APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 19-1330

BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY; BOARD OF COUNTY COMMISSIONERS OF SAN MIGUEL COUNTY; CITY OF BOULDER,
PLAINTIFFS-APPELLEES,

v.

SUNCOR ENERGY (U.S.A.) INC.; SUNCOR ENERGY SALES INC.; SUNCOR ENERGY INC.; EXXON MOBIL CORPORATION, DEFENDANTS-APPELLANTS.

Filed: February 8, 2022

Before: HOLMES, LUCERO, and McHUGH, Circuit Judges.

McHUGH, Circuit Judge.

This matter is before us on remand from the United States Supreme Court. *Suncor Energy (U.S.A.) Inc. v. Bd. of Cnty. Comm'rs of Boulder Cnty.*, 141 S. Ct. 2667 (2021) (Mem.). The case originally came to us as an appeal of the district court's order remanding the action to state court. Pursuant to 28 U.S.C. § 1447(d), orders remanding removed cases to state court are not appealable "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." In our prior decision, we held § 1447(d) limited our appellate jurisdiction to review of only the federal officer basis for removal, which was one of six grounds of federal subject-matter jurisdiction advanced in support of removal on appeal. *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 965 F.3d 792, 819 (10th Cir. 2020), *vacated and remanded by* 141 S. Ct. 2667 (2021) (Mem.).

In *BP P.L.C. v. Mayor & City Council of Baltimore*, the Supreme Court rejected that position, holding that when a removal action is appealed under the limited grounds listed in 28 U.S.C. § 1447(d), the appellate court has subject-matter jurisdiction over all grounds for removal addressed in the district court's order. 141 S. Ct. 1532, 1543 (2021). The Court then granted certiorari in this case, vacated our prior decision, and remanded for further consideration in light of its decision in *BP v. Mayor & City Council of Baltimore. Suncor Energy (U.S.A.) Inc. v. Bd. of Cnty. Comm'rs of Boulder Cnty.*, 141 S. Ct. 2667 (2021) (Mem.).

We undertake that further consideration now. For the following reasons, we hold that none of the six grounds asserted support federal removal jurisdiction. Accordingly, we affirm the district court's order remanding the action to state court.

I. BACKGROUND

A. Factual History

1. The Energy Companies and Climate Change[1]

Stated broadly, this is a lawsuit about damages related to climate change. The Board of County Commissioners of Boulder County, the Board of County Commissioners of San Miguel County, and the City of Boulder (collectively, the "Municipalities") say they have experienced and will continue to experience harm because of climate change caused by fossil-fuel consumption and rising levels of carbon dioxide in the atmosphere. They also allege they have spent and will continue spending millions of dollars to mitigate this harm.

The Municipalities contend that Suncor Energy (U.S.A.) Inc., Suncor Energy Sales, Inc., Suncor Energy, Inc., and ExxonMobil Corporation ("Exxon") (collectively, the "Energy Companies") have contributed significantly to the changing climate in Colorado by producing, marketing, and selling fossil fuels. And the Municipalities allege the Energy Companies have continued their fossil-fuel activities even though they knew these activities would change the climate dramatically. The Municipalities further allege the Energy Companies concealed and/or misrepresented the dangers associated with the burning of fossil fuels despite having been aware of those dangers for decades.

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[1] When courts review a notice of removal for jurisdiction, they may consider the complaint as well as documents attached to the notice of removal. *See McPhail v. Deere & Co.*, 529 F.3d 947, 955–56 (10th Cir. 2008). Thus, we take these facts from the Amended Complaint and the other documents attached to the Notice of Appeal.

2. Exxon's Outer Continental Shelf Leases

On appeal, the Energy Companies contend there is federal jurisdiction over the Municipalities' claims, in part, because Exxon and/or its affiliated companies have leased and continue to lease portions of the outer continental shelf of the United States ("OCS") pursuant to the Outer Continental Shelf Lands Act ("OCSLA") to extract fossil fuels. Accordingly, we include relevant background information about the OCS leases.

The OCS "is a vast underwater expanse" that begins several miles off the coastline and extends seaward for roughly two hundred miles. *Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588, 592 (D.C. Cir. 2015). The "subsoil and seabed" of the OCS "appertain to the United States and are subject to its jurisdiction and control." 43 U.S.C. § 1331(a). "Billions of barrels of oil and trillions of cubic feet of natural gas lie beneath the OCS." *Jewell*, 779 F.3d at 592.

Pursuant to the OCSLA, the Department of Interior ("DOI") administers a federal leasing program to develop and make use of the OCS's oil and gas resources. *See* 43 U.S.C. §§ 1334–1356b. The Interior Secretary "is authorized to grant to the highest responsible qualified bidder or bidders by competitive bidding . . . any oil and gas lease" on these submerged lands. 43 U.S.C. § 1337(a)(1). For decades, Exxon has participated in this competitive leasing program, and it continues to conduct operations under OCS leases.

By the terms of its OCS leases, Exxon is required to conduct drilling "in accordance with" federally approved exploration, development, and production plans and conditions. App. at 64 § 9. These plans must "conform to

sound conservation practices to preserve, protect, and develop minerals resources and maximize the ultimate recovery of hydrocarbons from the leased area." *Id.* § 10. Exxon is obligated to "exercise diligence in the development of the leased area and in the production of wells located thereon;" "prevent unnecessary damage to, loss of, or waste of leased resources;" and "comply with all applicable laws, regulations and orders related to diligence, sound conservation practices and prevention of waste." *Id.* Earlier OCS leases further provided, "[a]fter due notice in writing, the Lessee shall drill such wells and produce at such rates as the Lessor may require in order that the leased area or any part thereof may be properly and timely developed and produced in accordance with sound operating principles." *Id.* at 50 § 10. That provision is not included in the current leases.

The leases provide DOI officials reserve the right to obtain "prompt access" to facilities and records of private OCS lessees for the purpose of federal safety, health, or environmental inspections. *Id.* at 64 § 12. The government reserves a right of first refusal to purchase all materials "[i]n time of war or when the President of the United States shall so prescribe." *Id.* at 68 § 15(d). The government also requires that 20% of all crude or natural gas produced pursuant to drilling leases be offered "to small or independent refiners." *Id.* § 15(c).

B. Procedural History

1. The Claims

In this action, the Municipalities sue for damages allegedly caused by climate change. They assert a variety of claims under Colorado law, both common law and statutory, against the Energy Companies. Specifically, the Mu-

nicipalities allege claims of public nuisance; private nuisance; trespass; unjust enrichment; violation of the Colorado Consumer Protection Act, Colo. Rev. Stat. § 6-1-105(1), *et seq.*; and civil conspiracy. They do not allege any federal claims.

The Municipalities seek compensatory damages, remediation and/or abatement, treble damages, and costs and attorney fees. The Municipalities also ask that the Energy Companies be held jointly liable under Colorado Revised Statutes § 13-21-111.5(4) for "consciously conspir[ing] and deliberately pursu[ing] a common plan to commit tortious acts." *Id.* at 194–95. The Municipalities expressly do *not* seek to interfere with or impose liability based on the Energy Companies' speech; to "enjoin any oil and gas operations or sales in the State of Colorado, or elsewhere, or to enforce emissions controls of any kind;" to recover "damages or abatement relief for injuries to or occurring on federal lands;" or to impose liability based on any act potentially deemed lobbying or petitioning. *Id.* at 193. That is, the Municipalities do not ask the court "to stop or regulate" fossil-fuel production or emissions "in Colorado or elsewhere." *Id.* at 74. They instead request that the Energy Companies "help remediate the harm caused by their intentional, reckless and negligent conduct, specifically by paying their share of the costs [the Municipalities] have incurred and will incur because of [the Energy Companies'] contribution to alteration of the climate." *Id.*

2. The Notice of Removal and the District Court's Remand Order

After the Municipalities filed their Amended Complaint in Colorado state court, the Energy Companies filed a Notice of Removal in the United States District

Court for the District of Colorado. In that Notice, they asserted seven grounds for removal. Five of those grounds were under the general removal statute, 28 U.S.C. § 1441(a), allowing for removal of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction." Specifically, the Energy Companies contended that 28 U.S.C. § 1331 conferred original jurisdiction over the claims because (1) the Municipalities' claims arose only under federal common law; (2) the Clean Air Act ("CAA") completely preempted the state-law claims; (3) the claims implicated disputed and substantial "federal issues" under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005); (4) the claims arose from incidents that occurred in federal enclaves within the Municipalities' borders; and (5) original federal jurisdiction exists under the OCSLA. In addition, the Energy Companies asserted original federal jurisdiction was available under (6) the federal officer removal statute, 28 U.S.C. § 1442(a), and (7) the bankruptcy removal statute, 28 U.S.C. § 1452(a).

The Municipalities timely filed a Motion to Remand pursuant to 28 U.S.C. § 1447(c). In a detailed opinion, the district court rejected all asserted grounds for removal and remanded the action to state court.

3. The Appeal

The Energy Companies appealed the district court's remand order on six grounds, including the federal officer removal statute, 28 U.S.C. § 1442, pursuant to 28 U.S.C. § 1447(d). They argued that appealing the remand order under the federal officer removal statute gave this court jurisdiction to consider all the grounds for removal asserted, not just federal officer removal. On plenary re-

view, we disagreed and held that our jurisdiction was limited to the federal officer removal question. *Suncor Energy*, 965 F.3d at 819. Concluding that the requirements for federal officer removal had not been satisfied, we affirmed the district court's remand order without considering the other grounds for removal. *Id.* at 827.

The Supreme Court has now clarified that in circumstances such as the present, where federal officer removal is one of multiple grounds for removal, the entire order of remand is reviewable on appeal. *BP v. Mayor & City Council of Balt.*, 141 S. Ct. at 1543. Thus, our jurisdiction extends beyond the federal officer removal statute to all grounds advanced for federal jurisdiction over the action. The Court vacated our opinion and remanded to us for reconsideration. *See Suncor Energy*, 141 S. Ct. at 2667.

On remand from the Supreme Court, we requested supplemental briefing from the parties. The Municipalities seek affirmance of the district court's decision remanding the action to Colorado state court, and the Energy Companies again claim removal is proper.

II. DISCUSSION

On appeal, the Energy Companies challenge the district court's remand order, relying on six grounds for federal jurisdiction under § 1442, the federal officer removal statute, and § 1441, the general removal statute. Under § 1442, the Energy Companies contend Exxon acted under a federal officer, which establishes (1) federal officer removal. And under § 1441, they contend there is original federal jurisdiction over the Municipalities' claims because (2) the claims arise under federal common law; (3) the CAA completely preempts the Municipalities' state-law claims; (4) the claims necessarily raise substantial federal issues; (5) there is federal enclave jurisdiction; and

(6) the OCSLA establishes original federal jurisdiction over these claims.

We begin our analysis with a discussion of the relevant standard of review. Then, we discuss the merits of each proposed basis of federal subject-matter jurisdiction. Ultimately, we conclude the district court correctly rejected each ground, and we affirm the district court's remand order.

A. Standard of Review

"Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant." *Caterpillar Inc. v. Williams,* 482 U.S. 386, 392 (1987). "'Federal courts are courts of limited jurisdiction.'" *Gunn v. Minton,* 568 U.S. 251, 256 (2013) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). So "there is a presumption against our jurisdiction." *Merida Delgado v. Gonzales*, 428 F.3d 916, 919 (10th Cir. 2005) (quotation marks omitted).

The presumption against jurisdiction is manifested in "the deeply felt and traditional reluctance of th[e Supreme] Court to expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes." *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 379 (1959), *superseded on other grounds by statute*, The Jones Act, 45 U.S.C. § 59, *as recognized in Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). Thus, "statutes conferring jurisdiction on federal courts are to be strictly construed, and doubts resolved against federal jurisdiction." *United States ex rel. King v. Hillcrest Health Ctr., Inc.*, 264 F.3d 1271, 1280 (10th Cir. 2001) (quotation marks omitted). The Energy Companies, as the parties removing to federal court, bear the burden of establishing jurisdiction by a

preponderance of the evidence. *Dutcher v. Matheson*, 733 F.3d 980, 985 (10th Cir. 2013).

"We review the district court's ruling on the propriety of removal de novo." *Frederick v. Hartford Underwriters Ins. Co.*, 683 F.3d 1242, 1245 (10th Cir. 2012). We also apply de novo review to questions of federal subject-matter jurisdiction. *Navajo Nation v. Dalley*, 896 F.3d 1196, 1203 (10th Cir. 2018).

B. Grounds Asserted for Federal Jurisdiction

In our prior decision, we rejected the Energy Companies' reliance on § 1442, the federal officer removal statute. *Suncor Energy*, 965 F.3d at 819–27. Because the Supreme Court vacated our prior decision, we again consider that issue here. Then, we address each of the other grounds advanced for federal subject-matter jurisdiction, including a discussion of the district court's ruling on each issue.

1. 28 U.S.C. § 1442(a): Federal Officer Removal Jurisdiction

The Energy Companies argue there is federal jurisdiction and this action is removable because Exxon acted under a federal officer pursuant to its OCS leases.[2] The district court held that any control exercised by federal officers over Exxon's operations through the issuance of government leases to develop fossil fuels on the OCS was

[2] Exxon is the only party that allegedly acted under a federal officer. Section 1442, however, allows for independent removal of an entire case by "only one of several named defendants." *Akin v. Ashland Chem. Co.*, 156 F.3d 1030, 1034 (10th Cir. 1998). Thus, if Exxon can show it acted under a federal officer such that this case is removable under § 1442, the entire case is removable.

insufficient to trigger federal jurisdiction under § 1442. We agree.

The federal officer removal statute permits removal of a state court civil action "that is against or directed to . . . any officer (or any person acting under that officer) of the United States or of any agency thereof . . . for or relating to any act under color of such office." 28 U.S.C. § 1442(a)(1). The statute's "'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." *Mayor & City Council of Balt. v. BP P.L.C. (Baltimore II)*, 952 F.3d 452, 461 (4th Cir. 2020) (quoting *Watson v. Phillip Morris Cos., Inc.*, 551 U.S. 142, 150 (2007)), *vacated and remanded on other grounds by* 141 S. Ct. 1532 (2021).[3] Unlike other removal statutes, it should "be liberally construed to give full effect to th[at] purpose[]." *Colorado v. Symes*, 286 U.S. 510, 517 (1932).

Section 1442(a)(1) removal can apply to private persons "who lawfully assist" federal officers "in the performance of [their] official dut[ies]," *Davis v. South Carolina*, 107 U.S. 597, 600 (1883), meaning the private person must be "'authorized to act with or for [federal officers or agents] in affirmatively executing duties under . . . federal law,'" *Watson*, 551 U.S. at 151 (alterations in original)

[3] This is the appellate court's decision reviewing *Mayor & City Council of Balt. v. BP, P.L.C. (Baltimore I)*, 388 F. Supp. 3d 538, 565 (D. Md. 2019), *aff'd in part by* 952 F.3d 452 (4th Cir. 2020), which we cite later in this opinion. Because other cases we cite also name BP P.L.C. as a party, we distinguish these two cases by referring to the district court's opinion as *Baltimore I* and the appellate court's opinion as *Baltimore II*.

(quoting *City of Greenwood v. Peacock*, 384 U.S. 808, 824 (1966)). And § 1442(a)(1) also allows removal by private corporations. *Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 135–36 (2d Cir. 2008). In either case, private defendants may remove under § 1442(a)(1) if they can show (1) they acted under the direction of a federal officer, (2) the claim has a connection or association with government-directed conduct, and (3) they have a colorable federal defense to the claim or claims. 28 U.S.C. § 1442(a)(1); *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 296 (5th Cir. 2020); *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 254 (4th Cir. 2017); *see also Greene v. Citigroup, Inc.*, No. 99-1030, 2000 WL 647190, at *2 (10th Cir. May 19, 2000) (unpublished) (applying a similar three-part test for federal officer removal jurisdiction). Exxon has failed to establish the first element of federal officer removal jurisdiction.

"The statutory phrase 'acting under' describes 'the triggering relationship between a private entity and a federal officer.'" *Baltimore II*, 952 F.3d at 462 (quoting *Watson*, 551 U.S. at 149). "The words 'acting under' are broad," but "not limitless." *Watson*, 551 U.S. at 147. In this context, "under" describes a relationship between private entity and federal superior typically involving "'subjection, guidance, or control.'" *Id.* at 151 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 2765 (2d ed. 1953)). Thus, a "private person's 'acting under' must involve an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior." *Id.* at 152. This "help or assistance necessary to bring a private person within the scope of the statute does *not* include simply *complying* with the law[] . . . , even if the regulation is highly detailed and even if the private firm's activities are highly supervised and monitored." *Id.* at 152–53. Rather, "there must exist a 'special relationship' between" the private firm and

the federal superior. *Isaacson*, 517 F.3d at 137 (quoting *Watson*, 551 U.S. at 157).

In *Watson*, "the Court considered whether the Philip Morris Companies were 'acting under' a federal officer or agency when they tested and advertised their cigarettes in compliance with the Federal Trade Commission's [("FTC")] detailed regulations." *Id.* at 136. The defendants highlighted various lower court cases holding that government contractors could invoke § 1442 removal "at least when the relationship between the contractor and the [g]overnment is an unusually close one involving detailed regulation, monitoring, or supervision." *Watson*, 551 U.S. at 153. The Court unanimously rejected this attempt to equate the sufficiency of "close supervision" over private contractors to "intense regulation" of firms who are not operating under a governmental contract. *Id.*

The Court explained, "the private contractor [that is subject to sufficiently close supervision] is helping the [g]overnment to produce an item that it needs," unlike Phillip Morris, which was simply conducting its operations in compliance with federal law. *Id.* In other words, "[t]he assistance that private contractors provide federal officers goes beyond simple compliance with the law and helps officers fulfill other basic governmental tasks." *Id.*

In *Watson*, the Court illustrated a sufficient special relationship with the facts in *Winters v. Diamond Shamrock Chemical Co.*, 149 F.3d 387 (5th Cir. 1998), *overruled on other grounds by Latiolais*, 951 F.3d at 296. *Id.* at 153–54. *Winters* involved tort claims against Dow Chemical premised on the production of Agent Orange under a Department of Defense contract for use in the Vietnam War. 149 F.3d at 398. The Fifth Circuit determined that Dow satisfied the "acting under" element for federal officer removal based on "the government's detailed specifications

concerning the make-up, packaging, and delivery of Agent Orange, the compulsion to provide the product to the government's specifications, and the on-going supervision the government exercised over the formulation, packaging, and delivery of Agent Orange." *Id.* at 400. Dow "provid[ed] the [g]overnment with a product that it used to help conduct a war," and "at least arguably, . . . performed a job that, in the absence of a contract with a private firm, the [g]overnment itself would have had to perform." *Watson*, 551 U.S. at 154. As such, it had a "special relationship" with the government whereby it "help[ed] carry out[] the duties or tasks of the federal superior." *Id.* at 152, 157 (emphasis omitted); *see also Isaacson*, 517 F.3d at 137 (holding the "acting under" prong satisfied because Dow "received delegated authority" from the Pentagon "to provide a product [Agent Orange] that the [g]overnment was using during war" and that it would otherwise need to produce itself); *cf. Sawyer*, 860 F.3d at 255 (holding a private contractor "acted under" a federal superior by manufacturing boilers for use in U.S. Navy vessels).

Watson addressed one other "important" argument advanced in favor of § 1442 removal by a private corporation—that the FTC delegated testing authority to an industry-financed laboratory and that Philip Morris was "acting pursuant to that delegation." 551 U.S. at 153–54. The Court disagreed, finding "no evidence of any delegation of legal authority from the FTC to the industry association to undertake testing on the [g]overnment agency's behalf." *Id.* at 156. "Without evidence of some such special relationship, Philip Morris' analogy to [g]overnment contracting br[oke] down." *Id.* at 157.

This analysis of *Watson* and related caselaw indicates which types of contracts between federal superiors and

private firms are special enough to satisfy the "acting under" prong for § 1442 removal. The private firm must go beyond mere compliance with contractual terms, even if complex, and agree to help carry out the duties or tasks of the federal superior under that superior's strict guidance or control. And this closely supervised work must help federal officers fulfill basic government needs, accomplish key government tasks, or produce essential government products—that is, it must stand in for critical efforts the federal superior would need to undertake itself in the absence of a private contract. Wartime production is the paradigmatic example for this special relationship. Alternately, the "acted under" element may be established through the explicit contractual delegation of legal authority to act on the federal superior's behalf.

Here, Exxon's contractual relationship with the DOI does not meet these guidelines. By winning bids for leases to extract fossil fuels from federal land in exchange for royalty payments, Exxon is not assisting the government with essential duties or tasks. *See Baltimore II*, 952 F.3d at 465 (expressing skepticism "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"). Critically, the leases do not obligate Exxon to make a product specially for the government's use, as in *Winters*, *Isaacson*, and *Sawyer*.

