No. 19-1644

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MAYOR AND CITY COUNCIL OF BALTIMORE,

Plaintiff-Appellee,

v.

BP P.L.C., et al.,

Defendants-Appellants.

Appeal from the U.S. District Court
for the District of Maryland, No. 1:18-cv-02357-ELH
(The Honorable Ellen L. Hollander)

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

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

BP p.l.c., a publicly traded corporation organized under the laws of England and Wales, has no parent corporation, and there is no publicly held corporation that owns ten percent or more of BP p.l.c.'s stock. BP America Inc. is a 100% wholly owned indirect subsidiary of BP p.l.c., and no intermediate parent of BP America Inc. is a publicly traded corporation. BP Products North America Inc. is also a 100% wholly owned indirect subsidiary of BP p.l.c., and no intermediate parent of BP Products North America Inc. is a publicly traded corporation.

Chevron Corporation has no parent corporation, and there is no publicly held corporation that owns ten percent or more of Chevron Corporation's stock. Chevron U.S.A. Inc. is a wholly owned subsidiary of Chevron Corporation.

CITGO Petroleum Corporation's ("CITGO") parent corporation is CITGO Holding, Inc., which is a wholly-owned subsidiary of PDV Holding, Inc., which is a wholly-owned subsidiary of Petróleos de Venezuela S.A. No publicly held corporation owns ten percent or more of CITGO's stock;

CNX Resources Corporation is a publicly held corporation and does not have a parent corporation. No publicly held corporation owns ten percent or more of CNX Resources Corporation's stock.

CONSOL Energy Inc. is a publicly held corporation and does not have a parent corporation. BlackRock Fund Advisors, which is a subsidiary of publicly held BlackRock, Inc., owns ten percent or more of CONSOL Energy Inc.'s stock.

CONSOL Marine Terminals LLC is a wholly owned subsidiary of CONSOL Energy Sales Company LLC, which is a wholly owned subsidiary of CONSOL Energy Inc., a publicly held corporation. No other publicly held corporation owns ten percent or more of CONSOL Marine Terminals LLC's stock.

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

Crown Petroleum Corporation no longer exists. In 2005, it was merged into Crown Central LLC. Crown Central LLC's sole member is Crown Central New Holdings, LLC. The sole member of Crown Central New Holdings, LLC is Rosemore Holdings, Inc., which is a wholly owned subsidiary of Rosemore, Inc.

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

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

Corporation's stock.

Defendant the Louisiana Land & Exploration Company is defunct and has merged into The Louisiana Land and Exploration Company, LLC, which is not a party to this action and did not appear during proceedings below.

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

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

Phillips 66 does not have a parent corporation, and there is no publicly-held corporation that owns ten percent or more of Phillips 66's stock. Defendant Phillips 66 Company is not a party to this appeal, as it was never served with the underlying lawsuit and thus did not appear before the United States District Court for Maryland.

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

Speedway LLC is an indirect, wholly-owned subsidiary of Marathon Petroleum Corporation. No other publicly held corporation owns ten percent or more of its stock.

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INTRODUCTION

This case about global warming raises federal claims that belong in federal court.[1] Plaintiff, the Mayor and City Council of Baltimore, seeks to hold a select group of energy companies liable for harms allegedly resulting from worldwide fossil fuel production and global greenhouse gas emissions by countless people, companies, and governments around the globe.

Plaintiff seeks to litigate its claims in state court as if they were governed by state law. As the Supreme Court has recognized, however, state law cannot be used to resolve interstate pollution cases targeting out-of-state emissions, *see Am. Elec. Power Co., Inc. v. Connecticut* ("*AEP*"), 564 U.S. 410 (2011), nor can it apply to tortious conduct that occurred overseas, on the Outer Continental Shelf ("OCS"), in federal enclaves, and on navigable waters of the United States. On the contrary, such interstate pollution disputes, including claims based on alleged injuries from global warming, are governed by *federal common law*. *See id.*; *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012); *California v. BP p.l.c.*, 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018) ("*BP*"); *City of New York v. BP p.l.c.*, 325 F. Supp. 3d 466 (S.D.N.Y. 2018).

[1] Several Defendants contend that they are not subject to personal jurisdiction in Maryland. Defendants submit this brief subject to, and without waiver of, any jurisdictional objections.

Defendants removed this case on the ground that Plaintiff's claims arise under federal law. This is not a preemption defense as the district court erroneously concluded. Rather, it is a choice-of-law issue requiring the Court to identify the body of substantive law governing Plaintiff's claims, regardless of the labels that Plaintiff has affixed to those claims. "[A] cause of action … 'arises under' federal law if the dispositive issues stated in the complaint require the application of federal common law." *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972) ("*Milwaukee I*"). Because pollution cases targeting out-of-state emissions "should be resolved by reference to federal common law," not state law, Plaintiff's claims arise under federal law and are thus removable. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987).

Plaintiff's claims are removable on several other grounds as well: They necessarily raise disputed, substantial questions of federal law, making them removable under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 314 (2005). They allegedly arise out of conduct Defendants took at the direction of federal officers, 28 U.S.C. § 1442, as well as Defendants' substantial operations on the OCS, 43 U.S.C. §1349(b), and federal enclaves, *Stokes v. Adair*, 265 F.2d 662, 666 (4th Cir. 1959). The claims are also completely preempted by the Clean Air Act ("CAA"), *see Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 23-24 (1983), "related to" certain bankruptcy cases, 28 U.S.C. §§1452(a) and 1334(b), and within the district court's admiralty jurisdiction, 28 U.S.C. §1333.

This Court has authority under 28 U.S.C. § 1447(d) to review the entire remand "order"—not merely particular *issues* decided in that order—because Defendants' notice of removal invoked 28 U.S.C. §1442. Based on any or all of Defendants' grounds for removal, the Court should reverse the district court's remand order so that Plaintiff's global warming claims can be resolved in federal court.

JURISDICTIONAL STATEMENT

Defendants Chevron Corp. and Chevron U.S.A., Inc. timely removed this action to the district court on July 31, 2018. 28 U.S.C. §1446(b)(2)(A); JA.178; JA.260-61. The district court had jurisdiction under 28 U.S.C. §§1331, 1334, 1441(a), 1442, 1452, and 1367(a), and 43 U.S.C. § 1349(b).

On June 10, 2019, the district court granted Plaintiff's motion to remand this case to state court. JA.321. On June 12, 2019, Defendants timely filed a notice of appeal under 28 U.S.C §§ 1291 and 1447(d). JA.322.

ISSUES PRESENTED

I. Whether 28 U.S.C. §1447(d), which states that "an order remanding a case to the State court from which it was removed pursuant to section 1442 … of this title shall be reviewable by appeal or otherwise," permits this Court to review the entirety of the district court's remand order, where 28 U.S.C. §1442 was one of several bases for removal;

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

STATEMENT OF THE CASE

I. On July 20, 2018, the Mayor and City Council of Baltimore filed a complaint in state court, alleging that Defendants' "extraction, refining, and/or formulation of fossil fuel products … is a substantial factor," JA.140 ¶193, along with global consumers' "continued high use and combustion of [fossil fuels]," in the "buildup of CO_2 in the environment" that allegedly "drives global warming," JA.45 ¶6. Plaintiff claims "injuries[] and damages due to anthropogenic global warming … caused and/or exacerbated by Defendants' conduct." JA.140-41 ¶195. Plaintiff asserts causes of action for public and private nuisance, strict liability for failure to warn, strict liability for design defect, negligent design defect, negligent failure to warn, trespass, and violations of Maryland's Consumer Protection Act. JA.149-72 ¶¶218-98. The City demands, among other things, compensatory and punitive damages, disgorgement of profits, and equitable relief to abate the alleged nuisances. JA.172.

II. Defendants are 26 energy companies that have produced and sold fossil fuels for many decades. Nearly all of the relevant conduct alleged by Plaintiff occurred outside Maryland, with a significant portion occurring in foreign countries and on federal land, including the OCS. JA.209 ¶55; JA.240-59; JA.305-16; JA.319;

No. 18-cv-02357, ECF No. 127-1 – 127-7. Certain Defendants also engaged in fossil-fuel production at the direction of federal officers. JA.246-47 §1.a, JA.250 §4(b); JA.212-23 ¶¶61-62; JA.215-16 ¶64; JA.234 §9; JA.318-19 ¶¶5, 6(a)-(g); No. 18-cv-02357, ECF No. 127-6 §C.11 (CITGO-0424); No. 18-cv-02357, ECF No. 127-7 §C.9 (CITGO-0509). And some Defendants are affiliates of other energy companies that have gone through bankruptcy. *See In re Texaco Inc.*, 87 B 20142 (Bankr. S.D.N.Y. 1987); No. 18-cv-02357, ECF No. 125-20 at 2.

Defendants' notice of removal asserted that Plaintiff's claims: (1) "are governed by federal common law"; (2) "raise[] disputed and substantial federal questions"; (3) "are completely preempted by the Clean Air Act and/or other federal statutes and the United States Constitution"; (4) warrant original federal jurisdiction under the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1349; (5) allege actions taken pursuant to a federal officer's directions; (6) "are based on alleged injuries to and/or conduct on federal enclaves"; (7) "are related to cases under Title 11 of the United States Code"; and (8) "fall within the Court's original admiralty jurisdiction under 28 U.S.C. §1333." JA.83-84.

Plaintiff moved to remand, No. 18-cv-02357, ECF No. 111, and on June 10, 2019, the district court granted Plaintiff's motion, rejecting all of Defendants' bases for removal. JA.330. Pursuant to the parties' stipulation, the district court stayed execution of the remand order for 30 days. JA.375.

