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 United States District Court
for the District of Maryland, No. 1:18-cv-02357-ELH
(The Honorable Ellen L. Hollander)

APPELLANTS' REPLY BRIEF

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INTRODUCTION

This Court should reverse the remand order because federal jurisdiction exists over climate-change actions predicated on global fossil-fuel production and greenhouse-gas emissions.

There is no bar to appellate review of the entire remand order. The plain language of 28 U.S.C. §1447(d) authorizes appellate review of remand "orders" in cases removed under the federal officer removal statute—as this case was. Ignoring the text of §1447(d), Plaintiff contends that Congress *meant* to authorize appellate review only of certain "grounds" for removal. But Plaintiff can point to nothing in the text, legislative history, or Supreme Court precedent supporting that interpretation of §1447(d). And the Supreme Court's decision in *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996), interpreting 28 U.S.C. § 1292(b), reinforces that when Congress makes an "order" reviewable, it authorizes the appellate court to review the *entire* order. Plaintiff offers no justification for giving the word "order" a different meaning in §1447(d) than in §1292(b). *Yamaha* thus abrogated this Court's earlier decision in *Noel v. McCain*, 538 F.2d 633 (4th Cir. 1976).

Federal courts have jurisdiction because Plaintiff's Complaint raises necessarily federal claims regarding global-warming and worldwide fossil-fuel production and greenhouse-gas emissions. Although Plaintiff argues that the well-

pleaded complaint rule guarantees it a state-court forum because its global-warming claims "were pleaded under Maryland law," Response Brief ("Resp.Br.") at 2, Plaintiff's state-law labels do not eliminate the need to conduct a choice-of-law analysis. Regardless of how they are pleaded, claims "'arise under' federal law if the dispositive issues stated in the complaint require the application of federal common law." *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972) ("*Milwaukee I*").

Federal common law must be applied here because Plaintiff's claims—which are based on alleged injuries from interstate greenhouse-gas emissions—"deal with air and water in their ambient or interstate aspects," *id.* at 103, making them a "matter of federal, not state, law." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987). As the Supreme Court recognized in *American Electric Power Co., Inc. v. Connecticut*, 564 U.S. 410 (2011) ("*AEP*"), federal common law—not state common law—necessarily provides the legal framework for resolving transboundary air pollution disputes because "the basic scheme of the Constitution" precludes application of state law. *Id.* at 420-21; *cf. United States v. Standard Oil Co.*, 332 U.S. 301, 307 (1947) (federal common law, not state common law, governs "matters essentially of federal character"). To find Plaintiff's cursory invocation of state law sufficient would remove the "well" from

"well-pleaded" and allow any claim—no matter how interstate or international in scope—to be litigated improperly in state courts.

In short, federal common law is not merely a "preemption defense," as Plaintiff contends, but a source of federal jurisdiction. The nationwide and worldwide scope of Plaintiff's claims also creates removal jurisdiction on numerous other grounds as well.

ARGUMENT

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

The plain text of §1447(d) unambiguously makes remand *orders*—not merely particular issues—reviewable in cases removed under §1442 or §1443. *See Kircher v. Putnam Funds Trust*, 547 U.S. 633, 641 n.8 (2006) (Congress has "expressly made" §1447(d)'s general prohibition on appellate review "inapplicable to particular remand orders"). And "[t]o say that a district court's order is reviewable is to allow appellate review of the *whole* order, not just of particular issues or reasons." *Lu Junhong v. Boeing Co.*, 792 F.3d 805, 811 (7th Cir. 2015). Plaintiff's non-textual arguments to the contrary are not persuasive.

Plaintiff contends that the Seventh Circuit erred in following *Yamaha* because that case "did not involve a remand order." Resp.Br.10-11. But *Yamaha*'s holding is based on the meaning of the word "order," and the Seventh Circuit's "application of *Yamaha* … to the word 'order' in §1447(d)" is also "entirely

textual." *Lu Junhong*, 792 F.3d at 812. Because §1292(b) and §1447(d) both authorize appellate review of certain district court "orders," the Seventh Circuit was correct: "when 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.* at 811. The leading treatise on federal jurisdiction agrees with the Sixth and Seventh Circuits that review of a remand order made appealable by §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 word "order" does not have a different meaning in §1447(d) than in §1292(b) just because the two statutes authorize review of different *types* of orders. *See* Resp.Br.11-12. An "order" is simply a "written direction or command delivered by a court or judge," Black's Law Dictionary (3d ed.), and there is no reason to think the word means something different in the context of §1447(d). Moreover, as Plaintiff concedes (*see* No. 18-cv-02357, ECF No. 162 at 2), "an order remanding a case which had previously been removed under a claim of §1442 removability is a 'judgment' for purposes of the Federal Rules of Civil Procedure." *Northrop Grumman Tech. Servs. v. DynCorp Int'l LLC*, 2016 WL 3180775, at *2 (E.D. Va. June 7, 2016). The remand order is thus appealable under 28 U.S.C. §1291, which, like §1292(b), imposes no restrictions on the issues

that may be decided in the context of an appealable order. Because appellate courts review "judgments, not opinions," review of an appealable remand order should not be limited to the reasons underlying the order. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc*., 467 U.S. 837, 842 (1984); *see also Everett v. Pitt Cty. Bd. of Educ*., 678 F.3d 281 (4th Cir. 2012).

