APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-1644

MAYOR AND CITY COUNCIL OF BALTIMORE,
Petitioner-Appellee

v.

BP P.L.C.; BP AMERICA, INC.; BP PRODUCTS NORTH AMERICA, INC.; CROWN CENTRAL LLC; CROWN CENTRAL NEW HOLDINGS LLC; CHEVRON CORP.; CHEVRON U.S.A. INC.; EXXON MOBIL CORP.; EXXONMOBIL OIL CORPORATION; ROYAL DUTCH SHELL, PLC; SHELL OIL COMPANY; CITGO PETROLEUM CORP.; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66; MARATHON OIL COMPANY; MARATHON OIL CORPORATION; MARATHON PETROLEUM CORPORATION; SPEEDWAY LLC; HESS CORP.; CNX RESOURCES CORPORATION; CONSOL ENERGY, INC.; CONSOL MARINE TERMINALS LLC,
Respondents-Appellants

and

LOUISIANA LAND & EXPLORATION CO.; PHILLIPS 66 COMPANY; CROWN CENTRAL PETROLEUM CORPORATION,
Defendants

Filed: March 6, 2020

GREGORY, Chief Judge, and FLOYD and THACKER, Circuit Judges.

OPINION

FLOYD, Circuit Judge.

This appeal is about whether a climate-change lawsuit against oil and gas companies belongs in federal court. But this decision is only about whether one path to federal court lies open. Because 28 U.S.C. § 1447(d) confines our appellate jurisdiction, the narrow question before us is whether removal of this lawsuit is proper under 28 U.S.C. § 1442, commonly referred to as the federal officer removal statute. And because we conclude that § 1442 does not provide a proper basis for removal, we affirm the district court's remand order.

I.

In July 2018, the Mayor and City of Baltimore ("Baltimore") filed suit in Maryland state court against twenty-six multinational oil and gas companies ("Defendants") that it says are partly responsible for climate change.[1]

[1] Defendants consist of BP entities (BP P.L.C., BP America, Inc., and BP Products North America Inc.); Crown Central entities (Crown Central Petroleum Corporation, Crown Central LLC, and Crown Central New Holdings LLC); Chevron entities (Chevron Corp. and Chevron U.S.A. Inc.); Exxon Mobil entities (Exxon Mobil Corp. and ExxonMobil Oil Corporation); Shell entities (Royal Dutch Shell PLC and Shell Oil Company); Citgo Petroleum Corp.; ConocoPhillips entities (ConocoPhillips, ConocoPhillips Company, Louisiana Land & Exploration Co., Phillips 66, and Phillips 66 Company);

According to Baltimore, Defendants substantially contributed to climate change by producing, promoting, and (misleadingly) marketing fossil fuel products long after learning the dangers associated with them. Specifically, Baltimore alleges that, despite knowing about the direct link between fossil fuel use and global warming for nearly fifty years, Defendants have engaged in a "coordinated, multi-front effort" to conceal that knowledge; have tried to discredit the growing body of publicly available scientific evidence by championing sophisticated disinformation campaigns; and have actively attempted to undermine public support for regulation of their business practices, all while promoting the unrestrained and expanded use of their fossil fuel products. *See* J.A. 43-47. As a result of Defendants' conduct, Baltimore avers that it has suffered various "climate change-related injuries," J.A. 92, including an increase in sea levels, storms, floods, heatwaves, droughts, and extreme precipitation. So Baltimore sued Defendants to shift some of the costs of these injuries on to them.

The Complaint asserts eight causes of action, all founded on Maryland law: public and private nuisance (Counts I-II); strict liability for failure to warn and design defect (Counts III-IV); negligent design defect and failure to warn (Counts V-VI); trespass (Count VII); and violations of the Maryland Consumer Protection Act, Md. Code, Com. Law §§ 13-101 to 13-501 (Count VIII). As relief, Baltimore seeks monetary damages, civil penalties, and equitable relief. It does not "seek to impose liability on Defendants for their direct emissions of greenhouse

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Marathon entities (Marathon Oil Company, Marathon Oil Corporation, Marathon Petroleum Corporation, and Speedway LLC); Hess Corp.; and CONSOL entities (CNX Resources Corporation, CONSOL Energy Inc., and CONSOL Marine Terminals LLC).

gases" or to "restrain Defendants from engaging in their business operations." J.A. 47.

Two Defendants, Chevron Corporation and Chevron U.S.A. Inc. (collectively, "Chevron"), timely removed the case to the United States District Court for the District of Maryland.

Before continuing, a brief introduction to the various grounds for removal is helpful. Under 28 U.S.C. § 1441, the general removal statute, "any civil action brought in a State court of which the district courts of the United States have original jurisdiction" may be removed by the defendants "to the district court of the United States for the district and division embracing the place where such action is pending." *Id.* § 1441(a); *see also, e.g.,* 28 U.S.C. § 1331 (conferring "original jurisdiction" over cases that "aris[e] under" federal law). In addition, a civil action filed in state court may be removed to federal court if a specialized removal provision applies, such as the bankruptcy removal statute, 28 U.S.C. § 1452, or, as pertinent here, the federal officer removal statute, 28 U.S.C. § 1442.

In this case, Chevron asserted eight grounds for removal. Four of those grounds were premised on federal-question jurisdiction under 28 U.S.C. § 1331. Chevron argued that Baltimore's claims arose under federal law within the meaning of § 1331 because they (1) were governed by federal common law, rather than state law; (2) raised disputed and substantial issues of federal law under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005); (3) were completely preempted by the Clean Air Act, 42 U.S.C. §§ 7401-7671q, as well as the foreign affairs doctrine; and (4) were based on conduct or injuries that occurred on federal enclaves. The remaining grounds relied on alternative jurisdictional and removal statutes, including: (1) the jurisdictional grant in the Outer Continental Shelf Lands

Act ("OCSLA"), 43 U.S.C. § 1349(b); (2) the admiralty jurisdiction statute, 28 U.S.C. § 1333; (3) the bankruptcy removal statute, 28 U.S.C. § 1452; and (4) the federal officer removal statute, 28 U.S.C. § 1442.[2]

Baltimore then moved to remand the case back to state court under 28 U.S.C. § 1447(c), which some Defendants opposed.[3] In its forty-five-page opinion granting Baltimore's remand motion, the district court rejected each of the eight theories asserted by Defendants in support of removal. *See generally BP P.L.C.*, 388 F. Supp. 3d 538.

This timely appeal followed. Shortly after noticing their appeal, Defendants moved the district court to stay the execution of the remand to state court pending this appeal. The district court denied the motion, as did this Court. The Supreme Court likewise denied Defendants' application for a stay. *See BP P.L.C. v. Mayor & City Council of Balt.*, 140 S. Ct. 449 (2019) (mem.).

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[2] Because the OCSLA and admiralty statute are jurisdictional, Chevron relied upon the general removal statute, § 1441(a), as the statutory hook for removal for these grounds as well. As previously noted, the bankruptcy and federal officer statutes are specialized removal provisions. The bankruptcy statute authorizes removal in cases over which the district court has original jurisdiction per 28 U.S.C. § 1334, including in civil proceedings that "aris[e] in or relate[] to cases under title 11." *See* 28 U.S.C. § 1452(a). The federal officer removal statute lies at the heart of this appeal and is discussed in greater detail in Part III.

[3] Five of the twenty-six Defendants did not oppose remand. *See Mayor & City Council of Balt. v. BP P.L.C.*, 388 F. Supp. 3d 538, 549 n.2 (D. Md. 2019) (noting that three Defendants—Crown Central Petroleum Corp., Louisiana Land & Exploration Co., and Phillips 66 Company—appeared to have been improperly named in the Complaint, and two others—Marathon Oil Company and Marathon Oil Corporation—did not join in the opposition to remand).

II.

As in all cases involving an appeal of a remand order, we must confront the threshold question of our appellate jurisdiction.

"The authority of appellate courts to review district-court orders remanding removed cases to state court is substantially limited by statute," namely, 28 U.S.C. § 1447(d). *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 229 (2007). When a remand is based on a lack of subject-matter jurisdiction, *see Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 638 (2009), review of the remand order "on appeal or otherwise" is typically barred—however "manifestly" and "inarguably erroneous" it may be, *In re Norfolk S. Ry.*, 756 F.3d 282, 287 (4th Cir. 2014) (internal quotation mark omitted)—unless the case was removed pursuant to one of two specialized removal statutes. Specifically, § 1447(d) provides:

> 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. § 1447(d); *see also* 28 U.S.C. § 1442 ("Federal officers or agencies sued or prosecuted"); 28 U.S.C. § 1443 ("Civil rights cases").

Therefore, as a matter of statutory interpretation, we must first determine the scope of our appellate jurisdiction under § 1447(d) de novo. *See Stone v. Instrumentation Lab. Co.*, 591 F.3d 239, 242-43 (4th Cir. 2009). As explained below, we conclude that such jurisdiction does not extend to the non-§ 1442 grounds that were considered and rejected by the district court.

In *Noel v. McCain*, 538 F.2d 633 (4th Cir. 1976), this Court held that when a case is removed on several grounds, appellate courts lack jurisdiction to review any ground other than the one specifically exempted from § 1447(d)'s bar on review. Thus, in that case, we dismissed an appeal to the extent that it sought review of an order remanding a case for "failure to raise federal questions." *Id.* at 635. "Jurisdiction to review remand of a § 1441(a) removal," we explained, "is not supplied by also seeking removal under § 1443(1)." *Id.*

Because the only ground for removal that is made reviewable by § 1447(d) here is federal officer removal under § 1442, *Noel* teaches that our jurisdiction is confined to this ground alone; it does not extend to the seven other grounds for removal raised by Defendants, even though the district court rejected them in the same remand order.

Notwithstanding our holding in *Noel*, Defendants insist that we have jurisdiction to review the entire remand order. That is so, Defendants say, because *Noel* has been effectively abrogated by the Supreme Court's decision in *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996), as well as the Removal Clarification Act of 2011, Pub. L. No. 112-51, 125 Stat. 545 (codified in scattered sections of 28 U.S.C.). They are wrong.

We begin with *Yamaha*. There, the Supreme Court interpreted the word "order" within the meaning of the interlocutory appeal statute, 28 U.S.C. § 1292(b). In particular, the Court addressed whether, under § 1292(b), federal courts of appeals may exercise jurisdiction over *any* question that is included within an order certified for interlocutory appeal or, alternatively, whether such jurisdiction is limited to review of the controlling question of law identified by the district court—i.e., the question that makes an interlocutory appeal appropriate in the first place. *See Yamaha*, 516 U.S. at 204-05. Section 1292(b)

provides, in relevant part, that if a district judge concludes that "an order not otherwise appealable" in a civil action "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," then the judge shall "so state in writing in such order." 28 U.S.C. § 1292(b). "The Court of Appeals . . . may thereupon, in its discretion, permit an appeal to be taken from such order." *Id.* Based on the text of § 1292(b), the *Yamaha* Court held that appellate jurisdiction under that statute "applies to the *order* certified to the court of appeals, and is not tied to the particular question formulated by the district court." 516 U.S. at 205. As such, courts of appeals "may address any issue fairly included within the certified order because it is the *order* that is appealable." *Id.* (internal quotation mark omitted).

Although at least one other circuit has found *Yamaha* persuasive in interpreting the word "order" under § 1447(d) as a matter of first impression, *see Lu Junhong v. Boeing Co.*, 792 F.3d 805, 810-13 (7th Cir. 2015),[4] we simply cannot conclude that our contrary interpretation in *Noel* is *abrogated*. True, the Supreme Court's interpretation of the word "order" in *Yamaha* was entirely tex-

[4] Though the Sixth Circuit reached a similar conclusion in *Mays v. City of Flint*, 871 F.3d 437, 442 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 1557 (2018), it merely cited *Lu Junhong* in doing so and did not so much as address its earlier precedent applying a contrary rule, *see, e.g., Detroit Police Lieutenants & Sergeants Ass'n v. City of Detroit*, 597 F.2d 566, 567-68 (6th Cir. 1979). Similarly, although the Fifth Circuit has followed *Lu Junhong*'s lead, *see Decatur Hosp. Auth. v. Aetna Health, Inc.*, 854 F.3d 292, 295-97 (5th Cir. 2017), it, too, has potentially conflicting authority on the issue, *see City of Walker v. Louisiana*, 877 F.3d 563, 566 & n.2 (5th Cir. 2017).

tual. But it did not purport to establish a general rule governing the scope of appellate jurisdiction for every statute that uses that word. *See Yamaha*, 516 U.S. at 205. And for good reason: Section 1292(b) governs *when* an appellate court may review a particular question within its discretion. Section 1447(d), by contrast, limits *which* issues are "reviewable on appeal or otherwise." Put another way, § 1292(b) permits appellate review of important issues before final judgment, but it does not make otherwise non-appealable questions reviewable. Reading "order" to authorize plenary review thus makes sense in the § 1292(b) context, as § 1292(b) only affects the timing of review for otherwise appealable questions. But giving the word "order" the same meaning in the § 1447(d) context would mandate review of issues that are ordinarily unreviewable, period—even following a final judgment. *See generally Yates v. United States*, 135 S. Ct. 1074, 1082 (2015) ("[I]dentical language may convey varying content when used in different statutes, sometimes even in different provisions of the same statute.").

The Removal Clarification Act of 2011 does not alter this conclusion. The Act amended § 1447(d), among other statutes, "by inserting '1442 or' before '1443.'" 125 Stat. at 546. Because the Act "retain[s] § 1447(d)'s reference to reviewable 'orders,' even after *Yamaha*," Defendants contend that Congress must have intended to authorize "plenary review" of such orders. Opening Br. 12. Although Defendants are correct that courts may generally "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), we find *Yamaha* distinguishable for the reasons stated above. *Yamaha* did not interpret the scope of § 1447(d), let alone involve a remand order. *Cf. Jackson*, 880 F.3d at 170-71 (interpreting word "defendant" to have same meaning in "interlocking removal

statutes"). Moreover, to the extent that Defendants attempt to argue that we are not bound by *Noel*'s interpretation of § 1447(d) because *Noel* was decided before orders remanding cases removed pursuant to § 1442 were made reviewable, *see* 538 F.2d at 635 (interpreting prior version of § 1447(d) in which § 1443 was sole exception), we find that argument unpersuasive. Simply put, the fact that Congress later added § 1442 as an exception to § 1447(d)'s no-appeal rule for remand orders does not undermine our holding in *Noel* that appellate courts only have jurisdiction to review those grounds for removal that are specifically enumerated in § 1447(d).

In sum, *Noel* remains binding precedent in this Circuit.[5] Accordingly, "we dismiss this appeal for lack of jurisdiction," *id.*, insofar as it seeks to challenge the district court's determination with respect to the propriety of removal based on federal-question, OCSLA, admiralty, and bankruptcy jurisdiction.

III.

Having determined that we only have jurisdiction to review the district court's conclusion that removal was improper under the federal officer removal statute, we now turn to that issue.

"We review de novo issues of subject matter jurisdiction, including removal." *Ripley v. Foster Wheeler LLC*, 841 F.3d 207, 209 (4th Cir. 2016). Although Defendants

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[5] We note that we are not alone in continuing to interpret § 1447(d) consistently with *Noel*, even in the wake of *Yamaha* and the passage of the Removal Clarification Act. *See Jacks v. Meridian Res. Co.*, 701 F.3d 1224, 1229 (8th Cir. 2012); *see also Claus v. Trammell*, 773 F. App'x 103, 103 (3d Cir. 2019) (citing *Davis v. Glanton*, 107 F.3d 1044, 1047 (3d Cir. 1997)); *Wong v. Kracksmith, Inc.*, 764 F. App'x 583, 584 (9th Cir. 2019) (citing *Patel v. Del Taco, Inc.*, 446 F.3d 996, 998 (9th Cir. 2006)).

bear the burden of establishing jurisdiction as the party seeking removal, *see Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811, 816 (4th Cir. 2004), the federal officer removal statute must be "liberally construed," *Watson v. Philip Morris Co.*, 551 U.S. 142, 150 (2007) (quoting *Colorado v. Symes*, 286 U.S. 510, 517 (1932)). As such, the ordinary "presumption against removal" does not apply. *See Betzner v. Boeing Co.*, 910 F.3d 1010, 1014 (7th Cir. 2018).

The federal officer removal statute authorizes the removal of state-court actions filed against "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." 28 U.S.C. § 1442(a)(1). Its "basic purpose" is to protect against the interference with federal operations that would ensue if a state were able to arrest federal officers and agents acting within the scope of their authority and bring them to trial in a state court for an alleged state-law offense. *Watson*, 551 U.S. at 150 (explaining that state-court proceedings may "reflect local prejudice against unpopular federal laws or federal officials," "impede [enforcement of federal law] through delay," or "deprive federal officials of a federal forum in which to assert federal immunity defenses" (internal quotation marks omitted)).

Thus, to remove a case under § 1442(a)(1), a *private* defendant must show: "(1) that it 'act[ed] under' a federal officer, (2) that it has 'a colorable federal defense,' and (3) that the charged conduct was carried out for [or] in relation to the asserted official authority." *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 254 (4th Cir. 2017) (first alteration in original) (citations omitted). Here, Defendants assert that Baltimore's state-court action is removable under the federal officer removal statute "because the City bases liability on activities undertaken at the direction of the federal government." *BP P.L.C.*, 388 F. Supp. 3d at

567 (internal quotation mark omitted). It is the first and third prongs that are therefore in dispute. *See* Resp. Br. 14-21. We begin with the first, though the acting-under and causal-nexus prongs often "collapse into a single requirement." *In re MTBE Prods. Liab. Litig.*, 488 F.3d 112, 124 (2d Cir. 2007); *see also* 28 U.S.C. § 1442(a)(1) (targeting for removal state-court actions "for or relating to any act under color of [federal] office").

A.

The statutory phrase "acting under" describes "the triggering relationship between a private entity and a federal officer." *Watson*, 551 U.S. at 149. Although the words "acting under" are "broad," the Supreme Court has emphasized that they are not "limitless." *Id.* at 147. In cases involving a private entity, the "acting under" relationship requires that there at least be some exertion of "subjection, guidance, or control" on the part of the federal government. *See id.* at 151 (quoting Webster's New International Dictionary 2765 (2d ed. 1953)). Additionally, "precedent and statutory purpose" make clear that "'acting under' must involve an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior." *Id.* at 152.

