IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:18-cv-1672-WYD-SKC

BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY;
BOARD OF COUNTY COMMISSIONERS OF SAN MIGUEL COUNTY; and
CITY OF BOULDER,

Plaintiffs,

v.

SUNCOR ENERGY (U.S.A.) INC.;
SUNCOR ENERGY SALES INC.;
SUNCOR ENERGY INC.; and
EXXON MOBIL CORPORATION,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO REMAND

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INTRODUCTION

Plaintiffs filed Colorado common law and statutory claims in state court, for injuries occurring in Colorado. They seek only remedies for the nuisance caused by Defendants in Colorado, asking Defendants to pay their *pro rata* share of the costs of abating the impacts they have suffered from Defendants' tortious conduct. Increased wildfires, extreme weather events, drought and other consequences of an altered climate are imposing significant costs on the health and welfare of Plaintiffs' Colorado communities, and on Plaintiffs' own property in Colorado. Plaintiffs (and their taxpayers) should not suffer these costs without remedy when Defendants profited from selling fossil fuels and promoting their unchecked use, while concealing and misrepresenting their dangers.

The question here, however, is not whether Defendants are liable for that conduct; it is only whether they have met their burden to establish jurisdiction in this Court. They have not. Defendants ask this Court to create completely new bases for federal jurisdiction and to stretch the existing ones beyond recognition; if Defendants succeed, they will have federalized huge swathes of traditional state common law.

Two federal judges in the Northern District of California were presented with the same arguments Defendants make here. In *County of San Mateo v. Chevron Corp.*(*"San Mateo"*), 294 F. Supp. 3d 934 (N.D. Cal. 2018), *appeal pending*, the court rejected *every single one* and remanded the case to state court; for the reasons articulated in that opinion (and the others discussed below), this case should also be remanded. In *California v. BP P.L.C.*, No. 17-06011, 2018 U.S. Dist. LEXIS 32990 (N.D. Cal. Feb. 27, 2018) (remand decision), however, the court accepted Defendants' misleading characterization that the plaintiffs were trying to regulate greenhouse gas emissions, which it ruled was inherently federal.

California v. BP, currently on appeal, is not supported by any Tenth Circuit caselaw, nor

grounded in any recognized removal doctrine. The court did not find federal claims present on the face of the plaintiffs' well-pleaded complaint, nor did it find that the claims required determination of a substantial federal issue. The court also did not find that a federal statute completely preempted the claims. Moreover, the decision is undermined by the same court's subsequent opinion, issued only months later, that federal law provided no claim to the plaintiffs. *City of Oakland v. BP P.L.C.*, No. C 17-06011, 2018 U.S. Dist. LEXIS 106895 (N.D. Cal. June 25, 2018), *appeal pending*.[1] This Court should not make the same mistakes; *San Mateo* came to the right conclusion.

In addition to the fact that Defendants' argument (and *California*) is not based in any doctrine, the factual premise is incorrect. Plaintiffs' Complaint makes clear that they **are not** seeking to regulate greenhouse gas emissions anywhere, and they **are not** asking a court to determine whether any *emitter* is liable. This case is only about Defendants' liability for selling a product at levels that caused harm: very specific tortious conduct. There is nothing inherently or necessarily federal about that conduct or this case. Emitters – like the smokers in the tobacco cases brought by nearly every State under state common law – are nothing more than foreseeable (and intended) parts of a causal chain. Just as the States were not regulating smokers when they sued the tobacco companies for selling and misleadingly promoting cigarettes, Plaintiffs are not regulating emitters by suing Defendants for damage caused by their sale of fossil fuels.

This case is also not a threat to any federally determined balance between energy development and the environment. If Plaintiffs succeed, Defendants can continue to sell fossil fuels, purchasers can continue to emit, and the federal government will continue to regulate emissions. The only consequences of this case would be that *Defendants* will bear some of the external costs of

[1] The caption in No. C 17-06011 changed from *California v. BP P.L.C.* in the court's remand decision to *City of Oakland v. BP P.L.C.* in its decision on the motion to dismiss.

their conduct felt in Colorado and *Plaintiffs* will be compensated for their economic injuries; these are both traditional and appropriate functions of state tort law.

BACKGROUND

The fact that the climate has been altered is not disputed by the Parties. "[W]arming of the climate system is unequivocal." Plaintiffs' Amended Complaint ("Compl.") ¶ 132 (internal quotation marks omitted). The impacts of that alteration (and warming) are being felt, significantly, in Colorado and in Plaintiffs' communities. *See e.g.*, *id.* ¶¶ 132-196. There is also no real dispute here about the cause of the alteration. "The issue is not over science. All parties [including Exxon] agree that fossil fuels have led to global warming . . . and will continue to do so[.]" *City of Oakland*, 2018 U.S. Dist. LEXIS 106895 at *13.

Plaintiffs' Amended Complaint seeks damages for Defendants' conduct over decades producing, marketing and selling fossil fuels at levels that have caused and contributed to alteration of the climate without disclosing the dangers that continued fossil fuel overuse posed. Am. Compl. at *e.g.* ¶¶ 5, 14, 17, 18, 62, 70, 82, 85, 91, 107, Dkt. 1-18.

Plaintiffs have specifically alleged that: (1) Defendants have known for decades that the use of their products would contribute to climate change (*id.* ¶¶ 327-375); (2) in spite of that knowledge, they continued to produce, sell and market those products (and, in fact, developed fuels that resulted in greater emissions) at levels *they* chose (*id.* ¶¶ 376-406); and (3) they concealed from their customers what they knew about the causes and consequences of climate change, going so far as to misrepresent those facts (*id.* ¶¶ 407-443). The Complaint alleges that these actions were taken for profit and according to a deliberate plan formulated by Defendants' highest corporate offices. *See e.g.*, *id.* ¶¶ 60, 69, 74, 84.

Plaintiffs allege tort claims and seek ordinary tort relief. Based on Defendants' conduct,

Plaintiffs allege six state law causes of action: public nuisance, private nuisance, trespass, unjust enrichment, violation of the Colorado Consumer Protection Act, and civil conspiracy. Plaintiffs face substantial and rising costs to protect people and property within their jurisdictions from the dangers of climate alteration. In order to abate and mitigate those impacts, Plaintiffs seek monetary relief from Defendants, who substantially contributed to the harm. Compl. ¶¶ 532-536. "Plaintiffs **do not** seek to enjoin any oil and gas operations or sales in the State of Colorado, or elsewhere, or to enforce emissions controls of any kind." *Id.* ¶ 542.

SUMMARY OF ARGUMENT

Plaintiffs filed state law claims, in state court, for harms suffered entirely in Colorado. They have not pled federal claims, federal law is not an element of their claims, and no federal statute completely preempts these claims. Under the well-pleaded complaint rule, Plaintiffs are entitled to disclaim reliance on federal law, as they have done. There is no federal jurisdiction.

Defendants' lead argument – that Plaintiffs' state claims are really federal common law claims – is foreclosed by the well-pleaded complaint rule, which mandates that jurisdiction turns on the claims Plaintiffs actually pled. Even if that black-letter law could be ignored, the decisions upon which Defendants rely – *American Electric Power Co., Inc. v. Connecticut*, 564 U.S. 410 (2011) ("*AEP*") and *Native Village of Kivalina* v. *ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012) ("*Kivalina*"), cases in which the plaintiffs *actually* pled federal common law claims – do not suggest that federal common law must apply here. Both addressed interstate *emissions*, not the conduct for which Defendants are being held liable. As to the interstate emissions at issue in those cases, both courts expressly left open the question of whether *state* common law could apply.

Jurisdiction is also improper under the "substantial question" basis of removal jurisdiction. *See generally Grable & Sons Metal Prods. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005). *Grable* jurisdiction

attaches *only* if the "substantial question" is an essential part of *the plaintiffs' claims*. All of the federal issues Defendants raise – including preemption of state law – are simply defenses, which, as the Supreme Court and the Tenth Circuit have repeatedly held, do not create federal jurisdiction.

While "complete preemption" is an exception to the well-pleaded complaint rule, Defendants' argument that the Clean Air Act (CAA) completely preempts these claims must fail. For the CAA to create jurisdiction through complete preemption, it must provide the exclusive cause of action for addressing Defendants' conduct and Congress must have intended to preempt state law. The Act does not address the tortious actions at issue in this case, much less provide a cause of action to remedy them. Defendants do not suggest otherwise. Even if this case were about regulating emissions, as Defendants falsely suggest, *every* court to consider whether the Act completely preempts has rejected the argument. This Court should as well.

The rest of Defendants' arguments also fail. This case cannot be removed on the basis of the federal enclave doctrine, which requires the injury or tort to arise on federal land, when Plaintiffs' complaint expressly disclaims recovery for any injuries occurring on federal land. Similarly, no federal officer instructed Defendants how much fossil fuel to sell or that they should conceal or misrepresent the dangers of its use. The downstream impacts of fossil fuels produced offshore does not create jurisdiction under the Outer Continental Shelf Lands Act (OCSLA); recognizing such a wild theory would create federal jurisdiction over oil spill, contract and other cases arising anywhere in landlocked America, based on a statute that addresses offshore drilling operations. Finally, there is no bankruptcy jurisdiction where there is no applicable bankruptcy proceeding or an explanation of how these claims relate to it.

ARGUMENT

Defendants bear the burden of establishing jurisdiction and this Court "must presume no

jurisdiction exists absent an adequate showing by [the Defendants] that jurisdiction exists; that showing must be made by a preponderance of the evidence." *Dutcher v. Matheson*, 840 F.3d 1183, 1189 (10th Cir. 2016) (internal quotation marks omitted).

