No. 22A-

IN THE

Supreme Court of the United States

CHEVRON CORPORATION, *et al.*,

Applicants,

v.

COUNTY OF SAN MATEO., *et al.*,

Respondents.

APPENDIX TO APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COUNTY OF SAN MATEO, individually and on behalf of the People of the State of California, *Plaintiff-Appellee*, v. CHEVRON CORPORATION; CHEVRON U.S.A. INC.; EXXONMOBIL CORPORATION; BP PLC; BP AMERICA, INC.; SHELL PLC; SHELL OIL PRODUCTS COMPANY LLC; CITGO PETROLEUM CORPORATION; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66 COMPANY; PEABODY ENERGY CORPORATION; TOTAL E&P USA, INC.; TOTAL SPECIALTIES USA, INC.; ARCH COAL INC.; ENI OIL & GAS, INC.; RIO TINTO ENERGY AMERICA, INC.; RIO TINTO MINERALS, INC.; RIO TINTO SERVICES, INC.; ANADARKO PETROLEUM CORPORATION; OCCIDENTAL PETROLEUM CORPORATION; OCCIDENTAL CHEMICAL CORPORATION; REPSOL ENERGY	No. 18-15499 D.C. No. 3:17-cv-04929-VC

NORTH AMERICA CORP.; REPSOL TRADING USA CORP.; MARATHON OIL COMPANY; MARATHON OIL CORPORATION; MARATHON PETROLEUM CORP.; HESS CORP.; DEVON ENERGY CORP.; DEVON ENERGY PRODUCTION COMPANY, LP; ENCANA CORPORATION; APACHE CORP.,

Defendants-Appellants.

CITY OF IMPERIAL BEACH, individually and on behalf of the People of the State of California,

Plaintiff-Appellee,

v.

CHEVRON CORPORATION; CHEVRON U.S.A. INC.; EXXONMOBIL CORPORATION; BP PLC; BP AMERICA, INC.; SHELL PLC; SHELL OIL PRODUCTS COMPANY LLC; CITGO PETROLEUM CORPORATION; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66 COMPANY; PEABODY ENERGY CORPORATION; TOTAL E&P USA, INC.; TOTAL SPECIALTIES USA, INC.; ARCH

No. 18-15502

D.C. No. 3:17-cv-04934-VC

COAL INC.; ENI OIL & GAS, INC.; RIO TINTO ENERGY AMERICA, INC.; RIO TINTO MINERALS, INC.; RIO TINTO SERVICES, INC.; ANADARKO PETROLEUM CORPORATION; OCCIDENTAL PETROLEUM CORPORATION; OCCIDENTAL CHEMICAL CORPORATION; REPSOL ENERGY NORTH AMERICA CORP.; REPSOL TRADING USA CORP.; MARATHON OIL COMPANY; MARATHON OIL CORPORATION; MARATHON PETROLEUM CORP.; HESS CORP.; DEVON ENERGY CORP.; DEVON ENERGY PRODUCTION COMPANY, LP; ENCANA CORPORATION; APACHE CORP.,

Defendants-Appellants.

COUNTY OF MARIN, individually and on behalf of the People of the State of California,

Plaintiff-Appellee,

v.

CHEVRON CORPORATION; CHEVRON U.S.A. INC.; EXXONMOBIL CORPORATION; BP PLC; BP AMERICA, INC.; SHELL

No. 18-15503

D.C. No. 3:17-cv-04935-VC

PLC; SHELL OIL PRODUCTS COMPANY LLC; CITGO PETROLEUM CORPORATION; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66 COMPANY; PEABODY ENERGY CORPORATION; TOTAL E&P USA, INC.; TOTAL SPECIALTIES USA, INC.; ARCH COAL INC.; ENI OIL & GAS, INC.; RIO TINTO ENERGY AMERICA, INC.; RIO TINTO MINERALS, INC.; RIO TINTO SERVICES, INC.; ANADARKO PETROLEUM CORPORATION; OCCIDENTAL PETROLEUM CORPORATION; OCCIDENTAL CHEMICAL CORPORATION; REPSOL ENERGY NORTH AMERICA CORP.; REPSOL TRADING USA CORP.; MARATHON OIL COMPANY; MARATHON OIL CORPORATION; MARATHON PETROLEUM CORP.; HESS CORP.; DEVON ENERGY CORP.; DEVON ENERGY PRODUCTION COMPANY, LP; ENCANA CORPORATION; APACHE CORP.,

Defendants-Appellants.

COUNTY OF SANTA CRUZ, individually and on behalf of The People of the State of California; CITY OF SANTA CRUZ, a municipal corporation, individually and on behalf of The People of the State of California; CITY OF RICHMOND, individually and on behalf of The People of the State of California,
Plaintiffs-Appellees,

v.

CHEVRON CORPORATION; CHEVRON U.S.A. INC.; EXXONMOBIL CORPORATION; BP PLC; BP AMERICA, INC.; SHELL PLC; SHELL OIL PRODUCTS COMPANY LLC; CITGO PETROLEUM CORPORATION; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66 COMPANY; PEABODY ENERGY CORPORATION; TOTAL E&P USA, INC.; TOTAL SPECIALTIES USA, INC.; ARCH COAL INC.; ENI OIL & GAS, INC.; RIO TINTO ENERGY AMERICA, INC.; RIO TINTO MINERALS, INC.; RIO TINTO SERVICES, INC.; ANADARKO PETROLEUM CORPORATION; OCCIDENTAL

No. 18-16376

D.C. Nos.
3:18-cv-00450-VC
3:18-cv-00458-VC
3:18-cv-00732-VC

OPINION

PETROLEUM CORPORATION; OCCIDENTAL CHEMICAL CORPORATION; REPSOL ENERGY NORTH AMERICA CORP.; REPSOL TRADING USA CORP.; MARATHON OIL COMPANY; MARATHON OIL CORPORATION; MARATHON PETROLEUM CORP.; HESS CORP.; DEVON ENERGY CORP.; DEVON ENERGY PRODUCTION COMPANY, LP; ENCANA CORPORATION; APACHE CORP.,

Defendants-Appellants.

On Remand from the United States Supreme Court

Filed April 19, 2022

Before: Sandra S. Ikuta, Morgan Christen, and Kenneth K. Lee, Circuit Judges.

Opinion by Judge Ikuta

SUMMARY*

Removal Jurisdiction

On remand from the Supreme Court, the panel affirmed the district court's order remanding global-warming related complaints to state court after they were removed by the energy company defendants.

The complaints alleged that the energy companies' extraction of fossil fuels and other activities were a substantial factor in causing global warming and sea level rise. The County of San Mateo and other plaintiffs asserted causes of action for public and private nuisance, strict liability for failure to warn, strict liability for design defect, negligence, negligent failure to warn, and trespass.

In a prior opinion, the panel affirmed the district court's determination that no subject matter jurisdiction existed under the federal-officer removal statute, and the panel dismissed the rest of the appeal for lack of appellate jurisdiction. The Supreme Court granted the energy companies' petition for certiorari and remanded for further consideration in light of *BP p.l.c. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532 (2021), which interpreted 28 U.S.C. § 1447(d) as permitting appellate review of additional grounds for removal.

On remand, the panel concluded that *Baltimore* effectively abrogated the reasoning and holding of *Patel v.*

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Del Taco, Inc., 446 F.3d 996 (9th Cir. 2006), which held that the court of appeals lacked authority to review a remand order considering bases for subject matter jurisdiction other than federal officer jurisdiction. Accordingly, the panel considered all bases for removal raised by the defendants, rather than addressing only federal officer removal.

The panel held that the district court lacked federal-question jurisdiction under 28 U.S.C. § 1331 because, at the time of removal, the complaints asserted only state-law tort claims against the energy companies. The panel held that the plaintiffs' global-warming claims did not fall within the *Grable* exception to the well-pleaded complaint rule, under which federal jurisdiction over a state law claim will lie if a federal issue is necessarily raised, actually disputed, substantial, and capable of resolution in federal court without disrupting the federal-state balance approved by Congress. In addition, plaintiffs' state law claims did not fall under the "artful-pleading" doctrine, another exception to the well-pleaded complaint rule, because they were not completely preempted by the Clean Air Act. The panel rejected the energy companies' argument that the complaints arose under federal law for purposes of § 1331 because the tort claims at issue arose on a federal enclave.

The panel held that plaintiffs' claims were not removable under the Outer Continental Shelf Lands Act, which gives federal courts jurisdiction over actions "arising out of, or in connection with (A) any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals." Taking a different approach from other circuits, which interpreted the statute as requiring a "but-for"

connection between operations on the Outer Continental Shelf and a plaintiff's alleged injuries, the panel read the phrase "aris[e] out of, or in connection with" as granting federal courts jurisdiction over tort claims only when those claims arise from actions or injuries occurring on the Outer Continental Shelf.

The panel held that the district court did not have subject matter jurisdiction under the federal-officer removal statute, 28 U.S.C. § 1442(a)(1), because the energy companies were not "acting under" a federal officer's directions based on agreements with the government, including fuel supply agreements with the Navy Exchange Service Command, a unit agreement for petroleum reserves with the U.S. Navy, and lease agreements for the right to explore and produce oil and gas resources in the submerged lands of the Outer Continental Shelf.

The panel rejected the energy companies' argument that the district court had removal jurisdiction over the complaints under 28 U.S.C. § 1452(a) because they were related to bankruptcy cases involving Peabody Energy Corp., Arch Coal, and Texaco, Inc.

Finally, the panel held that the district court did not have admiralty jurisdiction because maritime claims brought in state court are not removable to federal court absent an independent jurisdictional basis, such as diversity jurisdiction.

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OPINION

IKUTA, Circuit Judge:

This appeal requires us to determine whether a district court erred in remanding the plaintiffs' global-warming related complaints to state court after they were removed by the energy company defendants. On appeal, the defendants argue that the district court had removal jurisdiction over these complaints on multiple grounds, including federal question and federal enclave jurisdiction under 28 U.S.C. § 1331, federal officer removal jurisdiction under 28 U.S.C. § 1442(a)(1), bankruptcy jurisdiction under 28 U.S.C. § 1452(a) and 28 U.S.C. § 1334(b), and admiralty jurisdiction under 28 U.S.C. § 1333(1). Because the district court did not err in concluding that it lacked subject matter jurisdiction under any of these asserted grounds, we affirm.

I

The County of San Mateo, the County of Marin, and the City of Imperial Beach filed three materially similar complaints in California state court against more than 30 energy companies in July 2017.[1] The complaints allege that the Energy Companies' "extraction, refining, and/or formulation of fossil fuel products; their introduction of fossil fuel products into the stream of commerce; their wrongful promotion of their fossil fuel products and concealment of known hazards associated with use of those products; and their failure to pursue less hazardous alternatives available to them; is a substantial factor in causing the increase in global

[1] We refer to the plaintiffs collectively as the "Counties" and to the defendants collectively as the "Energy Companies."

mean temperature and consequent increase in global mean sea surface height." Further, according to the complaints, the Counties "have already incurred, and will foreseeably continue to incur, injuries and damages because of sea level rise caused by [the Energy Companies'] conduct." Such "sea level rise-related injuries and damages" include flooding that causes injury and damages to real property and its improvements, and prevents the "free passage on, use of, and normal enjoyment of that real property, or permanently [destroys] it." For instance, the Counties allege that Surfer's Beach near the city of Half Moon Bay "has lost 140 feet of accessible beach since 1964 due to erosion, which has been exacerbated and substantially contributed to by sea level rise and increased extreme weather." Other injuries caused by sea level rise, according to the Counties, include "infrastructural repair and reinforcement of roads and beach access." Based on these allegations, the complaints assert causes of action for public and private nuisance, strict liability for failure to warn, strict liability for design defect, negligence, negligent failure to warn, and trespass.

The Energy Companies removed the three complaints to federal court, asserting multiple bases for subject matter jurisdiction: (1) the Counties' claims raise disputed and substantial federal issues, *see Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005); (2) the Counties' claims are "completely preempted" by federal law; (3) the Counties' claims arose on "federal enclaves"; (4) the Counties' claims arise out of operations on the outer Continental Shelf, *see* 43 U.S.C. § 1349(b); (5) the Counties' claims arise from actions that were taken by the Energy Companies pursuant to a federal officer's directions, *see* 28 U.S.C. § 1442(a); and (6) the Counties' claims are related to bankruptcy cases, *see* 28 U.S.C. §§ 1452(a), 1334(b).

Shortly after the complaints were filed, the County of Santa Cruz, the City of Santa Cruz, and the City of Richmond filed materially similar complaints in California state court. The Energy Companies removed these cases to federal court as well, asserting the same six bases for subject matter jurisdiction. Marathon Petroleum Corporation raised an additional ground for removal: the complaints raised issues concerning maritime activities, giving rise to admiralty jurisdiction. *See* 28 U.S.C. § 1333. These cases were assigned to the same district judge.

The Counties moved to remand each case to state court based on a lack of subject matter jurisdiction. In a reasoned opinion, the district court rejected all the grounds on which the Energy Companies relied for subject matter jurisdiction, but stayed its remand orders to give the Energy Companies an opportunity to appeal.

The Energy Companies appealed, and we affirmed the district court's determination that no subject matter jurisdiction existed under the federal-officer removal statute. *County of San Mateo v. Chevron Corp.*, 960 F.3d 586, 603 (9th Cir. 2020), *vacated*, 141 S. Ct. 2666 (2021) (mem.). We dismissed the rest of the appeal for lack of appellate jurisdiction. *Id.* Under 28 U.S.C. § 1447(d), "[1] [a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise [(referred to as the "non-reviewability clause")], [2] except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise [(referred to as the

"exceptions clause")]."[2] We concluded that we lacked authority to review the remand order under the non-reviewability clause because the district court's order remanded the complaints on subject matter jurisdiction grounds, and the non-reviewability clause applies when a district court bases its remand order on subject matter jurisdiction or nonjurisdictional defects. *San Mateo*, 960 F.3d at 594 95 (citing *Atl. Nat'l Tr. LLC v. Mt. Hawley Ins. Co.*, 621 F.3d 931, 934 (9th Cir. 2010)). We also concluded that we lacked authority to review the remand order under the exceptions clause because we were bound by our precedent, *see Patel v. Del Taco, Inc.*, 446 F.3d 996, 998 (9th Cir. 2006), which indicated we had the authority to review only the portion of the district court's remand order that addressed 28 U.S.C. § 1442(a), federal officer removal, but lacked jurisdiction to review the appeal from the portions of the remand order that considered the other bases for subject matter jurisdiction, *San Mateo*, 960 F.3d at 595 96. Therefore, we rejected the Energy Companies' argument that 28 U.S.C. § 1447(d) gave us the authority to conduct plenary review of the district court's remand order and did not address the other bases for removal. *Id.* at 603.

The Energy Companies sought review by the Supreme Court. While the Energy Companies' petition for certiorari was pending, the Supreme Court decided *BP p.l.c. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532 (2021). *Baltimore* interpreted § 1447(d) as permitting appellate review of all the defendants' grounds for removal under that section, and overruled the Fourth Circuit's interpretation of

[2] 28 U.S.C. § 1442 relates to removal of an action against an agency or an officer of the United States, or "any person acting under that officer," and 28 U.S.C. § 1443 relates to civil rights cases.