The government can (and does) purchase some of the fuel produced by Exxon via its OCS leases, as it does from others in the marketplace. But the OCS leases do not require Exxon to tailor fuel production to detailed government specifications aimed at satisfying pressing federal needs. *Compare Winters*, 149 F.3d at 399 (referencing

precise government specifications for Agent Orange that "included use of the two active chemicals in unprecedented quantities for the specific purpose of stripping" vegetation), *with Washington v. Monsanto Co.*, 738 F. App'x 554, 555 (9th Cir. 2018) (unpublished) (explaining the government's off-the-shelf purchase of a defendant's product does not show that the government "supervised [the defendant's] manufacture . . . or directed [the defendant] to produce [the product] in a particular manner, so as to come within the meaning of 'act[ed] under'" (quoting 28 U.S.C. § 1442(a)(1))). Nor do the leases obligate Exxon to perform services for the government.

Additionally, the OCS leases do not appear to contemplate the type of "close supervision of the private entity by the [g]overnment" needed to bring a government contractor relationship within the meaning of § 1442. *Isaacson*, 517 F.3d at 137. As the district court reasoned, "the government does not control the manner in which [Exxon] drill[s] for oil and gas, or develop[s] and produce[s] the product," nor has Exxon "shown that a federal officer instructed [it] how much fossil fuel to sell." App. at 242; *accord Baltimore II*, 952 F.3d at 466 (noting that "the leases do not appear to dictate that [the d]efendants extract fossil fuels in a particular manner," "vest the government with control over the composition of oil or gas to be refined and sold to third parties," or "affect the content or methods of [the d]efendants' communications with customers, consumers, and others about [the d]efendants' fossil-fuel products" (citations and quotation marks omitted)). Furthermore, many of the terms in the OCS leases "are mere iterations of the OCSLA's regulatory requirements," and compliance with such requirements, no matter their level of complexity, cannot by itself trigger the "acting under" relationship. *Baltimore II*, 952 F.3d at 465; *see also Watson*, 551 U.S. at 152.

The Energy Companies attack these conclusions by contending that "the operative leases explicitly afford the federal government the right to control the rates of mining and production." Appellants Br. at 40. The support for this argument comes from a provision in the 1979 lease, which states, "[a]fter due notice in writing, the Lessee shall drill such wells and produce at such rates as the Lessor may require in order that the leased area . . . may be properly and timely developed . . . ." App. 50 § 10. But there is also no allegation that the government ever actually directed Exxon's drilling activity or rates of production through its OCS land leases.

The same goes for the Energy Companies' citation to the government's wartime right of first refusal. Even if the exercise of these clauses would create the requisite level of federal supervision, the Energy Companies cite no authority for the proposition that the simple reservation of such rights by the government, without exercising those rights, places a contractor in the special relationship needed for a private firm to invoke the removal statute. *See Mays v. City of Flint*, 871 F.3d 437, 447 (6th Cir. 2017) (disagreeing with the "argument that this ability to intervene [by the federal government] supports the[] invocation of federal-officer removal" in the absence of actual intervention).

Last, Exxon cannot show the type of legal delegation that the *Watson* Court hypothesized would be sufficient to conclude a private corporation was "acting under" a government superior. None of the provisions of the OCS leases "establish the type of formal delegation that might authorize [defendants] to remove the case." *Watson*, 551 U.S. at 156. And "neither Congress nor federal agencies normally delegate legal authority to private entities without saying that they are doing so." *Id.* at 157.

Because Exxon has not established that it acted under a federal officer by complying with the terms of its OCS leases, we do not need to reach the remaining elements for federal officer removal. We hold that the Energy Companies have not established federal officer removal jurisdiction and affirm the district court on this removal ground.

2. 28 U.S.C. § 1441: Original Jurisdiction

The Energy Companies also contend that removal is available pursuant to 28 U.S.C. § 1441(a), the general removal statute, which allows for removal of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction." As relevant here, Congress has provided that federal "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. A defendant can remove an action provided at least one claim falls within original federal jurisdiction. 28 U.S.C. § 1367(a); *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 563 (2005).

On appeal, the Energy Companies claim federal jurisdiction exists under § 1441 and § 1331 on five separate grounds. First, they contend the Municipalities' claims arise under federal common law. Second, they claim federal jurisdiction exists because the CAA completely preempts the state-law claims. Third, the Energy Companies argue the Municipalities' claims necessarily raise substantial issues of federal policy. Fourth, they assert federal enclave jurisdiction. Fifth, they argue there is original federal jurisdiction under the OCSLA. We begin with an overview of the limitations of § 1331 jurisdiction, then we discuss how those principles apply to each of the five grounds asserted for federal jurisdiction.

a. 28 U.S.C. § 1331

Although § 1331 mirrors the "arising under" jurisdictional grant in Article III, statutory federal-question jurisdiction is interpreted more restrictively than its constitutional counterpart, which extends jurisdiction to all cases where a federal question is "'an ingredient'" of the action. *See Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 807 (1986) (quoting *Osborn v. Bank of the U.S.*, 22 U.S. 738, 823 (1824) (Marshall, C.J.)). "In exploring the outer reaches of § 1331," the Court has emphasized that "determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system." *Id.* at 810. And it has "forcefully reiterated" that this jurisdictional inquiry necessitates "prudence and restraint." *Id.*

i. The well-pleaded complaint rule

The Supreme Court has cabined jurisdiction under § 1331 by application of the well-pleaded complaint rule, which provides "that the federal question must appear on the face of a well-pleaded complaint and may not enter in anticipation of a defense." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 494 (1983). As a result, the well-pleaded complaint rule is a "powerful doctrine" that "severely limits the number of cases in which state law 'creates the cause of action' that may be initiated in or removed to federal district court." *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 9–10 (1983).

The rule is premised on the notion that the plaintiff is the "master of the claim" and may "avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar*, 482 U.S. at 392. Under the well-pleaded complaint rule, it has long been held that a "plaintiff may by the allegations of

his complaint determine the status with respect to removability." *Great N. Ry. Co. v. Alexander*, 246 U.S. 276, 282 (1918). And the defendant's assertion of a defense based on federal law does not transform claims based on state law into a removable federal question. *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152–54 (1908). Indeed, a federal defense, including preemption, cannot support removal "even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the federal defense is the only question truly at issue in the case." *Franchise Tax Bd.*, 463 U.S. at 14.

"[F]ederal jurisdiction attaches when federal law creates the cause of action asserted." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 578 U.S. 374, 383 (2016). The creation test "accounts for the vast bulk of suits that arise under federal law." *Gunn*, 568 U.S. at 257. But there are two exceptions to the well-pleaded complaint rule: (1) the state-law claims are artfully pleaded/completely preempted by federal law and (2) the state-law claims necessarily raise a substantial, disputed federal question. *Devon Energy Prod. Co., L.P. v. Mosaic Potash Carlsbad, Inc.*, 693 F.3d 1195, 1203–04 (10th Cir. 2012). Because the exceptions are relevant to this appeal, we describe them here.

ii. Complete preemption/artful pleading exception

Complete preemption is a term of art for an exception (or an independent corollary) to the well-pleaded complaint rule. *Schmeling v. NORDAM*, 97 F.3d 1336, 1339 (10th Cir. 1996). Sometimes complete preemption is also known as artful pleading. "If a court concludes that a plaintiff has 'artfully pleaded' claims" by excluding necessary federal questions from the pleadings, "it may uphold removal even though no federal question appears on the face of the plaintiff's complaint." *Rivet v. Regions Bank of*

La., 522 U.S. 470, 475 (1998). The Supreme Court treats the "artful pleading" and "complete preemption" doctrines as indistinct. *See id.*[4] Thus, "[t]he artful pleading doctrine allows removal where federal law completely preempts an asserted state-law claim." *Id.*

Complete preemption applies when "the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" *Caterpillar*, 482 U.S. at 393 (quoting *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987)). When this happens, the state-law cause of action becomes "purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of" the federal law. *Franchise Tax Bd.*, 463 U.S. at 23. Upon the doctrine's proper invocation, "a complaint alleging only a state law cause of action may be removed to federal court on the theory that federal preemption makes the state law claim 'necessarily federal in character.'" *Schmeling*, 97 F.3d at 1339 (quoting *Metro. Life*, 481 U.S. at 63–64).

To determine whether a state-law claim is completely preempted by federal law, we apply a two-step analysis: "first, we ask whether the federal question at issue preempts the state law relied on by the plaintiff; and second, whether Congress intended to allow removal in such

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[4] "The absence from Justice Ginsburg's [*Rivet*] opinion of any reference to a category of artful pleading that is conceptually distinct from the complete preemption doctrine hints that completely preempted claims may be the only claims to which the artful-pleading doctrine should apply." 14C CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3722.1 (Rev. 4th ed. 2021).

a case, as manifested by the provision of a federal cause of action." *Dutcher*, 733 F.3d at 985–86 (quotation marks omitted). Because the first prong implicates the merits of an ordinary preemption defense, which cannot support removal, the removal analysis begins with the second prong. *See Metro. Life*, 481 U.S. at 66 ("[T]he touchstone of the federal district court's removal jurisdiction is not the 'obviousness' of the pre-emption defense but the intent of Congress.").

A part of the congressional intent analysis is whether there is "a potential federal cause of action," the existence of which "is critical" because "complete preemption is not the same as preemption." *Dutcher*, 733 F.3d at 986. "That is, a state cause of action may not be viable because it is preempted by a federal law—but only if federal law provides its own cause of action does the case raise a federal question that can be heard in federal court." *Id.* To completely preempt, "the federal cause of action need not provide the same remedy as the state cause of action." *Schmeling*, 97 F.3d at 1343. However, "the federal remedy at issue must vindicate the same basic right or interest that would otherwise be vindicated under state law." *Devon Energy*, 693 F.3d at 1207.

"'Complete preemption is a rare doctrine.'" *Id.* at 1204 (quoting *Cmty. State Bank v. Strong*, 651 F.3d 1241, 1260 n.16 (11th Cir. 2011)). The Supreme Court has recognized it in just three statutory contexts: § 301 of the Labor Management Relations Act, § 502 of ERISA, and usury actions under the National Bank Act. *Devon Energy,* 693 F.3d at 1204–05. This circuit has also recognized the complete preemptive effect of the Securities Litigation Uniform Standards Act. *See Anderson v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 521 F.3d 1278, 1283–84 (10th Cir. 2008).

iii. Substantial federal-question jurisdiction (*Grable* jurisdiction)

The Supreme Court has instructed that "a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law." *Grable*, 545 U.S. at 312. This is true "[e]ven though state law creates [a plaintiff's] causes of action" because a "case might still 'arise under' the laws of the United States if a well-pleaded complaint established that its right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties." *Franchise Tax Bd.*, 463 U.S. at 13. But this circumstance describes a "special and small category" of cases. *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 699 (2006).

A federal court can exercise federal-question jurisdiction over an action that pleads only state-law claims if those claims "require[] resolution of a substantial question of federal law in dispute between the parties." *Franchise Tax Bd.*, 463 U.S. at 13. The Supreme Court set out the standard for substantial question jurisdiction in *Grable*. The Court explained that the relevant question is, "does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Grable*, 545 U.S. at 314.

Like complete preemption, "[t]he 'substantial question' branch of federal question jurisdiction is exceedingly narrow." *Gilmore v. Weatherford*, 694 F.3d 1160, 1171 (10th Cir. 2012). It is not triggered by a "mere need to apply federal law in a state-law claim." *Grable*, 545 U.S. at 313. Nor can it be triggered solely by a federal defense, in keeping with the well-pleaded complaint rule. *Becker v.*

Ute Indian Tribe of the Uintah & Ouray Rsrv., 770 F.3d 944, 947 (10th Cir. 2014).

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Having discussed the limits of § 1331 federal jurisdiction, we now turn to the Energy Companies' grounds for removal jurisdiction under § 1331: (1) the claims arise under federal common law, (2) the CAA completely preempts the claims, (3) the claims raise a substantial federal issue, (4) there is federal enclave jurisdiction, and (5) there is original jurisdiction under the OCSLA.

b. Claims arise under federal common law

The Energy Companies argue there is federal-question jurisdiction over the Municipalities' state-law claims because they are governed by federal common law. The district court concluded federal common law did not create the cause of action because a federal common law claim was not alleged on the face of the Amended Complaint. Additionally, the district court determined that the federal common law did not completely preempt the state-law claims. The district court held that, at best, the argument that the Municipalities' "state law claims are governed by federal common law [would] be a matter of ordinary preemption," which is "a defense to the complaint, and does not render a state-law claim removable." App. at 215–16.

It is undisputed that the Municipalities did not explicitly allege a claim under federal common law in the Amended Complaint. But the Energy Companies contend the Municipalities drafted their Amended Complaint to conceal the federal character of their claims. We begin by considering whether federal common law governs claims

related to climate change, as the Energy Companies contend. Then, we turn to the question of whether the federal common law creates the Municipalities' causes of action.

i. Relevant case law

"There is no federal general common law," *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), but there remain limited areas of "'specialized federal common law,'" *Am. Elec. Power Co., Inc. v. Connecticut (AEP)*, 564 U.S. 410, 421 (2011) (quoting Friendly, *In Praise of* Erie—*And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405 (1964)). "The cases in which federal courts may engage in common lawmaking are few and far between." *Rodriguez v. FDIC*, 140 S. Ct. 713, 716 (2020). Among them is when "a federal rule of decision is 'necessary to protect uniquely federal interests.'" *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964)). The Energy Companies assert that the Municipalities' claims here are governed by the federal common law of transboundary pollution. Accordingly, we begin with a discussion of the primary caselaw on which the Energy Companies rely.

In *Illinois v. City of Milwaukee (Milwaukee I)*, 406 U.S. 91, 93 (1972), Illinois filed an original complaint in the Supreme Court on a theory of public nuisance against Milwaukee and several other Wisconsin cities for allegedly polluting Lake Michigan. The Court first held that cases arising under federal common law fall under the ambit of § 1331. *Id.* at 100. While ultimately declining to exercise original jurisdiction over the substantive claims, the Court stated, "there is a federal common law" concerning "air and water in their ambient or interstate aspects." *Id.* at 103. In this area, "federal law governs," and "state statutes or decisions are not conclusive." *Id.* at 105, 107. But

the Court projected "that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance." *Id.* at 107.

In the 1970s, Congress passed major updates to the Clean Water Act. *City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304, 308 (1981). After these amendments, Illinois and Michigan filed a separate suit in federal district court under federal common law, seeking abatement of the public nuisance allegedly created by Lake Michigan sewage discharges. *Id.* at 310. The district court resolved the action in Illinois's favor. *Id.* at 312. The Seventh Circuit agreed that the federal common law of nuisance survived the 1972 amendments to the Water Pollution Control Act but held that courts should look to the amendments' "'policies and principles for guidance.'" *Id.* at 312 (quoting *Illinois v. City of Milwaukee*, 599 F.2d 151, 164 (7th Cir. 1979), *vacated & remanded by* 451 U.S. 304). The defendants appealed, and in *Milwaukee II*, the Court considered "the effect of this legislation on the previously recognized cause of action." *Id.* at 308. As detailed below, the Supreme Court disagreed about the effects of the amendments and vacated the Seventh Circuit's decision.

The Court explained that in the absence of congressional action, "and when there exists a 'significant conflict between some federal policy or interest and the use of state law,' the Court has found it necessary, in a 'few and restricted' instances, to develop federal common law." *Id.* at 313 (first quoting *Wallis v. Pan Am. Petrol. Corp.*, 384 U.S. 63, 68 (1966); and then quoting *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963)). This exercise is only "a 'necessary expedient,'" however, "and when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears."

Id. at 314 (quoting *Comm. for Consideration of Jones Falls Sewage Sys. v. Train*, 539 F.2d 1006, 1008 (4th Cir. 1976)). The Court ruled that the "self-consciously comprehensive" water pollution amendments left "no room for courts to attempt to improve on that program with federal common law." *Id.* at 319.

In rejecting Illinois's argument that the Act's savings provision, § 510, preserved federal common law, the Court further stated,

> It is one thing . . . to say that States may adopt more stringent limitations through state administrative processes, *or even that States may establish such limitations through state nuisance law, and apply them to in-state discharges*. It is quite another to say that the States may call upon *federal* courts to employ *federal* common law to establish more stringent standards applicable to out-of-state dischargers.

Id. at 327–28 (first emphasis added). Thus, the amendments to the Clean Water Act displaced the federal common law for water-based transboundary pollution.

What *Milwaukee II* did to the federal common law of interstate water pollution, *AEP* did to the federal common law of interstate air pollution. In *AEP*, several states sued a few power companies and the Tennessee Valley Authority in federal court, asserting the companies' CO_2 emissions contributed to global warming and interfered with public rights in violation of the federal common law of interstate nuisance, or, in the alternative, state tort law. 564 U.S. at 418. They sought injunctive relief in the form of emissions caps. *Id.* at 419. The Second Circuit held the plaintiffs had stated a claim under the "'federal common law of nuisance,'" but the Court reversed. *Id.* (quoting

Connecticut v. Am. Elec. Power Co., Inc., 582 F.3d 309, 358, 371 (2d Cir. 2009), *rev'd by* 564 U.S. 410).

The Court first noted the history of "federal common-law suits brought by one State to abate pollution emanating from another State," where "borrowing the law of a particular State would be inappropriate." *Id.* at 421–22. But it said determining whether "the plaintiffs could state a federal common-law claim for curtailment of greenhouse gas emissions because of their contribution to global warming" was now "an academic question," because "the [CAA] and the EPA actions it authorizes displace any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired powerplants." *Id.* at 423–24.

In closing, the Court briefly addressed the plaintiffs' state-law nuisance claims. It first noted that if a case "should be resolved by reference to federal common law[,] . . . state common law [is] pre-empted." *Id.* at 429 (quoting *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987)). Thus, due to the Court's "holding that the [CAA] displaces federal common law, the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act." *Id.* (citing *Ouellette*'s "holding that the Clean Water Act does not preclude aggrieved individuals from bringing a 'nuisance claim pursuant to the law of the *source* State'" (quoting 479 U.S. at 497)). But because no party briefed preemption or "the availability of a claim under state nuisance law," the Court left the matter open. *Id.*

The Ninth Circuit applied *AEP* in *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012). There, an Alaskan village sued various energy producers, including Exxon, for climate change-related harms in federal district court, alleging violation of the

federal common law of nuisance. *Id.* at 854. Kivalina's claims were slightly different than those of the *AEP* plaintiffs: it sought damages for harm caused by past emissions rather than emissions abatement. *Id.* at 857. But "the type of remedy asserted is not relevant to the applicability of the doctrine of displacement." *Id.* "When Congress has acted to occupy the entire field"—as it did through the CAA in regard to domestic greenhouse gas emissions—"that action displaces any previously available federal common law action." *Id.* "Thus, *AEP* extinguished Kivalina's federal common law public nuisance damage action, along with the federal common law public nuisance abatement actions." *Id.* In other words, the federal common law of nuisance that formerly governed transboundary pollution suits *no longer exists* due to Congress's displacement of that law through the CAA.[5] "Simply put,"

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[5] Even if the pre-*AEP* federal common law of transboundary pollution remained viable, however, it is unclear whether our case is properly placed within that realm. In *AEP*, the Court recognized this "specialized federal common law" as applying to "suits brought by *one State* to abate pollution emanating from *another State*," and did not decide "whether private citizens . . . or political subdivisions . . . of a State may invoke the federal common law of nuisance to abate out-of-state pollution." *Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 421–22 (2011) (emphasis added). Thus, it is an "open question" whether the Municipalities are "the type of part[ies] that can bring a federal common law nuisance claim." *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 866 (9th Cir. 2012) (Pro, J., concurring). It is also unsettled whether the federal common law of interstate pollution covers suits brought against product sellers rather than emitters—suits in which "out-of-state third-party emitters" are only "steps in the causal chain." Appellee Br. at 27. While several district courts have held it does, basing removal on an unsettled question of federal common law would cut against "the need for careful judgments about the exercise of federal judicial power in an area of uncertain jurisdiction." *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 814 (1986).

this case could "not have been removed to federal court on the basis of federal common law that no longer exists." *Cnty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 937 (N.D. Cal. 2018), *aff'd in part*, 960 F.3d 586 (9th Cir. 2020), *vacated on other grounds*, 141 S. Ct. 2666 (2021) (Mem.).

Kivalina also brought a state-law nuisance claim, which the district court dismissed without prejudice, and without being addressed by the Ninth Circuit majority. In a concurring opinion, Judge Pro stressed that Kivalina may have retained its causes of action under state law: "Once federal common law is displaced, state nuisance law becomes an available option to the extent it is not preempted by federal law." *Kivalina*, 696 F.3d at 866 (relying upon *AEP*'s statement that "the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act" (quoting 564 U.S. at 429)). Judge Pro therefore concluded that "Kivalina may pursue whatever remedies it may have under state law to the extent their claims are not preempted." *Id.*

Thus, the question is whether the federal act that displaced the federal common law preempted the state-law claims. And because *ordinary* preemption can never serve as a basis for removal, a state lawsuit brought under state law in the transboundary pollution context could be removed by means of a federal question only through the doctrine of *complete* preemption.