III. On June 12, 2019, Defendants timely noticed their appeal. JA.322. Defendants filed a motion to extend the stay pending appeal on June 23, 2019. No. 18-cv-02357, ECF No. 183. On June 24, 2019, the district court entered a Consent Order staying execution of the remand through resolution of Defendants' motion to extend the stay pending appeal, "and if that motion is denied, through the resolution of Defendants' anticipated" stay motion in this Court. JA.376. Defendants filed a motion for stay pending appeal, which was still pending at the time this brief was filed. No. 18-cv-02357, ECF No. 183.

STANDARD OF REVIEW

Questions of "statutory interpretation" are reviewed "de novo." *Stone v. Instrumentation Lab. Co.*, 591 F.3d 239, 242-43 (4th Cir. 2009). The Court also reviews "de novo" a "district court's decision to remand to state court." *Jackson v. Home Depot U.S.A., Inc.*, 880 F.3d 165, 167 (4th Cir. 2018), *aff'd*, 139 S. Ct. 1743 (2019).

SUMMARY OF ARGUMENT

I. Plaintiff contends that the only ground for removal "subject to appellate review" under §1447(d) is federal officer removal. No. 18-cv-02357, ECF No. 186 at 4-5. But the plain text of §1447(d) provides that when a case is removed under §1442 (federal officer removal), the remand *order*—not just the federal officer ground—is reviewable on appeal. "To say that a district court's 'order' is reviewable

is to allow appellate review of the *whole* order, not just of particular issues or reasons." *Lu Junhong v. Boeing Co.*, 792 F.3d 805, 811 (7th Cir. 2015). Fourth Circuit precedent to the contrary, *Noel v. McCain*, 538 F.2d 633 (4th Cir. 1976), has been effectively abrogated by the Removal Clarification Act of 2011, which made remand "orders" reviewable in cases removed under §1442.

II. This action was properly removed on multiple grounds.

A. Plaintiff's claims encompass Defendants' worldwide activities—including activities occurring on the OCS and in federal enclaves. Under settled U.S. Supreme Court precedent, Maryland law cannot apply because a transboundary pollution suit brought to address pollution emanating from other states is governed by federal common law and thus is within the district court's original jurisdiction. *AEP*, 564 U.S. at 422-24; *Ouellette*, 479 U.S. at 487-90; *Milwaukee I*, 406 U.S. at 103. Federal common law, not state law, must govern such disputes because of the limited sovereignty of individual states and the "overriding federal interest in the need for a uniform rule of decision." *Milwaukee I*, 406 U.S. at 105 n.6. The district court held that Defendants' argument was a "cleverly veiled preemption argument." JA (Remand Order at 12). But Defendants' argument about federal common law relates to the initial choice-of-law determination, not preemption.

B. Removal was also proper because Plaintiff's claims require the resolution of substantial, disputed federal questions related to the extraction, processing,

promotion, and consumption of global energy resources. *See Grable*, 545 U.S. at 313-14. To prevail on its claims, Plaintiff needs a fact-finder to declare unreasonable the balance that Congress and various federal agencies have struck between energy production and greenhouse gas regulation. "[A] collateral attack on an entire regulatory scheme … premised on the notion that [the scheme] provides inadequate protection" raises substantial federal issues sufficient to satisfy federal jurisdiction. *Bd. of Comm'rs v. Tenn. Gas Pipeline Co., L.L.C.*, 850 F.3d 714, 724-26 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 420 (2017).

C. The claims are removable under 28 U.S.C. §1442(a) because there is a causal nexus between Plaintiff's claims and oil and gas production that some Defendants took at the direction of federal officers. The case is also removable under OCSLA and the federal enclaves doctrine because Plaintiff's claims "aris[e] out of, or in connection with … operation[s] conducted on the [OCS]," 43 U.S.C. §1349(b), and Defendants' oil and gas production on federal land, *Stokes*, 265 F.2d at 666.

D. Plaintiff's claims also are completely preempted by the CAA, which provides the exclusive vehicle for regulating *nationwide* emissions and "channels review of final EPA action exclusively to the courts of appeals, regardless of how the grounds for review are framed." *Virginia v. United States*, 74 F.3d 517, 523 (4th Cir. 1996).

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

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

ARGUMENT

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

Under the plain text of §1447(d) and Supreme Court precedent, this Court has jurisdiction to review the entire remand "order"—including every ground for removal the district court addressed—not merely particular issues decided in that order, as Plaintiff contends. *See* No. 18-cv-02357, ECF No. 186 at 4-5. While this Court previously held that appellate review was limited to those grounds specifically enumerated in §1447(d), *see Noel v. McCain*, 538 F.2d 633, 635 (4th Cir. 1976), that decision has been disagreed with by sister Circuits and abrogated by subsequent Supreme Court authority and legislative enactment, and is not binding on this panel.

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

that "an *order* remanding a case to the State court from which it was removed pursuant to section 1442 [federal officer removal, asserted by Defendants here] or 1443 of this title shall be *reviewable by appeal* or otherwise." 28 U.S.C. § 1447(d) (emphases added).[2] As the Seventh Circuit has explained, "[t]o say that a district court's 'order' is reviewable is to allow appellate review of the *whole* order, not just of particular issues or reasons." *Lu Junhong*, 792 F.3d at 811. "[W]hen a statute provides appellate jurisdiction over an order, 'the thing under review is the order,' and the court of appeals is not limited to reviewing particular 'questions' underlying the 'order.'" *Id.*

As the Seventh Circuit explained, §1447(d) "was enacted to prevent appellate delay in determining where litigation will occur," "[b]ut once Congress has authorized appellate review of a remand order—as it has authorized review of suits removed on the authority of §1442—a court of appeals has been authorized to take the time necessary to determine the right forum." *Id.* at 813. In such cases, "[t]he marginal delay from adding an extra issue to a case where the time for briefing, argument, and decision has already been accepted is likely to be small." *Id.*

[2] Before 2011, §1447(d) authorized appellate review of remand orders only in cases removed under §1443. In the Removal Clarification Act of 2011, Congress amended §1447(d) to allow review of orders in cases removed under §1442 as well. Pub. L. No. 112-51, 125 Stat. 545 (2011).

The Sixth Circuit has similarly recognized that when a district court remands a case removed "under 28 U.S.C. §1442," the appellate court's "jurisdiction to review the remand order also encompasses review of the district court's decision on … alternative ground[s] for removal [such as] 28 U.S.C. § 1441." *Mays v. City of Flint, Mich.*, 871 F.3d 437, 442 (6th Cir. 2017) (citing *Lu Junhong*, 792 F.3d at 811-13).[3] The leading treatise on federal jurisdiction agrees that appellate review of a remand order made reviewable under §1447(d) "should … be extended to all possible grounds for removal underlying the order." 15A Wright *et al*., Fed. Prac. & P. Juris. §3914.11 (2d ed.).

The Supreme Court's decision in *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996), also supports this interpretation of §1447(d). *Yamaha* involved interpretation of 28 U.S.C. §1292(b), which, like §1447(d), provides that when an "order involves a controlling question of law as to which there is substantial ground for difference of opinion," the court of appeals may "permit an appeal to be taken from such order." There, the Court held that "appellate jurisdiction" under §1292(b)

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[3] *See also Decatur Hospital Authority v. Aetna Health, Inc.*, 854 F.3d 292, 296 (5th Cir. 2017) ("Like the Seventh Circuit, '[w]e take both Congress and *Kircher* at their word in saying that, if appellate review of an 'order' has been authorized, that means review of the 'order.' Not particular reasons for an order, but the order itself.") (quoting *Lu Junhong*, 792 F.3d at 812); *but see City of Walker v. Louisiana*, 877 F.3d 563, 566 n.2 & n.4 (5th Cir. 2017) (reading *Decatur* narrowly in a case where the appellants did "not argue that the §1447(d) exception for federal officer jurisdiction allow[ed] [the court] to review the entire remand order").

"applies to the *order* certified to the court of appeals, and is not tied to the particular question formulated by the district court." *Id.* at 205. As a result, "the appellate court may address any issue fairly included within the certified order because 'it is the *order* that is appealable, and not the controlling question identified by the district court.'" *Id.* (quoting 9 J. Moore & B. Ward, Moore's Fed. Prac. ¶110.25[1], at 300 (2d ed. 1995)). The same logic applies to §1447(d). Although removal under §1442 is a necessary predicate for an appeal—as a controlling question of law is a necessary predicate for an appeal under §1292(b)—when this predicate is satisfied, the court of appeals has jurisdiction to review the whole "order."

Moreover, Congress did not limit the language of §1447 in the Removal Clarification Act of 2011, after *Yamaha* was decided. Courts "presume" that Congress is "aware of judicial interpretations" of statutes. *Jackson v. Home Depot U.S.A., Inc*., 880 F.3d 165, 171 (4th Cir. 2018); *see also Lewis v. Kmart Corp.*, 180 F.3d 166, 171 (4th Cir. 1999) ("We may presume Congress was aware of the Supreme Court's interpretation of [previously existing statutory text]."); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 697-98 (1979) ("[W]e are especially justified in presuming both that [Congress was] aware of the prior interpretation of Title VI and that that interpretation reflects [its] intent with respect to Title IX."). That Congress retained §1447(d)'s reference to reviewable "orders," even after *Yamaha*, confirms that it intended to authorize plenary review of such orders.