§ 1447(d) as limiting appellate review of a remand order to "the *part* of the district court's remand order" discussing § 1442 or 1443. *See Baltimore*, 141 S. Ct. at 1537. The Supreme Court then granted the petition for writ of certiorari in *San Mateo*, vacated judgment, and remanded for further consideration in light of *Baltimore*. *Chevron Corp. v. San Mateo County, California*, 141 S. Ct. 2666 (2021).

On remand, we conclude that *Baltimore* has effectively abrogated *Patel*'s reasoning and holding "in such a way that the cases are clearly irreconcilable." *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). Because *Baltimore* held that § 1447(d) gives us the authority to review the district court's entire remand order, 141 S. Ct. at 1538, we now consider all bases for removal raised by the defendants, rather than addressing only federal officer removal.

We have jurisdiction under 28 U.S.C. § 1291. We review questions of statutory construction and subject matter jurisdiction de novo. *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1315 (9th Cir. 1998). The defendant has the burden of proving by a preponderance of the evidence that the requirements for removal jurisdiction have been met. *Leite v. Crane Co.*, 749 F.3d 1117, 1122 (9th Cir. 2014).

II

A

We start with the Energy Companies' argument that the district court erred in rejecting its claims that it had federal-question jurisdiction under 28 U.S.C. § 1331, which provides that "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.

At the time of removal, the Counties' complaints asserted only state-law claims against the Energy Companies. Under the well-pleaded complaint rule, the plaintiff is "the 'master of the claim'" and can generally avoid federal jurisdiction if a federal question does not appear on the face of the complaint. *City of Oakland v. BP PLC*, 969 F.3d 895, 904 (9th Cir. 2020) (quoting *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987)). The Energy Companies argue that the Counties' global-warming claims arise under federal common law and are removable under two exceptions to the well-pleaded complaint rule: (1) the exception articulated in *Grable*; and (2) the doctrine of complete preemption. We consider each in turn.

1

Grable affirmed a long line of Supreme Court cases that recognized an exception to the well-pleaded complaint rule when "federal law is a necessary element of the [plaintiff's] claim for relief." *Oakland*, 969 F.3d at 904 (cleaned up). "Only a few cases" have ever fallen into this narrow category. *Id.* Under this exception, "federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn v. Minton*, 568 U.S. 251, 258 (2013). If those requirements are met, federal jurisdiction exists "because there is a 'serious federal interest in claiming the advantages thought to be inherent in a federal forum,' which can be vindicated without disrupting Congress's intended division of labor between state and

federal courts." *Id.* (quoting *Grable*, 545 U.S. at 313 14). The inquiry under *Grable* often focuses on the third requirement, which asks whether the case "turn[s] on substantial questions of federal law." *Oakland*, 969 F.3d at 905 (quoting *Grable*, 545 U.S. at 312).

In *Oakland*, we considered a similar issue. In that case, two cities sued various energy companies in state court, raising a state-law claim for public nuisance based on "production and promotion of massive quantities of fossil fuels" which "caused or contributed to 'global warming-induced sea level rise,'" and in turn led to injuries to the cities' wastewater treatment systems and stormwater infrastructure, as well as other injuries. *Id.* at 901 02. The energy companies argued that we had federal jurisdiction over the state complaint under the exception to the well-pleaded complaint rule for substantial federal questions. *Id.* at 902.

We rejected this argument, holding that even assuming that the complaint "could give rise to a cognizable claim for public nuisance under federal common law," the state law claim in that case did not raise a substantial federal question because "the claim neither requires an interpretation of a federal statute . . . nor challenges a federal statute's constitutionality," nor identifies "a legal issue necessarily raised by the claim that, if decided, will be controlling in numerous other cases." *Id.* at 906 (cleaned up). Further, as we explained:

> [I]t is not clear that the claim requires an interpretation or application of federal law at all, because the Supreme Court has not yet determined that there is a federal common law

> of public nuisance relating to interstate pollution, and we have held that federal public-nuisance claims aimed at imposing liability on energy producers for acting in concert to create, contribute to, and maintain global warming and conspiring to mislead the public about the science of global warming, are displaced by the Clean Air Act.

Id. (cleaned up).

We also rejected the energy companies' argument that because the complaint "implicates a variety of 'federal interests,'" including energy policy, national security, and foreign policy, the complaint necessarily raised a substantial federal question. *Id.* at 906–07. Although we acknowledged that the "question whether the Energy Companies can be held liable for public nuisance based on production and promotion of the use of fossil fuels and be required to spend billions of dollars on abatement is no doubt an important policy question," we concluded it "does not raise a substantial question of federal law for the purpose of determining whether there is jurisdiction under § 1331." *Id.* at 907. Finally, we noted that a court's evaluation of the cities' public nuisance claim would require a fact-intensive and situation specific analysis, which "is not the type of claim for which federal-question jurisdiction lies" under *Grable*. *Id.* Therefore, we concluded that because the plaintiffs' claim did not raise a substantial federal issue, it did not fit within the exception to the well-pleaded complaint rule articulated in *Grable*. *Id.*

The same analysis applies here. Although in *Oakland* the plaintiffs raised a single public nuisance claim, while here the

Counties allege multiple state tort theories, including public nuisance, failure to warn, design defect, private nuisance, negligence, and trespass, the substance of their claims is the same as in *Oakland*: tortious conduct by the Energy Companies in the course of producing, selling, and promoting the use of fossil fuels contributed to global warming and sea-level rise, which led to property damage and other injuries to the Counties. Therefore, even if we assume that the Counties' complaints "could give rise to a cognizable claim" under federal common law, *id.* at 906, the global-warming-related tort claims do not "require resolution of a substantial question of federal law" because they do not require any interpretation of a federal statutory or constitutional issue, and are "displaced by the Clean Air Act." *Id.* And as in *Oakland*, even if the complaints raise federal policy issues that are national and international in scope, implicate foreign affairs and negotiations with other nations, and require uniform standards, they do not "raise a substantial question of federal law for the purpose of determining whether there is jurisdiction under § 1331." *Id.* at 907. Finally, as in *Oakland*, the Counties' tort claims require a fact-intensive and situation-specific analysis, which "is not the type of claim for which federal-question jurisdiction lies." *Id.*

Therefore, the exception to the well-pleaded complaint rule for substantial federal questions under *Grable* does not apply to the Counties' claims.

2

Second, the Energy Companies argue that the Counties' state law claims fall under the "artful-pleading doctrine," another exception to the well-pleaded complaint rule. *Oakland*, 969 F.3d at 905. Under this doctrine, a federal

statute's preemptive force 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)). Once a federal statute completely preempts an area of state law, then "any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law." *Id.* (citation omitted). We have held that complete preemption applies when Congress "(1) intended to displace a state-law cause of action, and (2) provided a substitute cause of action." *Oakland*, 969 F.3d at 906 (citations omitted). The Supreme Court has recognized only three statutes for which complete preemption applies: (1) § 301 of the Labor Management Relations Act, (2) § 502(a) of the Employee Retirement Income Security Act of 1974, and (3) §§ 85 and 86 of the National Bank Act. *See id.* at 905 906 (citations omitted).

The Energy Companies assert that the Counties' state-law claims are "completely preempted by the Clean Air Act and/or other federal statutes and the United States Constitution." We rejected this precise argument in *Oakland*, observing that "[t]he Clean Air Act is not one of the three statutes that the Supreme Court has determined has extraordinary preemptive force" and concluding that it does not "meet either of the two requirements for complete preemption." *Id.* at 907. The Energy Companies do not identify any other federal statute that completely preempts the state-law claims here. Therefore, the complete preemption exception to the well-pleaded complaint rule does not apply.

3

We next turn to the Energy Companies' argument that the Counties' complaints arise under federal law for purposes of § 1331 because the tort claims at issue arose on a federal enclave.

The removal of a claim brought in state court under the federal enclave doctrine is premised on the following legal framework. First, a state law claim brought in state court is removable under § 1331 when "federal law is a necessary element of the [plaintiff's] claim for relief." *Oakland*, 969 F.3d at 904 (cleaned up). The Constitution establishes the principle that federal law applies in federal enclaves:

> Congress shall have Power . . . [t]o exercise exclusive Legislation in all Cases whatsoever, over such District[s] . . . as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.

U.S. Const. art. I, § 8, cl. 17.

As this clause has been interpreted, when the federal government purchases state land with the consent of the state legislature, "any law existing [on that land] must derive its authority and force from the United States and is for that reason federal law." *Mater v. Holley*, 200 F.2d 123, 124 (5th

Cir. 1952).[3] Accordingly, unless an exception applies, any conduct on a federal enclave is governed by federal law. *Id.*[4] Because federal law governs disputes arising from such conduct, federal courts have the "power to adjudicate controversies arising" on federal enclaves. *Id.* If federal law applies to a legal controversy arising on federal enclaves, then such a controversy necessarily "arises under the laws of the United States, within the meaning of 28 U.S.C. § 1331." *Id.* at 125. In sum, because conduct on a federal enclave is generally subject to federal law, a claim based on injuries stemming from such conduct arises under federal law, and a court has jurisdiction over such a claim under § 1331.[5]

We have referenced this framework for federal enclave jurisdiction in several cases. In *Willis v. Craig*, a civilian employee who was injured while working at a federal naval center brought a negligence action in federal court. *See* 555 F.2d 724, 725 (9th Cir. 1977) (per curiam). We held that federal jurisdiction was proper if the employee's accident occurred on property that qualified as a federal enclave. *Id.*

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[3] We have said that *Mater* contains "[t]he best reasoning on [federal enclave jurisdiction]." *Willis v. Craig*, 555 F.2d 724, 726 n.4 (9th Cir. 1977) (per curiam).

[4] The state law that previously governed the territory "remain[s] operative as federal law" so long as it is consistent with federal law. *Mater*, 200 F.2d at 124. State law directly applies in federal enclaves only under one of three narrow exceptions, none of which is relevant here. *See Paul v. United States*, 371 U.S. 245, 268–69 (1963); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180 (1988).

[5] Where such an action is transitory and a state court has personal jurisdiction over the defendant, the state court may also hear the action. *Mater*, 200 F.2d at 123 (citing *Ohio River Cont. Co. v. Gordon*, 244 U.S. 68 (1917)).

at 726. In *Durham v. Lockheed Martin Corp.*, we noted in passing that federal courts would have federal question jurisdiction over an employee's claim arising from exposure to asbestos during his work on federal enclaves. 445 F.3d 1247, 1250 (9th Cir. 2006); *see also Alvares v. Erickson*, 514 F.2d 156, 160 (9th Cir. 1975) (noting in passing that in federal enclave cases, the jurisdiction of a federal court depends on "the locus in which the claim arose").

In this case, the Counties have not alleged that their claims are based on torts taking place on a federal enclave. Rather, their complaint raises state-law claims arising from injuries to real property and infrastructure within their local jurisdictions. For instance, San Mateo's alleged injuries flow from its claim of trespass to land, i.e., that the Energy Companies' petroleum activities ultimately led to a sea-level rise that caused water to enter San Mateo property in violation of trespass law and caused various damages and nuisances there, including the destruction of real property and infrastructure within its borders.[6]

[6] The other claims raised by the Counties are analogous. For its trespass claim, San Mateo claims that the Energy Companies caused "ocean waters to enter" city property, without the city's consent, "permanently submerging real property owned by [San Mateo], causing flooding which have [sic] invaded and threatens to invade real property owned by [San Mateo] and rendered it unusable, and causing storm surges which have invaded and threatened to invade real Property owned by [San Mateo] and rendered it unusable." For its nuisance claims, San Mateo alleges that the condition of flooding and storms is "harmful and dangerous to human health," "indecent and offensive to the senses of the ordinary person," "obstruct[s] and threaten[s] to obstruct the free use of the People's property," and "obstruct[s] and threaten[s] to obstruct the . . . use of [various areas] within San Mateo County." San Mateo specifies that "the ultimate nature of the harm is the destruction of real and personal

Therefore, we turn to the question whether the Counties' tort claims arose from actions and injuries that occurred on federal enclaves and thus were governed by federal law. The Energy Companies argue that "pertinent" or "substantial" events giving rise to the complaints took place on federal enclaves. Specifically, they contend that Standard Oil Co. (Chevron's predecessor) operated Elk Hills Naval Petroleum Reserve, a federal enclave, for many decades, and CITGO distributed gasoline and diesel under its contracts with the government to multiple naval installations that are federal enclaves. Relying on several district court opinions, the Energy Companies contend that because federal law applied to these activities on federal enclaves, federal law applies to the Counties' claims, which are therefore removable under § 1331.

We disagree. Unlike in *Willis*, where the accident that resulted in the plaintiff's injury occurred on a federal enclave, or in *Durham*, where the exposure that resulted in the plaintiff's injury occurred on a federal enclave, the Energy Companies allege only that some of the defendants engaged

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property," and that "the interference borne is the loss of property and infrastructure within San Mateo County."

For its failure to warn claim, San Mateo alleges that the Energy Companies "failed to adequately warn customers, consumers, elected officials and regulators of known and foreseeable risk of climate change and the consequences that inevitably flow from the normal, intended use and foreseeable misuse of [their] fossil fuel products," which caused "damage to publicly owned infrastructure and real property, and the creation and maintenance of a nuisance that interferes with the rights of the County, its residents, and of the People." Finally, for its design defect claim, San Mateo alleges that the Energy Companies' "fossil fuel products are defective because the risks they pose to consumers and to the public, including and especially to [San Mateo] outweigh their benefits."

in some conduct on federal enclaves that may have contributed to global warming, which allegedly caused the rising sea levels that resulted in the injuries that are the basis for the Counties' claims. The Energy Companies do not allege how much of that conduct occurred on federal enclaves. The connection between conduct on federal enclaves and the Counties' alleged injuries is too attenuated and remote to establish that the Counties' cause of action is governed by the federal law applicable to any federal enclave. As a result, the Energy Companies have failed to establish that a federal issue is "necessarily raised" by the complaints. *Gunn*, 568 U.S. at 258.[7] We therefore reject this basis for removal jurisdiction.

B

The Energy Companies next argue that the Counties' claims were removable under the Outer Continental Shelf Lands Act (OCSLA). OCSLA gives federal courts jurisdiction over actions "arising out of, or in connection with (A) any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer

[7] We reject the Energy Companies' passing argument that federal enclave jurisdiction extends to complaints implicating "powerful federal interests." The constitutional basis for federal enclave jurisdiction is Congress's power to exercise exclusive legislation over federal enclaves, U.S. Const. art I, § 8, cl. 17, and we have no authority to extend federal enclave jurisdiction beyond such limitations.

Continental Shelf, or which involves rights to such minerals."[8]

According to the Energy Companies, the Counties' tort claims fall within this jurisdictional grant. The Energy Companies reason as follows: The Counties allege that their injuries were caused in part by the Energy Companies' cumulative fossil-fuel extraction; and a portion of this extraction took place on the outer Continental Shelf (OCS) because some of the Energy Companies have conducted (and continue to conduct) petroleum exploration, development, and production on the outer Continental Shelf.[9] Therefore, the Energy Companies argue, the Counties' claims "aris[e]

[8] 43 U.S.C. § 1349(b)(1) provides in full:

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

[9] The outer Continental Shelf is defined as "all submerged lands lying seaward and outside of the area of lands beneath navigable waters . . . and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control." 43 U.S.C. § 1331(a).

out of, or in connection with" the Energy Companies' operations on the outer Continental Shelf.

