged decades-long daily exposure to asbestos); *Ronquille v. Aminoil Inc.*, 2014 WL 4387337, at *2 (E.D. La. Sept. 4, 2014) (finding OCSLA jurisdiction because "at least part of the work that Plaintiff allege[d] caused his exposure to asbestos arose out of or in connection with [defendant's] OCS operations").

Moreover, but-for causation is not even necessary for OCSLA jurisdiction. *See* AOB.60-61. Removal is proper where, as here, the relief sought would discourage OCS production and "impair the total recovery of the federally-owned minerals from the [OCS]." *Amoco Prod. Co. v. Sea Robin Pipeline Co.*, 844 F.2d 1202, 1210 (5th Cir. 1988).

Plaintiffs argue that allowing removal would "open the floodgates" by expanding OCLSA beyond its intended purpose. Ans.Br.48. But Plaintiffs have tied their claims directly to Defendants' fossil-fuel extraction, ER247-48 ¶¶74-77; ER248 ¶79, much of which occurred on the OCS. Because Plaintiffs' claims arise out of the "exploration and production of minerals" on the OCS, this is "not … a challenging case" for "removal jurisdiction[] under OCSLA." *In re Deepwater Horizon*, 745 F.3d 157, 163-64 (5th Cir. 2014).

2. The Claims Arise on Federal Enclaves

Federal jurisdiction also exists because Plaintiffs' "tort claims … arise on 'federal enclaves.'" *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1250 (9th Cir. 2006). Plaintiffs do not dispute that several Defendants (or their affiliates) maintained production operations and/or sold fossil fuels on federal enclaves. *See* AOB.62-63; *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).

Plaintiffs contend that federal enclave removal is improper because a tort claim "arises" where the injury occurs, not where the tortious conduct took place. Ans.Br.51. But courts have taken a broader view, asking whether any "pertinent events" giving rise to liability occurred on a federal enclave. *See 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). Indeed, in *Ballard v. Ameron Int'l Corp.*, 2016 WL 6216194 (N.D. Cal. Oct. 25, 2016), the court recognized that federal jurisdiction would exist even if some of the injury were sustained outside a federal enclave so long as the "federal interest" in regulating the conduct was sufficiently strong. *Id.* at *3.

Here, Defendants have identified an abundance of strong federal interests, from federalism to foreign affairs. Although Plaintiffs again profess concern about opening the "floodgates," Ans.Br.51, the claims here implicate decades-long drilling operations on federal land—hardly a common situation. Plaintiffs' proposal would have the odd consequence of denying removal where *all* of the tortious conduct

occurred on a federal enclave but the injury happened to occur after the plaintiff stepped outside the enclave. None of Plaintiffs' cases support that illogical result.

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

Federal jurisdiction also exists because Plaintiffs' suits are brought against "person[s] acting under" officers of the United States. 28 U.S.C. § 1442(a)(1). The federal officer removal statute was designed not merely to protect government agents from "local prejudice," Ans.Br.13, but also "to protect the Federal Government from the interference with its operations that would ensue were a State able [to] bring" claims "for an alleged offense against the law of the State[.]" *Watson v. Philip Morris Cos., Inc.*, 551 U.S. 142, 150 (2007) (quotations omitted); *see also Willingham v. Morgan*, 395 U.S. 402, 406 (1969) (federal officer jurisdiction protects "the very basic interest in the enforcement of federal law"). Here, Plaintiffs seek to hold Defendants strictly liable under California law for extracting, producing, and supplying allegedly defectively designed products under the direction of federal officers.

Plaintiffs argue that Defendants were not "acting under" a federal officer because their contractual relationship with the federal government amounts to nothing more than "simple compliance with federal law." Ans.Br.9; *see also* Public

Citizen Br. at 14-20. But the federal control apparent on the face of Defendants' contracts far exceeds mere "compliance" and instead typifies the "subjection, guidance, or control" necessary to invoke federal jurisdiction. *Watson*, 551 U.S. at 151; *see Savoie v. Huntington Ingalls, Inc.*, 817 F.3d 457, 463 (5th Cir. 2016) ("[R]emoval of the entire case is appropriate as long as a single claim satisfies the federal officer removal statute.").