In sum, the Energy Companies' argument that the Municipalities' claims "arise under" federal common law fails because the reliance on only state-law claims leaves complete preemption as the sole path for federal removal jurisdiction. As instructed in *AEP* and supported by *Kivalina*, we look to the federal act that displaced the federal common law to determine whether the state claims

are preempted. In this case, that would be the CAA. Before considering whether the CAA completely preempts the field, however, we pause to address the Energy Companies argument that the Municipalities artfully pleaded their state-law claims to avoid the federal nature of their federal common law claims.

ii. Artful pleading/complete preemption

The Energy Companies assert that despite stating only state-law claims, it is nonetheless clear from the face of the complaint that "federal common law supplies the rule of decision for th[e]se claims." Appellants Br. at 26. For the reasons we now explain, we reject this argument.

While the Energy Companies assert their argument is "not merely a question of pleading," Reply Br. at 7, they essentially contend the Municipalities have engaged in "artful pleading" by attempting to conceal the federal character of their claims in state garb, *see* Appellants Br. at 26 (citing a portion of a district court opinion that references "artful pleading"); Reply Br. at 7–8 (quoting a section of Wright & Miller's treatise titled "Removal Based on Artful Pleading" for the proposition that "a plaintiff cannot 'block removal' by attempting to 'disguise [an] inherently federal cause of action'" (quoting 14C CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3722.1 (2d ed. 2019))). This reliance on the "artful pleading" exception to the well-pleaded complaint rule, however, is misplaced. For purposes of federal subject-matter jurisdiction, we look to the face of the complaint and assess whether the plaintiff has advanced a federal claim. *Verlinden*, 461 U.S. at 494. It is only when the merits of a defense based on "complete preemption" are considered that the court is free to look behind the plaintiff's chosen claims to determine whether federal law has completely preempted the area.

As noted, complete preemption requires congressional intent. S*ee Metro. Life*, 481 U.S. at 65–66. Because federal common law is created by the judiciary—not Congress—Congress has not "clearly manifested an intent" that the federal common law for transboundary pollution will completely preempt state law. *Id.* at 66. Therefore, the federal common law for transboundary pollution cannot *completely* preempt the Municipalities' state-law claims. *See Marcus v. AT&T Corp.*, 138 F.3d 46, 54 (2d Cir. 1998) (applying the same reasoning and holding that "federal common law does not completely preempt state law claims in the area of interstate telecommunications").

The importance of the procedural posture of the lawsuit for purposes of removal jurisdiction was recently emphasized by the Second Circuit in *City of New York v. Chevron Corp.,* 993 F.3d 81 (2d Cir. 2021). There, the city brought state nuisance claims against various multi-national oil companies, alleging the companies were liable for damages caused by global warming. *Id.* at 88. Importantly, the city initiated the action in federal court, and thus, the issues before the district court and the circuit were not within the context of removal. *Id.* Instead, the district court granted the oil companies' motions to dismiss the action under Federal Rule of Civil Procedure 12(b)(6) because the CAA displaced the city's common law claims with respect to domestic emissions, and "judicial caution counseled against" entertaining the city's claims based on foreign greenhouse emissions. *Id.* at 88–89.

On appeal, the Second Circuit affirmed on the same grounds. *Id.* at 89–103. Importantly for our purposes, the circuit court acknowledged and explained the tension between its conclusion that federal common law displaced the city's state-law claims and the "parade of recent opinions holding that 'state-law claims for public nuisance

brought against fossil-fuel producers do not arise under federal law.'" *Id.* at 93 (quoting *City of Oakland v. BP P.L.C.*, 960 F.3d 570, 575 (9th Cir. 2020), *amended & superseded on denial of reh'g*, 969 F.3d 895 (9th Cir. 2020)). The court explained that each of the decisions that concluded federal common law did not preempt the plaintiff's state-law claims had done so in different procedural context—removal. *Id.* Unlike in the removal context, the Second Circuit was permitted to consider the defendants' *ordinary* preemption defense when analyzing whether the city had failed to state a claim.

In the removal context, however, only *complete* preemption can support removal. And because the federal common law does not *completely* preempt state law, removal is not warranted under the artful pleading or complete preemption exception to the well-pleaded complaint rule. The Municipalities have pleaded only state-law causes of action. And at this stage of the proceedings, we do not look behind those allegations.[6]

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[6] The Energy Companies raise an alternative basis for jurisdiction under the federal common law in their supplemental brief. First, they assert that "the Ninth Circuit erred by analyzing the federal-common-law argument under the *Grable* framework" in *City of Oakland v. BP PLC*, 969 F.3d 895, 906 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2776 (2021). Appellants Supp. Br. at 13. But they also say, "[e]ven if the Ninth Circuit were correct to invoke the *Grable* framework" in relation to the federal common law, it would support removal. *Id.* The Energy Companies did not raise this argument in their opening brief. They also failed to raise this argument in their Notice of Removal, and they do not argue that plain error would result if we did not reverse the district court on this ground. Thus, the Energy Companies waived this argument. *See Sawyers v. Norton*, 962 F.3d 1270, 1286 (10th Cir. 2020) ("Issues not raised in the opening brief are deemed abandoned or waived." (quotation marks omitted)); *United States v. Leffler*, 942 F.3d 1192, 1196 (10th Cir. 2019) ("When an appellant fails to preserve an issue and also fails to make a plain-error argument on

c. CAA Complete Preemption

Having determined that the federal common law does not completely preempt the state-law claims, we now consider whether the federal act that displaced the federal common law—the CAA—completely preempts them. The district court held that it does not, reasoning that the CAA does not govern the sale of fossil fuels, and it "expressly preserves many state common law causes of action." App. at 228. "From this," the district court determined "Congress did not intend the [CAA] to provide exclusive remedies in these circumstances, or to be a basis for removal under the complete preemption doctrine." *Id.* The district court explained that the preemption argument based on emissions standards must "be resolved in connection with an ordinary preemption defense, a matter that does not give rise to federal jurisdiction." *Id.* at 232.

The Energy Companies point to two provisions of the CAA they claim completely preempt the state-law claims. First, they highlight the CAA's citizen-suit provision authorizing private challenges to rulemakings, or the absence of such rulemakings, by the EPA. *See* 42 U.S.C. § 7604(a). Second, they rely on the CAA's "path for private parties to petition EPA to undertake new rulemakings, the response to which is reviewable in federal

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appeal, we ordinarily deem the issue waived."). For this reason, we decline to consider *Grable* jurisdiction as it relates to the federal common law in this appeal. *See* 14C CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3733 (Rev. 4th ed. 2021) (explaining "defendants may not add completely new grounds for removal . . . , and the court will not, on its own motion, retain jurisdiction on the basis of a ground that is present but that defendants have not relied upon" in their notice of removal).

court." Appellants Br. at 35 (citing 42 U.S.C. § 7607(b)(1) and 5 U.S.C. § 553(e)). But neither provision establishes complete preemption.

The Energy Companies acknowledge complete preemption applies when "a federal statutory scheme 'provide[s] the *exclusive* cause of action for the claim asserted.'" Appellants Br. at 34 (quoting *Beneficial Nat'l Bank v. Anderson*, 539 U.S. at 8) (emphasis added). But the CAA does not provide an exclusive federal cause of action for suits against private polluters, nor does it completely displace all state law in that area. To the contrary, § 7604 says "[n]othing in this section shall restrict any right which any person . . . may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief." 42 U.S.C. § 7604(e). Indeed, we have recognized that "[t]he purpose of the [CAA] is to control and improve the nation's air quality *through a combination of state and federal regulation*." *Ariz. Pub. Serv. Co. v. EPA*, 562 F.3d 1116, 1118 (10th Cir. 2009) (emphasis added). In other words, the CAA is designed to provide a floor upon which state law can build, not a ceiling to stunt complementary state-law actions. *See* 42 U.S.C. § 7416 (stating nothing in the CAA "shall preclude or deny the right of any State or political subdivision thereof" to adopt an emissions standard or limitation more stringent than the federal version); *id.* § 7412(r)(11) (similar provision regarding "prevention of accidental releases"). "A statute that goes so far out of its way to preserve state prerogatives cannot be said to be an expression of Congress's 'extraordinary pre-emptive power' to convert state-law into federal-law claims." *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142, 150 (D.R.I. 2019) (quoting *Metro. Life*, 481 U.S. at 65).

Even setting aside this savings clause, § 7604(a) creates causes of action against private companies only in specified circumstances that are not present here. Section 7604(a)(1) allows a private action for the violation of a CAA emissions standard, a limitation established by the CAA, or the violation of an official order; § 7604(a)(2) allows a private action against the Administrator for failing to perform a nondiscretionary act or duty; and § 7604(a)(3) permits a private suit for the construction (or proposed construction) of an emitting facility without the required federal permit, or for the violation of the conditions of such a permit. The Municipalities' claims do not concern CAA emissions standards or limitations, government orders regarding those standards or limitations, or federal air pollution permits. Indeed, their suit is not brought against emitters. Rather, the Municipalities' claims are premised on the Energy Companies' activities of "knowingly producing, promoting, refining, marketing and selling a substantial amount of fossil fuels used at levels sufficient to alter the climate, and misrepresenting the dangers." App. at 173. Section 7604(a) expressly does not "vindicate the same basic right or interest" as the Municipalities' state-law claims, *Devon Energy*, 693 F.3d at 1207, and thus cannot completely preempt those claims.

The same is true with respect to § 7607(b)(1), which governs judicial review of administrative proceedings. This section lays out the procedure for filing in a federal court "[a] petition for review of action of the [EPA] Administrator" taken under the CAA. As such, it does not "vindicate the same basic right or interest" as the Municipalities' state-law claims, *Devon Energy*, 693 F.3d at 1207, nor do those claims "duplicate[], supplement[], or supplant[]" § 7607(b)(1), *Aetna Health Inc. v. Davila*, 542 U.S. 200, 209 (2004). Indeed, § 7607(b)(1) does not allow for suits against private parties at all.

In *Devon Energy*, we held the availability of judicial review of federal administrative action does not displace comparable state-law claims against private parties. 693 F.3d at 1207. There, Devon, an oil and gas producer, mistakenly drilled a well at a location in New Mexico's "Potash Area"—a mineral-rich reserve managed by the federal Bureau of Land Management ("BLM")—without BLM permission. *Id.* at 1198. BLM subsequently reviewed and approved the placement of Devon's Apache Well. *Id.* at 1199. Mosaic, a potash mining company, claimed that Devon's initial mistaken placement of the Apache Well had wasted resources and caused Mosaic damage. *Id.* Unable to reach a settlement, Devon sued Mosaic in federal court, seeking "a declaratory judgment that federal law completely preempted Mosaic's anticipated state-law claims emanating from Devon's unauthorized drilling." *Id.* at 1198. Devon asserted that Mosaic's only available remedies were "the federal administrative and judicial remedies under the Administrative Procedure Act." *Id.* at 1200 (quotation marks omitted).

This court disagreed: "While Mosaic may have been able to appeal the BLM's approval of the Apache Well, the availability of an administrative remedy *against the BLM* has no bearing on whether Mosaic's state law claims *against Devon* have been completely supplanted by a private federal cause of action." *Id.* at 1207 (quotation marks omitted). Mosaic was not challenging federal agency action or inaction but rather those actions taken by the private party, Devon, that resulted in injury to Mosaic. "Thus, even if pursuing relief through the APA might ultimately have resulted in the Apache Well being plugged and abandoned, it would not have compensated Mosaic for any damages stemming from Devon's initial act of drilling at an unapproved well site." *Id.* As a result, the APA did

not provide a federal cause of action comprehensive enough to *completely* preempt related state-law claims.

This logic bars § 7607(b)(1) from serving to completely preempt the Municipalities' state-law claims. Even if those claims could be characterized as challenges to the air quality and emissions standards covered by the CAA, the availability of an administrative remedy against EPA would have no bearing on whether the Municipalities' state-law claims against the Energy Companies are completely preempted by a private federal cause of action. And even if pursuing relief against EPA through § 7607(b)(1) might ultimately lead to lower emissions in Colorado, it would not compensate the Municipalities for damages stemming from the Energy Companies' allegedly tortious fossil-fuel activities, which is the compensation they seek in this suit.[7]

The courts that have considered this question agree the CAA does not completely preempt this type of climate change action.[8] We agree with these well-reasoned decisions and affirm the district court's rejection of complete preemption by the CAA as a basis for federal jurisdiction.

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[7] Because neither of the CAA provisions highlighted by the Energy Companies "vindicate the same basic right or interest" as the Municipalities' state-law claims, *Devon Energy Prod. Co., L.P. v. Mosaic Potash Carlsbad, Inc.*, 693 F.3d 1195, 1207 (10th Cir. 2012), it is unnecessary to address the significance of the absence of any cause of action for damages in the CAA.

[8] *See City of Oakland v. BP PLC*, 969 F.3d at 907–08 (9th Cir. 2020) ("Thus, the [CAA] satisfies neither requirement for complete preemption."); *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142, 150 (D.R.I. 2019) ("[T]he CAA authorizes nothing like the State's claims, much less to the exclusion of those sounding in state law."); *Baltimore I*, 388 F. Supp. 3d at 562 (explaining "the absence of any indication that Congress intended for these causes of action in the

*d. Substantial federal-question jurisdiction (*Grable *jurisdiction)*

Next, the Energy Companies argue that the Municipalities' state-law claims necessarily raise disputed, substantial federal issues suitable for federal court resolution—both because the claims relate to the federal government's conduct of foreign affairs and because they "amount to a collateral attack on cost-benefit analyses committed to, and already performed by, the federal government." Appellants Br. at 28. The elements for substantial federal question—or *Grable*—jurisdiction are that the "federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn*, 568 U.S. at 258.

The district court rejected the Energy Companies' argument that the Municipalities' "claims necessarily depend on a resolution of a substantial question" of federal policy. App. at 217. It determined that the Energy Companies had not cited any binding foreign policies or explained how this case would interfere with the policies they did cite. The district court also held that the policies the Energy Companies cited failed to satisfy two of the four elements for *Grable* jurisdiction: they were neither "necessarily raised" nor "substantial." *Id.* at 219–25. As discussed below, we similarly conclude the federal issues

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CAA to be the exclusive remedy for injuries stemming from air pollution" is "[f]atal to defendants' argument"); *Cnty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 938 (N.D. Cal. 2018) ("[T]he [CAA] and the Clean Water Act both contain savings clauses that preserve state causes of action and suggest that Congress did not intend the federal causes of action under those statutes 'to be exclusive.'" (quoting *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 9 n.5 (2003))).

asserted are neither necessary to the Municipalities' claims nor substantial to the federal system. As a result, this case does not fit within that "slim category" of state-law disputes that merit removal based on the presence of a substantial federal question. *Gunn*, 568 U.S. at 258.

i. Necessarily raised

"To determine whether an issue is 'necessarily' raised, the Supreme Court has focused on whether the issue is an 'essential element' of a plaintiff's claim." *Gilmore*, 694 F.3d at 1173 (quoting *Grable*, 545 U.S. at 315). For example, in *Grable*, the Court exerted federal-question jurisdiction over a state court action because the meaning of a federal statute "appear[ed] to be the only legal or factual issue contested." 545 U.S. at 315. Likewise, in *Smith v. Kansas City Title & Trust Co.*, "[t]he decision depend[ed] upon the determination of" "the constitutional validity of an act of Congress which [was] directly drawn in question," 255 U.S. 180, 201 (1921). And in *Merrill Lynch*, the Court confirmed federal-question jurisdiction would lie over a state court action brought to enforce a federal duty "because the claim's very success depends on giving effect to a federal requirement." 578 U.S. at 384.

The Energy Companies contend that the Municipalities' suit "implicates federal issues" because it "interfere[s] with" the federal government's longstanding "policy of pursuing economic growth rather than imposing emissions limits under imbalanced international agreements." Appellants Br. at 29–30. The Energy Companies attempt to establish this specific foreign policy by citing multiple federal sources from different branches of government that span four decades and feature different levels of binding legal effect. *Id.* at 28–30 (citing remarks by Presidents Ford and Trump, an executive order from President Reagan, a Senate resolution responding to

President Clinton's signing of the Kyoto Protocol, and several laws passed in the wake of that signing). Setting aside whether this asserted foreign policy can be pieced together from such a miscellaneous patchwork, the Energy Companies have not shown how the alleged foreign policy forms a necessary element of the Municipalities' claims.

The Energy Companies also argue that the Municipalities' nuisance claims necessarily raise a collateral attack on the federal government's "weighing of the costs and benefits of fossil-fuel production and use" and upset the "appropriate balance" regarding that delicate issue struck under federal administrative law. Appellants Br. at 30–31 (citing 42 U.S.C. § 13384, 43 C.F.R. § 3162.1(a), and Exec. Order No. 12,866 (1993)). This argument, however, also fails to show how these regulatory cost-benefit determinations are an essential element of the Municipalities' claims. As the district court reasoned, the Municipalities "do not allege that any federal regulation or decision is unlawful, or a factor in their claims, nor are they asking the [c]ourt to consider whether the government's decisions to permit fossil fuel use and sale are appropriate." App. at 221. Rather, any implied conflict between the Municipalities' state-law claims and federal cost-benefit determinations speaks to a potential defense on the merits of those claims, specifically a preemption defense, rather than to the jurisdictional issue.

The Energy Companies argue the Municipalities "aim to achieve through state tort law what they could not achieve in the federal legislative and regulatory process—namely, a determination that [the Energy Companies'] activities are unreasonable." Appellants Br. at 31. But this is simply a description of our federalist system, not a reason to override state sovereignty. That state common law

might provide redress for harm caused by certain private actors, and thereby create remedies unavailable to a plaintiff through the federal legislative or regulatory process, is entirely unremarkable. Allowing any mismatch in the priorities evinced through state and federal law to warrant removal, in the absence of a substantial federal issue necessarily raised in the complaint, would lead to a major diminution in the power of state courts to enforce their own laws. It would also deny a tenet of dual sovereignty—that state courts "have inherent authority, and are thus presumptively competent" to address federal issues, including federal defenses. *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990).[9]

The Municipalities assert state-law claims—for nuisance, trespass, unjust enrichment, civil conspiracy, and violation of Colorado's consumer protection law—based on the Energy Companies' knowing promotion and sale of fossil fuels at levels that allegedly caused damage in Colorado. Far from the situation where the meaning of federal law is "the *only* legal or factual issue contested," *Grable*, 545 U.S. at 315 (emphasis added), here *none* of the issues the Municipalities raise pertain to the meaning of these policy statements and federal regulations. The Municipalities can prevail on their claims without proving any issue of federal law because the success of those claims is grounded in traditional state-law causes of action and

[9] "And, of course, the absence of original jurisdiction does not mean that there is no federal forum in which a pre-emption defense may be heard. If the state courts reject a claim of federal preemption, that decision may ultimately be reviewed on appeal by this Court." *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 12 n.12 (1983).

does not depend on any federal policy or regulation. And the decision in this suit does not "depend[] upon the determination of" any federal policy, order, or regulation that is "directly drawn in question." *Smith*, 255 U.S. at 201. If these federal issues are raised, it will be by the Energy Companies as potential defenses, which cannot create a basis for removal. *See Becker*, 770 F.3d at 947 (stating substantial question jurisdiction cannot depend solely on a federal defense).

To be sure, there is a federal interest in promoting energy development. The Energy Companies, however, have failed to establish that a federal issue is a necessary element of the Municipalities' state-law claims.

ii. Substantial

Even if the Energy Companies have identified a federal issue that is a necessary element of the Municipalities' claims, however, the Energy Companies would still have to show that the federal issues are sufficiently substantial. The Supreme Court has applied two tests to determine whether a federal issue is sufficiently substantial. As explained in *Grable* and *Gunn*, courts should look to the importance of the issue to the federal system to determine whether it is substantial. *Gunn*, 568 U.S. at 260; *Grable*, 545 U.S. at 310. The Supreme Court suggested in *Merrell Dow* that courts should also consider whether the relevant federal law provides a private right of action or preempts state causes of action. *See* 478 U.S. at 812.[10] We

[10] The Energy Companies cite a three-part test from *Nicodemus v. Union Pacific Corp.*, 440 F.3d 1227, 1236 (10th Cir. 2006), for when "[a] case should be dismissed for want of a substantial federal question." Appellants Br. at 32; Reply Br. at 15. We have since recognized that the "sweeping language" in *Nicodemus* "regarding substantiality . . . may no longer be good law" after the Supreme Court's decision in *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677,

consider each substantiality test in turn, ultimately concluding the Energy Companies have failed to establish the federal issues are sufficiently substantial under either test.

1) *Grable/Gunn* substantiality

To satisfy *Grable*'s "substantial" prong, "it is not enough that the federal issue be significant to the particular parties in the immediate suit." *Gunn*, 568 U.S. at 260. "The substantiality inquiry under *Grable* looks instead to the importance of the issue to the federal system as a whole." *Id.*; *see Grable*, 545 U.S. at 310 (holding "that the *national interest* in providing a federal forum for federal tax litigation is sufficiently substantial to support the exercise of federal-question jurisdiction." (emphasis added)). Such importance to the system can be evaluated by assessing whether the federal issue "would be controlling in numerous other cases." *McVeigh*, 547 U.S. at 700. For example, "*Grable* presented a nearly 'pure issue of law,' one 'that could be settled once and for all and thereafter would govern numerous . . . cases." *Id.* (quoting R. Fallon, et al., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 65 (2005 Supp.)). In contrast, resolution of claims that are "fact-bound and situation-specific" would not have this precedential effect and would be insufficiently substantial. *Id.* at 701.