In evaluating the Energy Companies' argument, we begin with the text of the jurisdictional statute, 43 U.S.C. § 1349(b)(1). The terms "aris[e] out of, or in connection with" are not defined in the statute. Nor are the dictionary definitions helpful. According to the dictionary definitions around the time OCSLA was enacted, "arise" in this context means to "spring up; originate," and "connection" means "[r]elationship by causality, mutual dependence, logical sequence, or the like." Webster's New Int'l Dictionary of the English Language (2d ed. 1952). As these definitions indicate, both terms are broad and indeterminate, and do not incorporate any principle that would limit federal jurisdiction. When interpreting phrases such as these, which lack a definite or fixed ending point, we must identify "a limiting principle consistent with the structure of the statute and its other provisions." *Maracich v. Spears*, 570 U.S. 48, 60 (2013) (interpreting the phrase "in connection with"); *see also Cal. Div. of Lab. Standards Enf't v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring) ("But applying the 'relate to' provision according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else."). Thus, in interpreting terms such as "relates to," "in connection with," or "in reference to," a court must "go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives" of the statute as a guide to its scope. *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995). The Supreme Court has approved this approach to interpreting OCSLA, acknowledging that terms which have "indeterminacy in isolation" should be

"interpreted in light of the entire statute." *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1888 (2019).

Applying this interpretive approach, we turn to the structure and purpose of OCSLA as a whole. The Supreme Court has explained that "the purpose of OCSLA was 'to assert the exclusive jurisdiction and control of the Federal Government of the United States over the seabed and subsoil of the outer Continental Shelf, and to provide for the development of its vast mineral resources.'" *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 479 n.7 (1981) (citation omitted). According to the Supreme Court's historical review of OCSLA, Congress was concerned about the extensive activity taking place on the outer Continental Shelf, and the need to identify with clarity the body of law that would govern such activities. *See Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 358 (1969). Congress recognized that "the full development of the estimated values in the shelf area [would] require the efforts and the physical presence of thousands of workers on fixed structures in the shelf area," and that "[i]ndustrial accidents, accidental death, peace, and order present problems requiring a body of law for their solution." *Id.* (cleaned up). After debating whether federal or state law should be applicable to the platforms and artificial islands created in the outer Continental Shelf (and to the workers present there), *see id.* at 363 64, Congress determined that federal law should "be applicable in the area, but that where there is a void, the State law may be applicable," *id.* at 358 (citation omitted).

To implement this determination, Congress expressly adopted "the federal enclave model" for OCSLA. *Parker Drilling*, 139 S. Ct. at 1890. It did so by enacting 43 U.S.C. § 1333, which provides that "[t]he Constitution and laws and

civil and political jurisdiction of the United States are extended, *to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State*" to all areas of the outer Continental Shelf where operations could occur, including the "subsoil and seabed" of the outer Continental Shelf, any artificial islands, installations attached to the seabed "erected thereon for the purpose of exploring for, developing, or producing resources," or any other installations or devices needed to transport the resources. 43 U.S.C. § 1333(a)(1)(A) (emphasis added). This language ensured that drilling rigs and equipment on the outer Continental Shelf were treated "as though they were federal enclaves in an upland State." *Rodrigue*, 395 U.S. at 355.

The "textual connection between the OCSLA and the federal enclave model" as set out in § 1333 "suggests that, like the generally applicable enclave rule, the OCSLA sought to make all OCS law federal yet also 'provide a sufficiently detailed legal framework to govern life' on the OCS." *Parker Drilling*, 139 S. Ct. at 1890 (citation omitted). Because § 1333 adopted the federal enclave model's legal framework for the outer Continental Shelf, we read § 1349(b) as according federal courts the same jurisdiction over actions and injuries on the outer Continental Shelf as they would have in other federal enclaves.[10] As explained above, *supra* at Section II(A)(3), federal courts have federal enclave jurisdiction over tort claims regarding actions and injuries

[10] We presume that Congress was familiar with the scope of federal jurisdiction over federal enclaves when enacting OCSLA. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184–85 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts.").

that occur on federal enclaves. Therefore, we read the phrase "aris[e] out of, or in connection with" in § 1349(b)(1) as granting federal courts jurisdiction over tort claims only when those claims arise from actions or injuries occurring on the outer Continental Shelf.

Reading the phrase "aris[e] out of, or in connection with" in § 1349(b)(1) as consistent with federal enclave jurisdiction provides "a limiting principle consistent with the structure of the statute and its other provisions," *Maracich*, 570 U.S. at 60, including OCSLA's purpose of addressing "industrial accidents, accidental death, peace, and order," given "the physical presence of thousands of workers on fixed structures in the shelf area," *Rodrigue*, 395 U.S. at 358 (cleaned up). Our interpretation of § 1349(b)(1) is also consistent with the Supreme Court's references to the scope of federal court jurisdiction under OCSLA. As the Supreme Court has explained, "a personal injury action *involving events occurring on the Shelf* is governed by federal law, the content of which is borrowed from the law of the adjacent State, here Louisiana." *Gulf Offshore Co.*, 453 U.S. at 481 (emphasis added); *see also id.* (describing OCSLA's legal framework by analogizing to a statute providing federal enclave jurisdiction over "personal injury and wrongful-death actions *involving events occurring within a national park or other place subject to the exclusive jurisdiction of the United States*, within the exterior boundaries of any State" (emphasis added) (internal quotation marks omitted)).

Three of our sister circuits have "deem[ed] § 1349 to require only a 'but-for' connection" between operations on the outer Continental Shelf and a plaintiff's alleged injuries. *See In re Deepwater Horizon*, 745 F.3d 157, 163 64 (5th Cir. 2014) (citation omitted) (collecting cases); *see also Bd. of*

Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 25 F.4th 1238, 1273 (10th Cir. 2022) (adopting the Fifth Circuit's approach); *Mayor & City Council of Baltimore v. BP P.L.C.*, 2022 WL 1039685, at *21 (4th Cir. Apr. 7, 2022) (following the Fifth and Tenth Circuits in concluding that "invoking jurisdiction under § 1349(b)(1) requires a but-for connection between a claimant's cause of action and operations on the OCS"). The Energy Companies argue that this analysis is contrary to *Ford Motor Co. v. Montana Eighth Judicial District Court*, which held that the "requirement of a 'connection' between a plaintiff's suit and a defendant's activities" in order for a court to assert specific personal jurisdiction over a defendant is not synonymous with but-for causation. 141 S. Ct. 1017, 1019 (2021) (citation omitted). While we are skeptical that *Ford Motor Co.*'s interpretation of judicial rules delineating the scope of a court's specific personal jurisdiction is pertinent in this different statutory context, we agree that the language of § 1349(b), "aris[e] out of, or in connection with," does not necessarily require but-for causation.[11]

[11] The Fifth Circuit's conclusion to the contrary is not based on its construction of the text of § 1349(b), but rather relies on cases construing 43 U.S.C. § 1333(b) (providing that a specified form of compensation was payable "[w]ith respect to disability or death of an employee resulting from any injury occurring as *the result of* operations conducted on the outer Continental Shelf" (emphasis added)). The Fifth Circuit "adopted a 'but for' test of causation in determining whether a particular injury was *the result of* operations on the shelf," *Herb's Welding v. Gray*, 766 F.2d 898, 900 (5th Cir. 1985) (emphasis added) (citation omitted), and then applied this "but for" test to § 1349(b)(1) without addressing the differences between the text of those provisions, *see Recar v. CNG Producing Co.*, 853 F.2d 367, 369 (5th Cir. 1988) (stating that "we have established a 'but for' test to resolve" the question whether a case "aris[es] out of or in connection with" operations on the OCS" for purposes of

Despite our different approach to construing § 1349(b), our sister circuits' application of § 1349(b)(1) leads to a materially similar result, because "[t]he decisions finding jurisdiction under § 1349" feature "either claims with a direct physical 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." *Bd. of Cnty. Comm'rs of Boulder Cnty.*, 25 F.4th at 1273 (collecting cases). Therefore, "despite the seemingly broad 'but-for' test," adopted by our sister circuits, "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." *Id.* (cleaned up); *see also Mayor & City Council of Baltimore*, 2022 WL 1039685 at *21 ("[A] 'mere connection' between a claimant's case and operations on the OCS is insufficient to show federal jurisdiction if the relationship is 'too remote.'").[12]

We now apply our rule to the Energy Companies' assertions here. The Energy Companies argue that because the Counties assert that their injuries were caused in part by the Energy Companies' cumulative fossil-fuel extraction, and because a portion of this extraction took place on the outer Continental Shelf, the Counties' claims "aris[e] out of, or in

§ 1349(b), but citing only the line of cases construing § 1333(b) (cleaned up)).

[12] Indeed, in *Ford Motor Co.*, the Supreme Court acknowledged the need to impose limiting principles on indeterminate jurisdictional language, stating that "the phrase 'relate to'" in the judge-made rule requiring a lawsuit to "arise out of *or relate to* the defendant's contacts with the forum," before a court can assert specific personal jurisdiction "incorporates real limits, as it must to adequately protect defendants foreign to a forum." 141 S. Ct. at 1026 (citation omitted).

connection with" the Energy Companies' operations on the outer Continental Shelf. We reject this argument, because the connection between such conduct and the injuries alleged by the plaintiffs here is too attenuated to give rise to jurisdiction. First, the Counties' complaints allege injuries occurring exclusively within their local jurisdictions, not on the outer Continental Shelf. Second, instead of alleging wrongful *actions* on the outer Continental Shelf, the Counties' claims focus on the defective nature of the Energy Companies' fossil fuel products, the Energy Companies' knowledge and awareness of the harmful effects of those products, and their "concerted campaign" to prevent the public from recognizing those dangers. These allegations do not refer to actions taken on the outer Continental Shelf. For these reasons, the Energy Companies have failed to establish that the Counties' tort claims "aris[e] out of, or in connection with" the Energy Companies' operations on the outer Continental Shelf for purposes of jurisdiction under § 1349(b)(1).[13]

[13] Relatedly, we also reject the Energy Companies' claim that § 1349(b)(1) gives federal courts jurisdiction over any claim that threatens to impair the recovery of federally owned minerals from the outer Continental Shelf, or that otherwise might affect the oil industry. This interpretation would give federal courts jurisdiction over any claim that might affect the finances of an energy company that engaged in operations there, even if the claim had no direct connection to events on the outer Continental Shelf, and is contrary to the federal enclave model. *See Bd. of Cnty. Comm'rs of Boulder Cnty.*, 25 F.4th at 1275 (rejecting an identical argument).

C

We now turn to the Energy Companies' claim that the district court had subject matter jurisdiction under the federal-officer removal statute, 28 U.S.C. § 1442(a)(1).[14]

As currently drafted, § 1442(a)(1) provides for removal of:

> A civil action . . . that is against or directed to . . . [t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

28 U.S.C § 1442.

In order to invoke § 1442(a)(1), a private person must establish: "(a) it is a person within the meaning of the statute; (b) there is a causal nexus between its actions, taken pursuant to a federal officer's directions, and [the] plaintiff's claims; and (c) it can assert a colorable federal defense." *Riggs v. Airbus Helicopters, Inc.*, 939 F.3d 981, 986 87 (9th Cir.

[14] The Supreme Court vacated our prior opinion, *County of San Mateo v. Chevron Corp.*, 960 F.3d 586 (9th Cir. 2020), but did not address our reasoning regarding the federal officer removal statute. *See Baltimore*, 141 S. Ct. at 1543. Therefore, we largely reprise our reasoning in our prior opinion on this issue.

2019) (quoting *Fidelitad, Inc. v. Insitu, Inc.*, 904 F.3d 1095, 1099 (9th Cir. 2018)). To demonstrate a causal nexus, the private person must show: (1) that the person was "acting under" a federal officer in performing some "act under color of federal office," and (2) that such action is causally connected with the plaintiff's claims against it. *See Goncalves ex rel. Goncalves v. Rady Child.'s Hosp. San Diego*, 865 F.3d 1237, 1244 50 (9th Cir. 2017).

The parties focus on the first prong: whether the Energy Companies were "acting under" a federal officer's directions. We begin by providing some background. The federal officer removal statute has existed in some version since 1815. *Willingham v. Morgan*, 395 U.S. 402, 405 (1969). Although Congress has amended the statute on a number of occasions, *see Watson v. Philip Morris Cos.*, 551 U.S. 142, 147 49 (2007), most recently in 2011, *see* Removal Clarification Act of 2011 § 2, the purpose of the statute has remained essentially the same: its "basic purpose is to protect the Federal Government from the interference with its operations that would ensue were a State able, for example, to arrest and bring to trial in a State court for an alleged offense against the law of the State, officers and agents of the Government acting . . . within the scope of their authority." *Watson*, 551 U.S. at 150 (cleaned up) (quoting *Willingham*, 395 U.S. at 406). Congress thought that allowing a federal officer to remove a state action was necessary because "[s]tate-court proceedings may reflect 'local prejudice' against unpopular federal laws or federal officials" and "deprive federal officials of a federal forum in which to assert federal immunity defenses." *Id.* (citation omitted). Moreover, state-court proceedings may have the effect of impeding or delaying the enforcement of federal law. *Id.* The federal officer removal statute should be "liberally construed" to fulfill its purpose of allowing federal

officials and agents who are being prosecuted in state court for acts taken in their federal authority to remove the case to federal court. *Id.* at 147 (citation omitted).

When Congress first enacted § 1442(a)(1), the phrase "officer of the United States" was generally understood as a term of art that referred to federal officers who "exercis[ed] significant authority." *Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 81 (1991) (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)). In 1948, Congress amended the statute to include the language "person[s] acting under" any officer of the United States. Act of June 25, 1948, ch. 646, § 1442, 62 Stat. 869, 938 (codified at 28 U.S.C. § 1442). At the time, this change was understood as extending the section to apply to employees, as well as officers. *Int'l Primate Prot. League*, 500 U.S. at 84 (quoting H.R. Rep. No. 80-308, at A134 (1947)).

