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.; EXXON MOBIL 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; and DOES 1-100,

Defendants-Appellants,

GETTY PETROLEUM MARKETING, INC.,

Defendant.

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)

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INTRODUCTION

All parties agree that this Court has jurisdiction to review removal on federal officer grounds. Removal is proper on this basis because much of the fossil-fuel production grounding Plaintiff's claims—including production on the Outer Continental Shelf—was performed under the direction of the federal government for the use of federal agencies, including the U.S. Navy. In fact, several Defendants' federal contracts *required* minimum levels of fossil-fuel production to satisfy the government's energy needs.

This Court has jurisdiction to review the other removal grounds as well. The plain language of 28 U.S.C. §1447(d) authorizes appellate review of remand "orders" in cases removed under the federal officer removal statute—as this case was. Although Plaintiff argues that Congress authorized review only of certain "grounds" for removal, it points to nothing in the text, history, or Supreme Court precedent to support its interpretation. And in *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996), the Supreme Court, interpreting 28 U.S.C. §1292(b), held that when Congress makes an "order" reviewable, it authorizes review of the *entire* order.

The district court had jurisdiction because Plaintiff's claims arise under federal common law. "[T]he scope, nature, legal incidents and consequences" of Plaintiff's claims "are fundamentally derived from *federal sources*." *United States v. Standard Oil Co.*, 332 U.S. 301, 305-06 (1947) (emphasis added). This Court made

clear in *United States v. Swiss American Bank, Ltd.*, 191 F.3d 30 (1st Cir. 1999), in which it applied *Standard Oil*, that a court must look to the *source*, rather than the *substance*, of a claim to determine whether it "arises under" federal law. *Id.* at 42. Where, as here, the "rule of decision" for a claim "must be drawn from federal common law," the claims "come[] within the original subject matter jurisdiction of the federal courts." *Id*. Plaintiff's state-law labels are thus irrelevant because 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*").

Because Plaintiff's claims—which are based on alleged injuries from interstate greenhouse-gas emissions—"deal with air and water in their ambient or interstate aspects," *id.* at 103, they have their source in "federal, not state, law," *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987). Although the Supreme Court in *American Electric Power Co., Inc. v. Connecticut*, 564 U.S. 410 (2011) ("*AEP*"), held that federal law did not provide a *remedy* for a similar claim (because federal common law had been displaced by federal statute, and that federal statute did not allow recovery), it reiterated that transboundary air pollution claims necessarily "arise under" federal law because "the basic scheme of the Constitution" precludes application of state law. *Id.* at 420-21.

Similarly, Plaintiff's arguments about the unavailability of relief under federal law are irrelevant because they go to the substance, rather than the source, of Plaintiff's claims. The decision below must be reversed because, under controlling Supreme Court and First Circuit precedent, the district court confused the constitutional choice-of-law issue that is presented here with a preemption issue that is irrelevant to the "arising under" issue. The combined impact of *Swiss American*, *Standard Oil, Milwaukee I*, *Ouellette*, and *AEP* is dispositive and requires reversal of the remand order.

Plaintiff's claims create removal jurisdiction on many other grounds as well.

ARGUMENT

I. Jurisdiction Exists Under the Federal Officer Removal Statute

Plaintiff concedes that this Court has jurisdiction to review the federal officer grounds for removal. Resp.Br.4. On this basis alone, the Court should reverse. Plaintiff has sued "person[s] acting under" officers of the United States because its claims are in connection with fossil-fuel extraction that occurred at the direction of federal officers. For many years, Defendants produced fossil fuels—including on the Outer Continental Shelf ("OCS")—under contracts with the federal government

mandating daily minimum fuel production and specifying the federal agencies to which the fuel must be sold. AOB.38-42.[1]

a. Plaintiff contends that Standard Oil (Chevron's predecessor) was not "acting under" federal officers when it extracted fossil fuels from the Elk Hills strategic petroleum reserve (the "Reserve") because Standard supposedly could have fulfilled its obligations by producing no oil at all. Resp.Br.15. That argument misstates the terms of the Unit Plan Contract ("UPC") and ignores subsequent congressional commands requiring maximum production at Elk Hills carried out by Standard for the government's benefit.

First, even if Standard *could have* complied with the UPC by producing nothing, Standard *in fact* produced fossil fuels on the Reserve, and the Navy had "*exclusive control* over the exploration, prospecting, development, and operation of the Reserve." JA.231 §3(a) (emphasis added). Indeed, the UPC was designed to give the "Navy a means of acquiring complete control over the development of *the entire Reserve* and the production of oil therefrom." JA.228 §(d)(1) (emphasis added). All of Standard's production thus occurred under the supervision and direction of federal officers, regardless of whether the UPC compelled a certain amount of production.

[1] Defendants have also sufficiently alleged several "meritorious federal defenses," including federal preemption. JA.201 ¶67. Plaintiff's assertion to the contrary, Resp.Br.12 n.15, is both waived and meritless.