The important national interest test is not satisfied here. A prerequisite to establish a case as having importance "to the federal system as a whole" is to identify

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690, 700 (2006). *Gilmore v. Weatherford*, 694 F.3d 1160, 1175 n.3 (10th Cir. 2012). As such, we do not apply the test in *Nicodemus* and instead rely on the substantiality tests applied by the Supreme Court.

a concrete federal law or regulation that the case definitively implicates, which the Energy Companies have neglected to do. *Gunn*, 568 U.S. at 260. The Energy Companies broadly argue that this state suit "sits at the intersection of federal energy and environmental regulation and necessarily implicates foreign policy and national security." Appellants Br. at 32. But it is difficult to comprehend how the suit's resolution could have controlling effect across the federal system regarding any of these substantial issues when the Energy Companies fail to adequately tether their "national interest" argument to any specific federal law or laws.

It follows from this fundamental failure that this case, unlike *Grable*, does not present "a nearly 'pure issue of [federal] law'" for definitive resolution, *McVeigh*, 547 U.S. at 700, (quoting R. Fallon et al., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 65 (2005 Supp.)), or "a context-free inquiry into the meaning of a federal law," *Bennett*, 484 F.3d at 910. To the contrary, the resolution of the Municipalities' state-law claims promises to be "fact-bound"—because it is dependent on analyzing the fossil-fuel activities of the Energy Companies over a period of decades— and "situation-specific"—because it is dependent on establishing the damage to natural environment and property in Colorado due to climate change. *McVeigh*, 547 U.S. at 701. To the extent federal issues may be injected into the proceedings, it is nevertheless likely that state issues will still predominate because the Municipalities have pleaded only state-law claims. *See Bennett*, 484 F.3d at 910. Regardless, the injection of those federal issues would at most require "a fact-specific application of rules that come from both federal and state law." *Id.* Such a case fails the important national interest test for substantiality.

2) *Merrell Dow* substantiality

A federal issue may also be substantial when the relevant federal law provides a private right of action or preempts state remedies. *Grable*, 545 U.S. at 316 (citing *Merrell Dow*, 478 U.S. at 812). *Merrell Dow*'s analysis of § 1331 substantiality in the context of a state court tort suit is pertinent here.

In *Merrell Dow*, the plaintiffs sued a drug manufacturer in state court, alleging that use of Bendectin during pregnancy led to birth deformities. 478 U.S. at 805. Five of the six claims were common-law tort claims, and one claim alleged misbranding in violation of the Food, Drug, and Cosmetic Act ("FDCA"). *Id.* at 805–06. The complaint also alleged that the defendant's promotion of the relevant drug violated the FDCA, amounting to a rebuttable presumption of negligence, and that the defendant's FDCA violations directly and proximately caused the injuries. *Id.* at 806. The defendant removed the case based on this injection of federal law into the complaint, and the Sixth Circuit upheld jurisdiction.

The Supreme Court reversed. It reasoned the FDCA provided no federal private cause of action and the plaintiffs' tort cause of action was "a subject traditionally relegated to state law." *Id.* at 810–11. "Given the significance of the assumed congressional determination to preclude federal private remedies, the presence of the federal issue as an element of the state tort is not the kind of adjudication for which jurisdiction would serve congressional purposes and the federal system." *Id.* at 814. The Court further explained that Congress's decision not to include a federal remedy for a violation of the FDCA "is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state

cause of action is insufficiently 'substantial' to confer federal-question jurisdiction." *Id.*

The Court rejected the defendant's argument "that there is a powerful federal interest in seeing that the federal statute is given uniform interpretations, and that federal review is the best way of insuring such uniformity." *Id.* at 815. "To the extent that petitioner is arguing that state use and interpretation of the FDCA pose a threat to the order and stability of the FDCA regime," the Court determined that a preemption defense, not an attempted removal under § 1331, was the defendant's proper recourse. *Id.* at 816. And it also rejected the argument that "whether a particular claim arises under federal law depends on the novelty of the federal issue." *Id.* at 817. It determined that this would lead to inconsistencies across the federal courts. *Id.*

The *Merrell Dow* opinion also included an important footnote that attempted to reconcile the seemingly conflicting holdings on § 1331 substantial question removal in *Smith*, 255 U.S. 180, and *Moore v. Chesapeake & Ohio Railway Co.*, 291 U.S. 205 (1934). *Id.* at 814 n.12. The Court saw the difference in results "as manifestations of the differences in the nature of the federal issues at stake." *Id.* In *Smith*, where the Court found federal jurisdiction, "the issue was the constitutionality of an important federal statute." *Id.* Conversely, in *Moore*, where the Court did not find federal jurisdiction, "the Court emphasized that the violation of the federal standard as an element of state tort recovery did not fundamentally change the state tort nature of the action." *Id.*

The *Grable* Court clarified that *Merrell Dow* did not create a bright-line rule prohibiting substantial-question jurisdiction from being premised on a federal statute that

contained no private right of action. 545 U.S. at 317–18. *Grable* explained the import of *Merrell Dow*'s reasoning:

> The absence of any federal cause of action affected *Merrell Dow*'s result two ways. The Court saw the fact as worth some consideration in the assessment of substantiality. But its primary importance emerged when the Court treated the combination of no federal cause of action and no preemption of state remedies for misbranding as an important clue to Congress's conception of the scope of jurisdiction to be exercised under § 1331. The Court saw the missing cause of action not as a missing federal door key, always required, but as a missing welcome mat, required in the circumstances, when exercising federal jurisdiction over a state misbranding action would have attracted a horde of original filings and removal cases raising other state claims with embedded federal issues.

Id. at 318.

Here, none of the sources of federal law upon which the Energy Companies premise their attempted substantial-question removal contain a private cause of action, and none would be likely to preempt any of the Municipalities' state-law claims.[11] Absence of a congressionally crafted remedy, or of a single federal statute, regulation,

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[11] It is doubtful the federal provisions cited by the Energy Companies in their cost-benefit argument would preempt state law. Both 42 U.S.C. § 13384 and Exec. Order No. 12,866 impose only inter- and intra-branch directives, respectively. And 43 C.F.R. § 3162.1(a) simply requires federal oil and gas lessees to drill in a way that maximizes economic recovery and minimizes waste. The same is true of the cited laws relating to the Kyoto protocol. And the cited presidential statements and joint resolutions lack the power to preempt.

or other law that speaks directly to the alleged important federal issues, reveals the absence of the "welcome mat" required for a federal court to confidently accept jurisdiction over these state-law tort claims. *Id.*

This case also falls within *Merrell Dow*'s conception of a federal interest not critical enough to trigger substantial-question jurisdiction because, as in *Moore*, whatever federal issues exist "d[o] not fundamentally change the state tort nature of the action." 478 U.S. at 814 n.12; *see Moore*, 291 U.S. at 216–17 (reasoning that the presence of a federal statute as an element of the state-law cause of action did not confer federal jurisdiction, because "'the right of the plaintiff to recover was left to be determined by the law of the state'" (quoting *Minneapolis, St. Paul & Sault Ste. Marie R. Co. v. Popplar*, 237 U.S. 369, 372 (1915))). Finally, *Merrell Dow* rejects the argument that uniformity of interpretation is a sufficient reason to demand a federal forum to protect the federal interest when a preemption defense can be ably pursued in the state court action.

In summary, the standards set forth in *Grable*, *Gunn*, and *Merrell Dow* indicate that the Energy Companies' asserted federal interests are not substantial enough to support federal jurisdiction. Because these federal interests are neither "necessarily raised" nor sufficiently "substantial," we affirm the district court's rejection of this basis for removal.

e. Federal enclave jurisdiction

State-law "actions which arise from incidents occurring in federal enclaves may be removed to federal district court as a part of federal question jurisdiction." *Akin v. Ashland Chem. Co.*, 156 F.3d 1030, 1034 (10th Cir. 1998). The Energy Companies contend this doctrine allows for

removal of the Municipalities' claims because the Amended Complaint alleges injuries within federal enclaves. Specifically, they point to allegations of an insect infestation across Rocky Mountain National Park, an increased flood risk to San Miguel River in Uncompahgre National Forest, and "heat waves, wildfires, droughts, and floods" in both locations. Appellants Br. at 44 (quoting App. at 73, 80, 111, 116, 127). The district court held federal enclave jurisdiction does not support removal because although injury may have occurred to those federal enclaves, "[t]he actual injury for which [the Municipalities] seek compensation is injury to 'their property' and 'their residents,' occurring 'within their respective jurisdictions'" and not within the federal enclaves. App. at 237 (quoting *id.* at 73, 75, 193). We agree.

As the Municipalities note, Uncompahgre National Forest is mentioned nowhere in the Amended Complaint. And San Miguel River is not a federal enclave. The river runs through southwest Colorado for approximately 81 miles. *San-Miguel River*, AMERICAN RIVERS, https://www.americanrivers.org/river/san-miguel-river/ (last visited Jan. 1, 2022). The majority of that distance is outside Uncompahgre Forest's borders. The river crosses through the forest at only two brief junctures, each well under a mile. *See* San Miguel River, GOOGLE MAPS, http://www.google.com/maps/place/San+Miguel+River/ (last visited January 12, 2022). An increased flood risk to the San Miguel River thus cannot credibly be deemed an injury within a federal enclave.

It is true that the Amended Complaint references damage in Rocky Mountain National Park, but it does so only in passing, and not as the site of any injury that might trigger federal enclave jurisdiction. For example, the

Amended Complaint alleges "more severe insect outbreaks" across Colorado resulting from climate change, as evidenced in part by a recent outbreak in Rocky Mountain National Park that "was the most severe ever seen" in the state. App. 116. As the district court reasoned, the insect outbreak in the national park is referenced only "to provide an example of the regional trends that have resulted from [the Energy Companies'] climate alteration," *id.* at 237, with the actual alleged injury being "the bark beetle epidemics seen *across Colorado*," *id.* 116 (emphasis added).

The Energy Companies also argue the allegation that climate change will bring "heat waves, wildfires, droughts, and floods to the State" is an allegation of injury to Rocky Mountain and Uncompahgre because those enclaves exist within Colorado. *Id.* At 73. This theory sweeps far too broadly. The doctrine of federal enclave jurisdiction generally requires "that *all* pertinent events t[ake] place on a federal enclave." *Rosseter v. Indus. Light & Magic*, No. C 08-04545 WHA, 2009 WL 210452, at *1 (N.D. Cal. Jan. 27, 2009) (emphasis added); *accord Mayor & City Council of Balt. v. BP, P.L.C. (Baltimore I)*, 388 F. Supp. 3d 538, 565 (D. Md. 2019) ("[C]ourts 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." (collecting cases)). And even if we were to credit the Energy Companies' all-encompassing theory, the Municipalities expressly disclaimed any "damages or abatement relief for injuries to or occurring on federal lands." App. 195. Rather, they sought relief for only the negative "impacts within their respective jurisdictions." *Id.* at 73.

"That the alleged climate alteration by [the Energy Companies] may have caused similar injuries to federal

property does not speak to the nature of [the Municipalities'] alleged injuries," which are all "alleged to have arisen exclusively on non-federal land." App. at 238. We agree with the district court that there is no viable claim of federal enclave jurisdiction and affirm its rejection of removal based on that doctrine.

f. Outer Continental Shelf Lands Act

The Energy Companies assert federal jurisdiction exists under the OCSLA due to Exxon's decades-long OCS fossil-fuel operations pursuant to federal leases. The district court denied this argument, holding that "[a] case cannot be removed under OCSLA based on speculative impacts; immediate and physical impact is needed." App. at 248. Thus, the district court concluded, "[t]he fact that *some of* Exxon[]'s oil was apparently sourced from the OCS does not create the required direct connection." *Id.* at 246 (emphasis added). And it held the OCSLA was not grounds for federal jurisdiction.

The OCSLA provides that federal courts "shall have jurisdiction of cases and controversies arising out of, or in connection with . . . any operation conducted on the [OCS] which involves exploration, development, or production of [OCS] minerals." 43 U.S.C. § 1349(b)(1). To determine whether there is OCSLA jurisdiction, we consider "whether (1) the activities that caused the injury constituted an 'operation' 'conducted on the [OCS]' that involved the exploration and production of minerals, and (2) the case 'arises out of, or in connection with' the operation." *In re Deepwater Horizon*, 745 F.3d 157, 163 (5th Cir. 2014) (quoting 43 U.S.C. § 1349(b)(1)). The second prong of that test "require[s] only a but-for connection." *Id.* (internal quotation marks omitted).

The dispute here focuses on this second prong: whether the case arises out of or in connection with the OCS operation. Exxon argues this question should be answered in the affirmative because the Municipalities' claims "arise in part from [Exxon]'s operations on the [OCS]." Appellants Br. at 47. In response, the Municipalities argue OCSLA jurisdiction is founded on only "injuries arising *directly* out of physical activities on the OCS or disputes *directly* involving OCS activities." Appellee Br. at 52. We agree with the Municipalities.

The § 1349(b) jurisdictional test is designed to cover a "'wide range of activity occurring beyond the territorial waters of the states,'" *Barker v. Hercules Offshore, Inc.*, 713 F.3d 208, 213 (5th Cir. 2013) (quoting *Texaco Expl. & Prod., Inc. v. AmClyde Engineered Prods. Co.*, 448 F.3d 760, 768 (5th Cir. 2006), *amended on reh'g*, 453 F.3d 652 (5th Cir. 2006)), and to encompass "the entire range of legal disputes that [Congress] knew would arise relating to resource development on the [OCS]," *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.,* 754 F.2d 1223, 1228 (5th Cir. 1985). But while "[u]se of the but-for test implies a broad jurisdictional grant under § 1349," *Tenn. Gas. Pipeline v. Houston Cas. Ins. Co.*, 87 F.3d 150, 155 (5th Cir. 1996), its use "is not limitless" because a "blind application of this test would result in federal court jurisdiction over all state law claims even tangentially related to offshore oil production on the OCS," *Plains Gas Sols., LLC v. Tenn. Gas Pipeline Co.*, 46 F. Supp. 3d 701, 704–05 (S.D. Tex. 2014).

The district court similarly reasoned that a strict application of the but-for test would "dramatically expand the statute's scope," creating removal jurisdiction regarding "[a]ny spillage of oil or gasoline involving some fraction of OCS-sourced-oil" or "any commercial claim over

such a[n OCS-sourced] commodity." App. at 247–48. The court concluded that § 1349 is not constructed so expansively in practice, and instead read OCSLA as requiring a case to "arise directly out of OCS operations." *Id.* at 245. Again, we agree with the district court's thoughtful analysis.

Indeed, caselaw bears out this interpretation. The decisions finding jurisdiction under § 1349 all involve a significantly more direct connection between OCS operations and the relevant lawsuit than that which exists here.[12] They each feature either claims with a direct phys-

[12] *See In re Deepwater Horizon*, 745 F.3d 157, 161 (5th Cir. 2014) (removal jurisdiction over action for oil-spill damages to wildlife stemming from catastrophic blowout of OCS drilling rig); *Barker v. Hercules Offshore, Inc.*, 713 F.3d 208, 211 (5th Cir. 2013) (removal jurisdiction over claims stemming from accidental death of worker "on a jack-up rig attached to the [OCS]"); *Tenn. Gas Pipeline v. Houston Cas. Ins. Co.*, 87 F.3d 150, 152 (5th Cir. 1996) (removal jurisdiction over claims stemming from a vessel's collision "with a platform secured to the [OCS]"); *Amoco Prod. Co. v. Sea Robin Pipeline Co.*, 844 F.2d 1202, 1203, 1209 n.23 (5th Cir. 1988) (removal jurisdiction over dispute regarding take-or-pay obligations in contracts for the sale and purchase o natural gas extracted from OCS wells); *Ronquille v. Aminoil Inc.*, No. 14-164, 2014 WL 4387337, at *2 (E.D. La. Sept. 4, 2014) (removal jurisdiction over tort claims of plaintiff whose asbestos exposure arose at least in part from provision of "direct support for Shell Oil's rigs," including "the unloading and loading of barges, other boats, and trucks that transported equipment and pipe from OCS platforms"); *Oil Field Cases*, 673 F. Supp. 2d 358, 370 (E.D. Pa. 2009) (removal jurisdiction over claims "based on injuries sustained while working on oil rigs" that were attached to the OCS); *see also EP Operating Ltd. P'ship v. Placid Oil Co.*, 26 F.3d 563, 565 (5th Cir. 1994) (original jurisdiction over suit filed to partition property located on the OCS); *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*, 754 F.2d 1223, 1225 (5th Cir. 1985) (original "jurisdiction over a contract

ical connection to an OCS operation (collision, death, personal injury, loss of wildlife, toxic exposure) or a contract or property dispute directly related to an OCS operation. *See, e.g.*, *Barker*, 713 F.3d at 213 ("By his own admission Barker's employment on the jack-up rig was directly related to the development of minerals or other natural resources on the OCS."); *Amoco Prod. Co. v. Sea Robin Pipeline Co.*, 844 F.2d 1202, 1210 (5th Cir. 1988) (stating that the contract rights at issue "necessarily and physically ha[d] an immediate bearing on the production of the particular [OCS oil] well," thus bringing the dispute within the "arising out of, or in connection with" language (quoting 43 U.S.C. § 349(b)(1))). Despite the seemingly broad "but-for" test, courts "have made it clear that a dispute must have a sufficient nexus to an operation on the OCS to fall within the jurisdictional reach of the OCSLA." *Fairfield Indus., Inc. v. EP Energy E&P Co., L.P.*, No. H-12-2665, 2013 WL 12145968, at *4 (S.D. Tex. May 2, 2013) (collecting cases).

Here, there is not such a nexus between the dispute and Exxon's OCS operations. The Fifth Circuit has sanctioned OCSLA jurisdiction over disputes "one step removed from the actual transfer of minerals to shore" such as "a contractual dispute over the control of an entity which operates a gas pipeline." *United Offshore Co. v. S. Deepwater Pipeline Co.*, 899 F.2d 405, 407 (5th Cir. 1990). But the relationship between Exxon's OCS operations and the Municipalities' claims is removed several steps

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dispute involving the construction of a stationary offshore platform on the [OCS]").

beyond that. The Municipalities largely challenge the Energy Companies' sale and deceptive promotion of fossil fuels, activities that have no direct connection to Exxon's *production* of fossil fuels on the OCS. *See* App. at 147–72. To be sure, the Energy Companies characterize the Municipalities' claims as "targeting defendants' worldwide fossil-fuel business," which it contends "necessarily sweep in [Exxon's OCS] operations." Reply Br. at 25. Even under the broader scope of its global operations, however, the extent to which Exxon's OCS activities contributed to the downstream injuries alleged by the Municipalities in Colorado is too attenuated to sustain OCSLA removal jurisdiction where none of those Colorado-sited injuries are alleged to arise directly from OCS operations or OCS-extracted oil. As the district court noted, "jurisdiction under OCSLA makes little sense for injuries in a landlocked state that are alleged to be caused by conduct that is not specifically related to the OCS." App. at 247. Indeed, we have found no prior citations to 43 U.S.C. § 1349(b)(1) in any opinion from the fully landlocked Tenth Circuit.

The decision in *Parish of Plaquemines v. Total Petrochemical & Refining USA, Inc.*, 64 F. Supp. 3d 872, 898 (E.D. La. 2014), supports this conclusion. While that case dealt with the first prong of the Fifth Circuit's § 1349(b) test, its analysis is nonetheless pertinent here. In *Total Petrochemical*, a Louisiana parish sued various oil companies for engaging in unpermitted local operations that damaged parish land and waterbodies. *Id.* at 877–78. In seeking removal under § 1349(b), the defendants argued that "some of the complained-of activity . . . pertains to pipelines that carry oil and gas from the OCS to the [Parish], and that some of the facilities at issue in the [Parish] service oil and gas development on the OCS and co-mingle production with offshore sources." *Id.* at 894.

The defendants claimed jurisdiction was proper "because [the] action 'involve[d]' operations on the OCS, and it therefore ar[o]se[] in connection with OCS operations." *Id.* at 896. The court rejected this argument, holding that "the relationship between the injuries in this case and the activities that cause[d] them and any operations on the OCS [was] simply too remote and attenuated." *Id.* at 898. Just as "the 'mere connection' between the claims asserted and an OCS operation [was] 'too remote' to establish federal jurisdiction" in *Total Petrochemical*, *id.*, it is likewise too remote to establish federal jurisdiction here.

Even under the technical reading of the Fifth Circuit's jurisdictional test advocated by Exxon, there is no indication that Exxon's OCS operations were a pure "but-for" cause of the Municipalities' claims. None of the Energy Companies offer any basis to conclude that absent the OCS activities the injuries complained of would not have occurred. Accordingly, the OCS activities are not the "but-for" cause of the Municipalities' injuries.