The Supreme Court subsequently interpreted the term "person acting under that officer" as extending to a "private person" who has certain types of close relationships with the federal government. *See Watson*, 551 U.S. at 152 53. The Supreme Court has identified a number of factors courts should consider in determining whether a private person is "acting under" a federal officer for purposes of § 1442(a)(1). Among other things, the Court considers whether the person is acting on behalf of the officer in a manner akin to an agency relationship. *See id.* at 151 (private person must be authorized to act "with or for [federal officers]" (alteration in original) (citation omitted)); *see also Goncalves*, 865 F.3d at 1246 47 (holding that a private person qualified as "acting under" a federal officer when it was "serving as the government's agent"); *Cabalce v. Thomas E. Blanchard & Assocs., Inc.*, 797 F.3d 720, 729 (9th Cir. 2015) (noting that

a company's independent-contractor status supported the conclusion that it was not acting under a federal officer). The Court also considers whether the person is subject to the officer's close direction, such as acting under the "subjection, guidance, or control" of the officer, or in a relationship which "is an unusually close one involving detailed regulation, monitoring, or supervision." *Watson*, 551 U.S. at 151, 153 (citation omitted); *see also Leite*, 749 F.3d at 1120, 1124 (holding that a defense contractor properly removed a case under § 1442(a)(1) based, in part, on "the Navy's detailed specifications regulating the warnings that equipment manufacturers were required to provide"). Third, the Court considers whether the private person is assisting the federal officer in fulfilling "basic governmental tasks" that "the Government itself would have had to perform" if it had not contracted with a private firm. *Watson*, 551 U.S. at 153 54; *see also Goncalves*, 865 F.3d at 1246 47 (holding that private person fulfilled a basic governmental task by pursuing subrogation claims on behalf of a government agency). Finally, taking into account the purpose of §1442(a)(1), the Court has considered whether the private person's activity is so closely related to the government's implementation of its federal duties that the private person faces "a significant risk of state-court 'prejudice,'" just as a government employee would in similar circumstances, and may have difficulty in raising an immunity defense in state court. *Watson*, 551 U.S. at 152 (citation omitted).

As the Supreme Court has indicated, and circuit courts have held, a government contractor qualifies as a person "acting under" an officer under certain circumstances. *See id.* at 153 54. *Watson* cited with approval a Fifth Circuit case, *Winters v. Diamond Shamrock Chemical Co.*, which held that a government contractor could remove a state action under

§ 1442(a) because the contractor was acting on behalf of the government to produce Agent Orange, a carcinogenic herbicide used as part of the war strategy in Vietnam, and was acting under the close direction of the federal government which had provided "detailed specifications concerning the make-up, packaging, and delivery of Agent Orange," as well as "on-going supervision . . . over the formulation, packaging, and delivery of Agent Orange." 149 F.3d 387, 399 400 (5th Cir. 1998), *overruled by Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286 (5th Cir. 2020) (en banc). Further, the contractor provided a product that was "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 Government itself would have had to perform." *Watson*, 551 U.S. at 154; *see also Goncalves*, 865 F.3d at 1246 47 (holding that a private contractor was "acting under" a federal officer when it was serving as an agent for the government and assisting the government in fulfilling basic duties).

By contrast, a person is not "acting under" a federal officer when the person enters into an arm's-length business arrangement with the federal government or supplies it with widely available commercial products or services. *See Cabalce*, 797 F.3d at 727 29; *cf. Goncalves*, 865 F.3d at 1244 47; *Winters*, 149 F.3d at 398 400. Nor does a person's "*compliance* with the law (or *acquiescence* to an order)" amount to "'acting under' a federal official who is giving an order or enforcing the law." *Watson*, 551 U.S. at 152. This is true "even if the regulation is highly detailed and even if the private firm's activities are highly supervised and monitored." *Id.* at 153. We may not interpret § 1442(a) so as to "expand the scope of the statute considerably, potentially bringing within its scope state-court actions filed against private firms in many highly regulated industries." *Id.*

The Energy Companies argue that they meet the criteria under § 1442(a) to remove the Counties' complaints because they were "persons acting under" a federal officer based on three agreements with the government.[15] They also argue that there is a causal nexus between their actions under those agreements and the Counties' claims. We consider each of these agreements in turn.

We first consider CITGO's fuel supply agreements with the Navy Exchange Service Command (NEXCOM). Under these contracts, CITGO agreed to supply gasoline and diesel fuel to NEXCOM for service stations on approximately forty U.S. Navy installations. The government resold the CITGO fuel at NEXCOM facilities to individual service members. The Energy Companies point to three sets of contractual requirements in the fuel supply agreements which they claim establish the "subjection, guidance or control" necessary to invoke federal jurisdiction, namely: (1) "fuel specifications" that required compliance with specified American Society for Testing and Material Standards and required that NEXCOM have a qualified independent source analyze the products for compliance with those specifications; (2) provisions that give the Navy the right to inspect delivery, site, and operations; and (3) branding and advertising requirements.[16]

[15] We have held that corporations are "person[s]" under § 1442(a)(1), *Goncalves*, 865 F.3d at 1244, so there is no dispute that the Energy Companies meet this requirement.

[16] The Energy Companies cite the following sections in the fuel supply agreements. First, the fuel specification provisions require CITGO to "provide high quality gasoline product identical to or the same product as supplied [by] the contractor[']s commercially operated gasoline service stations [(e.g., regular leaded, regular unleaded, and premium unleaded)]." The "[m]otor fuel products supplied" by CITGO were required to comply

This argument fails. The contracts evince an arm's-length business relationship to supply NEXCOM with generally available commercial products. Supplying gasoline to the Navy for resale to its employees is not an activity so closely related to the government's implementation of federal law that the person faces "a significant risk of state-court 'prejudice.'" *Watson*, 551 U.S. at 152 (citation omitted). Accordingly, we hold that CITGO was not "acting under" a federal officer by supplying gasoline and diesel fuel to NEXCOM pursuant to fuel supply contracts.

Second, the Energy Companies point to the 1994 unit agreement[17] for the petroleum reserves at Elk Hills between Standard Oil Company of California (Chevron Corporation's

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with the generic standards promulgated by the American Society for Testing and Materials, and the Navy agreed to "have a qualified independent source analyze the products provided [by CITGO]," including any product that was "suspected of being faulty/inferior." Second, the inspection provisions gave the Navy the right to "visually check truck compartment(s) before and after deliveries" of fuel, and to conduct "general operational reviews," which "might also include inspections of . . . vehicles." Third, the branding provisions require CITGO to "supply all necessary equipment, including signage, for each facility," to "incorporate the Government logo on at least three . . . provided signage fixtures," and to supply "[a] standard service station rotating-fixed neon or incandescent street corner station identification sign . . . for each Government fueling station." And CITGO could submit "proposals on [CITGO] branded product[s]," but the government was not obligated to market "said product under [CITGO's] brand or trade name."

[17] "A unit agreement was at that time and still is a common arrangement in the petroleum industry where two or more owners have interests in a common pool. Under such an arrangement, the pool is operated as a unit and the parties share production and costs in agreed-upon proportions." *United States v. Standard Oil Co. of Cal.*, 545 F.2d 624, 627 (9th Cir. 1976) (per curiam).

predecessor in interest) and the U.S. Navy. We have detailed the history of this unit agreement at length in our prior decisions. *See Standard Oil Co. of Cal.*, 545 F.2d at 626 28. In brief, Standard owned one-fifth and the Navy owned four-fifths of the approximately 46,000 acres comprising the Elk Hills reserves. As is common in the oil exploration and production industry, the two landowners entered into a unit agreement to coordinate operations in the oil field and production of the oil. Because the Navy sought to limit oil production in order to ensure the availability of oil reserves in the event of a national emergency, the unit agreement required that both Standard and the Navy curtail their production and gave the Navy "exclusive control over the exploration, prospecting, development, and operation of the Reserve." To compensate Standard for reducing production, the unit agreement gave Standard the right to produce a specified amount of oil per day (an average of 15,000 barrels per day). Both parties could dispose of the oil they extracted as they saw fit, and neither had a "preferential right to purchase any portion of the other's share of [the] production."

Standard's activities under the unit agreement did not give rise to a relationship where Standard was "acting under" a federal officer for purposes of § 1442. Standard was not acting on behalf of the federal government in order to assist the government in performing a basic government function. Rather, Standard and the government reached an agreement that allowed them to coordinate their use of the oil reserve in a way that would benefit both parties: the government maintained oil reserves for emergencies, and Standard ensured its ability to produce oil for sale. When Standard extracted oil from the reserve, Standard was acting independently, *see Cabalce*, 797 F.3d at 728 29, not as the Navy's "agent," *Goncalves*, 865 F.3d at 1246; *see also* H.R.

Rep. No. 112-17, pt. 1, at 3 (2011) ("Removal is allowed only when the acts of Federal defendants are essentially ordered or demanded by Federal authority . . ."). And Standard's arm's-length business arrangement with the Navy does not involve conduct so closely related to the government's implementation of federal law that the Energy Companies would face "a significant risk of state-court 'prejudice.'" *Watson*, 551 U.S. at 152 (citation omitted).[18]

Finally, we consider the Energy Companies' lease agreements, entitled "Oil and Gas Lease of Submerged Lands Under the Outer Continental Shelf Lands Act." Under these standard-form leases, the government grants the lessee the right to explore and produce oil and gas resources in the submerged lands of the outer Continental Shelf, and in exchange the lessee agrees to pay the government rents and royalties. The Energy Companies argue that the lessee Energy Companies were "acting under" a federal officer because the leases require that the lessees drill for oil and gas pursuant to government-approved exploration plans and that the lessees sell some of their production to certain buyers; specifically, lessees must offer twenty percent of their

[18] At oral argument, the Energy Companies argued for the first time that Standard was "acting under" a federal officer pursuant to the Naval Petroleum Reserves Production Act of 1976, Pub. L. 94-258, § 201, 90 Stat. 303 (1976), which directed the Secretary of the Navy to "produce such reserves [including the Elk Hill reserve] at the maximum efficient rate consistent with sound engineering practices for a period not to exceed six years" and to "sell or otherwise dispose of the United States share of such petroleum produced from such reserves." § 201, 90 Stat. at 308. Nothing in the record indicates that the Secretary of the Navy "ordered or demanded," H.R. Rep. No. 112-17, pt. 1, at 3 (2011), *reprinted in* 2011 U.S.C.C.A.N. 420, 422, that Standard produce oil on behalf of the Navy. Therefore, the Energy Companies' reliance on this Act is misplaced.

production to "small or independent refiners," and must give the United States the right of first refusal in time of war or "when the President of the United States shall so prescribe."

This argument also fails. The leases do not require that lessees act on behalf of the federal government, under its close direction, or to fulfill basic governmental duties. Nor are lessees engaged in an activity so closely related to the government's function that the lessee faces "a significant risk of state-court 'prejudice.'" *Watson*, 551 U.S. at 152 (citation omitted). In fact, the lease requirements largely track statutory requirements, for instance, that the lessee offer 20 percent of the "crude oil, condensate, and natural gas liquids produced on [the] lease . . . to small or independent refiners," 43 U.S.C. § 1337(b)(7), and that "[i]n time of war, or when the President shall so prescribe, the United States shall have the right of first refusal to purchase at the market price all or any portion of any mineral produced from the outer Continental Shelf," § 1341(b). Mere "compl[iance] with the law, even if the laws are 'highly detailed' and thus leave [an] entity 'highly regulated,'" does not show that the entity is "acting under" a federal officer. *Goncalves*, 865 F.3d at 1245 (quoting *Watson*, 551 U.S. at 151 53). We conclude that the federal government's willingness to lease federal property or minimal rights to a private entity for that entity's commercial purposes does not, without more, constitute the kind of assistance required to establish that the private entity is "acting under" a federal officer. Accordingly, the leases on which the defendants rely do not give rise to the "unusually close" relationship where the lessee was "acting under" a federal officer. *Watson*, 551 U.S. at 153.

Because we conclude that the Energy Companies have not carried their burden of proving by a preponderance of the evidence that they were "acting under" a federal officer, we do not reach the question whether actions pursuant to the fuel supply agreement, unit agreement, or lease agreement had a causal nexus with the Counties' complaints, or whether the Energy Companies can assert a colorable federal defense. *See Fidelitad*, 904 F.3d at 1099.

D

We turn next to the Energy Companies' argument that the district court had removal jurisdiction over the complaints under 28 U.S.C. § 1452(a) because they are related to bankruptcy cases involving Peabody Energy Corp., Arch Coal, and Texaco, Inc.

Under § 1452(a), "[a] party may remove any claim or cause of action in a civil action" (subject to certain exceptions) if the district court "has jurisdiction of such claim or cause of action under [28 U.S.C. § 1334]." Under § 1334(b), in turn, "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," again with exceptions not applicable here.[19] In sum, a

[19] 28 U.S.C. § 1334(b) provides:

> Except as provided in subsection (e)(2) [(relating to claims arising from employment of professionals under 11 U.S.C. § 327)], and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all

defendant may remove a civil action if the district court has jurisdiction over the civil action because it is "related to cases under title 11." *Id.*

In defining the term "related to" in this context, we have differentiated between bankruptcy cases that are pending before a plan has been confirmed and bankruptcy cases where the plan has been confirmed and the debtor discharged from bankruptcy. *See In re Pegasus Gold Corp.*, 394 F.3d 1189, 1193 94 (9th Cir. 2005). While a bankruptcy case is pending, we have defined "related to" broadly: A proceeding is "related to" a bankruptcy case when "*the outcome of the proceeding could conceivably have any effect on the estate being administered in bankruptcy*." *In re Fietz*, 852 F.2d 455, 457 (9th Cir. 1988) (citation omitted). But the same term "related to" has a more limited meaning after a plan has been confirmed. *See Pegasus Gold*, 394 F.3d at 1194. A proceeding that arises after a plan has been confirmed is "related to" a bankruptcy case only if there is "a close nexus to the bankruptcy plan or proceeding." *Id.* at 1194 (quoting *In re Resorts Int'l, Inc.*, 372 F.3d 154, 167 (3d Cir. 2004)). In defining "close nexus," we have indicated that "matters affecting 'the interpretation, implementation, consummation, execution, or administration of the confirmed plan will typically have the requisite close nexus'" to a bankruptcy case. *Id.* at 1194 (quoting *Resorts Int'l*, 372 F.3d at 167).

We take a holistic approach to determining whether a proceeding that arises after a plan has been confirmed has a close nexus to that plan. We have explained that the close nexus test "requires particularized consideration of the facts

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civil proceedings arising under title 11, or arising in or related to cases under title 11.

and posture of each case," and "can only be properly applied by looking at the whole picture." *In re Wilshire Courtyard*, 729 F.3d 1279, 1289 (9th Cir. 2013). At the same time, we recognize that it is necessary to avoid an interpretation of "related to" in the post-confirmation context that "could endlessly stretch a bankruptcy court's jurisdiction." *Pegasus Gold*, 394 F.3d at 1194 n.1; *see also Resorts Int'l*, 372 F.3d at 164 (holding that "bankruptcy court jurisdiction 'must be confined within appropriate limits and does not extend indefinitely, particularly after the confirmation of a plan and the closing of a case'" (citation omitted)). Thus, we have held that a "bankruptcy court did not retain 'related to' jurisdiction for [a] breach of contract action that could have existed entirely apart from the bankruptcy proceeding and did not necessarily depend upon resolution of a substantial question of bankruptcy law." *In re Ray*, 624 F.3d 1124, 1135 (9th Cir. 2010).

We now turn to the Energy Companies' claims that the Counties' complaints have a sufficiently close nexus to the Peabody Energy and Texaco, Inc. bankruptcy cases.[20] First, the Energy Companies claim that the Counties' complaints have a sufficiently close nexus to the Peabody Energy Corp.'s bankruptcy case because the complaints require an interpretation of Peabody's bankruptcy plan. According to the Energy Companies, a bankruptcy court has already interpreted the plan in response to the Counties' complaints. Specifically, the Counties here filed their complaints a few months after Peabody's bankruptcy plan was confirmed and became effective in April 2017. *In re Peabody Energy Corp.*, No. 16-42529-399, 2017 WL 4843724 at *1 (Bankr. E.D. Mo.