Defendants' Notice of Removal ("Not.", Dkt. 1) incorrectly relies on a variety of cases decided under federal law that do not actually consider *removal* to federal court. The analysis of removal is far more straightforward than Defendants' Notice implies.

This Court's removal jurisdiction must be predicated on original federal-question jurisdiction under 28 U.S.C. § 1331. Under the "well-pleaded complaint rule," a plaintiff is the "master of the claim" and can "avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar*, *Inc.*, *v. Williams*, 482 U.S. 386, 392 (1987). "For a case to arise under federal law within the meaning of § 1331, the plaintiff's 'well-pleaded complaint' must establish one of two things: 'either that federal law creates the cause of action or that plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.'" *Firstenberg v. City of Santa Fe*, 696 F.3d 1018, 1023 (10th Cir. 2012) (quoting *Nicodemus v. Union Pac. Corp.*, 440 F.3d 1227, 1232 (10th Cir. 2006)). "By omitting federal claims from a complaint, a plaintiff can generally guarantee an action will be heard in state court." *Devon Energy Prod. Co., L.P. v. Mosaic Potash Carlsbad, Inc.*, 693 F.3d 1195, 1202 (10th Cir. 2012) (internal quotation marks omitted). As set forth below, Plaintiffs have relied exclusively on state law and no substantial questions of federal law must be resolved here.

"[I]t is now settled law that a case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption." *Caterpillar*, 482 U.S. at 393. The rule has *one* general exception: the doctrine of *complete* preemption. Complete preemption arises only in the extraordinarily rare situation where "Congress affords defendants not only an affirmative defense against state law claims, but also the right to remove the dispute to federal court – ensuring that the

preemption question itself is decided in a federal (rather than a state forum)." *Cook v. Rockwell Int'l Corp.*, 790 F.3d 1088, 1097 (10th Cir. 2015). As set forth below, no statute completely preempts the claims at issue here.

Defendants' Notice relies heavily on federal common law, and *California* also relied on the notion that similar claims "arise" under federal common law. 2018 U.S. Dist. LEXIS 32990 at *14. This argument is not supported by or part of any recognized removal doctrine and must be rejected. If the plaintiffs do not plead federal claims or a substantial federal issue, there is no additional "arising under federal common law" doctrine of removal; at most this would be an ordinary preemption defense. As shown below, however, even if an unpled federal common law claim could support removal, Plaintiffs' claims are *not* federal common law claims because federal common law does not govern the conduct at issue.

Aside from general federal question jurisdiction, Congress has provided other limited bases for removal, *see e.g.*, 28 U.S.C. § 1442 (cases against federal officers), 28 U.S.C. § 1452(a) (bankruptcy removal), which are not necessarily governed by the well-pleaded complaint rule. While Defendants invoke several of these, as discussed below, none of them applies here.

I. REMAND IS REQUIRED BECAUSE PLAINTIFFS PLED CLAIMS ONLY UNDER COLORADO LAW

A. Plaintiffs' well-pleaded complaint relies only on state law, and an unpled federal common law claim cannot support removal.

No federal claims – statutory or common law – are found in Plaintiffs' complaint. Plaintiffs bring tort claims against private corporations for harms suffered in Colorado. They raise only state law claims: public nuisance (Compl. ¶¶ 444-56); private nuisance (*id.* ¶¶ 457-71); trespass (*id.* ¶¶ 472-82); unjust enrichment (*id.* ¶¶ 483-88); violation of the Colorado Consumer Protection Act (*id.* ¶¶ 489-500); and civil conspiracy (*id.* ¶¶ 501-30). These claims are based in Colorado tort law. *See, e.g.,*

Bd. of Cty. Comm'rs v. Slovek, 723 P.2d 1309 (Colo. 1986), *Pub. Serv. Co. v. Van Wyk*, 27 P.3d 377 (2001); *see also* C.J.I.-Civ. 18:1 to 18:4 (trespass); C.J.I.-Civ. 27:1 to 27:3 (civil conspiracy); C.J.I.-Civ. 29:1-29:6 (Colorado Consumer Protection Act). Under the well-pleaded complaint rule, Plaintiffs' claims do not create federal jurisdiction.

A case against the seller of a product – who contributes to a nuisance by promoting and concealing the dangers of that product – states an ordinary common law claim. Such cases are properly (and almost exclusively) brought and resolved under state law. *See e.g., In re Methyl Tertiary Butyl Ether Prods. Liab. Litig. ("MTBE")*, 725 F.3d 65 (2d Cir. 2013) (common law case against oil companies under New York law); *City of N.Y. v. Bob Moates' Sports Shop,* 253 F.R.D. 237, 242-43 (E.D.N.Y. 2008) (common law case against gun sellers under New York law); *People v. ConAgra Grocery Prods. Co.*, 17 Cal. App. 5th 51, 108 (Cal. Ct. App. 2017) (public nuisance against lead paint manufacturers under California law); *City of Gary v. Smith & Wesson*, 801 N.E. 2d 1222, 1235 (Ind. 2003) (public nuisance against gun manufacturer brought under Indiana law).

None of Plaintiffs' claims rely on federal law, and none seek to adjudicate compliance with any federal statute. In fact, Defendants correctly recognize that Plaintiffs do not allege that Defendants' conduct violated any federal statute or regulation. Not. at 14. Plaintiffs do not attempt to "usurp" the regulatory authority of the federal government, but rather hold Defendants liable for the economic harms caused to Plaintiffs by Defendants' tortious conduct, relief no federal regulatory scheme provides. Thus Plaintiffs' claims arise out of state common law and are not based on nor arise out of federal law.

Since the Plaintiffs did not plead federal common law claims, the "well-pleaded complaint" rule prevents removal and federal jurisdiction, and requires remand. *Devon*, 693 F.3d at 1202 ("Under

the well-pleaded complaint rule, a suit arises under federal law only when the plaintiff's statement of his own cause of action shows that it is based on federal law" (internal quotation marks omitted)).

B. Defendants' argument for a new removal doctrine based on unpled federal common law should be rejected.

Defendants argue that this Court has jurisdiction because Plaintiffs *should* have pled federal common law claims to regulate emissions, Not. at 6-12, or as *California* put it, that these claims can be removed because they are "necessarily governed by federal common law." 2018 U.S. Dist. LEXIS 32990 at *5-6. Neither the Supreme Court nor the Tenth Circuit has ever recognized such a doctrine. Indeed, even if it were true that federal law leaves no room for state claims, this is merely ordinary preemption, which does *not* support removal.

Defendants cite no authority for the proposition that removal may be based on the existence of an unpled federal common law claim – much less based on one that no court has ever recognized and which Defendants argue does not exist. They rely exclusively on cases in which the plaintiffs expressly invoked federal jurisdiction; federal common law was not a basis for removal, and none of these cases discuss removal. *See e.g.*, *Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 852-53 (1985); *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972) (*"Milwaukee I"*); *AEP*, 564 U.S. at 418; *Kivalina*, 696 F.3d at 855; *see also Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981) (case under the federal Clayton Act).

If federal law has in fact occupied the field and admits no state-law claims, that is just a matter of ordinary preemption: if this case "should be resolved by reference to federal common law," then "state common law [is] preempted." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987). Ordinary preemption, however, does not create federal jurisdiction; state courts are perfectly capable of adjudicating this issue. *Caterpillar*, 482 U.S. at 393; *see also Fuentes-Espinoza v. People*, 408 P.3d 445,

448 (Colo. 2017). While an "assertion that federal common law governs . . . may very well be a winning argument on a motion to dismiss in the state court, [it] will not support removal jurisdiction[.]" *E. States Health & Welfare Fund v. Philip Morris, Inc.*, 11 F. Supp. 2d 384, 394 (S.D.N.Y. 1998). Defendants' argument that this Court has jurisdiction based on an unpled federal common law claim clearly fails.

Even if removal could be founded on an unpled claim, it certainly cannot be founded on an unpled claim that no court has recognized, and that Defendants themselves argue against. Defendants do not concede that federal common law provides a damages cause of action for nuisance or trespass based on marketing and selling fossil fuels at levels that alter the climate, while concealing the dangers. Nuisance and trespass are traditional areas of state law, *see supra* Part II.A., and no court has ever recognized such a federal claim; as discussed below, the federal common law of interstate pollution was limited solely to injunctive relief against direct emitters or dischargers of pollution. Even *City of Oakland* refused to recognize such a federal common law claim. 2018 U.S Dist. LEXIS 106895, at *18-19.

Defendants argue that the facts alleged *could* support a federal common law claim for regulating emissions of greenhouse gases. Defendants cannot "force upon the [Plaintiffs] a federal common-law cause of action, despite the absence of such an action on the face of the complaint . . . merely because the facts alleged in the complaint *could* potentially support a federal claim." *E. States Health & Welfare Fund*, 11 F. Supp. 2d at 396. The problem for Defendants' removal argument is that the Plaintiffs did not plead that claim; instead, they pled Colorado claims for injuries arising from Defendants' tortious production, promotion, and sales of fossil fuels.

If there were some generalized "governed by federal common law" basis for removal, it would swallow the carefully considered "substantial federal issue" rule of *Grable*, as well the

"complete preemption" rule. The Supreme Court has articulated very specific requirements for these doctrines, and Defendants cannot avoid those requirements by claiming some vague, arising-under-federal-common-law argument. *Cf.* Not. at 6-12.