Second, Plaintiff is mistaken that the contract allowed Standard to produce nothing. The UPC obligated Standard to operate the Reserve to "permit production from the Shallow Oil Zone to be *maintained* at a rate sufficient to produce therefrom not less than 15,000 barrels of oil per day, averaged over each quarterly period." JA.232 §4(b) (emphasis added). Standard was required to do so "[u]ntil [it] … received from its share of production from the Shallow Oil Zone the quantity of oil it [was] permitted to receive" under the UPC. *Id.* Because Standard was subject to the 15,000-barrel requirement *until* it produced a certain amount of oil, it could not comply with its obligations without drilling. Moreover, this requirement served the UPC's goal of "[p]lac[ing] the Reserve in a condition of readiness whereby it will be able promptly to produce oil in substantial quantities whenever the strategic situation of the United States in the future may so require," JA.228 ¶6(d)(iii), which would be undermined had Standard let the fields lie dormant.

Third, although Plaintiff suggests no extraction ever took place at the Reserve under the UPC, Resp.Br.15, Congress explicitly ordered such production in 1976 when, in an effort to curb the oil crisis, it directed the Secretary of the Navy "to produce such reserves at the maximum efficient rate consistent with sound engineering practices for a period not to exceed six years." Naval Petroleum Reserves Production Act of 1976 §201(3)(c)(1)(B) ("Production Act"), Pub. L. No. 94-258, 90 Stat. 303. The Production Act gave the Secretary authority to "sell or otherwise

dispose of the United States[’] share of such petroleum produced from such reserves.” *Id.* §201(3)(c)(1)(C). From 1976 to 1998, Standard generated over $17 billion for the U.S. Treasury from the Reserve. Department of Energy, Naval Petroleum Reserves, https://www.energy.gov/fe/services/petroleum-reserves/naval-petroleum-reserves. All that production took place under the “exclusive control” of the U.S. government. JA.231-232 §§3(a), 4(a).

Although the UPC gave the Navy the right to produce fossil fuels itself, the UPC contemplated that the Reserve would be operated as a “unit” whereby Standard extracted fuels and the Navy reimbursed the “costs” of extracting its portion. *See* JA.227 ¶6; JA.231 §3(a); *United States v. Standard Oil Co*., 545 F.2d 624, 636-37 (9th Cir. 1976) (describing dispute over Navy’s payment of its share of costs). Because Standard “help[ed] the Government to produce an item that it need[ed],” and “performed a job that, in the absence of a contract with a private firm, the Government itself would have had to perform,” Standard “acted under” federal officers. *Watson v. Philip Morris Cos.*, 551 U.S. 142, 153-54 (2007); *see also id.* at 147 (“The words ‘acting under’ are broad” and “the statute must be liberally construed.”); *Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 137 (2d Cir. 2008).

CITGO’s detailed fuel-supply agreements with NEXCOM also evidence federal control. Far from merely providing an “off the shelf” commodity to the govern-

ment, Resp.Br.16-17, the NEXCOM agreements (1) set forth detailed "fuel specifications" that required compliance with American Society for Testing and Materials standards[2]; (2) authorized the Contracting Officer to inspect delivery, site, and operations[3]; and (3) established comprehensive branding and advertising requirements.[4] Unlike the contracts in *Washington v. Monsanto Co.*, 738 F.App'x 554 (9th Cir. 2018) (cited at Resp.Br.16-17), where the federal government neither "supervised Monsanto's manufacture of PCBs" nor "directed Monsanto to produce PCBs in a particular manner," *id*. at 555, the NEXCOM contracts evince the "subjection, guidance, or control" necessary to invoke federal jurisdiction, *Watson*, 551 U.S. at 151.

b. Plaintiff contends there is no "causal nexus" because "no federal officer directed any Defendant" to engage in the allegedly tortious conduct. Resp.Br.17. But that is not the standard. Before 2011, removal jurisdiction under §1442 required the removing party to show it had been sued "*for* any act under color of [federal] office." 28 U.S.C. §1442(a)(1) (2010) (emphasis added). Defendants had to "demonstrate that the acts for which they [we]re being sued" occurred at least in part

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[2] No. 18-cv-00395, ECF No. 89-1 at 13-14 §§10-11; ECF No. 89-2 at 14 §I.C.5; ECF No. 89-3 at 21-24 §§I.C.4-7; ECF No. 89-4 at 38, 42-43 §§C.6-10; ECF No. 89-5 at 20-22 §§C.1-4; ECF No. 89-7 at 12-14 §§C.1-4.

[3] No. 18-cv-00395, ECF No. 89-1 at 18-19 §19; ECF No. 89-3 at 31 §I.F.3; ECF No. 89-7 at 15 §D.

[4] JA.298 §C.11; No. 18-cv-00395, ECF No. 89-7 at 15 §C.9.