Unable to point to anything in the text of §1447(d) qualifying the word "order," Plaintiff opines—without citation to any authority—that Congress's "clear intent" was "to limit appellate review of remand orders to two theories for removal." Resp.Br.12. Not so. Congress designed §1447(d) not to insulate district court decisions from appellate review, but rather "to prevent appellate *delay* in determining where litigation will occur." *Lu Junhong*, 792 F.3d at 813 (emphasis added); *see* 14C Wright *et al.*, Fed. Prac. & Proc. Juris. §3740 (4th ed.) ("[T]he purpose of the ban on review is to spare the parties interruption of the litigation and undue delay in reaching the merits of the dispute, solely to contest a decision disallowing removal."). However, "once Congress has authorized appellate review of a remand order—as it has authorized review of suits removed under §1442—a court of appeals has been authorized to take the time necessary to determine the right forum." *Lu Junhong*, 792 F.3d at 813; *see also* 15A Wright *et*

al., Fed. Prac. & Proc. Juris. §3914.11 ("Once an appeal is taken there is very little to be gained by limiting review.").[1]

Plaintiff complains that the Seventh Circuit's interpretation "would allow appeal of non-reviewable grounds for removal." Resp.Br.12. But Congress has not made any "grounds" for removal non-reviewable—appellate courts can unquestionably review every "ground" for removal when the district court *denies* remand and subsequently dismisses. Rather, §1447(d) makes certain *orders* non-reviewable—*i.e.*, orders granting motions to remand in cases not removed under §1442 or §1443.

Plaintiff urges the Court to adopt an atextual interpretation of §1447(d) because giving the word "order" its normal meaning would authorize appeals "*as of right*" and "deny the circuit courts' gatekeeping role." Resp.Br.12-13. That policy-based argument should be directed to Congress, not this Court.[2]

This Court is not bound by the four-decade-old decision in *Noel*, *see* Resp.Br.9, because that decision predated both *Yamaha* and the Removal

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[1] This Court's decision in *In re Norfolk S. Ry. Co.*, 756 F.3d 282 (4th Cir. 2014), cited at Resp.Br.12, is inapposite because the defendant there did not remove under §1442 or §1443.

[2] Plaintiff's amici contend that review should be limited because removal statutes must be "strictly construe[d]." Nat'l League of Cities Br. at 12. But §1447(d) is not a removal statute—it addresses *appellate* jurisdiction, and the division of labor between federal district courts and courts of appeals does not implicate "[f]ederalism principles." *Id.*

Clarification Act of 2011 ("RCA"). This Court must presume that Congress was aware of the Supreme Court's decision in *Yamaha* when Congress amended the RCA to make cases removed under §1442 reviewable on appeal. *See Lewis v. Kmart Corp.*, 180 F.3d 166, 171 (4th Cir. 1999). Congress's decision to retain §1447(d)'s reference to reviewable "orders," even after *Yamaha,* confirms that it intended to authorize plenary review of such orders.

Plaintiff cites two unpublished per curiam decisions post-dating the RCA as supposed evidence of *Noel*'s ongoing vitality. Resp.Br.9 (citing *Lee v. Murraybey*, 487 F. App'x 84 (4th Cir. 2012), and *Attorney Grievance Comm'n of Md. v. Rheinstein*, 750 F. App'x 225 (4th Cir. 2019)). But the pro se appellant in *Lee* did not raise the scope of review—indeed, the appellant's informal brief did not argue that the case was properly removed on any ground other than §1443. *See* No. 12-7159, ECF No. 10. And *Rheinstein* did not even cite *Noel*. Because *Noel* has been effectively abrogated, this Court may review the entire remand order. *See McMellon v. United States*, 387 F.3d 329, 334 (4th Cir. 2004) (en banc).

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

With the entire remand order under review, this Court should reverse because Plaintiff's claims arise under federal law and are removable on several other grounds.

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

1. Plaintiff's global warming claims "'arise under' federal law" because "the dispositive issues stated in the complaint require the application of federal common law." *Milwaukee I*, 406 U.S. at 100; *see* Appellants' Opening Brief ("AOB") at 15-33. Global-warming claims based on worldwide greenhouse-gas emissions and fossil-fuel production implicate "uniquely federal interests," and "the interstate or international nature" of these claims "makes it inappropriate for state law to control." *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-41 (1981).