For example, the U.S. Navy's Unit Plan Contract ("UPC") with Standard Oil (a predecessor of Chevron) granted the Navy "*exclusive control* over the exploration, prospecting, development, and operation of the [Elk Hills Naval Petroleum] Reserve," ER200 §3(a) (emphasis added), and "*full and absolute power* to determine … the quantity and rate of production from, the Reserve," ER201 §4(a) (emphasis added). The UPC obligated Standard to operate the Reserve in such a manner as to produce "not less than 15,000 barrels of oil per day," ER201 §4(b), and retained for the Navy "absolute" discretion to suspend or increase the rate of production, ER201

§4(b), ER202 §5(d)(1).[15] As Plaintiffs concede, "military procurement contracts," can give rise to federal jurisdiction, Ans.Br.13, and the contracts here exemplify precisely the type of "exclusive control" required for removal.[16]

Defendant CITGO's detailed fuel supply agreements with NEXCOM further belie Plaintiffs' claim that Defendants' oil production for the federal government involved the "simple sale" of a generic "off-the-shelf" commodity. Ans.Br.17. Unlike in *Washington v. Monsanto Co.*, 738 F. App'x 554, 555 (9th Cir. 2018), where evidence did "not show that the federal government supervised Monsanto's

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[15] It is irrelevant that the UPC granted Standard Oil discretion concerning disposal of its share of the oil produced from the Reserve, and that neither party to the contract had preferential rights to purchase the other's share. *See* Ans.Br.19. "[J]ust because [Defendants'] are vested with discretion does not mean that they are not 'involve[d] in an effort to assist, or to help carry out, the duties or tasks of the federal superior.'" *Goncalves by and through Goncalves v. Rady Children's Hosp. San Diego*, 865 F.3d 1237, 1248 (9th Cir. 2017).

[16] Plaintiffs rely on *Fidelitad, Inc. v. Insitu, Inc.*, 904 F.3d 1095, 1099 (9th Cir. 2018), and *Lu Junhong*, but neither case involved the close control or supervision demonstrated here. In *Fidelitad*, the defendant produced "no … record of any communication between [defendant] and a federal officer"; "[n]o federal officer directed" the defendant to perform the act that gave rise to the claim; and the defendant did "not claim to have acted pursuant to a directive in any federal contract." 904 F.3d at 1099-1101. In *Lu Junhong*, defendant Boeing was merely "us[ing] FAA-approved procedures to conduct analysis and testing required for the issuance of … certifications for aircraft under Federal Aviation Regulations." 792 F.3d at 808.

manufacture of PCBs or directed Monsanto to produce PCBs in a particular manner," the NEXCOM Agreements: (1) set forth detailed "fuel specifications" that required compliance with specified American Society for Testing and Materials standards,[17] and compelled NEXCOM to "have a qualified independent source analyze the products" for compliance with those specifications[18]; (2) authorized the Contracting Officer to inspect delivery, site, and operations[19]; and (3) established detailed branding and advertising requirements.[20] These government purchases from CITGO were anything but "off-the-shelf."[21] The government exercised control over Defendants' fossil-fuel production, and Defendants assisted the government in "produc[ing] an item that it need[ed]," and "perform[ing] a job that," in Defendants' absence, "the Government itself would have had to perform." *Watson*, 551 U.S. at 153-54.

[17] *See* SER6-7 §§10-11; SER21 §I.C.5; SER38-40 §§I.C.4-7; SER46, 50-51 §§C.6-10; SER53-55 §§C.1-4; SER64-67 §§C.1-4; SER77-79 §§C.1-4.

[18] *See* SER7 §10.I; SER21 §I.C.5; SER38 §I.C.4(c); SER46 §C.6.a.

[19] *See* SER12-13 §19; SER57-59 §F.3; SER80 §D.