As the *Baltimore I* court reasoned, "[the d]efendants were not sued merely for producing fossil fuel products, let alone for merely producing them on the OCS." 388 F. Supp. 3d at 566. "Rather, the City's claims are based on a broad array of conduct, including [the] defendants' failure to warn consumers and the public of the known dangers associated with fossil fuel products, all of which occurred globally." *Id.* Consequently, the Municipalities' Colorado-based injuries and attendant state-law claims could have arisen even if whatever slice of Exxon's fossil-fuel production attributable to its operations on the OCS was removed from consideration. This failure to establish "but-for" causation leaves the Energy Companies' jurisdictional burden of proof unsatisfied.

Finally, the Energy Companies argue that the statutory purpose of OCSLA's jurisdictional grant would be frustrated if this suit is not heard in federal court because an award of the billions of dollars in damages sought by the Municipalities "would substantially discourage production on the [OCS] and would jeopardize the future viability of the federal [OCS] leasing program." Appellants Br. at 47–48. But it is difficult to see how such a prospective theory of negative economic incentives—flowing from a lawsuit that does not directly attack OCS exploration, resource development, or leases—is anything other than contingent and speculative. And, as the district court noted, "[a] case cannot be removed under OCSLA based on speculative impacts; immediate and physical impact is needed." App. at 248; *cf. Texas v. United States*, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" (quoting *Thomas v. Union Carbide Agricultural Prods. Co.*, 473 U.S. 568, 580–81 (1985))).

The defendants in *Total Petrochemical* made a similar policy argument, contending that the imposition of state court liability based on injuries to the land andwaterbodies of a Louisiana parish would "have a significant adverse impact on oil and gas production on the OCS because the OCS and onshore oil and gas systems do not operate independently but rather extensively overlap and share infrastructure." 64 F. Supp. 3d at 894. The district court found that the state court lawsuit *could* negatively impact the defendants' OCS operations but held that such impact was too speculative to support jurisdiction. *Id.* at 897–98. The same logic applies here. The chain of contingencies that connects the initiation of this case in state court to an eventual "impair[ment of] the total recovery of the federally[] owned materials from the" OCS is too uncertain,

speculative, and hypothetical to serve as a jurisdictional hook. *Amoco Prod.*, 844 F.2d at 1210. Thus, we affirm the district court's rejection of OCSLA's jurisdictional provision as a basis for federal subject-matter jurisdiction over the Municipalities' claims.

III. CONCLUSION

For the reasons explained, we hold that none of the six grounds the Energy Companies assert for removal on appeal are sufficient to establish federal jurisdiction over the Municipalities' state-law claims. We therefore AFFIRM the district court's order remanding the action to the state court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 18-cv-01672-WJM-SKC

BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY; BOARD OF COUNTY COMMISSIONERS OF SAN MIGUEL COUNTY; AND CITY OF BOULDER,
PLAINTIFFS,

v.

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

Filed: September 5, 2019

ORDER

MARTINEZ, United States District Judge.

Plaintiffs brought Colorado common law and statutory claims in Boulder County, Colorado District Court for injuries occurring to their property and citizens of their jurisdictions, allegedly resulting from the effects of climate change. Plaintiffs sue Defendants in the Amended Complaint ("Complaint") "for the substantial role they played and continue to play in causing, contributing to and exacerbating climate change." (ECF No. 7 ¶ 2.) Defendants

filed a Notice of Removal (ECF No. 1) on June 29, 2018. Plaintiffs filed a Motion to Remand (ECF No. 34) on July 30, 2018.

For the reasons explained below, the Court grants Plaintiffs' Motion to Remand. Defendants' Motion to Reschedule Oral Argument on Plaintiffs' Motion to Remand (ECF No. 67), is denied as the Court finds that a hearing is not necessary.

I. BACKGROUND

Plaintiffs assert six state law claims: public nuisance, private nuisance, trespass, unjust enrichment, violation of the Colorado Consumer Protection Act, and civil conspiracy. The Complaint alleges that Plaintiffs face substantial and rising costs to protect people and property within their jurisdictions from the dangers of climate alteration. (ECF No. 7 ¶¶ 1–4, 11, 221–320.) Plaintiffs allege that Defendants substantially contributed to the harm through selling fossil fuels and promoting their unchecked use while concealing and misrepresenting their dangers. (*Id.* ¶¶ 2, 5, 13–18, 321–435.) The fossil fuel activities have raised the emission and concentration of greenhouse gases ("GHGs") in the atmosphere. (*Id.* ¶¶ 7, 15, 123–138, 321–38.)

As a result of the climate alterations caused and contributed to by Defendants' fossil fuel activities, Plaintiffs allege that they are experiencing and will continue to experience rising average temperatures and harmful changes in precipitation patterns and water availability, with extreme weather events and increased floods, drought, and wild fires. (ECF No. 7 ¶¶ 145–179.) These changes pose a threat to health, property, infrastructure, and agriculture. (*Id.* ¶¶ 1–4, 180–196.) Plaintiffs allege that they are sustaining damage because of services they

must provide and costs they must incur to mitigate or abate those impacts. (*Id.* ¶¶ 1, 4–5, 221–320.) Plaintiffs seek monetary damages from Defendants, requiring them to pay their *pro rata* share of the costs of abating the impacts on climate change they have allegedly caused through their tortious conduct. (*Id.* at ¶ 6.) Plaintiffs do not ask the Court to stop or regulate Defendants' emissions of fossil fuels (*id.* at ¶¶ 6, 542), and do not seek injunctive relief.

Defendants' Notice of Removal asserts the following: (1) federal question jurisdiction— that Plaintiffs' claims arise under federal common law, and that this action necessarily and unavoidably raises disputed and substantial federal issues that give rise to jurisdiction under *Grable & Sons Metal Products, Inc.* v. *Darue Eng'g & Mfg.*, 545 U.S. 308 (2005) ("*Grable*"); (2) complete preemption; (3) federal enclave jurisdiction; (4) jurisdiction because the allegations arise from action taken at the direction of federal officers; (5) jurisdiction under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(b); and (6) jurisdiction under 28 U.S.C. § 1452(a) because the claims are related to bankruptcy proceedings.

While there are no dispositive cases from the Supreme Court, the United States Court of Appeals for the Tenth Circuit, or other United States Courts of Appeal, United States District Court cases throughout the country are divided on whether federal courts have jurisdiction over state law claims related to climate change, such as raised in this case. *Compare California* v. *BP p.l.c.* ("*CA I*"), 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018); *City of Oakland* v. *BP p.l.c. ("CA II*), 325 F. Supp. 3d 1017 (N.D. Cal. June 25, 2018); *City of New York v. BP p.l.c.*, 325 F. Supp. 3d 466 (S.D.N.Y. July 19, 2018) with *State of Rhode Island v. Chevron Corp.*, 2019 WL 3282007 (D. R.I. July 22, 2019);

Mayor and City Council of Baltimore v. BP P.L.C. ("*Baltimore*"), 2019 WL 2436848 (D. Md. June 10, 2019), *appeal docketed*, No. 19-1644 (4th Cir. June 18, 2019); and *Cnty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal. 2018), *appeal docketed*, No. 18-15499 (9th Cir. May 27, 2018).

II. LEGAL STANDARD

Plaintiffs' Motion to Remand is brought pursuant to 28 U.S.C. § 1447(c). The Motion to Remand asserts that the Court lacks subject matter jurisdiction over the claims in this case, which Plaintiffs contend are state law claims governed by state law.

Federal courts are courts of limited jurisdiction, "possessing 'only that power authorized by Congress and statute.'" *Gunn v. Minton*, 568 U.S. 251, 256 (2013) (citation omitted). Thus, "[f]ederal subject matter jurisdiction is elemental." *Firstenberg v. City of Santa Fe*, 696 F.3d 1018, 1022 (10th Cir. 2012). "It cannot be consented to or waived, and its presence must be established" in every case in federal court. *Id.*

Here, Defendants predicate removal on the ground that the federal court has original jurisdiction over the claims. 28 U.S.C. § 1441(a). Diversity jurisdiction has not been invoked. Removal is appropriate "if, but only if, 'federal subject-matter jurisdiction would exist over the claim.'" *Firstenberg*, 696 F.3d at 1023 (citation omitted). If a court finds that it lacks subject matter jurisdiction at any time before final judgment is entered, it must remand the case to state court. 28 U.S.C. § 1447(c).

The burden of establishing subject matter jurisdiction is on the party seeking removal to federal court, and there is a presumption against its existence. *Salzer v. SSM Health Care of Okla. Inc.*, 762 F.3d 1130, 1134 (10th Cir.

2014). "Removal statutes are to be strictly construed,. . . and all doubts are to be resolved against removal." *Fajen v. Found. Reserve Ins. Co.*, 683 F.2d 331, 333 (10th Cir. 1982). The party seeking removal must show that jurisdiction exists by a preponderance of the evidence. *Dutcher v. Matheson*, 840 F.3d 1183, 1189 (10th Cir. 2016).

III. ANALYSIS

A. Federal Question Jurisdiction

Defendants first argue that federal question jurisdiction exists. Federal question jurisdiction exists for "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. In determining whether such jurisdiction exists, a court must "look to the 'face of the complaint'" and ask whether it is "'drawn so as to claim a right to recover under the Constitution and laws of the United States'[.]" *Firstenberg*, 696 F.3d at 1023 (quoting *Bell v. Hood*, 327 U.S. 678, 681 (1946)).

"[T]he 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." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987) (citation omitted). Under this rule, a case arises under federal law 'only when the plaintiff's statement of his own cause of action shows that it is based' on federal law." *Devon Energy Prod. Co., L.P. v. Mosaic Potash Carlsbad, Inc.*, 693 F.3d 1195, 1202 (10th Cir. 2012) (citation omitted). The court need only examine "the well-pleaded allegations of the complaint and ignore potential defenses. . . ." *Id.* (citation omitted).

The well-pleaded complaint rule makes "the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar*,

482 U.S. at 392; *see also Devon Energy*, 693 F.3d at 1202 ("By omitting federal claims from a complaint, a plaintiff can generally guarantee an action will be heard in state court.") (internal quotation marks omitted). While the plaintiff may not circumvent federal jurisdiction by artfully drafting the complaint to omit federal claims that are essential to the claim, *Caterpillar*, 482 U.S. at 392, the plaintiff "can elect the judicial forum–state of federal" depending on how the plaintiff drafts the complaint. *Firstenberg*, 696 F.3d at 1023. "Neither the plaintiff's anticipation of a federal defense nor the defendant's assertion of a federal defense is sufficient to make the case arise under federal law." *Id.* (internal quotation marks omitted).

For a plaintiff's well-pleaded complaint to establish that the claims arise under federal law within the meaning of § 1331, it "must establish one of two things: 'either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on a resolution of a substantial question of federal law.'" *Firstenberg*, 696 F.3d at 1023 (citation omitted). The "creation' test" in the first prong accounts for the majority of suits that raise under federal law." *See Gunn*, 568 U.S. at 257. However, where a claim finds its origins in state law, the Supreme Court has identified a "'special and small category' of cases" in which jurisdiction lies under the substantial question prong as they "implicate significant federal interests." *Id.* at 258; *see also Grable*, 545 U.S. at 312.

Defendants argue that both prongs of federal question jurisdiction are met. The Court will address each of these arguments in turn.

1. Whether Federal Law Creates the Cause of Action

Defendants first assert that federal question jurisdiction exists because Plaintiffs' claims arise under federal law; namely, federal common law, such that federal law creates the cause of action. The Supreme Court has "held that a few areas, involving 'uniquely federal interests,' . . . are so committed by the Constitution and laws of the United States to federal control that state law is preempted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts—so-called 'federal common law.'" *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988) (citations omitted); *see also Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 *U.S.* 845, 850 (1985). The issue must involve "an area of uniquely federal interest", and federal common law will displace state law only where "a 'significant conflict' exists between an identifiable 'federal policy or interest and the [operation] of state law,' . . or the application of state law would 'frustrate specific objectives' of federal legislation." *Boyle*, 487 U.S. at 507 (citations omitted).

Defendants assert that this case belongs in federal court because it threatens to interfere with longstanding federal policies over matters of uniquely national importance, including energy policy, environmental protection, and foreign affairs. They note that two courts have held that claims akin to those brought by Plaintiffs are governed by federal common law, citing the decisions in *CA I*, *CA II*, and *City of New York*.[1]

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[1] Notably, in another case ExxonMobil appeared to argue the opposite of what it argues here: that there is no uniquely federal interest in this type of case and a suit does not require "'the application of

a. Relevant Case Law

Defendants state over the past century that the federal government has recognized that a stable energy supply is critical for the preservation of our economy and national security, taken steps to promote fossil fuel production, and worked to decrease reliance on foreign oil. The government has also worked with other nations to craft a workable international framework for responding to global warming. This suit purportedly challenges those decisions by requiring the court to delve into the thicket of the "worldwide problem of global warming"— the solutions to which Defendants assert for "sound reasons" should be "determined by our political branches, not by our judiciary." *See CA II*, 2018 WL 3109726, at *9.

Plaintiffs thus target *global* warming, and the transnational conduct that term entails. (ECF No. 7 ¶¶ 125–38.) Defendants contend that the claims unavoidably require adjudication of whether the benefits of fossil fuel use outweigh its costs—not just in Plaintiffs' jurisdictions, or even in Colorado, but on a global scale. They argue that these claims do not arise out of state common law. Defendants further assert that this is why similar lawsuits have been brought in federal court, under federal law, and why, when those claims were dismissed, the plaintiffs made no effort to pursue their claims in state courts. *See, e.g.*, *Am. Elec. Power Co., Inc.* v. *Connecticut* ("*AEP*"), 564 U.S. 410 (2011); *Kivalina* v. *ExxonMobil Corp.* ("*Kivalina*"), 696 F.3d 849 (9th Cir. 2012). Defendants thus contend that the

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federal common law, merely because the conflict is not confined within the boundaries of a single state.'" (*See* ECF No. 50-1 at 55–60) (citation omitted). Instead, it asserted that "only suits by [states] *implicating a sovereign interest* in abating interstate pollution give rise to federal common law." (*Id.* at 58–60) (emphasis added).

court has federal question jurisdiction because federal law creates the cause of action.

The Court first addresses the cases relied on by Defendants that address similar claims involving injury from global warming, beginning its analysis with the Supreme Court's decision in *AEP*. The *AEP* plaintiffs brought suit in federal court against five domestic emitters of carbon dioxide, alleging that by contributing to global warming, they had violated the federal common law of interstate nuisance, or, in the alternative, state tort law. 564 U.S. at 418 (citation omitted). They brought both federal and state claims, and asked for "a decree setting carbon-dioxide emission for each defendant." *Id.* The plaintiffs did not seek damages.

The Court in *AEP* stated what while there is no federal general common law, there is an "emergence of a federal decisional law in areas of national concern", the "new" federal common law. 564 U.S. at 421 (internal quotation marks omitted). This law "addresses 'subjects within national legislative power where Congress has so directed' or where the basic scheme of the Constitution so demands." *Id.* (citation omitted). The Court found that environmental protection is "undoubtedly an area within national legislative power, one in which federal courts may fill in statutory interstices, and, if necessary, even fashion federal law." *Id.* (internal quotation marks omitted). It further stated that when the court "deal[s] with air and water in their ambient or interstate aspects, there is federal common law.'" *Id.* (*quoting Illinois v. City of Milwaukee*, 406 US. 91, 103 (1972)).

AEP also found that when Congress addresses a question previously governed by federal common law, '"the need for such an unusual exercise of law-making by federal courts disappears.'" 564 U.S. at 423 (citation omitted).

The test for whether congressional legislation excludes the declaration of federal common law is "whether the statute 'speak[s] directly to [the] questions at issue." *Id.* at 424 (citation omitted). The Court concluded that "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants," *i.e.,* the Clean Air Act spoke directly "to emissions of carbon dioxide from the defendants' plants." *Id.* Since it found that federal common law was displaced, *AEP* did not decide the scope of federal common law, or whether the plaintiffs had stated a claim under it. *Id.* at 423 (describing the question as "academic"). It also did not address the state law claims. *Id.* at 429.

In *Kivalina*, the plaintiffs alleged that massive greenhouse gas emissions by the defendants resulted in global warming which, in turn, severely eroded the land where the City of Kivalina sat and threatened it with imminent destruction. 696 F.3d at 853. Relying on *AEP*, the Ninth Circuit found that the Clean Air Act displaced federal common law nuisance claims for damages caused by global warming. *Id.* at 856. It recognized that "federal common law includes the general subject of environmental law and specifically includes ambient or interstate air and water pollution." *Id.* at 855 (citing *City of Milwaukee*, 406 US. at 103). Thus, *Kivalina* stated that "federal common law can apply to transboundary pollution suits," and noted that most often such suits are, as in that case, founded on a theory of public nuisance. *Id.* The *Kivalina* court found that the case was governed by *AEP* and the finding that Congress had "directly addressed the issue of greenhouse gas commissions from stationary sources," thereby displacing federal common law. *Id.* at 856. The fact that the plaintiffs sought damages rather than an

abatement of emissions did not impact the analysis, according to *Kivalina*, because "the type of remedy asserted is not relevant to the applicability of the doctrine of displacement." *Id.* at 857. The *Kivalina* court affirmed the district court's dismissal of plaintiffs' claims. *Id.* at 858.

Both *AEP* and *Kivalina* were brought in federal court and asserted federal law claims. They did not address the viability of state claims involving climate change that were removed to federal court, as is the case here. This issue was addressed by the United States District Court for the Northern District of California in *CA I* and *CA II*. In the *CA* cases, the Cities of Oakland and San Francisco asserted a state law public nuisance claim against ExxonMobil and a number of other worldwide producers of fossil fuels, asserting that the combustion of fossil fuels produced by the defendants had increased atmospheric levels of carbon dioxide, causing a rise in sea levels with resultant flooding in the cities. *CA I*, 2018 WL 1064293, at *1. Like the instant case, the plaintiffs did not seek to impose liability for direct emissions of carbon dioxide.

Instead, they alleged "that—despite long-knowing that their products posed severe risks to the global climate—defendants produced fossil fuels while simultaneously engaging in large scale advertising and public relations campaigns to discredit scientific research on global warming, to downplay the risks of global warming, and to portray fossil fuels as environmentally responsible and essential to human well-being." *Id.* The plaintiffs sought an abatement fund to pay for infrastructure necessary to address rising sea levels. *Id.*

CA I found that the plaintiffs' state law "nuisance claims—which address the national and international geophysical phenomenon of global warming—are necessarily governed by federal common law," citing *AEP*, *City*

of Milwaukee, and *Kivalina*. *CA I*, 2018 WL 1064293, at *2–3. It stated that, as in those cases, "a uniform standard of decision is necessary to deal with the issues," explaining:

> If ever a problem cried out for a uniform and comprehensive solution, it is the geophysical problem described by the complaints, a problem centuries in the making (and studying) with causes [including] the combustion of fossil fuels. The range of consequences is likewise universal—warmer weather in some places that may benefit agriculture but worse weather in others, . . . and—as here specifically alleged—the melting of the ice caps, the rising of the oceans, and the inevitable flooding of coastal lands. . . . [T]he scope of the worldwide predicament demands the most comprehensive view available, which in our American court system means our federal courts and our federal common law. A patchwork of fifty different answers to the same fundamental global issue would be unworkable.

Id. at *3.

The *CA I* court also found that federal common law applied despite the fact that "plaintiffs assert a novel theory of liability," *i.e.,* against the *sellers* of a product rather than direct *dischargers* of interstate pollutants. *CA I*, 2018 WL 1064293, at *3 (emphasis in original). Again, that is the situation in this case. The *CA I* court stated that "the transboundary problem of global warming raises exactly the sort of federal interests that necessitate a uniform solution," which is no " less true because plaintiffs' theory mirrors the sort of state-law claims that are traditionally applied to products made in other states and sold nationally." *Id.* The court found, however, that federal common law was not displaced by the Clean Air Act and the EPA as in *AEP* and *Kivalina* because the plaintiffs there

sought only to reach domestic conduct, whereas the plaintiffs' claims in *CA I* "attack behavior worldwide." *Id.* at 4. It stated that those "foreign emissions are outside of the EPA and Clean Air Acts' reach." *Id.* Nonetheless, as the claims were based in federal law, the court found that federal jurisdiction existed and denied the plaintiffs' motions to remand. *Id.* at 5.

In *CA II*, the court granted the defendants' motion to dismiss. 325 F. Supp. 3d at 1019. It reaffirmed that the plaintiffs' nuisance claims "must stand or fall under federal common law," including the state law claims. *CA II*, 325 F. Supp. 3d at 1024. It then held that the claims must be dismissed because they ran counter to the presumption against extraterritoriality and were "foreclosed by the need for federal courts to defer to the legislative and executive branches when it comes to such international problems." *Id.* at 1024–25. The *CA II* court concluded that "[i]t may seem peculiar that an earlier order refused to remand this action to state court on the ground that plaintiffs' claims were necessarily governed by federal law, while the current order concludes that federal common law should not be extended to provide relief." *Id.* at 1028. But it found "no inconsistency," as "[i]t remains proper for the scope of plaintiffs' claims to be decided under federal law, given the international reach" of the claims. *Id.* at 1028–29.