Plaintiff contends that it is irrelevant whether federal common law governs its claims—a question it improperly characterizes as describing "ordinary preemption," which does not "convert a state claim into an action arising under federal law." Resp.Br.22-24 (quoting *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987)). Plaintiff misapprehends the posture of this case and Defendants' argument. Defendants did not raise federal common law as a *defense* to Plaintiff's claims. They made a threshold choice-of-law argument: that federal common law, not state common law, necessarily provides the legal framework for resolving Plaintiff's allegations regarding transboundary air pollution from out-of-state sources—including out-of-state greenhouse-gas emissions—because there is an "overriding federal interest in the need for a uniform rule of decision." *Milwaukee*

I, 406 U.S. at 105 n.6; *see City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 313 n.7 (1981) ("*Milwaukee II*") ("state law cannot be used" to resolve interstate pollution disputes); *AEP*, 564 U.S. at 421 ("the basic scheme of the Constitution" requires application of federal law to interstate pollution claims); *cf. Standard Oil*, 332 U.S. at 307 (holding that federal common law, not state common law, must govern "matters essentially of federal character").

Because Plaintiff's claims must be "resolved by reference to federal common law," *Ouellette*, 479 U.S. at 488, they arise under federal law, and the "well-pleaded complaint rule does not bar removal." *California v. BP p.l.c.*, 2018 WL 1064293, at *5 (N.D. Cal. Feb. 27, 2018). Indeed, the claims are well-pleaded only by reference to federal common law because state law *cannot* govern interstate (much less global) pollution claims.

Plaintiff does not dispute that other courts have upheld removal of claims nominally pleaded under state law on the ground that federal common law governed them. *See Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 926 (5th Cir. 1997); *New SD, Inc. v. Rockwell Int'l Corp.*, 79 F.3d 953, 954-55 (9th Cir. 1996); *Kight v. Kaiser Found. Health Plan*, 34 F. Supp. 2d 334, 340 (E.D. Va.

1999).[3] These cases demonstrate that upholding removal here would *not* "turn the well-pleaded complaint rule on its head." Resp.Br.23.

Plaintiff relies on *Rhode Island v. Chevron Corp.*, 2019 WL 3282007 (D.R.I. July 22, 2019), which remanded similar claims. Resp.Br.23-24. But the district court in *Rhode Island* (whose order is currently on appeal to the First Circuit) erroneously construed Defendants' federal common law argument as a "complete preemption" argument. 2019 WL 3282007, at *3. As Plaintiff here correctly observes, Defendants did "not make a complete-preemption argument *as to federal common law*." Resp.Br.22 (emphasis added). Defendants' complete-preemption argument is separate and based on the Clean Air Act. *See* infra Part II.D. Defendants' federal common law argument does not implicate the doctrine of complete preemption.[4]

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[3] Plaintiff cites dicta from an inapposite Third Circuit decision for the proposition that the "only state claims that are 'really' federal claims" are those "preempted completely by federal law." Resp.Br.23 (quoting *Goepel v. Nat'l Postal Mail Handlers Union*, 36 F.3d 306, 311-12 (3d Cir. 1994)). But the defendant in *Goepel* sought to remove on the basis of a federal statute—not federal common law. The *Goepel* Court therefore had no occasion to address the propriety of removal on the basis of federal common law.

[4] Plaintiff contends that Defendants' "reliance" on *Ouellette* "is unavailing" because that action was removed on diversity grounds. Resp.Br.24. But it was the district court that misinterpreted *Ouellette*—reading the word "preempted" to refer exclusively to a preemption *defense*. AOB.28-29; JA.342. As *Ouellette*'s citation to *Milwaukee I* demonstrates, federal common law is "a basis for dealing in

2. Plaintiff contends, in the alternative, that there is no "arising under" jurisdiction because the Clean Air Act ("CAA") displaced the relevant federal common law. Resp.Br.24-28. But whether Plaintiff's claims are displaced by the CAA is a merits issue that concerns the availability of a remedy. *See* AOB.30-31; *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 857 (9th Cir. 2012) ("displacement of a federal common law right of action means displacement of remedies"); *Milwaukee II*, 451 U.S. at 332 (Congress's overhaul of Clean Water Act meant "no federal common-law remedy was available"). That question is not relevant to, and cannot substitute for, the jurisdictional inquiry before the district court: *what substantive law* necessarily applies to Plaintiff's claims. *See Standard Oil*, 332 U.S. at 307.

There is nothing "odd" about having federal common law govern a claim yet provide no remedy. *See* Resp.Br.25. In *Standard Oil*, the Court held that the plaintiff's claim required application of federal common law even though it had been pleaded under state law, but declined to provide a remedy so as not to "intrud[e] within a field properly within Congress' control." 332 U.S. at 316. *Standard Oil* illustrates that the jurisdictional question (which law governs) is separate from, and antecedent to, the merits question (is there a remedy). Similarly, although *AEP* and *Kivalina* both held that plaintiffs' federal common

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uniform standard with the environmental rights of a State against improper impairment by sources outside its domain." *Milwaukee I*, 406 U.S. at 107 n.9.

law claims were displaced, neither court suggested that displacement deprived it of jurisdiction. As these cases make clear, this Court need not (and should not) decide at this stage of the litigation whether the CAA has displaced federal common law remedies for global warming claims, because "the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction." *Verizon Md., Inc. v. PSC*, 535 U.S. 635, 642-43 (2002).

