No. 19-1818

---

**UNITED STATES COURT OF APPEALS**
**FOR THE FIRST CIRCUIT**

---

STATE OF RHODE ISLAND,

*Plaintiff-Appellee*,

v.

SHELL OIL PRODUCTS COMPANY, LLC; CHEVRON CORP.; CHEVRON USA, INC.; EXXONMOBIL CORP.; BP, PLC; BP AMERICA, INC.; BP PRODUCTS NORTH AMERICA, INC.; ROYAL DUTCH SHELL PLC; MOTIVA ENTERPRISES, LLC; CITGO PETROLEUM CORP.; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66; MARATHON OIL COMPANY; MARATHON OIL CORPORATION; MARATHON PETROLEUM CORP.; MARATHON PETROLEUM COMPANY, LP; SPEEDWAY, LLC; HESS CORP.; LUKOIL PAN AMERICAS LLC; GETTY PETROLEUM MARKETING, INC.; DOES 1-100,

*Defendants-Appellants*.

---

Appeal from the U.S. District Court
for the District of Rhode Island, No. 1:18-cv-00395-WES-LDA
(The Honorable William E. Smith)

---

# APPELLANTS' OPENING BRIEF

---

Joshua S. Lipshutz
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
(202) 955-8500
jlipshutz@gibsondunn.com

Theodore J. Boutrous, Jr.
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, California 90071-3197
(213) 229-7000
tboutrous@gibsondunn.com

*Counsel for Defendants-Appellants Chevron Corporation and Chevron U.S.A. Inc.*
[*Additional counsel listed on signature page*]

## CORPORATE DISCLOSURE STATEMENT

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

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 ten percent 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. BP Products North America Inc. is also a 100% wholly owned indirect subsidiary of BP p.l.c., and no intermediate parent of BP Products North America Inc. is a publicly traded corporation.

Chevron Corporation has no parent corporation, and there is no publicly held corporation that owns ten percent 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 ten percent or more of CITGO's stock.

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

Exxon Mobil Corporation is a publicly traded corporation and it has no corporate parent. No publicly held corporation owns ten percent or more of Exxon Mobil Corporation's stock. ExxonMobil Oil Corporation is wholly owned by Mobil Corporation, which is wholly owned by Exxon Mobil Corporation.

Hess Corporation is a publicly traded corporation and it has no corporate parent. There is no publicly held corporation that owns ten percent or more of Hess Corporation's stock.

Lukoil Pan Americas, LLC is a wholly owned subsidiary of LITASCO SA, which is domiciled in Geneva, Switzerland. LITASCO SA is not a publicly held company.

Marathon Oil Company is a wholly owned subsidiary of Marathon Oil Corporation. Marathon Oil Corporation has no parent corporation. Based on the Schedule 13G/A filed with the SEC on July 10, 2019, BlackRock, Inc., through itself and as the parent holding company or control person over certain subsidiaries, beneficially owns ten percent or more of Marathon Oil Corporation's stock.

Marathon Petroleum Corporation has no parent corporation, and there is no publicly held corporation that owns ten percent or more of Marathon Petroleum Corporation's stock. Marathon Petroleum Company LP is a wholly-owned subsidiary of Marathon Petroleum Corporation.

Motiva Enterprises, LLC is a wholly owned subsidiary of Saudi Refining, Inc.

and Aramco Financial Services Co. Saudi Aramco does not have a parent corporation, and there is no publicly-held corporation that owns ten percent or more of Saudi Aramco's stock.

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

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

Speedway LLC is an indirect, wholly-owned subsidiary of Marathon Petroleum Corporation.

## TABLE OF CONTENTS

**TABLE OF CONTENTS** *(continued)*

Page

# TABLE OF AUTHORITIES

Page(s)

## Cases

**TABLE OF AUTHORITIES** *(continued)*

Page(s)

**TABLE OF AUTHORITIES** *(continued)*

Page(s)

**TABLE OF AUTHORITIES** *(continued)*

Page(s)

**TABLE OF AUTHORITIES** *(continued)*

Page(s)

**TABLE OF AUTHORITIES** *(continued)*

Page(s)

**TABLE OF AUTHORITIES** *(continued)*

Page(s)

**TABLE OF AUTHORITIES** *(continued)*

Page(s)

**TABLE OF AUTHORITIES** *(continued)*

Page(s)



**Statutes**

## TABLE OF AUTHORITIES *(continued)*

Page(s)

**TABLE OF AUTHORITIES** *(continued)*

Page(s)



**Regulations**



**Constitutional Provisions**



**Other Authorities**

## REASONS WHY ORAL ARGUMENT SHOULD BE HEARD[1]

This appeal presents important questions of federal subject matter jurisdiction and appellate jurisdiction. It also involves claims against energy producers that, if successful, could cripple the energy industry, interfere with the President's ability to conduct foreign policy to address global warming, substantially curtail the extraction of minerals from the Outer Continental Shelf, and hamper the military's ability to acquire vital resources necessary to domestic and overseas operations. Given the extreme importance of the legal issues implicated in this appeal and the high stakes of the case, Defendants-Appellants believe that oral argument will assist the Court in resolving this appeal.

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

## INTRODUCTION

The State of Rhode Island seeks to force Defendants (a number of investor-owned energy companies with global operations) to pay enormous sums in order to remedy the alleged effects of climate change in Rhode Island. Global warming is a worldwide phenomenon, generations in the making, resulting from the conduct of billions of actors worldwide. This includes non-defendants that produce the majority of the world's fossil fuels (many of which are foreign sovereigns) and the countless individuals, companies, and governments—including Plaintiff—that have combusted fuels and otherwise generated greenhouse gases. Plaintiff seeks to address the alleged effects of this worldwide phenomenon by using state common law to punish Defendants for their global conduct.

This appeal focuses on two discrete jurisdictional questions: (1) do the State's allegations regarding worldwide fossil-fuel production and interstate greenhouse-gas emissions invoke federal jurisdiction?; and (2) can this Court review all bases for removal considered in the remand order? The answer to both questions is yes.

Federal jurisdiction is proper because the State's claims necessarily invoke federal common law, notwithstanding the state-law labels used in the Complaint. The State's nuisance claims are based on allegations of interstate pollution—*i.e.*, the State claims that cumulative worldwide greenhouse-gas emissions from combustion of fossil fuels are causing injury in the state. Federal courts have long held that

federal common law must govern such interstate pollution cases because the law of the affected state cannot regulate out-of-state emissions, much less worldwide conduct. The federal government has unique interests in regulating interstate pollution, promoting energy independence, and negotiating multilateral treaties addressing global warming. Those interests would be damaged if Rhode Island and the 49 other states were permitted to apply their own (differing) state laws beyond their borders to remedy the alleged effects of climate change.

The district court erroneously concluded that the well-pleaded complaint rule barred removal because Plaintiff used state-law labels in its Complaint. But Plaintiff's state-law labels do not eliminate the need to determine what law actually governs these claims. Regardless of how they are pleaded, claims "'arise under' federal law if the dispositive issues stated in the complaint require the application of federal common law." *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972) ("*Milwaukee I*"). There is no such thing as a state common-law claim that reaches interstate and international pollution. Only federal common law can apply to interstate pollution claims based on alleged injury from out-of-state sources.

Federal jurisdiction is also proper under several federal statutes and doctrines because the State's claims target Defendants' worldwide production activities. The alleged torts extend to the production of fossil fuels at the direction of federal officers (28 U.S.C. §1442), on the Outer Continental Shelf ("OCS") (43 U.S.C. §1349), on

federal enclaves (U.S. Const. Art. I, § 8, cl. 17), and by vessels involved in maritime activity (28 U.S.C. §1333(1)). The State could have avoided jurisdiction under these statutes by excluding Defendants' conduct or production within those federal spheres, but chose not to. Defendants' conduct on federal land and at the direction of federal officers is sufficient to support federal jurisdiction.

This Court has authority under 28 U.S.C. §1447(d) to review the District Court's entire remand "order" because Defendants' notice of removal invoked 28 U.S.C. §1442. Section 1447(d) does not, as the State argues, limit appellate jurisdiction to particular *issues* decided in a remand order, but rather authorizes review of the whole order. Thus, based on any or all of Defendants' grounds for removal, the Court should reverse the district court's remand order so that Plaintiff's global warming claims can be resolved in federal court.

## JURISDICTIONAL STATEMENT

Defendant Shell Oil Products Company LLC timely removed this action to the district court on July 13, 2018. 28 U.S.C. §1446(b)(2)(A); JA.165. 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).

On July 22, 2019, the district court granted Plaintiff's motion to remand to state court. JA.420. On August 9, 2019, Defendants timely filed a notice of appeal under 28 U.S.C §§1291 and 1447(d). JA.437.

## ISSUES PRESENTED

**I.** 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 order, where 28 U.S.C. §1442 was one of several bases for removal;

**II.** Whether federal removal jurisdiction exists over Plaintiff's global warming-based tort claims.

## STATEMENT OF THE CASE

**I.** On July 2, 2018, the State of Rhode Island filed a complaint in state court, alleging that Defendants' "extraction, refining, and/or formulation of fossil fuel products … is a substantial factor," JA.120 ¶199, along with global consumers' "continued high use and combustion of [fossil fuels]," in the "buildup of $CO_2$ in the environment" that allegedly "drives global warming," JA.25 ¶6. Plaintiff claims it has been injured by "sea level rise … caused and/or exacerbated by Defendants' conduct." JA.121 ¶201.[2] Plaintiff asserts causes of action for public nuisance, strict liability for failure to warn, strict liability for design defect, negligent design defect,

[2] Defendants accept Plaintiff's allegations as true for purposes of removal, but dispute that Defendants' conduct is actionable under the asserted causes of action or that Defendants actions are the but-for or proximate cause of Plaintiff's alleged injuries.

negligent failure to warn, trespass, impairment of public trust resources, and violations of the Rhode Island Environmental Rights Act. JA.137-162 ¶¶225-315. The State demands, among other things, compensatory and punitive damages, disgorgement of profits, and equitable relief to abate the alleged nuisances. JA.162.

**II.** Defendants are 21 energy companies that have operated in the marketplace for many decades. Nearly all of the relevant conduct alleged by Plaintiff—including *all* of Defendants' extraction of fossil fuels—occurred outside Rhode Island, with a significant portion occurring in foreign countries and on federal land, including the OCS. JA.193-94, 196-201, 222-241. Certain Defendants engaged in oil exploration and fossil-fuel production at the direction of federal officers. JA. 229 § 1.a; JA.232 § 4(b); JA.216 § 9, JA.293 § C. Some Defendants are affiliates of companies that have gone through bankruptcy. *See In re Texaco Inc.*, 87 B 20142 (Bankr. S.D.N.Y. 1988).