In *Watson*, the Supreme Court held that "simply *complying* with the law" does not constitute the type of "help or assistance necessary to bring a private [entity] within the scope of the statute," *id.*, no matter how detailed the government regulation or how intensely the entity's activities are supervised and monitored, *see id.* at 153. In doing so, the Court distinguished several decisions cited by the defendant there in which lower courts had held that private *contractors* fell within the terms of § 1442(a)(1), at least where the relationship was "an unusually close one involving detailed regulation, monitoring, or supervision." *Id.* at 153 (citing *Winters v. Diamond Shamrock Chem.*

Co., 149 F.3d 387 (5th Cir. 1998)). The difference between those cases and a case involving a highly regulated private firm, the Court reasoned, was the fulfillment of a government need:

> The answer to this question lies in the fact that the private contractor in such cases is helping the Government to produce an item that it needs. The assistance that private contractors provide federal officers goes beyond simple compliance with the law and helps officers fulfill other basic governmental tasks. In the context of *Winters*, for example, Dow Chemical fulfilled the terms of a contractual agreement by providing the Government with a product that it used to help conduct a war. Moreover, at least arguably, Dow performed a job that, in the absence of a contract with a private firm, the Government itself would have had to perform.

Id. at 153-54.

The Supreme Court found these circumstances sufficient to distinguish Dow Chemical (the contractor in *Winters*) from the regulated tobacco companies who sought removal in *Watson*, and so it did not address "whether and when particular circumstances may enable private contractors to invoke the statute." *Id.* at 154. Nevertheless, in light of the Court's reasoning, we have relied on *Watson* to hold that certain private contractors "act under" federal officials. *See Sawyer*, 860 F.3d at 255. In *Sawyer*, we observed that "courts have unhesitatingly treated the 'acting under' requirement as satisfied where a contractor seeks to remove a case involving injuries arising from equipment that it *manufactured for the government*." *Id.* Thus, in that case, we found that the defendant "acted un-

der" the United States Navy when it manufactured boilers to be used aboard naval vessels per a detailed government contract. *See id.* at 252-53, 255.

B.

Here, Defendants collectively seek removal under § 1442 based on three contractual relationships between certain Defendants and the federal government: (1) fuel supply agreements between one Defendant (Citgo) and the Navy Exchange Service Command ("NEXCOM") from 1988 to 2012; (2) oil and gas leases administered by the Secretary of the Interior under the OCSLA; and (3) a 1944 unit agreement between the predecessor of another Defendant (Chevron) and the U.S. Navy for the joint operation of a strategic petroleum reserve in California known as the Elk Hills Reserve. For the reasons that follow, we agree with Baltimore that none of these relationships are sufficient to justify removal under the federal officer removal statute in this case, either because they fail to satisfy the acting-under prong or because they are insufficiently related to Baltimore's claims for purposes of the nexus prong.

1.

First, we have little trouble concluding that the NEXCOM fuel supply agreements do not satisfy the "acting under" requirement. These agreements required Defendant Citgo to advertise, supply, and distribute gasoline and diesel to NEXCOM, which NEXCOM resold at a discount to "active duty military, retirees, reservists, and their families" at "service stations operated by NEXCOM on Navy bases located in a number of states across the country." J.A. 216. Although Defendants contend that Citgo helped "the Government to produce an item that it needs" by selling NEXCOM fuel for resale on Navy bases,

see Watson, 551 U.S. at 153, such logic would bring every seller of contracted goods and services within the ambit of § 1442 when the government is a customer.

We refuse to adopt such a sweeping interpretation of *Watson*. In our view, the key lesson from *Watson* is that closely supervised government contractors are distinguishable from intensely regulated private firms because the former assist the government in carrying out basic governmental functions. *See* 551 U.S. at 153-54 ("The assistance that private contractors provide federal officers goes beyond simple compliance with the law and helps officers fulfill other basic governmental tasks . . . . [that] the Government itself would [otherwise] have . . . to perform."). And the provision of means to engage in chemical warfare, as in *Winters*, or even the provision of specific component parts to be used aboard military vessels, as in *Sawyer*, is different in kind from the provision of motor vehicle fuel for resale on Navy bases—both in terms of the nature of the "item" provided and the level of supervision and control that is contemplated by the contract.

To be sure, other circuits have applied the *Watson* dictum beyond the military-procurement-contract context, and we do not suggest that only defense contractors may invoke the federal officer removal statute.[6] Yet none of those cases have confronted a contract like the one we have here, which involves the sale of a standardized consumer product. Indeed, the Ninth Circuit has held, albeit

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[6] For cases involving people other than defense contractors, see, for example, *Goncalves ex rel. Goncalves v. Rady Children's Hosp. San Diego*, 865 F.3d 1237,1245-49 (9th Cir. 2017); *In re Commonwealth's Motion to Appoint Counsel Against or Directed to Defender Ass'n of Phila.*, 790 F.3d 457, 469 (3d Cir. 2015); *Bell v. Thornburg*, 743 F.3d 84, 89 (5th Cir. 2014); *Jacks v. Meridian Res. Co.*, 701 F.3d 1224, 1232-35 (8th Cir. 2012); *Bennett v. MIS Corp.*, 607 F.3d 1076, 1088 (6th Cir. 2010).

in an unpublished decision, that the fact that the federal government purchases "off-the-shelf" products from a manufacturer "does not show that the federal government [has] supervised [the] manufacture of [such products] or directed [that they be] produce[d] in a particular manner, so as to come within the meaning of 'act[ed] under.'" *Washington v. Monsanto Co.*, 738 F. App'x 554, 555 (9th Cir. 2018) (sixth alteration in original) (quoting 28 U.S.C. § 1442(a)(1)).

Although Defendants strongly resist the off-the-shelf-products analogy by pointing to particular provisions in the fuel supply agreements, we find those provisions unavailing. Defendants emphasize that the agreements: (1) "set forth detailed 'fuel specifications' that required compliance with specified American Society for Testing and Materials standards, and compelled NEXCOM to 'have a qualified independent source analyze the products' for compliance with those specifications"; (2) "authorized the Contracting Officer to inspect delivery, site, and operations"; and (3) "established detailed branding and advertising requirements." Reply Br. 19-20 (footnotes omitted). But we have reviewed the contractual provisions cited by Defendants, and they are a far cry from the type of close supervision that existed in both *Sawyer* and *Winters*. *See Sawyer*, 860 F.3d at 253 (noting that the Navy provided "highly detailed ship [and military] specifications" that boilers were required to match, and exercised "intense direction and control . . . over all written documentation to be delivered with its naval boilers," including warnings (internal quotation marks omitted)); *Winters*, 149 F.3d at 398-99 (noting that the Department of Defense required Dow Chemical to provide Agent Orange under threat of criminal sanctions, maintained strict control over the chemical's development, and required that it be produced according to its specifications); *cf. Isaacson*

v. Dow Chem. Co., 517 F.3d 129, 138 (2d Cir. 2008) (rejecting "off-the-shelf argument" because "commercially available products did not contain the Agent Orange herbicides in a concentration as high as that found in Agent Orange"). Rather, the cited provisions seem typical of any commercial contract. They are incidental to sale and sound in quality assurance.[7]

2.

Next up are the oil and gas leases. Defendants allege that Chevron and "other Defendants" have extracted oil and gas on the federal Outer Continental Shelf ("OCS")[8] pursuant to a leasing program administered by the Secretary of the Interior under the OCSLA. J.A. 212; *see, e.g.*, J.A. 233-39 (boilerplate lease); *see also Jewell*, 779 F.3d at 592 ("The [OCSLA] created a framework to facilitate the orderly and environmentally responsible exploration and extraction of oil and gas deposits on the OCS. It charges the Secretary of the Interior with preparing a program

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[7] In light of the misleading-marketing allegations that are at the center of Baltimore's Complaint, we pause to note that the "detailed branding and advertising requirements" cited by Defendants have absolutely nothing to do with those allegations. They simply address whether and when the government will market a branded product under a contractor's brand or trade name. *See BP P.L.C. v. Mayor & City Council of Balt.*, No. 18-2357 (D. Md.), ECF No. 127-6 at 23 (§ C.11), ECF No. 127-7 at 15 (§ C.9).

[8] The OCS is "a vast underwater expanse" that begins "a few miles from the U.S. coast, where states' jurisdiction ends," and "extends roughly two hundred miles into the ocean to the seaward limit of the international-law jurisdiction of the United States." *Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588, 592 (D.C. Cir. 2015); *see also* 43 U.S.C. § 1331(a) (defining "outer Continental Shelf"). "Billions of barrels of oil and trillions of cubic feet of natural gas lie beneath [it]." *Jewell*, 779 F.3d at 592.

every five years containing a schedule of proposed leases for OCS resource exploration and development.").

The leases grant lessees "the exclusive right and privilege to drill for, develop, and produce oil and gas resources" in the submerged lands of the OCS in exchange for certain royalties on production, *see* J.A. 233-34, and requires them to exercise diligence in the development of the leased area by engaging in exploration, development, and production activities in accordance with government-approved plans, *see* J.A. 234; *see also* 30 C.F.R. §§ 550.200-.299 (expounding plans referenced in lease). The leases also place certain conditions on the disposition of oil and gas that is produced. Defendants highlight two such conditions. The first mandates that twenty percent of production be offered to "small or independent refiners." J.A. 235. The second gives the government a right of first refusal to purchase all production "[i]n time of war or when the President of the United States shall so prescribe." J.A. 235.

Defendants argue that the foregoing provisions demonstrate that the Defendant lessees were "acting under" the Secretary of the Interior in extracting, producing, and selling fossil fuel products on the OCS. We disagree.

For starters, we note that many of lease terms are mere iterations of the OCSLA's regulatory requirements. Though OCS resource development is highly regulated, "differences in the degree of regulatory detail or supervision cannot by themselves transform . . . regulatory *compliance* into the kind of assistance" that triggers the "acting under" relationship. *See Watson*, 551 U.S. at 157. Of course, the presence of a contractual relationship (here, a lease) is an important distinction. But we are skeptical that the willingness to lease federal property or mineral rights to a private entity for the entity's own commercial

purposes, without more, could ever be characterized as the type of assistance that is required to trigger the government-contractor analogy. *See, e.g.*, *Bd. of Cty. Comm'rs v. Suncor Energy (U.S.A.) Inc.*, 405 F. Supp. 3d 947, 977 (D. Colo. 2019) ("At most, the leases appear to represent arms-length commercial transactions whereby ExxonMobil agreed to certain terms (that are not in issue in this case) in exchange for the right to use government-owned land for their own commercial purposes."), *appeal docketed*, No. 19-1330 (10th Cir. Sept. 9, 2019).

Moreover, we need not decide whether the OCSLA leases are distinguishable from other more run-of-the-mill natural-resources leases because they implicate national energy needs. Either way, we are not convinced that the supervision and control to which OCSLA lessees are subject connote the sort of "unusually close" relationship that courts have previously recognized as supporting federal officer removal. *See Watson*, 551 U.S. at 153-54; *see also supra* pp. 19-20 (discussing *Winters* and *Sawyer*). As Baltimore points out, the leases do not appear to dictate that Defendants "extract fossil fuels in a particular manner." Resp. Br. 18. Nor do they appear to vest the government with control over "the composition of oil or gas to be refined and sold to third parties," let alone purport to affect "the content or methods of Defendants' communications with customers, consumers, and others about Defendants' [fossil fuel] products." Resp. Br. 18; *accord Suncor Energy*, 405 F. Supp. 3d at 976-77.[9]

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[9] Defendants do not seriously contend otherwise. Instead, in their documents here and below, they repeatedly point to the same lease provisions that we cite above, without further explanation. This is a complex case, and we do not intend to suggest that Defendants were required to outline the leases' requirements in painstaking detail in order to satisfy their burden of justifying federal officer removal. But they must provide " 'candid, specific and positive' allegations that they

Finally, even to the extent that the OCSLA leases toe the "acting under" line, we still agree with the district court's analysis as to § 1442's third prong. Any connection between fossil fuel production on the OCS and the conduct alleged in the Complaint is simply too remote.

To satisfy the third prong, the conduct charged in the Complaint need only "relate to" the asserted official authority. *See Sawyer*, 860 F.3d at 257-58; *see also* 28 U.S.C. § 1442(a)(1) ("for *or relating to* any act under color of such office" (emphasis added)). That is, there must be "a connection or association between the act in question and the federal office." *Sawyer*, 860 F.3d at 258 (emphasis omitted) (quoting *Papp v. Fore-Kast Sales Co.*, 842 F.3d 805, 813 (3d Cir. 2016)). We elaborated upon this requirement in *Sawyer*. There, we held that the district court imposed "a stricter standard of causation than that recognized by the statute" by demanding a showing of "specific government direction" as to whether the defendant manufacturer should have warned shipyard workers who assembled boilers for use aboard naval vessels about the dangers of asbestos, which was a component of the boilers manufactured by the defendant under a contract with the Navy. *See id. at* 252, 258. Notably, the Navy required the use of asbestos in boilers despite its known dangers; dictated the content of the warnings that accompanied the boilers; and the defendant manufacturer complied with those requirements. Accordingly, we concluded that the defendant's performance of the contract was "sufficient to connect the plaintiffs' claims, which fault[ed] warnings

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were acting under federal officers." *In re MTBE*, 488 F.3d at 130 (citation omitted) (quoting *Willingham v. Morgan*, 395 U.S. 402, 408 (1969)). Here, the lack of any specificity as to federal direction leaves us unable to conclude that the leases rise to the level of an unusually close relationship, as required by the first "acting under" prong.

that were *not* specified by the Navy, to the warnings that the Navy specified and with which [the defendant] complied." *Id.* at 258 (emphasis added); *see also id.* ("These claims undoubtedly 'relat[e] to' all warnings, given or not, that the Navy determined in its discretion." (alteration in original)).

In this case, the district court held that even if the "acting under" and "colorable federal defense" requirements were satisfied, Defendants did not plausibly assert that the charged conduct was carried out "for or relating to" the alleged official authority, given the "wide array of conduct" for which they were sued. *See BP P.L.C.*, 388 F. Supp. 3d at 568-69. Specifically, the court explained that Defendants were sued "for their contribution to climate change by producing, promoting, selling, and concealing the dangers of fossil fuel products," and yet failed to show that a federal officer "controlled their total production and sales of fossil fuels," or "directed them to conceal the hazards of fossil fuels or prohibited them from providing warnings to consumers." *Id.* at 568.

On appeal, Defendants take issue with primarily two aspects of the district court's analysis. First, they argue that the lack of direction as to concealment or warnings is irrelevant to some of Baltimore's claims, namely, strict liability for design defect. Second, they contend that a lack of control as to *total* production and sales is not dispositive under *Sawyer*'s relaxed reading of the third "nexus" prong.

We disagree with Defendants on both fronts. When read as a whole, the Complaint clearly seeks to challenge the promotion and sale of fossil fuel products without warning and abetted by a sophisticated disinformation campaign. Of course, there are many references to fossil fuel production in the Complaint, which spans 132 pages. But, by and large, these references only serve to tell a

broader story about how the unrestrained production and use of Defendants' fossil fuel products contribute to greenhouse gas pollution. Although this story is necessary to establish the avenue of Baltimore's climate change-related injuries, it is not the source of tort liability. Put differently, Baltimore does not merely allege that Defendants contributed to climate change and its attendant harms by producing and selling fossil fuel products; it is the concealment and misrepresentation of the products' known dangers—and simultaneous promotion of their unrestrained use—that allegedly drove consumption, and thus greenhouse gas pollution, and thus climate change.[10]

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[10] The same holds true for Baltimore's strict-liability design-defect claim. As Defendants point out, design-defect claims generally focus on "the product itself," rather than "the conduct of the manufacturer." *Phipps v. Gen. Motors Corp.*, 363 A.2d 955, 958 (Md. 1976). But that is not how Baltimore has framed its claim. Instead, Baltimore relies on the same misleading-marketing and denialist-campaign allegations cited above, averring that Defendants not only failed to warn the public about the climate effects they knew would result from the normal use of their products, but also took affirmative steps to misrepresent the nature of those risks, such as by disseminating information aimed at casting doubt on the integrity of scientific evidence that was generally accepted at the time and by advancing their own pseudo-scientific theories. According to Baltimore, these tactics "prevented reasonable consumers from forming an expectation that fossil fuel products would cause grave climate changes." J.A. 161; *see also Maryland v. Exxon Mobil Corp.*, 406 F. Supp. 3d 420, 461 (D. Md. 2019) (explaining that Maryland applies a consumer-expectation test in design-defect cases, and only applies the risk-utility test when the product malfunctions in some way (citing *Halliday v. Sturm, Ruger & Co.*, 792 A.2d 1145 (Md. 2002)). Under Baltimore's own theory of liability, then, its design-defect claim hinges on its ability to demonstrate that Defendants' promotional efforts deprived reasonable consumers of the ability to form expectations that *they would have otherwise formed*. Though we agree with Defendants that Baltimore's theory appears to be a novel one, at least in the design-defect context, this may be a function of the unique circumstances that have

For this reason, the lack of federal control over the production and sale of *all* fossil fuel products is relevant to the nexus analysis, and the district court did not err in relying upon that fact in finding that any connection between the charged conduct and the asserted official authority was even further diminished. If production and sales went to the heart of Baltimore's claims, we might be inclined to think otherwise. After all, the alleged government-directed conduct (here, the production and sale of fossils fuels extracted on the OCS) need only "relate to" the conduct charged in the Complaint. But given the foregoing allegations, we agree with the district court's conclusion that the relationship between Baltimore's claims and any federal authority over a portion of certain Defendants' production and sale of fossil fuel products is too tenuous to support removal under § 1442.

In sum, we hold that the Defendants who participated in the OCSLA leasing program were not "acting under" federal officials in extracting and producing fossil fuels on the OCS, and any connection between such activity and Baltimore's claims is too attenuated in any event.

3.

That leaves the 1944 unit agreement governing the operation of the Elk Hills Reserve. Because the agreement has a complicated history, we begin with its origin and purpose, followed by a general overview of its terms (or at least those in dispute). In the end, however, we decline to

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allegedly given rise to this litigation. For our purposes, it is sufficient that Baltimore has limited its design-defect theory to one that turns on the promotion allegations, which have nothing to do with the action purportedly taken under federal authority. The viability of such a theory under Maryland law is a question for the Maryland courts to decide.

pass on the question of whether it satisfies the "acting under" prong. Like the OCSLA leases, we hold that the agreement fails to meet the third prong in any event.

a.

The Elk Hills Reserve is located in Kern County, California, and originated from a 1912 Executive Order.

