No. A-

IN THE

Supreme Court of the United States

SHELL OIL PRODUCTS COMPANY, *et al.*,

Applicants,

v.

STATE OF RHODE ISLAND,

Respondent.

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 FIRST CIRCUIT

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United States Court of Appeals
For the First Circuit

No. 19-1818

STATE OF RHODE ISLAND,

Plaintiff, Appellee,

v.

SHELL OIL PRODUCTS CO., L.L.C.; CHEVRON CORP.; CHEVRON USA, INC.; EXXONMOBIL CORP.; BP, PLC; BP AMERICA, INC.; BP PRODUCTS NORTH AMERICA, INC.; ROYAL DUTCH SHELL P.L.C.; MOTIVA ENTERPRISES, L.L.C.; CITGO PETROLEUM CORP.; CONOCOPHILLIPS; CONOCOPHILLIPS CO.; PHILLIPS 66; MARATHON OIL CO.; MARATHON PETROLEUM CORP.; MARATHON PETROLEUM CO., L.P.; SPEEDWAY, L.L.C.; HESS CORP.; LUKOIL PAN AMERICAS L.L.C.; AND DOES 1-100,

Defendants, Appellants,

GETTY PETROLEUM MARKETING, INC.

Defendant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[Hon. William E. Smith, District Judge]

Before

Thompson and Howard,
Circuit Judges.*

* Judge Torruella heard argument in this appeal. But he did not participate in the decision, which is being rendered by a "quorum" of the panel. See 28 U.S.C. § 46(d).

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Attorney General of Louisiana, Lynn Fitch, Attorney General of Mississippi, Austin Knudsen, Attorney General of Montana, Doug Peterson, Attorney General of Nebraska, Alan Wilson, Attorney General of South Carolina, Ken Paxton, Attorney General of Texas, Sean Reyes, Attorney General of Utah, and Bridget Hill, Attorney General of Wyoming, on supplemental brief for State of Alabama, State of Alaska, State of Arkansas, State of Georgia, State of Indiana, State of Kansas, Commonwealth of Kentucky, State of Louisiana, State of Mississippi, State of Montana, State of Nebraska, State of South Carolina, State of Texas, State of Utah, and State of Wyoming, amici curiae.

Robert S. Peck and Center For Constitutional Litigation, P.C., on supplemental brief for The National League of Cities, The U.S. Conference of Mayors, and The International Municipal Lawyers Association, amici curiae.

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Peter Huffman on supplemental brief for Natural Resources Defense Council, amicus curiae.

Kaighn Smith, Jr., and Drummond Woodsum on supplemental brief for Scholars of Foreign Relations and Federal Courts, amici curiae.[**]

[**] For the names of the attorneys involved in the original appeal, see 979 F.3d 50, 51-53 (1st Cir. 2020).

May 23, 2022

THOMPSON, Circuit Judge. This is our second pass at a climate-change case that requires us to explore the mind-numbing complexities of federal removal jurisdiction. See Rhode Island v. Shell Oil Prods. Co., 979 F.3d 50, 54 (1st Cir. 2020) ("Shell Oil"). We start by bringing the reader up to speed.[1]

Like other state and local governments across the country, Rhode Island claims that the Energy Companies named in our caption knew for *decades* that burning fossil fuels is damaging the earth's atmosphere but duped the public into buying more and more of their products (consequences be damned) — all to line their very deep pockets. See id. at 53. Seeking relief for the catastrophic harm they supposedly have done (and will do) to its non-federal property and natural resources, Rhode Island — also like other governments elsewhere — sued the Energy Companies in state court. See id. at 53-54. And its longish complaint alleges state-law causes of action for public nuisance, strict-liability design defect, negligent design defect, negligent failure to warn, impairment of public-trust resources, and violations of the state's Environmental Rights Act.

Not eager to try this case in a Rhode Island court, the Energy Companies removed the matter to federal court under the federal-officer removal statute, the federal-question doctrine,

[1] For efficiency's sake, we assume the reader's general familiarity with our Shell Oil opinion.

the Outer Continental Shelf Lands Act (just "OCSLA" from now on), the admiralty-jurisdiction statute, and the bankruptcy-removal statute. But to their disappointment, the district judge thought that none of those grounds could provide a hook on which removal could hang. See id. And so he remanded the case to state court. See id.

On the Energy Companies' appeal — in our first go-around — we concluded that we could only review the federal-officer removal ground. See id. at 58-60. And ruling that the Energy Companies had not satisfied the requirements of the federal-officer removal statute, we affirmed the judge's remand order. See id. at 60. But on the Energy Companies' petition for *certiorari*, the Supreme Court (without reversing our decision on the merits) GVR'd us (short for ***g***ranted certiorari, ***v***acated, and ***r***emanded) and instructed that we give "further consideration in light of BP p.l.c. v. Mayor & City Council of Baltimore, 141 S. Ct. 1532 (2021)" — a then-hot-off-the-presses opinion requiring courts of appeals to review the judge's entire remand order and consider all of the defendants' removal grounds, not just the part of the order resolving the federal-officer removal ground.[2] See

[2] For a good discussion of the GVR mechanism, see Gonzalez v. Justices of the Municipal Court of Boston, 420 F.3d 5, 7-8 (1st Cir. 2005). As a heads-up, today's opinion requires some tolerance for acronyms.

Shell Oil Prods. Co. v. Rhode Island, 141 S. Ct. 2666 (2021) (Mem.).

Pleased to oblige, we requested and received supplemental briefs from counsel.[3] In them, the parties continue battling over whether the Energy Companies can remove the case on various bases. And it is to this dispute that we turn to below, using a *de novo* standard (which gives zero deference to the judge's views) and adding more details when needed to put the arguments into workable perspective. See Amoche v. Guarantee Tr. Life Ins. Co., 556 F.3d 41, 48 (1st Cir. 2009). But to give away the opinion's ending up front: leaning hard on our sibling circuits' analyses in comparable climate-change cases — particularly County of San Mateo v. Chevron Corp., Nos. 18-15499, 18-15502, 18-15503, 18-16376, 2022 WL 1151275 (9th Cir. Apr. 19, 2022) ("San Mateo"); Mayor & City Council of Baltimore v. BP P.L.C., 31 F.4th 178 (4th Cir. 2022) ("BP P.L.C."); Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.) Inc., 25 F.4th 1238 (10th Cir. 2022) ("Suncor"); City of Oakland v. BP PLC, 969 F.3d 895, 907 (9th Cir. 2020) ("Oakland"), cert. denied, 141 S. Ct. 2776 (2021) — we once more *affirm* the judge's remand order.

[3] We wish to thank the amici and their attorneys for their helpful insights as well.

Overarching Considerations

Federal courts have limited jurisdiction, charted (within constitutional limits) by federal statute. See, e.g., López-Muñoz v. Triple-S Salud, Inc., 754 F.3d 1, 5 (1st Cir. 2014); Fayard v. Ne. Vehicle Servs., LLC, 533 F.3d 42, 48 (1st Cir. 2008) (noting that "[b]oth jurisdiction and removal are primarily creatures of Congress"). And as we are about to see, lots of statutes control removal of state-filed cases to federal court.

A generalized removal statute says that a defendant can remove a state-filed case to federal court only if the plaintiff could have brought the case there originally. See 28 U.S.C. § 1441(a). Pertinently here, a federal court has original jurisdiction over cases that "aris[e] under" federal law — *i.e.*, "the Constitution, *laws*, or treaties *of the United States*," see 28 U.S.C. § 1331 (emphases added), plus "claims founded upon federal common law," see Illinois v. City of Milwaukee, 406 U.S. 91, 100 (1972). Section 1441 is known as the general-removal statute. See, e.g., Home Depot U.S.A., Inc. v. Jackson, 139 S. Ct. 1743, 1746 (2019) ("Home Depot"). And section 1331 is known as the general federal-question jurisdiction statute. See, e.g., Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826, 829 (2002).