The *City of New York* case followed the rationale of *CA I* and *CA II*, and dismissed New York City's claims of public and private nuisance and trespass against multinational oil and gas companies related to the sale and production of fossil fuels. 325 F. Supp. 3d at 471–76. On a motion to dismiss, the court found that the City's claims were governed by federal common law, not state tort law, because they were "based on the 'transboundary' emission

of greenhouse gases" which "require a uniform standard of decision." *Id.* at 472 (citing *CA I*, 2018 WL 10649293, at *3). It also found that to the extent the claims involved domestic greenhouse emissions, the Clean Air Act displaced the federal common law claims pursuant to *AEP*. *Id.* To the extent the claims implicated foreign greenhouse emissions, they were "barred by the presumption against extraterritoriality and the need for judicial caution in the face of 'serious foreign policy consequences.'" *Id.* at 475 (citation omitted). The court in *City of New York* did not address federal jurisdiction or removal jurisdiction.

In summary, the above cases suggest that claims related to the emission or sale, production, or manufacture of fossil fuels are governed by federal common law, even if they are asserted under state law, but may displaced by the Clean Air Act and the EPA. At first blush these cases appear to support Defendants' assertion that Plaintiffs' claims arise under federal law and should be adjudicated in federal court, particularly given the international scope of global warming that is at issue.

However, the Court finds that *AEP* and *Kivalina* are not dispositive. Moreover, while the *CA I* decision has a certain logic, the Court ultimately finds that it is not persuasive. Instead, the Court finds that federal jurisdiction does not exist under the creation prong of federal question jurisdiction, consistent with *San Mateo* and the two most recent cases that have addressed the applicable issues, as explained below.

The Court first notes that in *AEP* and *Kivalina*, the plaintiffs expressly invoked federal claims, and removal was neither implicated nor discussed. Moreover, both cases addressed interstate emissions, which are not at issue here. Finally, the cases did not address whether the state law claims were governed by federal common law.

The *AEP* Court explained that "the availability *vel non* of a state lawsuit depend[ed], *inter alia*, on the preemptive effect of the federal Act," and left the matter open for consideration on remand. 564 U.S. at 429. Thus, "[f]ar from holding (as the defendants bravely assert) that state claims related to global warming are superseded by federal common law, the Supreme Court [in *AIG*] noted that the question of whether such state law claims survived would depend on whether they are preempted by the federal statute that had displaced federal common law (a question the Court did not resolve)." *San Mateo*, 294 F. Supp. 3d at 937.

Moreover, while *AEP* found that federal common law governs suits brought by a state to enjoin emitters of pollution in another state, it noted that the Court had never decided whether federal common law governs similar claims to abate out-of-state pollution brought by "political subdivisions" of a State, such as in this case. 564 U.S. at 421–22. Thus, *AEP* does not address whether state law claims, such as those asserted in this case and brought by political subdivisions of a state, arise under federal law for purposes of removal jurisdiction. The Ninth Circuit in *Kivalina* also did not address this issue.

The Court disagrees with the finding in *CA I* that removal jurisdiction is proper because the case arises under federal common law. *CA I* found that the well-pleaded complaint rule did not apply and that federal jurisdiction exists "if the claims necessarily arise under federal common law. 2018 WL 1064293, at *5. It based this finding on a citation to a single Ninth Circuit case, *Wayne v. DHL Worldwide Express*, 294 F.3d 1179, 1184–85 (9th Cir. 2002). *Id.* *Wayne*, however, recognized the well-pleaded complaint rule, and did not address whether a claim that arises under federal common law is an exception to the

rule. 294 F.3d at 1183-85. Moreover, *Wayne* cited *City of Milwaukee* in support of its finding that federal jurisdiction would exist if the claims arose under federal law. *City of Milwaukee* was, however, filed in federal court and invoked federal jurisdiction such that the well-pleaded complaint rule was not at issue.

Thus, *CA I* failed to discuss or note the significance of the difference between removal jurisdiction, which implicates the well pleaded complaint rule, and federal jurisdiction that is invoked at the outset such as in *AEP* and *Kivalina*. This distinction was recognized by the recent decision in *Baltimore*, which involved similar state law claims as to climate change that were removed to federal court. 2019 WL 2436848, at *1. *Baltimore* found *CA I* was "well stated and presents an appealing logic," but disagreed with it because the court looked beyond the face of the plaintiffs' well pleaded complaint. *Id.* at *7–8. It also noted that *CA I* "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." *Id.* at *8. *Baltimore* found that the well-pleaded complaint rule was plainly not satisfied in that case because the City did not plead any claims under federal law. *Id.* at *6.

b. The Well-Pleaded Complaint Rule as Applied to Plaintiffs' Claims

In a case that is removed to federal court, the presence or absence of federal-question jurisdiction is governed by the well-pleaded complaint rule, which gives rise to federal jurisdiction only when a federal question is presented on the face of the complaint. *Caterpillar*, 482 U.S. at 392. The Tenth Circuit has held that to support removal jurisdiction, "the required federal right or immunity must be

an essential element of the plaintiff's cause of action, and . . . the federal controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal." *Fajen*, 683 F.2d at 333 (citation and internal quotation marks omitted).

In this case, the Complaint on its face pleads only state law claims and issues, and no federal law or issue is raised in the allegations. While Defendants argue that the Complaint raises inherently federal questions about energy, the environment, and national security, removal is not appropriate under the well-pleaded complaint rule because these federal issues are not raised or at issue in Plaintiffs' claims. A defendant cannot transform the action into one arising under federal law, thereby selecting the forum in which the claim will be litigated, as to do so would contradict the well-pleaded complaint rule. *Caterpillar*, 489 U.S. at 399. Defendants, "in essence, want the Court to peek beneath the purported state-law facade of the State's public nuisance claim, see the claim for what it would need to be to have a chance at viability, and convert it to that (i.e., into a claim based on federal common law) for purposes of the present jurisdiction analysis." *State of Rhode Island*, 2019 WL 3282007, at *2. That court found nothing in the artful-pleading doctrine which sanctioned the defendants' desired outcome. *Id.*

Defendants cite no controlling authority for the proposition that removal may be based on the existence of an unplead federal common law claim—much less based on one that is questionable and not settled under controlling law. Defendants rely on the Supreme Court's holding that the statutory grant of jurisdiction over cases arising under the laws of the United States "will support claims founded upon federal common law." *Nat'l Farmers Union*

Ins. Cos., 471 U.S. at 850–53. However, the plaintiffs invoked federal jurisdiction in that case. The same is true in other cases cited by Defendants, including *City of Milwaukee* and *Boyle*, both of which were filed by plaintiffs in federal court and invoked federal jurisdiction. *See, e.g.*, *State of Rhode Island*, 2019 WL 3282007, at *2 n. 2 (*Boyle* "does not help Defendants" as it "was not a removal case, but rather one brought in diversity"); *Arnold by and Through Arnold v. Blue Cross & Blue Shield*, 973 F. Supp. 726, 737 (S.D. Tex. 1997) (*Boyle* did not address removal jurisdiction, nor did it modify the *Caterpillar* rule that federal preemption of state law, even when asserted as an inevitable defense to a . . . state law claim, does not provide a basis for removal"), *overruled on other grounds*, *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387 (5th Cir. 1997). Removal based on federal common law being implicated by state claims was not discussed or sanctioned in Defendants' cases.

A thoughtful analysis of the limits that removal jurisdiction poses on federal question jurisdiction was conducted in *E. States Health & Welfare Fund v. Philip Morris, Inc.*, 11 F. Supp. 2d 384 (S.D.N.Y. 1998). That court noted that removal jurisdiction is "a somewhat different animal than original federal question jurisdiction—i.e., where the plaintiff files originally in federal court." *Id.* at 389. It explained:

> When a plaintiff files in federal court, there is no clash between the principle that the plaintiff can control the complaint—and therefore, the choice between state and federal forums—and the principle that federal courts have jurisdiction over federal claims; the plaintiff, after all, by filing in a federal forum is asserting reliance upon both principles, and the only question a

> defendant can raise is whether plaintiff has a federal claim.
>
> On the other hand, when a plaintiff files in state court and purports to only raise state law claims, for the federal court to assert jurisdiction it has to look beyond the complaint and partially recharacterize the plaintiffs' claims—which places the assertion of jurisdiction directly at odds with the principle of plaintiff as the master of the complaint. It is for this reason that removal jurisdiction must be viewed with a somewhat more skeptical eye; the fact that a plaintiff in one case chooses to bring a claim as a federal one and thus invoke federal jurisdiction does not mean that federal *removal* jurisdiction will lie in an identical case if the plaintiff chooses not to file a federal claim.

Id. at 389–90. The Court agrees with this well-reasoned analysis.

The cases cited by Defendants from other jurisdictions that found removal of state law claims to federal court was appropriate because the claims arose under or were necessarily governed by federal common law are not persuasive. *See Wayne*, 294 F.3d at 1184–85; *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 926 (5th Cir. 1997); *CA I*, 2018 WL 1064293, at *2; *Blanco v. Fed. Express Corp.*, No. 16-561, 2016 WL 4921437, at *2–3 (W.D. Okla. Sept. 15, 2016). Those cases contradict *Caterpillar* and the tenets of the well-pleaded complaint rule. They also fail to cite any Supreme Court or other controlling authority authorizing removal based on state law claims implicating federal common law. While many of those cases relied on *City of Milwaukee* as authority for their holdings, the plaintiff in that case invoked federal common law and federal jurisdiction. *City of Milwaukee* does not

support a finding that a defendant can create federal jurisdiction by re-characterizing a state claim.

c. Ordinary Preemption

Ultimately, Defendants' argument that Plaintiffs' state law claims are governed by federal common law appears to be a matter of ordinary preemption which—in contrast to complete preemption, which is discussed in Section III.B, *infra*,–would not provide a basis for federal jurisdiction. *See Geddes v. Am. Airlines, Inc.*, 321 F.3d 1349, 1352 (11th Cir. 2003) (cited with approval in *Devon Energy*, 693 F.3d at 1203).[2] "Ordinary preemption 'regulates the interplay between federal and state laws when they conflict or appear to conflict . . . .'" *Baltimore*, 2019 WL 2436848, at *6 (citation omitted). The distinction between ordinary and complete preemption "is important because if complete preemption does not apply, but the plaintiff's state law claim is arguably preempted . . . the district court, being without removal jurisdiction, cannot resolve the dispute regarding preemption." *Colbert v. Union Pac. R. Co.*, 485 F. Supp. 2d 1236, 1243 (D. Kan. 2007) (internal quotation marks omitted).

When ordinary preemption applies, the federal court "'lacks the power to do anything other than remand to the state court where the preemption issue can be addressed and resolved.'" *Colbert*, 485 S. Supp. 2d at 1243 (citation omitted). Ordinary preemption is thus a defense to the complaint, and does not render a state- law claim removable to federal court. *Hansen v. Harper Excavating, Inc.*, 641 F.3d 1216, 1221 (10th Cir. 2011); *see also Caterpillar*,

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[2] The three forms of preemption that are frequently discussed in judicial opinions— express preemption, conflict preemption, and field preemption—are characterized as ordinary preemption. *Devon Energy*, 693 F.3d at 1203 n. 4.

482 U.S. at 392–93 (under the well-pleaded complaint rule, courts must ignore potential defenses such as preemption).

Thus, the fact that a defendant asserts that federal common law is applicable "does not mean the plaintiffs' state law claims 'arise under' federal law for purposes of jurisdictional purposes." *E. States Health*, 11 F. Supp. 2d at 394. As that court explained, "[c]ouch it as they will in 'arising under' language, the defendants fail to explain why their assertion that federal common law governs . . . is not simply a preemption defense which, while it may very well be a winning argument on a motion to dismiss in the state court, will not support removal jurisdiction." *Id.*

This finding is consistent with the decision in *Baltimore*. The court there found the defendants' assertion that federal question jurisdiction existed because the City's nuisance claim "is in fact 'governed by federal common law'" was "'a cleverly veiled [ordinary] preemption argument." *Baltimore*, 2019 WL 2436848, at *6 (citing *Boyle*, 487 U.S. at 504). As the *Baltimore* defendants' argument amounted to an ordinary preemption defense, it did "not allow the Court to treat the City's public nuisance claim as if it had been pleaded under federal law for jurisdictional purposes." *Id.* The court also found that the *CA I* ruling was "at odds with the firmly established principle that ordinary preemption does not give rise to federal question jurisdiction." *Id.* at *8.

Because an ordinary preemption defense does not support remand, Defendants' federal common law argument could only prevail under the doctrine of complete preemption. Unlike ordinary preemption, complete preemption "is so 'extraordinary' that it 'converts an ordinary state law common-law complaint into one stating a

federal claim for purposes of the well-pleaded complaint rule.'" *Caterpillar*, 482 U.S. at 393 (citation omitted).

2. Whether Plaintiffs' Right to Relief Necessarily Depends on Resolution of a Substantial Question of Federal Law (*Grable *Jurisdiction)

Defendants also argue that federal jurisdiction exists under the second prong of the "arising under" jurisdiction, as Plaintiffs' claims necessarily depend on a resolution of a substantial question of federal law under *Grable*. They contend that the Complaint raises federal issues under *Grable* "because it seeks to have a court determine for the entire United States, as well as Canada and other foreign actors, the appropriate balance between the production, sale, and use of fossil fuels and addressing the risks of climate change." (ECF No. 1 ¶ 37.) Such an inquiry, according to Defendants, "necessarily entails the resolution of substantial federal questions concerning important federal regulations, contracting, and diplomacy." (*Id.*) Thus, they assert that the "state-law claim[s] necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing . . . federal and state judicial responsibilities." *Grable*, 545 U.S. at 313–14.

The substantial question doctrine "captures the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues." *Grable*, 545 U.S. at 312. To invoke this branch of federal question jurisdiction, the Defendants must show that "a federal issue is: (1) necessarily raised, (2) actually dis-

puted, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn*, 568 U.S. at 258.

Jurisdiction under the substantial question doctrine "is exceedingly narrow—a special and small category of cases." *Firstenberg*, 696 F.3d at 1023 (citation and internal quotation marks omitted). "[M]ere need to apply federal law in a state-law claim will not suffice to open the 'arising under' door" of jurisdiction. *Grable*, 545 U.S. at 313. Instead, "'federal jurisdiction demands not only on a contested federal issue, but a substantial one, indicating a serious federal interest in claiming the advantages thought to be inherent in a federal forum.'" *Id.* (citation omitted).

a. Necessarily Raised

The Court finds that the first prong of substantial question jurisdiction is not met because Plaintiffs' claims do not necessarily raise or depend on issues of federal law. The discussion of this issue in *Baltimore* is instructive. In that case, the defendants contended that *Grable* jurisdiction existed because the claims raised a host of federal issues. *Baltimore*, 2019 WL 2436848, at *9. For example, the defendants asserted that the claims "'intrude upon both foreign policy and carefully balanced regulatory considerations at the national level, including the foreign affairs doctrine.'" *Id.* (citation omitted). They also asserted that the claims "'have a significant impact on foreign affairs,' 'require federal-law-based cost-benefit analyses,'" and "'amount to a collateral attack on federal regulatory oversight of energy and the environment.'" *Id.* (citation omitted). These allegations are almost identical to what Defendants assert in this case. (*See* ECF No. 48 at 22—"Plaintiffs' claims gravely impact foreign affairs"; 24—"Plaintiffs' claims require reassessment of cost-benefit

analyses committed to, and already conducted by the Government"; 26—the claims "are a collateral attack on federal regulatory oversight of energy and the environment").

Baltimore found that these issues were not "'necessarily raised' by the City's claims, as required for *Grable* jurisdiction." 2019 WL 2436848, at *9–10. As to the alleged significant effect on foreign affairs, the court agreed that "[c]limate change is certainly a matter of serious national and international concern." *Id.* at *10. But it found that defendants did "not actually identify any foreign policy that was implicated by the City's claims, much less one that is necessarily raised." *Id.* "They merely point out that climate change '*has* been the subject of international negotiations for decades.'" *Id. Baltimore* found that "defendants' generalized references to foreign policy wholly fail to demonstrate that a federal question is 'essential to resolving' the City's state law claims." *Id.* (citation omitted).

The Court finds the analysis in *Baltimore* equally persuasive as to Defendants' reliance on foreign affairs in this case, as they point to no specific foreign policy that is essential to resolving the Plaintiffs' claims. Instead, they cite only generally to non-binding, international agreements that do not apply to private parties, and do not explain how this case could supplant the structure of such foreign policy arrangements. Certainly Defendants have not shown that any interpretation of foreign policy is an essential element of Plaintiffs' claims. *Gilmore v. Weatherford*, 694 F.3d 1160, 1173 (10th Cir. 2012).

The *CA I* and *City of New York* decisions do not support Defendants' argument that the foreign policy issues raise substantial questions of law. Defendants note, for example, that the *City of New York* court dismissed the

claims there on the merits "for severely infring[ing] upon the foreign-policy decisions that are squarely within the purview of the political branches of the U.S. Government." 325 F. Supp. 3d at 476. But as Defendants have acknowledged, at least at this stage of these proceedings, the Court is not considering the merits of Plaintiffs' claims or whether they would survive a motion to dismiss, only whether there is a basis for federal jurisdiction. (*See* ECF No. 1 ¶ 20.) While *CA I* and *City of New York* may ultimately be relevant to whether Plaintiffs' claims should be dismissed, they do not provide a basis for *Grable* jurisdiction. *See Becker v. Ute Indian Tribe of the Uintah and Ouray Reservation*, 770 F.3d 944, 948 (10th Cir. 2014) (federal law that is alleged as a barrier to the success of a state law claim "is not a sufficient basis from which to conclude that the questions are 'necessarily raised'") (citation omitted).

Baltimore also rejected cost-benefit analysis and collateral attack arguments as a basis for *Grable* jurisdiction, finding that they "miss[ ] the mark." 2019 WL 2436848, at *10. This is because the nuisance claims were, as here, based on the "extraction, production, promotion, and sale of fossil fuel products without warning consumers and the public of their known risks", and did "not rely on any federal statutes or regulations" or violations thereof. *Id.* "Although federal laws and regulations governing energy production and air pollution may supply potential defenses," the court found that federal law was "plainly not an element" of the City's state law nuisance claims. *Id.*

The same analysis surely applies here. Plaintiffs' state law claims do not have as an element any aspect of federal law or regulations. Plaintiffs do not allege that any federal regulation or decision is unlawful, or a factor in their claims, nor are they asking the Court to consider whether

the government's decisions to permit fossil fuel use and sale are appropriate.

As to jurisdiction under *Grable*, the Baltimore court concluded that, "[t]o be sure, there are federal *interests* in addressing climate change." 2019 WL 2436848, at *11 (emphasis in original). "Defendants have failed to establish, however, that a federal *issue* is a 'necessary element' of the City's state law claims." *Id.* (citation omitted) (emphasis in original). Thus, even without considering the remaining requirements for *Grable* jurisdiction, the *Baltimore* court rejected the defendants' assertion that the case fell within "the 'special and small category' of cases in which federal question jurisdiction exists over a state law claim. *Id.* (citation omitted).

Two other courts have recently arrived at the same conclusion. The court in *State of Rhode Island* found that the defendants had not shown that federal law was "'an element and an essential one, of the [State]'s cause[s] of action.'" 2019 WL 3282007, at *4 (citation omitted). Instead, the court noted that the State's claims "are thoroughly state-law claims", and "[t]he rights, duties, and rules of decision implicated by the complaint are all supplied by state law, without reference to anything federal." *Id.* The court concluded:

> By mentioning foreign affairs, federal regulations, and the navigable waters of the United States, Defendants seek to raise issues that they may press in the course of this litigation, but that are not perforce presented by the State's claims. . . .These are, if anything, premature defenses, which even if ultimately decisive, cannot support removal.

Id. (internal citations omitted).

Similarly, the court in *San Mateo* found that the defendants had not pointed to a specific issue of federal law that necessarily had to be resolved to adjudicate the state law claims. 294 F. Supp. 3d at 938. Instead, "the def endants mostly gesture to federal law and federal concerns in a generalized way." *Id.* The court found that "[t]he mere potential for foreign policy implications", the "mere existence of a federal regulatory regime", or the possibility that the claims involved a weighing of costs and benefits did not raise the kind of actually disputed, substantial federal issue necessary for *Grable* jurisdiction. *Id.* *San Mateo* concluded, "[o]n the defendants' theory, many (if not all) state tort claims that involve the balancing of interests and are brought against federally regulated entities would be removable", and "*Grable* does not sweep so broadly." *Id.*

The Court agrees with the well-reasoned analyses in *Baltimore*, *State of Rhode Island*, and *San Mateo*, and adopts the reasoning of those decisions. To the extent Defendants raise other issues not addressed in those cases, the Court finds that they also are not necessarily raised in Plaintiffs' Complaint.