Plaintiff is also incorrect that, under *AEP*, state nuisance law becomes available once federal common law is displaced. *See* Resp.Br.25 (citing *AEP*, 564 U.S. at 429). The state-law claims the Court left "open for consideration on remand" in *AEP* were asserted under "the law of each State where the defendants operate power plants." 564 U.S. at 429. The Court remanded for the lower court to determine whether claims brought under the laws of the source states were preempted by the CAA "or otherwise" barred. *Id.* (citing *Ouellette*, 479 U.S. at 488-89). *AEP* did not suggest that Congress, by displacing common law remedies, somehow authorized state law to govern *out-of-state* emissions, which is how Plaintiff seeks to use Maryland law here. *See* AOB.32 & n.8.[5]

[5] Plaintiff contends that federal common law would not apply here even in the absence of the CAA because states have an interest in addressing the potential effects of global warming. Resp.Br.27 n.4. But that asserted interest does not expand the scope of state jurisdiction to include out-of-state emissions. The cases Plaintiff cites stand only for the proposition that states have authority to regulate *in-state* emissions. *See Am. Fuel & Petrochem. Mfrs. v. O'Keeffe*, 903 F.3d 903, 907-08 (9th Cir. 2018) (addressing Oregon rules designed to decrease "greenhouse

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

1. Plaintiff's claims are removable under *Grable* because they represent a "collateral attack" on the federal regulatory schemes governing fossil-fuel production and greenhouse-gas emissions and invite the factfinder to second-guess countless federal energy, environmental, and infrastructure policies and regulatory decisions. *Bd. of Comm'rs v. Tenn. Gas Pipeline Co., LLC*, 850 F.3d 714, 724-25 (5th Cir. 2017); *see* JA.151 ¶224; JA.154-55 ¶233; 42 U.S.C. §13384; *id.* §13389(c)(1).

Plaintiff contends that *Tennessee Gas Pipeline* is inapposite because the duty plaintiff sought to impose there "would have to be drawn from federal law." Resp.Br.37 (quoting *Tenn. Gas Pipeline*, 850 F.3d at 723). But the Complaint specifically invites the factfinder to consult federal regulations and executive

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gas emissions from transportation fuels produced in or imported into Oregon"); *Rocky Mountain Farmers Union v. Corey*, 913 F.3d 940, 946 (9th Cir. 2019) (addressing California fuel standards "aimed at accomplishing the goal of reducing the rate of greenhouse gas emissions in California's transportation sector"); *Merrick v. Diageo Ams. Supply, Inc.*, 805 F.3d 685, 686 (6th Cir. 2015) (claim "brought against an emitter based on the law of the state in which the emitter operates"); *Nat'l Audubon Soc'y v. Dep't of Water*, 869 F.2d 1196, 1205 (9th Cir. 1988) (case was "essentially a domestic dispute and therefore [was] not the sort of interstate controversy which makes application of state law inappropriate"). By contrast, Plaintiff seeks to hold Defendants liable for costs allegedly caused by *worldwide* production and combustion, not by emissions from in-state sources. Plaintiff's reliance on two products liability cases—*Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314 (5th Cir. 1985), and *In re Agent Orange Products Liability Litigation*, 635 F.2d 987 (2d Cir. 1980)—is even more misplaced, because those cases involved personal injury claims based on exposure to defendants' hazardous products.

orders when balancing the costs and benefits of Defendants' fossil-fuel production. For example, Plaintiff urges the factfinder to "weigh[] the social benefit of extracting and burning a unit of fossil fuels against the costs that a unit of fuel imposes on society, known as the 'social cost of carbon.'" JA.131 ¶177. The "social cost of carbon" is a metric developed by *federal agencies* for use in regulatory cost-benefit analyses. *See* AOB.35. Moreover, as Defendants have explained—and Plaintiff does not dispute—the claims implicate Defendants' supposed duty to disclose the known harms of fossil fuels to *federal* regulators. AOB.37–38. Such a duty, if it exists, could only come from federal law. Plaintiff's claims thus have more than a "mere connection" with federal law—they rise or fall based on the reasonableness of federal policy and regulatory requirements. *Pinney v. Nokia, Inc.*, 402 F.3d 430 (4th Cir. 2005).

Plaintiff's nuisance claims would also require a court to evaluate the adequacy of existing coastal protections in the course of weighing the benefits of fossil-fuel production against the alleged harms caused by rising sea levels. Contrary to Plaintiff's assertion, Resp.Br.38, this balancing—which implicates decisions within the authority of the Army Corps of Engineers, *see, e.g.*, 33 U.S.C. §§426, 426g—is an "element" of Plaintiff's nuisance claims, not a mere preemption defense.