Specialized removal statutes exist too. Take, for instance, the bankruptcy-removal statute, which (in broad strokes)

allows removal to a district court of any claim of which that court would have jurisdiction under another provision that (generally speaking) creates federal jurisdiction for disputes "arising under" the bankruptcy code, disputes "arising in" a bankruptcy case, and disputes "related to" the resolution of a bankruptcy case. See 28 U.S.C. §§ 1452(a), 1334(a)-(b).

Whether a case arises under federal law typically is "determined from what necessarily appears" on the face of a plaintiff's complaint, "unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose." See Taylor v. Anderson, 234 U.S. 74, 75-76 (1914); see also Franchise Tax Bd. v. Constr. Laborers Vacation Tr., 463 U.S. 1, 9-12 (1983). This is known as the well-pleaded-complaint rule, because it concentrates our attention on the complaint's terms. See Franchise Tax Bd., 463 U.S. at 9-10. And in most instances, that rule makes plaintiff the "master" of the complaint — including the master of "what law" plaintiff "will rely upon." See The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25 (1913) (Holmes, J., for the Court).

As with many rules, however, exceptions exist. See Rose v. RTN Fed. Credit Union, 1 F.4th 56, 59-60 (1st Cir. 2021). One exception applies when "a state-law claim necessarily raise[s] a stated federal issue," which is "actually disputed and substantial," and which a federal court can consider "without

disturbing any congressionally approved balance" between state and federal power. See Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 313-16 (2005) ("Grable"); accord R.I. Fishermen's All., Inc. v. R.I. Dep't of Envtl. Mgmt., 585 F.3d 42, 49 (1st Cir. 2009). Only a "*slim* category" of state-law claims satisfies Grable, however. See Empire Healthchoice Assurance, Inc. v. McVeigh, 547 U.S. 677, 701 (2006) ("Empire Healthchoice") (emphasis added); San Mateo, 2022 WL 1151275, at *4. Another exception applies when federal law has completely displaced state law and so "provide[s] the exclusive cause of action for such claims" — thus making the asserted claim necessarily federal. See Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 11 (2003) ("Beneficial"); accord Caterpillar Inc. v. Williams, 482 U.S. 386, 393 (1987); Lawless v. Steward Health Care Sys., LLC, 894 F.3d 9, 17 (1st Cir. 2018); López-Muñoz, 754 F.3d at 5.[4] Complete

[4] Anything involving "preemption" can be confusing. And in this setting, the word itself can cause even the most sophisticated readers to scratch their collective heads over the difference between "complete preemption" and "ordinary preemption." See Rueli v. Baystate Health, Inc., 835 F.3d 53, 57 (1st Cir. 2016). As a sort of cheat sheet: Only complete preemption affects the court's jurisdiction. See id. Where it exists, "there is . . . no such thing as a state-law claim" in the regulated area because Congress intended federal law to provide the *exclusive* cause of action for that claim. See Beneficial, 539 U.S. at 9, 11. And a court thus treats the complaint as if a federal claim appears on the face of it. See Rivet v. Regions Bank of La., 522 U.S. 470, 476 (1998). Ordinary preemption, contrastingly, "refer[s] to certain *defenses*" to the claim's merits, "of which a classic example is a state claim foreclosed because its assertion conflicts with a federal statute or falls within a field preempted by federal

preemption is a "narrow exception." Beneficial, 539 U.S. at 5.[5] But in the rare situations when it applies, courts sometime derisively describe the complaint as "artfully pleaded" to sidestep the federal claim. See, e.g., Rivet, 522 U.S. at 475.

As the parties trying to remove the case from state to federal court, the Energy Companies must prove that the federal court has original jurisdiction. See 28 U.S.C. § 1441(a); see also Danca v. Private Health Care Sys., Inc., 185 F.3d 1, 4 (1st Cir. 1999). And because removal jurisdiction raises serious federalism concerns, we construe removal statutes *strictly* and *against* removal. See, e.g., Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28, 32 (2002); Rosselló-González v. Calderón-Serra, 398 F.3d 1, 11 (1st Cir. 2004). So if federal jurisdiction is doubtful, a federal court must remand to state court. See, e.g., Rosselló-González, 398 F.3d at 11.

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law." See Cavallaro v. UMass Mem'l Healthcare, Inc., 678 F.3d 1, 4 n.3 (1st Cir. 2012) (emphasis added). And as a mere defense, ordinary preemption — according to the well-pleaded-complaint rule — "will *not* provide a basis for removal." See Beneficial, 539 U.S. at 6 (emphasis added).

[5] Because complete preemption affects plaintiffs' usual ability to plead the law they want, the Supreme Court is "reluctant" to find the exception applies. See Metro. Life Ins. v. Taylor, 481 U.S. 58, 65 (1987) ("Metro. Life"). The Court, in fact, has found complete preemption in only *three* statutes, see San Mateo, 2022 WL 1151275, at *6: (1) Beneficial, 539 U.S. at 10-11 (National Bank Act §§ 85 and 86); (2) Metro. Life, 481 U.S. at 66-67 (Employee Retirement Income Security Act § 502(a)); and (3) Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557, 560 (1968) (Labor Management Relations Act § 301).

Issues in Play

The Energy Companies argue for removal based on federal-question jurisdiction, which they think exists because (as they tell it) Rhode Island artfully pleaded state claims that are at bottom governed by federal common law; completely preempted by federal law; necessarily dependent on substantial and disputed federal issues; and based on injuries or conduct on federal enclaves. They also argue for removal based on other jurisdictional and removal statutes, namely the OCSLA-jurisdiction statute, the admiralty-jurisdiction statute, and the bankruptcy-removal statute.[6]

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[6] A word about the federal-officer removal statute — which, like the bankruptcy-removal statute, is a specialized removal statute. This provision allows private actors "acting under" color of federal authority to remove a state-court action "for or relating to any act under color of such office." See 28 U.S.C. § 1442(a)(1). And per our precedent, the Energy Companies must show that they acted under a federal officer, that the claims against them are "for or relating to" the alleged official authority, and that they will raise a colorable federal defense. See Moore v. Elec. Boat Corp., 25 F.4th 30, 34 & n.2 (1st Cir. 2022) (noting that Shell Oil "described the 'relating to' requirement as a 'nexus' between 'the allegations in the complaint and conduct undertaken at the behest of a federal officer,'" but stating that "[t]his nexus requirement is not a causation requirement" (quoting Shell Oil, 979 F.3d at 59)).

As reported in Shell Oil, the Energy Companies direct "us to three contracts with the federal government related to the production of oil and argue that they were 'acting under' a federal officer because they 'help[ed] the Government to produce an item that it needs.'" See 979 F.3d at 59 (alteration in original and quoting Watson v. Philip Morris Cos., 551 U.S. 142, 153 (2007)). But Rhode Island's complaint, we said, alleges that the Energy Companies "produced and sold oil and gas products in Rhode Island that were damaging the environment and engaged in a misinformation

In the pages that follow, we discuss and reject each of the Energy Companies' arguments (again, all in keeping with the recent decisions of other circuit courts).

Federal-Question Jurisdiction

Federal Common Law

Citing the artful-pleading doctrine, the Energy Companies argue that even though Rhode Island's complaint says nothing about federal common law, the claims alleged "are inherently federal" and necessarily arise under federal law because they are "based on interstate and international emissions" (excess capitalization removed) — *i.e.*, uniquely federal interests, the theory goes, that must be governed by federal common law. To their way of thinking then, Rhode Island's claims amount to federal claims in disguise. Noting our "skepti[cism]" about "the applicability of the artful pleading doctrine outside of complete federal preemption of a state cause of action," see Rosselló-González, 398 F.3d at 12 (citing Franchise Tax Bd. and Rivet), Rhode Island protests that the well-pleaded-complaint rule

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campaign about the harmful effects of their products on the earth's climate." Id. at 60. And, we ruled, the trio of contracts "mandate[s] none of those activities" — thus making the case *un*removable under the federal-officer removal statute. See id. Because nothing in the Supreme Court's BP p.l.c. opinion undermines that holding (BP p.l.c., remember, only requires us to consider the Energy Companies' other removal grounds), we "adhere to" Shell Oil's rejection of federal-officer removal jurisdiction (and for what it is worth, the Energy Companies identify no shortcomings with that rejection).