Defendants here assert that Plaintiffs' claims raise a significant issue under *Grable* because they attack the decision of the federal government to enter into contracts with Defendant ExxonMobil to develop and sell fossil fuels. (ECF No. 1 ¶ 43.) Further, they argue that the Complaint seeks to deprive the federal government of a mechanism for carrying out vital governmental functions, and frustrates federal objectives. (*Id.* ¶ 44.)

Plaintiffs' claims, however, assert no rights under the contracts referenced by Defendants. Nor do they challenge the contracts' validity, or require a court to interpret their meaning or importance. The Complaint does

not even mention the contracts. Defendants' argument appears to be based solely on their unsupported speculation about the potential impact that Plaintiffs' success would have on the government's ability to continue purchasing fossil fuels. (*Id.* ¶¶ 43–44.) Even if Defendants' speculation was well-founded, this would be relevant only to the substantiality prong of the *Grable* analysis. *See Bennett v. Sw. Airlines Co.*, 484 F.3d 907, 910 (10th Cir. 2007). Defendants have not established the first requirement—that the issue is necessarily raised by the Plaintiffs.

b. Substantiality

The Court also finds that the second prong, substantiality, is not met. To determine substantiality, courts "look[] to whether the federal law issue is central to the case." *Gilmore*, 694 F.3d at 1175. Courts distinguish "between 'a nearly pure issue of law' that would govern 'numerous' cases and issues that are 'fact-bound and situation-specific.'" *Id.* at 1174 (quoting *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 700–11 (2006)). When a case "'involve[s] substantial questions of state as well as federal law,' this factor weighs against asserting federal jurisdiction." *Id.* at 1175 (citation omitted).

The Court finds that the issues raised by Defendants are not central to Plaintiffs' claims, and the claims are "rife with legal and factual issues that are not related" to the federal issues. *See Stark-Romero v. Nat'l R.R. Passenger Co. (Amtrak)*, No. CIV-09- 295, 2010 WL 11602777, at *8 (D.N.M. Mar. 31, 2010). This case is quite different from those where jurisdiction was found under the substantial question prong of jurisdiction. For example, in *Grable*, "the meaning of the federal statute . . . appear[ed] to be the only legal or factual issue contested in the case." 545 U.S. at 315. Similarly, in a Tenth Circuit

case finding jurisdiction under *Grable*, "construction of the federal land grant" at issue "appear[ed] to be the only legal or factual issue contested in the case." *Nicodemus v. Union Pac. Corp.*, 440 F.3d 1227, 1236 (10th Cir. 2006). Here, it is plainly apparent that the federal issues raised by Defendants are not the only legal or factual issue contested in the case. Plaintiffs' claims also do not involve a discrete legal question, and are "fact-bound and situation-specific," unlike *Grable*. *See Empire Healthchoice Assurance*, 547 U.S. at 701; *Bennett*, 484 F.3d at 910–11. Finally, the case does not involve a state-law cause of action that "is 'brought to enforce' a duty created by [a federal statute]," where "the claim's very success depends on giving effect to a federal requirement." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Manning*, ___U.S. ___, 136 S. Ct. 1562, 1570 (2016).

The cases relied upon by Defendants are distinguishable, as Plaintiffs have shown in their briefing. For example, while Defendants cite *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), that case involved preemption under the Supremacy Clause because of a conflict between a state law and Congress's imposition of sanctions. It did not address *Grable* jurisdiction, and thus does not support Defendants' assertion that it is "irrelevant" to the jurisdictional issue that the "foreign agreements are not 'essential elements of any claim.'" (ECF No. 48 at 23.)

Based on the foregoing, the Court finds that federal jurisdiction does not exist under the second prong of the "arising under" jurisdiction, because Plaintiffs' claims do not necessarily depend on a resolution of a substantial question of federal law. As Defendants have not met the first two prongs of the test for such jurisdiction under *Grable*, the Court need not address the remaining prongs.

B. Jurisdiction Through Complete Preemption

Defendants also rely on the doctrine of complete preemption to authorize removal. Defendants argue that Plaintiffs' claims are completely preempted by the government's foreign affairs power and the Clean Air Act, which they claim govern the United States' participation in worldwide climate policy efforts and national regulation of GHG emissions.

The complete preemption doctrine is an "independent corollary'" to the well-pleaded complaint rule. *Caterpillar*, 482 U.S. at 393. "Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted claim is considered, from its inception, a federal claim, and therefore arises under federal law." *Id.* The complete preemption exception to the well-pleaded complaint rule is "quite rare," *Dutcher*, 733 F.3d at 985, representing "extraordinary pre-emptive power." *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987). The Supreme Court and the Tenth Circuit have only recognized statutes as the basis for complete preemption. *See, e.g.*, *Caterpillar*, 482 U.S. at 393 (the doctrine "is applied primarily in cases raising claims pre-empted by § 301 of the" Labor Management Relations Act ("LMRA")); *Devon Energy*, 693 F.3d at 1204–05 (complete preemption is "so rare that the Supreme Court has recognized compete preemption in only three areas: § 301 of the [LMRA], § 502 of [the Employee Retirement Income Security Act]," and actions for usery under the National Bank Act).

Complete preemption is ultimately a matter of Congressional intent. Courts must decipher whether Congress intended a statute to provide the exclusive cause of action. *See Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 9 (2003); *Metro. Life Ins. Co.*, 481 U.S. at 66 ("the touchstone of the federal district court's removal jurisdiction is

not the 'obviousness' of the pre-emption defense, but the intent of Congress"). If Congress intends preemption "completely to displace ordinarily applicable state law, and to confer federal jurisdiction thereby, it may be expected to make that atypical intention clear." *Empire Healthchoice Assurance*, 547 U.S. at 698.

"Thus, a state claim may be removed to federal courts in only two circumstances": "when Congress expressly so provides,. . . or when a federal statute wholly displaces the state law cause of action through complete pre-emption." *Beneficial Nat'l Bank*, 539 U.S. at 8. The court must ask, first, whether the federal question at issue preempts the state law relied on by the plaintiff and, second, whether Congress intended to allow removal in such a case, as manifested by the provision of a federal cause of action. *Devon Energy*, 693 F.3d at 1205.

1. Complete Preemption Based on Emissions Standards

Defendants argue that Congress allows parties to seek stricter nationwide emissions standards by petitioning the EPA, which is the exclusive means by which a party can seek such relief. *See* 42 U.S.C. § 7426(b). They assert that Plaintiffs' claims go far beyond the authority that the Clean Air Act reserves to states to regulate certain emissions within their own borders; Plaintiffs seek instead to impose liability for global emissions. Because these claims do not duplicate, supplement, or supplant federal law, *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 209 (2004), Defendants argue they are completely preempted.

The Court rejects Defendants' argument. First, Defendants mischaracterize Plaintiffs' claims. Plaintiffs do not challenge or seek to impose federal emissions regulations, and do not seek to impose liability on emitters. They

are also not seeking review of EPA regulatory actions related to GHGs, even those emissions created by the burning of Defendants' products, and are not seeking injunctive relief. Plaintiffs sue for harms caused by Defendants' sale of fossil fuels. The Clean Air Act is silent on that issue; it does not remedy Plaintiffs' harms or address Defendants' conduct. And neither EPA action, nor a cause of action against EPA, could provide the compensation Plaintiffs seek for the injuries suffered as a result of Defendants' actions.

For a statute to form the basis for complete preemption, it must provide a "replacement cause of action" that "substitute[s]" for the state cause of action. *Schmeling v. NORDAM*, 97 F.3d 1336, 1342–43 (10th Cir. 1996). "[T]he federal remedy at issue must vindicate the same basic right or interest that would otherwise be vindicated under state law." *Devon Energy*, 693 F.3d at 1207. The Clean Air Act provides no federal cause of action for damages, let alone one by a plaintiff claiming economic losses against a private defendant for tortious conduct. Moreover, the Clean Air Act expressly preserves many state common law causes of action, including tort actions for damages. *See* 42 U.S.C. § 7604(e) ("Nothing in this section shall restrict any right . . . under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief"). From this, it is apparent that Congress did not intend the Act to provide exclusive remedies in these circumstances, or to be a basis for removal under the complete preemption doctrine.

To the extent Defendants rely on *AEP*, the Supreme Court there held only that the Clean Air Act displaced federal common law nuisance action related to climate change; it did not review whether the Clean Air Act would preempt state nuisance law. 564 U.S. at 429. In fact, the

Court stated that "[n]one of the parties have briefed preemption or otherwise addressed the availability of a claim under state nuisance law," and the Court thus left "the matter open for consideration" by the state court on remand. *Id.* Every court that has considered complete preemption in this type of climate change case has rejected it, including the Baltimore, *State of Rhode Island*, and *San Mateo* courts.

In *Baltimore*, the court stated that while the Clean Air Act provides for private enforcement in certain situations, there was "an absence of any indication that Congress intended for these causes of action . . . to be the exclusive remedy for injuries stemming from air pollution." 2019 WL 2436848, at *13. To the contrary, it noted that the Clean Air Act "contains a savings clause that specifically preserves other causes of action." *Id.*

Similarly, the *State of Rhode Island* court stated, "statutes that have been found to completely preempt state-law causes of action . . . all do two things: They 'provide[] the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action.'" 2019 WL 3282007, at *3 (citation omitted). The court found that the defendants failed to show that the Clean Air Act does these things, and stated that "[a]s far as the Court can tell, the [Act] authorizes nothing like the State's claims, much less to the exclusion of those sounding in state law." *Id.* Further, it noted that the Act "itself says that controlling air pollution is 'the primary responsibility of States and local governments,'" and that the Act has a savings clause for citizen suits. *Id.* at *3–4 (citation omitted). The court concluded:

> A statute that goes so far out of its way to preserve state prerogatives cannot be said to be an expression of Congress's 'extraordinary pre-emptive power' to

> convert state-law claims into federal-law claims. *Metro. Life Ins. Co.*, 481 U.S. at 65. No court has so held, and neither will this one.

Id. at *4.

Finally, the *San Mateo* court noted that the defendants did "not point to any applicable statutory provision that involves complete preemption." 294 F. Supp. 3d at 938. To the contrary, the Clean Air Act and the Clean Water Act both contain savings clauses that preserve state causes of action and suggest that Congress did not intend the federal causes of action under those statutes 'to be exclusive.'" *Id.* (citations omitted).

Other courts have held similarly, rejecting federal jurisdiction on the basis of complete preemption of state law claims by the Clean Air Act. The United States District Court for the Southern District of New York held that the Clean Air Act did not completely preempt the plaintiffs' state law claims for temporary nuisance, trespass, and negligence arising from alleged contamination from a steel mill, and thus did not provide a basis for federal jurisdiction. *Keltner v. SunCoke Energy, Inc.*, 2015 WL 3400234, at *4–5 (S.D. Ill. May 26, 2015). Similarly, the Northern District of Alabama found that federal jurisdiction did not exist because the Clean Air Act did not completely preempt the plaintiff's state law claims arising out of the operation of a coke plant. *Morrison v. Drummond Co.*, 2013 WL 1345721, at *3–4 (N.D. Ala. Mar. 23, 2015). *See also Cerny v. Marathon Oil Corp.*, 2013 WL 5560483, at *3–8 (W.D. Tex. Oct. 7, 2013) (complete preemption did not apply to the plaintiffs' state law claims arising from the defendants' oil field operations so as to create federal jurisdiction).

While Defendants argue that Plaintiffs are attempting to do indirectly what they could not do directly, *i.e.,* "regulate the conduct of out-of-state sources," *Int'l Paper Co. v. Oulette*, 479 U.S. 481, 495 (1987), that is not an accurate characterization of the Plaintiffs' claims. Plaintiffs do not seek to regulate the conduct of the Defendants or their emissions, nor do they seek injunctive relief to induce Defendants to take action to reduce emissions. Defendants also rely on *Oulette* in arguing that suits such as this seeking damages, whether punitive or compensatory, can compel producers to "adopt different or additional means of pollution control" than those contemplated by Congress's regulatory scheme. 479 U.S. at 498 n.19. For these reasons, Defendants assert that the Supreme Court recognized in *Oulette* that damages claims against producers of interstate products would be "irreconcilable" with the Clean Water Act (which Defendants analogize to the Clean Air Act), and the uniquely federal interests involved in regulating interstate emissions. *Id.*

Oulette appears to involve only ordinary preemption, however, as there is no discussion of complete preemption.[3] The same is true of another case relied on by Defendants, *North Carolina v. Tenn. Valley Auth.*, 615 F.3d 291 (4th Cir. 2010). Indeed, the Fourth Circuit stated that it "need not hold flatly that Congress has entirely preempted the field of emissions regulation." *Id.* at 302. Moreover, *Oulette* allowed state law claims based on the law of the source state under the saving clause, since the

[3] "Complete preemption is a term of art for an exception to the well-pleaded complaint rule." *Meyer v. Conlon*, 162 F.3d 1264, 1268 n. 2 (10th Cir. 1998). The Tenth Circuit has held that the doctrines of ordinary and complete preemption are not fungible. *Id.*

Clean Water Act expressly allows source states to enact more stringent standards. 479 U.S. at 498–99.

Here, Defendants have not cited to any portion of the Clean Air Act or other statute that regulates the conduct at issue or allows states to enact more stringent regulations, such that similar restrictions on application of state law would apply. And Plaintiffs note that there no federal programs that govern or dictate how much fossil fuel Defendants produce and sell, or whether they can mislead the public when doing do.

Plaintiffs assert that the EPA does not determine how much fossil fuel is sold in the United States or how it is marketed, nor does it issue permits to companies that market or sell fossil fuels. Rather, the EPA regulates sources that emit pollution and sets emission "floors," which states can exceed. *See* 42 U.S.C. § 7416. Defendants have not shown that the conduct alleged in this case conflicts with any of those efforts.

Plaintiffs' claims also do not relate to or impact Defendants' emissions, and the claims for monetary relief presents no danger of inconsistent state (or state and federal) emission standards. *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 489 n. 7 (2008) ("private claims for economic injury do not threaten similar interference with federal regulatory goals," unlike cases where nuisance claims seeking injunctive relief amounted to arguments for discharge standards different that those provided by statute). In any event, the issues raised by Defendants need to be resolved in connection with an ordinary preemption defense, a matter that does not give rise to federal jurisdiction.

2. Complete Preemption Based on the Foreign Affairs Doctrine

Defendants also argue that complete preemption is appropriate based on the foreign affairs doctrine. They assert that litigating inherently transnational activities intrudes on the government's foreign affairs power. See *Am. Ins. Assoc. v. Garamendi*, 539 U.S. 396, 418 (2003) ("[S]tate action with more than incidental effect on foreign affairs is preempted, even absent any affirmative federal activity in the subject area of the state [action], and hence without any showing of conflict.").

Defendants also cite *California v. GMC*, 2007 WL 2726871, at *14 (N.D. Cal. Sept. 17, 2007) (dismissing claims where the government "ha[d] made foreign policy determinations regarding the [U.S.'s] role in the international concern about global warming," and stating, a "global warming nuisance tort would have an inextricable effect on . . . foreign policy"); *CA II*, 2018 WL 3109726, at *7 ("[n]uisance suits in various United States judicial districts regarding conduct worldwide are far less likely to solve the problem and, indeed, could interfere with reaching a worldwide consensus."); and *New York City*, 2018 WL 3475470, at *6 ("[T]he City's claims are barred by the presumption against extraterritoriality and the need for judicial caution in the face of serious foreign policy consequences."). Complete preemption is implicated, according to Defendants, because the government has exclusive power over foreign affairs.

The Court finds that Defendants' argument is without merit. First, none of the above cases cited by Defendants dealt with or addressed complete preemption, and they do not support Defendants' arguments. The Supreme Court in *Garamendi* discussed only conflict or field preemption. 539 U.S. at 419. As the *Baltimore* court noted, those types

of preemption are "forms of ordinary preemption that serve only as federal defenses to a state law claim." 2019 WL 2436848, at *5 (internal quotation marks omitted). In addition, the *GMC, CA II*, and *City of New York* cases did not address preemption at all, and certainly not complete preemption as providing a basis for removal jurisdiction.

Moreover, *Garamendi* is distinguishable. It dealt with the executive authority of the President to decide the policy regarding foreign relations and to make executive agreements with foreign countries or corporations. 539 U.S. at 413–15. The Court found that federal executive power preempted state law where, as in that case, "there is evidence of clear conflict between the policies adopted by the two." *Id.* at 420–21. The Court stated, "[t]he question relevant to preemption in this case is conflict, and the evidence here is 'more than sufficient to demonstrate that the state Act stands in the way of [the President's] diplomatic objectives.'" *Id.* at 427 (citation omitted). Here, no executive action is at issue, and Defendants have not demonstrated a clear conflict between Plaintiffs' claims and any particular foreign policy.

Accordingly, Defendants have not met their burden of showing that complete preemption applies based on the foreign affairs doctrine. While they suggest there might be an unspecified conflict with some unidentified specific policy, they have not shown that Congress expressly provided for complete preemption under the foreign-affairs doctrine, or that a federal statute wholly displaces the state law cause of action on this issue. *Beneficial Nat'l Bank*, 539 U.S. at 8.

The Court's finding that the foreign affairs doctrine does not completely preempt Plaintiffs' claims is also supported by the *Baltimore* and *State of Rhode Island* cases.

In *Baltimore*, the court held that the foreign affairs doctrine is "inapposite in the complete preemption context." 2019 WL 2436848, at *12. It explained that "complete preemption occurs only when Congress intended for federal law to provide the 'exclusive cause of action' for the claim asserted." *Id.* "That does not exist here." *Id.* "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." *Id.* The *State of Rhode Island* court also rejected complete preemption under the foreign affairs doctrine, relying on *Baltimore* and finding the argument to be "without a plausible legal basis." 2019 WL 3282007, at *4 n. 3.

3. Complete Preemption Under Federal Common Law

Finally, while Defendants do not rely on federal common law as the basis for their complete preemption argument, federal common law would not provide a ground for such preemption. As one court persuasively noted, "[w]hen the defendant asserts that federal common law preempts the plaintiff's claim, there is no congressional intent which the court may examine—and therefore congressional intent to make the action removable to federal court cannot exist." *Merkel v. Fed. Express Corp.*, 886 F. Supp. 561, 566 (N.D. Miss. 1995) (emphasis omitted); *see also Singer v. DHL Worldwide Express, Inc.*, No. 06-cv-61932, 2007 U.S. Dist. LEXIS 37120, at *13-14 (S.D. Fla. May 22, 2007) (same).

Based on the foregoing, the Court rejects complete preemption as a basis for federal jurisdiction.

C. Federal Enclave Jurisdiction

Causes of action "which arise from incidents occurring in federal enclaves" may also be removed as a part of federal question jurisdiction. *Akin* v. *Ashland Chem. Co.*, 156 F.3d 1030, 1034 (10th Cir. 1998). "The United States has power and exclusive authority 'in all Cases whatsoever . . . over all places purchased' by the government 'or the erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings.'" *Id.* (quoting U.S. Const. art. I, § 8, cl. 17.) These are federal enclaves within which the United States has exclusive jurisdiction. *Id.*

Here, Plaintiffs seek relief for injuries occurring "within their respective jurisdictions" (ECF No. 7 ¶ 4), and allege that they "do not seek damages or abatement relief for injuries to or occurring on federal lands." (*Id.* at ¶ 542.) Plaintiffs assert that ends the inquiry. *See, e.g.*, *Washington v. Monsanto Co.,* 274 F. Supp. 3d 1125, 1132 (W.D. Wash. 2017) (because plaintiff "assert[ed] that it does not seek damages for contamination to waters and land within federal territory, . . . none of its claims arise on federal enclaves").

Defendants argue, however, that Plaintiffs have alleged injuries in federal enclaves including: (i) an insect infestation across Rocky Mountain National Park (ECF No. 7 ¶ 183), that Defendants assert is partially within Boulder County; (ii) increased flood risk in the San Miguel River in San Miguel County (*id.* ¶¶ 31, 236), which Defendants assert is located in the Uncompahgre National Forest ("Uncompahgre"); and (iii) "heat waves, wildfires, droughts, and floods" which Defendants assert occur in Rocky Mountain National Park and Uncompahgre (*id.* ¶¶ 3, 162–63). Plaintiffs do not dispute that Rocky Mountain National Park and Uncompahgre are federal enclaves, but argue that the injury they have alleged did not

occur there such that there is no federal enclave jurisdiction.

The Court finds that Defendants have not met their burden of showing that subject matter jurisdiction exists under the federal enclave doctrine. Uncompahgre National Forest is not mentioned in the Complaint. Rocky Mountain National Park is referenced only as a descriptive landmark (*see* ECF No. 7 ¶¶ 20, 30, 35), and to provide an example of the regional trends that have resulted from Defendants' climate alteration. (*Id.* ¶ 183.) The actual injury for which Plaintiffs seek compensation is injury to "their property" and "their residents," occurring "within their respective jurisdictions." (*See, e.g., id.* ¶¶ 1-4, 10, 11, 532-33.) They specifically allege that they "**do not** seek damages or abatement relief for injuries to or occurring to federal lands." (*Id.* ¶ 542 (emphasis in original).)