The *California v. BP* court mistakenly adopted this argument based on a misinterpretation of a single Ninth Circuit case. In *Wayne v. DHL Worldwide Express*, 294 F.3d 1179, 1184-85 (9th Cir. 2002), the court stated, "[f]ederal jurisdiction would exist in this case if the claims arise under federal common law." This statement is unremarkable because the Ninth Circuit recognized the well-pleaded complaint rule and never suggested that a claim that arises under federal common law is an exception to the rule. *Id.* at 1183-85. Regardless, such an exception has never been adopted by the Tenth Circuit, which has been clear that the *only* recognized exception to the well-pleaded complaint rule is complete preemption. *Nicodemus*, 440 F.3d at 1232 n.4.

Because a preemption defense does not support remand, Defendants' federal common law argument could only prevail under complete preemption. The Supreme Court and the Tenth Circuit have only recognized *statutes* as the basis for complete preemption, and other courts have squarely held that "federal common law cannot serve as the basis for complete preemption or removal jurisdiction." *Arnold & Through Arnold v. Blue Cross & Blue Shield*, 973 F. Supp. 726, 737 (S.D. Tex. 1997). "Whether latent federal power should be exercised to displace state law is primarily a decision for Congress, not the federal courts." *Atherton v. FDIC*, 519 U.S. 213, 218 (1997) (internal quotation marks omitted). In a complete preemption case, courts are deciphering whether *Congress* intended to exercise its authority to provide a federal forum. *See Ben. Nat'l Bank v. Anderson*, 539 U.S. 1, 9 (2003). "When the defendant asserts that federal common law preempts the plaintiff's claim, there is no congressional intent which the court may examine – and therefore congressional intent to make the action removable to federal court cannot exist." *Merkel v. Fed. Express Corp.*, 886 F. Supp. 561, 566

(N.D. Miss. 1995). *See also Singer v. DHL Worldwide Express, Inc.*, No. 06-cv-61932, 2007 U.S. Dist. LEXIS 37120, at *13-14 (S.D. Fla. May 22, 2007) (same).

This Court should reject Defendants' invitation to create a new removal doctrine that impermissibly intrudes upon Congress' authority.

C. Even if an unpled federal common law claim could be the basis for removal, federal common law does not govern these claims.

Assuming that claims can be removed if they "necessarily arise under federal common law" – even if the complaint does not rely on such law and even if the requirements of complete preemption are not satisfied – *California v. BP*'s application of that framework to these claims is still incorrect. The claims here do not "arise under federal common law," for two reasons. First, the Supreme Court has *never* held that all climate cases arise exclusively under federal common law. Rather, the Court held that the Clean Air Act's *emissions* regime displaced a federal common law tort action seeking to regulate *emissions*. The Court expressly left open whether a similar state claim is viable. More importantly, while *emissions* cases have no bearing on the issues here, Defendants have argued that *any* federal common law claim has been displaced by the Clean Air Act; they cannot argue Plaintiffs are pleading around a body of federal law that they have argued does not exist. Second, Defendants' CAA displacement argument aside, federal common law does not govern tort claims for damages based on Defendants' promotion and sale of fossil fuels.

1. *AEP* and *Kivalina* held that federal common law was displaced by the Clean Air Act, but state common law remains open.

Defendants' claim that "the Supreme Court [in *AEP* and the Ninth Circuit in *Kivalina*] held that tort claims arising from climate change are governed by federal common law" is wrong. Not. at 7-8. Those courts held the exact opposite, *i.e.*, that the specific federal common law claims before

them – if they ever existed – had been displaced. *If* federal common law has been displaced by statute (as Defendants imply), *then* it certainly cannot be invoked as a basis for removal.

a. *AEP* and *Kivalina* did not hold federal common law governs climate change cases; both Courts left state law open.

Unlike here, the plaintiffs in *AEP expressly pled* a federal common law nuisance claim, which they filed in federal court, and that claim sought judicially imposed limits on particular polluters' greenhouse gas *emissions*. 564 U.S. at 415. In light of those facts, *AEP* has little bearing on the removal question presented here.

The substance of the *AEP* decision also supports remand. In *AEP*, the Court held that plaintiffs' federal common law claim was displaced by the Clean Air Act, which deals with emission limits. *Id.* at 423-29. Because of its holding that federal common law was displaced, *AEP* did not decide the scope of federal common law or whether plaintiffs had stated a claim under it. *Id.* at 423 (describing the question as "academic"). But the Court *did* note that while federal common law governs suits brought by a state to enjoin emitters of pollution in another state, the Court had never decided whether federal common law governs similar claims brought by "political subdivisions [ ] of a State," such as Plaintiffs – let alone the different types of claims pled here. *Id.* at 421-22.[2]

More importantly, the plaintiffs in *AEP* also pled state law claims, which the Court left "open for consideration on remand." *Id.* at 429; *see also Bell v. Cheswick*, 734 F.3d 188, 197 n.7 (3d Cir. 2013) (noting *AEP* "explicitly left open the question of whether the Clean Air Act preempted state law"). Specifically, the Court held "the availability *vel non* of a state lawsuit depends, *inter alia*, on the

[2] The Supreme Court has never recognized that federal common law governs interstate pollution claims for damages. *See Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 21 (1981) ("In these cases, we need not decide whether a cause of action may be brought under federal common law by a private plaintiff, seeking damages.").

preemptive effect of the federal [Clean Air] Act." 564 U.S. at 429. Displacement does not imply preemption. "Legislative *displacement* of federal common law does not require the same sort of evidence of a clear and manifest [congressional] purpose demanded for *preemption* of state law." *Id.* at 423 (emphasis added) (internal quotation marks omitted).

Similarly, in *Kivalina*, the plaintiff brought a federal common law claim (this time, for damages), based on defendants' direct greenhouse gas emissions. Relying on *AEP*, the Ninth Circuit held that the claim was displaced by the Clean Air Act. *Kivalina*, 696 F.3d at 857-58. However, as Judge Pro's concurrence made clear, "[o]nce federal common law is displaced, state nuisance law becomes an available option to the extent it is not preempted by federal law." *Id.* at 866 (citing *AEP*, 131 S. Ct at 2540). Indeed, the Ninth Circuit expressly contemplated litigation *in state court*. *Id.* (dismissal of "state law nuisance claim [was] without prejudice to refiling it in state court").

In short, *AEP* and *Kivalina* dealt only with claims against emitters, and both expressly left state law remedies open.

b. Federal law cannot be both displaced and a basis for removal.

Defendants cannot base federal jurisdiction on an un-pled federal common law claim that has been displaced because *AEP* held that *displaced federal common law* has no effect on the availability of state law; that turns on "the preemptive effect of *the federal Act*." 564 U.S. at 429 (emphasis added); *see also Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 488-91 (1987) (same).

Defendants have argued that any federal common law claim that *could* have provided relief has been displaced. *See* Not. at 3 (citing *City of Oakland*, 2018 U.S. Dist. LEXIS 106895, at *17-18). As the *San Mateo* court noted, however, if Defendants are right, "these cases [cannot be] removed to federal court on the basis of federal common law that no longer exists." 294 F. Supp. 3d at 937.

2. Federal common law does not necessarily govern these claims.

Defendants' other arguments as to why federal common law necessarily applies are likewise irrelevant under the well-pleaded complaint rule, and they are wrong. While federal common law *can* supersede state law – where (1) the case involves an area of "uniquely federal interest" *and* (2) "a significant conflict exists between [that interest] and the operation of state law, or the application of state law would frustrate specific objectives of federal legislation," *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507 (1988) (internal quotation marks and citations omitted) – that does not mean federal courts have jurisdiction over all claims that *could* be pled under or superseded by federal common law. *Boyle*, for example, was not a removal case; it only addressed the recognition of a *federal defense* to state claims already in *federal* court on diversity jurisdiction. *Id.* at 502-03.

Leaving aside the missing jurisdictional link in Defendants' argument, there is no "uniquely federal interest" in providing tort liability and compensation for a plaintiff injured as a result of a defendant's tortious conduct in connection with the promotion and sale of fossil fuels, and, no court has recognized otherwise. Additionally, state law liability does not conflict with any specific federal statute, policy or interest.

a. This case is not about the regulation of emissions; no "uniquely federal interest" is at issue.

Contrary to what Defendants argue, Plaintiffs' case is not about regulating emissions or emitters. Plaintiffs disclaimed any such purpose. Compl. ¶ 542. But, more broadly, nuisance and trespass liability for a manufacturer or seller does not regulate the conduct of third parties, such as the product users, simply because they are in the causal chain. The lawsuits brought by states against the tobacco companies are just one example. Others abound. In *MTBE*, Exxon was liable in nuisance for its production and failure to disclose the dangers of MTBE; even though the gasoline

leached from independent gas stations, the conduct of those station owners was not being regulated. 725 F.3d at 121. In lead paint cases, manufactures were liable for promoting lead paint knowing it was dangerous; even though homeowners had to use the paint, those individualized decisions were not being second-guessed. *ConAgra Grocery Prods. Co.*, 17 Cal. App. at 108. And, as Judge Weinstein put it, a case against gun distributors "is not about an individual right to keep and bear arms," it is about the "obligation to follow federal and state law applicable to the sale and marketing of firearms, the violation of which causes a public nuisance in a different geographical location through gun trafficking." *Bob Moates' Sport Shop, Inc.*, 253 F.R.D. at 242-43.