> At the turn of the [twentieth] century, Government lands in the West were rapidly being turned over to private ownership. At the same time, there was a growing realization of the importance of oil for the Navy, which was then changing its ships from coal to oil burning. In response to arguments that the Government should preserve oil for Naval purposes, President Taft withdrew large portions of land in California and Wyoming from eligibility for private ownership, and in 1912 set aside [the Elk Hills Reserve] by an Executive Order. . . .
>
> The establishment of the Reserve was expressly made subject to pre-existing private ownership. There are approximately 46,000 acres within the Reserve, approximately one-fifth [was] owned by [the Standard Oil Company of California] and the remainder, approximately four-fifths by Navy. The Standard lands [were] not in one block, but [were] checker-boarded throughout the Reserve. The Executive Order establishing the Reserve affected the Government lands in the field as far as future use and disposition were concerned, but it had no effect on the privately owned lands, and the owners of those lands were free to use and dispose of them as they saw fit.

United States v. Standard Oil Co., 545 F.2d 624, 626-27 (9th Cir. 1976).[11]

Because production from one part of the Elk Hills Reserve could have reduced the amount of oil underlying another part of the Reserve, the Navy and Standard Oil (a Chevron predecessor) initially "had an understanding to the effect that neither would drill wells . . . without six months' notice to the other." *Id.* at 627; *see also id.* (explaining that underlying both parties' lands were "separate accumulations of hydrocarbons," which, "unlike solid minerals, do not remain in place but move because of changes in underground pressure and [thus] move toward producing wells"). But the tension between Standard's legitimate goal of producing oil on its land and the Navy's duty to conserve its hydrocarbons in the ground until needed in an emergency became untenable on the brink of World War II. So the parties began negotiations over "an exchange, purchase or condemnation of Standard's land in the Reserve on the one hand, or their operation as a unit with the Navy land," on the other. *Id.*

These negotiations ultimately resulted in the 1944 Unit Plan Contract ("UPC").[12] A "unit agreement" is "a common arrangement in the petroleum industry where

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[11] *Standard Oil* involved a prior dispute over the same agreement, in which the Ninth Circuit endorsed the foregoing summary agreed upon by the parties in a pretrial statement.

[12] The parties entered into an earlier contract in 1942, but it was voluntarily terminated in 1943 due to doubts expressed by the Attorney General as to its legality. *Id.* The parties entered into the UPC in 1944, after Congress passed enabling legislation. *See id.* The UPC governed the joint operation and development of three initial "commercially productive zones" underlying the Elk Hills Reserve, two of which contained oil (the Stevens Zone and Shallow Oil Zone). Only the latter zone is at issue here, and all of the provisions discussed in this opinion pertain to that zone.

two or more owners have interests in a common pool," which is operated as a "unit." *Id.* The parties share production and costs in agreed-upon proportions, and, ordinarily, the objective is "to produce currently, at minimum expense and pursuant to good engineering practices." *Id.* The UPC involved here, however, was unique in that "its purpose was not to produce currently, and its effect was to conserve as much of the hydrocarbons in place as was feasible until needed for an emergency." *Id.* "This required curtailing production of Standard's hydrocarbons along with that of Navy, for which Standard would have to receive compensation." *Id.* Accordingly, "in consideration for Standard curtailing its production plus giving up certain other rights," *id.* at 627-28, the UPC gave Standard the right to take specified volumes of oil from certain zones in the pool—namely, an average of 15,000 barrels per day, or a lesser amount fixed by the Secretary of the Navy, with (a) a ceiling of 25,000,000 barrels or one-third of Standard's total share, whichever was less, and (b) a floor of an amount sufficient to cover Standard's out-of-pocket expenses in maintaining the Reserve in good oilfield condition, *see id.* at 628; J.A. 245-46, 250-52.

b.

With this background in mind, we turn to the specific UPC provisions relied upon by Defendants to establish that one of their predecessors (Standard) "acted under" the Navy when it engaged in fossil fuel production during the twentieth century.

In the main, Defendants stress that the UPC gave the Navy "*exclusive control* over the exploration, prospecting, development, and operation of the [Elk Hills] Reserve," and the "*full and absolute power* to determine . . . the quantity and rate of production from[] the Reserve." Reply Br. 18 (second alteration in original); *accord* J.A.

249-50. In particular, they note that the UPC "obligated" Standard "to operate the Reserve in such manner as to produce 'not less than 15,000 barrels of oil per day,'" and allowed the Navy to suspend or increase the rate of production in its "discretion," Reply Br. 18-19 (first quoting J.A. 250, § 4(b); then citing J.A. 250-51, §§ 4(b), 5(d)(1)).

Baltimore counters that these provisions do not establish that Standard was producing oil at the direction of a federal officer. According to Baltimore, these provisions merely required that the pool be maintained in a manner that would have made it *capable* of producing at least 15,000 barrels per day until Standard received its share under the contract. *See* J.A. 250, § 4(b) ("Until Standard shall have received . . . its share of production . . . , the Reserve shall be developed and operated in such manner and to such extent as will, so far as practicable, permit production . . . to be maintained at a rate sufficient to produce therefrom not less than 15,000 barrels of oil per day . . . ."). As a result, Baltimore argues that Standard could have complied with the contract by producing no oil at all, unless and until the Navy elected to increase the rate of production via congressional authorization.[13] And even then, Baltimore says, the contract did not necessarily make *Standard* responsible for production on the Navy's

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[13] *See generally* J.A. 246, recitals § 8 ("[The UPC] does not and cannot, in and of itself, authorize the production of any of Navy's share of the oil, . . . as distinct from that portion of Standard's share hereinafter permitted to be produced and received by Standard under the terms of [the above-cited provisions]. The production of the remainder of Standard's share and of all of Navy's share must, except for the purpose of protecting, conserving, maintaining, or testing the Reserve, be preceded by and based upon [congressional] authorization . . . ; and references hereinafter to an authorization or election by Navy to order the production of any such oil are intended to be limited to action by the Navy within the terms of any such [authorization].").

behalf. *See generally* J.A. 249, § 3(a) ("Navy shall, subject to the provisions hereof, have the exclusive control over the exploration, prospecting, development, and operation of the Reserve, and Navy may, in its discretion, explore, prospect, develop, and/or operate the Reserve directly with its own personnel *or* it may contract for all or any part of such [activities] with competent and responsible parties[, including] . . . Standard . . . ." (emphasis added)).

At oral argument, Defendants shifted their focus away from whether the 15,000-barrels-per-day provision actually required Standard to produce any oil, as they argued in their briefs. Instead, Defendants pointed to the Naval Petroleum Reserves Production Act of 1976 ("1976 Act"), which "authorized and directed" the Secretary of the Navy to produce the Elk Hills Reserve "at the maximum efficient rate consistent with sound engineering practices for a period not to exceed six years," Pub. L. No. 94-258, 90 Stat. 303, 308; *see also supra* note 13 (discussing UPC's congressional-authorization requirement). Congress authorized this increase in production after determining that "the Navy's intent to maintain a petroleum reserve, in case of national emergency in 1944, was no longer relevant," *Chevron U.S.A., Inc. v. United States*, 71 Fed. Cl. 236, 244 (2006), and in response to the 1973 oil crisis, J.A. 214. The 1976 Act also gave the Secretary the authority "to sell or otherwise dispose of the United States share of such petroleum produced from" the Elk Hills Reserve. *See* 90 Stat. at 308.

Shortly thereafter, in 1977, Congress transferred authority over the Elk Hills Reserve to the Department of Energy and assigned to it the Navy's interest in the Reserve as well as the UPC. *Chevron*, 71 Fed. Cl. at 244-45. Standard, and later Chevron as a successor, "continued its interest in the joint operation" of the Reserve until 1997. J.A. 214.

c.

The parties' dispute about the UPC and its significance for purposes of federal officer removal thus can be distilled to two main issues. First, was any oil ever produced from the Elk Hills Reserve at the Navy's direction? And second, if so, was it Standard who carried out those orders?

In light of the 1976 Act, we think the answer to the first question is yes. But as to the second, we simply have no idea whether production authorized by Congress was carried out by Standard. At oral argument, counsel for Chevron merely stated that it was his "understanding" that Standard extracted oil on the Navy's behalf under the unit agreement, and, more generally, that the government relies upon private companies because it does not have its own oil and gas engineers or drilling equipment. And although counsel later submitted a Rule 28(j) Letter stating that the government had final authority over all production, "which was carried out by Standard, and later Chevron," Appellants' Letter Suppl. Authorities 1, ECF No. 133, the letter merely cites the UPC *as a whole* in support of this assertion. In other words, it does not explain why Baltimore's reliance on the operational-control provision cited above is misplaced, *see* J.A. 249, § 3(a), nor does it point to any other provision or provisions that support a different reading.[14] Thus, we are left wanting for pertinent details about Standard's role in operating the Elk Hills Reserve and producing oil therefrom on behalf

[14] Because Baltimore only claimed that Standard was not responsible for production at oral argument—in response to Defendants' reliance on the 1976 Act, which Defendants, in turn, did not rely upon in their briefs on appeal—this issue is not addressed in Defendants' briefing, either. Nor can we find any relevant explanation in the federal-officer allegations in the Notice of Removal.

of the Navy, which might bear directly upon the "acting under" analysis. Indeed, if Standard was not responsible for producing the oil authorized by Congress in 1976, the upshot is that any extensive government control contemplated by the UPC only affected the parties' relative shares and the development of the Reserve, not Standard's duties with respect to any production carried out for the Navy's benefit.

Nevertheless, even if we were to conclude that Standard was responsible for such production under the UPC—and that this responsibility transformed Standard into a person "acting under" the Navy for purposes of § 1442—the production of oil from the Elk Hills Reserve by the predecessor of one of the twenty-six Defendants, like the production of fossil fuels on the OCS, is not sufficiently "related" to Baltimore's claims. *See supra* pp. 23-26. Accordingly, the district court was correct in concluding that the UPC cannot support federal officer removal in this case.

IV.

For the foregoing reasons, we affirm the district court's order granting Baltimore's motion to remand.

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. ELH-18-2357

MAYOR AND CITY COUNCIL OF BALTIMORE,

Plaintiff,

v.

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

Defendants

Filed: June 10, 2019

MEMORANDUM OPINION

HOLLANDER, United States District Judge.

In this Memorandum Opinion, the Court determines whether a suit concerning climate change was properly removed from a Maryland state court to federal court.

The Mayor and City Council of Baltimore (the "City") filed suit in the Circuit Court for Baltimore City against twenty-six multinational oil and gas companies. *See* ECF 42 (Complaint). The City alleges that defendants have substantially contributed to greenhouse gas pollution, global warming, and climate change by extracting, pro-

ducing, promoting, refining, distributing, and selling fossil fuel products (*i.e.*, coal, oil, and natural gas), while simultaneously deceiving consumers and the public about the dangers associated with those products. *Id.* ¶¶ 1-8. As a result of such conduct, the City claims that it has sustained and will sustain "climate change-related injuries." *Id.* ¶ 102. According to the City, the injuries from "[a]nthropogenic (human-caused) greenhouse gas pollution," *id.* ¶ 3, include a rise in sea level along Maryland's coast, as well as an increase in storms, floods, heatwaves, drought, extreme precipitation, and other conditions. *Id.* ¶ 8.

The Complaint asserts eight causes of action, all founded on Maryland law: public nuisance (Count I); private nuisance (Count II); strict liability for failure to warn (Count III); strict liability for design defect (Count IV); negligent design defect (Count V); negligent failure to warn (Count VI); trespass (Count VII); and violations of the Maryland Consumer Protection Act, Md. Code (2013 Repl. Vol., 2019 Supp.), Com. Law §§ 13-101 to 13-501 (Count VIII). *Id.* ¶¶ 218-98. The City seeks monetary damages, civil penalties, and equitable relief. *Id.*

Two of the defendants, Chevron Corp. and Chevron U.S.A., Inc. (collectively, "Chevron"), timely removed the case to this Court. ECF 1 (Notice of Removal).[1] Assert-

[1] Chevron alleged that no other defendants had been served prior to the removal. ECF 28 (Chevron's Statement in Response to Standing Order Concerning Removal). The Notice of Removal was timely. *See* 28 U.S.C. § 1446(b) (defendant must remove within thirty days after service). And, because the action was not removed "solely under section 1441(a)," the consent of the other defendants was not required. *See* 28 U.S.C. § 1446(b)(2)(A) ("When a civil action is removed solely under section 1441(a), all defendants who have been properly

ing a battery of grounds for removal, Chevron underscores that the case concerns "*global* emissions" (*Id.* at 3) with "uniquely federal interests" (*Id.* at 6) that implicate "bedrock federal-state divisions of responsibility[.]" *Id.* at 3.

The eight grounds for removal are as follows: (1) the case is removable under 28 U.S.C. § 1441(a) and § 1331, because the City's claims are governed by federal common law, not state common law; (2) the action raises disputed and substantial issues of federal law that must be adjudicated in a federal forum; (3) the City's claims are completely preempted by the Clean Air Act ("CAA"), 42 U.S.C. § 7401 *et seq.*, and/or other federal statutes and the Constitution; (4) this Court has original jurisdiction under the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1349(b); (5) removal is authorized under the federal officer removal statute, 28 U.S.C. § 1442(a)(1); (6) this Court has federal question jurisdiction under 28 U.S.C. § 1331 because the City's claims are based on alleged injuries to and/or conduct on federal enclaves; (7) removal is authorized under 28 U.S.C. § 1452(a) and 28 U.S.C. § 1334(b), because the City's claims are related to federal bankruptcy cases; and (8) the City's claims fall within the Court's original admiralty jurisdiction under 28 U.S.C. § 1333. ECF 1 at 6-12, ¶¶ 5-12.

Thereafter, the City filed a motion to remand the case to state court, pursuant to 28 U.S.C. § 1447(c). ECF 111. The motion is supported by a memorandum of law (ECF 111-1) (collectively, "Remand Motion"). Defendants filed a joint opposition to the Remand Motion (ECF 124, "Op-

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joined and served must join in or consent to the removal of the action.").

position"), along with three supplements containing numerous exhibits. ECF 125; ECF 126; ECF 127.[2] The City replied. ECF 133.

Defendants also filed a conditional motion to stay the execution of any remand order. ECF 161. They ask that, in the event the Court grants the City's Remand Motion, the Court issue an order staying execution of the remand for thirty days to allow them to appeal the ruling. *Id.* at 1-2. The City initially opposed that motion (ECF 162), but subsequently stipulated to the requested stay. ECF 170. This Court accepted the parties' stipulation by Consent Order of April 22, 2019. ECF 171.

No hearing is necessary to resolve the Remand Motion. *See* Local Rule 105.6. For the reasons that follow, I conclude that removal was improper. Therefore, I shall grant the Remand Motion. However, I shall stay execution of the remand for thirty days, in accordance with the parties' joint stipulation and the Court's prior Order.

I. DISCUSSION

A. The Contours of Removal

This matter presents a primer on removal jurisdiction; defendants rely on the proverbial "laundry list" of

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[2] The following defendants did not join in the Opposition to the City's Remand Motion: Crown Central Petroleum Corp.; Louisiana Land & Exploration Co.; Phillips 66 Co.; Marathon Oil Co.; and Marathon Oil Corp. See ECF 124; ECF 42. However, it appears that three of these defendants were not properly named in the Complaint. *See* ECF 14 (Local Rule 103.3 Disclosure Statement by Louisiana Land and Exploration Co. LLC, stating that defendant Louisiana Land & Exploration Co. no longer exists); ECF 40 (Local Rule 103.3 Disclosure Statement by Crown Central LLC and Crown Central New Holdings LLC, stating that defendant Crown Central Petroleum Corp. no longer exists); ECF 108 (Local Rule 103.3 Disclosure Statement by Phillips 66 does not identify Phillips 66 Co.).

grounds for removal. I begin by outlining the general contours of removal jurisdiction and then turn to the specific bases for removal on which defendants rely.

District courts of the United States are courts of limited jurisdiction and possess only the "power authorized by Constitution and statute." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552 (2005) (citation omitted); *see Home Buyers Warranty Corp. v. Hanna*, 750 F.3d 727, 432 (4th Cir. 2014). They "may not exercise jurisdiction absent a statutory basis . . . ." *Exxon Mobil Corp*, 545 U.S. at 552. Indeed, a federal court must presume that a case lies outside its limited jurisdiction unless and until jurisdiction has been shown to be proper. *United States v. Poole*, 531 F.3d 263, 274 (4th Cir. 2008) (citing *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994)).

Under § 28 U.S.C. § 1441, the general removal statute, "any civil action brought in a State court of which the district courts of the United States have original jurisdiction" may be "removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." *Id.* § 1441(a). Congress has conferred jurisdiction on the federal courts in several ways. Of relevance here, to provide a federal forum for plaintiffs who seek to vindicate federal rights, Congress has conferred on the district courts original jurisdiction over civil actions that arise under the Constitution, laws, or treaties of the United States. *See* U.S. Const. art. III, § 2 ("The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made . . ."); *see also* 28 U.S.C. § 1331;

Exxon Mobil Corp., 545 U.S. at 552. This is sometimes called federal question jurisdiction.[3]

The burden of demonstrating jurisdiction and the propriety of removal rests with the removing party. *See McBurney v. Cuccinelli*, 616 F.3d 393, 408 (4th Cir. 2010); *Robb Evans & Assocs. v. Holibaugh*, 609 F.3d 359, 362 (4th Cir. 2010); *Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811, 816 (4th Cir. 2004) (en banc). Therefore, "[i]f a plaintiff files suit in state court and the defendant seeks to adjudicate the matter in federal court through removal, it is the defendant who carries the burden of alleging in his notice of removal and, if challenged, demonstrating the court's jurisdiction over the matter." *Strawn v. AT&T Mobility LLC*, 530 F.3d 293, 296 (4th Cir. 2008). And, if "a case was not properly removed, because it was not within the original jurisdiction" of the federal court, then "the district court must remand [the case] to the state court from

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[3] In addition, "Congress . . . has granted district courts original jurisdiction in civil actions between citizens of different States, between U.S. citizens and foreign citizens, or by foreign states against U.S. citizens," so long as the amount in controversy exceeds $75,000. *Exxon Mobil Corp.*, 545 U.S. at 552; *see* 28 U.S.C. § 1332. Diversity jurisdiction "requires complete diversity among parties, meaning that the citizenship of *every* plaintiff must be different from the citizenship of *every* defendant." *Cent. W. Va. Energy Co., Inc. v. Mountain State Carbon, LLC*, 636 F.3d 101, 103 (4th Cir. 2011) (emphasis added); *see Strawbridge v. Curtiss*, 7 U.S. 267 (1806). Under 28 U.S.C. § 1367(a), district courts are also granted "supplemental jurisdiction over all other claims that are so related to claims in the action within [the courts'] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."