The decisions of this Court and others limiting appellate review to grounds specifically enumerated in §1447(d) did not take into account *Yamaha* or undertake the comprehensive analysis employed in *Lu Junhong*. *See Noel*, 538 F.2d at 635.[4] The Eighth Circuit's decision in *Jacks v. Meridian Res. Co*., 701 F.3d 1224 (8th Cir. 2012)—the only relevant published decision post-dating the Removal Clarification Act—carries little weight because it cited "nothing" to support its holding, and neither party in that case "cited authority or made a coherent argument." *Lu Junhong*, 792 F.3d at 805 (distinguishing *Jacks*, 701 F.3d at 1229).

Accordingly, the panel is not bound by *Noel*'s interpretation of the prior version of §1447(d). If the Court concludes that *Noel* is still binding, this case should be heard *en banc* because *Noel* "conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue" and addresses a jurisdictional issue of "exceptional importance." Fed. R. App. P. 35(b)(1)(B). The full Court can then decide whether §1447(d) means what it says—that the remand "*order*," not merely a particular issue addressed therein, is reviewable in cases removed under §1442.

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[4] *See*, *e.g.*, *State Farm Mut. Auto. Ins. Co. v. Baasch*, 644 F.2d 94, 96 (2d Cir. 1981) (per curiam); *Davis v. Glanton*, 107 F.3d 1044, 1047 (3d Cir. 1997); *Alabama v. Conley*, 245 F.3d 1292, 1293 n.1 (11th Cir. 2001); *Jacks v. Meridian Res. Co.*, 701 F.3d 1224, 1229 (8th Cir. 2012).

II. Plaintiff's Global Warming Claims Were Properly Removed

Although Plaintiff purports to assert only state-law claims, it does not limit its claims to fossil-fuel production (or consumption) within the City of Baltimore or the State of Maryland. Instead, Plaintiff's claims sweep in Defendants' worldwide fossil-fuel production, alleging that Defendants contributed substantially to a public nuisance by "[c]ontrolling every step of the fossil fuel product supply chain, including the extraction of raw fossil fuel products … from the Earth," "refining and marketing … those fossil fuel products," and placing "those fossil fuel products into the stream of commerce." JA.149 ¶221a. Plaintiff alleges that these fossil fuels were then consumed by billions of end users worldwide, resulting in greenhouse gas emissions that have accumulated in the Earth's atmosphere and caused global warming. JA.70-92 ¶¶36-102. Nowhere in its complaint does Plaintiff limit its claims to *in-state* production or emissions.

Plaintiff's claims thus encompass activities overseas, on federal lands, the OCS, the navigable waters of the United States, and in many states other than Maryland. At the same time, plaintiffs in similar cases pending in five other states (CA, RI, WA, CO, NY) against Defendants seek to apply *their* states' laws to these same worldwide activities. Plaintiff also proposes to hold Defendants liable for the production and promotion activities of their corporate affiliates, including many

entities operating under confirmed bankruptcy plans. Plaintiff's claims thus arise under federal common law and are also removable on several other grounds.

A. Plaintiff's Claims Arise Under Federal Common Law Because They Seek to Regulate Interstate Emissions.

Plaintiff's global warming claims are governed by federal common law—not state law—because they implicate "uniquely federal interests" in controlling interstate pollution, promoting energy independence, and negotiating multilateral treaties addressing climate change. *Tex. Indus., v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-41 (1981). Because federal common law must provide the rule of decision, Plaintiff's claims "arise under" federal law and thus are removable under 28 U.S.C. §§ 1331 and 1441. The district court erroneously concluded that Defendants' argument regarding the application of federal common law was merely a "cleverly veiled preemption argument." JA.341. But the question of which law governs—state law or federal common law—is not asserted here as a *defense* to Plaintiff's claims. On the contrary, for purposes of removal, this choice-of-law determination is a threshold jurisdictional question. And as more than a century of Supreme Court precedent confirms, claims based on air pollution by out-of-state sources—including those based on greenhouse gas emissions—must be resolved under federal common law.

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

The district court remanded this case without determining which law governs the Plaintiff's global warming claims, accepting Plaintiff's state-law labels as dispositive. That was error because "in examining the complaint, [the] *first step* is to 'discern whether federal or state law creates the cause of action.'" *Pinney v. Nokia, Inc.*, 402 F.3d 430, 442 (4th Cir. 2005) (emphasis added). As the Supreme Court has explained, "if the dispositive issues stated in the complaint require the application of federal common law," the "cause of action … 'arises under' federal law." *Milwaukee I*, 406 U.S. at 100.

Because the relevant question is *which law* governs Plaintiff's claims, the Court need not—indeed, should not—address whether Plaintiff's claims are viable. That federal common law does not provide a remedy does not mean, as the district court seemed to conclude, that federal common does not apply. On the contrary, federal common law may govern a claim nominally asserted under state law even when no federal common law remedy is available. In *United States v. Standard Oil Co.*, 332 U.S. 301 (1947), the Supreme Court held that certain claims asserted under state law must be governed by federal common law because they involved "matters essentially of federal character." *Id.* at 307. However, it then declined to "exercise" the "judicial power to establish the new liability" requested by the government, dismissing for failure to state a claim. *Id.* at 316. *Standard Oil* illustrates that courts

must resolve the jurisdictional question (which law governs) *before*—and separate from—the merits question (whether the claim is viable).

The Supreme Court, Ninth Circuit, and two district courts have applied the same two-step approach in cases involving global warming claims. *See AEP*, 564 U.S. at 422-24 (concluding *first* that plaintiffs' public nuisance claims were suitable "for federal law governance," and *second* that plaintiffs could not state a viable federal common law claim); *Kivalina*, 696 F.3d at 855 (applying the same two-step approach); *City of Oakland v BP p.l.c.*, 325 F. Supp. 3d 1017, 1028 (N.D. Cal. 2018) (dismissing for failure to state a viable public nuisance claim under federal common law after having upheld removal on the ground that federal common law governed the plaintiffs' global warming claims nominally asserted under state law); *City of New York*, 325 F. Supp. 3d at 471 (holding that federal common law governed plaintiff's global warming claims nominally asserted under state law, but then dismissing for failure to state a claim). The district court here wrongly concluded that the choice-of-law determination made by the court in New York was "of no help to defendants here, at the threshold jurisdictional stage." JA.346. If Plaintiff's claims are governed by federal common law, then they are removable here because they arise under federal law.

Courts have long recognized that federal jurisdiction exists—regardless whether the plaintiff purports to assert only state-law claims—"if the claims arise

under federal common law." *Wayne v. DHL Worldwide Express*, 294 F.3d 1179, 1184 (9th Cir. 2002); *see also Treiber & Straub, Inc. v. U.P.S., Inc.*, 474 F.3d 379, 383 (7th Cir. 2007) (a claim that "arise[s] under federal common law … is a permissible basis for jurisdiction based on a federal question"); *Woodward Governor Co. v. Curtiss Wright Flight Sys., Inc.*, 164 F.3d 123, 126 (2d Cir. 1999) ("[I]f federal common law governs a case, that case [is] within the subject matter jurisdiction of the federal courts[.]"); *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 926 (5th Cir. 1997) ("Federal jurisdiction exists if the claims … arise under federal common law.").[5]

Moreover, courts have long recognized that claims may arise under federal law even if the plaintiff purports to plead them under state law. The district court was thus incorrect in assuming that the only two exceptions to the well-pleaded complaint rule are *Grable* and complete preemption by a federal statute. JA.337-38; *see Sam L. Majors Jewelers*, 117 F.3d at 928 (upholding removal of state-law negligence claim against air carrier because "federal common law governed the liability of air carriers for lost or damaged goods"); *New SD, Inc. v. Rockwell Int'l Corp.*, 79 F.3d

[5] *See also BP*, 2018 WL 1064293, at *5 ("[F]ederal jurisdiction exists … if the claims necessarily arise under federal common law[.]"); *L-3 Commc'ns Corp. v. Serco Inc.*, 39 F. Supp. 3d 740, 745 (E.D. Va. 2014) ("[A] case is properly removed if federal common law governs it."); *Kight v. Kaiser Found. Health Plan of Mid-Atl. States, Inc.*, 34 F. Supp. 2d 334, 340 (E.D. Va. 1999) ("[C]auses of action which turn on the construction of federal common law are also removable.").

953, 954-55 (9th Cir. 1996) (contract claim nominally asserted under state law was removable because "contracts connected with the national security[] are governed by federal law" and a claim addressing such a contract "requires that 'the rule [of decision] must be uniform throughout the country'").

Contrary to the district court's remand order, this choice-of-law analysis precedes and is separate from any potential preemption defense Defendants may raise in the future. JA.342. Nor does it require looking beyond the four corners of the complaint. To decide the jurisdictional choice-of-law question, the district court was required to determine whether Plaintiff's global warming claims implicate "uniquely federal interests" that require a uniform rule of federal decision, and therefore fall within the ambit of federal common law as set forth in Supreme Court case law. *See Standard Oil*, 332 U.S. at 307, 310 (federal common law, not state law, must govern claims involving "matters essentially of federal character"). The answer to *that* question is plainly yes, as more than a century of Supreme Court precedent confirms.

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

Although "[t]here is no federal general common law," *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), there remain "some limited areas" in which the governing legal rules must be supplied, not by state law, but by "what has come to be known as 'federal common law.'" *Tex. Indus*, 451 U.S. at 640 (quoting *Standard*

Oil, 332 U.S. at 308). Federal common law governs where the subject matter implicates "uniquely federal interests," including where "the interstate or international nature of the controversy makes it inappropriate for state law to control." *Id.*, at 640-41; *see AEP*, 564 U.S. at 421.