(which — as already explained — generally bars removal unless a federal question appears on the complaint's face) stops us from looking behind the complaint and construing the state-law theories as federal common-law ones. But as a fallback, Rhode Island argues that even if the Energy Companies could get around that rule, they would still lose because Congress has replaced the federal common law that they rely on.

Avoiding the kerfuffle over the parties' artful pleading-based arguments — our credo is that "if it is not necessary to decide more, it is necessary not to decide more," see PDK Labs. Inc. v. U.S. D.E.A., 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment) — we take the "even if" approach and ultimately conclude the Energy Companies cannot premise removal on a federal common law that no longer exists, see generally 14C Charles A. Wright, Federal Practice and Procedure § 3722.1 (Rev. 4th ed. Apr. 2022) ("Federal Practice and Procedure") (lamenting that "the artful-pleading doctrine lacks precise definition and has bred considerable confusion"). Why we so rule requires some unpacking, however.

While there is no general common law, pockets of federal judge-made law exist that bind the states. See BP P.L.C., 31 F.4th at 200 (providing examples). But the circumstances where the "judicial creation of a special federal rule" ought to displace state law are "few and restricted," see O'Melveny & Meyers v.

F.D.I.C., 512 U.S. 79, 89 (1994) ("O'Melveny") (quotation marks omitted) — limited to those "extraordinary cases," see id., involving both "uniquely federal interests" *and* a "significant conflict . . . between some federal policy or interest and the use of state law," see Boyle v. United Tech. Corp., 487 U.S. 500, 506 (1988) (quotation marks omitted). That makes sense because where federal common law exists, it "pre-empt[s] and replace[s]" state law, see id. at 504 — which raises sensitive issues of separation of powers and federalism, see Rodriguez v. F.D.I.C., 140 S. Ct. 713, 717 (2020) (underscoring that "[j]udicial lawmaking in the form of federal common law plays a necessarily modest role under a Constitution that vests the federal government's 'legislative Powers' in Congress and reserves most other regulatory authority to the States" (quoting U.S. Const. art. 1, § 1)). Critically as well, the side pushing a theory of federal common law must show a "*specific, concrete* federal policy or interest" with which state law directly conflicts "as a *precondition* for recognition of a federal rule of decision." See O'Melveny, 512 U.S. at 87-88 (emphases added).[7]

The Energy Companies spend a lot of time on the "uniquely federal interests" point, highlighting (for instance) the federal government's special concern with "controlling interstate

[7] Courts use "federal rule of decision" to mean "federal common law," and vice versa. See BP P.L.C., 31 F.4th at 200 n.3.

pollution, promoting energy independence, and negotiating multilateral treaties addressing global warning" — interests, they continue, that call for the application of a "uniform federal rule of decision," which makes the case "removable under 28 U.S.C. §§ 1331 and 1441." But even "[a]ssuming" (without granting) that these concerns constitute "uniquely federal interests," see BP P.L.C., 31 F.4th at 202, we — like the Fourth Circuit in BP P.L.C. — find that the Energy Companies (despite being the burden-bearer on the removal issue) never adequately describe how "any significant conflict exist[s] between" these "federal interests" and the state-law claims, which (again) seek to hold them liable for the climate change-related harms they caused by deliberately misrepresenting the dangers they knew would arise from their deceptive hyping of fossil fuels, see id. at 203-04. Not only does this "misstep" raise a waiver problem. See, e.g., Rodríguez v. Mun. of San Juan, 659 F.3d 168, 175-76 (1st Cir. 2011) (discussing how to set an issue up for decision); United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) (doing the same and stressing that "[i]t is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work"). It also deals a "fatal" blow to the Energy Companies' bid to base federal-question jurisdiction on federal common law. See BP P.L.C., 31 F.4th at 202 (quoting O'Melveny, 512 U.S. at 88); see Atherton v. F.D.I.C., 519 U.S. 213, 218 (1997)

(confirming that "the guiding principle is that a significant conflict between some federal policy or interest and the use of state law . . . must first be *specifically shown*" (omission in original, emphasis added, and quoting Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966))).

To the extent the Energy Companies rely on City of New York v. Chevron Corp., 993 F.3d 81 (2d Cir. 2021), to hint at a conflict between the federal government's relations with foreign countries and the rights of states, they are unable to do so. See BP P.L.C., 31 F.4th at 202-03 (rebuffing a similar suggestion in a similar case); Suncor, 25 F.4th at 1262 (same). City of New York, after all, is distinguishable in at least one key respect. There, unlike here, the government "filed suit in *federal court* in the *first instance*" (relying on diversity jurisdiction) — so the court considered the fossil-fuel producers' "preemption defense on its own terms, not under the heightened standard unique to the removability inquiry." See 993 F.3d at 94 (emphases added). And the court found that its ordinary preemption analysis did not clash with the "fleet of cases" (among them Oakland) recognizing that "anticipated defenses" — including those based on federal common law — could not "singlehandedly create federal-question jurisdiction under 28 U.S.C. § 1331 in light of the well-pleaded complaint rule." See id.

Ignoring these problems just for discussion purposes, we still say the Energy Companies fall short. Instead of handling "the threshold inquiry above," they here — like the energy companies in BP P.L.C. — shine a spotlight on some old Supreme Court cases "that once (or possibly) recognized federal common law in the context of interstate pollution and greenhouse-gas emissions." See 31 F.4th at 204. And from there, they intimate that applying state law in this area would upset our constitutional scheme. Put aside how the federal common law they bring up does not address the type of acts Rhode Island seeks judicial redress for.[8] Even accepting the Energy Companies' description of Rhode Island's claims as being "transboundary pollution" claims (again, just for argument's sake), we know that "[w]hen Congress addresses a question previously governed by a decision rested on federal common law . . . the need for such an unusual exercise of law-making by federal courts disappears." See Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 423 (2011) ("AEP") (quoting City of Milwaukee v. Illinois, 451 U.S. 304, 314 (1981)). The Clean Water Act and the Clean Air Act — neither of which Rhode Island invokes

[8] Rhode Island (to repeat) seeks to hold "[d]efendants" liable for their "tortious conduct" that "deliberately and unnecessarily deceived" consumers about the scientific consensus on climate change and its devastating effects, and about the starring role their products play in causing it (quotes taken from the complaint), *not* to regulate greenhouse-gas emissions (Rhode Island challenges no federal contract, permit, regulation, or treaty, for example).

— "have statutorily displaced any federal common law that previously existed." See BP P.L.C., 31 F.4th at 207. So we cannot rule that any federal common law controls Rhode Island's claims. See id. at 199, 205-06 (saying that although the energy companies "characterize [the government's] claims as 'interstate-pollution claims' that arise under federal common law," Congress displaced the federal common law of interstate pollution, and it would "def[y] logic" to base removal on a "federal common law claim [that] has been deemed displaced, extinguished, and rendered null by the Supreme Court").[9]

Grable

The Energy Companies next argue that "[e]ven if" Rhode Island's claims found their origins in state rather than federal law, "removal still would be proper under Grable." Grable, as we signaled a few pages back, requires us to ask if Rhode Island's claims fall into the very rare class that (1) necessarily raise a

[9] Interestingly — and we think tellingly — some of the Energy Companies successfully argued in another case that "the Clean Air Act *displaces* any federal common law claims potentially arising from greenhouse[-]gas emissions" (excess capitalization omitted but emphasis added). See Answering Brief of ExxonMobil et al. at 61, Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849 (9th Cir. 2012) ("Kivalina") (No. 09-17490), 2010 WL 3299982, at *61. "Displacement of the federal common law does not leave those injured by air pollution without a remedy," wrote a concurring Kivalina panelist, because "[o]nce federal common law is displaced, state nuisance law becomes an available option to the extent it is not preempted by federal law." See Kivalina, 696 F.3d at 866 (Pro, D.J., concurring) (citing AEP, 564 U.S. at 429).

federal issue that is (2) truly disputed and (3) substantial and that (4) a federal court can decide without upsetting the balance between state and federal judiciaries. See Gunn v. Minton, 568 U.S. 251, 258 (2013) (discussing Grable). Just like other circuits in comparable cases, see San Mateo, 2022 WL 1151275, at *4-6; BP P.L.C., 31 F.4th at 208-15, we answer no.