"*because of* what they were asked to do by the Government." *Isaacson,* 517 F.3d at 137. The Removal Clarification Act of 2011 amended the statute to authorize removal of claims "for *or relating to* any act under color of [federal] office." 28 U.S.C. §1442(a)(1) (emphasis added). This amendment replaced the old "because of" test with a new "connection or association" test, which "'broadened the universe of acts' that enable federal removal." *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 258 (4th Cir. 2017).

Defendants' fossil-fuel production at the direction of federal officers is certainly *connected or associated with* Plaintiff's climate-change claims. Despite Plaintiff's assertion to the contrary, Plaintiff seeks to impose liability based, at least in part, on Defendants' *production* of oil and gas. *See, e.g.*, JA.23 ¶1; JA.138 ¶229(a); JA.141 ¶232(e). Notwithstanding Plaintiff's late pivot to promotion, Resp.Br.17, there is no dispute that, under Plaintiff's theory, its alleged injury would not have occurred without production of fossil fuels.

c. Federal officer removal is also supported by the fact that certain Defendants helped the government extract fossil fuels from the OCS pursuant to the requirements of the Outer Continental Shelf Lands Act ("OCSLA") and the terms of petroleum reserve leases with the government. *E.g.*, JA.215-21. As the Supreme Court recently explained, "OCSLA gives the Federal Government complete 'jurisdiction, control, and power of disposition' over the OCS, while giving the States no 'interest

in or jurisdiction' over it." *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S.Ct. 1881, 1888-89 (2019).

Up to one-third of annual domestic oil-and-gas production occurs on the OCS under leases granting Defendants the right—subject to federal oversight and conditions—to extract on "more than 5,000 active oil and gas leases on nearly 27 million OCS acres." JA.193-95 ¶51. Although these leases do not dictate the "manner" in which fuels are extracted, Resp.Br.16, they direct lessees to drill for oil and gas, and to give the federal government the right to purchase a percentage of the fuels "at the regulated price" established by the government,[5] JA.217 §15(a); *see also id.* §15(b); No. 18-cv-000395, ECF No. 3-2 §10. Indeed, the government preconditioned the leases on a right of first refusal to purchase "all or any portion of the oil or gas produced from the leased area" "[i]n time of war or when the President of the United States shall so prescribe." JA.217 §15(d). And if lessees fail to comply with these terms, they risk losing their leases. *See* 43 U.S.C. §1334(c) ("Whenever the owner of a nonproducing lease fails to comply with any of the provisions … of the lease, or of the regulations issued under this subchapter, such lease may be canceled by the Secretary.") These facts satisfy the "acting under" requirement.

[5] Nor are Plaintiff's claims based on the *manner* in which any Defendant extracted oil and gas, but only whether it did.

II. Federal Jurisdiction Exists for Many Other Reasons

A. This Court May Review Each of Defendants' Grounds for Removal

Section 1447(d) provides that "an *order* remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title *shall be reviewable*." 28 U.S.C. §1447(d) (emphases added). Plaintiff insists that remand orders in such cases are "*unreviewable* except to the limited extent they rest on the lower courts' rejection of federal-officer or civil rights removal." Resp.Br.7 (emphasis added). That reading contradicts the statute's plain text. As Judge Easterbrook 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 v. Boeing Co.*, 792 F.3d 805, 811 (7th Cir. 2015).

The Seventh Circuit's interpretation of the word "order" in §1447(d) followed the Supreme Court's reasoning in *Yamaha*, where it interpreted the same word in the context of §1292(b). Plaintiff contends that §1292(b) "implicates different policies than §1447(d)," Resp.Br.9, but the holding in *Yamaha* was based on text, not policies: "As the *text* of §1292(b) indicates, appellate jurisdiction applies to the *order* certified to the court of appeals, and is not tied to the particular question formulated by the district court." 516 U.S. at 205 (emphasis added); *see also Lu Junhong*, 792 F.3d at 812 ("Our application of *Yamaha* … to the word 'order' in §1447(d) … is entirely textual.").

Plaintiff provides no textual basis for reading the term "order" in §1447(d) any differently than in §1292(b). Resp.Br.11 n.14; *cf.* Black's Law Dictionary 1270 (11th ed. 2019) (defining "order" as "[a] command, direction, or instruction," or "[a] written direction or command delivered by a government official, esp. a court or judge"). And even if one were to ignore *Yamaha* and the Supreme Court's interpretation of the word "order" in §1292(b), the text of §1447(d) alone confirms Defendants' interpretation. Section 1447(d) uses "order" twice—first in describing the general rule that "[a]n order remanding a case … is not reviewable on appeal," and second in detailing the exception at issue here. Because the first usage clearly refers to the entire order, the second usage must as well. *See IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005) ("[T]he normal rule of statutory interpretation [is] that identical words used in different parts of the same statute are generally presumed to have the same meaning.").

