

No. 21-8005

**In the United States Court of Appeals
for the Eighth Circuit**

AMERICAN PETROLEUM INSTITUTE; EXXON MOBIL
CORPORATION; EXXONMOBIL OIL CORPORATION;
KOCH INDUSTRIES, INC.; FLINT HILLS RESOURCES LP;
AND FLINT HILLS RESOURCES PINE BEND, LLC,
PETITIONERS

v.

STATE OF MINNESOTA, RESPONDENT

RECEIVED
APR 13 2021
U.S. Court of Appeals
Eighth Circuit-St. Paul, MN

*ON PETITION FOR PERMISSION TO APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA (CIV. NO. 20-1636)
(THE HONORABLE JOHN R. TUNHEIM, C.J.)*

**PETITION FOR PERMISSION TO APPEAL
PURSUANT TO THE CLASS ACTION FAIRNESS ACT**

STEPHEN A. SWEDLOW
QUINN EMANUEL LLP
191 North Wacker Drive,
Suite 2700
Chicago, IL 60606

WILLIAM A. BURCK
QUINN EMANUEL LLP
1300 I Street, N.W., Suite 900
Washington, D.C. 20005

THOMAS H. BOYD
WINTHROP & WEINSTINE, P.A.
225 South Sixth Street,
Suite 3500 Cappella Tower
Minneapolis, MN 554029

KANNON K. SHANMUGAM
JUSTIN ANDERSON
WILLIAM T. MARKS
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com

THEODORE V. WELLS, JR.
DANIEL J. TOAL
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019

FILED

APR 13 2021

U.S. Court of Appeals
Eighth Circuit-St. Paul, MN

CORPORATE DISCLOSURE STATEMENT

Petitioner American Petroleum Institute has no parent corporation, and no publicly held company owns 10% or more of its stock.

Petitioner Exxon Mobil Corporation has no parent corporation, and no publicly held company owns 10% or more of its stock.

Petitioner ExxonMobil Oil Corporation is a wholly owned indirect subsidiary of petitioner Exxon Mobil Corporation.

Petitioner Koch Industries, Inc., is privately held, and no publicly held company owns 10% or more of its stock.

Petitioner Flint Hills Resources LP is a privately held affiliate of Koch Industries, Inc., and no publicly held company owns 10% or more of its stock.

Petitioner Flint Hills Resources Pine Bend, LLC, is a privately held affiliate of Koch Industries, Inc., and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

| | Page |
|--|------|
| Introduction..... | 1 |
| Questions presented | 2 |
| Statement of facts | 2 |
| Relief sought..... | 6 |
| Reasons for granting the petition..... | 6 |
| A. The CAFA question warrants review..... | 7 |
| 1. The CAFA question is novel and important..... | 7 |
| 2. The decision below is incorrect | 10 |
| B. The federal-common-law question warrants review..... | 12 |
| C. The <i>Grable</i> question warrants review | 18 |
| D. The balance of harms and procedural posture favors review..... | 21 |
| Conclusion..... | 22 |
| Appendix | |

TABLE OF AUTHORITIES

CASES

| | |
|---|--------|
| <i>Addison Automatics, Inc. v. Hartford Casualty Insurance Co.</i> , 731 F.3d 740 (7th Cir. 2013)..... | 10, 11 |
| <i>American Electric Power Co. v. Connecticut</i> , 564 U.S. 410 (2011) | 14 |
| <i>American Insurance Association v. Garamendi</i> , 539 U.S. 396 (2003)..... | 20 |
| <i>Battle v. Seibels Bruce Insurance Co.</i> , 288 F.3d 596 (4th Cir. 2002)..... | 18 |
| <i>BMW of North America v. Gore</i> , 517 U.S. 559 (1996)..... | 13 |
| <i>Board of Commissioners v. Tennessee Gas Pipeline Co.</i> , 850 F.3d 714 (5th Cir. 2017)..... | 20 |

| | Page |
|--|---------------|
| Cases—continued: | |
| <i>BP America, Inc. v. Oklahoma ex rel. Edmondson</i> , 613 F.3d 1029 (10th Cir. 2010)..... | 6, 22 |
| <i>City of Milwaukee v. Illinois</i> , 451 U.S. 304 (1981) | 13, 16 |
| <i>City of New York v. Chevron Corp.</i> , No. 18-2188, 2021 WL 1216541 (2d Cir. Apr. 1, 2021)..... | <i>passim</i> |
| <i>City of Oakland v. BP p.l.c.</i> , 960 F.3d 570 (9th Cir. 2020) | 18 |
| <i>Coleman v. Estes Express Lines, Inc.</i> , 627 F.3d 1096 (9th Cir. 2010)..... | 22 |
| <i>Dart Cherokee Basin Operating Co. v. Owens</i> , 574 U.S. 81 (2014)..... | 12 |
| <i>Dominion Energy, Inc. v. City of Warren Police & Fire Retirement System</i> , 928 F.3d 325 (4th Cir. 2019)..... | 6, 22 |
| <i>Franchise Tax Board v. Construction Laborers Vacation Trust</i> , 463 U.S. 1 (1983)..... | 17 |
| <i>George v. Omega Flex, Inc.</i> , 874 F.3d 1031 (8th Cir. 2017)..... | 7 |
| <i>Georgia v. Tennessee Copper Co.</i> , 206 U.S. 230 (1907)..... | 14 |
| <i>Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing</i> , 545 U.S. 308 (2005) | <i>passim</i> |
| <i>Great Lakes Gas Transmission LP v. Essar Steel Minnesota LLC</i> , 843 F.3d 325 (8th Cir. 2016)..... | 19 |
| <i>Hagen v. McAlpine & Co. Limited</i> , Civ. No. 14-1095, 2015 WL 321428 (D. Minn. Jan. 26, 2015) | 19 |
| <i>Hargett v. RevClaims, LLC</i> , 854 F.3d 962 (8th Cir. 2017)..... | 6 |
| <i>Illinois v. City of Milwaukee</i> , 406 U.S. 91 (1972) | 13, 14 |
| <i>Massachusetts v. EPA</i> , 549 U.S. 497 (2007) | 20 |

| | Page |
|---|--------|
| Cases—continued: | |
| <i>Mississippi ex rel. Hood v. AU Optronics Corp.</i> , 701 F.3d 796 (5th Cir. 2012), <i>rev'd on other grounds</i> , 571 U.S. 161 (2014) | 8 |
| <i>Missouri ex rel. Koster v. Portfolio Recovery Associates, Inc.</i> , 686 F. Supp. 2d 942 (E.D. Mo. 2010) | 8 |
| <i>Nessel ex rel. Michigan v. AmeriGas Partners, L.P.</i> , 954 F.3d 831 (6th Cir. 2020)..... | 9 |
| <i>National Farmers Union Insurance Cos.</i> <i>v. Crow Tribe of Indians</i> , 471 U.S. 845 (1985)..... | 13 |
| <i>Otter Tail Power Co., In re</i> , 116 F.3d 1207 (8th Cir. 1997) | 17, 18 |
| <i>Pet Quarters, Inc. v. Depository Trust & Cleaning Corp.</i> , 559 F.3d 772 (8th Cir. 2009) | 20 |
| <i>Pirozzi v. Massage Envy Franchising, LLC</i> , 938 F.3d 981 (8th Cir. 2019)..... | 7 |
| <i>PPL Montana LLC v. Montana</i> , 565 U.S. 576 (2012)..... | 13 |
| <i>Sam L. Majors Jewelers v. ABX, Inc.</i> , 117 F.3d 922 (5th Cir. 1997)..... | 18 |
| <i>Southern Pacific Co. v. Denton</i> , 146 U.S. 202 (1892) | 21 |
| <i>Texas Industries, Inc. v. Radcliff Materials, Inc.</i> , 451 U.S. 630 (1981) | 13 |
| <i>Treiber & Straub, Inc. v. UPS, Inc.</i> , 474 F.3d 379 (7th Cir. 2007)..... | 18 |
| <i>Washington v. Chimei Innolux Corp.</i> , 659 F.3d 842 (9th Cir. 2011)..... | 9 |
| <i>West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.</i> , 646 F.3d 169 (4th Cir. 2011)..... | 9 |
| <i>Williams v. Employees Mutual Casualty Co.</i> , 845 F.3d 891 (8th Cir. 2017)..... | 11, 12 |

Case—continued:

Wullschleger v. Royal Canin U.S.A., Inc., 953 F.3d 519 (8th Cir. 2020).....7

STATUTES AND RULE

Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4.....*passim*

28 U.S.C. § 1332(d)(1)(B)2, 3, 10

28 U.S.C. § 1332(d)(2).....12

28 U.S.C. § 1453(c)(1)6

28 U.S.C. § 1711 note.....9, 22

28 U.S.C. § 12911

28 U.S.C. § 13314, 13, 16

28 U.S.C. § 1332(a).....4

28 U.S.C. § 1441(a).....13, 16

28 U.S.C. § 14424

28 U.S.C. § 1447(d).....1

42 U.S.C. § 7401(c)19

43 U.S.C. § 1349(b)(1)4

Fed. R. Civ. P. 2310, 12

Minn. Stat. § 8.31*passim*

Minn. Stat. § 8.31(2c)8

MISCELLANEOUS

Black's Law Dictionary (8th ed. 2004).....10

151 Cong. Rec. 1810 (Feb. 9, 2005)9

| | |
|---|--------|
| | Page |
| Miscellaneous—continued: | |
| Alba Conte & Herbert B. Newberg, <i>Newberg on Class Actions</i> (4th ed. 2002)..... | 10, 12 |
| Jacob Durling, Note, <i>Waltzing Through A Loophole: How Parens Patriae Suits Allow Circumvention of the Class Action Fairness Act,</i> 83 U. Colo. L. Rev. 549 (2012) | 10 |
| S. Rep. No. 109-14 (2005) | 11 |

INTRODUCTION

Pursuant to the Class Action Fairness Act (CAFA), petitioners file this petition for permission to appeal the order of the district court dated March 31, 2021, remanding this case to Minnesota state court. Petitioners have separately filed a notice of appeal from that order, and the appeal has been docketed as No. 21-1752. It is petitioners' position that the Court has jurisdiction in that appeal to review all of the grounds for removal asserted in the notice of removal, an issue now pending before the Supreme Court. *See* 28 U.S.C. §§ 1291, 1447(d); *BP p.l.c. v. Mayor & City Council of Baltimore*, No. 19-1189 (argued Jan. 19, 2021). Petitioners file this petition as a protective matter and request that the Court hold it in abeyance pending resolution of the appeal in No. 21-1752.

If the Court concludes that it lacks jurisdiction in No. 21-1752 to review the grounds for removal presented here, this petition should be granted. The first question presented is whether an action by the Minnesota Attorney General under Section 8.31 of the Minnesota Statutes on behalf of all Minnesota residents and fossil-fuel consumers qualifies as a "class action" under CAFA. That question is an important one that remains open in this circuit, and the district court's resolution of that question was erroneous. The petition also presents two additional questions: whether the Attorney General's claims were removable because they are necessarily governed by federal common

law, and whether the claims were removable under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005). Review of each of the questions is warranted; the balance of harms favors petitioners; and there is no impediment to review. The Court should therefore grant the petition if necessary and reverse the remand order of the district court.

QUESTIONS PRESENTED

1. Whether an action filed by the Minnesota Attorney General under Section 8.31 of the Minnesota Statutes on behalf of all Minnesota residents and fossil-fuel consumers qualifies as a “class action” under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(1)(B).

2. Whether putative state-law tort claims alleging harms from global climate change are removable because they arise under federal law.

3. Whether the Attorney General’s claims are removable under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), because they raise disputed and substantial federal issues.