We begin and end at prong (1), the necessarily-raised prong — which the Energy Companies can satisfy only if a federal issue "is a *necessary* element of one of the well-pleaded state claims" in Rhode Island's complaint. See Franchise Tax Bd., 463 U.S. at 13 (emphasis added); see also Gunn, 568 U.S. at 258 (stressing that jurisdiction lies under Grable only if "all four" prongs "are met"). The best way to wrap one's mind around this prong is to consider what happened in Grable. The IRS seized and sold Grable's real property to satisfy a tax lien. See 545 U.S. at 310. Grable challenged the sale via a quiet-title suit in state court, calling the buyer's title invalid because the IRS had not complied with federal notice requirements. Id. at 311. The buyer removed the case to federal court. Id. The only disputed issue concerned whether Grable got "notice within the meaning of the *federal statute*." See id. at 315 (emphasis added). And the Supreme Court held that such a claim "arises under" federal law because (among other things) there was *nothing* in the suit but *federal law*: state law provided the remedy, a declaration of

ownership — but ownership could not be decided without deciding if the federal government respected *federal* legal demands. See id. In other words, "[d]eciding an issue of federal law was *inescapable*." Hartland Lakeside Joint No. 3 Sch. Dist. v. WEA Ins. Corp., 756 F.3d 1032, 1035 (7th Cir. 2014) (emphasis added). Importantly too, "the national government itself was vitally concerned about the outcome; an adverse decision could undercut its ability to collect taxes." See id.

Nothing at all similar is involved here. True, the Energy Companies say that Rhode Island's claims are "bound up with," "implicate," or "seek[] to replace" various "federal interests" — including energy policy, economic policy, environmental regulation, national security, and foreign affairs. But faced with comparable arguments, cases akin to this one flatly reject the idea that federal law is an *essential element* to the kind of classic state-law claims Rhode Island raises — claims, as we keep saying, that accuse the Energy Companies of contributing to climate change that (per the complaint) is wreaking havoc on the state's infrastructure and coastal communities. See San Mateo, 2022 WL 1151275, at *5; BP P.L.C., 31 F.4th at 208-15. To paraphrase these courts: none of Rhode Island's claims has as an element a violation of federal law; the Energy Companies pinpoint no specific federal issue that must necessarily be decided for Rhode Island to win its case; and their speaking about federal law

or federal concerns in the most generalized way is not enough for Grable purposes. See San Mateo, 2022 WL 1151275, at *5; BP P.L.C., 31 F.4th 208-15. Hence Rhode Island's state-law claims — like those in San Mateo and BP P.L.C. — are not among the rare few that "can[] be squeezed into the slim category Grable exemplifies." See Empire Healthchoice, 547 U.S. at 701.

Complete Preemption

As intimated above, Congress can pass a statute so broad that any complaint raising claims in that area is necessarily federal in nature and so is removable to federal court. See, e.g., Beneficial, 539 U.S. at 8. "Complete preemption," we must say (echoing a circuit relative of ours) "is 'a doctrine only a judge could love'" — "and one only judges could confusingly name." See Loffredo v. Daimler AG, 500 F. App'x 491, 495 (6th Cir. 2012) (quoting Bartholet v. Reishauer A.G. (Zurich), 953 F.2d 1073, 1075 (7th Cir. 1992)). "More productively thought of as a jurisdictional rather than a preemptive rule, complete preemption amounts to an exception to the well-pleaded complaint rule that converts a state-law claim . . . into a federal claim." Id.

Invoking this doctrine, the Energy Companies contend that the Clean Air Act completely preempts Rhode Island's claims and thus authorizes removal. So having ruled above "that the federal common law does not completely preempt the state-law claims, we now consider whether the federal act that displaced the

federal common law — the [Clean Air Act] — completely preempts them." See Suncor, 25 F.4th at 1263. No circuit to consider the kind of argument the Energy Companies press here has accepted it. See San Mateo, 2022 WL 1151275, at *6; BP P.L.C., 31 F.4th at 215-17; Suncor, 25 F.4th 1263-65. And we will not be the first.

"[T]he Clean Air Act is not one of the three statutes that the Supreme Court has determined has extraordinary preemptive force."[10] See San Mateo, 2022 WL 1151275, at *6 (quoting Oakland, 969 F.3d at 907); BP P.L.C., 31 F.4th at 215; Suncor, 25 F.4th at 1257. Also — and as noted previously — complete preemption requires that defendants show Congress *clearly intended* to supersede state authority. See, e.g., Metro. Life, 481 U.S. at 65-66. But the Clean Air Act says that "pollution prevention . . . and air pollution control at its source is the primary responsibility of *States and local governments*." See 42 U.S.C. § 7401(a)(3) (emphasis added); see also BP P.L.C., 31 F.4th at 215; Oakland, 969 F.3d at 908. And the Act has *two* "savings clauses" that expressly preserve non-Clean Air Act claims. See BP P.L.C., 31 F.4th at 216 (discussing "savings clauses that preserve state and local governments' legal right to impose standards and limitations on air pollution that are stricter than national

[10] Recall our earlier footnoted comments about the National Bank Act, the Employee Retirement Income Security Act, and the Labor Management Relations Act.

requirements"); see also Oakland, 969 F.3d at 907-08 (noting that the Act "preserves state-law causes of action pursuant to a saving clause" that "'makes clear that states retain the right to "adopt or enforce" common law standards that apply to emissions' and preserves '[s]tate common law standards . . . against preemption'" (discussing 42 U.S.C. § 7416, and quoting Merrick v. Diageo Ams. Supply, Inc., 805 F.3d 685, 690, 691 (6th Cir. 2015), which cites in turn W. Va. Univ. Hosp., Inc. v. Casey, 499 U.S. 83, 98 (1991))). All of which takes complete preemption off the table. See Suncor, 25 F.4th at 1263; accord BP P.L.C., 31 F.4th at 215-17; Oakland, 969 F.3d at 907-08. If more were needed, another prerequisite of complete preemption — do not forget — is that a statute supplies a federal cause of action to replace the state claim. See, e.g., Beneficial, 539 U.S. at 9; López-Muñoz, 754 F.3d at 5 (commenting that Supreme Court opinions "finding complete preemption share a common denominator: exclusive federal regulation of the subject matter of the asserted state claim, coupled with a federal cause of action for wrongs of the same type"). Accordingly then, the Clean Air Act's not providing an "exclusive federal cause of action for suits against private polluters" makes complete preemption a nonstarter too. See Suncor, 25 F.4th at 1263; accord BP P.L.C., 31 F.4th 215-17; Oakland, 969 F.3d at 907-08.[11]

[11] The Energy Companies make much of a Clean Air Act provision that lets states initiate federal-court challenges to actions by

Federal Enclave

Federal courts have federal-question jurisdiction over tort claims arising on federal enclaves. See, e.g., BP P.L.C., 31 F.4th at 217-18; Suncor, 25 F.4th at 1271. Rhode Island's complaint, however, specifically avoids seeking relief for damages to any federal lands in the Ocean State.[12] Faced with this reality, the Energy Companies claim that a big chunk of their "operative activities occurred on federal land" — like at the "Elk Hills Naval Petroleum Reserve" in California. See generally BP P.L.C., 31 F.4th at 217 (stating that "naval installations are generally considered federal enclaves"). The problem for them, though, is that "[t]he doctrine of federal enclave jurisdiction generally requires that *all* pertinent events t[ake] place on a federal enclave." See Suncor, 25 F.4th at 1271 (alterations by the Suncor Court and quotations omitted). And some of the pertinent events — *e.g.*, the Energy Companies' deceptive marketing and Rhode Island's injuries — occurred *outside* federal enclaves. See BP

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the Environmental Protection Agency regarding nationwide emissions. But that section has nothing to do with Rhode Island's claims here, which (once again) concern the Energy Companies' deceptive promotion of damaging fossil-fuel products. See BP P.L.C., 31 F.4th at 215-17 (rejecting a similar complete-preemption argument); Suncor, 25 F.4th at 1264-65 (ditto); Oakland, 969 F.3d at 908 (ditto again).