Because this case is not about emissions, it does not implicate federal law. As cases like *MTBE*, *ConAgra* and *Bob Moates' Sport Shop* show, claims against the seller of a product that contributes to a nuisance are state law claims.

MTBE is instructive, because it arose out of the Clean Air Act's requirement that gasoline manufacturers add an "oxygenate" to their products. MTBE was one such oxygenate, which defendants added specifically to comply with this federal mandate. That is a far stronger case for federal interest than here, where the Defendants cannot identify any federal statute or regulation that compelled them to produce and sell their fossil fuels at the levels they did, and mislead the public about their risks. Yet claims that MTBE polluted groundwater were still heard under New York law, *not* federal law. *MTBE*, 725 F.3d at 121.

This case is no different than the tens of thousands of cases filed against asbestos manufacturers under state tort law. Even though EPA has regulated asbestos as a Hazardous Air Pollutant under section 112 of the Clean Air Act since 1973, *see* 40 C.F.R. Subpart M ("National Emission Standard for Asbestos"), courts have declined to create new federal common law in lieu of state tort law for these claims. *See, e.g., Jackson v Johns Manville Sales Corp.*, 750 F.2d 1314, 1323-1327

(5th Cir. 1985)(en banc).

Because there is no "uniquely federal interest" in Defendants' liability for their specific tortious conduct, they argue that the "general subject of environmental law" is such an area of unique federal interest. Not. at 7. To say that all environmental law is exclusively federal is a vast overstatement. "[C]ommon law causes of action to address pollution has been part of the 'historic police powers' of the states." *Freeman v. Grain Processing Corp.*, 848 N.W.2d 58, 76 (Iowa 2014) (citation omitted). State, and in particular, Colorado common law has provided remedies for environmental harms for decades. *See, e.g.*, *Jackson v. Unocal Corp.*, 262 P.3d 874 (Colo. 2011) (asbestos contamination cases); *Burt v. Beautiful Savior Lutheran Church*, 809 P.2d 1064 (Colo. App. 1990) (storm water case); *Pub. Serv. Co. v. Van Wyk*, 27 P.3d 377 (Colo. 2001) (common law case arising out of noise and electromagnetic interference); *Miller v. Carnation Co.*, 516 P.2d 661 (Colo. App. 1973) (farm pollution and disturbances). And every state, including Colorado, has its own environmental statutes, including even air pollution statutes. *See* Colo. Rev. Stat. § 25-7-101 et seq. (2018) (Colo. Air Pollution, Prevention and Control Act); *see also id.* § 25-8-101 et seq. (2018) (Colo. Water Quality Control Act). If there were an exclusive "federal common law" of environmental law, decades of Colorado law addressing environmental harms would not exist.

Nor is there a unique federal interest even when injuries arise from out-of-state conduct, including pollution. While federal common law applies to *some* cases involving interstate pollution, it sweeps far too broadly to suggest that this always involves "uniquely federal interests," as Defendants argue. Not. at 7. In *AEP*, the Supreme Court expressly noted that it had only recognized federal common law for interstate cases brought by *states*. 564 U.S. at 421-22. In addition, state law has long been applied to interstate nuisance and negligence cases:

The cases are many in which a person acting outside the State may be held

> responsible according to the law of the State for injurious consequences within it. Thus, liability is commonly imposed under such circumstances . . . for maintenance of a nuisance, *State v. Lord,* 16 N.H. 357, 359 . . . and for negligent manufacture, *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050.

Young v. Masci, 289 U.S. 253, 258-59 (1933). "[I]n the ordinary interstate tort the Constitution does not preclude the application of one state's law to determine liability and afford a remedy for acts done in another state and producing injury within the forum state." *Illinois v. Milwaukee*, 731 F.2d 403, 411 n.3 (7th Cir. 1984) ("*Milwaukee III*"). Even in the context of direct regulation of emissions – which is *not* this case – the Supreme Court confirmed in *Ouellette* that state tort law applies in interstate cases, so long as it does not directly conflict with the federal regulatory scheme. 479 U.S. at 497-99.[3]

This case does not implicate conflicting sovereign prerogatives that justified the development of federal common law in the direct pollution cases. The Supreme Court has only recognized the need for federal common law to govern that specific subset of interstate pollution cases where states sought injunctive relief against out-of-state pollution sources. For example, in *Milwaukee I*, Illinois sought to *enjoin* Milwaukee from polluting Lake Michigan, "a body of interstate water." 406 U.S. at 93. Critical to the Court's finding that Illinois may have stated a claim under federal common law were two key points: (1) the case concerned out-of-state discharges; and therefore (2) Illinois could not otherwise prevent those discharges. *Id.* at 104. The case presented a "uniquely federal interest" because the "interstate dispute implicat[ed] the conflicting rights of states." *See Nat'l Audobon Soc'y v. Dep't of Water*, 869 F.2d 1196, 1202 (9th Cir. 1988). If Illinois law

[3] In *Ouellette*, that meant allowing only claims based on the law of the source state, since the Clean Water Act expressly allows source states to enact more stringent regulations. 479 U.S. at 498-99. Here, of course, no federal statute regulates the conduct at issue, and therefore no similar restrictions on application of state law apply.

could be used to shut down a pollution source in Wisconsin, it would be invading Wisconsin's sovereign prerogatives; but, if Wisconsin law did not provide a remedy for Illinois, that would invade Illinois' sovereign prerogatives to protect its citizenry. Therefore federal common law was needed. *Milwaukee I*, 406 U.S. at 104.

Here, however, if Colorado's law permits recovery for injury in Colorado, other states are free to agree or disagree on liability for injury in those jurisdictions, just as in any other case against sellers of harmful products that are widely sold and consumed. This is nothing like the instances in which the Supreme Court has authorized the creation of a federal common law of public nuisance, *i.e.*, where the plaintiffs seek to enjoin an out-of-state discharger of pollution.

b. This case does not conflict with a federal interest in uniformity.

As Judge Easterbrook advised, "one must be wary of uniformity-based arguments articulated at a high level of generality." *Bennett v. Sw. Airlines Co.*, 484 F.3d 907, 911 (7th Cir. 2007). Federal common law is not needed here because this case does not implicate a "federal program, which by its nature is and must be uniform throughout the nation." *Resolution Tr. Corp. Hesierman*, 856 F. Supp. 578, 581 (D. Colo. 1994). While there are federal programs that do limit the *emission* of greenhouse gases, Plaintiffs do not sue for Defendants' direct emissions, which may be covered by those programs. There is no federal program that governs or dictates how much fossil fuel Defendants produce and sell, or whether they can mislead the public when doing so.

Even Defendants' characterization of this case as dealing with emissions does not help them here. Plaintiffs' claims for monetary relief presents no danger of inconsistent state (or state and federal) emission standards. Unlike injunctive relief seeking to impose emission standards, which could lead to a multiplicity of conflicting requirements, monetary damages awarded by a Colorado

court do not – and cannot – conflict with any emission standards issued by any other state or federal government.

The Supreme Court made this point when it upheld maritime common law damages for the *Exxon Valdez* disaster. *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008). The Court distinguished displaced *injunctive* relief claims, which had been at issue in cases like *Milwaukee I*, and *Milwaukee* v. *Illinois*, 451 U.S. 304 (1981) ("*Milwaukee II*"), because in those earlier decisions, "plaintiffs' common law nuisance claims amounted to arguments for effluent-discharge standards different from those provided by the [Clean Water Act]." 554 U.S. at 489 n.7. By contrast, in *Baker*, as here, "private claims for economic injury do not threaten similar interference with federal regulatory goals." *Id.*

Because claims that Defendants sold a product in amounts that created a nuisance while concealing knowledge of its dangers implicate no "uniquely federal interest," and because liability for those actions does not conflict with, or frustrate the goals of, any federal law, those claims are not preempted by federal common law.

II. PLAINTIFFS' COMPLAINT DOES NOT RAISE SUBSTANTIAL FEDERAL ISSUES

The "*Grable*" or "'substantial question' branch of federal question jurisdiction is exceedingly narrow," *Gilmore v. Weatherford*, 694 F.3d 1160, 1171 (10th Cir. 2012) (citation omitted), and does not apply here. The argument was rejected in *San Mateo*, 294 F. Supp. 3d at 938; *California v. BP* did not address it.

Under the doctrine, federal jurisdiction lies over state law claims only if a federal issue is: "(1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn v. Minton*, 568 U.S. 251, 258 (2013) (citing *Grable*, 545 U.S. at 314). Defendants cannot satisfy any of these elements. To

succeed on their claims, Plaintiffs need not prove and no court need resolve any issue of federal law.

As in *San Mateo*, Defendants merely "gesture to federal law and federal concerns in a generalized way"; they "have not pointed to a specific issue of federal law that must necessarily be resolved to adjudicate the state law claims." 294 F. Supp. 3d at 938. If the amorphous issues cited by Defendants – background federal regulation (Not. at 17-20), the fact that the federal government is one of countless fossil fuel purchasers (Not. at 20-21), and the mere possibility of future diplomatic efforts concerning the general subject area (Not. at 21-23) – suffice for jurisdiction, *Grable* could be used to remove countless cases. Defendants' argument ignores the Supreme Court's clear direction that the doctrine should not be lightly invoked to federalize issues in ways that "upset[ ] the state-federal line drawn (or at least assumed) by Congress." *See Grable*, 545 U.S. at 314.