Plaintiff's claims also implicate foreign affairs because the relief sought would interfere with heavily negotiated international agreements addressing greenhouse-gas emissions and global warming. AOB.38-39. Plaintiff argues that a conflict with the federal government's administration of foreign affairs cannot supply jurisdiction. Resp.Br.38. To the contrary, federal jurisdiction lies where a "plaintiff's claims necessarily require determinations that will directly and significantly affect American foreign relations." *Republic of Philippines v. Marcos*, 806 F.2d 344, 352 (2d Cir. 1986). Plaintiff's claims would have more than an "incidental effect" on foreign affairs, *see* Resp.Br.39-40, because a judgment deeming fossil-fuel production a public nuisance would directly interfere with our Nation's express foreign policy of resisting reductions in greenhouse-gas emissions that are not accompanied by enforceable commitments from other nations to achieve similar reductions. *See* S. Res. 98, 105th Cong. (1997); AOB.38.

Defendants' removal arguments are not "identical" to those rejected in *Pinney*. Resp.Br.35-36. In *Pinney*, the plaintiffs asserted various state-law products liability and negligence claims based on the defendant's alleged failure to warn consumers about the risks of cell-phone radiation. 402 F.3d at 440. Those claims—unlike Plaintiff's nuisance claims here—did not require the factfinder to second-guess federal regulatory decisions or apply a federally-imposed duty. The

only federal issue in that case involved an "affirmative defense that the state claims [were] preempted by the FCA and federal RF radiation standards." *Id.* at 445. As this Court recognized, "a preemption defense 'that raises a federal question is inadequate to confer federal jurisdiction.'" *Id.* at 446 (quoting *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 808 (1986)). Here, by contrast, Defendants have not raised preemption as a basis for removal under *Grable*, but rather have demonstrated that Plaintiff's claims cannot be resolved without resort to federal law.

2. Plaintiff argues that any federal issues implicated here are not "substantial" because "this case" will not "control many other cases raising the same purported federal issues." Resp.Br.40. That is not the standard. "The substantiality inquiry under *Grable* looks instead to the importance of *the issue* to the federal system as a whole." *Gunn v. Minton*, 568 U.S. 251, 260 (2013) (emphasis added). The federal issues addressed here—including whether the social cost of carbon outweighs the benefits of fossil-fuel production; whether fossil-fuel producers have a duty to disclose the risks of global warming to federal regulators; and whether domestic fossil-fuel producers can be held liable for the alleged effects of global warming notwithstanding the Nation's longstanding foreign policy of negotiating multilateral agreements to address global warming—are plainly substantial to our federal system.

3. Allowing removal here would not upset the "'congressionally approved balance of federal and state judicial responsibilities.'" Resp.Br.41 (quoting *Grable*, 545 U.S. 314). Plaintiff has asserted several claims that do not turn on Defendants' alleged "marketing and promotion," *id.*, and removal of those claims would not intrude on an area of traditional state responsibility. Moreover, a significant portion of the alleged promotional activities do not concern Defendants' advertising to Maryland residents, but rather concern Defendants' lobbying efforts. States have no authority to redress the alleged effects of such constitutionally protected activity. In all events, federal courts, not state courts, are the traditional fora for cases addressing interstate pollution, which would include any claims that certain marketing increased the alleged interstate harms.

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

Plaintiff's claims must be resolved in federal court because the activities Plaintiff deems a public nuisance—extraction and production of fossil fuels—occurred at the direction of federal officers, and on the Outer Continental Shelf ("OCS") and various other federal enclaves.

1. The Action Is Removable Under the Federal Officer Removal Statute.

Federal jurisdiction exists because Plaintiff's suit is brought against "person[s] acting under" officers of the United States, and the charged conduct—

fossil-fuel extraction—occurred at the direction of federal officers. 28 U.S.C. § 1442(a)(1).

Plaintiff argues that Defendants were not "acting under" federal officers because Defendants' relationship with the federal government boils down to "occasional contracts" and "simple compliance with federal law." Resp.Br.7, 16. But Plaintiff cannot complain that removal is based on specific contracts, because it made the strategic choice to sue Defendants for *all* of their fossil-fuel extraction, including extraction occurring at the direction of federal officers. And the federal control apparent on the face of Defendants' contracts typifies the "subjection, guidance, or control" necessary to invoke federal jurisdiction. *Watson v. Philip Morris Cos.*, 551 U.S. 142, 151 (2007). The U.S. Navy's Unit Plan Contract ("UPC") with Standard Oil (a predecessor of Chevron) granted the Navy "*exclusive control* over the exploration, prospecting, development, and operation of the [Elk Hills Naval Petroleum] Reserve," JA.249 §3(a) (emphasis added), and "*full and absolute power* to determine … the quantity and rate of production from, the Reserve," JA.250 §4(a) (emphasis added). The UPC obligated Standard Oil to operate the Reserve in such a manner as to produce "not less than 15,000 barrels of oil per day," JA.250 §4(b), and retained for the Navy "absolute" discretion to

suspend or increase the rate of production, JA.250 §4(b), JA.251 §5(d)(1).[6] The Supreme Court has held that military procurement contracts can give rise to federal jurisdiction, *see Watson*, 551 U.S. at 149, and the contracts here exemplify precisely the type of "exclusive control" that supports removal.