[20] *See id.*, SER69 §C.11; SER80 §C.9.

[21] The government resold the CITGO fuel at NEXCOM facilities to individual service members, Ans.Br.19, but what matters for purposes of federal-officer removal is that the product was supplied by Defendants according to government specifications for a governmental purpose.

The bar to satisfy the causal nexus requirement is "quite low"—a defendant must "show only that the challenged acts 'occurred *because of* what they were asked to do by the Government.'" *Goncalves*, 865 F.3d at 1245. Here, Plaintiffs seek to hold Defendants liable for "extracting raw fossil fuel products, including crude oil, coal, and natural gas from the Earth, and placing those fossil fuel products into the stream of commerce." ER292 ¶181(a). Defendants were "asked" to engage in this conduct "by the Government."[22] *Goncalves*, 865 F.3d at 1245. Plaintiffs' claims and the conduct that Defendants took under the direction of the federal government are thus causally linked.

E. The Actions Were Properly Removed Under the Bankruptcy Removal Statute

Plaintiffs' actions were also properly removed because they are "related to" numerous bankruptcy cases. 28 U.S.C. § 1334(b).

Plaintiffs assert that this case lacks a sufficiently close nexus to any bankruptcy proceeding to justify removal jurisdiction because "[r]esolving this case requires no interpretation of any bankruptcy plan." Ans.Br.53. But Plaintiffs' claims have already required the court administering Defendant Peabody Energy's bankruptcy proceedings to interpret Peabody's recently confirmed bankruptcy plan.

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[22] *See* NOR, Exs. C §9, D §3(a)-(b).

The court concluded that Plaintiffs' claims against Peabody are barred by that plan, and it enjoined Plaintiffs from prosecuting their claims. *See* Mem. Op., *In re Peabody Energy Corp*., No. 16-42529 (Bankr. E.D. Mo. Oct 24, 2017), ECF No. 3514; *see In re Arch Coal, Inc.*, No. 16-40120 (Bankr. E.D. Mo. Oct. 4, 2017), ECF No. 1598 (seeking similar relief). Accordingly, Plaintiffs' claims clearly "affect[] the interpretation, implementation, consummation, execution, [and] administration of [Peabody's] confirmed plan." *In re Wilshire Courtyard*, 729 F.3d 1279, 1289 (9th Cir. 2013).

In fact, Plaintiffs' claims implicate numerous bankruptcy plans because Plaintiffs seek to hold Defendants liable for conduct of their affiliates, subsidiaries, and predecessors going back decades. Many of these entities have gone through bankruptcy. There is a "close nexus" between Plaintiffs' claims and the bankruptcy proceedings of these entities because the claims will require bankruptcy courts around the country to interpret the confirmed plans of these bankrupt companies. For example, Texaco's Chapter 11 plan bars certain claims against it arising before March 15, 1988. *In re Texaco Inc.*, 87 B 20142 (Bankr. S.D.N.Y. 1987) Dkt. 1743.5. Yet Plaintiffs allege that Texaco engaged in culpable conduct decades before then. ER220-21 ¶16(d). A court will thus be required to interpret Texaco's bankruptcy plan to determine whether Plaintiffs' claims against Texaco have been discharged.

A sufficient causal nexus therefore exists for bankruptcy removal. *In re Wilshire*, 729 F.3d at 1289.

Plaintiffs contend that these actions are exempt from removal because they aim to "protect[] the public safety and welfare." Ans.Br.53. But Plaintiffs' claims—which seek disgorgement of profits and "billions of dollars" in compensatory, punitive, and exemplary damages "to ensure that the parties responsible for sea level rise bear the costs of its impacts on the County," ER218 ¶11; ER305 ¶235; ER308 ¶247—are in the nature of a "private right[]" of contribution or indemnity rather than an effort to "effectuate [any] public policy," *see City & Cty. of San Francisco v. PG&E Corp.*, 433 F.3d 1115, 1125 (9th Cir. 2006). And contrary to Plaintiffs' assertions, a secondary interest in protecting public safety and welfare is insufficient to defeat removal jurisdiction. *See* Ans.Br.54. Removal is warranted "if the action *primarily* seeks to protect the government's pecuniary interest." *PG&E*, 433 F.3d at 1124 (emphasis added). Even if Plaintiffs contend a favorable judgment would help protect public health or safety, the express interest here is pecuniary.