STATEMENT OF THE FACTS

1. Plaintiff-respondent is the State of Minnesota, represented by its Attorney General. D. Ct. Dkt. 1-1, at 4 (Compl.). Defendants-petitioners are the American Petroleum Institute; Exxon Mobil Corporation; ExxonMobil Oil

Corporation; Koch Industries, Inc.; Flint Hills Resources LP; and Flint Hills Resources Pine Bend, LLC. *Id.* at 5-7.

In June 2020, the Attorney General filed a complaint against petitioners in Minnesota state court purportedly for violations of state consumer-protection statutes, failure to warn, and common-law negligence and fraud. Compl. 73-82. The complaint alleges that petitioners' production, sale, and promotion of fossil fuels have contributed to climate change and caused wide-ranging harm to Minnesota, its citizens, and fossil-fuel consumers. Compl. 3-4, 57-73. The Attorney General seeks damages, restitution, and injunctive relief. Compl. 76-77. The Attorney General invokes the State's *parens patriae* authority and Section 8.31 of the Minnesota Statutes, which authorizes him to file a civil action to enforce certain state laws and distribute any recovery to consumers. Compl. 77.

2. Petitioners removed this action to federal court. *See* D. Ct. Dkt. 1. One ground for removal was the Class Action Fairness Act. *Id.* at 50-54. Petitioners argued that CAFA's definition of "class action" includes actions brought under a "[s]tate statute" that authorized "an action to be brought by 1 or more representative persons as a class action," 28 U.S.C. § 1332(d)(1)(B), and that the Attorney General was purporting to proceed on behalf of a class of similarly situated residents and consumers purportedly injured by a common cause. *See* D. Ct. Dkt. 1, at 51-52. Petitioners alleged that the parties

were minimally diverse, the requisite class size was present, and the \$5 million amount-in-controversy requirement was satisfied. *See id.* at 52-54.

Petitioners also asserted that the district court had federal-question jurisdiction because federal common law necessarily governed the Attorney General's claims. *See* D. Ct. Dkt. 1, at 13-21; 28 U.S.C. § 1331. Petitioners explained that the claims implicated three uniquely federal interests that require the application of federal common law: namely, transboundary pollution, navigable waters of the United States, and international affairs and commerce. *Id.* at 13. While the Attorney General styled his complaint as alleging only state-law claims, petitioners contended that he could not plead around the complaint's focus on climate-change-related harms. *Id.*

Petitioners further argued that the claims necessarily raised disputed federal issues and thus were removable under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 314 (2005). *See* D. Ct. Dkt. 1, at 22. Petitioners raised other grounds for removal, including the federal-officer removal statute, 28 U.S.C. § 1442; the Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(b)(1); and diversity jurisdiction, 28 U.S.C. § 1332(a). *See* D. Ct. Dkt. 1, at 12.

The Attorney General moved to remand the case to state court. *See* D. Ct. Dkt. 32. With respect to the CAFA ground for removal, the Attorney General conceded that its action involved “fundamental attributes of a consumer

class action” in certain “key respects.” D. Ct. Dkt. 35, at 27-28. But it nevertheless argued that the action was not a “class action” for purposes of CAFA. *See id.* The Attorney General also contended that, even though it sought damages from the effects of global climate change, its complaint has no relationship to transboundary pollution. *See id.* at 22. The Attorney General further argued that the case did not necessarily implicate any federal issues. *See id.* at 16.

3. The district court granted the motion to remand. App., *infra*, 1a. Relying primarily on out-of-circuit authority, the court held that an action under Section 8.31 does not qualify as a “class action” under CAFA because the court was aware of “no state statute or procedural rule that would classify a suit of this nature as a class action.” *Id.* at 31a. The court also rejected the federal-common-law ground for removal, concluding both that nothing in the complaint implicated federal common law and that claims governed exclusively by federal common law are not removable to federal court. *See id.* at 12a-16a. The court further rejected removal under *Grable* and the other asserted grounds. *See id.* at 17a-30a, 32a-33a.

4. Petitioners filed a timely notice of appeal on April 1, 2021. D. Ct. Dkt. 81. A motion to stay the remand order is pending before the district court. D. Ct. Dkt. 87.

RELIEF SOUGHT

The petition for permission to appeal should be granted, and the order remanding the case to Minnesota state court should be reversed.

REASONS FOR GRANTING THE PETITION

CAFA authorizes a court of appeals to review an order granting or denying a motion to remand a class action. 28 U.S.C. § 1453(c)(1). When deciding whether to grant review under CAFA, courts consider factors such as whether the petition for permission to appeal presents a novel and important question; whether the district court's decision was incorrect or at least "fairly debatable"; whether the balance of harms supports granting review, including whether post-judgment review is available; and whether there is any impediment to review, such as the need for additional factual development. *See, e.g., Dominion Energy, Inc. v. City of Warren Police & Fire Retirement System*, 928 F.3d 325, 334 (4th Cir. 2019). Those factors, however, are not "rigid rules"; the decision whether to grant review is ultimately "committed to the informed discretion of the reviewing court." *BP America, Inc. v. Oklahoma ex rel. Edmondson*, 613 F.3d 1029, 1035 (10th Cir. 2010).

This Court has granted a variety of petitions for permission to appeal under CAFA. In addition to petitions presenting only "novel and important CAFA issue[s]," *Hargett v. RevClaims, LLC*, 854 F.3d 962, 965 (2017), the Court has granted CAFA petitions also presenting questions such as whether a district court had federal-question jurisdiction and whether the plaintiffs had

Article III standing—even when declining to accept the CAFA-related questions presented. *See, e.g., Wullschleger v. Royal Canin U.S.A., Inc.*, 953 F.3d 519, 520 (2020); *George v. Omega Flex, Inc.*, 874 F.3d 1031, 1032 (2017) (per curiam). Here, the relevant considerations weigh strongly in favor of review of each of the questions presented.

A. The CAFA Question Warrants Review

Review is warranted to resolve the question whether a civil action filed by the Attorney General under Section 8.31 of the Minnesota Statutes on behalf of all Minnesota residents and fossil-fuel consumers qualifies as a “class action” for purposes of CAFA.

1. The CAFA Question Is Novel And Important

One of CAFA’s “primary purpose[s]” was to “open the federal courts to corporate defendants” to avoid damage to the “national economy” from the “proliferation of meritless class action suits.” *Pirozzi v. Massage Envy Franchising, LLC*, 938 F.3d 981, 983 (8th Cir. 2019). This lawsuit directly implicates that concern. The Attorney General is attempting to use its statutory enforcement power to bring an action on behalf of all Minnesota residents and fossil-fuel consumers to recover from a handful of domestic companies damages for alleged harms caused by global climate change. *See, e.g.*, Compl. 73-74, 78-79, 81. Among other relief, the Attorney General seeks restitution,

which by statute it must attempt to distribute to all “injured persons.” Minn. Stat. § 8.31(2c); *see* Compl. 83.

The Attorney General is thus attempting to aggregate the claims of Minnesota residents into a functional class action—all in an attempt to influence national climate policy. And the Attorney General is not alone: nearly two dozen state attorneys general and municipalities have attempted to use their state enforcement powers to the same effect. *See* D. Ct. Dkt. 1, at 2-11. The question here is whether the Attorney General’s attempt to use his statutory enforcement powers in that way renders this action a “class action” for purposes of CAFA.

Eleven years ago, the Eastern District of Missouri observed that there was “no controlling law from the Supreme Court or Eighth Circuit” on the question whether civil actions prosecuted by a state attorney general qualify as class actions under CAFA. *Missouri ex rel. Koster v. Portfolio Recovery Associates, Inc.*, 686 F. Supp. 2d 942, 944 (2010). That remains true today.

Other courts of appeals have considered similar questions sufficiently important to warrant review of remand orders under CAFA. Both the Fifth and Sixth Circuits have granted CAFA petitions seeking review of whether an action by a state attorney general under a state consumer-protection statute qualified as a class action. *See Mississippi ex rel. Hood v. AU Optronics Corp.*, 701 F.3d 796, 799 (5th Cir. 2012), *rev’d on other grounds*, 571 U.S. 161 (2014);

Nessel ex rel. Michigan v. AmeriGas Partners, L.P., 954 F.3d 831, 833-834 (6th Cir. 2020). Other courts of appeals have granted review to address the distinct question of whether a *parens patriae* action qualifies as a class action under CAFA. *See Washington v. Chimei Innolux Corp.*, 659 F.3d 842 (9th Cir. 2011); *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169 (4th Cir. 2011).¹

The question presented is important and novel. To prevent removal of this suit from federal court would result in the problem of climate change—“a uniquely international problem of national concern” that “is simply beyond the limits of state law,” *see City of New York v. Chevron Corp.*, No. 18-2188, 2021 WL 1216541, at *1, *6 (2d Cir. Apr. 1, 2021)—being litigated in state court, in direct contravention of CAFA’s purpose of ensuring that cases of “national importance” are removable to federal court. *See* 28 U.S.C. § 1711 note (congressional finding 4(A)). Indeed, in voting against a failed amendment to exempt actions by state attorneys general from CAFA, one of CAFA’s sponsors cautioned against “creating a situation where [s]tate attorneys general can be used as pawns so that crafty class action lawyers can avoid [CAFA’s] jurisdictional provisions.” 151 Cong. Rec. 1810-1811 (Feb. 9, 2005) (Senator Grassley). The pursuit by the plaintiff’s attorneys here of damages awards in state court

¹ Notably, many of those decisions postdate this Court’s denial of review under CAFA in *Missouri v. Portfolio Recovery Associates, Inc.*, No. 10-8007 (Mar. 30, 2010), showing the increasing importance of the question.

in over 20 climate-change cases—including three cases brought on behalf of States—“should raise red flags” that “jurisdictional gamesmanship is afoot.” Jacob Durling, Note, *Waltzing Through A Loophole: How Parens Patriae Suits Allow Circumvention of the Class Action Fairness Act*, 83 U. Colo. L. Rev. 549 (2012). The Court’s review is warranted.

2. The Decision Below Is Incorrect

The district court erred in holding that this action does not constitute a “class action” under CAFA. App., *infra*, 30a-32a.

a. CAFA defines the phrase “class action” to mean “any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar [s]tate statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action.” 28 U.S.C. § 1332(d)(1)(B). The ordinary meaning of “class action” is a “lawsuit in which the court authorizes a single person or a small group of people to represent the interests of a larger group.” *Black’s Law Dictionary* 267 (8th ed. 2004); accord Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 1.1, at 2 (4th ed. 2002) (Newberg).

Courts have interpreted CAFA to preclude plaintiffs from thwarting removal of a lawsuit that is “in substance a class action” by “disguis[ing] the true nature” of the suit. *Addison Automatics, Inc. v. Hartford Casualty Insurance*

Co., 731 F.3d 740, 742 (7th Cir. 2013); *see Williams v. Employees Mutual Casualty Co.*, 845 F.3d 891, 901 (8th Cir. 2017). As this Court has explained, courts should not “prioritize a complaint’s use of magic words over its factual allegations” when determining whether an action constitutes a “class action” under CAFA. *Williams*, 845 F.3d at 901. That approach comports with CAFA’s legislative history, which indicates that the definition of “class action” should be “interpreted liberally” to include not only lawsuits that are “labeled” as class actions but also lawsuits that “resemble” one. S. Rep. No. 109-14, at 35 (2005).