Plaintiff contends that plenary review of remand orders would thwart Congress's intent to bar review of certain removal grounds. Resp.Br.10. But surely Congress has no interest in forcing parties to litigate in the wrong court. And while §1447(d) does serve to "curb the delay caused by interlocutory review of orders shifting cases from federal to state courts," *Perfect Puppy, Inc. v. City of East Providence*, 807 F.3d 415, 419 (1st Cir. 2015), once the court of appeal may review a remand order—as it may here—there is very little to be gained by limiting review,"

15A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* §3914.11 (2d ed. 1987); *see also Lu Junhong*, 792 F.3d at 813.[6]

Consequently, this Court has jurisdiction to consider all the grounds on which Defendants removed this action.

B. Plaintiff's Claims Arise Under Federal Law

Defendants removed this case under 28 U.S.C. §§1331 and 1441 because Plaintiff's climate-change claims necessarily "arise under" federal law. As this Court held in *Swiss American*, rather than focus on the labels used in the Complaint, the district court should have asked whether the "source of the controlling law [is] federal or state." 191 F.3d at 43. As decades of Supreme Court precedent make clear, federal law, not state law, provides the source for tort claims based on inter-state (and international) pollution. *See, e.g.*, *AEP*, 564 U.S. at 421; *Milwaukee I*, 406 U.S. at 103; *Ouellette*, 479 U.S. at 488.

Rather than engage in the constitutional choice-of-law analysis dictated by *Swiss American*, the district court erroneously evaluated this basis for jurisdiction through the lens of preemption. But preemption is a different argument and is not part of the "arising under" analysis, as this Court has confirmed.

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[6] There is little risk defendants will frivolously invoke federal officer removal to obtain appellate jurisdiction, *see* Resp.Br.10, because "a frivolous removal leads to sanctions, potentially including fee shifting." *Lu Junhong*, 792 F.3d at 813; *see also, e.g.*, *Wong v. Kracksmith*, 764 F.App'x 583 (9th Cir. 2019).

1. *Standard Oil* and *Swiss American* Compel Removal

Plaintiff, citing *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 391-92 (1987), contends that the well-pleaded complaint rule bars removal because the Complaint nominally asserts state-law claims. Resp.Br.20. However, as this Court held in *Swiss American*, decided more than a decade after *Caterpillar*, a claim "arises under" federal law if the "source of the rule to be applied" is federal law. 191 F.3d at 45.

In *Swiss American*, this Court interpreted and applied the Supreme Court's decision in *Standard Oil*, which established a two-step approach for analyzing questions like the one presented here: First, courts must determine whether the source of law is federal or state based on the nature of the issues at stake, and second, if federal law is the source, courts must determine the substance of that law. *Id.* at 43. *Standard Oil* involved a claim brought by the Government alleging interference with the government-soldier relationship. 332 U.S. at 302. The Court answered the first question in favor of federal law because "the scope, nature, legal incidents and consequences of the relationship between persons in service and the Government are fundamentally derived from *federal sources.*" *Id.* at 305-06 (emphasis added). Nevertheless, it resolved the second question by concluding that federal law did not provide any relief, declining the Government's invitation to "exercise [the] judicial power to establish the new liability" because doing so would "intrud[e] within a field properly within Congress' control." *Id.* at 315.

In *Swiss American*, this Court likewise recognized the difference between the "source question and the substance question," adhering to the "two-part approach" articulated in *Standard Oil* when considering whether civil asset forfeiture claims against foreign banks, which defendants argued were "garden-variety tort" and "breach of contract" claims, arose under federal law because "the ascertained federal interest necessitate[d] a federal source for the rule of decision." 191 F.3d at 43, 45. This Court explained that the "source question" asks whether "the source of the controlling law [should] be federal or state," while the substance question, "which comes into play only if the source question is answered in favor of a federal solution," asks whether the governing rule should be borrowed from state law or instead be a "uniform federal rule." *Id.* at 42-43. Whether a claim "arises under" federal law "turns on the resolution of the source question." *Id*. at 44.[7] *Swiss American* is

[7] Defendants' 28(j) letter citing *Swiss American* did not "raise new arguments." Pltf's 28(j) Response. It simply noted the decision's relevance to the central argument Defendants advanced throughout this litigation—that Plaintiff's claims "arise under" federal law because "only federal law can provide the rule of decision for interstate pollution torts." AOB.15; *see also* No. 18-cv-00395, ECF No. 87 at 26 ("*AEP* and *Kivalina* thus direct a two-step analysis to determine *first* whether, given the nature of the claims, federal law governs, and *second* whether Plaintiff has stated claims upon which relief may be granted."); ECF No. 113 at 31:11-14 ("I think of it as a two-step process…. The Supreme Court's decision in the *Standard Oil* case is a great example of that."); JA.172-77; AOB.19; AOB.26-28. "[A] Rule 28(j) letter can … be used to bring to the court's attention an authority that existed, but was not found by counsel, prior to briefing or argument." 16A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* §3974.6 (4th ed. Aug. 2019 Update). And Plaintiff cannot demonstrate prejudice because it had the opportunity to address this authority *twice*—

binding and dispositive, and requires reversal of the district court in light of the Supreme Court's cases holding that federal common law is the source of interstate pollution claims like this one.