The same is true of Defendant CITGO's detailed fuel supply agreements with NEXCOM. Far from the mere "provi[sion of] a commodity to the government for resale," Resp.Br.18, the NEXCOM agreements: (1) set forth detailed "fuel specifications" that required compliance with specified American Society for Testing and Materials standards,[7] and compelled NEXCOM to "have a qualified independent source analyze the products" for compliance with those

[6] While the UPC granted Standard Oil limited discretion regarding how much oil to produce from the Reserve, *see* Resp.Br.17, "just because [Defendants] are vested with discretion does not mean that they are not 'involve[d] in an effort to assist, or to help carry out, the duties or tasks of the federal superior.'" *Goncalves by and through Goncalves v. Rady Children's Hosp. San Diego*, 865 F.3d 1237, 1248 (9th Cir. 2017).

[7] *See* No. 18-cv-02357, ECF No. 127-1, pp. 13-14 §§10-11; ECF No. 127-2, p. 14 §I.C.5; ECF No. 127-3 at 21-24 §§I.C.4-7; ECF No. 127-4, at 38, 42-43 §§C.6-10; ECF No. 127-5 at 20-22 §§C.1-4; ECF No. 127-5 at 20-22 §§C.1-4; ECF No. 127-7 at 12-14 §§C.1-4.

specifications[8]; (2) authorized the Contracting Officer to inspect delivery, site, and operations[9]; and (3) established detailed branding and advertising requirements.[10]

Certain Defendants also extracted oil pursuant to the Outer Continental Shelf Lands Act ("OCSLA") and strategic petroleum reserve leases with the government. These leases provided that lessees "shall" drill for oil and gas pursuant to government-controlled exploration plans "at such rates as the [l]essor may require," and that they *must* sell it to specified buyers. JA.213-14 ¶62. The government also preconditioned the leases on a right of first refusal to purchase all materials "[i]n time of war or when the President of the United States shall so prescribe." *Id.*

Removal was therefore appropriate because Defendants "help[ed] the Government to produce an item that it needs" under federal "subjection, guidance, or control." *Watson*, 551 U.S. at 151, 153. Allowing removal of claims targeting conduct subject to plenary federal direction would not "federalize huge swaths" of state litigation. Resp.Br.18.

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[8] *See id.*, ECF No. 127-1, p. 14 §10.I; ECF No. 127-2, p. 14 §I.C.5; ECF No. 127-3, p. 21 §I.C.4(c); ECF No. 127-4, p. 38 §C.6.a.

[9] *See id.*, ECF No. 127-1 at 18-19 §19; ECF No. 127-3 at 31 §I.F.3; ECF No. 127-7 at 15 §D.

[10] *See id.*, ECF No. 127-6 at 23 §C.11; ECF No. 127-7 at 15 §C.9.

Plaintiff contends that the requisite "causal nexus" is missing because its claims "have nothing to do with what Defendants allege they have done under federal direction." Resp.Br.19. That is an astonishing assertion given that Plaintiff broadly alleges that the production of fossil fuels—all of it, everywhere around the world—has created a public nuisance. JA.149 ¶221(a); JA.155-56 ¶233(e). Although Plaintiff alleges that Defendants deceptively promoted fossil fuels, JA.112-128 ¶¶141-70, "promotion" is not an element of Plaintiff's claims for nuisance, trespass, or design defect. And to satisfy the nexus requirement for removal under the federal officer statute, Defendants need show "only that the charged conduct *relate[s]* to an act under color of federal office." *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 258 (4th Cir. 2017).[11] Defendants plainly satisfy that standard.

[11] The two cases cited at Resp.Br.19-20 are not to the contrary. In *In re Wireless Telephone Radio Frequency Emissions Prods. Liab. Litig.*, 327 F. Supp. 2d 554 (D. Md. 2004), there was no allegation that federal officers directed defendants to make the cellular phones that allegedly injured defendants' customers. *Id.* at 563. And in *Meyers v. Chesterton*, 2015 WL 2452346 (E.D. La. May 20, 2015), plaintiffs specifically disclaimed "any cause of action against any Defendant for recovery for any injuries or damages caused by exposure to asbestos that is based on any of the acts or omissions [that] were required by and/or committed at the direction of any officer of the United States." *Id.* at *4. The Plaintiff's Complaint here has no such disclaimer, but instead seeks to hold Defendants strictly liable for producing fossil fuels anywhere—conduct that occurred at the direction of federal officers.

2. The Claims Arise Out of Operations on the Outer Continental Shelf

This case is removable under OCSLA because Plaintiff alleges that Defendants' worldwide fossil-fuel extraction and production—including *all* of their production on the OCS—caused Plaintiff's injuries. OCSLA jurisdiction covers disputes where "physical activities on the OCS caused the alleged injuries," Resp.Br.42, and Plaintiff did not limit its claims to avoid OCSLA jurisdiction. Plaintiff's claims thus fall within the "broad … jurisdictional grant of section 1349." *EP Operating Ltd. P'ship v. Placid Oil Co.*, 26 F.3d 563, 569 (5th Cir. 1994).