This lawsuit is “in substance” a class action. *Addison Automatics*, 731 F.3d at 742. Indeed, the Attorney General concedes that this action contains the “fundamental attributes of a consumer class action” in “key respects.” D. Ct. Dkt. 35, at 27-28. The Complaint asserts claims on behalf of all Minnesota residents and fossil-fuel consumers. *See, e.g.*, Compl. 73-74, 77, 79. The Attorney General’s central theory is that petitioners “conspir[ed] to deceive consumers” about the alleged certainty of climate change and failed to “warn[] consumers” of alleged harms associated with certain of petitioners’ products. *Id.* at 75-76. In addition, the explicit purpose of this action is to recover the costs of alleged climate-change injuries on behalf of Minnesota’s citizens and fossil-fuel consumers—costs that Section 8.31 requires the Attorney General to attempt to distribute to those individuals. *See id.* at 3, 83. By suing in a representative capacity on behalf of Minnesota’s residents and consumers to

obtain relief on their behalf, the Attorney General has chosen to bring what is in substance a class action: a “representative suit[] on behalf of [a] group[] of persons similarly situated.” Newberg § 1.1, at 2.

b. The district court rejected the CAFA ground for removal on the basis that it was aware of “no state statute or procedural rule that would classify a suit of this nature as a class action.” App., *infra*, 31a. But to remove an action under CAFA, a defendant need only show that the state statute in question is “analogous” to Federal Rule 23. *See Williams*, 845 F.3d at 901. And when the Attorney General alleges common injury to the State and all state residents, an action under Section 8.31 is analogous to an action under Federal Rule 23 in all relevant respects.

Finally, there is no dispute that the parties are minimally diverse or that the aggregate amount in controversy exceeds \$5 million. The district court thus incorrectly concluded that this action is not a class action under CAFA, and its remand order should be reversed. *See* 28 U.S.C. § 1332(d)(2); *Dart Cherokee Basin Operating Co. v. Owens*, 574 U.S. 81, 89 (2014); D. Ct. Dkt. 1, at 52-54.

B. The Federal-Common-Law Question Warrants Review

The Court should also grant review to consider the question whether putative state-law tort claims alleging harms from global climate change are removable because they arise under federal law.

1. Federal common law necessarily supplies the rule of decision for certain narrow categories of claims that implicate “uniquely federal interests,” including where “the interstate or international nature of the controversy makes it inappropriate for state law to control.” *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-641 (1981) (citation omitted). At bottom, whenever there is “an overriding federal interest in the need for a uniform rule of decision,” *Illinois v. City of Milwaukee*, 406 U.S. 91, 105 n.6 (1972) (*Milwaukee I*), “state law cannot be used,” *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 n.7 (1981) (*Milwaukee II*), and any claims necessarily arise under federal law. If the “dispositive issues stated in the complaint require the application” of a uniform rule of federal law, the action “arises under” federal law for purposes of 28 U.S.C. § 1331, *Milwaukee I*, 406 U.S. at 100, and the case is removable to federal court, *see* 28 U.S.C. § 1441(a); *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 850 (1985).

The structure of our constitutional system requires that federal law exclusively govern claims seeking redress for interstate pollution. The States are “coequal sovereigns” in our system, *PPL Montana LLC v. Montana*, 565 U.S. 576, 591 (2012), and no State may “impos[e] its regulatory policies on the entire Nation,” *BMW of North America v. Gore*, 517 U.S. 559, 585 (1996). Accordingly, for more than a century, the Supreme Court has applied uniform federal rules of decision to common-law claims seeking redress for interstate

pollution. *See, e.g., American Electric Power Co. v. Connecticut*, 564 U.S. 410, 420-423 (2011); *Milwaukee I*, 406 U.S. at 103, 107 n.9; *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907).

2. The Second Circuit’s recent precedential decision in *City of New York*, *supra*—decided on the day after the district court ordered the case to be remanded—demonstrates that federal law necessarily governs the Attorney General’s claims here.

a. In *City of New York*, the plaintiff filed a complaint in federal court against ExxonMobil and other energy companies, seeking redress for injuries allegedly caused by global climate change. As the Attorney General does here, the plaintiff in *City of New York* attempted to argue that its claims were local in nature and not based on interstate and international emissions. *See* 2021 WL 1216541, at *5; D. Ct. Dkt. 35, at 15-17.

The Second Circuit rejected that effort in a unanimous decision, explaining that the plaintiff could not use “artful pleading” to disguise its complaint as “anything other than a suit over global greenhouse gas emissions.” *City of New York*, 2021 WL 1216541, at *5. The court noted that it was “precisely *because* fossil fuels emit greenhouse gases” and thereby exacerbate climate change that the plaintiff was seeking relief. *Id.* The plaintiff could not “disavow[] any intent to address emissions,” the court reasoned, while “identifying such emissions” as the source of its harm. *Id.*

The Second Circuit then held that federal common law necessarily governed claims seeking redress for global climate change. The court began by observing that, “for over a century,” a “mostly unbroken string of cases” has applied federal law to disputes involving “interstate air or water pollution.” *City of New York*, 2021 WL 1216541, at *6. The court then explained that any suit seeking to obtain damages from energy companies for the “effects of emissions made around the globe over the past several hundred years” was far too “sprawling” for state law to govern. *Id.*

A “substantial damages award” like the one sought by the plaintiff, the Second Circuit reasoned, would “effectively regulate the [companies’] behavior far beyond” the borders of any individual State. *City of New York*, 2021 WL 1216541, at *6. To allow such an action to proceed under state law, the court added, would “upset[] the careful balance that has been struck between the prevention of global warming, a project that necessarily requires national standards and global participation, on the one hand, and energy production, economic growth, foreign policy, and national security, on the other.” *Id.* at *7.²

² The Second Circuit separately concluded that the Clean Air Act and the considerations of international comity displaced any otherwise-viable claim under federal common law. *See City of New York*, 2021 WL 1216541, at *14, *16.

b. The same reasoning applies here. The Attorney General seeks damages for injuries alleged to have been caused by global climate change: for example, flooding, damage to infrastructure, personal injuries, and damages to forests. *See* Compl. 15-16, 60-70. The Attorney General also seeks disgorgement of all profits earned by petitioners from the production and sale of fossil fuels on behalf of fossil-fuel consumers, not merely from those sales associated with the State of Minnesota. The requested relief demonstrates that this case is a “suit over global greenhouse gas emissions,” notwithstanding the Attorney General’s attempts at “artful pleading.” *City of New York*, 2021 WL 1216541, at *5.

Because federal common law necessarily governs this lawsuit, a federal district court would have original jurisdiction over the action under 28 U.S.C. § 1331. The case was thus removable to federal court. *See* 28 U.S.C. § 1441(a).³

³ The Second Circuit acknowledged decisions holding that federal common law does not support removal but did not opine on whether those decisions were correctly decided because the plaintiff had “filed suit in federal court” on diversity grounds. *City of New York*, 2021 WL 1216541, at *8. Those decisions rested on mischaracterizing defendants’ federal-common-law argument as presenting a preemption defense. Petitioners’ argument that federal common law necessarily governs the Attorney General’s claims is not based on preemption, and the Second Circuit’s rationale in disposing of the plaintiff’s claims—that they “must be brought under federal common law” because they are “federal claims”—clearly supports removal. *Id.* at *9; *see also Milwaukee II*, 451 U.S. at 313 n.7 (“[I]f federal common law exists, it is because state law cannot be used.”).

3. The district court gave two principal reasons for rejecting the federal-common-law ground for removal. Each is erroneous.

The district court first concluded that removal was not permitted because the complaint did not expressly plead a claim “related to pollution regulations or disputes between states over emissions standards.” App., *infra*, 12a-13a. But the Second Circuit’s decision in *City of New York* demonstrates why that reasoning is erroneous. As was the case in *City of New York*, “[i]t is precisely *because* fossil fuels emit greenhouse gases—which collectively exacerbate global warming—that the [Attorney General] is seeking damages.” 2021 WL 121654, at *5.

The district court also concluded that the well-pleaded complaint rule precludes removal of a claim necessarily governed by federal common law. See App., *infra*, 15a. That too is incorrect. An “independent corollary” of the well-pleaded complaint rule is that “a plaintiff may not defeat removal by omitting to plead necessary federal questions.” *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 22 (1983).

This Court’s decision in *In re Otter Tail Power Co.*, 116 F.3d 1207 (1997), is illustrative. There, the complaint “raise[d] important questions of federal law requiring interpretation of treaties, federal statutes, and the federal common law of inherent tribal sovereignty.” *Id.* at 1215. In that situation, the plaintiff’s characterization of the claim as based “solely on state law” was “not

dispositive” because the complaint “necessarily present[ed] a federal question,” making removal proper. *Id.* at 1213-1214. A number of other courts of appeals have similarly held that a claim necessarily governed by federal common law is removable to federal court. *See, e.g., Treiber & Straub, Inc. v. UPS, Inc.*, 474 F.3d 379, 387 (7th Cir. 2007); *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 926 (5th Cir. 1997); *see also, e.g., Battle v. Seibels Bruce Insurance Co.*, 288 F.3d 596, 598 (4th Cir. 2002) (permitting removal under *Grable* of a case governed in part by federal common law); *contra City of Oakland v. BP p.l.c.*, 960 F.3d 570, 577-579 (9th Cir. 2020) (declining to permit removal of a climate-change claim based on federal common law).⁴

The district court erred in rejecting petitioners’ federal-common-law ground for removal. The Court should grant review to correct that error on this important question of federal law.

C. The *Grable* Question Warrants Review

Even if the Attorney General’s claims do not necessarily arise under federal common law, they implicate important federal questions and are thus removable under *Grable & Sons Metal Products, Inc. v. Darue Engineering &*

⁴ The defendants in *City of Oakland* (including the ExxonMobil defendants here) have sought Supreme Court review of the Ninth Circuit’s decision. The petition for certiorari presents the same question presented here: namely, “whether putative state-law tort claims alleging harm from global climate change are removable because they arise under federal law.” Pet. for Cert. at i, *Chevron Corp. v. City of Oakland*, No. 20-1089.

Manufacturing, 545 U.S. 308 (2005). The district court’s contrary conclusion was erroneous.

1. Under *Grable*, federal courts have federal-question jurisdiction over a putative state-law claim that “necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.” *Great Lakes Gas Transmission LP v. Essar Steel Minnesota LLC*, 843 F.3d 325, 331 (8th Cir. 2016) (quoting *Grable*, 545 U.S. at 314). That standard is satisfied here.

In this case, a court can only impose liability on the Attorney General’s negligence and failure-to-warn claims upon finding that the product at issue—here, fossil fuels—are “unreasonably dangerous.” *Hagen v. McAlpine & Co. Limited*, Civ. No. 14-1095, 2015 WL 321428, at *5 (D. Minn. Jan. 26, 2015). Determining “[w]hether a product is unreasonably dangerous requires the balancing of several competing factors,” including “the likelihood of harm,” “the gravity of harm,” and the “burden of the precaution which would be effective to avoid the harm.” *Id.* (citation omitted). That is precisely the weighing that Congress and the Environmental Protection Agency have already addressed through legislation and national policy related to fossil-fuel production, sale, use, and combustion, as well as greenhouse-gas emissions. *See, e.g.*, 42 U.S.C. § 7401(c). Federal courts have long concluded that such collateral

attacks on federal legislative and regulatory determinations implicate federal issues for purposes of federal-question jurisdiction. *See, e.g., Board of Commissioners v. Tennessee Gas Pipeline Co.*, 850 F.3d 714, 724-725 (5th Cir. 2017); *Pet Quarters, Inc. v. Depository Trust & Cleaning Corp.*, 559 F.3d 772, 779 (8th Cir. 2009).

Federal jurisdiction over this case would also be fully “consistent with congressional judgment about the sound division of labor between state and federal courts.” *Grable*, 545 U.S. at 313. Federal courts are the traditional forums for adjudicating claims involving the federal issues implicated here: environmental regulation, regulation of vital national resources, foreign policy, and national security. *Cf., e.g., Massachusetts v. EPA*, 549 U.S. 497, 519 (2007); *American Insurance Association v. Garamendi*, 539 U.S. 396, 427 (2003).

2. The district court squarely decided only the question whether the Attorney General’s claims necessarily raise a federal issue, concluding that they do not. *See App., infra*, 17a-22a. The court concluded that it need not “supplant its judgment for Congress’s regarding the safety and use of a product” because the Attorney General’s failure-to-warn claim merely requires a balancing of the dangerousness of the product with the adequacy of any warnings. *See id.* at 20a n.4.