Defendants' notice of removal asserted that Plaintiff's claims: (1) "are governed by federal common law"; (2) "raise[] disputed and substantial federal questions"; (3) "are completely preempted by the Clean Air Act and/or other federal statutes and the United States Constitution"; (4) warrant original federal jurisdiction under the Outer Continental Shelf Lands Act ("OCSLA"), 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." JA.169-171.

Plaintiff moved to remand, *Rhode Island v. Chevron, et al*, No. 18-cv-00395 (D.R.I.), ECF No. 40. On July 22, 2019, the district court granted Plaintiff's motion, rejecting each of Defendants' bases for removal. JA.436. On August 9, 2019, Defendants timely noticed their appeal. JA.437.

## STANDARD OF REVIEW

Questions of "statutory interpretation" are reviewed "de novo." *Mercado v. Puerto Rico*, 814 F.3d 581, 584 (1st Cir. 2016). The Court also reviews "de novo" a "district court's decision to remand a case to state court." *Amoche v. Guarantee Tr. Life Ins. Co.*, 556 F.3d 41, 48 (1st Cir. 2009).

## SUMMARY OF ARGUMENT

**I.** This Court has jurisdiction to review every ground for removal addressed by the remand order. The plain text of §1447(d) provides that when a case is removed under §1442 (federal officer removal), the remand *order*—not just the federal officer ground—is reviewable on appeal. "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." *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).

**II.** This action was properly removed on multiple grounds.

**A.** Plaintiff's claims encompass Defendants' worldwide fossil-fuel extraction and marketing activities and assert injuries allegedly caused by greenhouse-gas emissions from *every* state in the Union and every country on Earth. Under settled U.S. Supreme Court precedent, federal common law, not Rhode Island law, applies to pollution emanating from other states. *Am. Elec. Power. Co. v. Connecticut*, 564 U.S. 410, 422-24 (2011) ("*AEP*"); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 487-90 (1987); *Milwaukee I*, 406 U.S. at 103. Federal common law, not state law, governs such disputes because of the limited sovereignty of individual states and the "overriding federal interest in the need for a uniform rule of decision." *Milwaukee I*, 406 U.S. at 105 n.6. Because "the dispositive issues stated in the complaint require the application of federal common law," Plaintiff's claims "arise[] under federal law[.]" *Id.* at 100.

The district court rejected removal because it concluded that federal common law does not "completely preempt the State's public nuisance claim[.]" JA.428. But Defendants did not argue that federal common law "completely preempts" Plaintiff's claims. Complete preemption applies where a federal *statute* converts an ordinary state common-law claim into a federal claim. Rather, Defendants argued that the claims must be resolved by reference to the federal common law governing interstate pollution because of the uniquely federal interests involved in this case and the need for a uniform federal rule of decision—an entirely different question.

**B.** Removal was also proper because Plaintiff's claims require the resolution of substantial, disputed federal questions related to the extraction, processing, promotion, and consumption of global energy resources. *See Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 313-14 (2005). To prevail on its claims, Plaintiff needs a fact-finder to declare unreasonable the balance that Congress and various federal agencies have struck between energy production and greenhouse gas regulation. "[A] collateral attack on an entire regulatory scheme … premised on the notion that [the scheme] provides inadequate protection" raises substantial federal issues sufficient to satisfy federal jurisdiction. *Bd. of Comm'rs v. Tenn. Gas Pipeline Co.*, 850 F.3d 714, 724-26 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 420 (2017).

**C.** The claims are removable under 28 U.S.C. §1442(a) because there is a causal nexus between Plaintiff's claims and oil and gas production that some Defendants took at the direction of federal officers. The case is also removable under OCSLA and the federal enclaves doctrine because Plaintiff's claims "aris[e] out of, or in connection with … operation[s] conducted on the [OCS]," 43 U.S.C. §1349(b), and Defendants' oil and gas production on federal land, *Torrens v. Lockheed Martin Servs. Grp., Inc.*, 396 F.3d 468 (1st Cir. 2005).

**D.** The Clean Air Act ("CAA") completely preempts Plaintiff's claims because it provides the exclusive vehicle for regulating *nationwide* emissions and

"channels review of final EPA action exclusively to the courts of appeals, regardless of how the grounds for review are framed." *Virginia v. United States*, 74 F.3d 517, 523 (4th Cir. 1996).

**E.** Plaintiff's claims are removable under the federal bankruptcy statutes—28 U.S.C. §§1452(a) and 1334(b)—because they are "related to" various bankruptcy cases involving Defendants' predecessors and affiliates, whose activities the claims also encompass.

**F.** Finally, the claims fall within the district court's admiralty jurisdiction—28 U.S.C. §1333; 46 U.S.C. §30101(a)—because some of the allegedly tortious fossil-fuel extraction occurred on vessels engaged in maritime activities.

## ARGUMENT

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

Under the plain text of §1447(d) and Supreme Court precedent, this Court has jurisdiction to review the entire remand "order"—including every ground for removal the district court addressed—not merely particular issues decided in that order.

"Congress has … expressly made" 28 U.S.C. §1447(d)'s general prohibition of review of remand orders "inapplicable to particular remand orders." *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 641 n.8 (2006). Section 1447(d) itself provides

that "an *order* remanding a case to the State court from which it was removed pursuant to section 1442 [federal officer removal] or 1443 of this title shall be *reviewable by appeal* or otherwise." 28 U.S.C. §1447(d) (emphasis added). As the Seventh Circuit has explained, "[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. "[W]hen a statute provides appellate jurisdiction over an order, 'the thing under review is the order,' and the court of appeals is not limited to reviewing particular 'questions' underlying the 'order.'" *Id.*

As the Seventh Circuit explained, §1447(d) "was enacted to prevent appellate delay in determining where litigation will occur." *Id.* at 813; *see also* 14C Wright *et al.*, Fed. Prac. & Proc. Juris. §3740 (4th ed.) ("[T]he purpose of the ban is to spare the parties interruption of the litigation and undue delay in reaching the merits of the dispute, solely to contest a decision disallowing removal."). "But 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." *Lu Junhong*, 792 F.3d at 813. 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.*; *see also* 15A Wright *et al.*, Fed. Prac. & Proc. Juris. §3914.11 (2d ed.) ("Once an appeal is taken there is very little to be gained by limiting review.").

The Sixth Circuit has similarly recognized that when a district court remands a case removed "under 28 U.S.C. §1442," the appellate 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).[3] 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." 15A Wright *et al*., Fed. Prac. & Proc. Juris. §3914.11 (2d ed.).

The Supreme Court's decision in *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996), reinforces this plain-text interpretation of §1447(d). In *Yamaha*, the Supreme Court interpreted 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." *Id.* at 205-206. The Court held that "appellate jurisdiction" under §1292(b) "applies to the *order* certified to the court of appeals, and is not tied

[3] *See also Decatur Hospital Authority v. Aetna Health, Inc.*, 854 F.3d 292, 296 (5th Cir. 2017) ("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").

to 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], at 300 (2d ed. 1995)). The same logic applies to §1447(d). *See Lu Junhong*, 792 F.3d at 811 (following *Yamaha*). Although removal under §1442 is a necessary predicate for an appeal—as a controlling question of law is a necessary predicate for an appeal under §1292(b)—when this predicate is satisfied, the court of appeals has jurisdiction to review the whole "order."

After *Yamaha*, Congress amended §1447(d) to authorize review of remand orders in cases removed under §1442.[4] Removal Clarification Act of 2011, Pub. L. No. 112-51, 125 Stat. 545 (2011). Significantly, Congress neither limited appellate review to certain *issues*, nor defined the word "order" differently than the Supreme Court had interpreted the word in *Yamaha*. This Court "presume[s] Congress is aware of judicial interpretations of existing statutes when it passes new laws." *United States v. Place*, 693 F.3d 219, 229 (1st Cir. 2012); *see also Merck & Co. v. Reynolds*, 559 U.S. 633, 648 (2010) ("We normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent."); *cf. Cannon v. Univ. of*

[4] Before 2011, §1447(d) authorized appellate review of remand orders only in cases removed under §1443.

*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."). That Congress retained §1447(d)'s reference to reviewable "orders" after *Yamaha*'s interpretation of §1292(b) confirms that it intended to authorize plenary review of such orders.

Although other courts of appeals have limited appellate review to removal grounds specifically enumerated in §1447(d),[5] all but one of those decisions pre-dated the Removal Clarification Act of 2011, and none considered the Court's holding in *Yamaha* or undertook the comprehensive analysis employed in *Lu Junhong*. The Eighth Circuit's decision in *Jacks v. Meridian Res. Co*., 701 F.3d 1224 (8th Cir. 2012)—the only relevant published decision post-dating the Removal Clarification Act—carries little weight because neither party in that case "cited authority or made a coherent argument" in support of the narrow reading of §1447(d) and the court cited "nothing" to support its holding. *Lu Junhong*, 792 F.3d at 812 (distinguishing *Jacks*).[6]

---

[5] *See, e.g.*, *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); *Noel v. McCain*, 538 F.2d 633, 635 (4th Cir. 1976); *Jacks v. Meridian Res. Co.*, 701 F.3d 1224, 1229 (8th Cir. 2012); *Patel v. Del Taco, Inc.*, 446 F.3d 996, 998 (9th Cir. 2006); *Alabama v. Conley*, 245 F.3d 1292, 1293 n.1 (11th Cir. 2001).

[6] Although this Circuit has not yet interpreted §1447(d) to determine whether all removal grounds are reviewable in cases removed under the federal officer removal statute, it has previously declined to take a narrow view of the scope of appellate

Because §1447(d) means what it says, this Court has jurisdiction to review the remand "*order*," not merely a particular issue addressed therein.

## II. Plaintiff's Global Warming Claims Were Properly Removed

Plaintiff seeks to use state law to resolve claims based on Defendants' *worldwide* extraction and production of fossil fuels, and on *global* greenhouse gas emissions created by billions of third parties who use and combust those fuels. For example, Plaintiff alleges that Defendants contributed substantially to a public nuisance by "[c]ontrolling every step of the fossil fuel product supply chain, including the extraction of raw fossil fuel products … from the Earth," "refining and marketing … those fossil fuel products," and placing "those fossil fuel products into the stream of commerce." JA.138 ¶229a. Almost none of this conduct occurred in Rhode Island. Plaintiff further alleges that billions of end users worldwide combusted these fossil fuels, resulting in greenhouse gas emissions that have accumulated in the Earth's atmosphere and caused global warming. JA.49-72 ¶¶37-105. Plaintiff's claims thus encompass activities not limited to Rhode Island, but spanning the world: overseas, on federal lands (including the OCS and navigable waters of the United States), and all fifty states. Plaintiff also proposes to hold

---

review. *See American Policyholders Insurance Co. v. Nyacol Products, Inc.*, 989 F.2d 1256, 1261 (1st Cir. 1993) (noting that although removal was improper under §1442, "principles of equity, as well as the law, compel[led] [it] to explore whether [the] action falls within the federal district court's original jurisdiction," and examining whether removal was proper under §1441).