[12] "Ocean State" is a nickname of Rhode Island. "Little Rhody" is another. See "List of U.S. state and territory nicknames," Wikipedia, https://en.wikipedia.org/wiki/List_of_U.S._state_and_territory_nicknames.

P.L.C., 31 F.4th at 217-18 (explaining that "federal-question jurisdiction is not conferred merely because *some* of Defendants' activities occurred on military installations"); see also San Mateo, 2022 WL 1151275, at *8 (finding that "[t]he 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 federal law applicable to any federal enclave"). Enough said about that issue.

OCSLA Jurisdiction

Pointing to their "substantial" activities on the outer continent shelf ("OCS") — they say "the five" biggest "operators" there since the mid-1990s "have included at least three entities among the [Energy Companies] here (or a predecessor) or one of their subsidiaries" — the Energy Companies also maintain that federal jurisdiction exists under OCSLA.[13] That statute extends such jurisdiction to "cases and controversies arising out of, or *in connection with*[,] . . . any operation conducted on the [OCS] which involves exploration, development, or production of . . . minerals." 43 U.S.C. § 1349(b)(1) (emphasis added). The italicized phrase — "in connection with" — bears directly on this case. Our circuit (as the parties seem to agree) has not yet

[13] The OCS includes the seabed and natural resources lying "3 miles to 200 miles off the United States coast." See Ctr. For Biological Diversity v. U.S. Dep't of Interior, 563 F.3d 466, 472, (D.C. Cir. 2009); see also 43 U.S.C. §§ 1301(a), 1331(a).

addressed that phrase's meaning. Which explains why the Energy Companies rely big time on cases from the Fifth Circuit that have.[14]

OCSLA jurisdiction exists, says the Fifth Circuit, if "(1) the activities that caused the injury constituted an 'operation' 'conducted on the [OCS]' that involved the exploration and production of minerals, and (2) the case 'arises out of, or in connection with' the operation," In re Deepwater Horizon, 745 F.3d 157, 163 (5th Cir. 2014) ("Deepwater") (quoting OCSLA) — a "jurisdictional test" intended "to cover a '"wide range of activity occurring beyond the territorial waters of the states,"'" Suncor, 25 F.4th at 1272 (quoting Barker v. Hercules Offshore, Inc., 713 F.3d 208, 213 (5th Cir. 2013), in turn quoting Texaco Expl. & Prod., Inc. v. AmClyde Engineered Prods. Co., 448 F.3d 760, 768 (5th Cir. 2006), amended on reh'g, 453 F.3d 652 (5th Cir. 2006)); accord BP P.L.C., 31 F.4th at 219-20. Though the Energy Companies argue otherwise, the test's "second prong" — the only prong in dispute — might require "'a but-for connection.'" See Suncor, 25 F.4th at 1272 (quoting Deepwater, 745 F.3d at 163); accord BP P.L.C., 31 F.4th at 220 ("declin[ing] to disrupt th[e] settled and sensible trend" of cases holding that "'arise out of, or in connection with' under the OCSLA . . . imposes a but-for relationship between a party's case and operations on the OCS").

[14] The Fifth Circuit is quite familiar with OCSLA, apparently.

Cf. generally Maracich v. Spears, 570 U.S. 48, 60 (2013) (noting that "[t]he phrase 'in connection with' provides little guidance without a limiting principle").[15] We say "might" because the Ninth Circuit holds "that the language of § 1349(b), 'aris[e] out of, or in connection with,' does not *necessarily* require but-for causation." See San Mateo, 2022 WL 1151275, at *10 (emphasis added). But we need not wrestle the but-for-causation issue to the ground today. And that is because "[d]espite [the] different approach[es] to construing § 1349(b), our sister circuits' application of § 1349(b) leads to a materially similar result," see id. — as we now explain.

Cases finding OCSLA jurisdiction involve "either . . . 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 [that] operation." See id. (quoting Suncor, 25 F.4th at 1273 (stockpiling cases)). The "core" of Rhode Island's suit concerns how the Energy Companies "knew what fossil fuels were doing to the environment and continued

[15] Arguing against the but-for standard, the Energy Companies hype Ford Motor Co. v. Montana Eighth Judicial District Court, 141 S. Ct. 1017 (2021). Ford Motor Co. held that the "requirement of a 'connection' between a plaintiff's suit and a defendant's activities" for a court to exercise personal jurisdiction is not the same as but-for causation. See id. at 1026. Like the Ninth Circuit, however, "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." See San Mateo, 2022 WL 1151275, at *10.

to sell them anyway, all while misleading consumers about the true impact of the products." See Shell Oil, 979 F.3d at 54. The Energy Companies talk up how "extensive [their] OCS operations" are. That may be. But Rhode Island's claims concern their "overall conduct, not whatever unknown fraction of their fossil fuels was produced on the OCS." See Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc., 405 F. Supp. 3d 947, 979 (D. Colo. 2019).[16] And just because the Energy Companies' have "extensive OCS operations" does not mean that Rhode Island's claims satisfy OCSLA's in-connection-with benchmark. If it did then *any* suit against fossil-fuel companies regarding *any* adverse impact linked to their products would trigger OCSLA federal jurisdiction because (to quote Rhode Island's latest brief) "a significant portion" of the oil and gas we use comes from the OCS — a consequence too absurd to be attributed to Congress. See generally Sheridan v. United States, 487 U.S. 392, 402 n.7 (1988) (explaining that "courts should strive to avoid attributing absurd designs to Congress"). Anyhow, Rhode Island's allegations "do not refer to actions taken on the [OCS]." See San Mateo, 2022 WL 1151275, at *11. Ergo, the Energy Companies have not shown that Rhode Island's "tort claims 'aris[e] out of'" or are "'in connection with' [their]

[16] That is the decision the Tenth Circuit affirmed in Suncor.

operations on the [OCS] for purposes of" OCSLA jurisdiction. See id.

Pulling out all the stops, the Energy Companies write that "OCSLA jurisdiction is also proper for the additional and independent reason that the relief [Rhode Island] seeks would" present an obstacle to "the efficient exploitation of the minerals from the OCS" — thus jeopardizing "the continued scope and viability of [their] OCS operations and the federal OCS leasing program as a whole." Their theory is that a large monetary judgment against them "would inevitably deter" OCS operations. But like the Tenth Circuit, we fail "to see how such a prospective theory of negative economic incentives — flowing from a lawsuit that does not directly attack OCS exploration, resource development, or leases — is anything other than contingent and speculative." See Suncor, 25 F.4th at 1275. And "contingent and speculative" do not suffice for OCSLA jurisdiction purposes. See id.; accord BP P.L.C., 31 F.4th at 222.

Admiralty Jurisdiction

The Energy Companies also think they can get the case into federal court under admiralty jurisdiction because (to quote their brief) "fossil-fuel extraction occurs on vessels engaged in maritime commerce." We think not, however.