But one day later, the Second Circuit held that a balancing exercise like this one poses “a real risk” of “undermin[ing] important federal policy

choices.” *City of New York*, 2021 WL 1216541, at *7. Those choices are the result of a “careful balance” struck by the federal government between “the prevention of global warming” on the one hand and “energy production, economic growth, foreign policy, and national security” on the other. *Id.* Any court evaluating the Attorney General’s claims must consider and weigh these factors—factors that necessarily implicate questions of federal law. The district court thus erred in rejecting removal under *Grable*, and the Court should grant review to reverse that determination.

D. The Balance Of Harms And Procedural Posture Favors Appellate Review

The petition for permission to appeal should be granted for the additional reasons that the balance of harms favors petitioners and there is no impediment to review of the questions presented. *See* p. 6, *supra*. A defendant that has properly removed a case from state court has a “right and privilege secured” by “the [C]onstitution and laws of the United States” to proceed with the litigation in federal court. *Southern Pacific Co. v. Denton*, 146 U.S. 202, 207 (1892). If the remand order here is allowed to stand, “[t]he probability that a state court or the Supreme Court will review the federal jurisdictional question after the merits of the case have been decided is almost non-existent.” *Coleman v. Estes Express Lines, Inc.*, 627 F.3d 1096, 1101 (9th Cir. 2010). Petitioners may be additionally harmed by a denial if the Minnesota courts act with “bias against” the petitioners as “out-of-State defendants”—precisely the

type of risk that Congress sought to address when enacting CAFA. *See* 28 U.S.C. § 1711 note (congressional finding 4(B)).

Any risk of harm to the Attorney General from delay is minimal. Because (as of the filing of this petition) “no discovery has been taken” and there are “no ongoing proceedings” in the Minnesota state courts with which this Court “might interfere,” there is “relatively little concomitant probable harm” to the Attorney General. *BP*, 613 F.3d at 1035.

Finally, if this Court grants the petition, it will face no barrier to deciding any of the questions presented. Those questions are all purely legal in nature; “no additional factual development is required” for this Court to decide them. *Dominion Energy*, 928 F.3d at 335. For that reason and the others discussed above, the Court should grant review to decide each of the questions presented and reverse the district court’s remand order.

CONCLUSION

The petition for permission to appeal should be held in abeyance pending resolution of the appeal in No. 21-1752 and then granted if the Court determines that it lacks jurisdiction in that appeal over any ground for removal.

STEPHEN A. SWEDLOW
QUINN EMANUEL LLP
*191 North Wacker Drive,
Suite 2700
Chicago, IL 60606*

WILLIAM A. BURCK
QUINN EMANUEL LLP
*1300 I Street, N.W., Suite 900
Washington, D.C. 20005*

TODD NOTEBOOM
ANDREW W. DAVIS
PETER J. SCHWINGLER
STINSON LLP
*50 South Sixth Street,
Suite 2600
Minneapolis, MN 55402*

ANDREW M. LUGER
JONES DAY
*90 South Seventh Street,
Suite 4950
Minneapolis, MN 55402*

DEBRA R. BELOTT
JONES DAY
*51 Louisiana Ave., N.W.
Washington, DC 20001*

*Counsel for Appellants
Koch Industries, Inc.;
Flint Hills Resources LP; and
Flint Hills Resources Pine Bend
LLC*

APRIL 12, 2021

Respectfully submitted,

/s/ Kannon K. Shanumgam
KANNON K. SHANMUGAM
JUSTIN ANDERSON
WILLIAM T. MARKS
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
*2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com*

THEODORE V. WELLS, JR.
DANIEL J. TOAL
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
*1285 Avenue of the Americas
New York, NY 10019*

JERRY W. BLACKWELL
G. TONY ATWAL
BLACKWELL BURKE P.A.
*431 South Seventh Street,
Suite 2500
Minneapolis, MN 55415*

*Counsel for Appellants
Exxon Mobil Corporation and
ExxonMobil Oil Corporation*

BRIAN D. SCHMALZBACH
McGUIREWOODS LLP
Gateway Plaza
800 East Canal Street
Richmond, VA 23219

ANDREW G. MCBRIDE
McGUIREWOODS LLP
888 16th Street N.W., Suite 500
Washington, D.C. 20006

THOMAS H. BOYD
ERIC F. SWANSON
WINTHROP & WEINSTINE, P.A.
225 South Sixth Street,
Suite 3500 Cappella Tower
Minneapolis, MN 55402

Counsel for Appellant
American Petroleum Institute

**CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS**

I, Kannon K. Shanmugam, counsel for petitioner Exxon Mobil Corporation and ExxonMobil Oil Corporation and a member of the Bar of this Court, certify, pursuant to Federal Rules of Appellate Procedure 5(c)(1) and 32(c)(2), that the foregoing Petition for Permission to Appeal Pursuant to the Class Action Fairness Act is proportionately spaced, has a typeface of 14 points or more, and contains 5,166 words. I further certify that the electronic version of this petition and the attached appendix were automatically scanned for viruses and found to contain no known viruses.

APRIL 12, 2021

/s/ Kannon K. Shanmugam
KANNON K. SHANMUGAM

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

STATE OF MINNESOTA, *by its Attorney*
General Keith Ellison

Civil No. 20-1636 (JRT/HB)

Plaintiff,

v.

**MEMORANDUM OPINION
AND ORDER GRANTING MOTION TO
REMAND AND DENYING MOTION TO
STAY**

AMERICAN PETROLEUM INSTITUTE,
EXXON MOBIL CORPORATION,
EXXONMOBIL OIL CORPORATION, KOCH
INDUSTRIES, INC., FLINT HILLS
RESOURCES, LP, and FLINT HILLS
RESOURCES PINE BEND

Defendants.

Elizabeth C. Kramer, Leigh K. Currie, Oliver J. Larson, and Peter N. Surdo, **OFFICE OF THE MINNESOTA ATTORNEY GENERAL**, 445 Minnesota Street, Suite 1100, St. Paul, MN 55101; Matthew Kendall Edling and Victor Marc Sher, **SHER EDLING LLP**, 100 Montgomery Street, Suite 1410, San Francisco, CA 94104, for plaintiff.

Eric F. Swanson and Thomas H. Boyd, **WINTHROP & WEINSTINE PA**, 225 South Sixth Street, Suite 3500, Minneapolis, MN 55402; Andrew Gerald McBride, **MCGUIRE WOODS LLP**, 2001 K Street Northwest, Suite 400, Washington, DC 20006; and Brian David Schmalzbach, **MCGUIRE WOODS LLP**, 800 East Canal Street, Richmond, VA 23219, for defendant American Petroleum Institute.

Jerry W. Blackwell and Gurdip S. Atwal, **BLACKWELL BURKE PA**, 431 South Seventh Street, Suite 2500, Minneapolis, MN 55415; Daniel J. Toal and Theodore V. Wells, Jr., **PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP**, 1285 Avenue of the Americas, New York, NY 10019; Justin Anderson, **PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP**, 2001 K Street Northwest, Washington, DC 20006; and Patrick J. Conlon, **EXXON MOBIL**

CORPORATION, 22777 Springwoods Village Parkway, Suite N1.4B.388, Spring, TX 77389, for defendants Exxon Mobil Corporation and ExxonMobil Oil Corporation.

Michelle Schmit and Stephen Andrew Swedlow, **QUINN EMANUEL URQUHART & SULLIVAN LLP**, 191 North Wacker Drive, Suite 2700, Chicago, IL 60606; William Anthony Burck, **QUINN EMANUEL URQUHART & SULLIVAN LLP**, 1300 I Street Northwest, Suite 900, Washington, DC 20005; Andrew M. Luger, **JONES DAY**, 90 South Seventh Street, Suite 4950, Minneapolis, MN 55402; Debra Rose Belott, **JONES DAY**, 51 Louisiana Avenue Northwest, Washington, DC 20001; and Andrew W. Davis, Peter J. Schwinger, and Todd A. Noteboom, **STINSON LLP**, 50 South Sixth Street, Suite 2600, Minneapolis, MN 55402, for defendants Koch Industries, Inc., Flint Hills Resources, LP, and Flint Hills Resources Pine Bend.

Plaintiff State of Minnesota (“the State”) commenced this action in Minnesota state court against Defendants American Petroleum Institute (“API”), Exxon Mobil Corporation, ExxonMobil Oil Corporation, Koch Industries, Inc., Flint Hills Resources LP, and Flint Hills Resources Pine Bend asserting five causes of action for violations of Minnesota common law and consumer protection statutes. The State alleges that Defendants developed a widespread campaign to deceive the public about the dangers of fossil fuels and to undermine the scientific consensus linking fossil fuel emissions to climate change.

Defendants removed the action to federal court on seven independent grounds: federal common law; disputed and substantial federal issues (the *Grable* doctrine); the federal officer removal statute; the Outer Continental Shelf Lands Act; federal enclaves; the Class Action Fairness Act; and diversity. Plaintiff filed a Motion to Remand to state

court. Because Defendants have not met their burden of establishing that federal jurisdiction is warranted on any of the grounds presented, the Court will grant the State's Motion.

Defendants Koch Industries, Inc., Flint Hills Resources LP, and Flint Hills Resources Pine Bend (collectively, "FHR Defendants") have also filed a Motion to Stay to await the Supreme Court's decision in *BP p.l.c. v. Mayor & City Council of Baltimore*, No. 19-1189 (U.S.) and the Court's determination on a Petition for Certiorari in *Chevron Corporation et al. v. City of Oakland, et al.* (U.S., Jan. 8, 2021). Plaintiff opposes this motion. Because the Court finds that the *Baltimore* case is before the Supreme Court on a narrow procedural question not at issue here and the dispensation of the petition in *City of Oakland* is too speculative to warrant a stay in the instant proceedings, the Court will deny FHR Defendants' Motion to Stay.

BACKGROUND

I. FACTUAL BACKGROUND

The Attorney General brings this action pursuant to his authority under Minnesota Statutes Chapter 8 and his *parens patriae* authority under state common law. (Notice of Removal, Ex. A ("Compl.") ¶ 12, July 27, 2020, Docket No. 1-1.)

Defendant American Petroleum Institute (API) is a nonprofit corporation registered to do business in Minnesota. (*Id.* ¶ 13.) API was established in 1919 and is the country's largest oil trade association, with over 600 members. (*Id.*) Defendant Exxon

Mobil Corporation is a multinational, vertically integrated energy and chemicals company incorporated in New Jersey with a principal place of business in Irving, Texas. (*Id.* ¶ 17.) Exxon Mobil Corporation is the parent company for numerous subsidiaries and has done business as or is the successor in liability to numerous entities. (*Id.*) Defendant ExxonMobil Oil Corporation is a wholly owned subsidiary of Exxon Mobil Corporation, incorporated in New York with a principal place of business in Irving, Texas. (*Id.* ¶ 19.) Defendant Koch Industries, Inc. (“Koch”) is an American multinational corporation based in Wichita, Kansas. (*Id.* ¶ 28.) Koch is the parent company for numerous subsidiaries involved in the manufacturing, refining, and distribution of petroleum products. (*Id.* ¶ 29.) Koch, as well as many of its subsidiaries and affiliates, is registered to do business in Minnesota. (*Id.* ¶ 31.)

Defendants Flint Hills Resources LP and Flint Hills Resources Pine Bend, LLC, subsidiaries of Koch, are licensed distributors of petroleum products in Minnesota. (*Id.*) Koch subsidiaries import crude oil from Canada to a terminal in Clearbrook, Minnesota, which is owned and operated by Koch. (*Id.* ¶ 32.) Oil is piped from the Clearbrook terminal to the Flint Hills Resources Pine Bend Refinery via other Koch-owned pipelines. (*Id.*) Flint Hills Resources’ Pine Bend Refinery refines the majority of the motor gasoline consumed in Minnesota. (*Id.* ¶ 37.)