Other courts have similarly recognized that a claim governed by federal common law "arises under" federal law regardless of the labels used in the complaint. *See* AOB.16-17 (citing cases); *see also Downey v. State Farm Fire & Cas. Co.*, 266 F.3d 675, 680 (7th Cir. 2001) ("Sometimes the federal interest in a controversy is so dominant that federal law applies—activating federal-question jurisdiction under §1331."); *Ivy Broad. Co. v. Am. Tel. & Tel. Co.*, 391 F.2d 486, 492 (2d Cir. 1968).[8]

Plaintiff urges the Court to ignore the above authorities based on a misreading of *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing* ("*Grable*"), 545 U.S. 308 (2005). Resp.Br.22-23 & nn.20-21; *see also* Pltf's 28(j) Response. But *Grable* addressed the removal of "claims *recognized under state law* that nonetheless turn on substantial questions of federal law," 545 U.S. at 312 (emphasis added), holding that a "*state-law claim*" is removable when it "necessarily

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in its own 28(j) and in its Answering Brief, the latter of which does not even mention *Swiss American*.

[8] Plaintiff contends that *Sam L. Major Jewelers v. ABX Inc.*, 117 F.3d 922 (5th Cir. 1997), is inapposite because the Fifth Circuit affirmed removal on a "narrow" ground based on the "historical availability of [a federal] common law remedy." Resp.Br.22-23. However, federal common law has similarly governed interstate pollution claims for over a century. *See AEP*, 567 U.S. at 421 (collecting cases).

raise[s] a stated federal issue," *id*. at 314 (emphasis added); *see also Gunn v. Minton*, 568 U.S. 251, 258 (2013) (*Grable* clarified the "special and small category" of cases "where a claim finds its origins in state rather than federal law"). *Grable* does not preclude removal where, as here, there are no "state-law claim[s]," only federal ones.[9]

Indeed, in *AEP*—decided several years after *Grable*—the Supreme Court endorsed and applied *Standard Oil*'s two-step analysis. 564 U.S. at 422 ("Recognition that a subject is meet for federal law governance … does not necessarily mean that federal courts should create the controlling law."). In doing so, it noted that *Standard Oil* "h[e]ld[] that federal law determines whether [the] Government could secure indemnity" from the defendant "but declin[ed] to impose such an indemnity absent action by Congress." *Id.* Nothing in *Grable* undermines *Standard Oil* and *Swiss American*.

2. The Source of Law Governing Plaintiff's Claims Is Federal

In answering *Standard Oil*'s dispositive "source" question, the "strength of the relevant federal interest" is the "key determinant." *Swiss American*, 191 F.3d at

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[9] *Grable* did not disturb the Ninth Circuit's decision in *New SD, Inc. v. Rockwell Int'l Corp.*, 79 F.3d 953 (9th Cir. 1996), which affirmed removal of claims nominally pleaded under state law. *See Caltex Plastics, Inc. v. Lockheed Martin Corp.*, 824 F.3d 1156, 1159-60 (9th Cir. 2016) (citing *New SD* for the proposition that, "[o]ccasionally, a 'federal interest [is] so dominant'" that state law cannot apply and the court must apply a "uniform rule of decision" "governed by federal common law").

44. Because Plaintiff alleges injuries resulting from interstate (and international) greenhouse-gas emissions, the federal interest underpinning federal jurisdiction "ha[s] multiple dimensions," *id.*, including the federal government's interest in resolving interstate disputes, setting national energy and environmental policy, protecting national security, and engaging in foreign relations. *See* AOB.19-26. The Court need not evaluate the strength of these interests individually, however, because the Supreme Court has repeatedly held that where "we deal with air and water in their ambient or interstate aspects there is a federal common law." *Milwaukee I*, 406 U.S. at 103; *AEP*, 564 U.S. at 421 ("[T]he basic scheme of the Constitution" requires application of federal law to "[e]nvironmental protection" involving "air and water in their ambient and interstate aspects"); *Ouellette*, 479 U.S. at 488 (interstate pollution "is a matter of federal, not state, law").[10]

In other words, the interstate nature of claims traversing state boundaries to out-of-state sources—and principles of federalism—means that federal law necessarily must be the source for such claims and state law cannot be applied. *See Milwaukee I*, 406 U.S. at 105 n.6 ("[W]here there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests

[10] For this reason, Plaintiff's assertion that *Milwaukee* and *Ouellette* are distinguishable because there were *other* grounds for removal in those cases is beside the point. Resp.Br.25. The Supreme Court in both cases confirmed that interstate pollution claims like this one *necessarily* arise under federal common law.

of federalism, we have fashioned federal common law."). Because state law cannot govern interstate pollution torts, the well-pleaded complaint rule does not save Plaintiff's causes of action. *See Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (noting that in certain cases "our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control."). A claim is not well-pleaded under state law where its very nature goes beyond the authority of the state to regulate.