[20] The Energy Companies do not raise a distinct argument as to Arch Coal, so we do not address this issue.

Oct. 24, 2017). In July 2017, Peabody filed a motion to enjoin the Counties from prosecuting their complaint against Peabody and to dismiss those actions with prejudice on the ground that their claims had been discharged in bankruptcy. *Id.* The bankruptcy court granted the motion and directed the Counties to dismiss their causes of action against Peabody Energy with prejudice. *See id.*[21] The Energy Companies allege that given the bankruptcy court's need to interpret Peabody Energy's confirmed plan, there is a close nexus between the plan and the Counties' complaints.

We disagree. As stated above, we take a holistic look at "the whole picture." *Wilshire Courtyard*, 729 F.3d at 1289. As a general rule, proceedings that merely require the court to read a confirmed plan to determine whether it bars certain claims that arose before the confirmation date are not proceedings "*affecting* the interpretation [or] implementation" of a plan. *Pegasus Gold*, 394 F.3d at 1194 (cleaned up) (emphasis added). Typically, where the district court's review of a plan involves merely the application of the plan's plain or undisputed language, and does not require any resolution of disputes over the meaning of the plan's terms, the review does not "depend upon resolution of a substantial question of bankruptcy law." *Ray*, 624 F.3d at 1135.

[21] The Eighth Circuit affirmed this ruling on appeal. *See In re Peabody Energy Corp.*, 958 F.3d 717 (8th Cir. 2020). The Counties therefore dismissed Peabody Energy and Arch Coal from the complaint in June 2020. But at the time of the district court's remand order (on July 10, 2018), the Counties were still appealing the bankruptcy court's order directing the Counties to dismiss their complaint against Peabody. In determining whether the district court had removal jurisdiction, we must consider the events at the time of its ruling. *See Spencer v. U.S. Dist. Ct. for the N. Dist. of Cal.*, 393 F.3d 867, 871 (9th Cir. 2004); *County of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal. 2018).

Therefore, in the usual case, such a review would lack the close nexus with the bankruptcy case necessary for "related to" jurisdiction.

Here, the Energy Companies have not argued that the district court would have to interpret disputed language in Peabody Energy's confirmed plan in order to determine whether the Counties' complaints were barred. Nor could they, because at the time of removal, Peabody Energy had already elected to seek an order enforcing the discharge and injunction provisions of the Chapter 11 plan in bankruptcy court. This means that at the time of removal, the district court was not presented with any matters requiring interpretation of the confirmed plan, which was taking place on a different jurisdictional pathway. And even if the district court had been required to review a plan, the Energy Companies have not argued that such a review would "depend upon resolution of a substantial question of bankruptcy law." *Id*. Accordingly, under the circumstances of this case, the complaints before the district court were not "related to" Peabody Energy's bankruptcy case for purposes of § 1334(b), and the district court did not have removal jurisdiction over the complaints under § 1452 on that basis.

We next turn to the Energy Companies' argument that the Counties' complaints have a sufficiently close nexus to Texaco, Inc.'s bankruptcy case. According to the Energy Companies, Texaco, Inc.'s plan (which was confirmed some time in the 1980s) bars various claims arising against Texaco prior to March 15, 1988, so the Counties' proceedings would involve interpretation of Texaco's plan. Again, we disagree. As with Peabody Energy, the Energy Companies have not argued that the district court would have to interpret disputed language in Texaco's confirmed plan in order to determine

whether the Counties' complaints were barred. Moreover, Texaco's relationship to the complaints is attenuated: the Counties have not named Texaco in their complaints, and the Energy Companies claim Texaco is a defendant only because the complaints allege that Chevron's subsidiaries also engaged in culpable conduct. The district court would not have occasion to look at Texaco's plan unless it first determined that Texaco was a proper defendant who was liable for damages, and also determined that the Counties' claims arose before 1988. Under our "particularized consideration of the facts and posture" of this case, *Wilshire Courtyard*, 729 F.3d at 1289, we conclude that the Counties' case does not have the close nexus to Texaco's confirmed plan necessary to give the district court jurisdiction under § 1334(b) or removal jurisdiction under § 1452. Therefore, we reject this basis of jurisdiction.[22]

E

Finally, we turn to the Energy Companies' argument that the district court had admiralty jurisdiction over this case. Only Marathon Petroleum Corporation preserved this argument by raising admiralty jurisdiction as a basis for

[22] Because we decide on this ground, we need not reach the question whether removal of the claim under § 1334 is barred by § 1452(a), which prohibits the removal of a civil action by a governmental unit "to enforce such governmental unit's police or regulatory power." Nor do we need to address 28 U.S.C. § 1334(c)(2), which provides that "[u]pon timely motion of a party" the district court must abstain from hearing a proceeding based on a state law claim where the only source of jurisdiction is § 1334.

removal in its notice of removal.[23] According to Marathon, because the Counties' claims are based on fossil fuel extraction that occurs on vessels engaged in maritime activities, they fall within the Constitution's grant of original jurisdiction over "all Cases of admiralty and maritime Jurisdiction." U.S. Const. art. III, § 2, cl.1; *see also* 28 U.S.C. § 1333(1).[24]

We reject this argument because maritime claims brought in state court are not removable to federal court absent an independent jurisdictional basis. The relevant jurisdictional statute, 28 U.S.C. § 1333(1), gives a district court original jurisdiction of "[a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333(1). The "saving to suitors" clause of § 1333(1) "leave[s] state courts 'competent' to adjudicate maritime causes of action in proceedings 'in personam,' that is, where the defendant is a person, not a ship or some other instrument of navigation."

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[23] The other Energy Companies failed to invoke admiralty jurisdiction and therefore forfeited this ground of removal. Contrary to the Energy Companies' argument, their reference to "federal common law" in their notice of removal is insufficient to invoke this basis of jurisdiction. *See O'Halloran v. Univ. of Wash.*, 856 F.2d 1375, 1381 (9th Cir. 1988); *see also* 28 U.S.C. § 1446(a) (requiring that a notice of removal contain "a short and plain statement of the grounds for removal").

[24] 28 U.S.C. § 1333(1) provides:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

Ghotra by Ghotra v. Bandila Shipping, Inc., 113 F.3d 1050, 1054 (9th Cir. 1997) (quoting *Madruga v. Superior Ct. of Cal.*, 346 U.S. 556, 560 61 (1954)). This means that when a plaintiff brings a maritime cause of action against a person in state court, a federal court lacks admiralty jurisdiction over that claim. *See id*. at 1055 56. In order to remove such a claim to federal court, the defendant must assert some other basis of jurisdiction, such as diversity jurisdiction. *See id.*; *see also Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1069 (9th Cir. 2001).

Even assuming that the Counties' claims in this case qualify as maritime claims, the Counties chose to bring these claims in state court. Under the "saving to suitors" clause, these maritime claims are not removable to federal court based on admiralty jurisdiction alone.[25]

III

We have long held that "removal statutes should be construed narrowly in favor of remand to protect the jurisdiction of state courts." *Harris v. Bankers Life and Cas. Co.*, 425 F.3d 689, 698 (9th Cir. 2005). This rule of construction is based on the long-standing principle that "[d]ue regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the

[25] The Energy Companies do not "specifically and distinctly," *United States v. Kama*, 394 F.3d 1236, 1238 (9th Cir. 2005), argue that the "saving to suitors" clause only preserved the right to pursue non-maritime remedies, or that the Federal Courts Jurisdiction and Venue Clarification Act of 2011 amended the removal statute, 28 U.S.C. § 1441, so as to allow removal based on admiralty jurisdiction alone. Therefore, those arguments are waived. *See id*.

precise limits which the statute [authorizing removal jurisdiction] has defined." *Healy v. Ratta*, 292 U.S. 263, 270 (1934). In keeping with these principles, the Supreme Court has repeatedly affirmed its "deeply felt and traditional reluctance . . . to expand the jurisdiction of federal courts through a broad reading of jurisdictional statutes." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 578 U.S. 374, 389 90 (2016) (citation omitted). Our adherence to this doctrine does not change merely because plaintiffs raise novel and sweeping causes of action. We therefore reject the broad interpretations of removal jurisdiction urged on us by the Energy Companies and affirm the district court's remand order.

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- A response, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or response must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

COUNTY OF SAN MATEO, individually and on behalf of the People of the State of California, Plaintiff-Appellee, v. CHEVRON CORPORATION; et al., Defendants-Appellants.	No. 18-15499 D.C. No. 3:17-cv-04929-VC Northern District of California, San Francisco ORDER
CITY OF IMPERIAL BEACH, individually and on behalf of the People of the State of California, Plaintiff-Appellee, v. CHEVRON CORPORATION; et al., Defendants-Appellants.	No. 18-15502 D.C. No. 3:17-cv-04934-VC Northern District of California, San Francisco
COUNTY OF MARIN, individually and on behalf of the People of the State of California, Plaintiff-Appellee,	No. 18-15503 D.C. No. 3:17-cv-04935-VC Northern District of California, San Francisco

v.

CHEVRON CORPORATION; et al.,

Defendants-Appellants.

COUNTY OF SANTA CRUZ, individually and on behalf of The People of the State of California; et al.,

Plaintiffs-Appellees,

v.

CHEVRON CORPORATION; et al.,

Defendants-Appellants.

No. 18-16376

D.C. Nos. 3:18-cv-00450-VC
3:18-cv-00458-VC
3:18-cv-00732-VC
Northern District of California,
San Francisco

Before: IKUTA, CHRISTEN, and LEE, Circuit Judges.

The panel has unanimously voted to deny Appellants' Petition for Rehearing En Banc (Dkt. 318).

The full court has been advised of the Petition for Rehearing En Banc, and no Judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is **DENIED.**

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COUNTY OF SAN MATEO, individually and on behalf of the People of the State of California, *Plaintiff-Appellee*, v. CHEVRON CORPORATION; CHEVRON U.S.A. INC.; EXXONMOBIL CORPORATION; BP PLC; BP AMERICA, INC.; ROYAL DUTCH SHELL PLC; SHELL OIL PRODUCTS COMPANY LLC; CITGO PETROLEUM CORPORATION; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66 COMPANY; PEABODY ENERGY CORPORATION; TOTAL E&P USA, INC.; TOTAL SPECIALTIES USA, INC.; ARCH COAL INC.; ENI OIL & GAS, INC.; RIO TINTO ENERGY AMERICA, INC.; RIO TINTO MINERALS, INC.; RIO TINTO SERVICES, INC.; ANADARKO PETROLEUM CORPORATION; OCCIDENTAL PETROLEUM CORPORATION; OCCIDENTAL CHEMICAL CORPORATION; REPSOL ENERGY	No. 18-15499 D.C. No. 3:17-cv-04929-VC

NORTH AMERICA CORP.; REPSOL TRADING USA CORP.; MARATHON OIL COMPANY; MARATHON OIL CORPORATION; MARATHON PETROLEUM CORP.; HESS CORP.; DEVON ENERGY CORP.; DEVON ENERGY PRODUCTION COMPANY, LP; ENCANA CORPORATION; APACHE CORP.,

Defendants-Appellants.

CITY OF IMPERIAL BEACH, individually and on behalf of the People of the State of California,

Plaintiff-Appellee,

v.

CHEVRON CORPORATION; CHEVRON U.S.A. INC.; EXXONMOBIL CORPORATION; BP PLC; BP AMERICA, INC.; ROYAL DUTCH SHELL PLC; SHELL OIL PRODUCTS COMPANY LLC; CITGO PETROLEUM CORPORATION; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66 COMPANY; PEABODY ENERGY CORPORATION; TOTAL E&P USA, INC.; TOTAL SPECIALTIES USA, INC.; ARCH

No. 18-15502

D.C. No. 3:17-cv-04934-VC

COAL INC.; ENI OIL & GAS, INC.; RIO TINTO ENERGY AMERICA, INC.; RIO TINTO MINERALS, INC.; RIO TINTO SERVICES, INC.; ANADARKO PETROLEUM CORPORATION; OCCIDENTAL PETROLEUM CORPORATION; OCCIDENTAL CHEMICAL CORPORATION; REPSOL ENERGY NORTH AMERICA CORP.; REPSOL TRADING USA CORP.; MARATHON OIL COMPANY; MARATHON OIL CORPORATION; MARATHON PETROLEUM CORP.; HESS CORP.; DEVON ENERGY CORP.; DEVON ENERGY PRODUCTION COMPANY, LP; ENCANA CORPORATION; APACHE CORP.,

Defendants-Appellants.

COUNTY OF MARIN, individually and on behalf of the People of the State of California,

Plaintiff-Appellee,

v.

CHEVRON CORPORATION; CHEVRON U.S.A. INC.; EXXONMOBIL CORPORATION; BP

No. 18-15503

D.C. No. 3:17-cv-04935-VC

PLC; BP AMERICA, INC.; ROYAL DUTCH SHELL PLC; SHELL OIL PRODUCTS COMPANY LLC; CITGO PETROLEUM CORPORATION; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66 COMPANY; PEABODY ENERGY CORPORATION; TOTAL E&P USA, INC.; TOTAL SPECIALTIES USA, INC.; ARCH COAL INC.; ENI OIL & GAS, INC.; RIO TINTO ENERGY AMERICA, INC.; RIO TINTO MINERALS, INC.; RIO TINTO SERVICES, INC.; ANADARKO PETROLEUM CORPORATION; OCCIDENTAL PETROLEUM CORPORATION; OCCIDENTAL CHEMICAL CORPORATION; REPSOL ENERGY NORTH AMERICA CORP.; REPSOL TRADING USA CORP.; MARATHON OIL COMPANY; MARATHON OIL CORPORATION; MARATHON PETROLEUM CORP.; HESS CORP.; DEVON ENERGY CORP.; DEVON ENERGY PRODUCTION COMPANY, LP; ENCANA CORPORATION; APACHE CORP.,

Defendants-Appellants.

COUNTY OF SANTA CRUZ, individually and on behalf of The People of the State of California; CITY OF SANTA CRUZ, a municipal corporation, individually and on behalf of The People of the State of California; CITY OF RICHMOND, individually and on behalf of The People of the State of California,
Plaintiffs-Appellees,

v.

CHEVRON CORPORATION; CHEVRON USA INC.; ROYAL DUTCH SHELL PLC; BP PLC; SHELL OIL PRODUCTS COMPANY LLC; BP AMERICA, INC.; EXXON MOBIL CORPORATION; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; ANADARKO PETROLEUM CORPORATION; APACHE CORPORATION; DEVON ENERGY CORPORATION; DEVON ENERGY PRODUCTION COMPANY, LP; TOTAL E&P USA, INC.; TOTAL SPECIALTIES USA, INC.; ENCANA CORPORATION; CITGO PETROLEUM CORPORATION; HESS CORPORATION; MARATHON OIL COMPANY; MARATHON OIL

No. 18-16376

D.C. Nos.
3:18-cv-00450-VC
3:18-cv-00458-VC
3:18-cv-00732-VC

OPINION

CORPORATION; REPSOL ENERGY NORTH AMERICA CORPORATION; REPSOL TRADING USA CORPORATION; PHILLIPS 66 COMPANY; OCCIDENTAL PETROLEUM CORPORATION; OCCIDENTAL CHEMICAL CORPORATION; ENI OIL & GAS, INC.; MARATHON PETROLEUM CORPORATION,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of California
Vince Chhabria, District Judge, Presiding

Argued and Submitted February 5, 2020
Pasadena, California

Filed May 26, 2020

Before: Sandra S. Ikuta, Morgan Christen, and Kenneth K. Lee, Circuit Judges.