F. Plaintiffs' Claims Are Within the Court's Admiralty Jurisdiction

These actions are within the district court's admiralty jurisdiction because Plaintiffs' claims satisfy both the "location" and "connection with maritime activity"

tests. *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995).

Plaintiffs contend that the "location" test is not satisfied because it is Defendants' *promotion* of petroleum products and the dangerous nature of the products themselves that constitute "the proximate cause" of their injuries. Ans.Br.57. But the *Grubart* test is satisfied where "one of the arguably proximate causes of the incident originated in … maritime activity," *Taghadomi v. United States*, 401 F.3d 1080, 1087 (9th Cir. 2005) (quoting *Grubart*, 513 U.S. at 541), and the complaints make clear that Defendants' fossil-fuel extraction is a principal asserted cause of Plaintiffs' injuries. As with the OCSLA and federal enclave removal grounds, Plaintiffs run away from their allegations to avoid admiralty jurisdiction, asserting that their claims have "nothing to do" with Defendants' fossil-fuel production on navigable waters. Ans.Br.58; *but see* ER292 ¶181(a). But Plaintiffs' claims encompass all Defendants' "extraction" activity, ER247 ¶75, much of which has occurred aboard "mobile offshore drilling unit[s]," which are

considered "vessel[s] on navigable water" within the meaning of 46 U.S.C. § 30101(a).[23]

Despite Plaintiffs' protestations that their claims bear no "connection to maritime activity," Ans.Br.57, courts have consistently held that the *drilling and production* of oil and gas from a vessel—such as a floating oil rig—is maritime activity. *See, e.g.*, *In re Crescent Energy Servs., L.L.C. for Exoneration from or Limitation of Liab.*, 896 F.3d 350, 356 (5th Cir. 2018). *Herb's Welding*, 470 U.S. 414 (1985), cited by Plaintiffs, did not alter the principle. *See Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 539 n.11 (5th Cir. 1986) ("[T]hat the production of oil and gas from a vessel in navigable waters is a maritime activity is not affected by … *Herb's Welding*").

Plaintiffs contend that the "saving-to-suitors" clause in 28 U.S.C. § 1333 "prohibits removal absent some other jurisdictional basis." Ans.Br.56. But the "'saving to suitors' clause does no more than preserve the right of maritime suitors to pursue nonmaritime *remedies*." *Tenn. Gas Pipeline v. Houston Cas. Ins. Co.*, 87

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[23] *See In re Oil Spill*, 808 F. Supp. 2d 943, 949 (E.D. La. 2011); *Barker v. Hercules Offshore, Inc.*, 713 F.3d 208, 215 (5th Cir. 2013); *Demette v. Falcon Drilling Co., Inc.*, 280 F.3d 492, 498 n.18 (5th Cir. 2002) *overruled in part, on other grounds by Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 589 F.3d 778 (5th Cir. 2009) (en banc); *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 416 n.2 (1985).

F.3d 150, 153 (5th Cir. 1996). And the Venue Clarification Act of 2011 eliminated the portion of section 1441(b) that courts had interpreted to block removal based on admiralty alone. *Cf. In re Dutile*, 935 F.2d 61, 62-63 (5th Cir. 1991).

Finally, Defendants did not "waive" admiralty jurisdiction. Defendants' original removal notices invoked federal common law, and admiralty jurisdiction is "'one of the areas long recognized as subject to federal common law.'" *U.S. v. Guillen-Cervantes*, 748 F.3d 870, 874 (9th Cir. 2014) (quoting *Tex. Indus.*, 451 U.S. at 638).

CONCLUSION

Defendants respectfully request that the Court reverse the district court's remand order.

Dated: March 14, 2019

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
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CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2019, 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.

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