Plaintiff contends that state law applies here because its claims are not based on interstate pollution, but "on Defendants' tortious failures to warn and campaigns of deception and denial, which are within the several states' traditional authority to police." Resp.Br.28 n.24. But the gravamen of Plaintiff's claims is that Defendants should be held liable for the effects of global warming caused by others' *emissions* of fossil fuels extracted, produced, marketed, and sold by Defendants. JA.23 ¶1; JA.70 ¶97-98; JA.138 ¶229(a), (b); JA.141 ¶232(e). Indeed, Plaintiff's Complaint uses the word "emissions" 124 times, seeking to quantify "*CO_2 and methane pollution* attributable to Defendants by and through their fossil fuel products," as well as the changes in "ambient air and ocean temperature, sea level, and hydrologic cycle responses *to those emissions*." JA.70 ¶98 (emphasis added). Having alleged that

Defendants "are responsible" for climate change because they contributed to greenhouse-gas emissions by extracting, producing, and selling fossil fuels, Plaintiff cannot now argue that the claims turn exclusively on Defendants' public-relations campaigns.

The overriding, uniquely federal interests at stake are not diminished by the fact that Rhode Island, like every other state, has a "legitimate interest in combatting the adverse effects of climate change" on its residents. Resp.Br.28 n.24. The Clean Air Act ("CAA") authorizes states to enact more stringent regulations, but only on *in-state* emissions. *See Am. Fuel & Petrochemical Mfrs. v. O'Keefe*, 903 F.3d 903, 912 (9th Cir. 2018) (upholding Oregon statute that sought to "reduce *Oregon's contribution* to the global levels of greenhouse gas emissions and the impacts of those emissions in Oregon") (emphasis added); *Merrick v. Diageo Americas Supply, Inc*., 805 F.3d 685, 686 (6th Cir. 2015).[11]

To say that federal common law provides the source of a claim is not to say that it provides a "preemption" defense. *See* JA.426 n.2 (citing *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988), for the proposition that "federal common law"

[11] *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1324 (5th Cir. 1985) (en banc), and *In re Agent Orange Products Liability Litigation*, 635 F.2d 987, 994 (2d Cir. 1980), are inapposite because neither case involved pollution at all—they were personal-injury cases based on harms from exposure to inherently dangerous products.

may preempt state law in the "ordinary sense"); Resp.Br.21. As this Court clarified in *Swiss American*, "*Boyle* does not suggest any refinement in the framing of the source question" or "counsel abandonment of the archetypical two-part [*Standard Oil*] framework." 191 F.3d at 44 n.6. "As long as the source of the rule to be applied is federal," the "case is one 'arising under' federal law." *Id.* at 45.

3. The CAA's Displacement of Federal Common Law Is Irrelevant.

Plaintiff contends that federal common law cannot support removal because the Supreme Court held in *AEP* that the CAA has displaced federal common law with respect to claims like these. Resp.Br.26-28. That argument fails because it ignores the distinction between the "source" question and the "substance" question. *Swiss American*, 191 F.3d at 44 n.6. Because removal "turns on the resolution of the source question," the Court's inquiry "ends" "if the appropriate legal source is federal," "regardless of what the answer to the substance question eventually may prove to be." *Id.* at 44-45. Indeed, as *Standard Oil* makes clear, federal common law governs claims dealing with "essentially federal matters," *even if* there is no federal common law remedy. 332 U.S. at 305, 315; *see also* AOB.27-29.

Moreover, far from throwing open the floodgates to state-law claims addressing interstate pollution, Resp.Br.26, the Court in *AEP* remanded for the lower court to consider whether a federal statute authorized suits under "the law of each State where the defendants operate power plants." *See* AOB.29-30. Plaintiff has not even

attempted to plead such claims—nor could it, given the inherently global nature of its claims.

To be sure, Plaintiff's claims are doomed to fail on the merits in light of *Milwaukee I*, *Ouellette*, and *AEP*, but that question is not at issue yet. At this stage of the proceedings, where the Court must confront only whether Plaintiff's claims "arise under" federal law, only the source question is relevant.

C. Plaintiff's Claims Are Removable Under *Grable*.

Even if Plaintiff's claims were grounded in state law, rather than federal law, removal still would be proper under *Grable*. By styling this as a nuisance action, Plaintiff asks a court to rule that the amount of oil and gas produced by Defendants, and the emissions resulting from others' combustion of those products, are unreasonable. That determination necessarily raises substantial and disputed federal questions that have already been answered by the EPA.