A. Climate Change & Fossil Fuels

Beginning in the 1950s, scientists—including many employed by the fossil fuel industry—began to understand that burning fossil fuels released additional greenhouse gasses, drove up atmospheric concentration, changed the carbon ratio in the atmosphere, and impacted global temperature and climate. (*Id.* ¶¶ 55–59.) The State alleges that by 1965, Defendants and their predecessors-in-interest were aware that widely used fossil-fuel products would cause global warming by the end of the century and would have wide-ranging and costly consequences. (*Id.* ¶ 60.)

The State alleges that Defendants were at the forefront of scientific discourse about climate change and its relationship to fossil fuels, and were privy to research developed by industry-employed scientists as well as independent analyses, including research commissioned by Defendants and their colleagues. (*Id.* ¶¶ 60–72.) By the 1980s, there was an established consensus among scientists and within the fossil fuel industry that atmospheric CO₂ concentrations were reaching dangerous levels and would significantly impact the earth's climate, and international coalitions had begun to emerge to address the issue. (*Id.* ¶ 73.)

B. Defendants' Alleged Misinformation Campaign

The State alleges that, as the international and scientific consensus coalesced around the relationship between fossil fuels emissions and climate change, Defendants mounted an aggressive campaign to undermine the public's perception of climate

science. (*Id.* ¶¶ 82–87.) Defendants allegedly spent millions of dollars on advertising and public relations campaigns, in Minnesota and elsewhere, to mislead consumers and the general public about the scientific consensus around climate change, the relationship between climate change and their fossil-fuel products, and the urgency of the dangers of climate change. (*Id.* ¶¶ 88–90). The State further alleges that Defendants funneled hundreds of millions more dollars to organizations that publicly promoted false statements about and denied the existence of climate change, and paid scientists to produce misleading reports and materials, which Defendants’ then cited and promoted to support their own fraudulent statements. (*Id.* ¶¶ 92–131.)

The State identifies two broad categories of alleged injuries caused by Defendants’ misinformation campaign: (1) harms to consumers who relied on Defendants’ false information, (*id.* ¶¶ 172–83); and (2) environmental and social harms from increased consumption of fossil fuels, including changes in climate, damage to infrastructure, and worsening public health, (*id.* ¶¶ 139–71), all of which, the State avers, could have been mitigated, but for Defendants’ campaign, (*id.* ¶¶ 172, 213–14).

II. PROCEDURAL HISTORY

Plaintiff commenced this action in Minnesota state court asserting five counts related to Defendants’ alleged misinformation campaign: (1) violations of the Minnesota Consumer Fraud Act (“CFA”), Minnesota Statutes § 325F.69; (2) failure to warn under common law theories of strict liability and negligence, against all Defendants except API;

(3) common law fraud and misrepresentation; (4) violations of the Minnesota Deceptive Trade Practices Act (“DTPA”), Minnesota Statutes § 325D.44; and (5) violations of the Minnesota False Statement in Advertising Act (“FSAA”), Minnesota Statutes § 325F.67. (*Id.* ¶¶ 184–242.) The State seeks damages, civil penalties, disgorgement of profits made as a result of unlawful conduct, and an order enjoining Defendants from continued violations of the CFA, DTPA, and FSAA. (*Id.* ¶¶ 244, 247–249.). The State also requests that Defendants be compelled to disclose, disseminate, and publish all research that they conducted directly or indirectly relating to climate change, and fund a corrective climate change public education campaign in Minnesota, administered and controlled by an independent third party. (*Id.* ¶¶ 245–246).

On July 27, 2020, Defendants removed the action to federal court. (Notice of Removal, July 27, 2020, Docket No. 1.) Defendants raise seven grounds for asserting federal jurisdiction over this matter: (1) the claims arise under federal, not state, common law; (2) the action raises disputed and substantial federal issues that must be adjudicated in a federal forum (the “*Grable* doctrine”); (3) removal is authorized by the federal officer removal statute, 28 U.S.C. § 1442(a)(1); (4) federal jurisdiction arises under the Outer Continental Shelf Lands Act (“OCSLA”), 43 U.S.C. § 1349(b); (5) the claims are based on conduct arising out of federal enclaves; (6) the action is actually a class action governed by the Class Action Fairness Act (“CAFA”), 28 U.S.C. § 1332(d), 28 U.S.C. § 1453(b); and (7)

the court has diversity jurisdiction under 28 U.S.C. § 1332(a), on the theory that the real parties in interest are not the State, but the citizens of Minnesota.

On August 26, 2020, Minnesota moved to remand the case to state court, arguing that the Court lacks subject matter jurisdiction because (a) neither federal common law nor the *Grable* doctrine apply; (b) no federal enclaves are implicated; (c) the Outer Continental Shelf Lands Act is not implicated; (d) the federal officer removal statute does not apply; (e) the suit is not a “class action” and therefore not subject to the Class Action Fairness Act; and (f) the suit was brought by the State, which is not a citizen for purposes of diversity jurisdiction. (Mot. Remand, Aug. 26, 2020, Docket No. 32.) Defendants oppose this Motion.

The FHR Defendants filed a Motion to Stay, on January 15, 2021, arguing that staying proceedings until the Supreme Court issues a decision in *BP p.l.c. v. Mayor & City Council of Baltimore*, and makes a determination on the Petition for Certiorari in *Chevron Corporation v. City of Oakland, et al.*, would conserve judicial resources and would not prejudice the State. (Mot. Stay, Jan. 15, 2021, Docket No. 56.) The State opposes staying the Motion to Remand.

DISCUSSION

I. MOTION TO REMAND

A. Standard of Review

“Federal courts are courts of limited jurisdiction, possessing only that power authorized by Constitution and statute.” *Gunn v. Minton*, 568 U.S. 251, 256 (2013) (quotation omitted). A defendant may remove a civil action to federal court only if the action could have been filed originally in federal court. See 28 U.S.C. § 1441(a)–(b); *Gore v. Trans World Airlines*, 210 F.3d 944, 948 (8th Cir. 2000). The party seeking removal bears the burden of demonstrating that removal was proper, and “all doubts about federal jurisdiction must be resolved in favor of remand.” *Cent. Iowa Power Co-op. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 561 F.3d 904, 912 (8th Cir. 2009). Remand is mandatory “at any time before final judgment [if] it appears that the district court lacks subject matter jurisdiction.” 28 U.S.C. § 1447(c).

C. The Well-Pleaded Complaint Rule

“[F]ederal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law.” *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987) (citation omitted). Where a complaint pleads only state law claims, a federal court does not have jurisdiction based on a federal defense. See, e.g., *Aetna Health Inc. v. Davila*, 542 U.S. 200, 207 (2004).

There are two relevant exceptions to the well-pleaded complaint rule. First, “[w]hen a plaintiff has artfully pleaded in a manner that avoids an element of the tort that rests on federal law, the court ‘may uphold removal even though no federal question appears on the face of plaintiff’s complaint.’” *Gore*, 210 F.3d at 950 (quoting *Rivet v. Regions Bank of La.*, 522 U.S. 470, 475 (1998)). The artful pleading doctrine allows removal where Congress either expressly provides for removal of a particular state law action or where federal law completely preempts a plaintiff’s state-law claim. *Rivet*, 522 U.S. at 475.

Second, even where “federal law does not create the cause of action, federal question jurisdiction may exist if [Plaintiff’s] ‘state-law claim necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.’” *Great Lakes Gas Trans. Ltd. P’ship v. Essar Steel Minnesota LLC*, 843 F.3d 325, 331 (8th Cir. 2016) (quoting *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 314 (2005)). The Supreme Court has recognized a “special and small category” of cases that fit into this framework, *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 699 (2006), “where vindication of a right under state law necessarily turned on some construction of federal law,” *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 808–09 (1986) (quotation omitted).

B. Analysis

1. Federal Common Law

Defendants' first asserted ground for removal is that the Court has original jurisdiction because the State's claims arise under federal common law and cannot be resolved under state law. Only a few limited areas of federal common law survived *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). In particular, courts have determined that federal common law applies where a federal decision is required "to protect uniquely federal interests," *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 (1964), or where "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." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). Defendants argue that the State's Complaint necessarily arises under three areas controlled by federal common law: interstate pollution, navigable waters, and foreign affairs. Defendants further argue that federal jurisdiction is proper because state law cannot apply to the claims alleged.

i. Interstate Pollution

First, Defendants argue that the State's claims are premised upon interstate pollution because the State's alleged injuries stem from climate change impacts, which are caused by global emissions and are inherently transboundary in nature. The Supreme

Court has specifically recognized federal common law in the arena of transboundary pollution and environmental protection, *see Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 421 (2011) (“When we deal with air and water in their ambient or interstate aspects, there is federal common law.”), but has also held that this area of federal common law has largely (though not entirely) been displaced by environmental statutes, including the Clean Air Act and Clean Water Act, *see e.g., id.* at 424 (finding 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 powerplants”); *Int’l Paper v. Ouellette*, 479 U.S. 481, 497 (1987) (“The CWA precludes only those suits that may require standards of effluent control that are incompatible with those established by the procedures set forth in the Act.”).

Defendants cite a number of cases to support their argument that federal common law should govern; however, in each of these precedential cases, a cause of action for interstate pollution was alleged on the face of the complaint, which is not the case here.¹ Despite the fact that the State alleges no causes of action related to pollution regulations

¹ *See, AEP*, 564 U.S. at 415 (federal common law public nuisance claims against carbon-dioxide emitters seeking cap on emissions); *Illinois v. Milwaukee*, 406 U.S. 91, 93 (1972), *superseded by statute* (cause of action for pollution of Lake Michigan); *Ouellette*, 479 U.S. at 483–84 (1987) (common law nuisance for discharges into interstate lake); *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 853 (2012) (federal common law public nuisance claims against for greenhouse gas emissions and climate change injuries); *City of New York v. BP p.l.c.*, 325 F. Supp. 3d 466, 470 (S.D.N.Y. 2018) (public nuisance, private nuisance, and trespass claims related to sea level rise, increased flooding, and temperature increases). However, *City of New York* does not provide a framework for removal based upon federal common law because the action was originally filed in federal court.

or disputes between states over emissions standards, Defendants argue that the State has not pleaded sufficient facts to support its consumer protection claims, and therefore the complaint must actually establish a cause of action for interstate pollution under the federal common law.