Specifically, federal common law governs any "transboundary pollution suit[]" brought by one state to address pollution emanating from another state. *Kivalina*, 696 F.3d at 855; *see also Milwaukee I*, 406 U.S. at 103 ("When we deal with air and water in their ambient or *interstate* aspects, there is a federal common law[.]") (emphasis added). "[S]uch claims have been adjudicated in federal courts" under federal common law "for over a century." *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 331 (2d Cir. 2009), *rev'd on other grounds in AEP*, 564 U.S. 410; *Ouellette*, 479 U.S. at 487; *see, e.g.*, *Missouri v. Illinois*, 200 U.S. 496 (1906) (applying federal common law to interstate pollution dispute). Even after *Erie*, the Supreme Court affirmed the view that interstate pollution "is a matter of federal, not state, law," and "should be resolved by reference to federal common law." *Ouellette*, 479 U.S. at 488 (citing *Milwaukee I*, 406 U.S. at 102 n.3, 107 n.9).

Global warming claims involve interstate pollution because they are premised on harms allegedly caused by worldwide greenhouse gas emissions. The Supreme Court has recognized that state law cannot apply to such claims. *See AEP*, 564 U.S. at 421-22. In *AEP*, New York City and other plaintiffs sued five electric utilities,

contending that the "defendants' carbon-dioxide emissions" substantially contributed to global warming. *Id.* at 418. The Second Circuit held that the case would be "governed by recognized judicial standards under the federal common law of nuisance," and allowed the claims to proceed. *AEP*, 582 F.3d at 329. In reviewing that decision, the Supreme Court reiterated that federal common law governs public nuisance claims involving "'air and water in their ambient or interstate aspects,'" and explained that "borrowing the law of a particular State" to resolve plaintiffs' global warming claims "would be inappropriate." *AEP*, 564 U.S. at 421-22.

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

Two district courts recently held that virtually identical global warming claims against energy producers—including several Defendants in this action—arise under federal common law even though nominally asserted under state law. In *BP*, the court denied motions to remand, explaining that nuisance claims addressing "the national and international geophysical phenomenon of global warming" are "necessarily governed by federal common law." 2018 WL 1064293, at *2. Because "the

claims necessarily arise under federal common law," the court recognized that the "well-pleaded complaint rule does not bar removal of these actions." *Id.* at *5. And in *City of New York*, the court held that because the City was "seeking damages for global-warming related injuries resulting from greenhouse gas emissions, and *not* only the production of Defendants' fossil fuels," "the City's claims [were] ultimately based on the 'transboundary' emission of greenhouse gases." 325 F. Supp. 3d at 471-72 (emphasis added). The court thus concluded that the "claims arise under federal common law and require a uniform standard of decision." *Id.* at 472.

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

Plaintiff's global warming action—like *AEP*, *Kivalina*, *BP*, and *City of New York*—is a quintessential transboundary pollution suit governed by federal common law. Although Plaintiff purports to sue Defendants for their fossil-fuel production and promotion, Plaintiff's alleged injuries stem from global *greenhouse gas emissions*—almost all of which occurred outside of Maryland—from the use of fossil-fuel products extracted, produced, and promoted by Defendants and their subsidiaries.[6] *See, e.g.*, JA.44 ¶3 (alleging that "greenhouse gas pollution, primarily in the

[6] Defendants do not concede that Plaintiff has adequately pleaded that each Defendant is liable for the actions of separate current or former subsidiaries, affiliates, or predecessors—some of which no longer exist. Because the substantive adequacy of the complaint is irrelevant in assessing the district court's subject-matter jurisdiction,

form of CO_2, is far and away the dominant cause of global warming"); JA.72 ¶39; JA.76-78 ¶¶41-42, ¶¶48-54. Indeed, Plaintiff justifies its decision to sue these particular Defendants on the ground that they allegedly "caused approximately 15 percent of *global* fossil fuel product-related CO_2 between 1965 and 2015." JA.90 ¶94 (emphasis added).

Plaintiff's allegations demonstrate that far from targeting local conduct, its claims are "based on the 'transboundary' emission of greenhouse gases[.]" *City of New York*, 325 F. Supp. 3d at 472; *see, e.g.,* JA.43 ¶1 (alleging Defendants are responsible for "increase in global greenhouse pollution"). As in *BP*, Plaintiff's nuisance claims thus "depend on a global complex of geophysical cause and effect involving all nations of the planet." 2018 WL 1064293, at *5.

Because Plaintiff "seeks damages for global warming-related injuries caused by greenhouse gas emissions," its claims implicate interstate and international concerns and invoke uniquely federal interests and responsibilities. *City of New York*, 325 F. Supp. 3d at 473; *see also Massachusetts v. EPA*, 549 U.S. 497, 519-20 (2007) ("sovereign prerogatives" to force other states to reduce greenhouse gas emissions, negotiate emissions treaties, and exercise the police power to reduce motor-vehicle

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Defendants include the alleged actions of their subsidiaries, affiliates, predecessors, and alleged co-conspirators when describing the actions of "Defendants" for purposes of this appeal.

emissions are "lodged in the Federal Government."). For example, adjudicating Plaintiff's nuisance claim will necessarily require determining "what amount of carbon-dioxide emissions is unreasonable" in light of what is "practical, feasible and economically viable." *AEP*, 564 U.S. at 428; *see also City of New York*, 325 F. Supp. 3d at 473 ("factfinder[] would have to consider whether emissions resulting from the combustion of Defendants' fossil fuels created an 'unreasonable interference'" with public rights); *California v. Gen. Motors Corp.*, 2007 WL 2726871, at *8 (N.D. Cal. Sept. 17, 2007) (court could not resolve global warming-based claims against automobile manufacturers without "mak[ing] an initial decision as to what is unreasonable in the context of carbon dioxide emissions"). Any judgment as to whether the alleged harm caused by Defendants' contribution to worldwide emissions "outweighs any offsetting benefit," JA.149 ¶220, implicates the federal government's unique interests in setting national and international policy on matters involving energy, the environment, the economy, and national security. *See AEP*, 564 U.S. at 427. "If ever a problem cried out for a uniform and comprehensive solution, it is the geophysical problem" of global warming. *BP*, 2018 WL 1064293, at *3.

Plaintiff contends that its claims do not implicate federal interests because it seeks only "damages and abatement—the cost for adaptation and mitigation measures within its geographic boundaries." No. 18-cv-02357, ECF No. 111-1 at 17. But Plaintiff explicitly seeks "abatement of the nuisances complained of,"

JA.172, and asks for an order that would "enjoin[] Defendants from creating future common-law nuisances." JA.153 ¶228. And even if Plaintiff had only sought damages, "a liability award can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Walker v. Medtronic, Inc.*, 670 F.3d 569, 577 (4th Cir. 2012) (quoting *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 324 (2008)); *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 637 (2012) ("[S]tate regulation can be … effectively exerted through an award of damages[.]"); *BMW of N. Am. v. Gore*, 517 U.S. 559, 572 n.17 (1996) ("State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute.").

Given the uniquely federal interests implicated by Plaintiff's claims, there is an "overriding federal interest in the need for a uniform rule of decision." *Milwaukee I*, 406 U.S. at 105 n.6. Allowing state law to govern would permit states to "do indirectly what they could not do directly—regulate the conduct of out-of-state sources." *Ouellette*, 479 U.S. at 495-96. As the U.S. Solicitor General explained in *AEP*, "resolving such claims would require each court … to decide whether and to what extent each defendant should be deemed liable under general principles of nuisance law for some share of the injuries associated with global climate change." Br. for the TVA as Resp't Supporting Pet'rs, *AEP*, No. 10-174 (S. Ct.), 2011 WL 317143, at *37. Proceeding under the nation's 50 different state laws is untenable,

as this state-by-state approach could lead to "widely divergent results" based on "different assessments of what is 'reasonable.'" *Id.*

As this Court recognized in reversing an injunction capping emissions from out-of-state sources, "[i]f courts across the nation were to use the vagaries" of state "public nuisance doctrine to overturn the carefully enacted rules governing airborne emissions, it would be increasingly difficult for anyone to determine what standards govern." *N.C. ex. rel. Cooper v. TVA*, 615 F.3d 291, 298 (4th Cir. 2010) ("*Cooper*"). And as the U.S. Government recently highlighted in *BP*, the problems of applying state law to out-of-state sources "are magnified … where the sources of emissions alleged to have contributed to climate change span the globe." Amicus Curiae Br. for the United States, No. 17-cv-06011 (N.D. Cal.), ECF No. 245 at 11. Fundamentally, a "patchwork of fifty different answers to the same fundamental global issue would be unworkable." *BP*, 2018 WL 1064293, at *3.

Although Plaintiff had the option to limit its claims to in-state greenhouse gas emissions and Defendants' Maryland-based fossil-fuel production, it instead seeks redress for alleged impairment of its environmental rights by emissions and production *outside of Maryland*—and even outside the United States. Accordingly, federal common law provides the uniform standard of decision for Plaintiff's claims.

4. The Well-Pleaded Complaint Rule Is No Obstacle to Removal Because State-Law Labels Do Not Convert Federal Claims into State Law Claims.