First, the question whether Defendants' conduct was unreasonable "necessarily raise[s]" an "actually disputed" federal question. AOB.31-37. Plaintiff's contention that "no claim turns on federal law as an essential element to establish the right to relief," Resp.Br.31, is belied by its own Complaint. Plaintiff alleges that Defendants' conduct is a public nuisance because it "is extremely grave and outweighs [its] social utility." JA.140 ¶232. And crucially, Plaintiff suggests that "[t]he harms and benefits of Defendants' conduct can be balanced in part by weighing the

social benefit of extracting and burning a unit of fossil fuel against the costs that a unit of fuel imposes on society, known as the 'social cost of carbon' or 'SCC,'" JA.111-12 ¶184—a measure developed by *federal* agencies and, at least for now, applied by them in evaluating *federal* regulations, *see* AOB.32.

Second, this federal issue is substantial. Notwithstanding Plaintiff's insistence that no "federal program, agency, or service … would be affected by a judgment in the State's favor," Resp.Br.36, Plaintiff's action threatens to vitiate federal regulation of carbon emissions, supersede federal determinations regarding the measures necessary to ameliorate the encroachment of navigable waters along the coastline, and neuter the Executive Branch's ability to effectively negotiate for a comprehensive, global solution to climate change.

Third, resolution of Plaintiff's claims in federal court will not disrupt the federal-state balance approved by Congress. Plaintiff argues that this criterion "favors state court jurisdiction here" because its claims "come[] within traditional state police power, firmly within the authority of the state courts to resolve." AOB.37. But this gets the analysis backward. The question is not whether a *state court* can decide the question—*Grable* cases always present state-law causes of action that state courts have authority to resolve—but whether a *federal court* can do so without "attract[ing] a horde of original filings and removal cases to federal courts." *R.I. Fisherman's Alliance, Inc. v. R.I. Dep't of Envtl. Mgmt.*, 585 F.3d 42, 52 (1st Cir. 2009).

"[E]xtending federal jurisdiction" to a case like this one will *not* "permit a seismic shift in tort litigation from state to federal courts." *Id.* This is no "'[g]arden variety state tort action[] involving federally regulated products,'" Resp.Br.37; it presents novel claims of "breathtaking" scope, *City of Oakland v. BP P.L.C.*, 325 F.Supp.3d 1017, 1022 (N.D. Cal. 2018).

Indeed, no such climate-change tort has ever been recognized by any court, anywhere; in fact, courts have repeatedly rejected them. *See, e.g.*, *AEP*, 564 U.S. at 428-29.

D. This Action Is Removable Because the Claims Arise Out of Operations on the Outer Continental Shelf.

OCSLA provides a "broad jurisdictional grant" and, because Plaintiff's claims arise out of the "exploration and production of minerals" on the OCS, this is "not ... a challenging case" for "removal jurisdiction[] under OCSLA." *In re Deepwater Horizon*, 745 F.3d 157, 163-64 (5th Cir. 2014).

Plaintiff's argument that OCSLA does not support removal because Defendants' activities on the OCS were not the "but-for" cause of its alleged injuries, Resp.Br.43-44, conflicts with its own theory of causation—that, although Defendants allegedly account for only a small percentage of worldwide, historical production and promotion of fossil fuels, Plaintiff would not have been injured "[b]ut for Defendants' conduct." JA.136 ¶223. Under that theory (which Defendants dispute), Plaintiff cannot claim that Defendants' substantial OCS production—comprising up

to one-third of domestic production in some years—is *not* a but-for cause of its alleged injuries.

Although Plaintiff asserts that its claims "stem from Defendants' prevarications about the known dangers of their products," Resp.Br.43, its Complaint puts Defendants' extraction activities squarely at issue by alleging that Defendants are responsible for the "massive increase in the *extraction* and consumption" of fossil fuels. JA.23 ¶1 (emphasis added); *see also* JA.24 ¶3, JA.26 ¶10; JA.29 ¶19; JA.56 ¶49; JA.70-71 ¶98; JA.71 ¶103; JA.112 ¶186. Plaintiff cannot dispute that a substantial portion of that extraction occurred on the OCS. *See supra*, §I.

Removal is also proper because the relief sought would discourage OCS production and "impair the total recovery of the federally-owned minerals from the [OCS]." *Amoco Prod. Co. v. Sea Robin Pipeline Co.*, 844 F.2d 1202, 1210 (5th Cir. 1988). A ruling deeming fossil-fuel production a public nuisance—or labeling fossil fuels defective products—would have precisely that effect.

E. There Are Numerous Other Bases for Federal Jurisdiction.

Federal Enclave Jurisdiction. Plaintiff asserts that federal enclave jurisdiction does not exist because Defendants' alleged torts were not "complete[d]" on federal enclaves. Resp.Br.44-45. Even if this were the correct standard (it is not), Defendants satisfy it because much of their production and sale of fossil fuels was "completed" on federal enclaves.