A. Plaintiffs' state law claims do not raise federal issues; Defendants raise them.

For *Grable* jurisdiction to lie, a federal issue must be an "essential element of the plaintiff's claim." *Becker v. Ute Indian Tribe*, 770 F.3d 944, 947 (10th Cir. 2014) (quoting *Grable*, 545 U.S. at 315). For example, *Grable* applies where "a state-law cause of action is 'brought to enforce' a duty created by [a federal statute] because the claim's very success depends on giving effect to a federal requirement." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Manning*, 136 S. Ct. 1562, 1570 (2016). Cases where *Grable* jurisdiction was found demonstrate why it does not lie here. *See e.g.*, *Grable*, 545 U.S. at 315 (jurisdiction issue was whether proper notice was given under a federal statute); *Gilmore*, 694 F.3d at 1173 (jurisdiction where "plaintiffs must show that the Secretary's advance approval is required under federal law"); *Nicodemus v. Union Pac. Corp.*, 440 F.3d 1227, 1235 ("Plaintiffs must establish that the [federally given] right-of-way prohibited the use to which it was put.").

Here, Plaintiffs' rights and entitlement to relief arise under Colorado, not federal, law. Plaintiffs do not and need not rely on federal law as the source of their rights or for Defendants'

culpability. Defendants' liability is based on their production and sale of fossil fuels at levels that caused a trespass and nuisance to Plaintiffs, including Defendants' decision to do so with knowledge that the use of those fuels would contribute to climate change and concealment of those dangers. Federal law is simply not an *element* of the claims. *See Randolph v. Forsee*, No. 10-2445, 2010 U.S. Dist. LEXIS 131807, at *21-22 (D. Kan. Dec. 13, 2010) (Rejecting that state law claims necessarily raised federal issues where "Plaintiff alleges that defendants' duties of good faith, loyalty, and good care arise from . . . a relationship defined by Kansas law."). *See also id.* at *24-25 ("[D]efendants point to no statute or rule that the Court would be required to interpret in order for plaintiff to prevail on her state law claims. Instead, state law will define whether the statements made in federally required documents were false or misleading.").

The three federal issues Defendants raise are not essential elements of Plaintiffs' claims; they are merely potential federal defenses. This is fatal to their *Grable* arguments, because jurisdiction is inappropriate where "federal law is merely alleged as a barrier to" the success of a state law claim. *Becker*, 770 F.3d at 948 (internal quotation marks omitted)). *See also Doe v. Archdiocese of Denver*, 413 F. Supp. 2d 1187, 1192 (D. Colo. 2006) ("*Grable* did not in any way abrogate the well-pleaded complaint rule"); *Devon*, 693 F.3d at 1209-10.

Defendants as much as admit that the issues *they* raise are just potential defenses, *see* Not. at 18; that fails to satisfy *Grable*. Defendants' first *Grable* issue is the mere existence of federal regulations that govern greenhouse gas emissions. Not. at 17-18. Defendants admit that "Plaintiffs do not allege . . . that Defendants' conduct has violated any federal statute or regulation," *id.* at 14, and fail to explain how Plaintiffs' claims challenge or rely on any federal regulations or statutes. Any regulatory issues were thus introduced by the Defendants, and any conflicts – if they exist – create ordinary preemption questions, not a basis for jurisdiction. *San Mateo*, 294 F.3d at 938 (rejecting

Grable because "*Grable* does not sweep so broadly" as to remove "many (if not all) state tort claims that involve the balancing of interests and are brought against federally regulated entities").

The Tenth Circuit's decision in *Devon* is instructive. The court rejected *Grable* jurisdiction even though it recognized that the Complaint "*possibly*" raised "a disputed federal issue." 693 F.3d at 1209-10. That was not enough, because "federal issues [were] not *necessarily* raised by [the] claims." *Id.* at 1210. While the *Devon* defendants could raise their argument as a federal defense, "federal-question jurisdiction does not lie as a result." *Id.*

None of Defendants' cases suggest that the federal regulations that Defendants point to are "necessarily" raised by Plaintiffs' claims. In *Pet Quarters, Inc. v. Depository Tr. & Clearing Corp.*, 559 F.3d 772 (8th Cir. 2009), the plaintiffs' claims required the court to determine the validity of the federal government's conduct – a "Stock Borrow Program" approved by the SEC – not just the defendant's conduct. *Id.* at 779. Here, Plaintiffs do not allege that any federal regulation or decision is unlawful or a factor in their claims; nor are they asking a court to consider whether the government's decisions to permit fossil fuel use and sale was appropriate. Defendants can also find no aide in *Board of Commissioners v. Tennessee Gas Pipeline Co.*, 850 F.3d 714 (5th Cir. 2017). In that case the Fifth Circuit upheld jurisdiction because federal law was "the exclusive basis for holding Defendants liable" on some of the claims, *id.* at 722, and because the parties disputed whether federal law created the duties that the plaintiff claimed were breached, *id.* at 724.

Defendants' second *Grable* argument – the mere fact that the federal government leases land to, and purchases fossil fuels from, the Defendants – is meritless. Not. at 20-21. Plaintiffs' claims assert no rights under these contracts, do not challenge their validity, and do not require a court to interpret their meaning or importance; the complaint does not even mention them. For purposes of Plaintiffs' claims, the federal government is indistinguishable from any other consumer (*i.e.*, their use

is merely an intended and foreseeable link in the causal chain, to which Plaintiffs are not attributing liability); any contracts with the Defendants are not essential elements of any claim. Defendants' argument is based solely on their unsupported speculation about the *potential* impact that Plaintiffs' success would have on the government's ability to continue purchasing fossil fuels. Not. at 20-21. Even if Defendants' speculation was well-founded, this goes only to the substantiality prong of the *Grable* analysis – Defendants do not even attempt to establish the first requirement that the issue must be necessarily raised by the Plaintiffs. *See Bennett*, 484 F.3d at 910.

Defendants' third issue – the impact on foreign affairs – also fails to meet *Grable*'s first requirement. Defendants argue that "climate change has been the subject of international negotiations for decades" and that the U.S. position has been to balance the environment and economic growth, citing non-binding, international agreements that do not apply to private parties. Not. at 21-22. Fatally, none of these agreements are "essential elements" of any claim, nor do Plaintiffs challenge or ask a court to resolve the meaning of any such agreement. As with the federal regulations, Defendants base jurisdiction on alleged *conflicts* between these claims and those agreements; as with the regulations, these are, at best, preemption issues that do not provide a basis for removal jurisdiction.

Defendants cite *American Insurance Association v. Garamendi,* 539 U.S. 396 (2003), to erroneously claim that any case that could have "'more than incidental effect[s] on foreign affairs'" satisfies *Grable,* Not. at 21 (quoting *Garamendi*, 539 U.S. at 418), but *Garamendi* did not address *Grable.* It addressed the parameters of foreign affairs *preemption* (which Defendants misstate). Defendants will have their day to argue foreign affairs preemption in state court, but it does not create federal jurisdiction. *San Mateo*, 294 F. Supp. 3d at 938 (noting that "state courts are entirely capable of adjudication" of preemption issues).

B. The federal issues raised by Defendants are not relevant, let alone substantial.

Even if Defendants had established that a federal issue was an essential element of plaintiffs' claims, they fail the requirement that the issue must be substantial and actually disputed.

First, to determine substantiality, courts "look[] to whether the federal law issue is central to the case." *Gilmore v. Weatherford*, 694 F.3d 1160, 1175 (10th Cir. 2012). And when a case "involves substantial questions of state as well as federal law, this factor weights against asserting federal jurisdiction." *Id.* (citations and internal marks omitted). Defendants' issues are not central to and are far from the only issues. Plaintiffs' claims are "rife with legal and factual issues that are not related to [the federal issues]," so jurisdiction is not proper. *See Stark-Romero v. AMTRAK Co.*, No. CIV-09-295, 2010 U.S. Dist. LEXIS 141454, at *26 (D.N.M. Mar. 31, 2010).

Thus, this case is quite different from those where jurisdiction was found. For example, in *Grable*, "the meaning of the federal statute . . . appear[ed] to be the only legal or factual issue contested in the case." 545 U.S. at 315. Similarly, in *Nicodemus*, "construction of the federal land grant was the only legal or factual issue contested in the case." *Gonzales v. Ever-Ready Oil, Inc.*, 636 F. Supp. 2d 1187, 1190 (D.N.M. 2008) (citing *Nicodemus*, 440 F.3d at 1236).

Second, a substantial federal issue should pose a discrete *legal* question, which is not fact-dependent. *See Bennett* 484 F.3d at 910-11 (rejecting jurisdiction where there was "a fact-specific application of rules that come from both federal and state law rather than a context-free inquiry into the meaning of a federal law"). *Accord Gonzales*, 636 F. Supp. 2d at 1194 (rejecting jurisdiction where "Plaintiffs' claim does not involve a pure issue of federal law or even a dispute about the meaning of federal law" but instead is "centrally about the application of a mixture of federal and state law to fact"). Here, for example, Defendants' liability turns on whether there has been a trespass or an unreasonable interference with Plaintiffs' property rights. There is simply no discrete federal legal

issue.