Defendants liable for the production and promotion activities of their corporate affiliates, including many entities operating under confirmed bankruptcy plans. Under our federal system, these are precisely the types of claims that can (and should) be heard in a federal forum.

### A. Plaintiff's Claims Arise Under Federal Common Law

Plaintiff's global warming claims are governed by federal common law because they implicate "uniquely federal interests" in controlling interstate pollution, promoting energy independence, and negotiating multilateral treaties addressing global warming. *Tex. Indus., v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-41 (1981). Because only federal law can provide the rule of decision for interstate pollution torts, Plaintiff's claims "arise under" federal law and are removable under 28 U.S.C. §§1331 and 1441. Although the district court acknowledged that "transborder air and water disputes are one of the limited areas where federal common law survived," JA.428, it nonetheless analyzed Plaintiff's claims as if pleaded under state law without further discussion. But the question of which law governs—state law or federal common law—is a threshold jurisdictional question. And as more than a century of Supreme Court precedent confirms, claims based on air pollution by out-of-state sources—including those based on greenhouse-gas emissions—*must* be resolved under federal common law.

### 1. The District Court Erred by Failing to Determine which Body of Law Governs Plaintiff's Claims.

The district court accepted Plaintiff's state-law labels as dispositive and remanded this case without determining which law governs Plaintiff's global warming claims. This itself was error. The decision whether federal common law displaces state law—essentially a conflicts of law question—is committed exclusively to the federal courts. *City of Milwaukee v. Illinois & Michigan (Milwaukee II)*, 451 U.S. 304, 349 (1981); *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 592 (1973); *United States v. Standard Oil Co. of California,* 332 U.S. 301, 305 (1947). Plaintiff cannot avoid federal jurisdiction by simply slapping state-law labels on its global warming claims, because the "artful pleading doctrine," "prevent[s] a plaintiff from unfairly placing a thumb on the jurisdictional scales." *Lopez-Munoz v. Triple-S Salud, Inc.*, 754 F.3d 1, 4-5 (1st Cir. 2014). Plaintiff's sweeping interstate pollution claims are manifestly "federal in nature," and the district court should have "re-characterize[d] the complaint to reflect reality" and "affirm[ed] the removal despite the plaintiff's professed intent to pursue only state-law claims." *BIW Deceived v. Local S6, Indus. Union of Marine and Shipbuilding Works of Am.*, 132 F.3d 824, 831 (1st Cir. 1997).

As the Supreme Court stated nearly 50 years ago, "a cause of action … 'arises under' federal law if the dispositive issues stated in the complaint require the appli-

cation of federal common law." *Milwaukee I*, 406 U.S. at 100. Following the Supreme Court's guidance, lower courts have long recognized that federal jurisdiction exists "if the claims arise under federal common law." *Wayne v. DHL Worldwide Express*, 294 F.3d 1179, 1184 (9th Cir. 2002); *see also Almond v. Capital Properties, Inc.*, 212 F.3d 20, 23 (1st Cir. 2000) ("Undoubtedly, section 1331 covers claims that are created by federal law (including federal common law), whether expressly or by implication."); *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."); *California v. BP p.l.c*, 2018 WL 1064293, at *5 (N.D. Cal. Feb. 27, 2018) ("*BP*") ("[F]ederal jurisdiction exists … if the claims necessarily arise under federal common law[.]").

Moreover, courts have long recognized that a claim may arise under federal common law *even if* the plaintiff purports to plead it under state law. *See Sam L. Majors Jewelers*, 117 F.3d at 928 (upholding removal of state-law negligence claim against air carrier because "federal common law governed the liability of air carriers

for lost or damaged goods"); *New SD, Inc. v. Rockwell Int'l Corp*., 79 F.3d 953, 954-55 (9th Cir. 1996) (contract claim nominally asserted under state law was removable because "contracts connected with the national security[] are governed by federal law" and a claim addressing such a contract "requires that 'the rule [of decision] must be uniform throughout the country'"); *Kight v. Kaiser Found. Health Plan*, 34 F. Supp. 2d 334, 341 (E.D. Va. 1999) ("federal jurisdiction exist[ed]" over claims nominally pleaded under state law because "the dispute is governed by federal common law"). To determine whether removal was proper here, the district court should thus have determined whether the "interstate or international nature" of Plaintiff's claims "makes it inappropriate for state law to control." *Tex. Indus.*, 451 U.S. at 640-41.

The district court failed to conduct this choice-of-law analysis, however, instead rejecting removal based on a "complete preemption" argument Defendants did not make. JA.425-28. Defendants never argued that federal common law completely preempts Plaintiff's state-law claims because, as the district court correctly noted, that doctrine applies only when Congress has occupied a field that would *otherwise be governed by state law*.[7] JA.426-28. Rather, Defendants argued that Plaintiff's interstate pollution claims are inherently federal because state law *cannot*,

[7] The separate complete preemption argument Defendants did make, based on the Clean Air Act, is addressed in Section II.D below.

under our federal system, govern interstate pollution. *Rhode Island*, No. 18-cv-00395, ECF No. 87 at 10-11, 14-19.

To decide the jurisdictional choice-of-law question, the district court needed to determine whether Plaintiff's global warming claims implicate "uniquely federal interests" requiring a uniform rule of federal decision, and therefore fall within the ambit of federal common law as set forth in Supreme Court case law. *See Standard Oil Co.*, 332 U.S. at 307 (federal common law, not state law, must govern claims involving "matters essentially of federal character"). The answer to *that* question is plainly yes, as more than a century of Supreme Court precedent confirms.

### 2. Global Warming Claims Arise under Federal Common Law Because They Implicate "Uniquely Federal Interests."

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 must be supplied, not by state law, but by "what has come to be known as 'federal common law.'" *Tex. Indus*, 451 U.S. at 640 (quoting *Standard Oil*, 332 U.S. at 308). Federal common law governs where 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 AEP*, 564 U.S. at 421.

Specifically, as the district court acknowledged, JA.428, federal common law has historically governed "transboundary pollution suits." *Native Vill. of Kivalina*

*v. ExxonMobil Corp.*, 696 F.3d 849, 855 (9th Cir. 2012); *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[.]") (emphasis added). "[S]uch claims have been adjudicated in federal courts" under federal common law "for over a century." *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 331 (2d Cir. 2009), *rev'd on other grounds in AEP*, 564 U.S. 410; *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). Even post-*Erie*, the Supreme Court affirmed the view that interstate pollution "is a matter of federal, not state, law," and "should be resolved by reference to federal common law." *Ouellette*, 479 U.S. at 488 (citing *Milwaukee I*, 406 U.S. at 102 n.3, 107 n.9).

Global warming claims, which are necessarily premised on harms allegedly caused by worldwide greenhouse-gas emissions (and worldwide fossil-fuel production), plainly involve interstate pollution and thus cannot be resolved under state law. *See AEP*, 564 U.S. at 421-22. In *AEP*, New York City and other plaintiffs sued five electric utilities, contending that the "defendants' carbon-dioxide emissions" substantially contributed to global warming. *Id.* at 418. The Second Circuit held that the case would be "governed by recognized judicial standards under the federal common law of nuisance," and allowed the claims to proceed. *AEP*, 582 F.3d at 329. In

reviewing that decision, the Supreme Court reiterated that federal common law governs public nuisance claims involving "air and water in their ambient or interstate aspects," and explained that "borrowing the law of a particular State" to resolve plaintiffs' global warming claims "would be inappropriate." *AEP*, 564 U.S. at 421-22.

The Ninth Circuit reached the same conclusion in *Kivalina*, concluding that "federal common law" applied to a "transboundary pollution suit[]" brought by an Alaskan city asserting public nuisance claims under federal and state law for damages from "sea levels ris[ing]" and other alleged effects of defendants' "emissions of large quantities of greenhouse gases." 696 F.3d at 856, 853-54 (citing *AEP* and *Milwaukee I*).

Two district courts recently held that virtually identical global warming claims against energy companies—including several Defendants in this action—arise under federal common law even though nominally asserted under state law. In *BP*, the District Court for the Northern District of California denied motions to remand, explaining that nuisance claims addressing "the national and international geophysical phenomenon of global warming" are "necessarily governed by federal common law." 2018 WL 1064293, at *2. Because "the claims necessarily arise under federal common law," the court recognized that the "well-pleaded complaint rule does not bar removal of these actions." *Id.* at *5. And in *City of New York v.*

*BP P.L.C.*, 325 F. Supp. 3d 466 (S.D.N.Y. 2018), the court held that because the City was "seeking damages for global-warming related injuries resulting from greenhouse gas emissions, and *not* only the production of Defendants' fossil fuels," "the City's claims [were] ultimately based on the 'transboundary' emission of greenhouse gases." *Id.* at 471-72 (emphasis added). The court thus concluded that the "claims arise under federal common law and require a uniform standard of decision." *Id.* at 472.

### 3. Plaintiff's Claims Require a Uniform Federal Rule of Decision Because They Are Based on Interstate and Worldwide Production and Emissions, Not Intrastate Conduct.

Plaintiff's global warming action—like *AEP*, *Kivalina*, *BP*, and *City of New York*—is a quintessential transboundary pollution suit that can be governed only by federal common law. Although Plaintiff purports to sue Defendants for their fossil-fuel production and promotion, Plaintiff's alleged injuries stem from global *greenhouse-gas emissions* from many sources, including the use of fossil-fuel products extracted, produced, and promoted by Defendants and their subsidiaries.[8] *See, e.g.*,

[8] Defendants do not concede that Plaintiff has adequately pleaded that each Defendant is liable for the actions of separate and distinct entities that are current or former subsidiaries, affiliates, or predecessors, some of which no longer exist. For purposes of assessing federal subject-matter jurisdiction, however, the substantive adequacy of the Complaint is irrelevant. *See Bell v. Hood*, 327 U.S. 678, 682 (1946) ("Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover."); *BIW Deceived*, 132

JA.24 ¶3 (alleging that "greenhouse gas pollution, primarily in the form of $CO_2$, is far and away the dominant cause of global warming"); JA.52 ¶¶40, 42-43; JA.56-58 ¶¶49-56. Indeed, Plaintiff justifies its decision to sue these particular Defendants on the ground that they allegedly "caused over 14.5% of global fossil fuel product-related $CO_2$ between 1965 and 2015." JA.70 ¶97 (emphasis added).

Nearly all of the greenhouse gas emissions that allegedly caused Plaintiff's injuries occurred outside of Rhode Island. Indeed, Plaintiff's allegations demonstrate that, far from targeting local conduct, its claims are "based on the 'transboundary' emission of greenhouse gases[.]" *City of New York*, 325 F. Supp. 3d at 472; *see, e.g.*, JA.23 ¶1 (alleging Defendants are responsible for an "increase in global greenhouse pollution"). Plaintiff's nuisance claims thus "depend on a global complex of geophysical cause and effect involving all nations of the planet." *BP*, 2018 WL 1064293, at *5.