Complete Preemption. The CAA so comprehensively regulates interstate air pollution that it "transmogrifies [Plaintiff's] claim[s] purportedly arising under state law into … claim[s] arising under federal law." *Lawless v. Steward Health Care Sys., LLC*, 894 F.3d 9, 17-18 (1st Cir. 2018).

Although the CAA allows states to "enforce … any standard or limitation respecting emissions of air pollutants," 42 U.S.C. §7416, it does not allow states to apply such standards to *out-of-state sources*, as Plaintiff seeks to do here. Resp.Br.39-40; *see also Ouellette*, 479 U.S. at 493-94. And although the citizen-suits provision notes that the CAA does not "restrict any right … to seek enforcement of any emission standard," 42 U.S.C. §7604(e), state common law has never governed interstate pollution claims, AOB.19-22, 51-52. Indeed, although the Clean Water Act contains materially identical clauses, the Supreme Court in *Ouellette* held that it permitted suits only under the law of the state where the polluter was located. *Ouellette*, 479 U.S. at 493-94 (rejecting the position that "this language … compel[led] the inference that Congress intended to preserve the right to bring suit under the law of any affected State").

Plaintiff complains that the CAA does not provide a substitute cause of action, Resp.Br.40-41, but the "the federal claim need not be co-extensive with the ousted state claim. On the contrary, the superseding federal scheme may be more limited or different in its scope and still completely preempt." *Fayard v. Ne. Vehicle Servs.,*

LLC, 533 F.3d 42, 46 (1st Cir. 2008); *cf. AEP*, 564 U.S. at 426 (rejecting federal common law climate-change tort claim as displaced by the CAA even though the statute provided different and narrower remedies). Here, the CAA authorizes Plaintiff to petition the EPA for stricter emissions standards and provides a cause of action to challenge existing standards, 42 U.S.C. §7607(b), and violations of those standards, *id.* §7604(a)(1).

Bankruptcy Removal. There is a "close nexus" between Plaintiff's claims and several confirmed bankruptcy plans, including Texaco's.[12] JA.53-54 ¶¶113-15. Although Texaco's bankruptcy plan has consummated, Plaintiff's claims target fossil-fuel related activities "since the Second World War." JA.24 ¶4.

The police-power exception does not bar removal, Resp.Br.45, because Plaintiff does not seek to "effectuate [any] public policy," *City & Cty. of San Francisco v. PG&E Corp.*, 433 F.3d 1115, 1125, 1124 n.9 (9th Cir. 2006); *see also McMuller v. McMuller*, 386 F.3d 320, 325 (1st Cir. 2004), but rather asserts a "private right[],"

[12] Plaintiff misleadingly quotes *In re Boston Regional Medical Center, Inc.*, 410 F.3d 100, 106 (1st Cir. 2005), for the proposition that "*[a]fter* confirmation, 'related to' jurisdiction 'narrows dramatically' and requires that claims have a 'particularly close nexus' to the plan." Resp.Br.47. This was an *argument* presented by a party, which the court rejected because, "[o]n its face, section 1334 does not distinguish between pre-confirmation and post-confirmation jurisdiction." 410 F.3d at 106.

as evidenced by the fact that it seeks compensatory damages and disgorgement, JA.162.

Admiralty. Plaintiff relies on *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985), for the proposition that oil-and-gas production is not "'maritime activity.'" Resp.Br.50. But *Herb's Welding* addressed only work on *fixed* offshore platforms, 470 U.S. at 421, not the *floating* rigs at issue here, which courts have considered maritime activity, *see, e.g.*, *In re Crescent Energy Servs.*, 896 F.3d 350, 356 (5th Cir. 2018).[13]

Plaintiff also claims the "saving-to-suitors" clause "prohibit[s] removal solely on the basis of admiralty jurisdiction," Resp.Br. 48, but that provision "does no more than preserve the right of maritime suitors to pursue nonmaritime *remedies*," *Tenn. Gas Pipeline v. Houston Cas. Ins. Co.*, 87 F.3d 150, 153 (5th Cir. 1996). While an older version of 28 U.S.C. §1441(b) had been interpreted to prohibit removal "absent some independent jurisdictional basis," Resp.Br.48, the Venue Clarification Act of 2011 eliminated that requirement, *see* AOB.55.

CONCLUSION

This Court should reverse the district court's remand order.

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[13] Plaintiff asserts that *Barker v. Hercules Offshore, Inc.* conceded offshore drilling is not maritime commerce, Resp.Br.50, but that section of the opinion did not command a majority, *see* 713 F.3d 208, 211 & n.* (5th Cir. 2013).

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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 6,484 words. This certificate was prepared in reliance on the word-count function of the word-processing system used to prepare this brief.

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CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First 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.

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