The district court declined to decide whether federal common law governs Plaintiff's claims. Instead, it concluded that the well-pleaded complaint rule barred removal because Plaintiff had not expressly pleaded "any claims under federal law." JA.341. But the well-pleaded complaint rule precludes removal based solely on a federal *defense*—it does not allow a plaintiff to "exalt form over substance," *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 595 (2013), by affixing a state-law label to a claim that is necessarily *federal in nature*. *See* 14C Wright *et al*., Fed. Prac. & P. §3722.1 (4th ed.) ("[W]hen a cause of action in the plaintiff's complaint, if properly pled, would pose a federal question and make the case removable, the plaintiff will not be permitted to disguise the inherently federal cause of action, to block removal."). The question whether federal common law necessarily applies to Plaintiff's claims does not implicate any potential *defense* to those claims—indeed, Defendants have not yet asserted defenses. Rather, it is the threshold jurisdictional question that must be answered as part of the two-step approach applied in *Standard Oil*, *AEP*, *Kivalina*, *BP*, and *City of New York*.

In holding that Defendants have merely asserted an "ordinary preemption" defense, the district court conflated the threshold choice-of-law analysis with a preemption argument that Defendants did not make. The district court cited *Boyle v.*

United Tech. Corp., 487 U.S. 500 (1988), and *Ouellette*, JA.341-42, but neither case supports the district court's conclusion that federal common law is merely a preemption defense. In *Boyle*, the plaintiff brought a diversity action in federal court against the manufacturer of a military helicopter, asserting tort claims under state law. 487 U.S. at 502-03. Recognizing the unique federal interests in military procurement, and the "significant conflict" with federal policy that would result from state law being used to hold "Government contractors liable for design defects in military equipment," the Court held that state law "must be displaced." *Id.* at 511-12. Remand was not at issue in *Boyle* because the case originated in federal court, and unlike here, the defendant did not argue that the plaintiff had pleaded federal common law claims under the guise of state law, but rather that a federal common law *defense* barred plaintiff's state-law claims on the merits. *Boyle* thus does not affect—much less foreclose—Defendants' removal argument. If anything, *Boyle* confirms that where, as here, "the federal interest requires a uniform rule, the entire body of state law applicable to the area conflicts and is replaced by federal rules." *Id.* at 508.

The district court also misread *Ouellette*. There, the Supreme Court characterized *Milwaukee I* as holding that interstate pollution disputes "should be resolved by reference to federal common law," and it recognized that "the implicit corollary of this ruling was that state common law was preempted." *Ouellette*, 479 U.S. at

488 (citing *Milwaukee I*, 406 U.S. at 107 n.9). The district court read this statement to mean that federal common law is an "ordinary preemption" doctrine that Defendants may raise only as a defense to Plaintiff's claims. JA.342. But "corollary" does not mean equivalent—it is a "proposition inferred immediately from a proved proposition with little or no additional proof." *Corollary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/corollary (last accessed July 28, 2019). That one rule follows from another does not collapse them into a single rule. As the footnote in *Milwaukee I* cited by the Court in *Ouellette* makes clear, regardless whether federal common law may preempt state law and be asserted as a "defense," it is also "a basis for dealing in uniform standard with the environmental rights of a State against improper impairment by sources outside its domain." 406 U.S. at 107 n.9. The brief reference to "preemption" in *Ouellette* is not to the contrary.[7]

The district court alternately characterized Defendants' argument as a "veiled complete preemption argument," which it found unavailing because "complete

[7] The district court also cited a Mississippi district court order holding that removal cannot be based on federal common law. JA.342 (citing *Merkel v. Fed. Exp. Corp.*, 886 F. Supp. 561, 564-65 (N.D. Miss. 1995)). But *Merkel* recognized that three other courts had held that "removal jurisdiction" is proper when "federal common law control[s] the action." 886 F. Supp. at 564 n.1. And both the Fifth and Ninth Circuits have subsequently upheld removal of purported state-law claims governed by federal common law. *See New SD*, 79 F.3d at 954-55; *Sam L. Majors Jewelers*, 117 F.3d at 928-29.

preemption occurs only when Congress intended for federal law to provide the 'exclusive cause of action' for the claim asserted." JA.346 (quoting *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 9 (2003)). But Defendants never argued that federal common law completely preempts Plaintiff's state-law claims, as that doctrine applies only when *Congress* has occupied a field that would *otherwise be governed by state law*. Plaintiff's *interstate* pollution claims (and Plaintiff asserts no intrastate pollution claim) are *inherently federal* and thus must be resolved by reference to federal common law even in the absence of any congressional action. This case is thus unlike *Hannibal v. Fed. Express Corp.*, 266 F. Supp. 2d 466 (E.D. Va. 2003) (cited at JA.342), where the court remanded garden-variety breach-of-contract claims after finding they were properly governed by state law. *Id.* at 469-70.

5. Whether Federal Common Law Remedies Have Been Displaced Is a Merits Question, Separate from the Question of Which Law Governs.

The district court reasoned that federal common law might not govern Plaintiff's claims because "case law suggests that any such federal common law claim has been displaced by the Clean Air Act." JA.346 (citing *AEP*, 564 U.S. at 424). But if federal common law is "displaced" by federal statute, that merely means it "does not provide a remedy." *Kivalina*, 696 F.3d at 856; *see id.* at 857 ("displacement of a federal common law right of action means displacement of remedies"); *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 332 (1981) ("*Milwaukee*

II") (Congress's comprehensive overhaul of the Clean Water Act meant "no federal common-law remedy was available"). The absence of a federal common law remedy has no bearing on whether federal common law governs the claims in the first place. *See Standard Oil*, 332 U.S. at 307, 313. Put differently, the viability of Plaintiff's global warming claims neither affects subject-matter jurisdiction nor alters the federal character of those claims. *See Goldfarb v. Mayor & City Council of Baltimore*, 791 F.3d 500, 507 (4th Cir. 2015); *Morrison v. Nat'l Australia Bank Ltd*., 561 U.S. 247, 254 (2010).

The district court's conflation of the jurisdictional determination, which here involves a choice-of-law inquiry, with its tentative merits conclusion that federal common law no longer provides a remedy because the CAA has displaced it, runs afoul of "two centuries of jurisprudence affirming the necessity of determining jurisdiction before proceeding to the merits." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 98 (1998); *see also Stop Reckless Econ. Instability Caused by Democrats v. Fed. Election Comm'n*, 814 F.3d 221, 228 (4th Cir. 2016).

6. *AEP* and *Kivalina* Do Not Authorize Transboundary Pollution Suits to Be Decided Under State Law.

Plaintiff argued below that *AEP* and *Kivalina* do not support removal because neither case "considered the relationship between federal common law and state law," and both cases left open the possibility that state law might govern *some* global

warming-based public nuisance claims. No. 18-cv-02357, ECF No. 111-1 at 12-15. The first assertion is wrong, and the second is irrelevant.

First, "if federal common law exists," as it does for interstate pollution suits targeting out-of-state emissions, "it is because state law cannot be used." *Milwaukee II*, 451 U.S. at 313 n.7; *see also AEP*, 564 U.S. at 421 ("[T]he basic scheme of the Constitution" precludes the application of state law to such interstate pollution claims). The decision that federal common law applies to a particular cause of action thus *necessarily* entails that state law *cannot* apply.

Second, whether or not state law may govern some global warming claims, it does not govern the interstate and global claims asserted by Plaintiff here. In *AEP*, the Court left "open for consideration on remand" only the narrow question of whether the CAA preempted state-law claims based on "*the law of each State where the defendants operate power plants.*" 564 U.S. at 429 (emphasis added) (citing *Ouellette*, 479 U.S. at 488).[8] That narrow carve-out for certain state-law claims is inapplicable here because Plaintiff has not pleaded claims under the laws of the states in which the emissions occurred—or even where the fossil-fuel extraction took

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

place. Rather, Plaintiff's claims are based on the alleged effects of worldwide greenhouse gas emissions resulting from Defendants' worldwide conduct. That is precisely the type of claim that must be governed by federal common law.

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

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

Collateral Attack on Federal Regulatory Decisions. Plaintiff's nuisance claims require a determination of whether the harm allegedly caused by Defendants' conduct outweighs the benefits of that conduct to society. *See City of Oakland*, 325 F. Supp. 3d at 1026 (resolving plaintiffs' nuisance claim would require weighing the "conflicting pros and cons" of fossil fuel consumption and global warming); *Tadjer v. Montgomery Cty.*, 300 Md. 539, 552 (1984) (defining public nuisance as "an unreasonable interference with a right common to the general public"); Maryland Civil Pattern Jury Instruction 20:1 ("A suit in nuisance involves balancing the correlative rights of the parties. The utility of the defendant's conduct and his or her rights are weighed against the amount of harm to the plaintiff and to his or her rights."). Indeed, the complaint acknowledges that this balancing is central to Plaintiff's claims. *See, e.g.*, JA.149 ¶220 ("harm" from Defendants' conduct "outweighs any offsetting benefit"); JA.151 ¶224 (harm from rising seas "outweighs the social utility of Defendants' conduct"); JA.154-55 ¶233.