Opinion by Judge Ikuta

SUMMARY*

Removal/Subject-Matter Jurisdiction/Appellate Jurisdiction

On appeal from the district court's order remanding complaints to the state court from which they had been removed, the panel dismissed the appeal in part for lack of jurisdiction and affirmed in part, holding that defendants did not carry their burden of establishing the criteria for federal-officer removal under 28 U.S.C. § 1442(a)(1).

The County of San Mateo and other cities and counties filed six complaints in California state court against more than thirty energy companies, alleging nuisance and other causes of action arising from the role of fossil fuel products in global warming. The energy companies removed the cases to federal court. The district court granted plaintiffs' motions to remand, rejecting all eight of the grounds on which the energy companies relied for subject-matter jurisdiction.

Dismissing in part, the panel held that under 28 U.S.C. § 1447(d), it had jurisdiction to review the removal order only to the extent the order addressed whether removal was proper under § 1442(a)(1). The panel concluded that the non-reviewability clause of § 1447(d) applied because the district court remanded based on a lack of subject-matter jurisdiction. Declining to follow the Seventh Circuit, the panel held that under the "exception clause" of § 1447(d), authorizing review of removal pursuant to 28 U.S.C. §§ 1442 and 1443, it had

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

jurisdiction to review whether removal was proper under § 1442(a)(1), but the exception clause did not subject the district court's entire remand order to plenary review. The panel followed *Patel v. Del Taco, Inc.*, 446 F.3d 996 (9th Cir. 2006), concluding that *Patel* was not abrogated either by intervening judicial authority or by Congress's 2011 amendment of § 1447(d) to insert § 1442.

Affirming in part, the panel held that the district court did not err in holding that there was no subject-matter jurisdiction under the federal-officer removal statute. The panel concluded that the energy companies failed to establish that they were "acting under" a federal officer's directions based on three agreements with the government: CITGO's fuel supply agreements with the Navy Exchange Service Command, a unit agreement for the petroleum reserves at Elk Hills between Standard Oil Company of California and the U.S. Navy, and the energy companies' Oil and Gas Leases of Submerged Lands Under the Outer Continental Shelf Lands Act.

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OPINION

IKUTA, Circuit Judge:

In this appeal, we consider a district court's order remanding complaints to state court after the defendants had removed the complaints to federal court on eight separate grounds. Under 28 U.S.C. § 1447(d), we have jurisdiction to review the remand order only to the extent it addresses whether removal was proper under § 1442(a)(1), *see Patel v. Del Taco, Inc.*, 446 F.3d 996, 998 (9th Cir. 2006), which authorizes removal by "any person acting under" a federal officer, 28 U.S.C. § 1442(a)(1). We conclude that the defendants did not carry their burden of establishing this criteria for removal. Because we lack jurisdiction to review other aspects of the remand order, we dismiss the remainder of the appeal.

I

The County of San Mateo, the County of Marin, and the City of Imperial Beach filed three materially similar complaints in California state court against more than 30 energy companies in July 2017.[1] The complaints allege that the Energy Companies' "extraction, refining, and/or formulation of fossil fuel products; their introduction of fossil fuel products into the stream of commerce; their wrongful promotion of their fossil fuel products and concealment of known hazards associated with use of those products; and their failure to pursue less hazardous alternatives available to them; is a substantial factor in causing the increase in global

[1] We refer to the plaintiffs collectively as the "Counties" and to the defendants collectively as the "Energy Companies."

mean temperature and consequent increase in global mean sea surface height." Based on these allegations, the complaints assert causes of action for public and private nuisance, strict liability for failure to warn, strict liability for design defect, negligence, negligent failure to warn, and trespass.

The Energy Companies removed the three complaints to federal court, asserting seven bases for subject-matter jurisdiction, including jurisdiction under the federal-officer removal statute, 28 U.S.C. § 1442(a)(1). The three cases were assigned to Judge Vince G. Chhabria.

Shortly thereafter, the County of Santa Cruz, the City of Santa Cruz, and the City of Richmond filed materially similar complaints in California state court. The Energy Companies removed these cases to federal court as well, asserting the same seven bases for subject-matter jurisdiction,[2] and they were also assigned to Judge Chhabria.[3]

The Counties, in all six cases, moved to remand to state court based on a lack of subject-matter jurisdiction. In a reasoned opinion, the district court rejected all eight of the

[2] Marathon Petroleum Corporation raised an eighth ground for removal: that the complaints raised issues concerning maritime activities, giving rise to admiralty jurisdiction. *See* 28 U.S.C. § 1333.

[3] The city attorneys of Oakland and San Francisco filed similar actions in California state court. Those cases were removed and assigned to Judge William H. Alsup, who subsequently dismissed the action for failure to state a claim and for lack of personal jurisdiction. *See City of Oakland v. BP p.l.c.*, 325 F. Supp. 3d 1017 (N.D. Cal. 2018); *City of Oakland v. BP p.l.c.*, 2018 WL 3609055 (N.D. Cal. July 27, 2018). In a concurrently filed opinion, we resolve the appeal from those cases. *See City of Oakland v. BP p.l.c.*, — F.3d — (9th Cir. 2020).

grounds on which the Energy Companies relied for subject-matter jurisdiction, but the district court stayed its remand orders to give the Energy Companies an opportunity to appeal. "[W]e have jurisdiction to determine whether we have jurisdiction to hear [a] case." *Atl. Nat'l Tr. LLC v. Mt. Hawley Ins. Co.*, 621 F.3d 931, 933 (9th Cir. 2010) (citation omitted).

II

Our authority to review an order remanding a case to state court is limited. Under 28 U.S.C. § 1447(d), "[1] [a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, [2] except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise." We consider the Energy Companies' arguments that we may conduct a plenary review of the district court's remand order under both of these clauses.

A

Although the first clause in § 1447(d) (the "non-reviewability clause") broadly prohibits review of "[a]n order remanding a case to the State court from which it was removed," the Supreme Court has interpreted this language narrowly as prohibiting review only if a remand order was issued based on a ground enumerated in § 1447(c).[4] *Atl. Nat'l*

[4] Section 1447(c) states, in pertinent part:

> A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be

Tr., 621 F.3d at 934 (citing *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 343 (1976)). When a district court bases its remand order on one of the grounds in § 1447(c) i.e., the district court "remands based on subject matter jurisdiction [or] nonjurisdictional defects" as opposed to, for example, based on a merits determination or concerns about a heavy docket, *id.* at 934 35, "review is unavailable no matter how plain the legal error in ordering the remand," *Briscoe v. Bell*, 432 U.S. 404, 413 n.13 (1977). "[R]eview of the District Court's characterization of its remand as resting upon lack of subject-matter jurisdiction, to the extent it is permissible at all, should be limited to confirming that that characterization was colorable." *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 234 (2007).

The Energy Companies argue that the district court's order remanded the complaints on a ground that cannot be "colorably characterized as subject-matter jurisdiction." *Id.* Specifically, the Energy Companies contend that the district court remanded the complaints based on a merits determination when it held that "federal common law d[id] not govern the [Counties'] claims" and therefore "d[id] not preclude [the Counties] from asserting . . . state law claims."

We reject this argument. The district court ordered remand based on its view that the cases were "improperly

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> made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

28 U.S.C. § 1447(c).

removed to federal court" because the Energy Companies failed to show that "the case[s] . . . fit[] within one of a small handful of small boxes" providing for subject-matter jurisdiction. Put simply, the district court concluded that it "lack[ed] subject matter jurisdiction." 28 U.S.C. § 1447(c). Even if the district court erred in reaching this conclusion, "review is unavailable no matter how plain the legal error in ordering the remand." *Kircher v. Putnam Funds Tr.*, 547 U.S. 633, 642 (2006) (citing *Briscoe*, 432 U.S. at 413 n.13). To the extent *Powerex* requires that we determine whether the district court's conclusion that "federal common law [d]id not govern the [Counties'] claims" was "at least arguable," *Townsquare Media, Inc. v. Brill*, 652 F.3d 767, 775 (7th Cir. 2011) (citing *Atl. Nat'l Tr.*, 621 F.3d at 937 38, 940), we hold that it was, *see City of Oakland v. BP p.l.c.*, F.3d (9th Cir. 2020) (holding that the district court erred in concluding that there was subject-matter jurisdiction on the ground that the plaintiffs' state-law nuisance claims were "necessarily governed by federal common law").

B

We next consider the Energy Companies' argument that the second clause of § 1447(d) (the "exception clause") requires us to conduct plenary review of the district court's remand order. We have interpreted the exception clause as giving us the authority to review the district court's remand order only to the extent that the order addresses the statutory sections listed in the clause. *See Patel v. Del Taco, Inc.*, 446 F.3d 996, 998 (9th Cir. 2006). In *Patel*, the defendants removed a state-court complaint to federal court under § 1443(1), which provides for removal of civil-rights cases. *Id.* The district court granted the plaintiff's motion for remand on the ground that removal was not proper under

either § 1441 or § 1443(1). *Id.* We held that, under § 1447(d), we lacked jurisdiction "to review the remand order based on § 1441" and thus dismissed the defendants' appeal to the extent it was based on that section. *Id.*[5] At the same time, we held that we had jurisdiction "to review the remand order based on . . . § 1443(1)." *Id.* The reasoning in *Patel* applies directly to our case. Under § 1447(d), as interpreted in *Patel*, we have jurisdiction to review the Energy Companies' appeal to the extent the remand order addresses § 1442(a)(1), but we lack jurisdiction to review their appeal from the portions of the remand order considering the seven other bases for subject-matter jurisdiction.

Arguing against this conclusion, the Energy Companies contend that when a suit is "removed pursuant to section 1442," 28 U.S.C. § 1447(d), the district court's entire remand order is subject to plenary review. The Energy Companies base this argument on a Seventh Circuit case, *Lu Junhong v. Boeing Co.*, which concluded that because § 1447(d) authorizes appellate review of "an order," it authorizes review of "the order itself," not just "particular reasons *for* an order." 792 F.3d 805, 812 (7th Cir. 2015). In reaching this conclusion, the Seventh Circuit relied on *Yamaha Motor Corp., U.S.A. v. Calhoun*, which construed a statute (28 U.S.C. § 1292(b)) giving appellate courts jurisdiction to review interlocutory orders that a district court certifies for

[5] *Patel* considered an earlier version of § 1447(d), which did not include § 1442 in the exception clause. *See* Removal Clarification Act of 2011, Pub. L. No. 112-51, § 2, 125 Stat. 545, 546 (2011).

immediate appeal. 516 U.S. 199 (1996).[6] *Yamaha* concluded that § 1292(b) gives an appellate court jurisdiction over "any issue fairly included within the certified order because 'it is the *order* that is appealable, and not the controlling question identified by the district court.'" *Id.* at 205 (citation omitted).

The Energy Companies urge us to follow *Lu Junhong* notwithstanding our decision in *Patel* for two reasons. First, they argue that *Patel* has been abrogated by an act of Congress. After *Patel* was decided, Congress enacted the Removal Clarification Act of 2011, which amended § 1447(d) to allow for review of remand orders in cases removed pursuant to § 1442. *See* Removal Clarification Act of 2011, Pub. L. No. 112-51, § 2, 125 Stat. 545, 546 (2011). According to the Energy Companies, Congress's failure to amend the reference in § 1447(d) to orders "reviewable by appeal," means that Congress intended to adopt *Yamaha*'s interpretive approach and therefore authorized plenary review of remand orders for cases removed pursuant to § 1442.[7] Second, the Energy Companies argue that we are not bound by *Patel* because it was not well reasoned: it did not provide

[6] Section 1292(b) provides that "[w]hen a district judge, in making . . . an order not otherwise appealable" determines that the order meets certain criteria and that "an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order," and "[t]he Court of Appeals . . . may thereupon, in its discretion, permit an appeal to be taken from such order." 28 U.S.C. § 1292(b).

[7] The Energy Companies do not argue that *Yamaha* abrogated *Patel*, nor could they, given that *Yamaha* was decided in 1996—a decade before *Patel*—and thus is not "intervening higher authority." *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc).

any grounds for its conclusion that we lacked jurisdiction to conduct a plenary review of the remand order.

Both of these arguments implicate our doctrine of stare decisis. We have long held that "one three-judge panel . . . cannot reconsider or overrule the decision of a prior panel," *United States v. Gay*, 967 F.2d 322, 327 (9th Cir. 1992), unless "our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority," *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc).

There is no intervening judicial authority that would abrogate *Patel*. Neither the Supreme Court nor an en banc panel of this court has issued a decision after *Patel* was decided in 2006 that is clearly irreconcilable with *Patel*'s conclusion that § 1447(d) limits our review to the grounds for removal covered by the exception clause. Therefore, we consider only the effect of Congress's amendment of § 1447(d) in 2011.

Before Congress's amendment of § 1447(d), every circuit court that had addressed this issue agreed with our reading of § 1447(d).[8] Although *Yamaha* was decided in 1996 (ten years before we decided *Patel*), no circuit court had applied *Yamaha* to § 1447(d) or discussed its applicability in that context. Therefore, when Congress amended § 1447(d) to

[8] *See Alabama v. Conley*, 245 F.3d 1292, 1293 n.1 (11th Cir. 2001); *Davis v. Glanton*, 107 F.3d 1044, 1047 (3d Cir. 1997); *Thornton v. Holloway*, 70 F.3d 522, 524 (8th Cir. 1995); *State Farm Mut. Auto. Ins. Co. v. Baasch*, 644 F.2d 94, 97 (2d Cir. 1981); *Detroit Police Lieutenants & Sergeants Ass'n v. City of Detroit*, 597 F.2d 566, 567 (6th Cir. 1979); *Robertson v. Ball*, 534 F.2d 63, 66 & n.5 (5th Cir. 1976); *Noel v. McCain*, 538 F.2d 633, 635 (4th Cir. 1976).

insert "1442 or" before "1443," Removal Clarification Act of 2011 § 2, it was against a backdrop of unanimous judicial interpretation of § 1447(d) as permitting review of only the grounds for removal identified in the exception clause. Congress did not give any indication that it intended to overrule the then-unanimous interpretation of § 1447(d) as limiting judicial review of a remand order to the grounds listed in the exception clause. We "presume that Congress acts 'with awareness of relevant judicial decisions.'" *United States v. Alvarez-Hernandez*, 478 F.3d 1060, 1065 (9th Cir. 2007) (quoting *United States v. Male Juvenile*, 280 F.3d 1008, 1016 (9th Cir. 2002)). And "when 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate [the statute's] . . . judicial interpretations as well." *Id.* (quoting *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85 (2006)). Accordingly, we conclude that Congress did not abrogate *Patel* sub silentio but rather "inten[ded] to incorporate" *Patel*'s (and six other circuits') interpretation of § 1447(d). *Id.* (citation omitted). The Fourth Circuit has reached the same conclusion. *See Mayor & City Council of Baltimore v. BP P.L.C.*, 952 F.3d 452, 461 (4th Cir. 2020) ("[T]he fact that Congress later added § 1442 as an exception to § 1447(d)'s no-appeal rule for remand orders does not undermine our holding . . . that appellate courts only have jurisdiction to review those grounds for removal that are specifically enumerated in § 1447(d)."). We therefore conclude that Congress's amendment of § 1447(d) did not abrogate our interpretation in *Patel.*

The Energy Companies also argue that we are not bound by *Patel* because it was not well reasoned and failed to analyze *Yamaha* or the statutory interpretation arguments

discussed in *Lu Junhong*. Were we writing on a clean slate, we might conclude that *Lu Junhong* provides a more persuasive interpretation of § 1447(d) than *Patel*. *But see Baltimore*, 952 F.3d at 459 60. Precedents, however, do not cease to be authoritative merely because counsel in a later case advances new arguments. *See United States v. Ramos-Medina*, 706 F.3d 932, 939 (9th Cir. 2013) ("This panel is not free to disregard the decision of another panel of our court simply because we think the arguments have been characterized differently or more persuasively."). Therefore, we remain bound by *Patel* until abrogated by an intervening higher authority.