Moreover, Defendants do not suggest this case turns on terms of any contract provision, federal regulation or treaty that this Court could interpret as a matter of law; rather, they are arguing that federal policies and decisions *conflict* with this case; Defendants identify no federal provision in need of interpretation. The cases Defendants cite do not support their argument; instead, the disputes involved discrete and often sole issues of federal law. In *Grable*, the only issue in the case – who had proper title – turned on whether the IRS gave "adequate notice, as defined by federal law." 545 U.S. at 314-15. In *Nicodemus*, "[a]ll of Plaintiffs' claims hinge[d] on whether Union Pacific's use of the right-of-way [ ] exceeded the purpose for which it was granted," a strict question of federal law. 440 F.3d at 1234. And, in *Gilmore*, the inquiry turned on whether the Secretary of the Bureau of Indian Affairs "must approve the disposition of restricted Indian personality[,] a legal question that d[id] not appear to depend on the specific facts of a case[.]" 694 F.3d at 1174.

Third, this case does not directly implicate any federal interest, so there is no strong interest justifying a federal forum. "Plaintiffs' claims are against only private defendants and do not challenge the validity of any federal agency's action or rule," nor do they directly or substantially "affect federal revenue collection or a federal agency's performance of its duties under federal law." *Gonzalez*, 636 F. Supp. 2d at 1194 (internal quotations omitted). Defendants' unsupported arguments – for example, that Plaintiffs' success in this case would somehow "starve the federal treasury of billions of dollars in revenue" and "deprive the federal government of a mechanism for carrying out vital governmental functions," Not. at 20 – are based on wildly unfounded and wholly irrelevant impacts; removal cannot be based on speculation. *San Mateo*, 294 F. Supp. 3d at 938 (similar "potential . . . implications . . . [do] not raise the kind of actually disputed, substantial federal issue necessary for *Grable* jurisdiction").

Defendants' cases involved direct impacts on the federal government, which do not exist here. In *Grable*, the Supreme Court recognized that the "Government [ ] has a direct interest in the availability of a federal forum *to vindicate its own administrative action*[.]" 545 U.S. at 315 (emphasis added). And, in *Gilmore*, "[u]nlike a typical dispute between two private litigants, [the] *action concern[ed] the responsibilities that a private defendant owes to a federal agency."* 694 F.3d at 1174 (emphasis added). Because there is no non-speculative, direct and concrete federal interest in the outcome of this case, there is no *Grable* jurisdiction based on this factor.

C. Forcing these cases into federal court would disrupt the proper federal/state balance.

If the first two requirements are met, this Court must determine whether "federal jurisdiction is consistent with *congressional judgment* about the sound division of labor between state and federal courts." *Grable*, 545 U.S. at 313-14 (emphasis added). Nothing suggests Congress intended federal courts to be the forum for this case or every climate change case, and certainly not every trespass, nuisance or unjust enrichment case that is so remotely related to federal environmental or energy policy, federal contracting or foreign affairs.

Neither the Clean Air Act, its implementing regulations, nor any other federal statute, provides a cause of action (much less an exclusive one) to deal with Defendants' conduct. This sheds plenty of light on Congressional intent. *Cf. Gonzales*, 636 F. Supp. 2d at 1196 ("To allow any state tort claim with an element of federal aviation law into federal court, particularly when Congress has not created a federal cause of action, [is] inconsistent with congressional judgment about the scope of the federal courts' jurisdiction over state law tort claims involving aviation.").

Moreover, Defendants' arguments would result in *Grable* jurisdiction anytime a defendant suggested a conflict with federal regulations, policy or international agreement; or if liability might

affect the cost of a product purchased by the government. Such disruption clearly tips against recognizing *Grable* jurisdiction. *See Gonzales*, 636 F. Supp. 2d at 1195 (rejecting *Grable* jurisdiction that would result in "a flood of cases"); *Bennett*, 484 F.3d at 911 ("mov[ing] a whole category of suits to federal court" was inconsistent with congressional judgment); *Ranjer Foods LC v. QFA Royalties LLC*, C.A. No. 13-cv-00256, 2013 U.S. Dist. LEXIS 18132, at *8-9 (D. Colo. Feb. 8, 2013) (rejecting *Grable* removal based merely on the existence of "federally-regulated communications or activities").

III. THE CLEAN AIR ACT DOES NOT COMPLETELY PREEMPT

Ordinary preemption is not a basis for federal jurisdiction; removal is only possible if a statute *completely* preempts. "Complete preemption is a rare doctrine, one that represents an extraordinary pre-emptive power." *Devon*, 693 F.3d at 1204-05 (internal quotation and citation omitted). It is so rare that the Supreme Court has recognized it "in only three areas: § 301 of the Labor Management Relations Act of 1947 ('LMRA'), § 502 of the Employee Retirement Income Security Act of 1974 ('ERISA'), and actions for usury against national banks under the National Bank Act." *Id.* (internal citations and quotation marks omitted). The unique circumstances required are not present here.

Jurisdiction based on "complete preemption" requires more than just that state law is preempted by federal law. Instead, Congress must clearly intend: (1) to preempt state common law claims; *and* (2) to create jurisdiction through a substitute and exclusive federal cause of action. *Id.* at 1342-43; *Cook*, 790 F.3d at 1097; *see also Ben. Nat'l Bank v. Anderson*, 539 U.S. 1, 9 (2003) (removal appropriate "[o]nly if Congress intended [Act] to provide the exclusive cause of action"). "If Congress intends a preemption instruction completely to displace ordinarily applicable state law, and to confer federal jurisdiction thereby, it may be expected to make that atypical intention clear." *Empire HealthChoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 698 (2006). While "courts should begin

their inquiry with the second prong," *Devon*, 693 F.3d at 1205-06, the Clean Air Act does not satisfy either.

Like many of Defendants' arguments, this one also rests on a mischaracterization of the case. Plaintiffs *are not* seeking to regulate emissions; they *are not* seeking review of EPA regulatory actions related to greenhouse gas emissions, even those emissions created by burning Defendants' products; and neither EPA action, nor a cause of action against EPA, could *ever* provide the compensation Plaintiffs seek for the injuries suffered as a result of Defendants' actions.

A. No court has held that the Clean Air Act completely preempts state law.

Every court that has considered "complete preemption" under the CAA has rejected it. As *San Mateo* held in rejecting the exact argument Defendants make here, the CAA contains "savings clauses that preserve state causes of action and suggest that Congress did not intend the federal causes of action under those statutes 'to be exclusive.'" 294 F. Supp. 3d at 938 (citing 42 U.S.C. §§ 7604, 7416); *see also Her Majesty The Queen In Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332, 344 (6th Cir. 1989) (CAA does not completely preempt, Michigan law merely "created a mechanism under which more stringent limitations may be imposed than under federal law"). Indeed, courts have specifically rejected the notion that the CAA completely preempts state nuisance claims, *see Keltner v. SunCoke Energy, Inc.*, No. 3:14-cv-01374, 2015 U.S. Dist. LEXIS 67776, at *12 (S.D. Ill. May 26, 2015); *Cerny v. Marathon Oil Corp.*, No. S.A-13-CA-562, 2013 U.S. Dist. LEXIS 144831 at *8-9 (W.D. Tex. Oct. 7, 2013); as well as personal injury claims, *see Morrison v. Drummond Co.*, No. 2:14-cv-0406, 2015 U.S. Dist. LEXIS 35482, at *8 (N.D. Ala. Mar. 23, 2015).

The only CAA case Defendants cite, *North Carolina v. Tennessee Valley Authority*, dealt with an ordinary preemption question; it did not hold that the Clean Air Act completely preempts or address the matter. 615 F.3d 291, 302-04 (4th Cir. 2010).

B. The Clean Air Act does not provide a substitute cause of action, nor one for damages.

For a statute to completely preempt, it must provide a "replacement cause of action" that "substitute[s]" for the state cause of action. *Schmeling v. NORDAM*, 97 F.3d 1336, 1342-43 (10th Cir. 1996). "[T]he federal remedy at issue must vindicate the same basic right or interest that would otherwise be vindicated under state law." *Devon*, 693 F.3d at 1207. The CAA provides no federal cause of action for damages *at all*, let alone one by a plaintiff claiming economic losses against a private defendant for tortious conduct.

The fact that the Act expressly preserves *state* common law causes of action – including tort actions for damages – makes it clear that Congress did not intend the Act to provide exclusive remedies or be a basis for removal.[4] "Nothing in this section shall restrict *any* right . . . under *any statute or common law* to seek enforcement of any emission standard or limitation *or to seek any other relief* (including relief against the Administrator or a State agency)." 42 U.S.C. § 7604(e) (emphasis added). This is why *San Mateo* rejected the argument that a tort suit for harms associated with climate change is completely preempted, 294 F. Supp. 3d at 938, and why courts have held likewise with respect to other common law torts. *Keltner*, 2015 U.S. Dist. LEXIS 67776, at *12; *Morrison*, 2015 U.S. Dist. LEXIS 35482, at *8; *Cerny*, 2013 U.S. Dist. LEXIS 144831 at *8-9.

Defendants suggest that Plaintiffs have sued the wrong party and sought the wrong relief. *See* Not. at 13 (arguing that "the Clean Air Act provides the exclusive cause of action for challenging the

[4] The Act only creates claims for violations of the Act itself. For example, the Act grants citizens the right to sue to enforce Clean Air Act standards (42 U.S.C. § 7604(a)(1)), to sue EPA for failure to perform a mandatory duty (42 U.S.C. § 7604(a)(2)), and to sue for failure to obtain certain necessary preconstruction approvals (42 U.S.C. § 7604(a)(3)). None of these provisions provide the relief Plaintiffs seek or regulate the conduct at issue here.

regulation of nationwide emissions"). However, Plaintiffs *did not* sue EPA to compel it to properly manage greenhouse gas emissions; they sued the Defendants to obtain monetary recovery for their economic losses caused by the Defendants' tortious trespass and nuisance. Defendants' argument – that Plaintiff could have sued someone else for something different – does not authorize removal under the "complete preemption" doctrine.