Although defendants do not argue otherwise, the Court observes that removal of this case was not based on diversity jurisdiction. Presumably, this is because BP Products North America Inc. is domiciled in Maryland. ECF 42, ¶ 20(e); *see* 28 U.S.C. § 1332; 28 U.S.C. § 1441(b).

which it was removed." *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 8 (1983) (citing 28 U.S.C. § 1447(c)).

Courts are required to construe removal statutes narrowly. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941). This is because "the removal of cases from state to federal court raises significant federalism concerns." *Barbour v. Int'l Union*, 640 F.3d 599, 605 (4th Cir. 2011) (en banc), *abrogated in part on other grounds by* the Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, 125 Stat. 758 (2011); *see also Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir. 1994) ("Because removal jurisdiction raises significant federalism concerns, [courts] must strictly construe removal jurisdiction.") (citing *Shamrock*, 313 U.S. at 108-09). Thus, "any doubts" about removal must be "resolved in favor of state court jurisdiction." *Barbour*, 640 F.3d at 617; *see also Cohn v. Charles*, 857 F. Supp. 2d 544, 547 (D. Md. 2012) ("Doubts about the propriety of removal are to be resolved in favor of remanding the case to state court.").

Defendants assert a host of grounds for removal; four of their eight grounds are premised on federal question jurisdiction under 28 U.S.C. § 1331. These grounds are as follows: (1) the City's public nuisance claim is necessarily governed by federal common law; (2) the City's claims raise disputed and substantial issues of federal law; (3) the City's claims are completely preempted by the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, and the foreign affairs doctrine; and (4) the City's claims are based on conduct or injuries that occurred on federal enclaves. ECF 1, ¶¶ 5-7; ECF 124 at 8-49. I shall address each of these arguments in turn and then consider defendants' alternative bases for removal.

As alternative grounds, defendants assert that this Court has original jurisdiction under the OCSLA, 43 U.S.C. § 1349(b); removal is authorized under the federal officer removal statute, 28 U.S.C. § 1442(a)(1); removal is authorized under 28 U.S.C. § 1452(a) and 28 U.S.C. § 1334(b) because the City's claims are related to bankruptcy cases; and the City's claims fall within the Court's original admiralty jurisdiction under 28 U.S.C. § 1333.

B. Federal Question Jurisdiction

Article III of the United States Constitution provides: "The judicial Power shall extend to all Cases, in Law and Equity, arising under . . . the Laws of the United States." U.S. Const. art. III, § 2, cl. 1. Section 1331 of 28 U.S.C. grants federal district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." "Article III 'arising under' jurisdiction is broader than federal question jurisdiction under [28 U.S.C. § 1331]." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 495 (1983). Although Congress has the power to prescribe the jurisdiction of federal courts under U.S. Const. art. I, § 8, cl. 9, it "may not expand the jurisdiction of the federal courts beyond the bounds established by the Constitution." *Verlinden*, 461 U.S. at 491.

The "propriety" of removal on the basis of federal question jurisdiction "depends on whether the claims 'aris[e] under' federal law." *Pinney v. Nokia, Inc.*, 402 F.3d 430, 441 (4th Cir. 2005) (citation omitted). And, when jurisdiction is based on a claim "arising under the Constitution, treaties or laws of the United States," the case is "removable without regard to the citizenship or residence of the parties." 28 U.S.C. § 1441(b).

A case "'aris[es] under' federal law in two ways." *Gunn v. Minton*, 568 U.S. 251, 257 (2013); *see Beneficial*

Nat'l Bank v. Anderson, 539 U.S. 1, 8 (2003). First, and most commonly, "a case arises under federal law when federal law creates the cause of action asserted." *Gunn*, 568 U.S. at 257; *see also Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) (stating that a "suit arises under the law that creates the cause of action"). Second, a claim is deemed to arise under federal law for purposes of § 1331 when, although it finds its origins in state law, "the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Empire Healthchoice Assurance Inc. v. McVeigh*, 547 U.S. 677, 690 (2006); *see Franchise Tax Bd.*, 463 U.S. at 13.

This latter set of circumstances arises only in a "'special and small category' of cases." *Gunn*, 568 U.S. at 258 (quoting *Empire Healthchoice*, 547 U.S. at 699). Specifically, jurisdiction exists under this category only when "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." *Id.*; *see Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 313-14 (2005); *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 808 (1988); *Flying Pigs, LLC v. RRAJ Franchising, LLC*, 757 F.3d 177, 181 (4th Cir. 2014).

The "presence or absence of federal question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Rivet v. Regions Bank of La.*, 522 U.S. 470, 475 (1998) (citation omitted); *see Pressl v. Appalachian Power Co.*, 842 F.3d 299, 302 (4th Cir. 2016). This "makes the plaintiff the master of [its] claim," because in drafting the complaint, the plaintiff may "avoid federal jurisdiction by exclusive reliance on state law."

Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987); *see Pinney*, 402 F.3d at 442.

However, even when a well-pleaded complaint sets forth a state law claim, there are instances when federal law "is a necessary element" of the claim. *Christianson*, 486 U.S. at 808. Under certain circumstances, such a case may be removed to federal court. The *Pinney* Court explained, 402 F.3d at 442 (internal citation omitted):

> Under the substantial federal question doctrine, 'a defendant seeking to remove a case in which state law creates the plaintiff's cause of action must establish two elements: (1) that the plaintiff's right to relief necessarily depends on a question of federal law, and (2) that the question of federal law is substantial.' If the defendant fails to establish either of these elements, the claim does not arise under federal law pursuant to the substantial federal question doctrine, and removal cannot be justified under this doctrine.

(internal citations omitted).

A case may also be removed from state court to federal court based on the doctrine of complete preemption. The complete preemption doctrine is a "corollary of the well-pleaded complaint rule." *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987); *see In re Blackwater Sec. Consulting, LLC*, 460 F.3d 576, 584 (4th Cir. 2006). The Supreme Court has explained: "When [a] federal statute *completely* pre-empts [a] state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law." *Beneficial*, 539 U.S. at 8 (emphasis added). Therefore, federal question jurisdiction is satisfied "when a federal statute wholly displaces the state-law cause of action through *complete* pre-emption." *Id.* (emphasis added); *see also Vaden v. Discover Bank*, 556 U.S. 49, 61

(2009); *Aetna Health Inc. v. Davila*, 542 U.S. 200, 207-08 (2004).

Complete preemption is a jurisdictional doctrine that "'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the wellpleaded complaint rule.'" *Caterpillar Inc.*, 482 U.S. at 393 (quoting *Metro. Life Ins.*, 481 U.S. at 65); *see Pinney*, 402 F.3d at 449. But, to remove an action on the basis of complete preemption, a defendant must show that Congress intended for federal law to provide the "exclusive cause of action" for the claim asserted. *Beneficial*, 539 U.S. at 9; *see also Barbour*, 640 F.3d at 631.

Moreover, it is "settled law that a case may not be removed to federal court on the basis of a federal defense, *including the defense of pre-emption,* even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." *Caterpillar Inc.*, 482 U.S. at 393 (emphasis added); *see Vaden*, 556 U.S. at 60. Therefore, in examining the well pleaded allegations in the complaint for purposes of removal, the court must "ignore potential defenses." *Beneficial*, 539 U.S. at 6. Put another way, when preemption is a defense, it "does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to federal court." *Metro. Life Ins.*, 481 U.S. at 63; *see Pinney*, 402 F.3d at 449.

Defendants seem to conflate complete preemption with the defense of ordinary preemption. *See Caterpillar Inc.*, 482 U.S. at 392. The "existence of a federal defense normally does not create statutory 'arising under' jurisdiction, and 'a defendant [generally] may not remove a case to federal court unless the *plaintiff's* complaint establishes that the case 'arises under' federal law.'" *Davila*, 542 U.S. at 207 (internal citations omitted).

"Federal law may preempt state law under the Supremacy Clause in three ways—by 'express preemption,' by 'field preemption,' or by 'conflict preemption.'" *Anderson v. Sara Lee Corp.*, 508 F.3d 181, 191 (4th Cir. 2007) (citation omitted); *see also Decohen v. Capital One, N.A.*, 703 F.3d 216, 223 (4th Cir. 2012). These three types of preemption, however, are forms of "ordinary preemption" that serve only as federal defenses to a state law claim. *Lontz v. Tharp*, 413 F.3d 435, 441 (4th Cir. 2005); *see Wurtz v. Rawlings Co., LLC*, 761 F.3d 232, 238 (2d Cir. 2014). As one federal court recently explained: "The doctrine of complete preemption should not be confused with ordinary preemption, which occurs when there is the defense of 'express preemption,' 'conflict preemption,' or 'field preemption' to state law claims." *Meade v. Avant of Colorado, LLC*, 307 F. Supp. 3d 1134, 1140 (D. Colo. 2018). Unlike the doctrine of complete preemption, these forms of preemption do not appear on the face of a well-pleaded complaint and therefore they do not support removal. *Lontz*, 413 F.3d at 440; *Wurtz*, 761 F.3d at 238.

Ordinary preemption "regulates the interplay between federal and state laws when they conflict or appear to conflict . . . ." *Decohen*, 703 F.3d at 222. "[S]tate law is naturally preempted to the extent of any conflict with a federal statute," *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000), because the Supremacy Clause of the Constitution, U.S. Const. art. VI, cl. 2, provides that a federal enactment is superior to a state law. As a result, pursuant to the Supremacy Clause, "[w]here state and federal law 'directly conflict,' state law must give way." *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 617 (2011) (citation omitted); *see also Merck Sharp & Dohme Corp. v. Albrecht*, ___U.S. ___, 2019 WL 2166393, at *8 (May 20, 2019) (discussing impossibility or conflict preemption, and reiterating that "'state laws that conflict with federal law

are without effect,'" but noting that the "'possibility of impossibility [is] not enough'") (citations omitted); *Mutual Pharm. Co., Inc. v. Bartlett*, 570 U.S. 472, 480 (2013). In *Drager v. PLIVA USA, Inc.*, 741 F.3d 470 (4th Cir. 2014), the Fourth Circuit stated: "The Supreme Court has held that state and federal law conflict when it is impossible for a private party to simultaneously comply with both state and federal requirements.[] In such circumstances, the state law is preempted and without effect." *Id.* at 475.[4]

"Federal preemption of state law under the Supremacy Clause—including state causes of action—is 'fundamentally . . . a question of congressional intent.'" *Cox v. Duke Energy, Inc.*, 876 F.3d 625, 635 (4th Cir. 2017) (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990)); *see also Beneficial*, 539 U.S. at 9. Congress manifests its intent in three ways: (1) when Congress explicitly defines the extent to which its enactment preempts state law (express preemption); (2) when state law "regulates conduct in a field that Congress intended the Federal Government to occupy exclusively" (field preemption); and (3) when state law "actually conflicts with federal law" (conflict or impossibility preemption). *English*, 496 U.S. at 78-79.

1. Federal Common Law

Defendants first argue that federal question jurisdiction exists because the City's public nuisance claim implicates "uniquely federal interests" and thus "is governed by federal common law." ECF 124 at 9-11. According to defendants, the federal government has a unique interest both in promoting fossil fuel production and in crafting

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[4] In his concurrence in *Albrecht*, Justice Thomas observed that a defense based on conflict preemption fails as a matter of law in the absence of a statute, regulations, or other agency action "with the force of law that would have prohibited [the defendant] from complying with its alleged state-law duties. . . ." 2019 WL 2166393, at *12.

multilateral agreements with foreign nations to address global warming. *Id. at* 16. Therefore, they insist that federal common law supports removal. *Id.*

The City counters that this argument is no more than an ordinary preemption defense. ECF 111-1 at 9. In effect, argues the City, defendants contend that federal common law applies to any cause of action "touching on climate change, such that state law claims under any theory have been obliterated . . . ." ECF 111-1 at 8. In the City's view, federal common law does not provide a proper basis for removal. *Id.* I agree.

It is true that federal question jurisdiction exists over claims "founded upon" federal common law. *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972) (stating that 28 U.S.C. § 1331 "will support claims founded upon federal common law as well as those of a statutory origin"). It is also true, however, that the presence of federal question jurisdiction is governed by the well-pleaded complaint rule. *Rivet*, 522 U.S. at 475. The well-pleaded complaint rule is plainly not satisfied here because the City does not plead any claims under federal law. *See* ECF 42.

Defendants' assertion that the City's public nuisance claim under Maryland law is in fact "governed by federal common law" is a cleverly veiled preemption argument. *See Boyle v. United Tech. Corp.*, 487 U.S. 500, 504 (1988) (finding that a state law claim against a federal government contractor that involved "uniquely federal interests" was governed exclusively by federal common law and, thus, state law was preempted); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987) (stating that if a case "should be resolved by reference to federal common law . . . state common law [is] preempted"); *see also Merkel v. Fed. Exp. Corp.*, 886 F. Supp. 561, 564-65 (N.D. Miss. 1995) (stating that if "plaintiff's claims are governed by federal common law," as defendant argued to support removal,

"then [defendant] is entitled to assert the defense of preemption against the plaintiff's state law claims"). Unfortunately for defendants, ordinary preemption does not allow the Court to treat the City's public nuisance claim as if it had been pleaded under federal law for jurisdictional purposes. *See Franchise Tax Bd.*, 463 U.S. at 14.

As indicated, unlike ordinary preemption, complete preemption *does* "'convert[] an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" *Caterpillar Inc.*, 482 U.S. at 393 (quoting *Metro. Life Ins.*, 481 U.S. at 65); *see Lontz*, 413 F.3d at 439 (noting that the complete preemption doctrine is the only "exception" to the well-pleaded complaint rule); *Goepel v. Nat'l Postal Mail Handlers Union*, 36 F.3d 306, 311-12 (3d Cir. 1994) ("[T]he only state claims that are 'really' federal claims and thus removable to federal court are those that are preempted completely by federal law.") (citations omitted); *see also Hannibal v. Fed. Exp. Corp.*, 266 F. Supp. 2d 466, 469 (E.D. Va. 2003) (observing that, where the defendant argued that removal was proper because the plaintiff's contract claim was governed exclusively by federal common law, "the Defendant is attempting to argue that federal common law completely preempts the Plaintiff's state breach of contract claim"). But, defendants do not argue that the City's public nuisance claim is completely preempted by federal common law. Rather, they contend only that the City's claims are completely preempted by the Clean Air Act and the foreign affairs doctrine. *See* ECF 124 at 43-48.

As I see it, defendants' assertion that federal common law supports removal is without merit, even if construed as a complete preemption argument.

Two district judges in the Northern District of California considered the matter of removal in cases similar

to the one sub judice. They reached opposing conclusions as to removal.

In *County of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal. 2018), plaintiffs lodged tort claims against fossil fuel producers for injuries stemming from climate change. *Id.* at 937. Judge Chhabria expressly determined that "federal common law does not govern plaintiffs' claims" and thus the cases "should not have been removed to federal court on the basis of federal common law . . . ." *Id.* He considered almost every ground for removal that has been asserted here, and rejected each one. He concluded that removal was not warranted under the doctrine of complete preemption, *id.*, or on the basis of *Grable* jurisdiction, *id.* at 938, or under the Outer Continental Shelf Lands Act, *id.*, or because two of the defendants had earlier bankruptcy proceedings. *Id.* at 939. An appeal is pending. *See County of Marin v. Chevron Corp.*, Appeal No. 18-15503 (9th Cir. Mar. 27, 2018).

Conversely, in *California v. BP P.L.C.*, Civ. No. WHA-16-6011, 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018), *appeal docketed sub. nom.*, *City of Oakland v. BP, P.L.C.*, No. 18-16663 (9th Cir. Sept. 4, 2018), Judge Alsup ruled in favor of removal. I pause to review that opinion and to elucidate my point of disagreement.

The State of California and the cities of Oakland and San Francisco asserted public nuisance claims against energy producers—many of whom are defendants in this action—for injuries stemming from climate change. *Id.* at *1. The plaintiffs alleged that the defendants produced and sold fossil fuels while simultaneously deceiving the public regarding the dangers of global warming and the benefits of fossil fuels. *Id.* at *1, 4. After the defendants removed the action to federal court, the plaintiffs moved to remand. *Id.* Although the plaintiffs' public nuisance claims were pleaded under California law, the court found

that federal question jurisdiction existed because the claims were "necessarily governed by federal common law." *Id.* at *2.

The court reasoned that "a uniform standard of decision is necessary to deal with the issues raised" in the suits, in light of the "worldwide predicament . . . ." *Id.* at *3. The court explained, *id.*: "A patchwork of fifty different answers to the same fundamental global issue would be unworkable." Further, the court observed that the plaintiffs' claims "depend on a global complex of geophysical cause and effect involving all nations of the planets," and that "the transboundary problem of global warming raises exactly the sort of federal interests that necessitate a uniform solution." *Id.* at *3, 5. Accordingly, the court denied the plaintiffs' motion to remand. *Id.* at *5.

The court's reasoning was well stated and presents an appealing logic. Nevertheless, the court did not find that the plaintiffs' state law claims fell within either of the carefully delineated exceptions to the well-pleaded complaint rule—*i.e.*, that they were completely preempted by federal law or necessarily raised substantial, disputed issues of federal law. *See Gunn*, 568 U.S. at 257-58; *Caterpillar Inc.*, 482 U.S. at 393. Instead, the court looked beyond the face of the plaintiffs' well-pleaded complaint and authorized removal because it found that the plaintiffs' public nuisance claims were "governed by federal common law." *BP*, 2018 WL 1064293, at *5. But, the ruling is at odds with the firmly established principle that ordinary preemption does not give rise to federal question jurisdiction. *See Caterpillar Inc.*, 482 U.S. at 393; *Marcus v. AT&T Corp.*, 138 F.3d 46, 53-54 (2d Cir. 1998) (rejecting the defendants' argument that federal common law provided a basis for removal of plaintiff's state law claims where federal common law did not completely preempt

plaintiff's claims); *Hannibal*, 266 F. Supp. 2d at 469 (holding that federal common law did not support removal where it did not completely preempt the plaintiff's state law claim).