Applying *Patel*'s reading of § 1447(d), we may review the district court's remand order only to the extent it addresses § 1442(a)(1). 446 F.3d at 998; *accord Baltimore*, 952 F.3d at 461. Accordingly, we dismiss the Energy Companies' appeals for lack of jurisdiction to the extent the Energy Companies seek review of the district court's ruling as to other bases for subject-matter jurisdiction. *See Patel*, 446 F.3d at 1000.

III

We now turn to the single ground of removal that we have jurisdiction to review: the question whether the district court erred in holding that there was no subject-matter jurisdiction under the federal-officer removal statute, 28 U.S.C. § 1442(a)(1). We review questions of statutory construction and subject-matter jurisdiction de novo. *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1315 (9th Cir. 1998). The defendant has the burden of proving by a preponderance of the evidence that the requirements for removal jurisdiction

have been met. *Leite v. Crane Co.*, 749 F.3d 1117, 1122 (9th Cir. 2014).

As currently drafted, § 1442(a)(1) provides for removal of:

> A civil action . . . that is against or directed to . . . [t]he United States or any agency thereof or any officer (*or any person acting under that officer*) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

28 U.S.C. § 1442(a)(1) (emphasis added).

In order to invoke § 1442(a)(1), a private person must establish: "(a) it is a person within the meaning of the statute; (b) there is a causal nexus between its actions, taken pursuant to a federal officer's directions, and [the] plaintiff's claims; and (c) it can assert a colorable federal defense." *Riggs v. Airbus Helicopters, Inc.*, 939 F.3d 981, 986 87 (9th Cir. 2019) (quoting *Fidelitad, Inc. v. Insitu, Inc.*, 904 F.3d 1095, 1099 (9th Cir. 2018)). To demonstrate a causal nexus, the private person must show: (1) that the person was "acting under" a federal officer in performing some "act under color of federal office," and (2) that such action is causally connected with the plaintiffs' claims. *See Goncalves ex rel. Goncalves v. Rady Children's Hosp. San Diego*, 865 F.3d 1237, 1244 (9th Cir. 2017).

The parties focus on the first prong: whether the Energy Companies were "acting under" a federal officer's directions. We begin by providing some background. The federal officer removal statute has existed in some version since 1815. *Willingham v. Morgan*, 395 U.S. 402, 405 (1969). Although Congress has amended the statute on a number of occasions, *see Watson v. Philip Morris Cos.*, 551 U.S. 142, 147 49 (2007), most recently in 2011, *see* Removal Clarification Act of 2011 § 2, the purpose of the statute has remained essentially the same: "The statute's history and th[e] Court's cases demonstrate that its basic purpose is to protect the Federal Government from the interference with its operations that would ensue were a State able, for example, to arrest and bring to trial in a State court for an alleged offense against the law of the State, officers and agents of the Government acting . . . within the scope of their authority." *Watson*, 551 U.S. at 150 (cleaned up) (quoting *Willingham*, 395 U.S. at 406). Congress thought that allowing a federal officer to remove a state action was necessary because "[s]tate-court proceedings may reflect 'local prejudice' against unpopular federal laws or federal officials" and "deprive federal officials of a federal forum in which to assert federal immunity defenses." *Id.* (citation omitted). Moreover, state-court proceedings may have the effect of impeding or delaying the enforcement of federal law. *Id.* The federal officer removal statute should be "liberally construed" to fulfill its purpose of allowing federal officials and agents who are being prosecuted in state court for acts taken in their federal authority to remove the case to federal court. *Id.* at 147 (citation omitted).

When Congress first enacted § 1442(a)(1), the phrase "officer of the United States" was generally understood as a term of art that referred to federal officers who "exercis[ed] significant authority." *Int'l Primate Prot. League v. Adm'rs*

of Tulane Educ. Fund, 500 U.S. 72, 81 (1991) (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)). In 1948, Congress amended the statute to include the language "person[s] acting under" any officer of the United States. Act of June 25, 1948, ch. 646, § 1442, 62 Stat. 869, 938 (codified at 28 U.S.C. § 1442). At the time, this change was understood as extending the section to apply to employees, as well as officers. *Int'l Primate Prot. League*, 500 U.S. at 84 (quoting H.R. Rep. No. 80-308, at A134 (1947)).

The Supreme Court subsequently interpreted the term "person acting under that officer" as extending to a "private person" who has certain types of close relationships with the federal government. *See Watson*, 551 U.S. at 152 53. The Supreme Court has identified a number of factors courts should consider in determining whether a private person is "acting under" a federal officer for purposes of § 1442(a)(1). Among other things, the Court considers whether the person is acting on behalf of the officer in a manner akin to an agency relationship. *See id.* at 151 (private person must be authorized to act "with or for federal officers"); *see also Goncalves*, 865 F.3d at 1246 (holding that a private person qualified as "acting under" a federal officer when it was "serving as the government's agent"); *Cabalce v. Thomas E. Blanchard & Assocs., Inc.*, 797 F.3d 720, 729 (9th Cir. 2015) (noting that a company's independent-contractor status supported the conclusion that it was not acting under a federal officer). The Court also considers whether the person is subject to the officer's close direction, such as acting under the "subjection, guidance, or control" of the officer, or in a relationship which "is an unusually close one involving detailed regulation, monitoring, or supervision." *Watson*, 551 U.S. at 151, 153 (citation omitted); *see also Leite*, 749 F.3d at 1120, 1124 (holding that a defense contractor

properly removed a case under § 1442(a)(1) based, in part, on "the Navy's detailed specifications regulating the warnings that equipment manufacturers were required to provide"). Third, the Court considers whether the private person is assisting the federal officer in fulfilling "basic governmental tasks" that "the Government itself would have had to perform" if it had not contracted with a private firm. *Watson*, 551 U.S. at 153 54; *see also Goncalves*, 865 F.3d at 1246 47 (holding that private person fulfilled a basic governmental task by pursuing subrogation claims on behalf of a government agency). Finally, taking into account the purpose of § 1442(a)(1), the Court has considered whether the private person's activity is so closely related to the government's implementation of its federal duties that the private person faces "a significant risk of state-court 'prejudice,'" just as a government employee would in similar circumstances, and may have difficulty in raising an immunity defense in state court. *Watson*, 551 U.S. at 152 (citation omitted).

As the Supreme Court has indicated, and circuit courts have held, a government contractor may meet the criteria for "acting under" an officer under certain circumstances. *See id.* at 153 54. *Watson* cited with approval a Fifth Circuit case, *Winters v. Diamond Shamrock Chemical Co.*, which held that a government contractor could remove a state action under § 1442(a) because the contractor was acting on behalf of the government to produce Agent Orange, a carcinogenic herbicide used as part of the war strategy in Vietnam, and was acting under the close direction of the federal government which had provided "detailed specifications concerning the make-up, packaging, and delivery of Agent Orange," as well as "on-going supervision . . . over the formulation, packaging, and delivery of Agent Orange." 149 F.3d 387, 399 400 (5th Cir. 1998). Further, the contractor provided a product that

was "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 Government itself would have had to perform." *Watson*, 551 U.S. at 153 54; *see also Goncalves*, 865 F.3d at 1246 47 (holding that a private contractor was "acting under" a federal officer when it was serving as an agent for the government and assisting the government in fulfilling basic duties).

By contrast, a person is not "acting under" a federal officer when the person enters into an arm's-length business arrangement with the federal government or supplies it with widely available commercial products or services. *See Cabalce*, 797 F.3d at 727 29; *Baltimore*, 952 F.3d at 463 64; *cf. Goncalves*, 865 F.3d at 1244 47; *Winters*, 149 F.3d at 398 400. Nor does a person's "*compliance* with the law (or *acquiescence* to an order)" amount to "'acting under,' a federal officer who is giving an order or enforcing the law." *Watson*, 551 U.S. at 152. This is true "even if the regulation is highly detailed and even if the private firm's activities are highly supervised and monitored." *Id.* at 153. We may not interpret § 1442(a) so as to "expand the scope of the statute considerably, potentially bringing within its scope state-court actions filed against private firms in many highly regulated industries." *Id.*

The Energy Companies argue that they meet the criteria under § 1442(a) to remove the Counties' complaints because they were "persons acting under" a federal officer based on three agreements with the government.[9] They also argue that

[9] We have held that corporations are "person[s]" under § 1442(a)(1), *Goncalves*, 865 F.3d at 1244, so there is no dispute that the Energy Companies meet this requirement.

there is a causal nexus between their actions under those agreements and the Counties' claims. We consider each of these agreements in turn.

We first consider CITGO's fuel supply agreements with the Navy Exchange Service Command (NEXCOM). Under these contracts, CITGO agreed to supply gasoline and diesel fuel to NEXCOM for service stations on approximately forty U.S. Navy installations. The government resold the CITGO fuel at NEXCOM facilities to individual service members. The Energy Companies point to three sets of contractual requirements in the fuel supply agreements which they claim establish the "subjection, guidance or control" necessary to invoke federal jurisdiction, namely: (1) "fuel specifications" that required compliance with specified American Society for Testing and Material Standards and required that NEXCOM have a qualified independent source analyze the products for compliance with those specifications; (2) provisions that give the Navy the right to inspect delivery, site, and operations; and (3) branding and advertising requirements.[10]

[10] The Energy Companies cite the following sections in the fuel supply agreements. First, the fuel specification provisions require CITGO to "provide high quality gasoline product identical to or the same product as supplied [by] the contractor[']s commercially operated gasoline service station [e.g., regular leaded, regular unleaded, and premium unleaded]." The "[m]otor fuel products supplied" by CITGO were required to comply with the generic standards promulgated by the American Society for Testing and Materials, and the Navy agreed to "have a qualified independent source analyze the products provided [by CITGO]," including any product that was "suspected of being faulty/inferior." Second, the inspection provisions gave the Navy the right to "visually check truck compartment(s) before and after deliveries" of fuel and to conduct "general operational reviews," which "might also include inspections of . . . vehicles." Third, the branding provisions require CITGO to "supply all necessary equipment, including signage, for each facility," to

This argument fails. The provisions on which the Energy Companies rely "seem typical of any commercial contract" and are "incidental to sale and sound in quality assurance." *Baltimore*, 952 F.3d at 464. The contracts evince an arm's-length business relationship to supply NEXCOM with generally available commercial products. *See id.* Supplying gasoline to the Navy for resale to its employees is not an activity so closely related to the government's implementation of federal law that the person faces "a significant risk of state-court prejudice." *Watson*, 551 U.S. at 152. Accordingly, we hold that CITGO was not "acting under" a federal officer by supplying gasoline and diesel fuel to NEXCOM pursuant to fuel supply contracts.

Second, the Energy Companies point to the 1944 unit agreement[11] for the petroleum reserves at Elk Hills between Standard Oil Company of California (Chevron Corporation's predecessor in interest) and the U.S. Navy. We have detailed the history of this unit agreement at length in our prior decisions. *See United States v. Standard Oil Co. of Cal.*, 545 F.2d 624, 626 28 (9th Cir. 1976). In brief, Standard owned one-fifth and the Navy owned four-fifths of the

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"incorporate the Government logo on at least three . . . provided signage fixtures," and to supply "[a] standard service station rotating-fixed neon or incandescent street corner station identification sign . . . for each Government fueling station." And CITGO could submit "proposals on [CITGO] branded products," but the government was not obligated to market "said product under [CITGO's] brand or trade name."

[11] "A unit agreement was at that time and still is a common arrangement in the petroleum industry where two or more owners have interests in a common pool. Under such an arrangement, the pool is operated as a unit and the parties share production and costs in agreed-upon proportions." *United States v. Standard Oil Co. of California*, 545 F.2d 624, 627 (9th Cir. 1976).

approximately 46,000 acres comprising the Elk Hills reserves. As is common in the oil exploration and production industry, the two landowners entered into a unit agreement to coordinate operations in the oil field and production of the oil. Because the Navy sought to limit oil production in order to ensure the availability of oil reserves in the event of a national emergency, the unit agreement required that both Standard and the Navy curtail their production and gave the Navy "exclusive control over the exploration, prospecting, development, and operation of the Reserve." To compensate Standard for reducing production, the unit agreement gave Standard the right to produce a specified amount of oil per day (an average of 15,000 barrels per day). Both parties could dispose of the oil they extracted as they saw fit, and neither had a "preferential right to purchase any portion of the other's share of [the] production."

Standard's activities under the unit agreement did not give rise to a relationship where Standard was "acting under" a federal officer for purposes of § 1442. Standard was not acting on behalf of the federal government in order to assist the government perform a basic government function. Rather, Standard and the government reached an agreement that allowed them to coordinate their use of the oil reserve in a way that would benefit both parties: the government maintained oil reserves for emergencies, and Standard ensured its ability to produce oil for sale. When Standard extracted oil from the reserve, Standard was acting independently, *see Cabalce*, 797 F.3d at 728 29, not as the Navy's "agent," *Goncalves*, 865 F.3d at 1246; *see also* H.R. Rep. No. 112-17, pt. 1, at 3 (2011) ("Removal is allowed only when the acts of Federal defendants are essentially ordered or demanded by Federal authority . . . ."). And Standard's arm's-length business arrangement with the Navy does not

involve conduct so closely related to the government's implementation of federal law that the Energy Companies would face "a significant risk of state-court 'prejudice.'" *Watson*, 551 U.S. at 152.[12]

Finally, we consider the Energy Companies' lease agreements, entitled "Oil and Gas Leases of Submerged Lands Under the Outer Continental Shelf Lands Act." Under these standard-form leases, the government grants the lessee the right to explore and produce oil and gas resources in the submerged lands of the outer Continental Shelf, and in exchange the lessee agrees to pay the government rents and royalties. The Energy Companies argue that the lessee Energy Companies were "acting under" a federal officer because the leases require that the lessees drill for oil and gas pursuant to government-approved exploration plans and that the lessees sell some of their production to certain buyers; specifically, lessees must offer twenty percent of their production to "small or independent refiners" and must give

[12] At oral argument, the Energy Companies argued for the first time that Standard was "acting under" a federal officer pursuant to the Naval Petroleum Reserves Production Act of 1976, Pub. L. 94-258, § 201, 90 Stat. 303 (1976), which directed the Secretary of the Navy to "produce such reserves [including the Elk Hill reserve] at the maximum efficient rate consistent with sound engineering practices for a period not to exceed six years" and to "sell or otherwise dispose of the United States share of such petroleum produced from such reserves." § 201, 90 Stat. at 308. Nothing in the record indicates that the Secretary of the Navy "ordered or demanded," H.R. Rep. No. 112-17, pt. 1, at 3 (2011), *reprinted in* 2011 U.S.C.C.A.N. 420, 422, that Standard produce oil on behalf of the Navy, *see also Baltimore*, 952 F.3d at 471 ("[W]e are left wanting for pertinent details about Standard's role in operating the Elk Hills Reserve and producing oil therefrom on behalf of the Navy."). Therefore, the Energy Companies' reliance on this Act is misplaced.

the United States the right of first refusal in time of war or "when the President of the United States shall so prescribe."