The Constitution extends federal jurisdiction to "admiralty and maritime" cases. See U.S. Const., art. III, § 2,

cl. 1. And Congress grants federal courts jurisdiction over "[a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." See 28 U.S.C. § 1333(1).[17] While "not entirely clear," it seems the drafters of the saving-to-suitors clause intended to "preserve[] remedies and the concurrent jurisdiction of state courts over some admiralty and maritime claims." See Lewis v. Lewis & Clark Marine, Inc., 531 U.S. 438, 444, 445 (2001).[18]

The district judge in our case relied on a line of decisions indicating that admiralty issues — without more — cannot make a case removable from state to federal court. The Energy Companies call this reversible error, writing that a recent amendment to section 1441 (the general-removal statute) jettisoned jargon that these courts had used "to block the removal of admiralty claims absent another basis for federal jurisdiction." "[C]ourts," however, "split on whether the working of the amended statute changes the rule for removal of maritime claims." BP P.L.C., 31 F.4th at 226 (quoting Thomas J. Schoenbaum, Admiralty

[17] "Suitors" in this context is just another word for "plaintiffs." See 14A Federal Practice & Procedure Jurisdiction § 3672.

[18] Courts often use "admiralty" and "maritime" synonymously. See Adamson v. Port of Bellingham, 907 F.3d 1122, 1125 n.4 (9th Cir. 2018). See generally Sisson v. Ruby, 497 U.S. 358, 362 (1990) (using "admiralty jurisdiction" and "maritime jurisdiction" interchangeably).

and Maritime Law § 4.3, Westlaw (database updated Dec. 2021)). We need not choose sides, because even if saving-to-suitors actions are freely removable under section 1441 (and we are not saying either way), the Energy Companies still face an insurmountable obstacle.

A tort claim comes within our admiralty jurisdiction if the party invoking that jurisdiction "satisf[ies] conditions both of location and of connection with maritime activity." See Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 534 (1995). The test is intricate. But we can make short work of the Energy Companies' effort by focusing on one facet. When, as here, the "injury suffered" is on "land," the jurisdiction-invoking party must show that "a vessel on navigable water" caused the tort. See id. So even if the Energy Companies could show that fossil-fuel extraction occurs on "vessels," that gets them nowhere.[19] We say that because Rhode Island does not allege any vessel caused the land-based injuries (the complaint alleges their dangerous products and misleading promotion caused Rhode Island's injuries, not a vessel) — a point made in Rhode Island's brief, without contradiction from the Energy Companies in their reply

[19] Rhode Island apparently disagrees with the Energy Companies' claim that "a floating oil rig," for example, is a vessel used for navigation. Given our "even if" approach, we have no need to wade into that debate.

brief. And that means no admiralty jurisdiction exists in this case. See BP P.L.C., 31 F.4th at 227.

Bankruptcy Jurisdiction

As we noted a little while ago, a party in a civil suit may remove claims "related to" bankruptcy cases. See 28 U.S.C. §§ 1452(a), 1334(b). Seizing on this, the Energy Companies tell us that Rhode Island's complaint is "related to" bankruptcy cases because it "seeks to hold [them] liable for the pre-bankruptcy operations of Texaco Inc. (a subsidiary of Chevron) and Getty Petroleum." "Texaco's confirmed bankruptcy plan," the Energy Companies say, "bars various claims arising against it" before "March 15, 1988." And, they add, Rhode Island's "allegations against Texaco include conduct" before that date. Quoting a Fourth Circuit opinion — Valley Historic Ltd. Partnership v. Bank of New York, 486 F.3d 831, 836-37 (4th Cir. 2007) — they then write that deciding Rhode Island's "claims would 'affect the interpretation, implementation, consummation, execution, or administration of [Texaco's] confirmed plan.'"[20]

But taking another page from the Fourth Circuit's BP P.L.C. opinion — which considered and rejected a strikingly similar argument — we rule not only that "there is no indication that the bankruptcy plan involved climate change" but also that the Energy

[20] The internal quotations are from the Fourth Circuit case.

Companies offer no convincing explanation for "how a judgment more than thirty years later could impact Texaco's estate." See 31 F.4th at 223. And even if they think their appellate papers give the needed indication and explanation, we would consider the argument "too skeletal or confusingly constructed and thus waived." See Págan-Lisboa v. Soc. Sec. Admin., 996 F.3d 1, 7 (1st Cir. 2021) (quotation marks omitted). The Energy Companies also vaguely suggest (emphasis ours) that Rhode Island's "theories of liability" are based on the actions of their "predecessors, subsidiaries, and affiliates" and so "affect *additional* bankruptcy matters." But that perfunctory comment is insufficient to preserve the issue for appeal. See, e.g., Rodríguez, 659 F.3d at 175-76. The bottom line is that "we find no federal jurisdiction under the bankruptcy[-]removal statute." See BP P.L.C., 31 F.4th at 225.

Final Words

We *affirm* the district judge's order remanding the case to Rhode Island state court. Costs to Rhode Island.

United States Court of Appeals
For the First Circuit

No. 19-1818

STATE OF RHODE ISLAND,

Plaintiff, Appellee,

v.

SHELL OIL PRODUCTS CO., L.L.C.; CHEVRON CORP.; CHEVRON USA, INC.; EXXONMOBIL CORP.; BP, PLC; BP AMERICA, INC.; BP PRODUCTS NORTH AMERICA, INC.; ROYAL DUTCH SHELL P.L.C.; MOTIVA ENTERPRISES, L.L.C.; CITGO PETROLEUM CORP.; CONOCOPHILLIPS; CONOCOPHILLIPS CO.; PHILLIPS 66; MARATHON OIL CO.; MARATHON PETROLEUM CORP.; MARATHON PETROLEUM CO., L.P.; SPEEDWAY, L.L.C.; HESS CORP.; LUKOIL PAN AMERICAS L.L.C.; AND DOES 1-100,

Defendants, Appellants,

GETTY PETROLEUM MARKETING, INC.

Defendant.

JUDGMENT

Entered: May 23, 2022

This cause came on to be heard on appeal from the United States District Court for the District of Rhode Island and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The district court's order remanding the case to Rhode Island state court is affirmed. Costs are awarded to the State of Rhode Island.

By the Court:

Maria R. Hamilton, Clerk

cc: Adi Goldstein, Corrie J. Yackulic, Matthew Kendall Edling, Victor Marc Sher, Alison B. Hoffman, Jeffrey S. Brenner, David Charles Frederick, Grace W. Knofczynski, Neal S. Manne,

Gerald J. Petros, Robin-Lee Main, Joshua Seth Lipshutz, Theodore J. Boutrous Jr., Thomas G. Hungar, Matthew Thomas Oliverio, Kannon K. Shanmugam, William Thomas Marks, Daniel J. Toal, Theodore V. Wells Jr., Jaren Janghorbani, John A. Tarantino, Patricia K. Rocha, Nicole J. Benjamin, Nancy Gordon Milburn, Matthew T. Heartney, Oliver Peter Thoma, Tracie Jo Renfroe, John E. Bulman, Stephen John MacGillivray, Lisa S. Meyer, Nathan P. Eimer, Pamela R. Hanebutt, Raphael Janove, Ryan Walsh, Michael J. Colucci, Robert G. Flanders Jr., Timothy K. Baldwin, Jameson R. Jones, Margaret Tough, Steven Mark Bauer, Daniel R. Brody, Robert P. Reznick, Stephen M. Prignano, James L. Stengel, Patrick C. Lynch, Jeffrey B. Pine, Shawn Patrick Regan, Shannon S. Broome, Ann Marie Mortimer, Jason Christopher Preciphs, Jacob Scott Janoe, Megan H. Berge, Steven Paul Lehotsky, Peter D. Keisler, William M. Jay, Andrew Kim, Tobias S. Loss-Eaton, Patrick Parenteau, Robert S. Peck, Seth Schofield, William M. Tong, Benjamin Gould, Anthony Tarricone, Gerson H. Smoger, Peter Huffman, William A. Rossbach, Scott Lawrence Nelson, Matthew Hardin, Christopher Edward Appel, Philip S Goldberg, Thomas Molnar Fisher, Kaighn Smith Jr.

United States Court of Appeals
For the First Circuit

No. 19-1918

STATE OF RHODE ISLAND,

Plaintiff - Appellee,

v.