Indeed, the ruling has been harshly criticized by at least one law professor. *See* Gil Seinfeld, *Climate Change Litigation in the Federal Courts: Jurisdictional Lessons from California v. BP*, 117 Mich. L. Rev. Online 25, 32-35 (2018) (asserting that the decision "disregards" and "transgresses the venerable rule that the plaintiff is the master of her complaint," including whether "to eschew federal claims in favor of ones grounded in state law alone"; stating that the case is "best understood as a complete preemption case" because that is the "only doctrine that is . . . capable of justifying the holding"; observing that the district court's application of the preemption doctrine was "unorthodox," as congressional intent was "out of the picture"; and stating that the ruling "is out of step with prevailing doctrine").

Defendants also rely on *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466 (S.D.N.Y. 2018), *appeal docketed*, No. 18-2188 (2d Cir. July 26, 2018), to support their argument that federal common law provides an independent basis for removal. There, the plaintiffs brought claims for nuisance and trespass under state law against oil companies for producing and selling fossil fuel products that contributed to global warming. *Id.* at 468. In their motion to dismiss the complaint, the defendants argued that the plaintiffs' claims were governed by federal common law rather than state law. *Id.* at 470. After concluding that the plaintiffs' claims were "ultimately based on the 'transboundary' emission of greenhouse gases," the court agreed. *Id.* at 472 (citing *BP*, 2018 WL 1064293, at *3). Significantly, however, the court did not consider whether

this finding conferred federal question jurisdiction because the plaintiffs originally filed their complaint in federal court based on diversity jurisdiction. *See id.* Accordingly, this case is of no help to defendants here, at the threshold jurisdictional stage.

In sum, defendants have framed their argument to allege that federal common law governs the City's public nuisance claim. In actuality, however, they present a veiled complete preemption argument. As noted, complete preemption occurs only when Congress intended for federal law to provide the "exclusive cause of action" for the claim asserted. *Beneficial*, 539 U.S. at 9; *see also Barbour,* 640 F.3d at 631. Defendants have not shown that any federal common law claim for public nuisance is available to the City here, and case law suggests that any such federal common law claim has been displaced by the Clean Air Act. *See Am. Elec. Power Co. v. Connecticut* ("*AEP*"), 564 U.S. 410, 424 (2011) (holding that the CAA displaced plaintiffs' federal common law claim for public nuisance against power plants seeking abatement of their carbon dioxide emissions); *Native Village of Kivalina v. Exxonmobil Corp.*, 696 F.3d 849, 857-58 (9th Cir. 2012) (holding that the CAA displaced the plaintiffs' federal common law claim for public nuisance seeking damages for past greenhouse gas emissions).

It may be true that the City's public nuisance claim is not viable under Maryland law. But, this Court need not—and, indeed, cannot—make that determination. The well-pleaded complaint rule confines the Court's inquiry to the face of the Complaint and demands the conclusion that no federal question jurisdiction exists over the City's public nuisance claim, which is founded on Maryland law. *See Caterpillar Inc.*, 482 U.S. at 392. Authorizing removal on the basis of a preemption defense hijacks this rule and, in turn, enhances federal judicial power at the expense of

plaintiffs and state courts. In the absence of any controlling authority, I decline to endorse such an extension of removal jurisdiction.

2. Disputed, Substantial Federal Interests

Defendants next assert that, even if removal is not appropriate on the basis of federal common law, removal is nonetheless proper because the City's claims raise substantial and disputed federal issues. ECF 124 at 27. As noted, there is a "slim category" of cases in which federal question jurisdiction exists even though the claim "finds its origins in state rather than federal law." *Gunn*, 568 U.S. at 258. A state law claim falls within this category of jurisdiction, often referred to as *Grable* jurisdiction because of the Supreme Court's seminal opinion on the topic in *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005), only when four requirements are satisfied. "That is, 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." *Id.*; *see Grable*, 545 U.S. at 313-14. The Supreme Court has emphasized that courts are to be cautious in exercising jurisdiction of this type because it lies at "the outer reaches of § 1331." *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 810 (1986).

Defendants contend that *Grable* jurisdiction exists because the City's claims raise a host of federal issues. ECF 124 at 28-39. For example, they assert that the City's claims "intrude upon both foreign policy and carefully balanced regulatory considerations at the national level, including the foreign affairs doctrine." ECF 1 at 21-22, ¶ 34. Further, they assert that the City's claims "have a significant impact on foreign affairs," "require federal-law-

based cost-benefit analyses," "amount to a collateral attack on federal regulatory oversight of energy and the environment," "implicate federal issues related to the navigable waters of the United States," and "implicate federal duties to disclose." ECF 124 at 28-39. Accordingly, defendants argue that *Grable* jurisdiction supports removal. *Id.*

I begin by considering whether any of these issues are "necessarily raised" by the City's claims, as required for *Grable* jurisdiction. *See Gunn*, 568 U.S. at 258; *Grable*, 545 U.S. at 314. "A federal question is 'necessarily raised' for purposes of § 1331 only if it is a 'necessary element of one of the well-pleaded state claims.'" *Burrell v. Bayer Corp.*, 918 F.3d 372, 381 (4th Cir. 2019) (quoting *Franchise Tax Bd.*, 463 U.S. at 13). It is not enough that "federal law becomes relevant only by way of a defense to an obligation created entirely by state law." *Franchise Tax Bd.*, 463 U.S. at 13. Rather, "a plaintiff's right to relief for a given claim necessarily depends on a question of federal law only when *every* legal theory supporting the claim requires the resolution of a federal issue." *Flying Pigs, LLC*, 757 F.3d at 182 (quoting *Dixon*, 369 F.3d at 816).

Defendants first argue that the City's claims have a "significant impact" on foreign affairs. ECF 124 at 28. They assert that addressing climate change has been the subject of international negotiations for decades and that the City's claims "seek to supplant these international negotiations and Congressional and Executive branch decisions, using the ill-suited tools of Maryland law and private state-court litigation." *Id.* at 30. Thus, according to defendants, the City's claims raise substantial federal issues and removal is proper. *Id.* at 28.

Climate change is certainly a matter of serious national and international concern. But, defendants do not actually identify any foreign policy that is implicated by

the City's claims, much less one that is necessarily raised. *See* ECF 124 at 31. They merely point out that climate change "*has* been the subject of international negotiations for decades," as most recently evidenced by the adoption of the Paris Agreement in 2016. *Id.* at 29, 31 (emphasis added). Putting aside the fact that President Trump has announced his intention to withdraw the United States from the Paris Agreement, defendants' generalized references to foreign policy wholly fail to demonstrate that a federal question is "essential to resolving" the City's state law claims. *Burrell*, 918 F.3d at 383; *see also President Trump Announces U.S. Withdrawal from the Paris Climate Accord*, WhiteHouse.gov (June 1, 2017), https://www.whitehouse.gov/articles/president-trump-announces-u-s-withdrawal-paris-climate-accord/.

Defendants' next argument for *Grable* jurisdiction is slightly more specific, but nonetheless misses the mark. They assert that the City's nuisance claims require the same cost-benefit analysis of fossil fuels that federal agencies conduct and, thus, that adjudicating these claims will require a court to interpret various federal regulations. ECF 124 at 34. Further, defendants contend that, because the City's nuisance claims seek a different balancing of social harms and benefits than that struck by Congress, they "amount to a collateral attack on federal regulatory oversight of energy and the environment." *Id.* at 35.

The City's nuisance claims are based on defendants' extraction, production, promotion, and sale of fossil fuel products without warning consumers and the public of their known risks. *See* ECF 42, ¶¶ 218-36. The City does not rely on any federal statutes or regulations in asserting its nuisance claims; in fact, it nowhere even alleges that defendants violated any federal statutes or regulations. Rather, it relies exclusively on state nuisance law, which prohibits "substantial and unreasonable" interferences

with the use and enjoyment of property. *Washington Suburban Sanitary Comm'n v. CAE-Link Corp.*, 330 Md. 115, 125, 622 A.2d 745, 750 (1993); *see also Burley v. City of Annapolis*, 182 Md. 307, 312, 34 A.2d 603, 605 (1943) (stating that a public nuisance is one that "ha[s] a common effect and produce[s] a common damage"). Although federal laws and regulations governing energy production and air pollution may supply potential defenses, federal law is plainly not an element of the City's state law nuisance claims.

Moreover, the City does not seek to modify any regulations, laws, or treaties, or to establish national or global standards for greenhouse gas emissions. Rather, as the City observes, it seeks damages and abatement of the nuisance within Baltimore. ECF 111-1 at 32 (citing ECF 42, ¶¶ 12, 228).[5]

Nor is removal proper because the City's claims amount to a "collateral attack on the federal regulatory scheme." ECF 124 at 35. Indeed, defendants do not identify any regulation or statute that is actually attacked by the City's claims. Rather, defendants make only vague references to a "comprehensive regulatory scheme." *Id.* The mere existence of a federal regulatory regime, however, does not confer federal question jurisdiction over a state cause of action. *See Pinney*, 402 F.3d at 449 (finding that a "connection between the federal scheme regulating wireless telecommunications and the [plaintiffs'] state claims" was not enough to establish federal question jurisdiction).

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[5] The City asserts in its Remand Motion that it does not seek to enjoin any party. ECF 111-1 at 32. But, in its Complaint it does seek to "enjoin" defendants from "creating future common-law nuisances." ECF 42, ¶ 228.

In addition, defendants contend that the City's public nuisance claim "implicate[s] federal issues related to the navigable waters of the United States." ECF 124 at 37. They assert that a necessary element of the City's theory of causation is the rising sea levels and that, to assess whether defendants' conduct is the proximate cause of the sea level rise, a court will have to evaluate the adequacy of the federal infrastructure in place to protect navigable waters. *Id.* Further, defendants argue that the equitable relief sought by the City will require approval of the U.S. Army Corps of Engineers ("Army Corps") and will require a court to interpret an extensive web of regulations issued by the Army Corps governing the construction of structures on navigable waters. *Id.* at 35.

The argument, although creative, would lead the court into unchartered waters. The Complaint does not challenge the adequacy of any federal action taken over navigable waters, and the requested relief nowhere mentions the construction or modification of any infrastructure on navigable waters. *See* ECF 42, ¶¶ 218-28. That the City's hypothetical remedy *might* include some construction of infrastructure on navigable waters, and thus require the approval of the Army Corps, does not mean that an issue of federal law is necessarily raised by the City's claims. *See K2 Am. Corp. v. Roland Oil & Gas, LLC*, 653 F.3d 1024, 1032 (9th Cir. 2011) (stating that, where the plaintiff brought an action seeking ownership of an oil and gas lease, "[t]he mere fact that the Secretary of the Interior must approve oil and gas leases does not raise a federal question").

Finally, defendants assert that the City's claims "implicate" federal duties to disclose because their alleged deception of federal regulators is "central to [the City's] al-

legations." ECF 124 at 39. And, because federal law governs claims of fraud on federal agencies, defendants argue that the City's claims "give rise to federal questions." *Id.*

This argument rests on a mischaracterization of the City's claims. The Complaint does not allege that defendants violated any duties to disclose imposed by federal law. Rather, it alleges that defendants breached various duties under state law by, *inter alia*, failing to warn consumers, retailers, regulators, public officials, and the City of the risks posed by their fossil fuel products. *See, e.g.*, ECF 42, ¶¶ 221-22, 241, 259. These duties, imposed by state law, exist separate and apart from any duties to disclose imposed by federal law. *See, e.g.*, *Gourdine v. Crews*, 405 Md. 722, 738-54, 955 A.2d 769, 779-89 (2008) (describing duty in failure to warn cases); *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 446-48, 601 A.2d 633, 645-47 (1992). Thus, I reject defendants' attempt to inject a federal issue into the City's state law public nuisance claim where one simply does not exist.

To be sure, there are federal *interests* in addressing climate change. Defendants have failed to establish, however, that a federal *issue* is a "necessary element" of the City's state law claims. *Franchise Tax Bd.*, 463 U.S. at 13. Accordingly, even without considering the remaining requirements for *Grable* jurisdiction, I reject defendants' assertion that this action falls within the "special and small category" of cases in which federal question jurisdiction exists over a state law claim. *Empire Healthchoice*, 547 U.S. at 699.

3. Complete Preemption

Defendants contend that removal is proper because the City's claims are completely preempted by both the foreign affairs doctrine and the Clean Air Act. ECF 124 at 43-44. The Court has previously addressed preemption

principles. As noted, federal question jurisdiction exists "when a federal statute wholly displaces the state-law cause of action through complete pre-emption." *Beneficial*, 539 U.S. at 8.

To remove an action on the basis of complete preemption, a defendant must show that Congress intended for federal law to provide the "exclusive cause of action" for the claim asserted. *Id. at* 9; *see also Barbour*, 640 F.3d at 631. The Fourth Circuit recognizes a presumption against complete preemption that may only be rebutted in the rare circumstances where "federal law 'displace[s] entirely any state cause of action.'" *Lontz*, 413 F.3d at 440 (quoting *Franchise Tax Bd.*, 463 U.S. at 23).

Complete preemption is rare. To my knowledge, the Supreme Court has, in fact, found complete preemption in regard to only three statutes. *See Beneficial*, 539 U.S. at 10-11 (National Bank Act); *Metro. Life Ins.*, 481 U.S. at 66-67 (ERISA § 502(a)); *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists*, 390 U.S. 557, 560 (1968) (Labor Management Relations Act § 301). This is unsurprising because the doctrine represents a significant departure from the general rule that the plaintiff is "the master" of its claim, and it "may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar Inc.*, 482 U.S. at 392; *see also Lontz*, 413 F.3d at 441 (noting that complete preemption "undermines the plaintiff's traditional ability to plead under the law of his choosing").

Defendants first argue that the City's claims are completely preempted by the foreign affairs doctrine, because "litigating in state court the inherently transnational activity challenged by the Complaint would inevitably intrude on the foreign affairs power of the federal government." ECF 124 at 44. I disagree.

The federal government has the exclusive authority to act on matters of foreign policy. *Crosby*, 530 U.S. at 380;

United States v. Pink, 315 U.S. 203, 233 (1942). Accordingly, state laws that conflict with the federal government's foreign policy are preempted. In *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003), the Court said: "There is, of course, no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the 'concern for uniformity in this country's dealings with foreign nations' that animated the Constitution's allocation of the foreign relations power to the National Government in the first place." *Id. at* 413 (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427, n.25 (1964)); *see Crosby*, 530 U.S. at 380; *Gingery v. City of Glendale*, 831 F.3d 1222, 1228 (9th Cir. 2016).

But, defendants' reliance on this principle, often referred to as the "foreign affairs doctrine," *Gingery*, 831 F.3d at 1228, is inapposite in the complete preemption context. As indicated, complete preemption occurs only when Congress intended for federal law to provide the "exclusive cause of action" for the claim asserted. *Beneficial*, 539 U.S. at 9; *see also Barbour*, 640 F.3d at 631. That does not exist here. That is, there is no congressional intent regarding the preemptive force of the judicially-crafted foreign affairs doctrine, and the doctrine obviously does not supply any substitute causes of action. Therefore, I am not convinced by defendants' argument that the City's claims are completely preempted by the foreign affairs doctrine.

Defendants also assert that the City's claims are completely preempted by the Clean Air Act. ECF 124 at 44-48. They contend that the Clean Air Act provides the exclusive cause of action for regulating nationwide emissions and that permitting the City's state law claims against out-of-state sources would pose an obstacle to the objectives of Congress. *Id.*

The CAA was enacted in 1963. Clean Air Act, Pub. L. No. 88-206, 77 Stat. 392-401 (1963). Among other purposes, the CAA aims "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population[.]" 42 U.S.C. § 7401(b)(1). It is an expansive statute separated into six Titles. It addresses pollution from stationary sources (Title I, 42 U.S.C. §§ 7401-7431, 7470-7479, 7491-7492, 7501-7515); pollution from moving sources (Title II, 42 U.S.C. §§ 7521-7554, 7571-7574, 7581-7590); noise pollution and acid rain control (Title IV, 42 U.S.C. §§ 7641-7642 and 7651-7651o); and stratospheric ozone protection (Title VI, 42 U.S.C. §§ 7671-7671q). Title III contains general provisions, including definitions, citizen suits, and other administrative matters, and Title V governs permits.

It is true, as defendants point out, that the Clean Air Act provides for private enforcement. Specifically, it creates a federal private right of action "against any person . . . who is alleged to have violated . . . or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation." 42 U.S.C. § 7604(a)(1). The CAA also creates a federal private right of action against the Environmental Protection Agency "where there is alleged a failure . . . to perform any act or duty under this chapter which is not discretionary." 42 U.S.C. § 7604(a)(2).

Fatal to defendants' argument, however, is the absence of any indication that Congress intended for these causes of action in the CAA to be the exclusive remedy for injuries stemming from air pollution. *See Beneficial*, 539 U.S. at 9 (stating that complete preemption occurs "[o]nly if Congress intended [the statute] to provide the exclusive cause of action"). To the contrary, the CAA contains a

savings clause that specifically preserves other causes of action. That provision states, in relevant part, 42 U.S.C. § 7604(e):

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency). Nothing in this section or in any other law of the United States shall be construed to prohibit, exclude, or restrict any State, local, or interstate authority from—
>
> (1) bringing any enforcement action or obtaining any judicial remedy or sanction in any State or local court, or
>
> (2) bringing any administrative enforcement action or obtaining any administrative remedy or sanction in any State or local administrative agency, department or instrumentality,
>
> against the United States, any department, agency, or instrumentality thereof, or any officer, agent, or employee thereof under State or local law respecting control and abatement of air pollution.

The CAA also includes the following provision regarding state regulation of hazardous air pollutants, 42 U.S.C. § 7412(r)(11):

> Nothing in this subsection shall preclude, deny or limit any right of a State or political subdivision thereof to adopt or enforce any regulation, requirement, limitation or standard (including any procedural requirement) that is more stringent than a regulation, requirement, limitation or standard in effect under this

subsection or that applies to a substance not subject to this subsection.

The language of these provisions unequivocally demonstrates that "Congress did not intend the federal causes of action under [the Clean Air Act] 'to be exclusive.'" *County of San Mateo*, 294 F. Supp. 3d at 938 (quoting *Beneficial*, 539 U.S. at 9 n.5); *see also Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit,* 874 F.2d 332, 342-43 (6th Cir. 1989) (holding that the plaintiffs' claims for violation of state air pollution standards were not completely preempted by the CAA because the CAA's savings clause "clearly indicates that Congress did not wish to abolish state control"). Accordingly, I conclude that the CAA does not completely preempt the City's claims.