This argument also fails. The leases do not require that lessees act on behalf of the federal government, under its close direction, or to fulfill basic governmental duties. Nor are lessees engaged in an activity so closely related to the government's function that the lessee faces "a significant risk of state-court 'prejudice.'" *Id.* In fact, the lease requirements largely track legal requirements, for instance, that the lessee offer 20 percent of the "crude oil, condensate, and natural gas liquids produced on [the] lease . . . to small or independent refiners," 43 U.S.C. § 1337(b)(7), and that "[i]n time of war, or when the President shall so prescribe, the United States shall have the right of first refusal to purchase at the market price all or any portion of any mineral produced from the outer Continental Shelf," 43 U.S.C. § 1341(b). Mere "compl[iance] with the law, even if the laws are 'highly detailed, and thus leave [an] entity 'highly regulated,'" does not show that the entity is "acting under" a federal officer. *Goncalves*, 865 F.3d at 1245 (quoting *Watson*, 551 U.S. at 151 53). We agree with the Fourth Circuit that "the willingness to lease federal property or mineral rights to a private entity for the entity's own commercial purposes, without more" cannot be "characterized as the type of assistance that is required" to show that the private entity is "acting under" a federal officer. *Baltimore*, 952 F.3d at 465. Accordingly, the leases on which the defendants rely do not give rise to the "unusually close" relationship where the lessee was "acting under" a federal officer. *Watson*, 551 U.S. at 153.

Because we conclude that the Energy Companies have not carried their burden of proving by a preponderance of the

evidence that they were "acting under" a federal officer, we do not reach the question whether actions pursuant to the fuel supply agreement, unit agreement, or lease agreement had a causal nexus with the Counties' complaints, or whether the Energy Companies can assert a colorable federal defense. *See Fidelitad*, 904 F.3d at 1099.

***

We affirm the district court to the extent it held there was no subject-matter jurisdiction under 28 U.S.C. § 1442(a)(1), and we dismiss the remainder of the appeals for lack of jurisdiction under § 1447(d).

AFFIRMED IN PART; DISMISSED IN PART.[13]

[13] The Counties' Motion for Partial Dismissal (ECF No. 41) is **GRANTED**. *See Patel*, 446 F.3d at 1000. Costs shall be taxed against the Energy Companies.

FILED

AUG 4 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

COUNTY OF SAN MATEO, individually and on behalf of the People of the State of California, Plaintiff-Appellee, v. CHEVRON CORPORATION; et al., Defendants-Appellants.	No. 18-15499 D.C. No. 3:17-cv-04929-VC Northern District of California, San Francisco ORDER
CITY OF IMPERIAL BEACH, individually and on behalf of the People of the State of California, Plaintiff-Appellee, v. CHEVRON CORPORATION; et al., Defendants-Appellants.	No. 18-15502 D.C. No. 3:17-cv-04934-VC Northern District of California, San Francisco
COUNTY OF MARIN, individually and on behalf of the People of the State of California, Plaintiff-Appellee,	No. 18-15503 D.C. No. 3:17-cv-04935-VC Northern District of California, San Francisco

v.

CHEVRON CORPORATION; et al.,

Defendants-Appellants.

COUNTY OF SANTA CRUZ, individually and on behalf of The People of the State of California; et al.,

Plaintiffs-Appellees,

v.

CHEVRON CORPORATION; et al.,

Defendants-Appellants.

No. 18-16376

D.C. Nos. 3:18-cv-00450-VC
3:18-cv-00458-VC
3:18-cv-00732-VC
Northern District of California, San Francisco

Before: IKUTA, CHRISTEN, and LEE, Circuit Judges.

The panel has unanimously voted to deny Appellants' Petition for Rehearing En Banc (ECF No. 222).

The full court has been advised of the Petition for Rehearing En Banc, and no Judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The Petition for Rehearing En Banc is **DENIED**.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

COUNTY OF SANTA CRUZ, Plaintiff, v. CHEVRON CORP., et al., Defendants.	Case No. 18-cv-00450-VC Re: Dkt. No. 68
CITY OF SANTA CRUZ, Plaintiff, v. CHEVRON CORP., et al., Defendants.	Case No. 18-cv-00458-VC Re: Dkt. No. 66
CITY OF RICHMOND, Plaintiff, v. CHEVRON CORP., et al., Defendants.	Case No. 18-cv-00732-VC **ORDER GRANTING MOTIONS TO REMAND** Re: Dkt. No. 45

For the reasons stated in this Court's prior order, *see* Order Granting Motions to Remand, No. 3:17-cv-04929-VC (Dkt. No. 223), as well as for the reasons stated in *Coronel v. AK Victory*, 1 F. Supp. 3d 1175, 1178-89 (W.D. Wash. 2014), the motions to remand filed by the County of Santa Cruz, City of Santa Cruz, and City of Richmond are granted. However, the remand orders are stayed pending the outcome of the appeals in the County of San Mateo, City

of Imperial Beach, and County of Marin cases.

IT IS SO ORDERED.

Dated: July 10, 2018

VINCE CHHABRIA
United States District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

COUNTY OF SAN MATEO, Plaintiff, v. CHEVRON CORP., et al., Defendants.	Case No. 17-cv-04929-VC Re: Dkt. No. 144
CITY OF IMPERIAL BEACH, Plaintiff, v. CHEVRON CORP., et al., Defendants.	Case No. 17-cv-04934-VC Re: Dkt. No. 140
COUNTY OF MARIN, Plaintiff, v. CHEVRON CORP., et al., Defendants.	Case No. 17-cv-04935-VC **ORDER GRANTING MOTIONS TO REMAND** Re: Dkt. No. 140

The plaintiffs' motions to remand are granted.

1. Removal based on federal common law was not warranted. In *American Electric Power Co., Inc. v. Connecticut*, the Supreme Court held that the Clean Air Act displaces federal common law claims that seek the abatement of greenhouse gas emissions. 564 U.S. 410, 424 (2011). Far from holding (as the defendants bravely assert) that state law claims relating to

global warming are superseded by federal common law, the Supreme Court 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). *Id.* at 429. This seems to reflect the Court's view that once federal common law is displaced by a federal statute, there is no longer a possibility that state law claims could be superseded by the previously-operative federal common law.

Applying *American Electric Power*, the Ninth Circuit concluded in *Native Village of Kivalina v. ExxonMobil Corp.* that federal common law is displaced by the Clean Air Act not only when plaintiffs seek injunctive relief to curb emissions but also when they seek damages for a defendant's contribution to global warming. 696 F.3d 849, 857-58 (9th Cir. 2012). The plaintiffs in the current cases are seeking similar relief based on similar conduct, which means that federal common law does not govern their claims. In this respect, the Court disagrees with *People of the State of California v. BP P.L.C.*, Nos. C 17-06011 WHA, C 17-06012 WHA (N.D. Cal. Feb. 27, 2018), which concluded that San Francisco and Oakland's current lawsuits are materially different from *Kivalina* such that federal common law could play a role in the current lawsuits brought by the localities even while it could not in *Kivalina*. Like the localities in the current cases, the *Kivalina* plaintiffs sought damages resulting from rising sea levels and land erosion. Not coincidentally, there is significant overlap between the defendants in *Kivalina* and the defendants in the current cases. 696 F.3d at 853-54 & n.1. The description of the claims asserted was also nearly identical in *Kivalina* and the current cases: that the defendants' contributions to greenhouse gas emissions constituted "a substantial and unreasonable interference with public rights." *Id.* at 854. Given these facts, *Kivalina* stands for the proposition that federal common law is not just displaced when it comes to claims against domestic sources of emissions but also when it comes to claims against energy producers' contributions to global warming and rising sea levels. *Id.* at 854-58. Put another way, *American Electric Power* did not confine its holding about the displacement of federal common law to particular sources of emissions, and *Kivalina* did not apply *American Electric Power* in such a

limited way.

Because federal common law does not govern the plaintiffs' claims, it also does not preclude them from asserting the state law claims in these lawsuits. Simply put, these cases should not have been removed to federal court on the basis of federal common law that no longer exists.

2. Nor was removal warranted under the doctrine of complete preemption. State law claims are often preempted by federal law, but preemption alone seldom justifies removing a case from state court to federal court. Usually, state courts are left to decide whether state law claims are preempted by federal law under principles of "express preemption," "conflict preemption" or "field preemption." And state courts are entirely capable of adjudicating that sort of question. *See, e.g.*, *Smith v. Wells Fargo Bank, N.A.*, 38 Cal. Rptr. 3d 653, 665-73 (Cal. Ct. App. 2005), *as modified on denial of reh'g* (Jan. 26, 2006); *Carpenters Health & Welfare Trust Fund for California v. McCracken*, 100 Cal. Rptr. 2d 473, 474-77 (Cal. Ct. App. 2000). A defendant may only remove a case to federal court in the rare circumstance where a state law claim is "completely preempted" by a specific federal statute – for example, section 301 of the Labor Management Relations Act, section 502 of the Employment Retirement Income Security Act, or sections 85 and 86 of the National Bank Act. *See Sullivan v. American Airlines, Inc.*, 424 F.3d 267, 271-73 (2d Cir. 2005). The defendants do not point to any applicable statutory provision that involves complete preemption. 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." 42 U.S.C. §§ 7604(e), 7416; 33 U.S.C. §§ 1365(e), 1370; *Beneficial National Bank v. Anderson*, 539 U.S. 1, 9 n.5 (2003); *Bell v. Cheswick Generating Station*, 734 F.3d 188, 194-97 (3d Cir. 2013). There may be important questions of ordinary preemption, but those are for the state courts to decide upon remand.

3. Nor was removal warranted on the basis of *Grable* jurisdiction. The defendants have not pointed to a specific issue of federal law that must necessarily be resolved to adjudicate the

state law claims. *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 314 (2005); *see also Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 700 (2006). Instead, the defendants mostly gesture to federal law and federal concerns in a generalized way. The mere potential for foreign policy implications (resulting from the plaintiffs succeeding on their claims at an unknown future date) does not raise the kind of actually disputed, substantial federal issue necessary for *Grable* jurisdiction. Nor does the mere existence of a federal regulatory regime mean that these cases fall under *Grable*. *See Empire Healthchoice*, 547 U.S. at 701 ("[I]t takes more than a federal element 'to open the "arising under" door.'" (quoting *Grable*, 545 U.S. at 313)). Moreover, even if deciding the nuisance claims were to involve a weighing of costs and benefits, and even if the weighing were to implicate the defendants' dual obligations under federal and state law, that would not be enough to invoke *Grable* jurisdiction. On 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. *Grable* does not sweep so broadly. *See Empire Healthchoice*, 547 U.S. at 701 (describing *Grable* as identifying no more than a "slim category" of removable cases); *Grable*, 545 U.S. at 313-14, 319.

4. These cases were not removable under any of the specialized statutory removal provisions cited by the defendants. Removal under the Outer Continental Shelf Lands Act was not warranted because even if some of the activities that caused the alleged injuries stemmed from operations on the Outer Continental Shelf, the defendants have not shown that the plaintiffs' causes of action would not have accrued *but for* the defendants' activities on the shelf. *See In re Deepwater Horizon*, 745 F.3d 157, 163 (5th Cir. 2014). Nor was federal enclave jurisdiction appropriate, since federal land was not the "locus in which the claim arose." *In re High-Tech Employee Antitrust Litigation*, 856 F. Supp. 2d 1103, 1125 (N.D. Cal. 2012) (quoting *Alvares v. Erickson*, 514 F.2d 156, 160 (9th Cir. 1975)); *see also Ballard v. Ameron International Corp.*, No. 16-CV-06074-JSC, 2016 WL 6216194, at *3 (N.D. Cal. Oct. 25, 2016); *Klausner v. Lucas Film Entertainment Co, Ltd.*, No. 09-03502 CW, 2010 WL 1038228, at *4 (N.D. Cal. Mar. 19,

2010); *Rosseter v. Industrial Light & Magic*, No. C 08-04545 WHA, 2009 WL 210452, at *2 (N.D. Cal. Jan. 27, 2009). Nor was there a reasonable basis for federal officer removal, because the defendants have not shown a "causal nexus" between the work performed under federal direction and the plaintiffs' claims, which are based on a wider range of conduct. *See Cabalce v. Thomas E. Blanchard & Associates, Inc.*, 797 F.3d 720, 727 (9th Cir. 2015); *see also Watson v. Philip Morris Companies, Inc.*, 551 U.S. 142, 157 (2007). And bankruptcy removal did not apply because these suits are aimed at protecting the public safety and welfare and brought on behalf of the public. *See City & Cty. of San Francisco v. PG & E Corp.*, 433 F.3d 1115, 1123-24 (9th Cir. 2006); *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1108-09 (9th Cir. 2005). To the extent two defendants' bankruptcy plans are relevant, there is no sufficiently close nexus between the plaintiffs' lawsuits and these defendants' plans. *See In re Wilshire Courtyard*, 729 F.3d 1279, 1287 (9th Cir. 2013).

* * *

As the defendants note, these state law claims raise national and perhaps global questions. It may even be that these local actions are federally preempted. But to justify removal from state court to federal court, a defendant must be able to show that the case being removed fits within one of a small handful of small boxes. Because these lawsuits do not fit within any of those boxes, they were properly filed in state court and improperly removed to federal court. Therefore, the motions to remand are granted. The Court will issue a separate order in each case to remand it to the state court that it came from.

At the hearing, the defendants requested a short stay of the remand orders to sort out whether a longer stay pending appeal is warranted. A short stay is appropriate to consider whether the matter should be certified for interlocutory appeal, whether the defendants have the right to appeal based on their dubious assertion of federal officer removal, or whether the remand orders should be stayed pending the appeal of Judge Alsup's ruling. Therefore, the remand orders are stayed until 42 days of this ruling. Within 7 days of this ruling, the parties must submit a stipulated briefing schedule for addressing the propriety of a stay pending appeal. The

parties should assume that any further stay request will be decided on the papers; the Court will schedule a hearing if necessary.

IT IS SO ORDERED.

Dated: March 16, 2018

VINCE CHHABRIA
United States District Judge