Because Plaintiff "seeks damages for global warming-related injuries caused by greenhouse gas emissions," its claims implicate interstate and international concerns and invoke uniquely federal interests and responsibilities. *City of New York*, 325 F. Supp. 3d at 473; *cf. Massachusetts v. EPA*, 549 U.S. 497, 519-20 (2007)

---

F.3d at 832. Defendants thus include the alleged actions of their subsidiaries, affiliates, predecessors, and alleged co-conspirators when describing the actions of "Defendants."

("sovereign prerogatives" to force other states to reduce greenhouse-gas emissions, negotiate emissions treaties, and exercise the police power to reduce motor-vehicle emissions are "lodged in the Federal Government."). For example, adjudicating Plaintiff's nuisance claim will necessarily require determining "what amount of carbon-dioxide emissions is unreasonable" in light of what is "practical, feasible and economically viable." *AEP*, 564 U.S. at 428; *see also City of New York*, 325 F. Supp. 3d at 473 ("factfinder[] would have to consider whether emissions resulting from the combustion of Defendants' fossil fuels created an 'unreasonable interference'" with public rights); *California v. Gen. Motors Corp.*, 2007 WL 2726871, at *8 (N.D. Cal. Sept. 17, 2007) (court could not resolve global warming-based claims against automobile manufacturers without "mak[ing] an initial decision as to what is unreasonable in the context of carbon dioxide emissions"). Any judgment as to whether the alleged harm caused by Defendants' contribution to worldwide emissions "outweighs the social utility of Defendants' conduct," JA.140 ¶232, implicates the federal government's unique interests in setting national and international policy on matters involving energy, the environment, the economy, and national security. *See AEP*, 564 U.S. at 427. "If ever a problem cried out for a uniform and comprehensive solution, it is the geophysical problem" of global warming. *BP*, 2018 WL 1064293, at *3.

Plaintiff contends that its claims do not implicate federal interests because it seeks only "damages and abatement—the cost for adaptation and mitigation measures within its geographic boundaries." *Rhode Island*, No. 18-cv-00395, ECF No. 40-1 at 17. But Plaintiff explicitly seeks "[e]quitable relief, including abatement of the nuisances complained of." JA.162. And even if Plaintiff had sought only damages, "a liability award can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 324 (2008); *see also Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 637 (2012) ("[S]tate regulation can be … effectively exerted through an award of damages[.]"); *BMW of N. Am. v. Gore*, 517 U.S. 559, 572 n.17 (1996) ("State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute.").

Given the uniquely federal interests implicated by Plaintiff's claims, there is an "overriding federal interest in the need for a uniform rule of decision." *Milwaukee I*, 406 U.S. at 105 n.6. Allowing state law to govern would permit 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 U.S. Solicitor General explained in *AEP*, "resolving such claims would require each court to … determin[e] 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 (S. Ct.), 2011 WL 317143, at *37. Proceeding under the nation's 50 different state laws is untenable, as this state-by-state approach could lead to "widely divergent results" based on "different assessments of what is 'reasonable.'" *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 state "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. Government recently highlighted in *BP*, the problems of applying state law to out-of-state sources "are magnified … 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, 2018 WL 2192113. Fundamentally, a "patchwork of fifty different answers to the same fundamental global issue would be unworkable." *BP*, 2018 WL 1064293, at *3.

Although Plaintiff had the option to limit its claims, it chose to seek redress for alleged impairment of its environmental rights by emissions generated *outside of Rhode Island*—and even outside the United States. Accordingly, federal common law provides the uniform standard of decision for Plaintiff's claims.

#### 4. Whether Federal Common Law Remedies Have Been Displaced Is a Merits Question, Separate from the Question of which Law Governs.

The district court suggested that federal common law might not govern Plaintiff's claims because "[a]t least some of it … has been displaced by the Clean Air Act." JA.428 (citing *AEP*, 564 U.S. at 424). But to say that federal common law has been "displaced" by federal statute is merely to say that it "does not provide a remedy" for the alleged injury. *Kivalina*, 696 F.3d at 856; *see id.* at 857 ("displacement of a federal common law right of action means displacement of remedies"); *Milwaukee II*, 451 U.S. at 332 (Congress's comprehensive overhaul of the Clean Water Act meant "no federal common-law remedy was available"). The absence of a federal common law remedy has no bearing on whether federal common law governs the claims in the first place. *See Standard Oil*, 332 U.S. at 307, 313. The viability of Plaintiff's global warming claims neither affects subject-matter jurisdiction nor alters the federal character of those claims. *See Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 254 (2010).

The district court's conflation of the jurisdictional determination, which here involves a choice-of-law inquiry, with its tentative merits conclusion that federal common law may no longer provide a remedy because the CAA has displaced "[a]t least some of it," JA.428, runs afoul of "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). The absence of a federal common law remedy has no bearing on whether federal common law governs the claims in the first place.

Moreover, regardless of whether federal common law remedies are still available today, "federal common law exists" in this area precisely "because state law cannot be used." *Milwaukee II*, 451 U.S. at 313 n.7; *see also AEP*, 564 U.S. at 421 ("[T]he basic scheme of the Constitution" precludes the application of state law to interstate pollution claims). That Congress has enacted a statutory scheme that so comprehensively addresses the subject as to leave no room for federal common law remedies does not mean that *state* common law remedies suddenly become viable. If anything, the enactment of a comprehensive federal statutory framework in an area previously occupied by federal common law underscores the federal nature of the field and reinforces the notion that it would be "inappropriate for state law to control" except to the extent that Congress explicitly authorizes it. *Tex. Indus.*, 451 U.S. at 641; *see also Ouellette*, 479 U.S. at 492 ("[I]t is clear that the only state suits that remain available are those specifically preserved by the Act.").

This is also why, contrary to Plaintiff's argument below, federal common law is not merely a preemption defense that may be raised in state court to defeat state law claims. Preemption implies that state common law *could* govern the dispute absent a conflict with federal law. But here, federal courts created federal common

law because applying state law to interstate pollution claims would frustrate "[t]he basic scheme of the Constitution." *AEP*, 564 U.S. at 421; *see also Milwaukee II*, 451 U.S. at 313 n.7; *Nat'l Audubon Soc'y v. Dep't of Water*, 869 F.2d 1196, 1204-05 (9th Cir. 1988) ("true interstate [pollution] disputes require application of federal common law" to "the exclusion of state law").

### 5. *AEP* and *Kivalina* Do Not Authorize Transboundary Pollution Suits to Be Decided under State Law.

Plaintiff argued below that *AEP* and *Kivalina* left open the possibility that state law might govern some global warming-based public nuisance claims. No. 18-cv-00395, ECF No. 40-1 at 12-15. But whether or not state law may govern *some* global warming claims, it does not govern the interstate (indeed, global) claims Plaintiff asserts here.

In *AEP*, the Court left "open for consideration on remand" only the narrow question of whether the CAA preempted certain state-law claims that were based on "*the law of each State where the defendants operate power plants.*" 564 U.S. at 429 (emphasis added) (citing *Ouellette*, 479 U.S. at 488).[9] That narrow carve-out for certain state-law claims is inapplicable here because Plaintiff has not pleaded claims

[9] In *Ouellette*, the Court held that "the CWA precludes a court from applying the law of an affected State against an out-of-state source," but does not preclude "aggrieved individuals from bringing a nuisance claim pursuant to the law of the *source* State." 479 U.S. at 494, 497; *see also Cooper*, 615 F.3d at 306 (agreeing that *Ouellette*'s "holding is equally applicable to the [CAA]").

under the laws of the states in which the emissions occurred—or even where the fossil-fuel extraction took place. Rather, Plaintiff seeks to apply Rhode Island law to claims based on the alleged effects of worldwide greenhouse gas emissions resulting from Defendants' worldwide conduct. That is precisely the type of trans-border claim that must be governed by federal common law.

### B. Plaintiff's Claims Are Removable under *Grable* Because They Invite the Court to Second-Guess Federal Agencies' Decisions, Construe Federal Disclosure Law, and Interfere with Foreign Affairs.

Plaintiff's claims also give rise to federal jurisdiction under *Grable*, which provides that "federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn v. Minton*, 568 U.S. 251, 258 (2013) (citing *Grable*, 545 U.S. at 313-14). Several aspects of Plaintiff's claims—even if they somehow could be governed by state law—present substantial and disputed federal issues. For example, the balancing requirement and reasonableness determinations inherent to Plaintiff's nuisance claims raise questions about how to regulate and limit the nation's energy production and emissions levels, not just the energy production and emissions level within Rhode Island. Those issues are inextricably bound up with uniquely federal interests involving national security, foreign affairs, energy policy, economic policy, and environmental regulation. If this case does not "justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues," *Grable*, 545 U.S. at 312, it is hard to imagine one that does.

***Collateral Attack on Federal Regulatory Decisions***. Plaintiff's nuisance claims require a determination of whether the harm allegedly caused by Defendants' operations outweighs their benefits to society. *See City of Oakland v. BP P.L.C.*,

325 F. Supp. 3d 1017, 1027 (N.D. Cal. 2018) (resolving plaintiffs' nuisance claim would require weighing the "conflicting pros and cons" of fossil fuel consumption and global warming); *cf. State v. Lead Ind. Ass'n., Inc.*, 951 A.2d 428, 446 (R.I. 2008) (defining public nuisance as "an unreasonable interference with a right common to the general public") (quotation marks and citation omitted). Indeed, the complaint acknowledges that this balancing is central to Plaintiff's claims. *See, e.g.*, JA.140 ¶232 ("associated consequences of those physical and environmental changes … outweighs the social utility of Defendants' conduct").

For decades, federal law has required agencies to weigh the costs and benefits of oil exploration. *See, e.g.*, 42 U.S.C. §13384; *id.* §13389(c)(1).[10] An agency may impose a significant regulation "only upon a reasoned determination that the benefits … justify its costs." Exec. Order No. 12866, 58 Fed. Reg. 51735 (Sep. 30, 1993). Federal agencies have developed mechanisms to incorporate the impact of carbon emissions on global warming for regulatory cost-benefit analyses, including through a "social cost of carbon" metric—which Plaintiff expressly invokes. JA.111-13

[10] *See also, e.g.*, 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.