In sum, I disagree with defendants' contention that removal is proper on the grounds that the City's state law claims are completely preempted by the foreign affairs doctrine and the CAA. However, this Memorandum Opinion does not foreclose the defense of preemption in state court. *See In re Blackwater Sec. Consulting, LLC*, 460 F.3d at 590 (holding that "the district court's finding that complete preemption did not create federal removal jurisdiction will have no preclusive effect on a subsequent state-court defense of federal preemption").

4. Federal Enclaves

Defendants offer one final theory for federal question jurisdiction. That is, they contend that the City's claims arise under federal law because they are based on events that occurred on military bases and other federal enclaves. ECF 124 at 53.

The parameters of this contention are unclear, and defendants eschew mention of any controlling authority. Indeed, defendants only support their argument with a few

cases from various district courts, most of which are unpublished. The Court's research reveals, however, that this theory of federal question jurisdiction arises from Article I, Section 8, Clause 17 of the United States Constitution. *See, e.g., Willis v. Craig*, 555 F.2d 724, 726 (9th Cir. 1977); *Mater v. Holley*, 200 F.2d 123 (5th Cir. 1952). In relevant part, that section provides:

> Congress shall have Power . . . to exercise exclusive legislation in all cases whatsoever, over the [District of Columbia], and to exercise like authority over all places purchased by the consent of the legislature of the state in which the [place is located], for the erection of forts, magazines, arsenals, dockyards, and other needful buildings.

U.S. Const. art. I, § 8, cl. 17.

This provision grants the federal government exclusive legislative jurisdiction over lands obtained pursuant to this clause, or "enclaves." In *Surplus Trading Co. v. Cook*, 281 U.S. 647 (1930), the Court said: "It has long been settled that where lands for such a purpose are purchased by the United States with the consent of the State legislature, the jurisdiction theretofore residing in the state passes, in virtue of the constitutional provision, to the United States, thereby making the jurisdiction of the latter the sole jurisdiction." *Id. at* 652; *see Akin v. Ashland Chem. Co.*, 156 F.3d 1030, 1034 (10th Cir. 1998).

Courts have held that federal question jurisdiction exists over claims that arise on federal enclaves. *See Stokes v. Adair*, 265 F.2d 662, 666 (4th Cir. 1959); *see also Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1250 (9th Cir. 2006) ("Federal courts have federal question jurisdiction over tort claims that arise on 'federal enclaves.'") (citations omitted); *Akin*, 156 F.3d at 1034

("Personal injury actions which arise from incidents occurring in federal enclaves may be removed to federal district court as a part of federal question jurisdiction."); *Willis*, 555 F.2d at 726; *Mater*, 200 F.2d at 124; *Hall v. Coca-Cola Co.*, Civ. No. MSD-18-0244, 2018 WL 4928976, at *2-3 (E.D. Va. Oct. 11, 2018); *Federico v. Lincoln Military Hous.*, 901 F. Supp. 2d 654, 664 (E.D. Va. 2012). The general reasoning of these courts is that any claim that arises on a federal enclave is necessarily a creature of federal law because, quite simply, there is no other law. *See Mater*, 200 F.2d at 124 ("[A]ny law existing in territory over which the United States has exclusive sovereignty must derive its authority and force from the United States and is for that reason federal law."); *Hall*, 2018 WL 4928976, at *2.

Defendants argue that federal question jurisdiction exists because "[s]ome" of them maintain production operations and sell fossil fuels on military bases and other federal enclaves. ECF 124 at 53. Specifically, they assert: "Standard Oil Co. (Chevron's predecessor) operated Elk Hills Naval Petroleum Reserve, a federal enclave, for most of the twentieth century." *Id.* In addition, they allege that defendant CITGO distributed gasoline and diesel under contracts with the Navy to multiple Naval installations. *Id. at* 54. Finally, defendants contend that federal enclave jurisdiction exists because the City alleges tortious conduct, such as lobbying activities, that occurred in the District of Columbia. *Id.*

At the outset, I reject defendants' argument that removal is proper because some of the allegedly tortious conduct occurred in the District of Columbia. Congress established a code and a local court system for the District of Columbia and, in doing so, "divested the federal courts of jurisdiction over local matters." *Andrade v. Jackson*,

401 A.2d 990, 992 (D.C. 1979) (observing that, in establishing a unified local court system under the Court Reform Act of 1973, "Congress divested the federal courts of jurisdiction over local matters, restricting those courts to those matters generally viewed as federal business"); D.C. Code § 11-501 (2012) (civil jurisdiction of the United States District Court for the District of Columbia); D.C. Code § 11-921 (2012) (civil jurisdiction of the Superior Court for the District of Columbia). *See also Palmore v. United States*, 411 U.S. 389, 408-09 (1973) (explaining that Congress established the local court system for the District of Columbia so that Article III courts can be "devoted to matters of national concern"); *McEachin v. United States*, 432 A.2d 1212, 1215 (D.C. 1981). That a claim is based on conduct that occurred in the District of Columbia, therefore, does not *ipso facto* make it a federal claim over which federal question jurisdiction lies. Rather, it must arise under federal law—as distinct from the local law of the District of Columbia or that of another state—to fall within the scope of federal question jurisdiction.

Defendants' contention that federal question jurisdiction exists because CITGO and Chevron's predecessor, Standard Oil, conducted fossil fuel operations on federal enclaves is also without merit. As the dearth of case law illustrates, courts have only relied on this "federal enclave" theory to exercise federal question jurisdiction in limited circumstances. Specifically, courts have only found that claims arise on federal enclaves, and thus fall within federal question jurisdiction, when all or most of the pertinent events occurred there. *See, e.g.*, *Stokes*, 265 F.2d at 665-66 (finding jurisdiction existed over a personal injury suit where the injury occurred at a U.S. Army post); *Mater*, 200 F.2d at 124 (holding that the district

court had jurisdiction over plaintiff's claim for personal injuries sustained on a military base); *Norair Eng'g Corp. v. URS Fed. Servs., Inc.*, Civ. No. RDB-16-1440, 2016 WL 7228861, at *3 (D. Md. Dec. 14, 2016) (finding removal proper where plaintiff's cause of action arose out of work performed exclusively on a federal enclave); *see also In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d 1103, 1125 (N.D. Cal. 2012) (stating that federal jurisdiction exists in federal enclave cases "when the locus in which the claim arose is the federal enclave itself"); *Totah v. Bies*, Civ. No. CW-10-05956, 2011 WL 1324471, at *2 (N.D. Cal. Apr. 6, 2011) (upholding removal where the "substance and consummation of the tort" occurred on a federal enclave).

Those circumstances do not exist here. The City seeks relief for conduct that occurred globally over a fifty-year period—that is, defendants' contribution to global warming through their extraction, production, and sale of fossil fuel products. ECF 42, ¶¶ 5-7, 18, 20, 191. The Complaint does not contain any allegations concerning defendants' conduct on federal enclaves and, in fact, it expressly defines the scope of injury to exclude any federal territory. *Id.* ¶¶ 1 n.2, 195-217. Accordingly, it cannot be said that federal enclaves were the "locus" in which the City's claims arose merely because one of the twenty-six defendants, and the predecessor of another defendant, conducted some operations on federal enclaves for some unspecified period of time. *See County of San Mateo*, 294 F. Supp. 3d at 939 (finding no federal enclave jurisdiction over plaintiffs' claim against oil companies for injuries stemming from climate change "since federal land was not the 'locus in which the claim arose'") (quoting *In re High-Tech*, 856 F. Supp. 2d at 1125); *see also Washington v. Monsanto Co.*, 274 F. Supp. 3d 1125, 1132 (W.D. Wash. 2017) (stating that, "because [plaintiff] avowedly does not

seek relief for contamination of federal territories, none of its claims arise on federal enclaves"); *Bd. of Comm'rs of the Se. La. Flood Prot. Auth. v. Tenn. Gas Pipeline Co.*, 29 F. Supp. 3d 808, 831 (E.D. La. 2014) (finding no enclave jurisdiction where plaintiff stipulated that it would not seek damages for injuries sustained in federal wildlife reserve).

As the City observes, ECF 111-1 at 49, under Maryland law, when events giving rise to a suit occur in multiple jurisdictions, generally "the place of the tort is considered to be the place of injury." *Philip Morris Inc. v. Angeletti*, 358 Md. 689, 745, 752 A.2d 200, 231 (2000); *see also Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 511 (4th Cir. 1986). Here, the claims appear to arise in Baltimore, where the City allegedly suffered and will suffer harm.

I conclude that removal is not warranted on the ground that the City's claims arose on federal enclaves.

C. Alternative Bases for Removal

I turn to the defendants' alternative bases for removal.

1. Outer Continental Shelf Lands Act

Defendants argue that removal is proper because the Court has jurisdiction over the City's claims under the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. §§ 1331-1356b (2012). ECF 124 at 49. Specifically, defendants assert that this case falls within the jurisdictional grant of the OCSLA because they produce a substantial volume of oil and gas on the Outer Continental Shelf ("OCS") and the City's claims arise out of those operations. *Id. at* 50.

The OCSLA provides, in pertinent part: "The subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control,

and power of disposition . . .” 43 U.S.C. § 1332(a). The OCSLA contains a jurisdictional grant which states:

> [T]he district courts of the United States shall have jurisdiction of cases and controversies arising out of, or in connection with . . . 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 . . .

43 U.S.C. § 1349(b)(1).

The Fifth Circuit has found that the OCSLA jurisdictional grant is “broad” and requires only a “‘but-for’ connection” between the cause of action and the OCS operation. *In re Deepwater Horizon*, 745 F.3d 157, 163 (5th Cir. 2014) (quoting *Hufnagel v. Omega Serv. Indus., Inc.*, 182 F.3d 340, 350 (5th Cir. 1999)); *see also Barker v. Hercules Offshore, Inc.*, 713 F.3d 208, 213 (5th Cir. 2013). The Fifth Circuit has also said: “A plaintiff does not need to expressly invoke OCSLA in order for it to apply.” *Barker*, 713 F.3d at 213 (upholding removal where OCSLA jurisdiction existed even though the plaintiff did not specifically invoke it). Defendants do not cite to cases from any other circuit courts applying the OCSLA jurisdictional grant, and this Court is only aware of one. *See Shell Oil Co. v. F.E.R.C.*, 47 F.3d 1186, 1192 (D.C. Cir. 1995) (summarily finding that OCSLA jurisdiction existed over action brought by operator of oil pipeline on OCS challenging FERC order ruling that pipeline was required to provide oil company with access and transportation services).

Even under a “broad” reading of the OCSLA jurisdictional grant endorsed by the Fifth Circuit, defendants fail to demonstrate that OCSLA jurisdiction exists. *In re Deepwater Horizon*, 745 F.3d at 163 (citations omitted). Defendants were not sued merely for producing fossil fuel

products, let alone for merely producing them on the OCS. Rather, the City's claims are based on a broad array of conduct, including defendants' failure to warn consumers and the public of the known dangers associated with fossil fuel products, all of which occurred globally. *See* ECF 42, ¶¶ 5-7, 18, 20, 191. And, defendants offer no basis to enable this Court to conclude that the City's claims for injuries stemming from climate change would not have occurred but for defendants' extraction activities on the OCS. *See County of San Mateo*, 294 F. Supp. 3d at 938-39 (finding that removal under the OCSLA was not warranted where, even though some of the activities that caused the plaintiffs' climate change related injuries stemmed from operations on the OCS, defendants failed to show that the plaintiffs' causes of action would not have accrued but for their activities on the OCS); *see also Matte v. Mobile Expl. & Prod. North Am. Inc.*, Civ. No. BWA-18-7446, 2018 WL 5023729, at *4-5 (E.D. La. Oct. 17, 2018) (no OCSLA jurisdiction where defendants failed to show that plaintiff's injury, leukemia as a result of benzene exposure, would not have occurred but for his three-month employment on the OCS, where plaintiff alleged that he was exposed to benzene for seven years); *Hammond v. Phillips 66 Co.*, Civ. No. KS-14-0119, 2015 WL 630918, at *4 (S.D. Miss. Feb. 12, 2015). *Cf. In re Deepwater Horizon*, 745 F.3d at 163-64 (finding the but for test satisfied where Louisiana sued defendants for pollution damage to its waters and coastline caused by a massive oil spill and it was "undeniable that the oil and other contaminants would not have entered into the State of Louisiana's territorial waters but for [defendants'] drilling and exploration operation" on the OCS) (internal quotation marks and citation omitted).

Accordingly, I am satisfied that the OCSLA does not support removal.

2. Federal Officer Removal

Defendants assert that this action is removable under the federal officer removal statute, 28 U.S.C. § 1442, because the City "bases liability on activities undertaken at the direction of the federal government." ECF 124 at 56.

In relevant part, the federal officer removal statute authorizes the removal of cases commenced in state court against "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 . . ." 28 U.S.C. § 1442(a)(1) (2012). The Supreme Court has explained:

> The [federal officer] removal statute's "basic" purpose is to protect the Federal Government from the interference with its "operations" that would ensue were a State able, for example, to "arrest" and bring "to trial in a State court for an alleged offense against the law of the State," "officers and agents" of the Federal Government "acting . . . within the scope of their authority."

Watson v. Philip Morris Co., 551 U.S. 142, 150 (2007) (quoting *Willingham v. Morgan*, 395 U.S. 402, 406 (1969)); *see also Maryland v. Soper*, 270 U.S. 9, 32 (1926) ("The constitutional validity of the section rests on the right and power of the United States to secure the efficient execution of its laws and to prevent interference therewith, due to possible local prejudice . . .").

A defendant who seeks to remove a case under § 1442(a)(1) must satisfy three elements. *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 254 (4th Cir. 2017) (citations omitted). First, it must show that it was an officer of the United States or "acting under" a federal officer within the meaning of the statute. *Id.* (citing *Watson*, 551

U.S. at 147). Second, it must raise "a colorable federal defense." *Id.* (citing *Jefferson County v. Acker*, 527 U.S. 423, 431 (1999)). Finally, it must establish that the charged conduct was carried out "for or relating to" the asserted official authority. *Id.* (citing 28 U.S.C. § 1442(a)(1)); *see Mesa v. California*, 489 U.S. 121, 139 (1989); *Texas v. Kleinert*, 855 F.3d 305, 311-12 (5th Cir. 2017), *cert. denied*, ___ U.S. ___, 138 S. Ct. 642 (2018).

This is, of course, a civil case. But, by analogy, in a criminal case, to establish that an act arises "under color of such office", the removing defendant "must 'show[ ] a "causal connection" between the charged conduct and asserted official authority.'" *Kleinert*, 855 F.3d at 312 (quoting *Willingham*, 395 U.S. at 409). "'It must appear that the prosecution . . . arise[s] out of the acts done by [the officer] under color of federal authority and in enforcement of federal law . . .'" *Id.* (alterations in original) (quoting *Mesa*, 489 U.S. at 132-33).

Moreover, invocation of the federal officer removal statute must be "predicated on the allegation of a colorable federal defense by the defendant officer. *Mesa*, 489 U.S. at 129; *see also North Carolina v. Cisneros*, 947 F.2d 1135, 1139 (4th Cir. 1991); *North Carolina v. Ivory*, 906 F.2d 999, 1001 (4th Cir. 1990). A court must construe the defendant's alleged facts as "if those facts were true." *Ivory*, 906 F.2d at 1002. But, the factual allegations must "support" a defense." *Cisneros*, 947 F.2d at 1139 (quoting *Ivory*, 906 F.2d at 1001) (emphasis omitted). That is, they must enable a court to conclude that the "colorable" defense is plausible. *See United States v. Todd*, 245 F.3d 691, 693 (8th Cir. 2001); *Kleinert*, 855 F.3d at 313; *cf. Jefferson Cty.*, 527 U.S. at 432 ("[R]equiring a 'clearly sustainable defense' rather than a colorable defense would defeat the purpose of the removal statue").

Defendants rely on three relationships with the federal government to support their argument that the federal officer removal statute authorizes removal of this action. First, they point out that the predecessor of defendant Chevron, Standard Oil, extracted oil for the United States Navy. ECF 1, ¶ 63; ECF 2-4 (Unit Plan Contract of 06/19/1944 between Navy Department and Standard Oil). In addition, defendant CITGO had fuel supply agreements with the Navy between 1988 and 2012. ECF 1, ¶ 64. Finally, defendants assert that their operations on the OCS were regulated by a leasing program developed by the Secretary of the Interior to promote the development of OCS resources. *Id.* ¶ 61; ECF 2-3 (boilerplate lease issued by the Department of the Interior pursuant to the OCSLA). By contracting with the government to perform these vital services, defendants argue, they were "acting under" federal officials. ECF 124 at 62.

Even assuming that the first two requirements for removal under § 1442 are satisfied, defendants have failed plausibly to assert that the third requirement for removal under this statute is met—*i.e.*, that the charged conduct was carried out "for or relating to" the alleged official authority. 28 U.S.C. §1442(a)(1); *Sawyer*, 860 F.3d at 257-58. Defendants have been sued for their contribution to climate change by producing, promoting, selling, and concealing the dangers of fossil fuel products. *See* ECF 42, ¶¶ 1, 221, 241, 253, 263. They have not shown that a federal officer controlled their total production and sales of fossil fuels, nor is there any indication that the federal government directed them to conceal the hazards of fossil fuels or prohibited them from providing warnings to consumers.

Defendants claim only that the federal government purchased oil and gas from one of the twenty-six defendants, and the predecessor of another defendant, and

broadly regulated defendants' extraction on the OCS. Case law makes clear that this attenuated connection between the wide array of conduct for which defendants have been sued and the asserted official authority is not enough to support removal under § 1442(a)(1). *See County of San Mateo*, 294 F. Supp. 3d at 939 (finding that defendants failed to show a "causal nexus" between the work performed under federal direction and the plaintiffs' claims for injuries stemming from climate change because the plaintiffs' claims were "based on a wider range of conduct"); *In re Wireless Tel.*, 327 F. Supp. 2d 554, 562-63 (D. Md. 2004) (holding that phone manufacturers could not remove pursuant to § 1442(a)(1) where plaintiffs' claims were largely based on their failure to provide warnings to consumers and the manufacturers did not show that the government prohibited them from providing additional safeguards or information to consumers); *Ryan v. Dow Chem. Co.*, 781 F. Supp. 934, 950 (E.D.N.Y. 1992) (finding that defendants could not remove case pursuant to § 1442(a)(1) where they were "being sued for formulating and producing a product all of whose components were developed without direct government control and all of whose methods of manufacture were determined by the defendants"). *Cf. Sawyer*, 860 F.3d at 258 (finding a sufficient connection between the charged conduct and the asserted official authority where the plaintiffs alleged that defendant failed to warn them of asbestos in the boilers it manufactured for the Navy and the Navy dictated the content of the warnings on defendant's boilers).