In *Devon*, the Tenth Circuit addressed a perfectly analogous situation. Mosaic sued Devon in state court for drilling an unauthorized well on federal land where Mosaic had rights to mine potash. 693 F.3d at 1200. Devon argued that Mosaic's state common law claims were completely preempted because they had "a private right of action under the APA against the [federal government]." *Id.* at 1206. The Circuit rejected the argument because APA relief "would not have compensated Mosaic for any damages," and held that "the availability of an administrative remedy *against the [government]* has no bearing on whether Mosaic's state law claims *against Devon* have been completely supplanted by a private federal cause of action." *Id.* at. 1206-07 (quoting the district court, emphasis added by Tenth Circuit).

A similar argument was made and rejected in *Colorado ex rel. Salazar v. ACE Cash Express, Inc.*, 188 F. Supp. 2d 1282 (D. Colo. 2002). There the defendant tried to invoke the National Bank Act – a statute, which has completely preempted certain types of claims – but were denied because the plaintiff had made no claims against the national bank. The court agreed with the plaintiffs that the defendant's argument "'confuses what this case *is* and is *not* about'" because the complaint dealt "*strictly*" with a "non-bank's violations of *state* law." *Id.* at 1285.

In short, in the Clean Air Act, Congress did not replace state common law causes of action for damages in tort with a federal cause of action. *Devon* and *Salazar* foreclose Defendants' complete preemption argument.

C. The Clean Air Act does not have even ordinary preemptive force.

The lack of a remedy under the CAA ends the inquiry. Even it did not, however, complete preemption fails because the CAA does not have even *ordinary* preemptive force. There are three ways that federal law can preempt state law: express preemption, "when Congress defines explicitly the extent to which its enactments pre-empt state law"; field preemption, "which occurs when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively"; and conflict preemption, "which occurs when it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Emerson v. Kan. City S. Ry. Co.*, 503 F.3d 1126, 1129 (10th Cir. 2007) (internal quotation marks omitted). None of these applies here.

The Clean Air Act clearly does not expressly preempt state law. Defendants' argument that the Clean Air Act preempts this case is based on their assertion that Plaintiffs "seek to declare unreasonable nationwide emissions that conform to EPA emissions standards." Not. at 15. Plaintiffs do not seek to limit emissions, set a reasonable level of nationwide emissions or even assign liability to anyone for their emissions. Nor do they even seek to prevent anyone from using, producing or selling fossil fuels. Only Defendants' acts – selling fossil fuels at levels that create a nuisance and trespass, while concealing and misrepresenting their dangers – are in issue.

Even if this case were about the regulation of greenhouse gas emissions, the Clean Air Act does not occupy the field. Congress did not intend the Clean Air Act to be the exclusive means of regulation greenhouse gas emissions, and no court has held otherwise. "The text of the Clean Air Act, in a number of different sections, explicitly protects the authority of the state to regulate air pollution." *ExxonMobil Corp. v. EPA*, 217 F.3d 1246, 1254 (9th Cir. 2000). Congress expressly preserved state authority in the Act's two savings clauses, which, with exceptions not applicable

here, allow states to impose *stricter* emissions requirements than the federal limits, 42 U.S.C. § 7416; and, preserve "any right under any statute or common law to seek enforcement of any emission standard or limitation." 42 U.S.C. § 7604(e). Congress could not have intended to occupy the field when it preserved so much room for state common law and state regulation. Whatever its form, pre-emption analysis starts with "the assumption that the historic police powers of the States are not to be superseded by the federal act unless that is the clear and manifest purpose of Congress." *Emerson*, 503 F.3d at 1129 (internal quotation marks omitted).

Indeed, state greenhouse gas emission regulation is pervasive throughout the United States. [5] Under Defendants' theory, all of these state actions would be "completely preempted."

D. Plaintiffs' claims do not conflict with any federal statute or goal in regulating greenhouse gases.

Defendants argue that Plaintiffs seek to "supplant rulemaking regarding greenhouse gas emissions," claiming that the claims "require precisely the cost-benefit analysis of emissions that the EPA is charged with undertaking and, accordingly, would directly interfere with the EPA's determinations." Not. at 15-16. However, this case does not conflict with any efforts EPA has or might take to regulate the *sources* of greenhouse gas emissions.

[5] For example, the Regional Greenhouse Gas Initiative limits emissions from power plants in nine states. *See generally* Regional Greenhouse Gas Initiative, https://www.rggi.org (last visited August 30, 2018). California's AB 32 imposes an economy-wide GHG cap and trade system. *Association of Irritated Residents v. State Air Resources Board,* 206 Cal.App.4th 1487, 1498, fn. 6 (Cal. Ct. App. 2012). California's separate Low Carbon Fuel Standard limits GHG emissions from transportation fuels (and is not preempted by the Clean Air Act. *See Rocky Mt. Farmers Union v. Corey*, 258 F. Supp. 3d 1134, 1153 (E.D. Cal. 2017). Washington limits the GHG emissions from generating electricity sold in the state. Wash. Rev. Code § 80.80060(1). New York State limits CO2 emissions from new power plants. N.Y. Comp. Codes R. & Regs tit. 6, § 251.3. Massachusetts requires the state to reduce its GHG emissions by 80% from 1990 levels by 2050. *Kain v. Department of Environmental Protection*, 474 Mass. 278, 282 (2016).

Contrary to what Defendants suggest, EPA does not determine how much fossil fuel is sold in the United States or how it is marketed; and it does not issue permits to companies that market or sell fossil fuels. Rather, EPA regulates sources that *emit* pollution. What is more, EPA sets emission "floors," which states can exceed. 42 U.S.C. § 7416. This case *does not* conflict with any of those efforts. As noted repeatedly above, this case does not address the appropriateness of any *source* emissions that EPA regulates; those emissions may be part of the causal chain, but Plaintiffs are not asking a court to assess the reasonableness of any emitter's conduct. *See California v. Atl. Richfield Co. (In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 488 F.3d 112, 136 (2d Cir. 2007).

As an afterthought, Defendants erroneously claim that federal foreign affairs power completely preempts Plaintiffs' claims. Not. at 16 (citing *Garamendi*, 539 U.S. at 418). But again, *Garamendi* addressed the scope of an ordinary preemption *defense*. And even if federal foreign affairs power *could* create jurisdiction, Defendants cannot show Plaintiffs' claims are actually preempted. Plaintiffs rely on generally applicable tort law, so the state has a "serious claim to be addressing a traditional state responsibility." *Garamendi*, 539 U.S. at 420 n.11. Thus, Defendants must show a conflict with a federal act that is "fit to preempt" state law. *Id.* at 416, 418-19, 420 & n.11. Defendants suggest there might be some unspecified conflict with some amorphous policy, but policy – even foreign policy – that lacks the force of law lacks the power to preempt, even where state law has serious foreign policy implications. *Medellin v. Texas*, 552 U.S. 491, 524-32 (2008). Under Defendants' view, every state or local law, regulation or initiative regarding or impacting the output of carbon would be preempted.

IV. THE REMAINING BASES FOR JURISDICTION ALL FAIL

Defendants argue four additional bases for federal jurisdiction; each one is stretched beyond recognition. In the California cases, *California v. BP* did not address these doctrines; *San Mateo* flatly

rejected all of them. 294 F. Supp. 3d at 938-39.

A. Plaintiffs' injuries did not arise on federal lands or enclaves.

Federal enclave jurisdiction exists only if Plaintiffs' injuries "arise" on federal lands considered "enclaves." *Ramos v. C. Ortiz Corp.*, No. 15-980, 2016 U.S. Dist. LEXIS 66638, at *8-9 (D.N.M. May 20, 2016). "[T]he location where Plaintiff was injured" is key to whether "the right to removal exists." *Id.*. Defendants' own cases confirm that it is the location of the *injury*, not the Defendants' conduct, that matters. *See Akin v. Ashland Chem. Co.,* 156 F.3d 1030, 1034-35 & n.5 (10th Cir. 1998) (action against chemical manufacturers fell within enclave jurisdiction where the claimed *exposure* to the chemicals – not their manufacture or sale – "occurred within the confines" of U.S. Air Force base).The doctrine plainly does not supply federal question jurisdiction where, as here, Plaintiffs' claims and injuries arose *exclusively on non-federal land.*

Whether the injury arose on a "federal enclave" is determined on the "face of the complaint." *Firstenberg*, 696 F.3d at 1023. Plaintiffs seek relief for injuries occurring "within their respective jurisdictions," Compl. ¶ 4, and "**do not** seek damages or abatement relief for injuries to or occurring on federal lands." *Id.* ¶ 542. That ends the inquiry. *See e.g. Washington v. Monsanto Co.,* 274 F. Supp. 3d 1125, 1132 (W.D. Wash. 2017) (because plaintiff "assert[ed] that it does not seek damages for contamination to . . . land within federal territory," "none of its claims arise on federal enclaves"); *San Mateo*, 294 F. Supp. 3d at 939 (rejecting federal enclave jurisdiction because "federal land was not the locus in which the claim arose").

Defendants' suggestion that Plaintiffs' injuries here arise from "incidents" in two nearby national parks is disingenuous. Not. at 24-26. Uncompahgre National Forest is never mentioned in the complaint, and Rocky Mountain National Park is referenced only as a descriptive landmark, *see* Compl. ¶¶ 20, 30, 35, and to provide an example of the regional trends that have resulted from

Defendants' climate alteration. *Id.* ¶ 183. That Defendants' climate alteration may have caused *similar* injuries to federal property does not speak to the nature of *Plaintiffs*' injuries, which did not occur on federal land.