For decades, federal law has required agencies to weigh the costs and benefits of fossil-fuel extraction. *See, e.g.*, 42 U.S.C. §13384; *id.* §13389(c)(1).[9] An agency may impose a significant regulation "only upon a reasoned determination that the

[9] *See also, e.g.*, CAA, 42 U.S.C. §7401(c); Mining and Minerals Policy Act, 30 U.S.C. §21a; Coastal Zone Management Act, 16 U.S.C. §1451; Surface Mining Control and Reclamation Act, 30 U.S.C. §1201.

benefits … justify its costs." Exec. Order No. 12866, 58 Fed. Reg. 51,735 (Sept. 30, 1993). Federal agencies have developed mechanisms to incorporate the impact of carbon emissions on climate change for regulatory cost-benefit analyses, including through a "social cost of carbon" metric—which Plaintiff expressly invokes. JA.131 ¶177; *see also* JA.193 ¶27; Exec. Order No. 13783, Promoting Energy Independence and Economic Growth, §5 (Mar. 28, 2017), 82 Fed. Reg. 16,093 (Mar. 31, 2017); JA.298-305.[10]

Plaintiff would invite a state court factfinder adjudicate the reasonableness of these federal agencies' balancing of harms and benefits. This action thus amounts to a "collateral attack" on federal agencies' regulatory decisions, which justifies federal jurisdiction. *Bd. of Comm'rs v. Tenn. Gas Pipeline Co., LLC*, 850 F.3d 714, 724-25 (5th Cir. 2017) (state-law claim raises substantial federal issue where it amounts to "a collateral attack on an entire regulatory scheme … premised on the notion that [the scheme] provides inadequate protection").[11]

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

[11] *See also Pet Quarters, Inc. v. Depository Trust & Clearing Corp.*, 559 F.3d 772, 779 (8th Cir. 2009) (complaint "presents a substantial federal question because it directly implicates actions of" federal agency); *Bennett v. Sw. Airlines Co*., 484 F.3d 907, 909 (7th Cir. 2007) (recognizing federal jurisdiction "when the state proceeding

The district court concluded that this cost-benefit analysis did not justify removal because Plaintiff has not alleged that "defendants violated any federal statutes or regulations." JA (Remand Order at 20). But as the district court conceded, the alleged "unreasonable[ness]" of Defendants' conduct is an *element* of Plaintiff's nuisance claims. *Id.* That is enough. Because Plaintiff would have a state court decide whether determinations made by federal agencies were reasonable as a matter of Maryland law, this case is removable. *See Tenn. Gas*, 850 F.3d at 720 (state-law negligence and nuisance claims could "[]not be resolved" without determination of federal law).

Plaintiff's claims also amount to a collateral attack on the comprehensive federal regulatory scheme for navigable waters. A necessary and critical element of Plaintiff's causation theory is that rising sea level along navigable waters is encroaching on Plaintiff's land. But Congress has delegated broad authority to the U.S. Army Corps of Engineers ("Corps") as to all structures and activities within

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amounted to a collateral attack on a federal agency's action"); *McKay v. City & Cty. of San Francisco*, 2016 WL 7425927, at *4 (N.D. Cal. Dec. 23, 2016) (finding federal jurisdiction under *Grable* because state-law claims were "tantamount to asking the Court to second guess the validity of the [federal agency's] decision"); *Bader Farms, Inc. v. Monsanto Co*., 2017 WL 633815, at *3 (E.D. Mo. Feb. 16, 2017) (federal jurisdiction existed because state-law claims were a "collateral attack on the validity of [the agency's] decision").

navigable waters, 33 U.S.C. §§401-404, to protect shores from the very harms Plaintiff alleges. *See, e.g., id.* §426, §426g. Adjudication of Plaintiff's claims requires evaluation of the adequacy of complex Corps decisions (*e.g.*, authorization of existing shore protections), whether those decisions unreasonably failed to prevent Plaintiff's injuries, and whether the Corps would authorize projects (*e.g.*, improved flood protection infrastructure, JA.144-46 ¶¶201-08) for which Plaintiff seeks recompense. *See Tenn. Gas*, 850 F.3d at 725 (removal appropriate where "scope and limitations of a complex federal regulatory framework are at stake").

Federal Duties to Disclose. Plaintiff's promotion claims implicate federal duties to disclose because they rest on the premise that Defendants had a duty to inform federal regulators about known harms, and that Defendants' statements were material to regulators' decisions not to limit fossil-fuel extraction and production and impeded regulators' ability to perform their duties. *See* JA.43 ¶1; JA.92 ¶102; JA.112-14 ¶¶142-43; JA.125 ¶161; JA.128 ¶¶169-70; JA.150 ¶221(d). To resolve Plaintiff's claims, the Court would need to construe federal law to determine the scope of Defendants' disclosure obligations. *See Tenn. Gas*, 850 F.3d at 723.

While the district court noted that the "complaint does not allege that defendants violated any duties to disclose imposed by federal law," JA.351, Plaintiff's claims are not based on misleading statements to *Maryland* officials, but rather on

allegedly misleading statements to *federal* officials. *See, e.g.*, JA.117 ¶151 (describing the goal of Defendants' promotional efforts as "avoid[ing] regulation" because "policymakers are prepared to act on global warming."); JA.119-20 ¶154; JA.123-24 ¶159.

Foreign Affairs. The question of how to address climate change has long been and remains the subject of international negotiations. In these negotiations, the United States has always sought to balance environmental policy with robust economic growth. After President Clinton signed the Kyoto Protocol in 1997, for example, the U.S. Senate expressed its view (by a vote of 95-0) that the United States should not be a signatory to any protocol that "would result in serious harm to the economy" or fail to regulate the emissions of developing nations. *See* S. Res. 98, 105th Cong. (1997). Congress then enacted a series of laws barring the Environmental Protection Agency ("EPA") from implementing or funding the Protocol. *See* Pub. L. No. 105-276, 112 Stat. 2461, 2496 (1998); Pub. L. No. 106-74, 113 Stat. 1047, 1080 (1999); Pub. L. No. 106-377, 114 Stat. 1441, 1441A-41 (2000). President Trump cited similar economic concerns when he announced his intent to withdrew the United States from the Paris Agreement. JA.283-90.

Plaintiff seeks to replace these international negotiations and congressional and executive decisions with Maryland common law and private litigation in state

court. Even when *states*—as opposed to municipalities—have enacted laws supplanting or supplementing foreign policy, the Supreme Court has rejected them. *See Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 381, 388 (2000); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420 (2003). Here, Plaintiff's claims "touch[] on foreign relations" and therefore "must yield to the National Government's policy, given the 'concern for uniformity in this country's dealings with foreign nations.'" *Garamendi*, 539 U.S. at 413.

The district court faulted Defendants for failing to "identify any foreign policy … implicated by the City's claims," JA.348, but Defendants highlighted the longstanding policy of pursuing economic growth rather than imposing emissions limits under imbalanced international agreements, and the concomitant policy of ensuring that developing nations face similar environmental constraints to avoid placing the United States at a competitive disadvantage. *See* JA.265-69 ¶¶3-12; No. 18-cv-02357, ECF No. 124 at 29. Plaintiff's claims, if successful, would interfere with both of these federal policies and require a factfinder to substitute its own judgment for that of policymakers and second-guess the reasonableness of the policies.

Remaining Grable Factors. Although the district court did not "consider[] the remaining requirements for *Grable* jurisdiction," JA.352, Plaintiff cannot deny that the federal questions raised in this action are disputed and substantial issues of "importance … to the federal system as a whole," *Gunn*, 568 U.S. at 260, because

this case sits at the intersection of federal energy and environmental regulatory policy, and implicates foreign policy and national security. Federal jurisdiction is also fully "consistent with congressional judgment about the sound division of labor between state and federal courts," *Grable*, 545 U.S. at 313, because federal courts are the traditional fora for cases raising federal questions addressing foreign policy, national security, and the regulation of vital national resources.

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

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

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

The action is removable under the Federal Officer Removal Statute, which provides for removal of suits brought against "any person acting under" a federal officer "for or relating to any act under color of such office." 28 U.S.C. §1442(a)(1). A party seeking federal officer removal must demonstrate that "(1) it is a federal officer or a person acting under that officer; (2) it has a colorable federal defense; and (3) the suit is for an act under color of office, which requires a causal nexus between the charged conduct and asserted official authority." *Ripley v. Foster*

Wheeler LLC, 841 F.3d 207, 209–10 (4th Cir. 2016). The policy of ensuring a federal forum to federal officers and those working at their direction "should not be frustrated by a 'narrow, grudging interpretation' of the statute." *Kolibash v. Comm. on Legal Ethics of W. Va. Bar*, 872 F.2d 571, 576 (4th Cir. 1989) (quoting *Willingham v. Morgan*, 395 U.S. 402, 407 (1969)). On the contrary, "the right of removal conferred by §1442(a)(1) is to be broadly construed." *Id*.

Plaintiff does not dispute (nor could it) that Defendants have colorable federal defenses. And the Supreme Court has indicated that a private contractor "acts under" the direction of a federal officer when it "helps the Government to produce an item that it needs" under federal "subjection, guidance, or control." *Watson v. Phillip Morris Cos.*, 551 U.S. 142, 151, 153 (2007). Here, certain Defendants produced and distributed fossil fuels under at least three distinct federal programs.

First, the U.S. Navy supervised Standard Oil's extraction from the Elk Hills Naval Petroleum Reserve for use by the government in wartime. JA.241-59. The contract between the government and Standard Oil mandated that the Reserve "*shall* be developed and operated," JA.246 §1.a, and *required* Standard Oil to produce "not less than 15,000 barrels of oil per day" until the Navy had received its share of production, and enough thereafter to cover Standard Oil's operating costs, JA.250 §4(b). *Second*, certain Defendants extracted oil pursuant to OCSLA and strategic petroleum reserve leases with the government which provided that lessees "shall" drill for oil

and gas pursuant to government-approved exploration plans and that they *must* sell it to certain specified buyers. JA.212-13 ¶¶61-62; JA.234 §9. And *third*, CITGO executed fuel supply agreements with the U.S. Navy that required CITGO to advertise, supply, and distribute gasoline and diesel fuel to NEXCOM. JA.318-19 ¶¶5, 6(a)–(g)); *see also* JA.215-16 ¶64; No. 18-cv-02357, ECF No. 127-6 §C.11 (CITGO-0424)); No. 18-cv-02357, ECF No. 127-7 §C.9 (CITGO-0509).