To adopt Defendants' theory, the Court would have to weave a new claim for interstate pollution out of the threads of the Complaint's statement of injuries. This is a bridge too far. Because Defendants do not plausibly identify any actual disputes related to interstate pollution that must be resolved to reach the merits of the State's pleaded claims, federal common law does not establish a basis for jurisdiction on this ground.

ii. Navigable Waters

Similarly, Defendants argue that federal common law must govern because the State seeks remedies for injuries related to flooding, damage, and contamination of navigable waters. Again, the cases that Defendants rely on establish that federal common law is required to resolve issues not present here; in particular, to mediate conflict between the states or between states and the federal government related to interstate water bodies.² Although flooding is an alleged injury related to the consumer protection claims, the State's action does not purport to regulate, apportion, or mediate other

² See *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938) (apportionment of water of an interstate stream between two states is a question of federal common law); *Milwaukee I*, 406 U.S. at 105 n.6 (conflict over pollution discharged by one state into water body that bordered four states); *Michigan v. U.S. Army Corps of Engineers*, 667 F.3d 765, 767–68 (7th Cir. 2011) (action related to federal management of interstate waterway).

states' or agencies' relationships to navigable waters, and the federal common law of navigable waters is not necessarily raised here.

iii. Foreign Affairs

Third, Defendants argue that the State's claims are of an inherently international nature because the regulation of energy production and trade has important foreign policy implications and is accordingly within the exclusive purview of the federal courts. Defendants claim that, because fossil fuels are strategically important domestic and international resources, the State's case is intended to have significant impacts on United States foreign policy. The Court declines Defendants' invitation to interpret this well-pleaded consumer protection action as a wholesale attack on all features of global fossil fuel extraction, production, and policy.

iv. State Law

Finally, Defendants contend that federal jurisdiction is proper because state law cannot control claims that seek to regulate the interstate and international production and sale of fossil fuels. The State does, however, have a clear interest in preventing fraud and deception and ensuring that citizens have access to accurate information in the consumer marketplace. *See e.g., Edenfield v. Fane*, 507 U.S. 761, 768–69 (1993). Because the State's claims fall squarely within that area of state interest, the claims do not open the door for substantive challenges to Minnesota's (or any other state's) emissions or water quality standards. Neither do the claims alleged require the Court to assess federal

management of navigable waters or weigh any issues of foreign policy. Accordingly, federal common law is not applicable.

v. Federal Common Law as a Basis for Removal

Even if the Court could conjure a separate claim arising from the State's alleged environmental injuries that would fall within an area of federal common law, it still may not confer jurisdiction. Defendants argue that federal common law provides a basis for federal jurisdiction because (1) courts have recognized an exception to the well-pleaded complaint rule where plaintiff's putative state law claims arise under federal common law, and (2) federal common law presents a substantial federal question for the purposes of asserting jurisdiction under the *Grable* doctrine. The Court will address the *Grable* doctrine in Section 2.

As noted above, the Supreme Court has established two exceptions to the well-pleaded complaint rule: express provision of Congress and complete preemption. *Rivet*, 522 U.S. at 475. A federal statute completely preempts artfully pleaded state law claims if it "provide[s] the exclusive cause of action for the claim asserted and also set[s] forth procedures and remedies governing that cause of action[.]" *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003), and the statute's pre-emptive force 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." *Caterpillar, Inc.*, 482 U.S. at 393 (quotation omitted). Complete preemption is distinct from ordinary preemption, which

provides a defense against state law claims, but does not establish a pathway for federal jurisdiction. *See Johnson v. MFA Petroleum Co.*, 701 F.3d 243, 247 (8th Cir. 2012).

Defendants suggest that complete preemption is not required for removal because the State's claims inherently arise under federal common law, and artful pleading that disguises a federal cause of action is a separate and distinct basis for removal than complete preemption. However, neither the Eighth Circuit nor the Supreme Court has found that implied federal common law claims establish a separate and independent exception to the well-pleaded complaint rule. To the extent that the cases Defendants cite carve out a third exception, this approach lacks support in this circuit and is contrary to Supreme Court precedent establishing the specific and defined parameters for federal jurisdiction over exclusively state law claims. *See Caterpillar*, 482 U.S. at 392–94; *Rivet*, 522 U.S. at 474–75.

Further, in each of the cases Defendants cite to support this argument, plaintiffs' precise claims were explicitly connected to or relied upon interpretations of a discrete area of federal law.³ Here, Defendants proffer multiple theories for how Plaintiff's claims

³ *See In re Otter Tail Power Co.*, 116 F.3d 1207, 1215 (8th Cir. 1997) (state law claims involved tribal regulatory authority and raised important questions of federal law requiring interpretation of treaties, federal statutes, and the federal common law of inherent tribal sovereignty); *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 928. (5th Cir. 1997) (claims arising out of "clearly established federal common law cause of action against air carriers for lost shipments."); *Treiber & Straub, Inc. v. UPS, Inc.*, 474 F.3d 379, 384 (7th Cir. 2007) (same); *Caudill v. Blue Cross and Blue Shield of N.C.*, 999 F.2d 74, 76–77 (4th Cir. 1993) (applying federal jurisdiction to state-law claims pursuant to Federal Employees Health Benefits Act), *abrogated by Empire HealthChoice Assur. Inc. v. McVeigh*, 547 U.S. 677, 693 (2006); *Battle v. Seibels Bruce Ins. Co.*, 288 F.3d 596, 607 (claims requiring interpretation of insurance policies issued pursuant to the National Flood Insurance

might be related to federal common law but as noted above, each of these theories lacks a substantial relationship to the actual claims alleged and would require the Court to invent a separate cause of action. That is beyond the Court's discretion and is not a sound foundation for asserting federal jurisdiction.

Because the Court finds that the claims alleged by the State do not arise under federal common law and Defendants do not plausibly allege that the claims are completely preempted, federal common law is not a sufficient independent basis for removal in this manner.

2. *Grable* Jurisdiction

Defendants' second argument for removal is that this action necessarily raises and requires the resolution of substantial questions of federal law. Federal jurisdiction may be asserted over a state-law claim 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*, 568 U.S. at 258 (citing *Grable & Sons Metal Products, Inc. v. Darue Eng. & Mfg.*, 545 U.S. 308, 313–14 (2005)). All four criteria, often referred to as the "*Grable* doctrine," must be met to exercise federal jurisdiction. *Id.*

Program governed exclusively by federal common law); *Newton v. Capital Assur. Co., Inc.*, 245 F.3d 1306, 1308–09 (11th Cir. 2001) (same).

i. Necessarily Raised

Defendants offer various avenues for the Court to find that the claims necessarily raise disputed federal issues, including foreign policy considerations, injuries to and management of the navigable waters of the United States, and transboundary pollution. Defendants also assert that the claims implicate Congress's careful policymaking balance between energy production and environmental protection, Defendants' alleged influence over policymakers' decisions, and constitutional questions of federalism.

The Court has already rejected Defendants' arguments that the Complaint necessarily raises issues related to management of navigable waters, transboundary pollution, or foreign policy. Contrary to Defendants' assertions, the Complaint does not require interpretation of any federal environmental regulations or climate treaties, nor does it ask a court to review federal agencies' management of interstate waters. The Complaint only requires a court to determine whether Defendants engaged in a misinformation campaign that ran afoul of Minnesota's consumer protection statutes and common law, and whether the State can demonstrate that those alleged violations of discrete state laws caused harm to Minnesota and Minnesota consumers.

With regard to Congress's careful balance between energy and environmental priorities, Defendants do not appear to argue that Congress sanctioned, directed, or participated in the alleged scheme to defraud the public. Accordingly, determining whether Defendants engaged in a misinformation campaign in violation of Minnesota law

does not require a court to second-guess Congress's priorities regarding energy production and environmental protection.

Defendants further argue that the Complaint necessarily asserts federal claims to the extent that it alleges that federal policymakers would have adopted different energy and climate policies but-for Defendants' alleged misrepresentations. However, the Complaint includes policymakers as a category of individuals who relied on Defendants' allegedly fraudulent misrepresentations in deciding to continue to purchase and use Defendants' fossil-fuel products. It does not argue that any particular policies or regulatory decisions would be different but-for Defendants' actions, and therefore does not implicate Congress' careful regulatory framework.

As to questions of federalism, Defendants allege that the State seeks to supplant the federal government's authority over federal questions and requires the Court to consider the constitutional division of authority between the federal government and the states. This gravely overstates the State's case, and it is unclear to the Court how a state court adjudicating a set of claims that fall well within a state's consumer protection interest will necessarily challenge the foundations of our system of government.

Defendants also claim that proving the specific elements of the causes of action will require a court to wade into disputed and substantial federal questions, including whether fossil fuels are unreasonably dangerous, and whether Defendants actually misrepresented the dangers of climate change and the urgency required to mitigate

climate change. Again, Defendants overstate both the State's claims and what is required to prove them under Minnesota law.⁴

Although Defendants have identified ways in which the State's claims may be tangentially related to federal law, "it takes more than a federal element to open the 'arising under' door" to federal jurisdiction. *Empire Healthchoice*, 547 U.S. at 701 (quoting *Grable*, 545 U.S. at 313). The federal issues that Defendants offer are not necessarily raised by the Complaint's state-law claims, and vindication of the State's rights under state consumer protection law does not "necessarily turn on some construction of federal law." *Franchise Tax Board*, 463 U.S. at 9.

⁴ It is not necessary for the Court to weigh Minnesota's ability to prove the elements of the state law claims here; it is Defendants' burden to demonstrate that these claims warrant federal jurisdiction. Nevertheless, the Court notes that adjudicating the State's failure to warn claims do not require a court to supplant its judgment for Congress's regarding the safety and use of a product, as Defendants allege. While the danger of a product is raised in a failure to warn action, it is in the context of whether a warning was adequate under state law, and does not require a court to determine whether the product should have been manufactured, sold, and consumed generally. See, e.g., *Glorvigen v. Cirrus Design Corp.*, 816 N.W.2d 572, 582 (Minn. 2012) (explaining that the duty to warn consists of two duties: (1) to give adequate instructions for safe use; and (2) to warn of dangers inherent in improper use); *Frey v. Montgomery Ward & Co.*, 258 N.W.2d 782, 788 (Minn. 1977) (stating the rule that, where a manufacturer has "actual or constructive knowledge of danger to users, the . . . the manufacturer has a duty to warn of such dangers."); *Gray v. Badger Mining Corp.*, 676 N.W.2d 268, 274 (Minn. 2004) (explaining conditions of legal adequacy for warnings). As to the State's other statutory claims under Minnesota's various consumer protection and trade practices statutes, Defendants' own explanations of the law demonstrate that the State's claims only require proving that Defendants engaged in misinformation, deception, fraud, or otherwise unfair practices prohibited by state law; the claims alleged do not require the Court to make determinations about fossil fuels or federal energy policy in general.

ii. Actually Disputed and Substantial

Having found that the State's action does not necessarily raise the federal issues offered by Defendants, the Court need not proceed to address the other *Grable* factors. However, the Court notes that, while the complex features of global climate change certainly present many issues of great federal significance that are both disputed and substantial, the State here does not bring claims capable of addressing the panoply of social, environmental, and economic harms posed by climate change. The State's Complaint, far more simply, seeks to address one particular feature of the broader problem—Defendants' alleged misinformation campaign. The State's case is constrained by the causes of action asserted in its Complaint. Accordingly, the State must prove that its purported injuries are related to Defendants' alleged violations of state laws, and any judicial remedies will likely be limited and responsive to those specific claims. As a result, this action does not present the doomsday scenario that Defendants present, and neither does it necessarily raise the disputed and substantial issues of federal law that are required for the Court to assert jurisdiction pursuant to *Grable*.

iii. Federal/State Balance

Moreover, the Court finds that its efforts to exercise jurisdiction over this case may disrupt the balance between federal and state courts. In this case, the state court will not need to reach any question of federal law to litigate these claims, nor will the state court's holding "stand as binding precedent for any future [consumer fraud or climate-change

injury] claim[.]” *Gunn*, 568 U.S. 264. The State asks the court to determine only whether Defendants are liable for misleading the public and engaging in consumer fraud under state law. For the federal court to assert jurisdiction over these areas of traditional state jurisdiction may disrupt the balance between state and federal judicial authority.

Ultimately, Defendants question whether there can be a state law action for alleged climate change injuries at all. The Court does not disagree that assessing this type of injury raises broad and complicated questions. However, allegations of a complex injury do not create a pathway for federal jurisdiction when the actual causes of action arise only under state law. Accepting Defendants’ interpretation of *Grable* jurisdiction would require the Court to make an exceptional logical leap and interpret this Complaint as a full-scale assault on all aspects of fossil fuel extraction, production, distribution, and use. That is not what the Complaint asserts on its face, and it is not within the Court’s authority to rewrite the Complaint and make it so.