¶¶184-187; *see also* JA.147 ¶255(h); Exec. Order No. 13783, Promoting Energy Independence and Economic Growth, §5 (Mar. 28, 2017), 82 Fed. Reg. 16093 (Mar. 31, 2017).[11]

Plaintiff would invite a state court factfinder to adjudicate the reasonableness of these federal agencies' balancing of harms and benefits. This action thus amounts to a "collateral attack" on federal agencies' regulatory decisions (including decisions *not* to regulate), which justifies federal jurisdiction. *Tenn. Gas Pipeline*, 850 F.3d at 724 (state-law claim raises 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").[12]

---

[11] In 2017, the President disbanded the Interagency Working Group on Social Cost of Greenhouse Gases, which previously calculated the social cost of carbon, and directed federal agencies to calculate the social cost of carbon in accordance with the general guidance issued by the Office of Management and Budget in 2003. *See* Exec. Order. 13783, §§5(b)-(c).

[12] *See also Pet Quarters, Inc. v. Depository Trust & Clearing Corp.*, 559 F.3d 772, 779 (8th Cir. 2009) (complaint "presents a substantial federal question because it directly implicates actions of" federal agency); *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"); *McKay v. City & 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 [federal agency's] decision"); *Bader Farms, Inc. v. Monsanto Co*., 2017 WL 633815, at *3 (E.D. Mo. Feb. 16, 2017) (federal jurisdiction existed because state-law claims were a "collateral attack on the validity of [the agency's] decision").

The district court concluded removal was not justified because "the rights, duties, and rules of decision implicated by the complaint are all supplied by state law, without reference to anything federal." JA.431. But as previously noted, the rules of decision in an interstate pollution case are *not* supplied by state law, but by federal common law. *See supra* Part II.A. Furthermore, all but a *de minimis* portion of the allegedly tortious conduct occurred out of state, and there is a well-established "presumption" in Rhode Island that state statutes are "intended to have no extraterritorial effect" absent clear language in the statute to the contrary. *Grinnell v. Wilkinson*, 98 A. 103, 106 (R.I. 1916); *see also Fratus v. Amerco*, 575 A.2d 989, 992 (R.I. 1990) (declining to give extraterritorial effect to Rhode Island statute governing motor vehicle rentals). The district court's conclusion that Rhode Island tort law supplies the "rights and duties" governing Defendants' operations around the world was plainly incorrect.

Plaintiff's claims also *necessarily* implicate federal law because Plaintiff would have a court decide whether determinations made by federal agencies were reasonable. *See Tenn. Gas Pipeline*, 850 F.3d at 723 (state-law negligence and nuisance claims could "[]not be resolved" without determination of federal law).

Plaintiff's claims also amount to a collateral attack on the comprehensive federal regulatory scheme for navigable waters. A necessary and critical element of

Plaintiff's causation theory is that rising sea level along navigable waters is encroaching on Plaintiff's land. But Congress has delegated broad authority to the U.S. Army Corps of Engineers ("Corps") as to all structures and activities within navigable waters, 33 U.S.C. §§401-404, to protect shores from the very harms Plaintiff alleges. *See, e.g.*, *id.* §426, §426g. Adjudication of Plaintiff's claims requires evaluation of the adequacy of complex Corps decisions (*e.g.*, authorization of existing shore protections), whether those decisions unreasonably failed to prevent Plaintiff's injuries, and whether the Corps would authorize projects (*e.g.*, improved flood protection infrastructure, JA.122-125 ¶¶205-12) for which Plaintiff seeks recompense. *See Tenn. Gas Pipeline*, 850 F.3d at 725 (removal appropriate where "scope and limitations of a complex federal regulatory framework are at stake").

***Federal Duties to Disclose.*** Plaintiff's promotion claims implicate federal duties to disclose because they rest on the premise that Defendants had a duty to inform federal regulators about known harms, and that Defendants' statements were material to regulators' decisions not to limit fossil-fuel extraction and production and impeded regulators' ability to perform their duties. *See* JA.23 ¶1; JA.72 ¶105; JA.92-95 ¶¶148-49; JA.105 ¶167; JA.108-09 ¶¶176-77; JA.138 ¶229(d). To resolve Plaintiff's claims, the Court would need to construe federal law to determine the scope of Defendants' disclosure obligations. *See Tenn. Gas Pipeline*, 850 F.3d at 723.

While the district court did not address the federal duty to disclose, it is obvious that Plaintiff's claims are not based on misleading statements to *Rhode Island* officials, but rather on allegedly misleading statements to *federal* officials. *See, e.g.*, JA.97-98 ¶157 (describing the goal of Defendants' promotional efforts as "avoid[ing] regulation" because "policymakers are prepared to act on global warming."); JA.99-100 ¶160; JA.103 ¶165.

***Foreign Affairs.*** The question of how to address global warming has long been and remains the subject of international negotiations. In these negotiations, the United States 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 a signatory to any protocol that "would result in 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 the Environmental Protection Agency ("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 announced his intent to withdraw the United States from the Paris Agreement. *See* JA.262-270.

Plaintiff seeks to replace these international negotiations and congressional and executive decisions dealing with global warming with a state-law solution crafted by a state court and jury applying Rhode Island common law in the context of private litigation. Where states have enacted laws supplanting or supplementing foreign policy, the Supreme Court has rejected them. *See Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 381, 388 (2000); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420 (2003). Here, Plaintiff's claims concerning global production and emissions "touch[] on foreign relations" and therefore "must yield to the National Government's policy, given the 'concern for uniformity in this country's dealings with foreign nations.'" *Garamendi*, 539 U.S. at 413.

The district court concluded that although the issue of foreign affairs could give rise to a possible *defense*, it was "not perforce presented by the State's claims[.]" JA.432. But because Plaintiff's claims will require a determination as to the reasonableness of the extraction and sales of fossil fuels, the claims implicate the same policy questions that the President and Congress must balance in carrying out United States foreign policy. *See* JA.243-47. Plaintiff's claims, if successful, would require a factfinder to substitute its own judgment for that of policymakers and second-guess the reasonableness of the selected foreign policies. Federal law, not state law, must be used to resolve such claims.

***Remaining Grable Factors***. Although the district court did not discuss the remaining requirements for *Grable* jurisdiction, Plaintiff cannot deny that the federal questions raised in this action are disputed and substantial issues of "importance … to the federal system as a whole," *Gunn*, 568 U.S. at 260, because this case sits at the intersection of federal energy and environmental regulatory policy, and implicates foreign policy and national security. Federal jurisdiction is also fully "consistent with congressional judgment about the sound division of labor between state and federal courts," *Grable*, 545 U.S. at 313, because federal courts are the traditional fora for cases raising federal questions addressing foreign policy, national security, and the regulation of vital national resources.

### C. The Action Is Removable because It Is Based on Defendants' Activities on Federal Lands and at the Direction of Federal Officers.

Plaintiff's claims extend to Defendants' oil and gas extraction, a substantial portion of which occurred at the direction of federal officers, and much of which took place on the OCS and on federal enclaves. All of this conduct is governed by federal law, not state law.

#### 1. The Action Is Removable under the Federal Officer Removal Statute because Defendants Produced and Sold Oil at the Direction of Federal Officers.

The action is removable under the Federal Officer Removal Statute, which provides for removal of suits brought against "any person acting under" a federal officer "for or relating to any act under color of such office." 28 U.S.C. §1442(a)(1).

A party seeking federal officer removal must demonstrate that "(1) it is a federal officer or a person acting under that officer; (2) [it has] a colorable federal defense; and (3) the suit is for an act under color of office, which requires a causal nexus between the charged conduct and asserted official authority." *Ripley v. Foster Wheeler LLC*, 841 F.3d 207, 209-10 (4th Cir. 2016). The policy of ensuring a federal forum to federal officers and those working at their direction should not be "frustrated by a narrow, grudging interpretation" of §1442(a)(1). *Camacho v. Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482, 487 (1st Cir. 1989) (quoting *Willingham v. Morgan*, 395 U.S. 402, 407 (1969)). Instead, the right of removal conferred by §1442(a)(1) is broadly construed. *See Kolibash v. Comm. on Legal Ethics of W. Virginia Bar*, 872 F.2d 571, 576 (4th Cir. 1989); *Nationwide Investors v. Miller*, 793 F.2d 1044, 1045 (9th Cir. 1986).

The district court did not disagree (nor could it) that Defendants have colorable federal defenses—including federal preemption, and arguments that the claims are barred by the First Amendment, Commerce Clause, and Due Process Clause. The district court also did not deny that certain Defendants acted under federal officers when extracting and producing fossil fuels under federal direction. The Supreme Court has indicated that a private contractor "acts under" the direction of a federal officer when it "help[s] the Government to produce an item that it needs" under federal "subjection, guidance, or control." *Watson v. Phillip Morris Cos.*, 551

U.S. 142, 151, 153 (2007). Here, certain Defendants produced and distributed fossil fuels under at least three distinct federal programs.

*First*, the U.S. Navy supervised extraction by Standard Oil of California (Chevron's predecessor) from the Elk Hills Naval Petroleum Reserve for use by the government in wartime. JA.222-241. The contract between the government and Standard Oil mandated that the Reserve "*shall* be developed and operated," JA.228 §1.a, and *required* Standard Oil to operate the reserve in a manner so as to permit the production of "not less than 15,000 barrels of oil per day" until the Navy had received its share of production, and enough thereafter to cover Standard Oil's operating costs, JA.232 §4(b). *Second*, certain Defendants extracted oil pursuant to OCSLA and strategic petroleum reserve leases with the government that provided that lessees "shall" drill for oil and gas pursuant to government-approved exploration plans and that they *must* sell it to certain specified buyers. JA.197-98; JA.216 §9. 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. JA.272-274 ¶¶5, 6(a)–(g); *see also* JA.200 ¶65; JA.298-299 §C.11; JA.384 §C.9.

The district court rejected federal officer removal because it concluded there is no "causal connection between any actions Defendants took while 'acting under' federal officers or agencies and the allegations supporting the State's claims[.]" JA.434. But to satisfy the nexus requirement defendants must show "only that the

charged conduct relate[s] to an act under color of federal office," *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 258 (4th Cir. 2017), not "that the acts for which they [a]re being sued occurred … *because of* what they were asked to do by the Government." *In re Commonwealth's Motion to Appoint Counsel*, 790 F.3d 457, 471 (3d Cir. 2015) (emphasis in original)); *accord In re Goncalves v. Rady Children's Hosp. San Diego*, 865 F.3d 1237, 1244 (9th Cir. 2017) (the "hurdle erected by [the causal-connection] requirement is quite low"); *Papp v. Fore-Kast Sales Co.*, 842 F.3d 805, 813 (3d Cir. 2016) ("in order to meet the 'for or relating to' requirement, 'it is sufficient for there to be a connection or association between the act in question and the federal office.'"); *Caver v. Cent. Ala. Elec. Coop.*, 845 F.3d 1135, 1144 & n.8 (11th Cir. 2017) ("The phrase 'relating to' is broad and requires only 'a connection or association between the act in question and the federal office.'"). Here, Defendants have been sued for, *inter alia*, extracting and producing massive quantities of fossil fuels, the very activity that some Defendants undertook at the direction of federal officers. JA.23 ¶1.