The district court assumed that Defendants could meet the first two requirements but held that removal was improper because the cited conduct under federal direction was not sufficiently connected to Plaintiff's claims. JA.365-66. The district court thereby erroneously applied a heightened statutory causal-nexus requirement. But to satisfy the nexus requirement a defendant must show "only that the charged conduct *relate[s]* to an act under color of federal office," which Defendants plainly have done here. *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 258 (4th Cir. 2017) (emphasis added); *accord In re Goncalves v. Rady Children's Hosp. San Diego*, 865 F.3d 1237, 1244 (9th Cir. 2017) (the "hurdle erected by [the causal-connection] requirement is quite low").

The district court also rejected removal because Plaintiff did not allege that the federal government "directed [Defendants] to conceal the hazards of fossil fuels or prohibited them from providing warnings to consumers." JA.365. That conclusion is likewise based on a misunderstanding of the causal nexus requirement. It is

also irrelevant, because Plaintiff's strict-liability design-defect claim (JA.159-60 ¶¶251, 253)) does not turn on whether Defendants concealed hazards or provided warnings—much less on whether federal officers directed the alleged concealment[12]—and "removal of the entire case is appropriate so long as *a single claim* satisfies the federal officer removal statute." *Savoie v. Huntington Ingalls, Inc.*, 817 F.3d 457, 463 (5th Cir. 2016) (emphasis added).

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

OCSLA grants federal courts original jurisdiction over actions "arising out of, or in connection with … any operation conducted on the [OCS] which involves exploration, development, or production of the minerals, of the subsoil and seabed[.]" 43 U.S.C. §1349(b)(1). Certain Defendants and their affiliates operate a large share of the "more than 5,000 active oil and gas leases on nearly 27 million OCS acres" administered by the Department of the Interior under OCSLA and have historically produced as much as *one-third* of domestic oil and gas from the OCS in some years. JA.209 ¶55). Plaintiff's claims as alleged encompass *all* of Defendants "exploration and production" of fossil fuels on the OCS (JA.49 ¶19; JA.53 ¶22(b); JA.92 ¶101) and therefore fall within the "broad … jurisdictional grant of section 1349." *EP*

[12] "The relevant inquiry in a strict liability action focuses not on the conduct of the manufacturer but rather on the product itself." *Phipps v. Gen. Motors Corp.,* 278 Md. 337, 344 (1976).

Operating Ltd. P'ship v. Placid Oil Co., 26 F.3d 563, 569 (5th Cir. 1994); *In re Deepwater Horizon*, 745 F.3d 157, 163 (5th Cir. 2014) (finding OCSLA jurisdiction where oil and gas extraction on the OCS resulted in pollution that harmed aquatic life and wildlife in Louisiana).

The district court rejected OCSLA jurisdiction because "Defendants were not sued merely for producing fossil fuel products … on the OCS," but rather for "a broad array of conduct." JA.362. This reasoning misses the mark: Whether or not Plaintiff's claims target other conduct, a significant portion of the activity that Plaintiff alleges caused its injuries—namely, Defendants' extraction of fossil fuels—took place on the OCS. That is all OCSLA requires to confer federal jurisdiction. *See Tenn. Gas Pipeline v. Hous. Cas. Ins. Co*., 87 F.3d 150, 155 (5th Cir. 1996); *Ronquille v. Aminoil Inc*., 2014 WL 4387337, at *2 (E.D. La. Sept. 4, 2014) (OCSLA jurisdiction where "at least part of the work that Plaintiff allege[d] caused his exposure to asbestos arose out of or in connection with Shell's OCS operations").

The district court faulted Defendants for failing to establish that Plaintiff's alleged "injuries stemming from climate change would not have occurred but for defendants' extraction activities on the OCS." JA.362. But Plaintiff's theory of causation is that Defendants are liable because their alleged "affirmative acts" have "contributed to, and/or assisted in creating" and were a "substantial contributing factor" to a public nuisance. JA.149 ¶219; JA.153 ¶226. Because a substantial portion

of those "affirmative acts" occurred on the OCS, Defendants' OCS operations necessarily "contributed to" Plaintiff's alleged injuries under Plaintiff's theory of the case.[13]

Moreover, because OCSLA was designed to promote "the efficient exploitation of the minerals on the OCS," courts hold that OCSLA confers jurisdiction where, as here, the claims threaten to "impair the total recovery of the federally-owned minerals from the [OCS]." *Amoco Prod. Co. v. Sea Robin Pipeline Co.,* 844 F.2d 1202, 1210 (5th Cir. 1988); *see also EP Operating Ltd. P'ship*, 26 F.3d at 570 (applying "impaired recovery" test); *United Offshore Co. v. S. Deepwater Pipeline Co.*, 899 F.2d 405, 407 (5th Cir. 1990) (similar). Here, Plaintiff seeks potentially billions of dollars in damages and disgorgement of profits, together with equitable relief to abate the alleged nuisances. JA.172. Such relief would substantially discourage OCS production and jeopardize the future viability of the federal OCS leasing program, potentially costing the federal government hundreds of millions of dollars in revenues. It would also substantially interfere with OCSLA's congressionally-mandated goal of obtaining the largest "total recovery of the federally-owned minerals" underlying the OCS. *Amoco*, 844 F.2d at 1210; *see also* 43 U.S.C.

[13] Defendants dispute that they are the but-for or proximate cause of Plaintiff's alleged injuries, but accept Plaintiff's allegations on this point as true for purposes of removal.

§1802(1), (2). This action thus falls squarely within the "legal disputes … relating to resource development on the [OCS]" that Congress intended to be heard in federal court. *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*, 754 F.2d 1223, 1228 (5th Cir. 1985). As the Supreme Court recently confirmed in *Parker Drilling Management Services, Ltd. v. Newton*, 139 S. Ct. 1881 (2019), "OCSLA denies States any interest in or jurisdiction over the OCS." *Id.* at 1886. On the contrary, "federal law is 'exclusive' in its regulation of the [OCS]." *Id.* at 1889.

Plaintiff could have attempted to exclude OCS production and conduct from its complaint, but it did not. Because "[a]ll law applicable to the [OCS] is federal law," Maryland law "does not provide the rule of decision" for Plaintiff's claims. *Parker Drilling*, 139 S. Ct. at 1891, 1892-93. Accordingly, Plaintiff's federal claims were properly removed under OCSLA.

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

This Court has long recognized federal-question jurisdiction over claims that arise on federal enclaves. *See Stokes*, 265 F.2d at 666. Here, a substantial portion of the operative activities occurred on federal land. Some Defendants maintained production operations on federal enclaves, and others sold fossil fuels on federal enclaves, including on military bases. *See United States v. Passaro*, 577 F.3d 207, 212 (4th Cir. 2009). For example, Standard Oil Co. (Chevron's predecessor) operated Elk Hills Naval Petroleum Reserve, a federal enclave, for most of the twentieth

century. *See* JA.242-59, 307-316 (Executive Order and California statutes relating to federal jurisdiction). And CITGO distributed gasoline and diesel under its contracts with the Navy Exchange Service Command ("NEXCOM") to multiple Naval installations. *See* JA.319-20 ¶6; No. 18-cv-02357, ECF Nos. 127-1 – 127-7; *cf.* 43 U.S.C. §1333(a)(1); *Parker Drilling*, 139 S. Ct. at 1891 ("OCS should be treated as an exclusive federal enclave").

The district court held that the claims were not removable because the complaint did not "contain any allegations concerning defendants' conduct on federal enclaves." JA.359. But Plaintiff did not dispute Defendants' factual submissions regarding fossil-fuel production and sale on federal enclaves. And even though not *all* of Defendants' extraction occurred on federal enclaves (JA.360), the district court's jurisdictional conclusion again ignores Plaintiff's sweeping theory of causation. *See supra* II.C.2. It also conflicts with case law holding that removal is proper so long as "pertinent events" on which liability is allegedly based occurred on federal enclaves. *See Jones v. John Crane-Houdaille, Inc.*, 2012 WL 1197391, at *1 (D. Md. Apr. 6, 2012); *Rosseter v. Indus. Light & Magic*, 2009 WL 210452, at *2 (N.D. Cal. Jan. 27, 2009); *Corley v. Long-Lewis, Inc.*, 688 F. Supp. 2d 1315, 1336 (N.D. Ala. 2010); *Stiefel v. Bechtel Corp.*, 497 F. Supp. 2d 1138, 1148 (S.D. Cal. 2007); *Klausner v. Lucas Film Ent. Co.*, 2010 WL 1038228, at *1, *4 (N.D. Cal. Mar. 19, 2010). A substantial amount of various Defendants' conduct occurred on federal

enclaves, and it is "sufficient for federal jurisdiction" that Plaintiff's "allegations stem from" that conduct. *Jamil v. Workforce Res., LLC*, 2018 WL 2298119 at *4 (S.D. Cal. May 21, 2018). That Defendants "maintain[] operations outside the enclave is [] not pertinent." *Rosseter*, 2009 WL 210452, at *2.

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

Complete preemption occurs where a federal law has a "preemptive force … so powerful as to displace entirely any state cause of action[.]" *Franchise Tax Bd.*, 463 U.S. at 23-24; *see also In re Blackwater Security Consulting, LLC*, 460 F.3d 576, 584 (4th Cir. 2006) ("The doctrine of complete preemption … recognizes that some federal laws evince such a strong federal interest that, when they apply to the facts underpinning the plaintiff's state-law claim, they convert that claim into one arising under federal law.").