B. Downstream injuries connected to products that may have been produced on the Outer Continental Shelf do not create jurisdiction.

According to Defendants, the Outer Continental Shelf Lands Act (OCSLA) provides jurisdiction for these claims for local harms in Colorado. It does not, because Plaintiffs do not challenge conduct on any offshore "submerged lands." 43 U.S.C. § 1331(a). Defendants' argument that there is federal jurisdiction if any oil *sourced* from the OCS is some *part* of the conduct that creates the injury would dramatically expand the statute's scope. Any spillage of oil or gasoline involving some fraction of OCS-sourced oil – or any commercial claim over such a commodity – could be removed to federal court. Congress did not intend such an absurd result.

Federal courts have jurisdiction over cases arising out of "any operation conducted on the outer Continental Shelf." 43 U.S.C. § 1349(b)(1). Contrary to what Defendants argue, Plaintiffs' claims do not arise out of and are not connected to any OCS operations. Not. at 29 (citing *In re Deepwater Horizon,* 745 F.3d at 163). Defendants' fossil fuel activities that Plaintiffs challenge – including, most notably, the deceptive promotion of unchecked fossil fuel use – are not "operation[s] conducted on" the OCS. While Exxon's OCS oil *production* might qualify as an "operation," they are not being sued for merely *producing*, let alone for merely producing on the OCS. It is those broader activities – taken with knowledge about the consequences of unchecked fossil fuel use – that give rise to Plaintiffs' claims.

For jurisdiction to lie, a case must *directly* arise out of OCS operations, for example, where a person is injured on an OCS oil rig, *In re Asbestos Prods. Liab. Litig. (No. VI)*, 673 F. Supp. 2d 358,

370 (E.D. Pa. 2009); or where oil was spilled from such a rig, *In re Deepwater Horizon*, 745 F. 3d 157, 162 (5th Cir. 2014); or in contract disputes directly relating to OCS operations. *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*, 754 F.2d 1223, 1225 (5th Cir. 1985). In all these cases, there was a *direct* connection between the claims and physical operations on the OCS.[6] The fact that some of Exxon's oil was apparently sourced from the OCS does not create the required *direct* connection that existed in these cases. Indeed, that is why the *San Mateo* court rejected this exact argument. 294 F. Supp. 3d at 938-39.

Defendants cite no case holding that injuries associated with downstream uses of OCS-derived oil and gas products creates OSCLA jurisdiction. This Court should not be the first.

C. Defendants were not "acting under" a federal officer when they chose to produce, market and deceptively promote fossil fuels for profit.

The statute allowing a person "acting under" a federal officer to remove has no application here. 28 U.S.C. § 1441(a)(1). Private actors invoking the statute "bear a special burden of establishing the *official* nature of their activities." *Freiberg v. Swinerton & Walberg Prop. Servs.*, 245 F. Supp. 2d 1144, 1150 (D. Colo. 2002) (emphasis added). The burden is "is not satisfied by incantations of government contractor status alone." *Id.* at 1152. Defendants admit they must show: "(1) that [they] acted under the direction of a federal officer; (2) that there is a causal nexus between the plaintiff's claims and the acts [ ] performed under the federal officer's direction; and (3) that there is a

[6] Defendants' other cases suggest the same directness requirement. *See Amoco Prod. Co. v. Sea Robin Pipeline Co.*, 844 F.2d 1202, 1203-05 (5th Cir. 1988) (OSCLA jurisdiction in contract dispute involving the purchase of OCS oil and natural gas where contracts "necessarily and physically [had] an immediate bearing on the production of the particular [OCS] well"); *Ronquille v. Aminoil Inc.*, No. 14-164, 2014 U.S. Dist. LEXIS 123224, at *7-8 (E.D. La. Sept. 4, 2014) (asbestos exposure on OCS operations); *EP Operating Ltd. P'Ship v. Placid Oil Co.*, 26 F.3d 563, 565 (5th Cir. 1994) (contract dispute concerning OCS pipeline involving a "partition" of OCS property).

colorable federal defense to the plaintiff's claims." Not. at 30 (quoting *Greene v. Citigroup, Inc.,* No. 99-1030, 2000 U.S. App. LEXIS 11350, at *6 (10th Cir. May 19, 2000) (unpublished)). They cannot.

Federal officer removal "protects against the possibility of a hostile state forum, which might arise when the federal officer is enforcing a locally unpopular national law." *Wyoming v. Livingston*, 443 F.3d 1211, 1222 (10th Cir. 2006). There is no such concern here. Plaintiffs' claims involve private corporations acting for their own commercial purposes; proceeding in state court will not risk bias against any federal policy.

The leases Defendants cite do not support a finding that they were "acting under" federal officials. Not. at 30-32. The fact that Defendants voluntarily agreed to abide by certain regulatory obligations, in connection with their operations on federal lands, does not support the type of "direct and detailed control" that is required. *Freiberg,* 245 F. Supp. 2d at 1152. *See also Watson v. Philip Morris Cos.*, 551 U.S. 142, 152 (2007) (defendant must act under the "subjection, guidance, or control" of federal official). Exxon was not asked by the federal government "to help *carry out,* the duties . . . of the federal superior," *Watson*, 551 U.S. at 152 (emphasis in original). At most, the leases are an arms-length commercial transaction whereby Exxon agreed to certain terms (that are not in issue in this case) in exchange for the right to use government-owned land for their own commercial purposes.

More fundamentally, Defendants were not acting under a federal officer in producing, selling or deceptively marketing fossil fuels. A private corporation cannot show that "the acts forming the basis of the state suit were carried out pursuant to [the] officer's direct orders[.]" *Freiberg*, 245 F. Supp. 2d at 1152; *accord Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 137 (2d Cir. 2008) ("corporate defendants . . . must demonstrate that the acts for which they are being sued . . . occurred *because* of what they were asked to do by the Government" (emphasis in original)). That is, Defendants must

show it was "required by the government to take actions that subjected it to liability under state law." *Vandeventer v. Guimond*, 494 F. Supp. 2d 1255, 1264 (D. Kan. 2007).

Here, Defendants were not sued because of something the federal government or a federal officer required them to do. Plaintiffs' claims are based on Defendants' total fossil fuel production and sales – the vast majority of which is unrelated to any activities under any federal lease – and the trespass and nuisance they have created. No federal lease, regulation, or officer controls Defendants' fossil fuel sales, nor the amount of fossil fuels Defendants produce overall. Moreover, the federal government did not require Defendants to conceal and misrepresent what they knew about the consequences of unchecked fossil fuel use. Defendants may produce a small fraction of their fossil fuels on federal lands, but they do not and cannot argue that the harms at issue occurred *because* of that production.

Simply put, Plaintiffs' claims have nothing to do with what Defendants allege to have done under the direction of the federal government. Thus, the *San Mateo* court rejected similar arguments for federal officer removal in a climate abatement suit, concluding "defendants have not shown a 'causal nexus' between the work allegedly performed under federal direction and the plaintiffs' claims, which are based on a wider range of conduct." 294 F. Supp. 3d at 939.

The cases Defendants cite support remand. In *Watson*, the Supreme Court held Phillip Morris was *not* "acting under" a federal officer in spite of far more extensive federal involvement and supervision. 551 U.S. at 154-56. In *Greene*, the defendant was sued over implementation of a clean-up remedy for a radioactive waste site *that was specifically ordered* and "selected by the EPA, "under CERCLA, and it was subject to civil penalties for failure to comply with that directive." *Greene,* 2000 U.S. App. LEXIS 11350, at *6.

Last, Defendants also fail to establish the last prong – the existence of a colorable federal

defense. While Defendants recite a laundry list of supposed defenses, they do not explain how they might apply here. Jurisdiction cannot rest on such a flimsy reed.

To accept Defendants' expansive theory would dramatically expand the number of cases that could be removed. *See Watson*, 551 U.S. at 153 (rejecting removal where it "would expand the scope of the statute's scope considerably, potentially bringing within its scope state-court actions filed against private firms in many highly regulated industries."). This doctrine does not apply.

D. Defendants' bankruptcy removal argument is frivolous.

Defendants' argument that bankruptcy jurisdiction exists because this case *may* relate to an un-specified bankruptcy proceeding is plainly frivolous. Not. at 33. If Defendants knew of any actual bankruptcy proceeding to which this case relates, they were obliged to identify it. Even if Defendants had done so, this case would still not be removable because jurisdiction does not extend to suits "by a governmental unit to enforce such governmental unit's police or regulatory powers." 28 U.S.C. § 1452(a). *See also San Mateo*, 294 F. Supp. 3d at 939 (no removal for suit "aimed at protecting the public safety and welfare . . . on behalf of the public"). Defendants' bankruptcy argument cannot satisfy their burden of establishing jurisdiction.

CONCLUSION

For these reasons, the Court should grant the motion and remand this case to state court.

Dated: August 31, 2018

Respectfully submitted,

s/ Kevin Hannon

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CERTIFICATE OF SERVICE

I hereby certify and affirm that on the 31st day of August 2018, I electronically filed a true and correct copy of the foregoing filing with the Clerk of the United States District Court for the District of Colorado using its CM/ECF system and served the same via the CM/ECF system on all counsel of record.

s/ Kevin S. Hannon