Plaintiff attempts to have it both ways by contending that because Defendants' OCS production is only a fraction of their global production, Defendants' activities on the OCS were not the "but-for" cause of its alleged injuries. Resp.Br.44. But that argument cannot be reconciled with Plaintiff's own theory of causation. Indeed, Defendants as a group allegedly account for only a small percentage of worldwide, historical production and promotion of fossil-fuels, yet Plaintiff asserts that "[b]ut for Defendants' conduct," Plaintiff would not have been injured.[12] JA.148 ¶216. Given its theory of "but-for" causation, Plaintiff cannot contest OCSLA jurisdiction on the basis that Defendants' substantial OCS

[12] Defendants dispute that their conduct was the "but-for" cause of Plaintiff's alleged injuries but accept Plaintiff's allegations for purposes of removal.

production—*all* of which is encompassed by Plaintiff's allegations—is *not* the but-for cause of its alleged injuries.[13]

Plaintiff also distances itself from its Complaint by contending that its claims do not "arise from" fossil-fuel production on the OCS, but rather "from the nature of the products themselves and Defendants' knowledge of their dangerous effects." Resp.Br.44. Defendants' "knowledge" would not cause sea levels to rise, nor would un-extracted and unrefined fossil fuels. Plaintiff seeks to hold Defendants liable for their alleged role in the "massive increase in the *extraction* and consumption" of fossil fuels—putting Defendants' worldwide extraction activities squarely at issue. JA.43 ¶1 (emphasis added). A substantial portion of that extraction occurred on the OCS, and "OCSLA denies States any interest in or jurisdiction over the OCS." *Parker Drilling Mgmt. Srvs., Ltd. v. Newton*, 139 S. Ct. 1881, 1886 (2019).

Moreover, OCSLA removal is proper where, as here, the relief sought would discourage OCS production and "impair the total recovery of the federally-owned minerals from the [OCS]." *Amoco Prod. Co. v. Sea Robin Pipeline Co.*, 844 F.2d

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[13] Plaintiff relies on *Hammond v. Phillips 66 Co.*, 2015 WL 630918 (S.D. Miss. Feb. 12, 2015), where the court denied OCSLA jurisdiction because only a portion of plaintiff's asbestos exposure occurred while working on the OCS. *Id.* at *3-4. But other courts have upheld OCSLA jurisdiction in nearly identical situations. *See Sheppard v. Liberty Mutual Ins. Co.*, 2016 WL 6803530 (E.D. La. Nov. 17, 2016); *Ronquille v. Aminoil Inc.*, 2014 WL 4387337, at *2 (E.D. La. Sept. 4, 2014).

1202, 1210 (5th Cir. 1988). Plaintiff does not dispute that a ruling deeming fossil-fuel production a public nuisance—or labeling fossil fuels themselves defective products—would sharply discourage future fossil-fuel extraction on the OCS. Nor can it, because such an outcome would make any production on the OCS—including that sanctioned by the federal government under federal leases—a nuisance per se.

Plaintiff exaggerates in suggesting that allowing removal here would "open the floodgates" to OCLSA removal. Resp.Br.42. Plaintiff's claims are tied directly to Defendants' fossil-fuel *extraction*. JA.43 ¶1; JA.44 ¶3, JA.47 ¶10; JA.48 ¶18; JA.76 ¶48; JA.91 ¶95; JA.91 ¶100; JA.132 ¶179. Allowing removal of claims alleging "massive" fossil-fuel extraction and production around the world would hardly lead to "absurd results" or unreasonably expand OCSLA jurisdiction. Resp.Br.43 (quoting *Plains Gas Sols., LLC v. Tenn. Gas Pipeline Co*., 46 F. Supp. 3d 701, 704-05 (S.D. Tex. 2014), which rejected OCSLA jurisdiction over claims by an employee working at an "onshore processing facility").

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

3. The Claims Arise on Federal Enclaves.

Federal jurisdiction also exists because Plaintiff's tort claims arise from activities on federal enclaves. *See Stokes v. Adair*, 265 F.2d 662, 666 (4th Cir. 1959). Plaintiff does not dispute that several Defendants (or their affiliates) maintained production operations and/or sold fossil fuels on federal enclaves, but nonetheless contends that removal is improper because a tort claim arises where the injury occurs, not where the tortious activities took place. Resp.Br.45-46. But the proper question is whether any "pertinent events" giving rise to liability occurred on a federal enclave. *Jones v. John Crane-Houdaille, Inc.*, 2012 WL 1197391, at *1 (D. Md. Apr. 6, 2012); *see* AOB.47 (citing cases).

Although Plaintiff again professes concern about opening the "floodgates," Resp.Br.46, the claims here implicate decades-long drilling operations on federal land—hardly a common situation.

D. Plaintiff's Claims Are Completely Preempted by the Clean Air Act.

Plaintiff's claims are completely preempted because this action is a veiled attempt to regulate nationwide greenhouse-gas emissions, and the CAA provides the exclusive vehicle for achieving such reductions. *See* AOB.48-51.