The district court disregarded these allegations and concluded narrowly that Defendants could not "show the alleged promotion and sale of fossil fuels abetted by a sophisticated misinformation campaign were 'justified by [their] federal duty.'" JA.434 (quoting *Mesa v. California*, 489 U.S. 121, 131-32 (1989)). But several of

Plaintiff's claims—including trespass, design defect, impairment of public trust resources, and the claim under the State Environmental Rights Act—do not turn on Defendants' alleged "misinformation campaign." Instead, those claims are purportedly based on Defendants' extraction and production—activities plainly justified by Defendants' federal duty. Those claims thus satisfy the causal nexus requirement, and "removal of the entire case is appropriate so long as a single claim satisfies the federal officer removal statute." *Savoie v. Huntington Ingalls, Inc.*, 817 F.3d 457, 463 (5th Cir. 2016). Plaintiff's remaining claims also satisfy the causal nexus requirement because they are not limited to alleged "misinformation campaigns," but also involve Defendants' fossil-fuel extraction and production.

**2. The Claims Arise out of Operations on the Outer Continental Shelf where Much of Defendants' Fossil-Fuel Extraction Occurs.**

OCSLA grants federal courts original jurisdiction over actions "arising out of, or in connection with … any operation conducted on the [OCS] which involves exploration, development, or production of the minerals, of the subsoil and seabed[.]" 43 U.S.C. §1349(b)(1). 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.

JA.193-95 ¶51. Plaintiff's claims, as alleged, encompass *all* of Defendants "exploration and production" of fossil fuels on the OCS (JA.29-30 ¶¶19, 21(b); JA.71-72 ¶104) and therefore 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); *In re Deepwater Horizon*, 745 F.3d 157, 163 (5th Cir. 2014) (finding OCSLA jurisdiction where oil and gas extraction on the OCS resulted in pollution that harmed aquatic life and wildlife in Louisiana).

The district court reasoned that OCSLA did not supply jurisdiction because "Defendants have not shown that [Plaintiff's] injuries would not have occurred but for [Defendants'] operations" on the OCS. JA.434.[13] This reasoning misses the mark: Plaintiff's theory of causation is that Defendants are liable because their alleged "affirmative acts" have "contributed to, and assisted in creating," and were a "substantial contributing factor" to a public nuisance. JA.137 ¶227; JA.138 ¶229. Because a substantial portion of those "affirmative acts" occurred on the OCS, Defendants' OCS operations necessarily "contributed to" Plaintiff's alleged injuries under Plaintiff's theory of the case. That is all OCSLA requires to confer federal

[13] The amount of fossil fuels Defendants produced on the OCS dwarfs the amount of fossil fuels produced in Rhode Island. *See* U.S. Energy Information Administration, Rhode Island, *State Profile and Energy Estimates*, *available at*, https://www.eia.gov/state/?sid=RI (showing no oil, gas, or coal production in Rhode Island).

jurisdiction. *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) (OCSLA jurisdiction where "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, because OCSLA was designed to promote "the efficient exploitation of the minerals of the OCS," it confers jurisdiction where, as here, the claims threaten to "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); *see also EP Operating*, 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) (similar). Here, Plaintiff seeks potentially billions of dollars in damages and disgorgement of profits, together with equitable relief to abate the alleged nuisances. JA.162. Such relief would substantially discourage OCS production and jeopardize the future viability of the federal OCS leasing program, potentially costing the federal government hundreds of millions of dollars in revenues. It would also substantially interfere with OCSLA's congressionally-mandated goal of obtaining the largest "total recovery of the federally-owned minerals" underlying the OCS. *Amoco*, 844 F.2d at 1210; *see also* 43 U.S.C. §1802(1), (2). This action thus falls squarely within the "legal disputes … relating to resource development on the [OCS]" that

Congress intended to be heard in federal court. *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*, 754 F.2d 1223, 1228 (5th Cir. 1985).

Given the importance of the OCS to our nation's energy production, Congress has made federal law "exclusive" where the OCS is concerned. *Parker Drilling Management Services, Ltd. v. Newton*, 139 S. Ct. 1881, 1889 (2019). Plaintiff should not be permitted to use state law to cripple Defendants' operations on the OCS because "OCSLA denies States any interest in or jurisdiction over the OCS." *Id.* at 1886.

Plaintiff could have attempted to exclude Defendants' OCS production from its complaint, but it did not. Because "[a]ll law applicable to the [OCS] is federal law," Rhode Island law "does not provide the rule of decision" for Plaintiff's claims. *Id.* at 1891, 1892-93.

**3. The Claims Arise on Federal Enclaves where Some of Defendants' Fossil-Fuel Extraction Occurs.**

"[F]ederal courts have federal question jurisdiction over tort claims that arise on 'federal enclaves.'" *Serrano v. Consol. Waste Servs. Corp.*, 2017 WL 1097061, at *1 (D.P.R. Mar. 23, 2017); *see also Torrens*, 396 F.3d 468. Here, a substantial portion of the operative activities occurred on federal land. *See United States v. Passaro*, 577 F.3d 207, 212 (4th Cir. 2009) (federal enclaves include "military bases, federal buildings, and national parks, the high seas and waters within this Country's

admiralty and maritime jurisdiction, and certain aircraft and spacecraft"). Some Defendants maintained production operations on federal enclaves, and others sold fossil fuels on federal enclaves, including on military bases. For example, Standard Oil operated Elk Hills Naval Petroleum Reserve, a federal enclave, for most of the twentieth century. JA.223-241. And CITGO distributed gasoline and diesel under its contracts with the Navy Exchange Service Command ("NEXCOM") to multiple Naval installations. JA.272 ¶6; *Rhode Island*, No. 18-cv-00395, ECF Nos. 89-1–89-7; *cf.* 43 U.S.C. §1333(a)(1); *Parker Drilling*, 139 S. Ct. at 1891 ("OCS should be treated as an exclusive federal enclave"). By contrast, almost *none* of Defendants' fossil fuel extraction occurred in Rhode Island. *See supra* at II.

The district court held that the claims were not removable because "the State's claims did not arise" on federal enclaves, "especially since [Plaintiff's] complaint avoids seeking relief for damages to any federal lands." JA.434 (citing *Washington v. Monsanto Co.*, 274 F. Supp. 3d 1125, 1132 (W.D. Wash. 2017)). But regardless whether the alleged *injury* occurred on federal land, this case was properly removed because much of the allegedly tortious *conduct* occurred on federal enclaves. As numerous courts have held, federal enclave jurisdiction is proper so long as "pertinent events" on which liability is allegedly based occurred on federal enclaves. *See Jones v. John Crane-Houdaille, Inc.*, 2012 WL 1197391, at *1 (D. Md. Apr. 6, 2012); *Rosseter v. Indus. Light & Magic*, 2009 WL 210452, at *2 (N.D. Cal. Jan. 27,

2009); *Corley v. Long-Lewis, Inc.*, 688 F. Supp. 2d 1315, 1336 (N.D. Ala. 2010); *Stiefel v. Bechtel Corp.*, 497 F. Supp. 2d 1138, 1148 (S.D. Cal. 2007); *Klausner v. Lucas Film Ent. Co.*, 2010 WL 1038228, at *1, *4 (N.D. Cal. Mar. 19, 2010). A substantial portion of various Defendants' conduct occurred on federal enclaves, and it is "sufficient for federal jurisdiction" that Plaintiff's "allegations stem from" that conduct. *Jamil v. Workforce Res., LLC*, 2018 WL 2298119 at *4 (S.D. Cal. May 21, 2018). That Defendants "maintain[] operations outside the enclave is [] not pertinent." *Rosseter*, 2009 WL 210452, at *2.

This case is thus unlike *Monsanto*—a case involving tort claims stemming from defendant's alleged contamination of water in the state of Washington—because the defendant in that case did not argue that any of the allegedly tortious conduct occurred on federal enclaves. 274 F. Supp. 3d at 1132. Rather, defendant argued that federal enclave jurisdiction existed because "several of the allegedly contaminated water bodies mentioned in Washington's complaint are 'on or near' federal territories, including military bases." *Id.* The court declined to "exercise jurisdiction on federal enclave grounds" because "Washington avowedly does not seek relief for contamination of federal territories." *Id.* Although Plaintiff here has likewise disclaimed any attempt to seek damages for injury to federal land, Plaintiff's claims allege liability based on *all* of Defendants' fossil-fuel extraction, including extraction occurring on federal enclaves.

### D. Plaintiff's Claims Are Completely Preempted by the Clean Air Act Because They Seek to Challenge Nationwide Emissions Standards.

Complete preemption occurs where a federal statute has a "preemptive force … so powerful as to displace entirely any state cause of action[.]" *Franchise Tax Bd. v. Const. Laborers Vacation Tr.*, 463 U.S. 1, 23-24 (1983); *see also Lawless v. Steward Health Care Sys., LLC*, 894 F.3d 9, 17–18 (1st Cir. 2018) ("with respect to the application of the well-pleaded complaint doctrine, [complete preemption] transmogrifies a claim purportedly arising under state law into a claim arising under federal law."); *BIW Deceived*, 132 F.3d at 831 (the complete preemption doctrine "empowers courts to look beneath the face of the complaint to divine the underlying nature of a claim, to determine whether the plaintiff has sought to defeat removal by asserting a federal claim under state-law colors, and to act accordingly.").

The CAA establishes the exclusive vehicle for regulating nationwide emissions of air pollutants to "promote the public health and welfare and the productive capacity of its population." 42 U.S.C. §7401(b)(1); *see also* 42 U.S.C. §7607(e); *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003). At the heart of this system are emission limits, permitting requirements, and related programs set by the EPA, which reflect the CAA's dual goals of protecting both public health and welfare and the nation's productive capacity. The CAA provides specific procedures for any person, including private parties and state and local governments, to challenge nationwide emissions standards or permitting requirements. 42 U.S.C. §7607(b), (d).

They may also petition the EPA for rulemaking on these issues, and the EPA's response to such a petition is reviewable in federal court. 5 U.S.C. §7607(b)(1); 5 U.S.C. §553(e); *AEP*, 564 U.S. at 425. In fact, numerous state and city governments, including the State of Rhode Island, have already challenged the EPA's action (or inaction) regarding nationwide emissions.[14]

The CAA completely preempts Plaintiff's claims because Plaintiff is attempting to use state law to impose nationwide (indeed, worldwide) restrictions on combustion of Defendants' fossil fuels through a crippling damages award. *See* JA.162 (seeking damages and abatement remedy). Plaintiff asserts that "a 15 percent annual reduction" in global carbon dioxide emissions will be necessary "to restore the Earth's energy balance," JA.112-13 ¶187, and Plaintiff does not (and could not) allege that emissions within Rhode Island account for 15% of global emissions. Plaintiff is thus seeking to use Rhode Island tort law to obtain relief the CAA directs Plaintiff to seek from the EPA.