SHELL OIL PRODUCTS COMPANY, LLC; CHEVRON CORP.; CHEVRON USA, INC.; EXXONMOBIL CORP.; BP, PLC; BP AMERICA, INC.; BP PRODUCTS NORTH AMERICA, INC.; SHELL PLC, f/k/a Royal Dutch Shell PLC; MOTIVA ENTERPRISES, LLC; CITGO PETROLEUM CORP.; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66; MARATHON OIL COMPANY; MARATHON OIL CORPORATION; MARATHON PETROLEUM CORP.; MARATHON PETROLEUM COMPANY, LP; SPEEDWAY, LLC; HESS CORP.; LUKOIL PAN AMERICAS LLC; DOES 1-100,

Defendants - Appellants,

GETTY PETROLEUM MARKETING, INC.,

Defendant.

Before

Thompson, Howard, and Gelpí,
Circuit Judges.

ORDER OF COURT

Entered: July 7, 2022

Appellants' petition for panel rehearing is denied.

As it appears that there may be no quorum of circuit judges in regular active service who are not recused who may vote on appellants' request for rehearing en banc, the request for rehearing en banc is also denied. See 28 U.S.C. § 46(d); 1st Cir. R. 35.0(a)(1).

By the Court:

Maria R. Hamilton, Clerk

cc:
Adi Goldstein, Corrie J. Yackulic, Matthew Kendall Edling, Victor Marc Sher, Alison B. Hoffman, Jeffrey S. Brenner, David Charles Frederick, Grace W. Knofczynski, Neal S. Manne, Gerald J. Petros, Robin-Lee Main, Joshua Seth Lipshutz, Theodore J. Boutrous Jr., Thomas G. Hungar, Matthew Thomas Oliverio, Kannon K. Shanmugam, William Thomas Marks, Daniel J. Toal, Theodore V. Wells Jr., Jaren Janghorbani, John A. Tarantino, Patricia K. Rocha, Nicole J. Benjamin, Nancy Gordon Milburn, Matthew T. Heartney, Oliver Peter Thoma, Tracie Jo Renfroe, John E. Bulman, Stephen John MacGillivray, Lisa S. Meyer, Nathan P. Eimer, Pamela R. Hanebutt, Raphael Janove, Ryan J. Walsh, Michael J. Colucci, Robert G. Flanders Jr., Timothy K. Baldwin, Jameson R. Jones, Margaret Tough, Steven Mark Bauer, Daniel R. Brody, Robert P. Reznick, Stephen M. Prignano, James L. Stengel, Patrick C. Lynch, Jeffrey B. Pine, Shawn Patrick Regan, Shannon S. Broome, Ann Marie Mortimer, Jason Christopher Preciphs, Jacob Scott Janoe, Megan H. Berge, Steven Paul Lehotsky, Peter D. Keisler, William M. Jay, Andrew Kim, Tobias S. Loss-Eaton, Patrick Parenteau, Robert S. Peck, Seth Schofield, William M. Tong, Benjamin Gould, Anthony Tarricone, Gerson H. Smoger, Peter Huffman, William A. Rossbach, Scott Lawrence Nelson, Matthew Hardin, Christopher Edward Appel, Philip S Goldberg, Thomas Molnar Fisher, Kaighn Smith Jr.

United States Court of Appeals
For the First Circuit

No. 19-1818

STATE OF RHODE ISLAND,

Plaintiff, Appellee,

v.

SHELL OIL PRODUCTS CO., L.L.C.; CHEVRON CORP.; CHEVRON USA, INC.; EXXONMOBIL CORP.; BP, PLC; BP AMERICA, INC.,; BP PRODUCTS NORTH AMERICA, INC.; ROYAL DUTCH SHELL P.L.C.; MOTIVA ENTERPRISES, L.L.C.; CITGO PETROLEUM CORP.; CONOCOPHILLIPS; CONOCOPHILLIPS CO.; PHILLIPS 66; MARATHON OIL CO.; MARATHON PETROLEUM CORP.; MARATHON PETROLEUM CO., L.P.; SPEEDWAY, L.L.C.; HESS CORP.; LUKOIL PAN AMERICAS L.L.C.; AND DOES 1-100,

Defendants, Appellants,

GETTY PETROLEUM MARKETING, INC.

Defendant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[Hon. William E. Smith, Chief U.S. District Judge]

Before

Howard, Chief Judge
and Thompson, Circuit Judge.*

Theodore J. Boutrous, Jr., with whom Joshua S. Lipshutz,

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* Judge Torruella heard oral argument in this matter and participated in the semble, but he did not participate in the issuance of the panel's opinion in this case. The remaining two panelists therefore issued the opinion pursuant to 28 U.S.C. § 46(d).

Anne Champion, Gibson, Dunn & Crutcher LLP, Gerald J. Petros, Robin L. Main, Ryan M. Gainor, Hinckley, Allen & Snyder LLP, Neal S. Manne, Susman Godfrey LLP, John A. Tarantino, Patricia K. Rocha, Nicole J. Benjamin, Adler Pollock & Sheehan P.C., Philip H. Curtis, Nancy G. Milburn, Matthew T. Heartney, Arnold & Porter Kaye Scholer LLP, Matthew T. Oliverio, Oliverio & Marcaccio LLP, Theodore V. Wells, Jr., Daniel J. Toal, Jaren Janghorbani, Kannon Shanmugam, Paul, Weiss, Rifkind, Wharton, Garrison LLP, Jeffrey S. Brenner, Nixon Peabody LLP, David C. Frederick, Brendan J. Crimmins, Grace W. Knofczynski, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., Daniel B. Levin, Jerome C. Roth, Elizabeth A. Kim, Munger, Tolles & Olson LLP, John E. Bulman, Stephen J. MacGillivray, Pierce Atwood LLP, Nathan P. Eimer, Pamela R. Hanebutt, Lisa S. Meyer, Raphael Janove, Ryan J. Walsh, Eimer Stahl LLP, Michael J. Colucci, Olenn & Penza, LLP, Sean C. Grimsley, Jameson R. Jones, Bartlit Beck LLP, Robert G. Flanders, Jr., Timothy K. Baldwin, Whelan, Corrente, Flanders, Kinder & Siket LLP, Steven M. Bauer, Margaret A. Tough, Latham & Watkins LLP, Jeffrey B. Pine, Patrick C. Lynch, Lynch & Pine, Shannon S. Broome, Shawn Patrick Regan, Ann Marie Mortimer, Hunton Andrews Kurth LLP, Jason C. Preciphs, Roberts, Carroll, Feldstein & Peirce, INC., J. Scott Janoe, Matthew Allen, Megan Berge, Baker Botts L.L.P., Lauren Motola-Davis, Samuel A. Kennedy-Smith, Lewis Brisbois Bisgaard & Smith LLP, Jeffrey S. Brenner, Nixon Peabody LLP, Stephen M. Prignano, Mcintyre Tate LLP, James Stengel, Robert Reznick, and Orrick, Herrington & Sutcliffe, LLP, were on brief for appellants.

Victor M. Sher, with whom Matthew K. Edling, Sher Edling LLP, and Neil F.X. Kelly, Assistant Attorney General, were on brief for appellee.

Steven P. Lehotsky, U.S. Chamber Litigation Center, Peter D. Keisler, Tobias S. Loss-Eaton, and Sidley Austin LLP, on brief for Chamber of Commerce of The United States of America, amicus curiae.

Patrick Parenteau, Vermont Law School, Harold Hongju Koh, Conor Dwyer Reynolds, Peter Gruber Rule of Law Clinic, and Yale Law School, on brief for Former U.S. Government Officials, amicus curiae.

Gerson H. Smoger, Smoger & Associates, P.C., Anthony Tarricone, and Kreindler & Kreindler, LLP, on brief for Senator Sheldon Whitehouse, Senator Jack Reed, and Senator Edward Markey, amicus curiae.

Scott L. Nelson, Allison M. Zieve, and Public Citizen Litigation Group, were on brief for Public Citizen, amicus curiae.