Therefore, even assuming, *arguendo*, that the defendants were "acting under" federal officials on these occasions and can assert a colorable defense, removal based on the federal officer removal statute is not proper because defendants have failed to plausibly assert that the acts for which they have been sued were carried out "for

or relating to" the alleged federal authority. 28 U.S.C. §1442(a)(1); *Sawyer*, 860 F.3d at 254.

3. Bankruptcy Removal Statute

Defendants maintain that the bankruptcy removal statute, 28 U.S.C. § 1452, permits removal. ECF 124 at 64. That statute provides, in relevant part:

> A party may remove any claim or cause of action in a civil action other than . . . 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.

28 U.S.C. § 1452(a). Section 1334, in turn, grants district courts original but not exclusive jurisdiction "of all civil proceedings . . . arising in or related to cases under title 11." *Id.* § 1334(b).

According to defendants, this action falls within the Court's original jurisdiction under § 1334 because it is "related to countless bankruptcy cases." ECF 124 at 64. Specifically, they claim that this action is related to bankruptcy proceedings involving the predecessor of defendant Chevron, Texaco, whose Chapter 11 plan was confirmed in 1987. *Id. at* 65. Defendants also assert that Texaco's Chapter 11 plan bars "certain claims" against it arising before March 15, 1988, and, because the City seeks to hold defendant Chevron liable for Texaco's culpable conduct before that date, the adjudication of the City's claims would affect the interpretation or administration of the plan. *Id.* In addition, defendants argue that this case is related to the bankruptcy proceedings of other companies in the fossil fuel industry, such as Peabody Energy. *Id.* Therefore, defendants posit that this case falls within the

Court's "related to" jurisdiction and was properly removed under § 1452. *Id.* at 64-65.

The City contends, however, that this action does not fall within the Court's original jurisdiction under § 1334 because it is not related to any bankruptcy proceedings. ECF 111-1 at 59-60. In addition, the City argues that this action is exempt from removal under § 1452 because it represents an exercise of its police and regulatory powers. *Id.* at 56-58.

The Court first considers whether this action is "related to" a bankruptcy proceeding and, thus, subject to removal under the bankruptcy removal statute. 28 U.S.C. § 1334(b); 28 U.S.C. § 1452(a) ("A party may remove . . . if such district court has jurisdiction of such claim or cause of action under section 1334 of this title."). The "close nexus" test determines the scope of a court's "related to" jurisdiction in the post-confirmation context. *Valley Historic Ltd. P'ship v. Bank of N.Y.*, 486 F.3d 831, 836 (4th Cir. 2007). That is, for "related to" jurisdiction to exist after a Chapter 11 plan is confirmed, "the claim must affect an integral aspect of the bankruptcy process—there must be a close nexus to the bankruptcy plan or proceeding." *Id.* at 836 (quoting *In re Resorts Int'l, Inc.*, 372 F.3d 154, 166-67 (3d Cir. 2004)); *see also In re Wilshire Courtyard*, 729 F.3d 1279, 1287 (9th Cir. 2013).

Under this inquiry, "[m]atters that affect the interpretation, implementation, consummation, execution, or administration of the confirmed plan will typically have the requisite close nexus." *Valley Historic*, 486 F.3d at 836-37 (quoting *In re Resorts Int'l*, 372 F.3d at 167). As the Fourth Circuit explained, the "close nexus" requirement "insures that the proceeding serves a bankruptcy administration purpose on the date the bankruptcy court exercises that jurisdiction." *Id.* at 837. *See also In re Pegasus Gold Corp.*, 394 F.3d 1189, 1194 (9th Cir. 2005) (adopting

the "close nexus" test for post-confirmation "related to" jurisdiction because it "recognizes the limited nature of post-confirmation jurisdiction but retains a certain flexibility").

Defendants fail to demonstrate that there is a "close nexus" between this action and any bankruptcy proceedings. The only bankruptcy plan that defendants identify was confirmed more than thirty years ago and, although defendants assert that the plan bars "certain claims against [Texaco] arising before March 15, 1988," they do not explain how the City's recently filed claims implicate this provision. ECF 124 at 65. At most, defendants have only established that some day a question *might* arise as to whether a previous bankruptcy discharge precludes the enforcement of a portion of the judgment in this case against defendant Chevron. This remote connection does not bring this case within the Court's "related to" jurisdiction. 28 U.S.C. 1334(b); *see In re Ray*, 624 F.3d 1124, 1135 (9th Cir. 2010) (holding that the bankruptcy court did not have "related to" jurisdiction over breach of contract action that "could have existed entirely apart from the bankruptcy proceeding and did not necessarily depend upon resolution of a substantial question of bankruptcy law").

Moreover, even assuming, *arguendo*, that this action is within the Court's bankruptcy jurisdiction, it is exempt from removal under § 1452 as an exercise of the City's police or regulatory powers.

To my knowledge, the Fourth Circuit has not considered the parameters of the police or regulatory exception to removal under § 1452. It has, however, construed the phrase "police or regulatory power" in the automatic stay provision of the bankruptcy code. *See Safety-Kleen, Inc. (Pinewood) v. Wyche*, 274 F.3d 846, 865 (4th Cir. 2001). That section, in relevant part, exempts from the automatic

stay "the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit's . . . power and regulatory power, including the enforcement of a judgment other than a money judgment . . ." 11 U.S.C. § 362(b)(4). Because "[t]he language of the police and regulatory power exceptions in the automatic stay context and in the removal context is virtually identical, and the purpose behind each exception is the same," it is proper to look to judicial interpretation of § 362 for guidance in applying the exception in the removal context. *City & Cty. of San Francisco v. PG&E Corp.*, 433 F.3d 1115, 1123 (9th Cir. 2006), *cert denied*, 549 U.S. 882 (2006); *see also In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 488 F.3d 112, 132 (2d Cir. 2007) (looking to judicial interpretations of § 362(b)(4) for guidance in defining the parameters of a governmental unit's police or regulatory power in the context of § 1452).

The Fourth Circuit looks to the "purpose of the law that the state seeks to enforce" to determine whether an action is an exercise of a governmental entity's police and regulatory power. *Safety-Kleen*, 274 F.3d at 865. In *Safety-Kleen*, it explained the inquiry as follows:

> If the purpose of the law is to promote "public safety and welfare," or to "effectuate public policy," then the exception applies. On the other hand, if the purpose of the law relates "to the protection of the government's pecuniary interest in the debtor's property," or to "adjudicate private rights," then the exception is inapplicable.

Id. (citations omitted). This inquiry is an objective one. *Id.* The court examines "the purpose of the law that the state seeks to enforce rather than the state's intent in enforcing the law in a particular case." *Id.*

The City asserts claims against defendants for injuries stemming from climate change. It brings this action on behalf of the public to remedy and prevent environmental damage, punish wrongdoers, and deter illegal activity. As other courts have recognized, such an action falls squarely within the police or regulatory exception to § 1452. *See County of San Mateo*, 294 F. Supp. 3d at 939 (holding that suits against oil companies for injuries stemming from climate change were exempt from bankruptcy removal statute because they were "aimed at protecting the public safety and welfare and brought on behalf of the public"); *MTBE*, 488 F.3d at 133 (finding that the police power exception prevented the removal of states' claims against corporations that manufactured and distributed gasoline containing MTBE because "the clear goal of these proceedings is to remedy and prevent environmental damage with potentially serious consequences for public health, a significant area of state policy"). *See also Safety-Kleen*, 274 F.3d at 866 (holding that a state environmental agency's attempt to enforce financial assurance requirements was within the regulatory exception because "the regulations serve to promote environmental safety in the design and operation of hazardous waste facilities").

That the relief sought by the City includes a monetary judgment does not alter this conclusion. In *Safety-Kleen*, the Fourth Circuit reasoned: "The fact that one purpose of the law is to protect the state's pecuniary interest does not necessarily mean that the exception is inapplicable. Rather, we must determine the *primary* purpose of the law that the state is attempting to enforce." 274 F.3d at 865. *See also MTBE*, 488 F.3d at 133-34 (rejecting defendants' argument that the police power exception to § 1452 did not apply to suit brought by governmental units for environmental damage merely because they sought money damages).

Accordingly, I reject defendants' argument that removal of this case is proper under § 1452.

4. Admiralty Jurisdiction

Defendants assert that admiralty jurisdiction supports removal of this action. The contention is premised on the fact that, according to defendants, the Complaint alleges injury based on their offshore oil and gas drilling from vessels. ECF 124 at 67.

The Constitution extends the federal judicial power "to all Cases of admiralty and maritime Jurisdiction." U.S. Const. art. III, § 2. Congress codified this power in a statute, 28 U.S.C. § 1333, which grants federal district courts "original jurisdiction, exclusive of the courts of the States, of . . . [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." *Id.* § 1333(1); *see Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 531 (1995). The latter portion of this jurisdictional grant, often referred to as the "saving to suitors" clause, is a "grant to state courts of in personam jurisdiction, concurrent with admiralty courts." *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 445 (2001) (citations omitted).

The City argues that admiralty claims brought in state court are not removable under 28 U.S.C. § 1441 absent some other jurisdictional basis, such as diversity or federal question jurisdiction. ECF 111-1 at 62. Further, it maintains that, even if admiralty jurisdiction *does* supply an independent basis for removal, this action does not fall within the Court's admiralty jurisdiction because it satisfies neither the "location" test nor the "connection to maritime activity" test articulated by the Supreme Court. *Id. at* 63-64 (citing *Grubart*, 513 U.S. at 534).

The scope of removal jurisdiction over admiralty claims has generated significant confusion over the years. *See* 14A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction* § 3674 (4th ed. 2013) ("Whether an admiralty or maritime matter instituted in a state court falls within the removal jurisdiction of the federal courts is a question that has been beset by confusion and uncertainty over the years, some of which continues to this day.").

To my knowledge, most of the courts that have considered the issue have concluded that admiralty claims are not removable absent an independent basis for federal jurisdiction, such as diversity. *See Cassidy v. Murray*, 34 F. Supp. 3d 579, 583 (D. Md. 2014); *Forde v. Hornblower N.Y., LLC*, 243 F. Supp. 3d 461, 467-68 (S.D.N.Y. 2017) (noting that "the overwhelming majority of district courts" have held that admiralty claims are not removable absent another basis for jurisdiction); *Langlois v. Kirby Inland Marine, LP*, 139 F. Supp. 3d 804, 809-10 (M.D. La. 2015) (citing over forty cases for the proposition that a "growing chorus of district courts that have concluded that the [the 2011 amendment to § 1441] did not upset the long-established rule that general maritime law claims, saved to suitors, are not removable to federal court, absent some basis for original federal jurisdiction other than admiralty"). *See also* 14A Wright & Miller, *supra*, § 3674 (4th ed. Supp. 2019) (noting that a majority of courts have found that admiralty jurisdiction does not independently support removal). But, as defendants point out, some courts have held otherwise. *See Ryan v. Hercules Offshore, Inc.*, 945 F. Supp. 2d 772, 777-78 (S.D. Tex. 2013) (holding that admiralty claims are freely removable); *see also Exxon Mobil Corp. v. Starr Indem. & Liab. Co.*, Civ. No. NFA-14-1147, 2014 WL 2739309, at *2 (S.D. Tex.

June 17, 2014), remanded on other grounds on reconsideration, 2014 WL 4167807 (S.D. Tex. Aug. 20, 2014); *Carrigan v. M/V AMC Ambassador*, Civ. No. EW-13-3208, 2014 WL 358353, at *2 (S.D. Tex. Jan. 31, 2014).

In my view, this Court need not weigh in on this admittedly complicated issue. I find safe harbor in the view that, even if admiralty jurisdiction *does* provide an independent basis for removal, this case is outside the Court's admiralty jurisdiction.

As to a tort claim, a party seeking to invoke federal admiralty jurisdiction pursuant to 28 U.S.C. §1333(1) must satisfy two tests: the "location test" and the "maritime connection" test. *Grubart*, 513 U.S. at 534, 538. To satisfy the location test, a plaintiff must show that the tort at issue "occurred on navigable water," or if the injury was suffered on land, that it was "caused by a vessel on navigable water" within the meaning of the Admiralty Extension Act. *Id.* at 534 (citing former 46 U.S.C. § 30101(a) (2012)). To satisfy the maritime connection test, a plaintiff must show that the case has "a potentially disruptive impact on maritime commerce" and that the "general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity." *Id.* (internal quotation marks and citations omitted).

The Court's analysis begins and ends with the location test. Defendants do not dispute that the City's injuries occurred on land; they argue only that the location test is satisfied because the City's injuries were caused by vessels on navigable waters within the meaning of the Admiralty Extension Act, 46 U.S.C. § 30101(a). ECF 124 at 69.

The Admiralty Extension Act provides, in relevant part, 46 U.S.C. § 30101(a):

> The admiralty and maritime jurisdiction of the United States extends to and includes cases of injury or dam-

> age, to person or property, caused by a vessel on navigable waters, even though the injury or damage is done or consummated on land.

The statute broadened the reach of admiralty jurisdiction to include claims for injuries suffered on land that are caused by vessels. *See id.* Congress passed the Admiralty Extension Act "specifically to overrule or circumvent" a line of Supreme Court cases that had "refused to permit recovery in admiralty even where a ship or its gear, through collision or otherwise, caused damage to persons ashore or to bridges, docks, or other shore-based property." *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 209 (1971); *see also Louisville & N.R. Co. v. M/V Bayou Lacombe*, 597 F.2d 469, 472 (5th Cir. 1979) ("As a result of the Act, a plaintiff is no longer precluded from suing in admiralty when a vessel collides with a land structure, such as a bridge.").

Not all torts involving vessels on navigable waters fall within the Admiralty Extension Act, however. Rather, the Act requires that an injury on land be proximately caused by a vessel or its appurtenances. *Grubart*, 513 U.S. at 536 (holding that the terms "caused by" in the Admiralty Extension Act require proximate causation); *see also Pryor v. Am. President Lines*, 520 F.2d 974, 979 (4th Cir. 1975) (holding that "a ship or its appurtenances must proximately cause an injury on shore" to fall within admiralty jurisdiction), *cert. denied*, 423 U.S. 1055 (1976); *Adamson v. Port of Bellingham*, 907 F.3d 1122, 1131-32 (9th Cir. 2018) (holding that the Admiralty Extension Act applies only when an injury on land is proximately caused by a vessel or its appurtenances, not those performing acts for the vessel); *Scott v. Trump Ind., Inc.*, 337 F.3d 939, 943 (7th Cir. 2003); *Egorov, Puchinsky, Afanasiev & Juring v. Terriberry, Carroll & Yancey*, 183 F.3d 453, 456 (5th Cir. 1999) (stating that "the [Admiralty Extension]

Act means the vessel and her appurtenances, and does not include those performing actions for the vessel") (citations omitted).

Even if mobile drilling platforms qualify as "vessels" in admiralty, defendants have failed to demonstrate that the City's injuries were "caused by a vessel on navigable waters," within the meaning of the Admiralty Extension Act. 46 U.S.C. § 30101(a). The City nowhere alleges that defendants' mobile drilling platforms or their appurtenances caused its injuries. Indeed, the Complaint does not mention any mobile drilling platforms or other vessels. Rather, the City alleges that defendants' worldwide production, wrongful promotion, and sale of fossil fuel products caused its environmental disruptions and their associated impacts.

That some unspecified portion of defendants' production occurred on these vessels, as defendants assert, does not mean that the vessels *themselves* caused the City's injuries, much less proximately caused them. *See Pryor*, 520 F.2d at 982 (finding vessel did not cause plaintiff's injuries on land "[b]ecause it is not conceptually possible to charge the ship with having caused the defective packaging . . ."). Thus, it cannot be said that the City's injuries were "caused by a vessel on navigable waters," within the meaning of the Admiralty Extension Act. 46 U.S.C. § 30101(a).

II. CONCLUSION

For the reasons stated above, I conclude that the case was not properly removed to federal court. Therefore, the case must be remanded to the Circuit Court for Baltimore City, pursuant to 28 U.S.C. § 1447(c).

As stipulated by the parties, the Court will stay execution of an order to remand for thirty days.

An Order follows.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. ELH-18-2357

MAYOR AND CITY COUNCIL OF BALTIMORE,

Plaintiff,

v.

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

Defendants.

Filed: July 31, 2009

MEMORANDUM

HOLLANDER, United States District Judge.

In this Memorandum, I address defendants' motion to stay the Court's Order (ECF 173) remanding this case to the Circuit Court for Baltimore City. *See* ECF 173 ("Remand Order"). Defendants seek the stay pending resolution by the United States Court of Appeals for the Fourth Circuit of their appeal of the Remand Order. Defendants' motion (ECF 183) is supported by a memorandum of law (ECF 183-1) (collectively, "Motion to Stay"). Plaintiff, the

Mayor and City Council of Baltimore (the "City"), opposes the Motion to Stay. ECF 186. Defendants have replied. ECF 187.

No hearing is necessary to resolve the Motion to Stay. *See* Local Rule 105.6. For the reasons that follow, I shall deny the Motion to Stay.

I. FACTUAL AND PROCEDURAL BACKGROUND

On July 20, 2018, the City filed suit in the Circuit Court for Baltimore City against twenty-six multinational oil and gas companies. ECF 42 (Complaint). The City alleges that defendants have substantially contributed to greenhouse gas pollution, global warming, and climate change by extracting, producing, promoting, refining, distributing, and selling fossil fuel products (*i.e.*, coal, oil, and natural gas), while simultaneously deceiving consumers and the public about the dangers associated with those products. *Id.* ¶¶ 1-8. As a result of such conduct, the City claims that it has sustained and will sustain several injuries, including a rise in sea level along Maryland's coast, as well as an increase in storms, floods, heatwaves, drought, extreme precipitation, and other conditions. *Id.* ¶ 8.