"[T]he location where Plaintiff was injured" determines whether "the right to removal exists." *Ramos v. C. Ortiz Corp.*, 2016 WL 10571684, at *3 (D.N.M. May 20, 2016). It is not the defendant's conduct, but the injury, that matters. *See Akin*, 156 F.3d at 1034–35 & n.5 (action against chemical manufacturers fell within enclave jurisdiction where the claimed exposure to the chemicals, not their manufacture or sale, "occurred within the confines" of U.S. Air Force base); *Baltimore*, 2019 WL 2436848, at *15 ("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").

Federal enclave jurisdiction thus does not exist here because Plaintiffs' claims and injuries are alleged to have arisen exclusively on non-federal land. That the alleged climate alteration by Defendants may have caused similar injuries to federal property does not speak to the nature

of Plaintiffs' alleged injuries for which they seek compensation, and does not provide a basis for removal. *See State of Rhode Island*, 2019 WL 3282007, at *5 (finding no federal enclave jurisdiction because while federal land that met the definition of a federal enclave in Rhode Island and elsewhere "may have been the site of Defendants' activities, the State's claims did not arise there, especially since its complaint avoids seeking relief for damages to any federal lands"); *Baltimore*, 2019 WL 2436848, at *15 ("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 . . . . [I]t cannot be said that federal enclaves were the 'locus' in which the City's claims arose merely because one of the twenty-six defendants . . . conducted some operations on federal enclaves for some unspecified period of time.").

D. Federal Officer Jurisdiction

Defendants also argue that removal is appropriate under 28 U.S.C. § 1442 because the conduct that forms the basis of Plaintiffs' claims was undertaken at the direction of federal officers. Section 1442(a)(1) provides that a civil action that is commenced in a State Court may be removed to the district court of the United States if the suit is "against or directed to . . . the United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agent thereof in an official or individual capacity, for or related to any act under color of such office. . . ."

For § 1442(a)(1) to constitute a basis for removal, a private corporation must show: "(1) that it acted under the direction of a federal officer; (2) that there is a causal nexus between the plaintiff's claims and the acts the pri-

vate corporation performed under the federal officer's direction; and (3) that there is a colorable federal defense to the plaintiff's claims." *Greene v. Citigroup, Inc.*, 2000 WL 647190, at *6 (10th Cir. May 19, 2000). "The words 'acting under' are broad," and § 1442(a)(1) must be construed liberally. *Watson* v. *Phillip Morris Co., Inc.*, 551 U.S. 142, 147 (2007). "At the very least, it is broad enough to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law." *Willingham v. Morgan*, 395 U.S. 402, 406–07 (1969).

Thus, the federal officer removal statute should not be read in a "narrow" manner, nor should the policy underlying it "be frustrated by a narrow, grudging interpretation." *Willingham*, 395 U.S. at 406; *Jefferson Cnty., Ala. v. Acker*, 527 U.S. 423, 431 (1999). Under the statute, "suits against federal officers may be removed despite the nonfederal cast of the complaint; the federal-question element is met if the defense depends on federal law." *Acker*, 527 U.S. at 431. Such jurisdiction is thus an exception to the rule that the federal question ordinarily must appear on the face of a properly pleaded complaint. *Id.* "Federal jurisdiction rests on a 'federal interest in the matter', . . . the very basic interest in the enforcement of federal law through federal officials." *Willingham*, 395 U.S. at 406.

Private actors invoking the statute bear a special burden of establishing the official nature of their activities. *See Freiberg v. Swinerton & Walberg Prop. Servs.*, 245 F. Supp. 2d 1144, 1150 (D. Colo. 2002). The federal officer removal statute "authorizes removal by private parties 'only' if they were 'authorized to act with or for [federal officers or agents] in affirmatively executing duties under . . . federal law." *Watson*, 551 U.S. at 151 (quoting *City of*

Greenwood v. Peacock, 384 U.S. 808, 824 (1966)). "That relationship typically involves 'subjection, guidance, or control.'" *Id.* (citation omitted). "[T]he private person's 'acting under' must involve an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior." *Id.* at 152 (emphasis in original). This "does *not* include simply *complying* with the law." *Id.* (emphasis in original). As the *Watson* court stated:

> it is a matter of statutory purpose. When a company subject to a regulatory order (even a highly complex order) complies with the order, it does not ordinarily create a significant risk of state-court "prejudice.". . . . Nor is a state-court lawsuit brought against such a company likely to disable federal officials from taking necessary action to enforce federal law. . . . Nor is such a lawsuit likely to deny a federal forum to an individual entitled to assert a federal claim of immunity.

Id. (internal citations omitted).

Here, Defendants assert that the conduct at issue in Plaintiffs' claims was undertaken, in part, while acting under the direction of federal officials. Specifically, Defendants assert that federal officers exercised control over ExxonMobil through government leases issued to it. (*See* ECF No. 1 ¶¶ 60, 69, 70–73, Exs. B and C.) Under these leases, ExxonMobil contends that it was required to explore, develop, and produce fossil fuels. (ECF No 1, Ex. C § 9.)

For example, Defendants assert that leases related to the outer Continental Shelf ("OCS") obligated ExxonMobil to diligently develop the leased area, which included—under the direction of Department of the Interior ("DOI") officials—carrying out exploration, development, and production activities for the express purpose of maximizing

the ultimate recovery of hydrocarbons from the leased area.[4] Defendants argue that those leases provide that ExxonMobil "*shall*" drill for oil and gas pursuant to government-approved exploration plans (ECF No. 1, Ex. C § 9), and that the DOI may cancel the leases if ExxonMobil does not comply with federal terms governing land use. Given these directives and obligations, Defendants submit that ExxonMobil has acted under a federal officer's direction within the meaning of § 1442(a)(1).

The Court rejects Defendants' argument, finding that Defendants have not shown that they acted under the direction of a federal officer, or that there is a causal connection between the work performed under the leases and Plaintiffs' claims. The federal leases were commercial leases whereby ExxonMobil contracted "for the exclusive right to drill for, develop, and produce oil and gas resources. . . ." (*See* ECF No. 1, Ex. B, p. 1) While the leases require that ExxonMobil, like other OCS lessees, comply with federal law and regulations (*see* ECF No. 1, Ex. B ¶ 10, Ex. C §§ 10, 11), compliance with federal law is not enough for "acting under" removal, even if the company is "subjected to intense regulation." *Watson*, 551 U.S. at 152-53. Defendants also point to the fact that the leases require the timely drilling of wells and production (ECF No. 1, Ex. B ¶ 10, Ex. C §§ 10, 11), but the government does not control the manner in which Defendants drill for oil and gas, or develop and produce the product.

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[4] Defendants cite *California* v. *Watt*, 668 F.2d 1290, 1316 (D.C. Cir. 1981) (the Outer Continental Shelf Lands Act "has an objective—the expeditious development of OCS resources"). They further note that the Secretary of the Interior must develop serial leasing schedules that "he determines will best meet national energy needs for the five-year period" following the schedule's approval. 43 U.S.C. §1344(a).

Similarly, Defendants have not shown that a federal officer instructed them how much fossil fuel to sell or to conceal or misrepresent the dangers of its use, as alleged in this case. They also have not shown that federal officer directed them to market fossil fuels at levels they knew would allegedly cause harm to the environment. 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.

Defendants have not shown that this is sufficient for federal officer jurisdiction. Defendants have also not shown that this lawsuit is "likely to disable federal officers from taking necessary action designed to enforce federal law", or "to deny a federal forum to an individual entitled to assert a federal claim of immunity." *Watson*, 551 U.S. at 152.

To the extent Defendants claim there is jurisdiction because ExxonMobil is "helping the government to produce an item that it needs," *Watson*, 551 U.S. at 153, this also does not suffice to provide jurisdiction in this Court. Federal officer jurisdiction requires an "unusually close" relationship between the government and the contractor. In *Watson*, the Supreme Court noted an example of a company that produced a chemical for the government for use in a war. *Id.* (discussing *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387 (5th Cir. 1998)). As *Winters* explained in more detail, the Defense Department contracted with chemical companies "for a specific mixture of herbicides, which eventually became known as Agent Orange"; required the companies to produce and provide the chemical "under threat of criminal sanctions"; "main-

tained strict control over the development and subsequent production" of the chemical; and required that it "be produced to its specifications." 149 F.3d at 398–99. The circumstances in *Winters* were far different than the circumstances in this case, and Defendants have thus not shown an unusually close relationship between ExxonMobil and the government.

Defendants also cite no support for their assertion that the government "specifically dictated much of ExxonMobil's production, extraction, and refinement of fossil fuels" (ECF No. 48 at 35), much less that it rises to the level of government control set forth in *Winters*. As Plaintiffs note, under Defendants' argument, "any state suit against a manufacturer whose product has at one time been averted and adapted for [government] use . . . would potentially be subject to removal, seriously undercutting the power of state courts to hear and decide basic tort law." *See Ryan v. Dow Chem. Co.*, 781 F. Supp. 934, 951 (E.D.N.Y. 1992).

Baltimore also counsels against finding federal jurisdiction under the federal officer removal statute. It found that the defendants failed plausibly to show that the charged conduct was carried out "for or relating to" the alleged official authority, as they did not show "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." *Baltimore*, 2019 WL 2436848, at *17. The court concluded, "[c]ase 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)." *Id.*; *see also State of Rhode Island*, 2019 WL 3282007, at

*5 (finding no causal connection between any actions Defendants took while "acting under" federal officers or agencies, and thus no grounds for federal-officer removal); *San Mateo*, 294 F. Supp. 3d at 939 (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").

E. Jurisdiction Under the Outer Continental Shelf Lands Act

Defendants next argue that Plaintiffs' claims arise out of Defendants' operations on the OCS. Federal courts have jurisdiction "of cases and controversies rising out of, or in connection with (A) any operation conducted on the [OCS] which involves exploration, development, or production of the minerals, of the subsoil and seabed of the [OCS], or which involves rights to such minerals. . . ." 43 U.S.C. § 1349(b)(1). When assessing jurisdiction under the Outer Continental Shelf Lands Act ("OCSLA"), courts consider whether "(1) the activities that caused the injury constituted an operation conducted on the [OCS] that involved the exploration and production of minerals, and (2) the case arises out of, or in connection with the operation." *In Re Deepwater Horizon*, 745 F.3d 157, 163 (5th Cir. 2014) (internal quotation marks omitted).

Here, Defendants assert that jurisdiction is established because the case arises out of or in connection with an operation conducted on the OCS in connection with the OCSLA leasing program in which ExxonMobil participated. Plaintiffs seek potentially billions of dollars in abatement funds that inevitably would, according to Defendants, discourage OCS production and substantially

interfere with the congressionally mandated goal of recovery of the federally-owned minerals. ExxonMobil has participated in the OCSLA leasing program for decades, and continues to conduct oil and gas operations on the OCS. By making all of Defendants' conduct the subject of their lawsuit, Defendants argue that Plaintiffs necessarily sweep in ExxonMobil's activities on the OCS. Plaintiffs purportedly do not dispute that ExxonMobil operates extensively on the OCS, and Plaintiffs' claims do not distinguish between fossil fuels extracted from the OCS and those found elsewhere. Thus, Defendants assert that at least some of the activities at issue arguably came from an operation conducted on the OCS. The Court rejects Defendants' argument, as they have not shown that the case arose out of, or in connection with an operation conducted on the OCS.

The Court agrees with Plaintiffs that for jurisdiction to lie, a case must arise directly out of OCS operations. For example, courts have found OCSLA jurisdiction where a person is injured on an OCS oil rig "exploring, developing or producing oil in the subsoil and seabed of the continental shelf." *Various Plaintiffs v. Various Defendants ("Oil Field Cases")*, 673 F. Supp. 2d 358, 370 (E.D. Pa. 2009); where oil was spilled from such a rig, *Deepwater Horizon*, 745 F.3d at 162, or in contract disputes directly relating to OCS operations, *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*, 754 F.2d 1223, 1225 (5th Cir. 1985); *cf. Fairfield Indus., Inc. v. EP Energy E&P Co.*, 2013 WL 12145968, at *5 (S.D. Texas May 2, 2013) (finding claims involving performance of contracts "would not influence activity on the OCS, nor require either party to perform physical acts on the OCS", and that the claims thus did not "have a sufficient nexus to an operation on the OCS to fall within the jurisdictional reach of OCSLA"). The fact that some of ExxonMobil's oil

was apparently sourced from the OCS does not create the required direct connection.

As the *Baltimore* court found, "[e]ven under a 'broad' reading of the OCSLA jurisdictional grant endorsed by the Fifth Circuit [in *Deepwater Horizon*], defendants fail to demonstrate that OCSLA jurisdiction exists." 2019 WL 2436848, at *16. "Defendants were not sued merely for producing fossil fuel products, let alone for merely producing them on the OCS." *Id.* "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." *Id.* The defendants there offered "no basis to enable th[e] 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." *Id.*; *see also San Mateo*, 294 F. Supp. 3d at 938–39 ("Removal under OCSLA was not warranted because even if some of the activities that caused the alleged injuries stemmed from operations on the [OCS], the defendants have not shown that the plaintiffs' causes of action would not have accrued *but for* the defendants' activities on the shelf" (emphasis in original)).

Defendants cite no case authority holding that injuries associated with downstream uses of OCS-derived oil and gas products creates OCSLA jurisdiction. The cases cited by Defendants instead involved a more direct connection. *See*, *e.g.*, *Amoco Prod. Co. v. Sea Robin Pipeline Co.*, 844 F.2d 1202, 1210 (5th Cir. 1988) (finding that the exercise of take-or-pay rights, minimum-take rights, or both, by Sea Robin necessarily and physically had an immediate bearing on the production of the particular well at issue,

"certainly in the sense of the volume of gas actually produced", and would have consequences as to production of the well).

Moreover, as Plaintiffs note, jurisdiction under OCSLA makes little sense for injuries in a landlocked state that are alleged to be caused by conduct that is not specifically related to the OCS. No court has read OCSLA so expansively. Defendants' argument would arguably lead to the removal of state claims that are only "tangentially related" to the OCS. *See Plains Gas Solutions, LLC v. Tenn. Gas Pipeline Co.*, 46 F. Supp. 3d 701, 704–05 (S.D. Texas 2014) (recognizing that the "but-for" test articulated by the Fifth Circuit in the *Deepwater Horizon* case "is not limitless," and that "a blind application of this test would result in federal court jurisdiction over all state law claims even tangentially related to offshore oil production on the OCS"; "Defendants' argument that the 'but-for' test extends jurisdiction to any claim that would not exist but for offshore production lends itself to absurd results").

The downstream impacts of fossil fuels produced offshore also does not create jurisdiction under OCSLA because Plaintiffs do not challenge conduct on any offshore "submerged lands." 43 U.S.C. § 1331(a). Defendants' argument that there is federal jurisdiction if any oil *sourced* from the OCS is some *part* of the conduct that creates the injury would, again, dramatically expand the statute's scope. Any spillage of oil or gasoline involving some fraction of OCS-sourced oil—or any commercial claim over such a commodity—could be removed to federal court. It cannot be presumed that Congress intended such an absurd result. Plaintiffs' claims concern Defendants' overall conduct, not whatever unknown fraction of their fossil fuels was produced on the OCS. No case holds removal is

appropriate if some fuels from the OCS *contribute* to the harm. A case cannot be removed under OCSLA based on speculative impacts; immediate and physical impact is needed. *See Amoco Prod. Co.*, 844 F.2d at 1222–23. Accordingly, the Court does not have jurisdiction under OCSLA.

F. Jurisdiction as the Claims Relate to Bankruptcy Proceedings

Finally, Defendants argue that this Court has jurisdiction and this action is removable because Plaintiffs' claims are related to bankruptcy proceedings within the meaning of 28 U.S.C. §§ 1452(a). Subject to certain exceptions, that statute allows a party to remove any claim or cause of action in a civil action . . . to the district court 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." Section 1334(b) of the Bankruptcy Code states that "the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11."

The Tenth Circuit has held that an action is "related to" bankruptcy if it "'could conceivably have any effect on the estate being administered in bankruptcy.'" *In re Gardner*, 913 F.2d 1515, 1518 (10th Cir. 1990) (citation omitted). "Although the proceeding need not be against the debtor or his property, the proceeding is related to the bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action in any way, thereby impacting on the handling and administration of the bankruptcy estate." *Id.* Removal is proper even after a bankruptcy plan has been confirmed if the case would impact a creditor's recovery under the reorganization plan. *In re CF & I Fabricators of Utah, Inc.*, 150 F.3d 1233, 1237 (10th Cir. 1998).

Defendants assert that Plaintiffs' claims relate to ongoing bankruptcy proceedings because they could impact the estates of other bankrupt entities that are necessary and indispensable parties to this case. They note in that regard that 134 oil and gas producers filed for bankruptcy in the United States between 2015 and 2017. Peabody Energy and Arch Coal ("Peabody"), in particular, is alleged to have emerged from Chapter 11 bankruptcy in 2016. Defendants argue that the types of claims brought by Plaintiffs are irreconcilable with the "implementation," "execution," and "administration" of Peabody's "confirmed plan," citing *In Re Wiltshire Courtyard*, 729 F.3d 1279, 1289 (9th Cir. 2013). Defendants thus assert that this case is related to a bankruptcy proceeding and is therefore removable.

The Court, too, rejects Defendants' final argument. As the Ninth Circuit noted in the *Wiltshire Courtyard* case, "'to support jurisdiction, there must be a close nexus connecting a proposed [bankruptcy proceeding] with some demonstrable effect on the debtor or the plan of reorganization.'" 729 F.3d at 1289 (citation omitted). "[A] close nexus exists between a post-confirmation matter and a closed bankruptcy proceeding sufficient to support jurisdiction when the matter 'affect[s] the interpretation, implementation, consummation, execution, or administration of the confirmed plan.'" *Id.* (citation omitted).

Here, none of the Defendants have filed for bankruptcy. To the extent Defendants argue that this case may effect other oil and gas producers who filed for bankruptcy, including Peabody or other unspecified bankrupt entities, this is entirely speculative. Defendants have not shown any nexus, let alone a close nexus, between the claims in this case and a bankruptcy proceeding. Thus,

Defendants offer no evidence of how Plaintiffs' claims relate to any estate or affect any creditor's recovery, including Peabody. Defendants suggest bankrupt entities are indispensable parties, but joint tortfeasors are not indispensable. *See Temple v. Synthes Corp.*, 498 U.S. 5, 7 (1990). Nor would it matter if Defendants have third-party claims against bankruptcy estates. *See Pacor, Inc. v. Higgins*, 743 F.2d 984, 995 (3d Cir. 1984); *Union Oil Co. of California v. Shaffer*, 563 B.R. 191, 198–200 (E.D. La. 2016). Plaintiffs do not seek any relief from a debtor in bankruptcy, advantage over creditors, or to protect any interest in the debtor's property. *City & Cnty. of San Francisco v. PG & E Corp.*, 433 F.3d 1115, 1124–25 (9th Cir. 2006). Thus, Defendants have failed to show that jurisdiction is proper under the bankruptcy removal statute.

As discussed in *Baltimore*, "Defendants fail to demonstrate that there is a 'close nexus' between this action and any bankruptcy proceedings . . . 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" the defendant. 2019 WL 2436848, at *19 (emphasis in original). "This remote connection does not bring this case within the Court's "related to" jurisdiction under 28 U.S.C. § 1334(b). *Id.*

Moreover, one of the exceptions to removal are proceedings "by a governmental unit to enforce such governmental unit's police or regulatory powers." 28 U.S.C. § 1452(a). *Baltimore* noted that an action such as this where the plaintiffs "assert claims for injuries stemming from climate change" are actions "on behalf of the public to remedy and prevent environmental damage, punish wrongdoers, and deter illegal activity." 2019 WL 2436848,

at *19. It found that "[a]s other courts have recognized, such an action falls squarely within the police or regulatory exception to § 1452." *Id*. *See also Rhode Island*, 2019 WL 3282007, at *5; *San Mateo*, 294 F. Supp. 3d at 939. This Court agrees and adopts the *Baltimore* court's analysis on this point. Accordingly, removal is also inappropriate because this case is a proceeding "by a governmental unit to enforce such governmental unit's police or regulatory powers." 28 U.S.C. § 1452.

IV. CONCLUSION

Plaintiffs' claims implicate important issues involving global climate change caused in part by the burning of fossil fuels. While Defendants assert, maybe correctly, that this type of case would benefit from a uniform standard of decision, they have not met their burden of showing that federal jurisdiction exists. Accordingly, the Court **ORDERS** as follows:

1. Defendants' Motion to Reschedule Oral Argument on Plaintiffs' Motion to Remand (ECF No. 67) is **DENIED**.
2. Plaintiffs' Motion to Remand (ECF No. 34) is **GRANTED**; and
3. The Clerk shall **REMAND** this case to Boulder County District Court, and shall terminate this action.