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

local governments, to challenge nationwide emissions standards or permitting requirements. 42 U.S.C. §7607(b), (d). They may also petition the EPA for rulemaking on these issues, and the EPA's response to such a petition is reviewable in federal court. 5 U.S.C. §7607(b)(1); 5 U.S.C. §553(e); *AEP*, 564 U.S. at 425. In fact, numerous state and city governments, including the State of Maryland, have already challenged the EPA's action (or inaction) regarding nationwide emissions.[14]

As this Court has recognized, the CAA "channels review of final EPA action exclusively to the courts of appeals, *regardless of how the grounds for review are framed*." *Virginia v. United States*, 74 F.3d 517, 523 (4th Cir. 1996) (emphasis added). Plaintiff's claims are completely preempted. Plaintiff seeks not only compensatory damages, but equitable relief, including abatement—which, given the global atmospheric causal chain upon which Plaintiff has sued, necessarily means imposing nationwide (and worldwide) restrictions on combustion of Defendants' fossil fuels. JA.172; *see* JA.350 n.5 (complaint seeks "to 'enjoin' defendants from

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

'creating future common-law nuisances'").[15] This abatement remedy necessarily implicates nationwide emissions standards. Plaintiff asserts that "a 15 percent annual reduction" in global carbon dioxide emissions will be necessary "to restore the Earth's energy balance," JA.132 ¶180, and Plaintiff does not (and could not) allege that emissions within Maryland account for 15% of global emissions.

The district court rejected complete preemption, stating that there is no "indication that Congress intended for these causes of action in the CAA to be the exclusive remedy for injuries stemming from air pollution." JA.355. But the CAA authorizes states to impose additional restrictions only on *in-state* emissions, and to provide remedies only for localized injuries stemming from in-state air pollution. *See Ouellette*, 479 U.S. at 496; *Bell v. Cheswick Generating Station*, 734 F.3d 188, 198 (3d Cir. 2013) (explaining that under the CAA, states are "free to impose higher standards *on their own sources of pollution*") (emphasis added); 42 U.S.C. §7401(a)(3) ("[A]ir pollution prevention … and air pollution control *at its source* is the primary responsibility of States and local governments") (emphasis added).

[15] It is immaterial that the CAA does not provide for compensatory damages because the inquiry in a complete preemption analysis is not the scope of relief available, but the "nature of the claim." *Rosciszewki v. Arete Assocs., Inc.*, 1 F.3d 225, 230 (4th Cir. 1993); *see also Prince v. Sears Holding Corp.*, 848 F.3d 173, 178 (4th Cir. 2017).

Nothing in the CAA suggests that Congress intended that state law be used to regulate *nationwide* (and worldwide) emissions.

The district court relied on *Her Majesty the Queen In Right of the Province of Ont. v. City of Detroit*, 874 F.2d 332 (6th Cir. 1989), JA.355-56, but that case merely held that plaintiffs could use Michigan law to impose emissions requirements on a *Michigan* garbage incineration plant that were more stringent than those imposed under federal law. *Id.* at 342-43.

The district court also relied on the CAA's savings clause (JA.355), which preserves "any right which any person … may have under … common law to seek enforcement of any emission standard or limitation or to seek any other relief." 42 U.S.C. §7604(e). In the case of nationwide or international greenhouse gas emissions, however, the Supreme Court has made clear that "common law" must refer to *federal* common law. *AEP*, 564 U.S. at 421-22. State law has never governed such emissions, and the CAA does not preserve state common law actions that have never existed.

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

Plaintiff's action, which seeks massive damages awards, was properly removed also because it is "related to" numerous bankruptcy cases. 28 U.S.C. §§ 1334(b), 1452(a).

After a bankruptcy plan has been confirmed, "related to" jurisdiction exists where the claim has "a close nexus to the bankruptcy plan or proceeding," such as where the case "affect[s] the interpretation, implementation, consummation, execution, or administration of the confirmed plan." *Valley Historic Ltd. P'ship v. Bank of N.Y.*, 486 F.3d 831, 836-37 (4th Cir. 2007).

Here, Plaintiff explicitly seeks to hold Defendants liable for the pre-bankruptcy conduct of Texaco Inc., (JA.96 ¶¶109-111; JA.101-02 ¶¶115, 120; JA.130 ¶¶174-75)—a Chevron subsidiary, JA.96 ¶¶109-111)—even though Texaco's confirmed plan bars various claims arising prior to March 15, 1988. *In re Texaco Inc.*, 87 B 20142 (Bankr. S.D.N.Y. 1987). Adjudicating Plaintiff's claims would thus require a court to interpret Texaco's plan to determine whether the claims are dischargeable. *See Valley Historic*, 486 F.3d at 836-37 (citation omitted). And contrary to the district court's assertion that Defendants identified "only" one bankruptcy plan (JA.368), Plaintiff's claims are based on the actions of Defendants' predecessors, subsidiaries, and affiliates—JA.130 ¶176; JA.135 ¶183; JA.160 ¶252—many of which may also be operating under confirmed bankruptcy cases. *See* No. 18-cv-02357, ECF No. 125-20 at 2 (observing that 134 North American oil and gas producers filed for bankruptcy protection since the beginning of 2015).

The district court also erred in concluding that this "action falls squarely within the police or regulatory exception to §1452," JA.370, because Plaintiff seeks

an economic windfall in the form of compensatory and punitive damages as well as disgorgement of profits. JA.172.

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

Finally, because fossil-fuel extraction occurs on vessels engaged in maritime commerce, this action falls within the Constitution's grant of original jurisdiction over "all Cases of admiralty and maritime Jurisdiction." U.S. Const. Art. III, §2; *see* 28 U.S.C. §1333(1). Admiralty jurisdiction "extends to … cases of injury or damage, to person or property, caused by a vessel on navigable waters, even though the injury or damage is done or consummated on land." 46 U.S.C. §30101(a).

As the Supreme Court has explained, "virtually every activity involving a vessel on navigable waters" is a "traditional maritime activity sufficient to invoke maritime jurisdiction." *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 542 (1995). "Oil and gas drilling on navigable waters aboard a vessel is recognized to be maritime commerce." *Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 538-39 (5th Cir. 1986); *In re Oil Spill by the Oil Rig Deepwater Horizon*, 808 F. Supp. 2d 943, 949 (E.D. La. 2011); *Barker v. Hercules Offshore, Inc.* 713 F.3d 208, 215 (5th Cir. 2013).

The district court held that this case is "outside the Court's admiralty jurisdiction" because Defendants could not show that "vessels *themselves* caused the City's injuries." JA.373-75 (citing *Pryor v. Am. President Lines*, 520 F.2d 974, 982 (4th

Cir. 1975)). But there was no admiralty jurisdiction in *Pryor* because the ship was not the proximate cause of plaintiff's injuries, as the coil of wire that injured him sprang out of a defective package moments *before* the coil was placed on board the ship. *Id.* Here, Plaintiff specifically alleges that "Defendants' production … of fossil fuel products"—much of which occurred aboard vessels—"proximately caused [its] injuries." JA.47 ¶10.[16] Plaintiff has thus tied its alleged injuries directly to activities Defendants carried out aboard vessels engaged in maritime commerce, which is sufficient for admiralty jurisdiction.

CONCLUSION

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

Dated: July 29, 2019

Respectfully submitted,

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[16] As noted above, Defendants do not concede causation, but accept Plaintiffs' factual allegations as true for purposes of removal.

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REQUEST FOR ORAL ARGUMENT

Defendants-Appellants hereby request oral argument.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the undersigned certifies that this brief complies with the applicable typeface, type-style, and type-volume limitations. This brief was prepared using a proportionally spaced type (Times New Roman, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 12,860 words. This certificate was prepared in reliance on the word-count function of the word-processing system used to prepare this brief.

/s/ *Theodore J. Boutrous, Jr.*
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CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: July 29, 2019

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

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

28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1292. Interlocutory decisions

. . . .

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

. . . .

28 U.S.C. § 1333. Admiralty Jurisdiction

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

28 U.S.C. § 1334. Bankruptcy cases and proceedings

. . . .

(b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

28 U.S.C. § 1442. Federal officers or agencies sued or prosecuted

(a) A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

(3) Any officer of the courts of the United States, for or relating to any act under color of office or in the performance of his duties;

(4) Any officer of either House of Congress, for or relating to any act in the discharge of his official duty under an order of such House.

. . . .

28 U.S.C. § 1447. Procedure after removal generally

. . . .

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise.

28 U.S.C. § 1452. Removal of claims related to bankruptcy cases

(a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

. . . .

43 U.S.C. § 1349. Citizen suits, jurisdiction and judicial review

. . . .

(b) Jurisdiction and venue of actions

(1) Except as provided in subsection (c) of this section, the district courts of the United States shall have jurisdiction of cases and controversies arising out of, or in connection with (A) any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals, or (B) the cancellation, suspension, or termination of a lease or permit under this subchapter. Proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the State nearest the place the cause of action arose.

(2) Any resident of the United States who is injured in any manner through the failure of any operator to comply with any rule, regulation, order, or permit issued pursuant to this subchapter may bring an action for damages (including reasonable attorney and expert witness fees) only in the judicial district having jurisdiction under paragraph (1) of this subsection.

. . . .

46 U.S.C. § 30101. Admiralty Jurisdiction

(a) The admiralty and maritime jurisdiction of the United States extends to and includes cases of injury or damage, to person or property, caused by a vessel on navigable waters, even though the injury or damage is done or consummated on land.