[14] *See, e.g.*, *California v. EPA*, No. 18-1192 (D.C. Cir. July 19, 2018) (Rhode Island, 15 other states, and the District of Columbia challenging EPA decision loosening emission standards for freight truck diesel engines); *New York v. Pruitt*, No. 18-773 (D.D.C. Apr. 5, 2018) (Rhode Island, 13 other states, the City of Chicago, and the District of Columbia seeking to compel the EPA to establish guidelines for methane emissions); *State of Maryland v. EPA*, No. 18-1285 (D.C. Cir. Oct. 15, 2018) (Maryland and Delaware challenging EPA's failure to regulate emissions from power plants in neighboring states).

The district court rejected complete preemption, stating that Defendants had not shown that Congress intended for the CAA to "provide[] the exclusive cause of action for the claim asserted." JA.429. But as other courts have recognized, the CAA "channels review of final EPA action exclusively to the courts of appeals, *regardless of how the grounds for review are framed*." *Virginia v. United States*, 74 F.3d 517, 523 (4th Cir. 1996) (emphasis added); *California Dump Truck Owners Ass'n v. Nichols*, 784 F.3d 500, 506 (9th Cir. 2015); *Am. Rd. & Transp. Builders Ass'n v. E.P.A.*, 865 F. Supp. 2d 72, 80 (D.D.C. 2012), *aff'd*, No. 12-5244, 2013 WL 599474 (D.C. Cir. Jan. 28, 2013). If Plaintiff wants to limit nationwide greenhouse-gas emissions, the CAA provides a mechanism for obtaining such relief—Plaintiff may petition the EPA for a rulemaking.

The district court also relied on the CAA's statement that "controlling air pollution 'is the primary responsibility of States and local governments.'" JA.429 (quoting 42 U.S.C. §7401(a)(3)). But the CAA does not authorize states to control *nationwide* emissions, which is what Plaintiff attempts to do here. Rather, it allows states to impose additional restrictions only on *in-state* emissions, and to provide remedies only for localized injuries stemming from *in-state* air pollution. *See Ouellette*, 479 U.S. at 496; *Bell v. Cheswick Generating Station*, 734 F.3d 188, 198 (3d Cir. 2013) (under the CAA, states are "free to impose higher standards *on their own sources of pollution*") (emphasis added); 42 U.S.C. §7401(a)(3) ("[A]ir pollution

prevention … and air pollution control *at its source* is the primary responsibility of States and local governments") (emphasis added). Nothing in the CAA suggests that Congress intended that state law be used to regulate *nationwide* (and worldwide) emissions.

The district court relied on *Her Majesty the Queen In Right of the Province of Ont. v. City of Detroit*, 874 F.2d 332 (6th Cir. 1989), JA.430, but that case merely held that plaintiffs could use Michigan law to impose, on a *Michigan* garbage incinerator, emissions requirements more stringent than those imposed under federal law. *Id.* at 342-43. The court also cited *American Fuel & Petrochemical Manufacturers v. O'Keeffe*, 903 F.3d 903 (9th Cir. 2018), but that case involved a challenge to an Oregon statute that sought "to reduce greenhouse gas emissions from use and production of transportation fuels in Oregon." *Id.* at 908. Neither *Her Majesty* nor *American Fuel* involved an effort to use state law to regulate *out-of-state* emissions or production.

The district court also relied on the CAA's savings clause (JA.429-30), 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). But the district court ignored *which* common law would govern here. In the case of nationwide or international greenhouse gas emissions, the Supreme Court has made clear that *federal* common law governs. *AEP*, 564 U.S. at

421-22. State law has never governed such emissions, and the CAA does not preserve state common law actions that have never existed.

### E. The Action Was Properly Removed under the Bankruptcy Removal Statute Because Plaintiff's Claims Relate to Bankruptcy Cases.

Plaintiff's action, which seeks massive damages awards, was properly removed because it is "related to" numerous bankruptcy cases. 28 U.S.C. §§1334(b), 1452(a). The "statutory grant of 'related to' jurisdiction is quite broad," *In re Boston Regional Medical Center, Inc.*, 410 F.3d 100, 105 (1st Cir. 2005), and exists when "the outcome of th[e] proceeding could conceivably have any effect on the estate being administered in bankruptcy," *In re G.S.F. Corp.*, 938 F.2d 1467, 1475 (1st Cir. 1991) (citation omitted).

Here, Plaintiff apparently seeks to hold Defendants liable for the pre-bankruptcy operations of Texaco Inc. (a subsidiary of Chevron) and Getty Petroleum. *See, e.g.*, JA.29 ¶21. Texaco's confirmed bankruptcy plan bars various claims arising against it prior to March 15, 1988. *In re Texaco Inc.*, 87 B 20142 (Bankr. S.D.N.Y. 1988) Dkt. 1743.5. Plaintiff's allegations against Texaco include conduct prior to March 15, 1988. *See* JA.29 ¶21. The adjudication of Plaintiff's claims would "affect the interpretation, implementation, consummation, execution, or administration of [Texaco's] confirmed plan." *Valley Historic Ltd. P'ship v. Bank of N.Y.*, 486 F.3d 831, 836-37 (4th Cir. 2007) (citation omitted). Plaintiff's theories of

liability also rely on the operations of Defendants' predecessors, subsidiaries, and affiliates, *see, e.g.*, JA.97 ¶156; JA.110 ¶183; JA.115-16 ¶190(a); JA.143 ¶241; JA.145-46 ¶254, and thus affect additional bankruptcy matters.

The district court rejected bankruptcy jurisdiction on the ground that the action is purportedly "designed primarily to protect the public safety and welfare." JA.435 (quoting *McMuller v. Sevigny*, 386 F.3d 320, 325 (1st Cir. 2004)). But these claims do not fall within the narrowly construed police or regulatory exception to §1452 because Plaintiff seeks an economic windfall in the form of compensatory and punitive damages as well as disgorgement of profits. JA.162. Looking at the "totality of the circumstances," it is clear that this case "represents a governmental attempt to recover" money from Defendants. *McMuller*, 386 F.3d at 325; *see also Safety-Kleen, Inc. (Pinewood) v. Wyche*, 274 F.3d 846, 865 (4th Cir. 2001); *City & Cty. of S.F. v. PG&E Corp.*, 433 F.3d 1115, 1124 n.9 (9th Cir. 2006) (explaining the exemption for government exercises of police power "is intended to be given a narrow construction"). Plaintiff explicitly disclaims any interest in "restrain[ing] Defendants from engaging in their business operations," JA.27 ¶12, and purports to seek only recovery of costs it will allegedly incur in remediating harms, JA.112 ¶186. But that is a pecuniary interest. Removal is thus proper regardless of whether the State has a secondary interest in protecting public safety and welfare.

### F. The Court Has Admiralty Jurisdiction Because the Claims Are Based in Part on Fossil-Fuel Extraction on Floating Oil Rigs.

This action falls within the Constitution's grant of original jurisdiction over "all Cases of admiralty and maritime Jurisdiction" because much of Defendants' allegedly tortious fossil-fuel extraction occurs on vessels engaged in maritime commerce. U.S. Const. Art. III, §2; *see* 28 U.S.C. §1333(1). A claim falls within a federal court's admiralty jurisdiction if "the tort occurred on navigable water" or if an "injury suffered on land was caused by a vessel on navigable water."[15] *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995).

The allegedly tortious conduct here satisfies both the "location" and the "connection to maritime activity" tests for maritime jurisdiction. *Id.* Defendants' extraction activities occurred aboard "vessel[s] on navigable water" within the meaning of 46 U.S.C. §30101(a).[16] Courts have consistently held that the drilling and production of oil and gas from a vessel—such as a floating oil rig—is considered maritime activity. *See, e.g.*, *In re Crescent Energy Servs.*, 896 F.3d 350, 356 (5th Cir. 2018); *Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 539 (5th Cir. 1986).

---

[15] 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).

[16] *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); *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 416 n.2 (1985).

Applying an older line of precedent, the district court held that "state-law claims cannot be removed based solely on federal admiralty jurisdiction." JA.435. However, the Venue Clarification Act of 2011 eliminated the portion of §1441(b) that courts had interpreted to block the removal of admiralty claims absent another basis for federal jurisdiction. Pub. L. 112- 63, Title I, § 103, 125 Stat. 759 (2011); *cf. In re Dutile*, 935 F.2d 61, 62–63 (5th Cir. 1991) (interpreting previous version of §1441(b) to bar removal of admiralty claims absent diversity jurisdiction). Section 1441(b) now states that the presence of a local defendant will bar removal only in cases arising under diversity jurisdiction. 28 U.S.C. §1441(b)(2). Accordingly, "the current version of 28 U.S.C. §1441 allows removal of general maritime claims without requiring an additional source of federal jurisdiction." *Genusa v. Asbestos Corp.*, 18 F. Supp. 3d 773, 790 (M.D. La. 2014).

## CONCLUSION

For these reasons, Defendants respectfully request that the Court reverse the district court's order granting Plaintiff's Motion to Remand.

Dated: November 20, 2019

Respectfully submitted,

By: /s/ *Theodore J. Boutrous, Jr.*

Theodore J. Boutrous, Jr.
Joshua S. Lipshutz
GIBSON, DUNN & CRUTCHER LLP

333 South Grand Avenue
Los Angeles, CA 90071
Telephone: (213) 229-7000
Facsimile: (213) 229-7520
E-mail: tboutrous@gibsondunn.com
E-mail: jlipshutz@gibsondunn.com

Anne Champion
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166-0193
Telephone: (212) 351-4000
Facsimile: (212) 351-5281
E-mail: achampion@gibsondunn.com

Gerald J. Petros
Robin L. Main
Ryan M. Gainor
HINCKLEY, ALLEN & SNYDER LLP
100 Westminster Street, Suite 1500
Providence, RI 02903
Telephone: (401) 274-2000
Facsimile: (401) 277-9600
E-mail: gpetros@hinckleyallen.com
E-mail: rmain@hinckleyallen.com
E-mail: rgainor@hinckleyallen.com

Neal S. Manne
SUSMAN GODFREY LLP
1000 Louisiana, Suite 5100
Houston, TX 77002
Telephone: (713) 651-9366
Facscimile: (713) 654-6666
E-mail: nmanne@susmangodfrey.com

*Attorneys for Defendants-Appellants CHEVRON CORPORATION and CHEVRON U.S.A., INC.*

By: /s/ *John A. Tarantino*

John A. Tarantino
Patricia K. Rocha
Nicole J. Benjamin
ADLER POLLOCK & SHEEHAN P.C.
One Citizens Plaza, 8th Floor
Providence, RI 02903
Tel.: (401) 427-6262
Fax: (401) 351-4607
E-mail: jtarantino@apslaw.com
E-mail: procha@apslaw.com
E-mail: nbenjamin@apslaw.com