3. Federal Officer Removal Statute

Defendants’ next proffered removal ground is the federal officer removal statute, 28 U.S.C. § 1442(a)(1), which requires that the removing defendant plausibly allege that (1) the defendant is a “person” under the statute, which is undisputed here; (2) the defendant was “acting under” the direction of a federal officer when it engaged in the allegedly tortious conduct; (3) there is a causal connection between the defendant’s actions and the official authority; and (4) the defendant raises a “colorable” federal

defense. *See; Jacks v. Meridian Res. Co.*, 701 F.3d 1224, 1230 (8th Cir. 2012). Relevant here is the federal government contractor defense, which provides that suits against defendants acting on behalf of federal officers “may be removed despite the nonfederal cast of the complaint; the federal-question element is met if the defense depends on federal law[.]” *Jefferson County v. Acker*, 527 U.S. 423, 431 (1999).

i. “Acting Under”

Defendants first argue that they were “acting under” the direction of federal officers in the production of fossil fuels and the development of specialized military products in support of multiple war efforts since at least World War II. Second, Defendants argue that they have worked under federal direction to extract and produce critical energy resources for the nation, including exploration and development of resources in the Outer Continental Shelf and as operators and lessees of the Strategic Petroleum Reserve infrastructure. The Court finds that these are plausible ways in which Defendants may have acted under the direction of federal officers, and because the Court lacks information about whether Defendants’ alleged tortious conduct occurred when Defendants were acting under federal officer control, the Court will proceed with the analysis.

ii. Connection to Claims

Historically, courts have considered the causal connection requirement to be a low hurdle. *See, e.g., Graves v. 3M Co.*, 447 F. Supp. 3d 908, 913 (D. Minn. 2020) (citing

Isaacson v. Dow Chem. Co., 517 F.3d 129, 137 (2d Cir. 2008). Indeed, in 2011, Congress amended the statute to encompass suits “for or **relating to** any act under color of [federal] office.” 28 U.S.C. § 1442(a)(1) (2011) (emphasis added); *see also In re Commonwealth’s Motion to Appoint Counsel Against or Directed to Def. Ass’n of Philadelphia*, 790 F.3d 457, 471 (3d Cir. 2015), *as amended* (June 16, 2015) (discussing the 2011 amendment). As a result of the amendment, all that is required is that the case relates to an official act. For example, the Third Circuit has found that the condition is met so long as Defendants’ conduct has a “connection” or “association” with a governmental act. *In re Commonwealth’s Motion*, 790 F.3d at 471. However, Defendants are still required to demonstrate that the act for which they are being sued occurred at least in part “**because of** what they were asked to do by the Government.” *Graves*, 447 F. Supp. 3d at 913. (emphasis in original) (quoting *Isaacson v. Dow Chem Co.*, 517 F.3d 1129, 137 (2d Cir. 2008)).

Defendants argue that their fossil fuel activities satisfy the low threshold of connection to or association with actions directed by the federal government. However, Defendants do not claim that any federal officer directed their respective marketing or sales activities, consumer-facing outreach, or even their climate-related data collection. Accordingly, despite the low bar, there does not appear to be any direction from or connection to the federal government related to the specific claims alleged here.

iii. Colorable Defense

Although the lack of connection to a federal officer alone is fatal to federal officer jurisdiction, the Court notes that the fourth prong also fails. The federal officer removal statute requires that the defendant identify a federal defense to the claim brought against them in state court, but a defendant need only demonstrate that its defense is “colorable,” not “clearly sustainable.” *Jacks v. Meridian Res. Co., LLC*, 701 F.3d 1224, 1235 (8th Cir. 2012). “For a defense to be considered colorable, it need only be plausible; § 1442(a)(1) does not require a court to hold that a defense will be successful before removal is appropriate.” *United States v. Todd*, 245 F.3d 691, 693 (8th Cir. 2001).

In a footnote, Defendants claim a number of defenses, including preemption under the Clean Air Act, the Commerce Clause, the First Amendment, and the foreign affairs doctrine, although they do not describe any particular defense or why it justifies application of the federal officer removal statute. As discussed with regard to the *Grable* doctrine and federal common law, the State does not raise claims related to environmental regulation or foreign policy, therefore the Clean Air Act and foreign affairs doctrine do not pose colorable defenses. As to the Commerce Clause and the First Amendment, Defendants do not explain exactly how these defenses relate either to the claims or actions taken at the direction of a foreign officer. Because it is the Defendants’ burden to demonstrate a colorable defense now, and not “the mere possibility of some

future evidence as the basis for removal,” *Graves*, 447 F. Supp. 3d at 916 n.8, Defendants have not met this hurdle to federal jurisdiction.

Defendants have failed to satisfy three of the four elements of the federal officer removal statute, and the Court cannot, therefore, exercise jurisdiction on this basis.

4. Outer Continental Shelf Lands Act

The Outer Continental Shelf Lands Act (“OCSLA”) establishes original jurisdiction in federal district courts over “cases and controversies arising out of, or in connection with (A) any operation conducted on 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.” 43 U.S.C. § 1349(b)(1). The outer Continental Shelf (“OCS”) includes all submerged lands lying seaward that are subject to the jurisdiction and control of the United States, but are outside of any particular State. 43 U.S.C. §§ 1301(a), (f), 1331(a). The Fifth Circuit has interpreted the jurisdictional grant under OCSLA broadly, only requiring a “but-for connection” between the cause of the action and OCS operation. *In re Deepwater Horizon*, 745 F.3d 157, 163 (5th Cir. 2014).

Despite Defendants’ argument that their various activities on the OCS necessarily account for a significant portion of the conduct attributable to alleged climate change injuries in Minnesota, the State’s claims are rooted not in the Defendants’ fossil fuel production, but in its alleged misinformation campaign. Further, Defendants offer no basis for the Court to conclude that Minnesota’s alleged injuries would not have occurred

but-for the Defendants' extraction activities on the OCS. *Accord Mayor and City Council of Baltimore v. BP*, 388 F. Supp. 3d 538, 566–67 (D. Md. 2019) (rejecting federal jurisdiction under OCSLA based on lack of evidence of but-for causation).

Defendants also argue that, because the Complaint seeks potentially billions of dollars in damages, restitution, and equitable relief, this action could substantially discourage production on the OCS and undermine the viability of the federal government's leasing program. This argument is highly speculative and quite unlikely and asks the Court to assume both the outcome of the suit in state court and the highest damages award possible. This type of speculation, however, does not establish a stable ground for supporting removal, and the Court finds that it lacks jurisdiction under OCSLA.

5. Federal Enclave

Defendants next argue that federal jurisdiction is appropriate because the action implicates federal enclaves in four distinct ways: (1) by targeting the alleged impacts of Defendants' oil and gas operations, the Complaint necessarily sweeps in operations that occur on military bases and other federal enclaves; (2) the Complaint's allegations of climate change injuries—including extreme heat, crop damage, drought, flooding, infrastructural damage, and disease—necessarily impact federal enclaves in Minnesota, including Fort Snelling Military Reservation, Federal Correctional Institute Sandstone, and

Cass Lake Indian Hospital⁵; (3) the claims arise out of sales of certain Defendants' products within Minnesota, which include sales on unspecified federal enclaves; and (4) to the extent the Complaint asserts that federal policymakers would have adopted different energy and climate policies absent Defendants' alleged misrepresentations, the Complaint touches on conduct occurring in the District of Columbia, a federal enclave.

"A federal enclave is created when a state cedes jurisdiction over land within its borders to the federal government and Congress accepts that cession. These enclaves include numerous military bases [and] federal facilities." *Allison v. Boeing Laser Tech. Servs.*, 689 F.3d 1234, 1235 (10th Cir. 2012). The constitutional grant of legislative power to Congress over federal enclaves "bars state regulation without specific congressional action." *W. River Elec. Ass'n, Inc. v. Black Hills Power & Light Co.*, 918 F.2d 713, 716 (8th Cir. 1990) (quoting *Paul v. United States*, 371 U.S. 245, 263 (1963)).

"[I]n enclave jurisdiction, the determinative fact is the precise location of the events giving rise to the claims for relief." *Akin v. Big Three Indus., Inc.*, 851 F. Supp. 819, 824 (E.D. Tex. 1994) (emphasis omitted). When an alleged injury has occurred both on and off the federal enclave, federal jurisdiction is proper if the federal enclave was the

⁵ To establish a federal enclave, (1) the United States must acquire land in a state for one of the purposes mentioned in the Enclave Clause, (2) the state legislature must consent to the jurisdiction of the federal government, and (3) the federal government must accept the jurisdiction by filing a notice of acceptance with the state governor or in another manner prescribed by the laws of the state. See 40 U.S.C. § 3112(b); *Paul v. United States*, 371 U.S. 245, 264 (1963); see also U.S. Const. Art. I, § 8, cl. 17. Defendants state that these sites in Minnesota are federal enclaves, but do not provide documentation to satisfy the criteria.

locus in which the tort claim arose. *See Sultan v. 3M Co.*, No. 20-1747, 2020 WL 7055576, at *8 (D. Minn. Dec. 2, 2020). Even if some of the injuries occur inside while some occur outside of the federal enclave, the federal interest in exercising federal jurisdiction over the resultant claims decreases. *See Akin*, 851 F. Supp. at 825 n.4.

The State specifically disclaims “injuries arising on federal property and those that arose from Defendants’ provision of fossil fuel products to the federal government for military and national defense purposes.” (Compl. ¶ 9 n.4.) Defendants contend that this disclaimer is ineffective because it offers no method to isolate injuries that arose on federal property.⁶ However, the burden is on Defendants to demonstrate that federal enclaves are the locus in which the claims arose, and they have not done so. *See Sultan*, 2020 WL 7055576, at *4. While the various injuries alleged in the complaint may be felt on federal enclaves as much as they are felt anywhere, the Court requires a more

⁶ Further, Defendants counter that the Attorney General cannot sidestep federal jurisdiction by disclaiming damages for events that took place in federal enclaves. However, both of the cases that Defendants cite for this proposition, *Fung v. Abex Corp.*, 816 F. Supp. 569, 571 (N.D. Cal. 1992) and *Richard v. Lockheed Martin Corp.*, 2012 WL 13081667, at *2 (D.N.M. Feb. 24, 2012), involve personal injury claims in which the injuries largely occurred on federal enclaves. In *Fung*, the injuries involved asbestos exposure on submarines that were supervised by a contractor, but that were regularly docked at United States naval bases (there, the Court found the Federal Officer Removal Statute to be of greater significance than the enclaves); in *Richards*, the injuries largely occurred on White Sands Missile Range. Here, Defendants do not claim that any particular injury occurred on a federal enclave; they merely allege that the State cannot effectively disclaim injuries on enclaves. Because neither party has identified injuries that specifically occurred on a federal enclave, these cases do not support Defendants’ argument that federal enclave jurisdiction is proper here.

substantive and explicit relationship between the actual claims alleged and á specific federal enclave to exercise jurisdiction.

6. Class Action Fairness Act

Defendants also raise the possibility of jurisdiction under CAFA, 28 U.S.C. § 1453(b), on the theory that the case is actually a class action in which the Attorney General has brought a representative suit on behalf of a group of similarly situated persons. CAFA expands federal diversity jurisdiction to allow for minimal diversity in class actions filed under Federal Rule of Civil Procedure 23 or similar state statute or rule of judicial procedure, 28 U.S.C. § 1332(d)(1)(B), in which more than \$5 million is in controversy and there are greater than 100 members of proposed plaintiff classes. *Id.* § 1332(d)(5), (6); *Pirozzi v. Massage Envy Franchising, Inc.*, 938 F.3d 981, 983 (8th Cir. 2019). Defendants argue that, while this case is not styled as a class action, because it is brought in a representative capacity and seeks restitution and damages on behalf of many potential plaintiffs, it resembles a purported class action and should therefore be considered a class action under CAFA.