The Complaint contains eight causes of action, all founded on Maryland law: public nuisance (Count I); private nuisance (Count II); strict liability for failure to warn (Count III); strict liability for design defect (Count IV); negligent design defect (Count V); negligent failure to warn (Count VI); trespass (Count VII); and violations of the Maryland Consumer Protection Act, Md. Code (2013 Repl. Vol., 2019 Supp.), Com. Law §§ 13-101 to 13-501 (Count VIII). ECF 42 ¶¶ 218-98. The City seeks monetary damages, civil penalties, and equitable relief. *Id.*

Two of the defendants, Chevron Corp. and Chevron U.S.A., Inc. (collectively, "Chevron"), timely removed the

case to this Court. ECF 1 (Notice of Removal). They asserted the following eight grounds for removal: (1) the case is removable under 28 U.S.C. § 1441(a) and § 1331, because the City's claims are governed by federal common law, not state common law; (2) the action raises disputed and substantial issues of federal law that must be adjudicated in a federal forum; (3) the City's claims are completely preempted by the Clean Air Act ("CAA"), 42 U.S.C. § 7401 *et seq.*, and/or other federal statutes and the Constitution; (4) this Court has original jurisdiction under the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1349(b); (5) removal is authorized under the federal officer removal statute, 28 U.S.C. § 1442(a)(l); (6) this Court has federal question jurisdiction under 28 U.S.C. § 1331 because the City's claims are based on alleged injuries to and/or conduct on federal enclaves; (7) removal is authorized under 28 U.S.C. §1452(a) and 28 U.S.C. § 1334(b), because the City's claims are related to federal bankruptcy cases; and (8) the City's claims fall within the Court's original admiralty jurisdiction under 28 U.S.C. § 333. ECF 1 at 6-12, ¶¶ 5-12.

Thereafter, the City filed a motion to remand the case to state court, pursuant to 28 U.S.C. §1447(c). ECF 111. The motion was supported by a memorandum of law (ECF 111-1) (collectively, "Remand Motion"). Defendants filed a joint opposition to the Remand Motion (ECF 124, "Opposition"), along with three supplements containing numerous exhibits. ECF 125; ECF 126; ECF 127. The City replied. ECF 133.

While the City's Remand Motion was pending, defendants filed a conditional motion to stay the execution of any order to remand. ECF 161. They asked that, in the event this Court grants the City's Remand Motion, the Court issue an order staying execution of the remand for thirty days to allow time to appeal the ruling. *Id.* at 1-2. The

City initially opposed that motion (ECF 162), but subsequently stipulated to the requested stay. ECF 170. This Court accepted the parties' stipulation by Consent Order of April 22, 2019. ECF 171.

In a Memorandum Opinion (ECF 172) and Order (ECF 173) of June 10, 2019, I granted the City's Remand Motion. After consideration of all eight bases for removal relied on by defendants, I concluded that removal was improper. *See* ECF 172. However, in accordance with the parties' joint stipulation (ECF 170) and the Court's prior Order (ECF 171), I stayed execution of the Remand Order for thirty days. ECF 173.

On June 13, 2019, defendants filed a Notice of Appeal of the Remand Order to the United States Court of Appeals for the Fourth Circuit. ECF 178. Then, on June 23, 2019, defendants filed the Motion to Stay currently pending before this Court. ECF 183. Defendants ask this Court to stay execution of the remand until their appeal is resolved by the Fourth Circuit, arguing that their appeal "presents substantial legal questions on which Defendants are likely to succeed." ECF 183 ¶ 3. In the alternative, they ask the Court to extend the current stay until this Court resolves their Motion to Stay and, should the Court deny the Motion, until the Fourth Circuit resolves the Motion to Stay. *Id.* ¶ 4.

That same day, the City stipulated to a partial extension of the current stay. ECF 184. That is, the City agreed to stay the execution of the remand "through and including this Court's resolution of Defendants' Motion to Extend the Stay Pending Appeal, and if that motion is denied, through the resolution of Defendants' anticipated Motion to Stay in the U.S. Court of Appeals for the Fourth Circuit." ECF 184 at 2. This Court accepted the parties' joint stipulation by Consent Order of June 24, 2019. ECF 185.

However, the City opposes the defendants' Motion to Stay pending resolution of the merits of the appeal of the remand. ECF 186. It argues that defendants are unlikely to succeed on the merits of the appeal, that defendants would not suffer irreparable harm absent a stay, and that a stay would delay resolution of its claims. *Id.* at 4-17.

II. DISCUSSION

A stay is "'an exercise of judicial discretion' and '[t]he propriety of its issue is dependent upon the circumstances of the particular case.'" *Nken v. Holder*, 556 U.S. 418,433 (2009) (quoting *Virginia Ry. Co. v. United States*, 272 U.S. 658, 672 (1926)). The party requesting a stay bears the burden of showing that a stay is warranted. *Id.* at 433-34. When evaluating a motion to stay, courts consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay, (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.* at 434; see *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Nero v. Mosby*, No. MJG-16-1288, 2017 WL 1048259, at *l (D. Md. Mar. 20, 2017); *Realvirt, LLC v. Lee*, 220 F. Supp. 3d 704, 705 (E.D. Va. 2016). The first two factors are the "most critical." *Nken*, 556 U.S. at 434.

The Court begins with the first factor—the defendants' likelihood of success on the merits of their appeal. *Nken*, 556 U.S. at 434. Defendants assert that their appeal presents substantial legal questions, particularly whether removal was proper because the City's claims "necessarily arise under federal common law." ECF 183-1 at 2. They point out that other district courts in similar cases have reached different conclusions on this issue. *Id.* at 2, 5-9. Thus, according to defendants, the first factor

supports the issuance of a stay pending resolution of the appeal. *Id.*

The Court agrees that the removal of this case based on the application of federal law presents a complex and unsettled legal question, as evidenced by the diverging opinions reached by other district courts that have considered the issue. *Compare California v. BP P.L.C.*, No. WHA-16-6011, 2018 WL 1064293, at *5 (N.D. Cal. Feb. 27, 2018) (upholding removal of plaintiffs' public nuisance claims against fossil fuel companies because, "though pled as state-law claims, [they] depend on a global complex of geophysical cause and effect involving all nations of the planet" and, thus, "are governed by federal common law"), *appeal docketed sub. nom., City of Oakland v. BP, P.L.C.*, No. 18-16663 (9th Cir. Sept. 4, 2018), *with County of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 937-39 (N.D. Cal. 2018) (remanding plaintiffs' tort claims against oil companies relating to global warming because removal was not supported by federal common law or any of the other bases relied upon by defendants), *appeal docketed sub. nom., County of Marin v. Chevron Corp.*, No. 18-15503 (9th Cir. Mar. 27, 2018), *and Rhode Island v. Chevron Corp.*, No. WES-18-0395, 2019 WL 3282007, at *2-3 (D.R.I. July 22, 2019) (same). But, of course, this issue does not support a stay pending resolution of defendants' appeal if it is not actually presented on appeal. And, as the City points out, a remand based on a finding of lack of subject matter jurisdiction—like that issued by this Court—is typically not subject to appellate review. *See* ECF 173.

The scope of appellate review over remand orders is "substantially limited" by 28 U.S.C. § 1447(d). *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 229 (2007). That section provides: "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 [federal officer removal] or 1443 [civil rights cases] of this title shall be reviewable by appeal or otherwise." 28 U.S.C. § 1447(d). This statute generally prohibits appellate review of remand orders based on a district court's lack of subject matter jurisdiction. *Powerex*, 551 U.S. at 230; s*ee In re Norfolk S. Ry. Co.*, 756 F.3d 282, 287 (4th Cir. 2014); *In re Blackwater Sec. Consulting, LLC*, 460 F.3d 576, 585 (4th Cir. 2006) (finding that § 1447(d) prohibited appellate review of remand order because "the reasoning behind the district court's remand order in this case indicate[d] the court's belief that it lacked subject matter jurisdiction upon removal").

The purpose of the prohibition on appellate review of remand orders in § 1447(d) is to avoid "prolonged litigation on threshold nonmerits questions." *Powerex*, 551 U.S. at 237. This rule is strict; it bars review "even if the remand order is manifestly, inarguably erroneous," *In re Norfolk S.*, 756 F.3d at 287, and even if the "erroneous remand[] has undesirable consequences" for federal interests, *Powerex*, 551 U.S. at 237.

Defendants seek to avoid the force of § 1447(d) through reliance on one of their grounds for removal—the federal officer removal statute, 28 U.S.C. § 1442. ECF 183-1 at 4-5. They point out that § 1447(d) expressly exempts cases removed under § 1442 from the general prohibition on appellate review of remand orders.[1] *Id.*; *see*

[1] There are a few other exceptions to § 1447(d)'s bar on appellate review of remand orders. *See* 14C Charles Alan Wright et al., *Federal Practice & Procedure: Jurisdiction and Related Matters* § 3740 (4th ed. 2018) (outlining the exceptions to the no-appeal rule for remand orders); *see also Powerex*, 551 U.S. at 237; *In re Norfolk S.*, 756 F.3d

Northrop Grumman Tech. Servs., Inc. v. DynCorp Int'l LLC, 865 F.3d 181, 186 n.4 (4th Cir. 2017) ("Although orders remanding cases to state court generally are not reviewable on appeal, we may review such an order when, as here, the removal was made pursuant to the federal officer removal statute, 28 U.S.C. § 1442.") (citing 28 U.S.C. § 1447(d)). So, defendants' argument goes, because this ground for removal is subject to appellate review, *all* of their other grounds for removal are also subject to appellate review—including the complex legal question presented by removal of the case based on the application of federal common law. ECF 183-1 at 4-5.

But, case law suggests otherwise. The Fourth Circuit has concluded that, when a case that was removed on several grounds is remanded, appellate jurisdiction of the remand extends only to those bases for removal that are reviewable. *See Lee v. Murraybey*, 487 F. App'x 84, 85 (4th Cir. 2012) ("To the extent that the district court concluded it lacked subject matter jurisdiction under removal provisions other than § 1443 [removal in civil rights cases], we dismiss the appeal."); *Noel v. McCain*, 538 F.2d 633, 635 (4th Cir. 1976) (holding that appellate jurisdiction of a remand extended to the issue of whether removal was proper under § 1443—because § 1447(d) authorized such review—but did not extend to the issue of whether removal was proper based on federal question jurisdiction). The majority of other circuits have reached the same conclusion. *See Jacks v. Meridian Res. Co.*, 701 F.3d 1224, 1229 (8th Cir. 2012) (holding that remand of case was subject to appellate review only to the extent it was based on the federal officer removal statute); *Patel v. Del Taco, Inc.*, 446 F.3d 996, 998 (9th Cir. 2006); *Alabama v. Conley*,

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at 287. Defendants do not identify any other exception that is applicable here, and this Court is aware of none.

245 F.3d 1292, 1293 n.1 (11th Cir. 2001); *Davis v. Glanton*, 107 F.3d 1044, 1047 (3d Cir. 1997); *State Farm Mut. Auto. Ins. Co. v. Baasch*, 644 F.2d 94, 96-97 (2d Cir. 1981); *but see Mays v. City of Flint, Mich.*, 871 F.3d 437, 442 (6th Cir. 2017) (holding that § 1447(d) authorized review of district court's decision on the propriety of federal officer removal and this jurisdiction "also encompasses review of the district court's decision on the alternative ground for removal under [federal question jurisdiction]"); *Decatur Hosp. Auth. v. Aetna Health, Inc.*, 854 F.3d 292, 296 (5th Cir. 2017) (same); *Lu Junhong v. Boeing Co.*, 792 F.3d 805, 811 (7th Cir. 2015) (Easterbrook, J.) (" . . . once an appeal of a remand 'order' has been authorized by statute, the court of appeals may consider all of the legal issues entailed in the decision to remand").

Accordingly, in this case, only the issue of federal officer removal would be subject to review on defendants' appeal of the remand. Defendants have not demonstrated a substantial likelihood of success on the merits of this issue, or even that removal of this case under the federal officer removal statute raises a complex, serious legal question. They merely recite the same arguments outlined in their Notice of Removal and opposition to the City's Remand Motion. See ECF 1 at 34-40; ECF 124 at 56-64; ECF 183-1 at 5-7.

This Court considered defendants' arguments at length and rejected them in its Memorandum Opinion of June 10, 2019. ECF 172 at 34-37. And, courts that have addressed the removal of similar cases under the federal officer removal statute have reached the same conclusion. *See County of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d at 939 ("Nor was there a reasonable basis for federal officer removal, because the defendants have not shown a 'causal nexus' between the work performed under federal direction and the plaintiffs' claims, which are based on a

wider range of conduct.") (citations omitted); *Rhode Island v. Chevron Corp.*, 2019 WL 3282007, at *5 (finding federal officer removal statute did not support removal of plaintiff's suit against fossil fuel producers because "[d]efendants cannot show the alleged promotion and sale of fossil fuels abetted by a sophisticated misinformation campaign were 'justified by [their] federal duty'") (quoting *Mesa v. California*, 489 U.S. 121, 131-32 (1989)). That this issue may be subject to appellate review, therefore, does not support the issuance of a stay pending appeal.

In any event, defendants have not demonstrated that any of the remaining three factors support a stay pending resolution of their appeal of the Remand Order. Thus, even if the Remand Order is subject to appellate review in its entirety, I am satisfied that such a stay is not warranted.

The second factor courts consider in evaluating a motion to stay is whether the applicant will be irreparably injured absent a stay. *Nken*, 556 U.S. at 434. Defendants argue that this factor supports a stay pending appeal because an immediate remand would render their appeal meaningless and would undermine the right to a federal forum provided by the federal officer removal statute. ECF 183-1 at 12-14. They assert that federal courts are "uniquely qualified" to address the issues raised in this case and, further, that proceeding with litigation in state court would cost them significant time and money. *Id.* at 13.

Defendants' arguments are unavailing. Absent a stay, their appeal would only be rendered moot in the unlikely

event that a final judgment is reached in state court before the resolution of their appeal.[2] This speculative harm does not constitute an irreparable injury. *See Rose v. Logan*, No. RDB-13-3592, 2014 WL 3616380, at *3 (D. Md. July 21, 2014) ("An appeal being rendered moot does not itself constitute irreparable injury."); see also *Nken*, 556 U.S. at 434-35 ("[S]imply showing some possibility of irreparable injury fails to satisfy the second factor.") (citation and internal quotation marks omitted); *Brea Union Plaza I, LLC v. Toys R Us, Inc.*, No. MHL-18-0419, 2018 WL 3543056, at *5 (E.D. Va. July 23, 2018) (finding this factor did not support a stay because the purported harm was "entirely speculative").

Nor have defendants shown that the cost of proceeding with litigation in state court would cause them to suffer irreparable injury. *See Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury."); *Long v. Robinson*, 432 F.2d 977, 980 (4th Cir. 1970) ("[M]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough.") (citation omitted); *Broadway Grill, Inc. v. Visa Inc.*, No. PJH-16-4040, 2016 WL 6069234, at *2 (N.D. Cal. Oct. 17, 2016) (finding no irreparable harm because the

[2] The Court notes that defendants acknowledge—and, in fact, elsewhere rely on—the likelihood of a prompt resolution on appeal. Specifically, in support of their argument that a stay would not harm the City, defendants assert that state court proceedings "will be delayed only briefly" because, "pursuant to the Fourth Circuit's Briefing Order, the appeal will be fully briefed no later than September of this year." ECF 183-1 at 15. Given defendants' own expectation of a speedy appellate process, and particularly in a case of this size, their professed concern of a final judgment being reached in state court before resolution of their appeal seems disingenuous.

injury of having to litigate in state and federal court is "a not-uncommon result given the limited jurisdiction of federal courts"). And, I disagree with defendants' assertion that federal courts are "uniquely qualified" to address the issues presented by this case; our state courts are well equipped to handle complex cases.[3]

The last two factors call for "assessing the harm to the opposing party and weighing the public interest." *Nken*, 556 U.S. at 435. Where, as here, a government body is the party opposing the stay, "[t]hese factors merge." *Id.* According to defendants, these considerations support the issuance of a stay because it would avoid costly, potentially wasteful litigation in state court. ECF 183-1 at 14. They also argue that a stay would delay proceedings in state court "only briefly" and, thus, would not prejudice the City. *Id. at* 15.

I disagree. This case is in its earliest stages and a stay pending appeal would further delay litigation on the merits of the City's claims. This favors denial of a stay, particularly given the seriousness of the City's allegations and the amount of damages at stake. Further, even if the remand is vacated on appeal, the interim proceedings in state court may well advance the resolution of the case in federal court. After all, the parties will have to proceed with the filing of responsive pleadings or preliminary motions, regardless of the forum.

To be sure, defendants may seek, and the state court may issue, a stay pending the Fourth Circuit's resolution of the appeal of the remand. However, defendants have not met their burden of demonstrating that *this* Court should issue a stay pending appeal. Accordingly, I shall deny the defendants' Motion to Stay.

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[3] The Court notes that many federal judges have previously served as state court judges.

III. CONCLUSION

For the reasons stated above, I shall deny the defendants' Motion to Stay the case until such time as the Fourth Circuit resolves the merits of defendants' appeal of the Remand Order. However, in accordance with the parties' joint stipulation (ECF 184) and the Court's Order approving the stipulation (ECF 185), I will extend the stay of the Remand Order pending resolution of defendants' anticipated appeal of this Order to the Fourth Circuit.

An Order follows.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-1644

MAYOR AND CITY COUNCIL OF BALTIMORE,

Plaintiff-Appellee,

v.

BP P.L.C.; BP AMERICA, INC.; BP PRODUCTS NORTH AMERICA, INC.; CROWN CENTRAL LLC; CROWN CENTRAL NEW HOLDINGS LLC; CHEVRON CORP.; CHEVRON U.S.A. INC.; EXXON MOBIL CORP.; EXXONMOBIL OIL CORPORATION; ROYAL DUTCH SHELL, PLC; SHELL OIL COMPANY; CITGO PETROLEUM CORP.; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66; MARATHON OIL COMPANY; MARATHON OIL CORPORATION; MARATHON PETROLEUM CORPORATION; SPEEDWAY LLC; HESS CORP.; CNX RESOURCES CORPORATION; CONSOL ENERGY, INC.; CONSOL MARINE TERMINALS LLC,

Defendants-Appellants

and

LOUISIANA LAND & EXPLORATION CO.; PHILLIPS 66 COMPANY; CROWN CENTRAL PETROLEUM CORPORATION,

Defendants

Filed: October 1, 2019

ORDER

Upon review of submissions relative to the motion for stay pending appeal, the court denies the motion.

Entered at the direction of Judge Wynn with the concurrence of Chief Judge Gregory and Judge Diaz.