Philip H. Curtis
Nancy G. Milburn
ARNOLD & PORTER KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019-9710
Telephone: (212) 836-8000
Facsimile: (212) 836-8689
E-mail: philip.curtis@arnoldporter.com
E-mail: nancy.milburn@arnoldporter.com

Matthew T. Heartney
ARNOLD & PORTER KAYE SCHOLER LLP
777 South Figueroa Street, 44th Floor
Los Angeles, California 90017-5844
Telephone: (213) 243-4000
Facsimile: (213) 243-4199
E-mail: matthew.heartney@arnoldporter.com
E-mail: john.lombardo@arnoldporter.com

*Attorneys for Defendants-Appellants BP PRODUCTS NORTH AMERICA INC., BP P.L.C., and BP AMERICA INC.*

By: /s/ *Matthew T. Oliverio*

Matthew T. Oliverio, Esquire
OLIVERIO & MARCACCIO LLP
55 Dorrance Street, Suite 400
Providence, RI 02903
Tel.: (401) 861-2900
Fax: (401) 861-2922
E-mail: mto@om-rilaw.com

Theodore V. Wells, Jr.
Daniel J. Toal
Jaren Janghorbani
PAUL, WEISS, RIFKIND, WHARTON, GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
Telephone: (212) 373-3089
Fax: (212) 492-0089
E-mail: twells@paulweiss.com
E-mail: dtoal@paulweiss.com
E-mail: jjanghorbani@paulweiss.com

Kannon Shanmugam
PAUL, WEISS, RIFKIND, WHARTON, GARRISON LLP
2001 K Street, NW
Washington, DC 20006-1047
Telephone: (202) 223-7325
Facsimile: (202) 224-7397
E-mail: kshanmugam@paulweiss.com

*Attorneys for Defendants-Appellants EXXON MOBIL CORPORATION*

By: */s/ Jeffrey S. Brenner*

Jeffrey S. Brenner
NIXON PEABODY LLP
One Citizens Plaza, Suite 500
Providence, RI 02903
Tel: (401) 454-1042
Fax: (866) 947-0883
E-mail: jbrenner@nixonpeabody.com

David C. Frederick
Brendan J. Crimmins
Grace W. Knofczynski
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
Telephone: (202) 326-7900
Facsimile: (202) 326-7999
E-mail: dfrederick@kellogghansen.com
E-mail: bcrimmins@kellogghansen.com
E-mail: gknofczynski@kellogghansen.com

Daniel B. Levin
MUNGER, TOLLES & OLSON LLP
350 S. Grand Ave. 50th Fl.
Los Angeles, CA 90071
Telephone: (213) 683-9100
Facsimile: (213) 687-3702
E-mail: daniel.levin@mto.com

Jerome C. Roth
Elizabeth A. Kim
MUNGER, TOLLES & OLSON LLP
560 Mission Street
Twenty-Seventh Floor
San Francisco, California 94105-2907
Telephone: (415) 512-4000
Facsimile: (415) 512-4077

By: /s/ *Stephen J. MacGillivray*

John E. Bulman, Esq.
Stephen J. MacGillivray, Esq.
PIERCE ATWOOD LLP
One Financial Plaza, 26th Floor
Providence, RI 02903
Telephone: 401-588-5113
Fax: 401-588-5166
E-mail: jbulman@pierceatwood.com
E-mail: smacgillivray@pierceatwood.com

Nathan P. Eimer, Esq.
Pamela R. Hanebutt, Esq.
Lisa S. Meyer, Esq.
Raphael Janove, Esq.
EIMER STAHL LLP
224 South Michigan Avenue, Ste. 1100
Chicago, IL 60604
Telephone: (312) 660-7600
Facsimile: (312) 692-1718
E-mail: neimer@EimerStahl.com
E-mail: phanebutt@EimerStahl.com
E-mail: lmeyer@Eimerstahl.com
E-mail: rjanove@Eimerstahl.com

Ryan J. Walsh
EIMER STAHL LLP
10 East Doty Street, Suite 800
Madison, WI 53703
Telephone: (608) 441-5798
Facsimile: (312) 692-1718
E-mail: rwalsh@EimerStahl.com

*Attorneys for Defendant-Appellant CITGO PETROLEUM CORPORATION*

E-mail: jerome.roth@mto.com
E-mail: elizabeth.kim@mto.com

*Attorneys for Defendants-Appellants*
*SHELL OIL PRODUCTS COMPANY*
*LLC and ROYAL DUTCH SHELL, plc*

By: /s/ *Michael J. Colucci*

Michael J. Colucci, Esq.
OLENN & PENZA, LLP
530 Greenwich Avenue
Warwick, RI 02886
PHONE: (401) 737-3700
FAX: (401) 737-5499
E-mail: mjc@olenn-penza.com

Sean C. Grimsley, Esq.
Jameson R. Jones, Esq.
BARTLIT BECK LLP
1801 Wewatta Street, Suite 1200
Denver, CO 80202
Telephone: (303) 592-3123
Facsimile: (303) 592-3140
E-mail: sean.grimsley@bartlit-beck.com
E-mail: jameson.jones@bartlit-beck.com

*Attorneys for Defendants-Appellants CONOCOPHILLIPS and CONOCOPHILLIPS COMPANY*

By: /s/ *Robert G. Flanders, Jr.*

Robert G. Flanders, Jr.
Timothy K. Baldwin
WHELAN, CORRENTE, FLANDERS, KINDER & SIKET LLP
100 Westminster Street, Suite 710
Providence, RI 02903
PHONE: (401) 270-4500
FAX: (401) 270-3760
E-mail: rflanders@whelancorrente.com
E-mail: tbaldwin@whelancorrente.com

*Attorneys for Defendant-Appellant PHILLIPS 66*

Steven M. Bauer
Margaret A. Tough
LATHAM & WATKINS LLP
505 Montgomery Street, Suite 2000
San Francisco, CA 94111-6538
Telephone: (415) 391-0600
Facsimile: (415) 395-8095
E-mail: steven.bauer@lw.com
E-mail: margaret.tough@lw.com

*Attorneys for Defendants-Appellants PHILLIPS 66, CONOCOPHILLIPS and CONOCOPHILLIPS COMPANY*

By: /s/ *Jeffrey B. Pine*

Jeffrey B. Pine
Patrick C. Lynch
LYNCH & PINE
One Park Row, 5th Floor
Providence, RI 02903
Tel: (401) 274-3306
Fax: (401) 274-3326
E-mail: JPine@lynchpine.com
E-mail: Plynch@lynchpine.com

Shannon S. Broome
HUNTON ANDREWS KURTH LLP
50 California Street
San Francisco, CA 94111
Telephone: (415) 975-3718
Facsimile: (415) 975-3701
E-mail: SBroome@HuntonAK.com

Shawn Patrick Regan
HUNTON ANDREWS KURTH LLP
200 Park Avenue
New York, NY 10166
Telephone: (212) 309-1046
Facsimile: (212) 309-1100
E-mail: SRegan@HuntonAK.com

Ann Marie Mortimer
HUNTON ANDREWS KURTH LLP
550 South Hope Street, Suite 2000
Los Angeles, CA 90071
Telephone: (213) 532-2103
Facsimile: (213) 312-4752
E-mail: AMortimer@HuntonAK.com

*Attorneys for Defendants-Appellants MARATHON PETROLEUM CORPORATION; MARATHON PETROLEUM COMPANY LP, and SPEEDWAY, LLC*

By: /s/ *Scott Janoe*

Scott Janoe
BAKER BOTTS L.L.P.
910 Louisiana Street
Houston, Texas 77002
Telephone: (713) 229-1553
Facsimile: (713) 229 7953
E-mail: scott.janoe@bakerbotts.com

Evan Young
BAKER BOTTS L.L.P.
98 San Jacinto Boulevard
Austin, Texas 78701
Telephone: (512) 322-2506
Facsimile: (512) 322-8306
E-mail: evan.young@bakerbotts.com

Christopher J. Carr
Jonathan A. Shapiro
BAKER BOTTS L.L.P.
101 California Street
36th Floor, Suite 3600
San Francisco, California 94111
Telephone: (415) 291-6200
Facsimile: (415) 291-6300
E-mail: chris.carr@bakerbotts.com
E-mail:
Jonathan.shapiro@bakerbotts.com

Megan Berge
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave, NW
Washington, D.C. 20004
Telephone: (202) 639-7700
Facsimile: (202) 639-1171
Email: megan.berge@bakerbotts.com

*Attorneys for Defendant-Appellant HESS CORP.*

By: /s/ *Lauren Motola-Davis*

Lauren Motola-Davis
Samuel A. Kennedy-Smith
LEWIS BRISBOIS BISGAARD & SMITH LLP
1 Turks Head Place, Suite 400
Providence, RI 02903
Tel: 401-406-3313
Fax: 401-406-3312
Email: Lauren.MotolaDavis@lewisbrisbois.com
Email: samuel.kennedysmith@lewisbrisbois.com

*Attorneys for Defendant LUKOIL PAN AMERICAS, LLC*

By: /s/ *Jeffrey S. Brenner*

Jeffrey S. Brenner
NIXON PEABODY LLP
One Citizens Plaza, Suite 500
Providence, RI 02903
Tel: (401) 454-1042
Fax: (866) 947-0883
E-mail: jbrenner@nixonpeabody.com

*Attorneys for Defendant MOTIVA ENTERPRISES, LLC*

## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the undersigned certifies that this brief complies with the applicable typeface, type-style, and type-volume limitations. This brief was prepared using a proportionally spaced type (Times New Roman, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 12,942 words. This certificate was prepared in reliance on the word-count function of the word-processing system used to prepare this brief.

/s/ *Theodore J. Boutrous, Jr.*
Theodore J. Boutrous, Jr.

## CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: November 20, 2019

/s/ *Theodore J. Boutrous, Jr.*
Theodore J. Boutrous, Jr.

GIBSON, DUNN & CRUTCHER LLP

*Attorneys for Defendants-Appellants Chevron Corp. and Chevron U.S.A. Inc.*

# ADDENDUM

Pursuant to Federal Rule of Appellate Procedure 28(f), this addendum includes pertinent statutes, reproduced verbatim:

**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.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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

**OPINION AND ORDER**

WILLIAM E. SMITH, Chief Judge.

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

I. Background[1]

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

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

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

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

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

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

II. Discussion

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

A. General Removal

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

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

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

1. Complete Preemption

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

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

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

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

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

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

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

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

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

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

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

Furthermore, in its section providing for citizen suits, the

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

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

2. Grable Jurisdiction

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

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

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

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

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

B. Less-General Removal

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

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

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

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

III. Conclusion

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

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

IT IS SO ORDERED.

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