However liberally interpreted, federal jurisdiction under CAFA is limited to civil actions either filed under Rule 23 or brought under a similar state mechanism that authorizes class actions. In the Eighth Circuit, an action can be interpreted as a class action subject to CAFA even where Plaintiff has omitted reference to the authorizing procedural rule or statute, but only where the state class action rule actually governs the

action. See *Williams v. Emp'rs Mut. Cas. Co.*, 845 F.3d 891, 901 (8th Cir. 2017). Defendants have identified no state statute or procedural rule that would classify a suit of this nature as a class action.⁷ Further, as the State points out, every court to have addressed the application of CAFA to actions brought by a State in *parens patriae* under state common law or consumer protection statutes has found that CAFA is not applicable.⁸ Because

⁷ The cases Defendants cite do not support their argument that the present action should, or even could, be subject to CAFA. Both *Addison Automatics, Inc. v. Hartford Cas. Ins. Co.*, 731 F.3d 740 (7th Cir. 2013) and *Williams*, 845 F.3d 891 are cases in which representatives of certified classes attempted to make separate claims against the same defendants as individuals. In both of those cases, the Courts found that omitting reference to the existing class or applicable state statute did not allow the defendant to dodge CAFA jurisdiction. Neither of these cases dealt with an action brought by an Attorney General on behalf of a state where no class action has been claimed or certified. The case that Defendants characterize as most “instructive,” *Song v. Charter Comm'ns. Inc.*, is an order on a Motion to Compel Arbitration and Stay Proceedings that does not substantively deal with the CAFA issue at all, except to include a short footnote noting that Plaintiff opposed CAFA jurisdiction, but the Court felt that the jurisdictional determination was within its discretion. No. 17-325, 2017 WL 1149286, at *1 n.1 (S.D. Cal. Mar. 28, 2017). *Dart Cherokee Basin Op. Co. LLC v. Owens* deals with a case filed as a class action in state court, where the dispute was about whether the amount in controversy met the \$5 million CAFA threshold. 574 U.S. 81, 85 (2014). Defendants also cite *Missouri ex rel. Koster v. Portfolio Recovery Assocs., Inc.*, for the proposition that the Eighth Circuit has not weighed in on the issue of CAFA application to *parens patriae* actions. 686 F. Supp. 2d 942, 944–47 (E.D. Mo. 2010). However, the court in *Koster* found that a request for treble damages did not convert a *parens patriae* action into either a “mass action” or a “class action” under CAFA and declined to exercise federal jurisdiction. *Id.*

⁸ See *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 164 (2014) (*parens patriae* suit is not a “mass action” under CAFA); *Hawaii ex rel. Louie v. HSBC Bank Nevada*, 761 F.3d 1027, 1040 (9th Cir. 2014) (“Failure to request class status or its equivalent is fatal to CAFA jurisdiction.”); *Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 212–20 (2d Cir. 2013) (determining *parens patriae* action was not “filed under” state statute or rule of judicial procedure “similar” to federal class action rule, and thus action did not qualify as a “class action” within the meaning of CAFA); *Mississippi ex rel. Hood v. AU Optronics Corp.*, 701 F.3d 796, 799 (5th Cir. 2012), *rev'd on other grounds*, 571 U.S. 161 (2014) (*parens patriae* action to enforce state law did not justify removal under CAFA); *LG Display Co. v. Madigan*, 665 F.3d 768, 770–72 (7th Cir. 2011) (case brought by Attorney General was brought under state anti-trust law that did not impose any of the familiar Rule 23 constraints); *Washington v. Chimei Innolux Corp.*, 659 F.3d 842, 847–49 (9th Cir. 2011) (“[P]arens patriae suits filed by state Attorneys General may not be removed to federal

neither the Eighth Circuit nor any other court has applied CAFA to a State Attorney General's representative action in this way, and because Defendants have not demonstrated that this action was brought under or would meet the standards of either Rule 23 or any state rule for class certification, CAFA is not applicable here.

7. Diversity Jurisdiction

Finally, Defendants argue that the Court has diversity jurisdiction because the real parties in interest are the citizens of Minnesota, who are completely diverse from Defendants, and the amount in controversy undisputedly exceeds \$75,000. Defendants argue that the Attorney General seeks compensation for alleged injuries related only to Minnesota consumers, not the State in general, and that the harm alleged is only to consumers who were influenced by the purported misinformation campaign, and thus only applies to a subset of identifiable Minnesotans.

A state "may act as the representative of its citizens in original actions where the injury alleged affects the general population of a State in a substantial way." *Maryland v. Louisiana*, 451 U.S. 725, 737 (1981). "There is no question that a State is not a 'citizen' for purposes of the diversity jurisdiction." *Moor v. Alameda Cty.*, 411 U.S. 693, 717 (1973).

court because the suits are not 'class actions' within the plain meaning of CAFA."); *W. Va. ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169, 174–78 (4th Cir. 2011); *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31, 48–51 (D. Mass. 2020) (finding CAFA does not apply to *parens patriae* Attorney General actions); *Town of Randolph v. Purdue Pharma L.P.*, No. 19-10813, 2019 WL 2394253, at *4 (D. Mass. June 6, 2019) (finding no federal jurisdiction under CAFA in *parens patriae* opioid action); *City of Galax, Virginia v. Purdue Pharma, L.P.*, No. 18-617, 2019 WL 653010, at *5–6 (W.D. Va. Feb. 14, 2019) (same).

The Complaint alleges injury to all Minnesotans and the Attorney General brings the action pursuant to state statutes and under *parens patriae authority* on behalf of Minnesota citizens and consumers. Defendants have not offered any precedent or a cognizable argument for treating this as anything other than an action by the State of Minnesota, and therefore this action does not give rise to federal diversity jurisdiction.

CONCLUSION ON MOTION TO REMAND

The Court recognizes that the vast threat of climate change requires a comprehensive federal, and indeed, global response. The complex environmental impacts of climate change, and its far-reaching consequences for health, economy, and social wellbeing of all people cannot be understated. Given the stakes, the Court has some reluctance in remanding such significant litigation to state court. But the Court is also mindful of the limits of its jurisdiction. If the State were—as Defendants suggest—seeking a referendum on the broad landscape of fossil fuel extraction, production, and emission, state court would most certainly be an inappropriate venue. However, the State’s action here is far more modest than the caricature Defendants present. States have both the clear authority and primary competence to adjudicate alleged violations of state common law and consumer protection statutes, and a complex injury does not a federal action make. The limits written into the Complaint likely will restrict the ultimate possible recovery in this case and thus, its possible impact on climate change, but that is the choice the State has made. Because this Court does not have original jurisdiction over

this action, and because the claims alleged neither explicitly raise federal claims nor fall within one of the exceptions to the well-pleaded complaint rule, the Court must decline to exercise jurisdiction and remand the matter to state court.

II. MOTION TO STAY

The FHR Defendants move the Court to stay proceedings until the Supreme Court issues a decision in *BP p.l.c. et al. v. Baltimore* and makes a determination on the Petition for Certiorari in *Chevron et al. v. City of Oakland et al.* (U.S., Jan. 8, 2021). The FHR Defendants argue that a stay is warranted because these cases are similar to the instant action and granting a stay would preserve judicial resources by alleviating the Court's need to decide issues now that may be ruled on by the Supreme Court within a few months. In addition, the FHR Defendants argue that a stay is necessary to prevent serious hardship, particularly if the Court grants the Motion to Remand and the Supreme Court's decisions in either *Baltimore* or *Oakland* cast doubt on the remand. Finally, the FHR Defendants argue that the State cannot plausibly claim any meaningful harm from such a brief stay. The State opposes this Motion.

Because the Court finds that neither pending matter relied on by the FHR Defendants bear upon the Court's decision to remand the case for lack of federal jurisdiction, the Court will deny the FRH Defendants' Motion.

A. STANDARD OF REVIEW

The Court has the inherent power and broad discretion to stay proceedings to control its docket, to conserve judicial resources, and to ensure that each matter is handled with economy of time and effort. *Sierra Club v. U.S. Army Corp of Engineers*, 446 F.3d 808, 816 (8th Cir. 2006) (citing *Clinton v. Jones*, 520 U.S. 681, 706 (1997)). A court may consider factors, including “conservation of judicial resources and the parties’ resources, maintaining control of the court's docket, providing for the just determination of cases, and hardship or inequity to the party opposing the stay.” *Frable v. Synchrony Bank*, 215 F. Supp. 3d 818, 821 (D. Minn. 2016). The moving party bears the burden of establishing that a stay is necessary. *Jones*, 520 U.S. at 708. When the stay is requested pending disposition of a petition for certiorari, “[a]pplicants bear the burden of persuasion on two questions: whether there is a balance of hardships in their favor; and whether four Justices of [the Supreme Court] would likely vote to grant a writ of certiorari.” *New York Times Co. v. Jascalevich*, 439 U.S. 1304, 1304 (1978).

B. ANALYSIS

The question addressed by the Supreme Court in *Baltimore* is specific to the scope of appellate review of remand orders under 28 U.S.C. § 1447(d). That issue is not present here, and it will arise only if Defendants appeal the Court’s decision to grant the motion to remand. The Eighth Circuit, like the Fourth Circuit, has interpreted 28 U.S.C. § 1447(d) to limit its scope of remand review to the removal grounds established in 28 U.S.C. § 1442

(federal officer removal) or § 1443 (civil rights claims). See *Jacks*, 701 F.3d at 1229; *Thornton v. Holloway*, 70 F.3d 522, 524 (8th Cir. 1995). Accordingly, the Supreme Court's decision in *Baltimore* will only potentially affect this action at the appellate stage, and does not bear upon a district court's determination.

While the petition in the *Oakland* case raises issues that are more pertinent to the instant proceedings, the FHR Defendants speculate that at least four Justices of the Supreme Court are likely to vote to grant certiorari because the Court granted certiorari in *Baltimore*. However, the scope of the *Oakland* defendants' petition is much broader than the narrow petition granted in *Baltimore*. The FHR Defendants generally assert that the Ninth Circuit's rejection of the federal common law as a basis for removal is contrary to Supreme Court precedent, but provide little else to support their position that certiorari is likely to be granted.

Additionally, although the FHR Defendants argue that a stay will not prejudice the State, the State counters that a stay would be highly prejudicial to the public interest by delaying the proceedings for an indeterminate amount of time for the sake of pending decisions that do not bear upon the merits of this action. Of course, Defendants may appeal this decision which would result inevitably in a much longer delay. But balancing the hardships between the two parties, and not knowing whether the Defendants will appeal the remand, the Court finds that the State would likely be more prejudiced by a stay than Defendants would be by proceeding, particularly because Defendants cannot

anticipate any relevant relief at this juncture related to the *Baltimore* case and the status of the *Oakland* petition is still very much uncertain. Ultimately, the possible prejudice to both sides is quite similar, and the Court will choose to try to move the case along as quickly as possible.

The Court therefore finds that Defendants have not met their burden of persuasion that a stay is necessary and denies the Motion.


ORDER

Based on the foregoing, and all the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that:

1. Plaintiff's Motion to Remand [Docket No. 32] is **GRANTED**.
2. FHR Defendants' Motion to Stay [Docket No. 56] is **DENIED**.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: March 31, 2021
at Minneapolis, Minnesota.



JOHN R. TUNHEIM
Chief Judge
United States District Court

CERTIFICATE OF SERVICE

I, Kannon K. Shanmugam, counsel for petitioner Exxon Mobil Corporation and a member of the Bar of this Court, certify that, on April 12, 2021, a copy of the attached Petition for Permission to Appeal Pursuant to the Class Action Fairness Act was sent, by third-party commercial carrier for delivery overnight and by electronic mail, to the following counsel:

Liz Kramer, Esq.
Solicitor General
State of Minnesota
445 Minnesota Street, Suite 1400
St. Paul, MN 55101
liz.kramer@ag.state.mn.us

I further certify that all parties required to be served have been served.

/s/ Kannon K. Shanmugam
KANNON K. SHANMUGAM