Plaintiff contends that the CAA cannot completely preempt its claims because the CAA preserves states' authority to regulate air pollution. Resp.Br.30-31 (citing 42 U.S.C. §§ 7401(a)(3), 7416, and 7604(e)). But the cited provisions

merely preserve states' authority to regulate *in-state* sources of air pollution. And all of Plaintiff's cases involve state regulation of local emissions; none involves regulation of out-of-state emissions. *See Her Majesty The Queen In Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332, 342-43 (6th Cir. 1989); *Bell v. Cheswick Generating Station*, 734 F.3d 188, 189-90 (3d Cir. 2013); *Merrick v. Diageo Ams. Supply, Inc.*, 805 F.3d 685, 686, 691-92 (6th Cir. 2015). Here, by contrast, Plaintiff attempts to use Maryland law to impose de facto restrictions on *out-of-state* greenhouse gas emissions.

Plaintiff complains that the CAA "provides no substitute cause of action" for challenging out-of-state emissions. Resp.Br.32. But Congress expressly provided a means of challenging the EPA's nationwide emissions standards. *See* 42 U.S.C. §7607(b), (d). Local governments may also petition the EPA for rulemaking regarding interstate emissions. 5 U.S.C. §§7607; 553(e); *AEP*, 564 U.S. at 425.

E. The Action Was Properly Removed Under the Bankruptcy Removal Statute.

Plaintiff's action is removable under the bankruptcy removal statute because it is related to countless bankruptcy cases, including Texaco's, and Plaintiff seeks a monetary windfall. *See* AOB.51-53.

Plaintiff maintains that there is no "close nexus" between its claims and any confirmed bankruptcy plans, Resp.Br.48, but it seeks to hold Defendants liable for the conduct of their affiliates, subsidiaries, and predecessors going back decades,

many of which are operating under confirmed bankruptcy plans. *See, e.g.* JA.96 ¶¶109-111; AOB.52. Although Texaco's bankruptcy plan has "been long since consummated," *In re Wilshire Courtyard*, 729 F.3d 1279, 1289, 1292 (9th Cir. 2013), there is a nexus with Plaintiff's claims, which target conduct "since the Second World War." JA.44 ¶4.

Plaintiff contends that these actions are exempt from removal "as an exercise of Plaintiff's police or regulatory powers." Resp.Br.49. However, the majority of Plaintiff's claims are in the nature of a "private right[]" of contribution or indemnity rather than an effort to "effectuate [any] public policy." *See City & Cty. of San Francisco v. PG&E Corp.*, 433 F.3d 1115, 1125 (9th Cir. 2006). Further, the relief sought includes compensatory damages, punitive and exemplary damages, and disgorgement of profits, JA.172, confirming that Plaintiff primarily seeks to protect the City's pecuniary interest. *See Safety-Kleen, Inc. (Pinewood) v. Wyche*, 274 F.3d 846, 865 (4th Cir. 2001).

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

Plaintiff's claims satisfy both the "location" and "connection to maritime activity" tests required to establish admiralty jurisdiction. *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995).

Plaintiff argues that the "location" test is not met because its injuries were not caused by maritime commerce. Resp.Br.51. But this cannot be reconciled

with Plaintiff's allegations, which focus on Defendants' extraction of fossil fuels—conduct that occurred aboard "vessel[s] on navigable water" within the meaning of 46 U.S.C. § 30101(a).[14]

Plaintiff contends that oil and gas production—even from floating drilling platforms—is not a "maritime activity.'" Resp.Br.52 (quoting *Barker*, 713 F.3d at 215-16). But *Barker* held only that *construction work* occurring on offshore platforms is not traditionally maritime activity. 713 F.3d at 215. The claims here relate specifically to oil and gas production from floating oil rigs, and the Fifth Circuit has recently reaffirmed that "[o]il and gas drilling on navigable waters aboard a vessel is recognized to be maritime commerce." *In re Crescent Energy Servs., L.L.C. for Exoneration from or Limitation of Liab.*, 896 F.3d 350, 356 (5th Cir. 2018).

Finally, the "saving-to-suitors" clause in 28 U.S.C. §1333 no longer prohibits removal "absent some independent jurisdictional basis," Resp.Br.52-53, because the Venue Clarification Act of 2011 eliminated the portion of §1441(b) courts interpreted as blocking removal of admiralty claims absent another basis for federal jurisdiction. *See In re Dutile*, 935 F.2d 61, 62-63 (5th Cir. 1991); Pub. L. 112-63, Title I, § 103, 125 Stat. 759 (2011). Plaintiff's claims are thus removable under sections 1333 and 1441.

[14] *See In re Oil Spill*, 808 F. Supp. 2d 943, 949 (E.D. La. 2011); *Barker v. Hercules Offshore, Inc.*, 713 F.3d 208, 215 (5th Cir. 2013).

CONCLUSION

For the foregoing reasons, the Court should reverse the remand order.

September 17, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the undersigned certifies that this brief complies with the applicable typeface, type-style, and type-volume limitations. This brief was prepared using a proportionally spaced type (Times New Roman, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 6,456 words. This certificate was prepared in reliance on the word-count function of the word-processing system used to prepare this brief.

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CERTIFICATE OF SERVICE

I hereby certify that on September 17, 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.

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