Robert S Peck and Center For Constitutional Litigation, P.C., on brief for The National League of Cities; The U.S. Conference of Mayors; and The International Municipal Lawyers Association, amicus curiae.

Amy Williams-Derry, Daniel P. Mensher, Alison S. Gaffney, and Keller Rohrback L.L.P., on brief for Robert Brulle, Center for Climate Integrity, Justin Farrell, Benjamin Franta, Stephan Lewandowsky, Naomi Oreskes, Geoffrey Supran, and The Union of Concerned Scientists, amicus curiae.

William A. Rossbach and Rossbach Law, PC on brief for Mario J. Molina, Michael Oppenheimer, Robert E. Kopp, Friederike Otto, Susanne C. Moser, Donald J. Wuebbles, Gary B. Griggs, Peter C. Frumhoff and Kristina Dahl, amicus curiae.

Peter Huffman on brief for Natural Resources Defense Council, amicus curiae.

Xavier Becerra, Attorney General for the State of California, David A. Zonana, Supervising Deputy Attorney General, Erin Ganahl, Deputy Attorney General, Heather Leslie, Deputy Attorney General, Maura Healey, Attorney General for the Commonwealth of Massachusetts, Seth Schofield, Senior Appellate Counsel, William Tong, Attorney General of Connecticut, Kathleen Jennings, Attorney General of Delaware, Clare E. Connors, Attorney General of Hawaii, Aaron M. Frey, Attorney General of Maine, Brian E. Frosh, Attorney General of Maryland, Keith Ellison, Attorney General of Minnesota, Gurbir S. Grewal, Attorney General of New Jersey, Letitia James, Attorney General of New York, Ellen F. Rosenblum, Attorney General of Oregon, Thomas J. Donovan, Attorney General of Vermont, and Robert W. Ferguson, Attorney General of Washington on brief for Commonwealth of Massachusetts, State of California, State of Connecticut, State of Delaware, State of Hawaii, State of Maine, State of Maryland, State of Minnesota, State of New Jersey, State of New York, State of Oregon, State of Vermont, and State of Washington, amicus curiae.

Matthew D. Hardin on brief for Energy Policy Advocates, amicus curiae.

October 29, 2020

THOMPSON, Circuit Judge. Rhode Island is salty about losing its already limited square footage to rising sea levels caused by climate change. Facing property damage from extreme weather events and otherwise losing money to the effects of climate change, Rhode Island sued a slew of oil and gas companies for the damage caused by fossil fuels while those companies misled the public about their products' true risks.

Because those claims were state law claims, Rhode Island filed suit in state court. The oil companies, seeing many grounds for federal jurisdiction, removed the case to federal district court. Rhode Island opposed removal and asked that the district court kindly return the lawsuit to state court. The district court obliged and allowed Rhode Island's motion for remand.

The oil companies appealed the district court's order to us and a heated debate ensued over the scope of our review. After careful consideration, we conclude that 28 U.S.C. § 1447(d) permits our review of remand orders only to the extent that the defendant's grounds for removal are federal-officer jurisdiction, pursuant to 28 U.S.C. § 1442 or civil rights jurisdiction, pursuant to 28 U.S.C. § 1443. The oil companies make no argument that this is a civil rights case and we conclude the allegations in Rhode Island's state court complaint do not give rise to federal-officer jurisdiction. Having jurisdiction to review no

more than that question, we affirm the district court's remand order.

BACKGROUND

Rhode Island's State Court Case

We summarize Rhode Island's claims, taking all well-pleaded allegations in its state court complaint as true for the purposes of our analysis. Ten Taxpayer Citizens Grp. v. Cape Wind Assocs., LLC, 373 F.3d 183, 186 (1st Cir. 2004).

In 2018, faced with rising sea levels, higher average temperatures and extreme heat days, more frequent and severe floods, tropical storms, hurricanes, and droughts, Rhode Island sued, in state court, nearly every oil and gas company under the sun.[1] According to Rhode Island, the companies knew that their fossil fuel products were hazardous to the planet and concealed those risks, instead opting to market their products in Rhode Island and promote "antiscience campaigns." The oil companies actively worked to muddy the waters of scientific consensus, collecting decades of detailed research into the global impact of fossil fuels but hiding the results.

All of this left the state up the creek without a paddle once the effects of fossil fuels became more clear, working to combat the effects of a warming planet and an extreme climate.

[1] The defendants are unified in their arguments about the issues before us, so we treat them as one group in our analysis.

And those effects are no joke. Most Rhode Island cities and towns are below the floodplain and New England as a whole is losing ground to the ocean at a rate three to four times faster than the global average (and Rhode Island is hardly big enough to sacrifice so much of its land). Those rising sea levels have already increased erosion and the damage of storm surges along Rhode Island's coast. On top of the work it has already done to respond to these environmental crises, Rhode Island anticipates that the costs will only grow as it responds to more frequent and extreme flooding and other storm damage.

Rhode Island therefore brought this lawsuit "to ensure that the parties who have profited from externalizing the responsibility for [climate change] bear the costs of those impacts on Rhode Island." Or, as the district court aptly summarized: "Climate change is expensive, and the State wants help paying for it." Rhode Island v. Chevron Corp., 393 F. Supp. 3d 142, 146 (D.R.I. 2019).

The state court complaint lists state causes of action: public nuisance, various products liability claims, trespass, impairment of public trust resources, and violation of the state's Environmental Rights Act. The theories of liability vary to fit each cause of action, but at its core, Rhode Island's claim is simple: the oil companies knew what fossil fuels were doing to

the environment and continued to sell them anyway, all while misleading consumers about the true impact of the products.

District Court Litigation

The oil companies removed the case to the district court, arguing that it falls within federal jurisdiction under a variety of theories. The oil companies contended that removal was proper pursuant to 28 U.S.C. § 1441, which permits removal of any cases that could have been originally brought in federal court. To support that ground for removal, the oil companies in turn argued that the district court could have had jurisdiction over the case from the start per 28 U.S.C. § 1331 because the complaint presents a federal question. The oil companies also argued that any of a flock of specific jurisdiction statutes provided the necessary hook to keep the case in federal court, citing the federal-officer removal statute, the Outer Continental Shelf Lands Act, federal-enclave jurisdiction, the bankruptcy-removal statute, and admiralty jurisdiction.

Rhode Island disagreed with all of these arguments and moved for the case to be remanded to state court.

The district court evaluated each of the oil companies' claims and saw no federal jurisdiction lurking within Rhode Island's state causes of action. Accordingly, the district court ordered the case remanded to state court.

Questions on Appeal

The oil companies appealed the remand order to us. As we detail below, Rhode Island argues that our appellate jurisdiction is limited by 28 U.S.C. § 1447(d) to considering only whether the district court was wrong about federal-officer removal and forsaking the other grounds for removal claimed below. Rhode Island, of course, contends the district court was correct to reject the federal-officer removal theory. The oil companies read § 1447(d) to authorize appellate review of the entire remand order and tell us that, were we to review the entire order, we would find that the district court improperly remanded the case. Should we limit our review only to the federal-officer jurisdiction question, the oil companies are confident we will still find federal jurisdiction.

OUR TAKE

The first question we must resolve is the scope of our review of this appeal under 28 U.S.C. § 1447(d). Is our appellate jurisdiction limited to the types of removal listed in § 1447(d) or may we examine every basis for removal alleged by the oil companies and rejected by the district court? We begin with the statute and then detail our interpretation of it, peppering our discussion with each side's contentions along the way. Concluding that our review is cabined to the question of whether the district court has jurisdiction over this case pursuant to federal officer

removal, we then analyze whether Rhode Island's complaint meets that threshold, and ultimately conclude it does not.

Scope of Appellate Review

Section 1447(d) of Title 28 United States Code, provides:

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

Section 1442, in turn, authorizes defendants to remove from state court cases involving "[f]ederal officers or agencies" and § 1443 permits removal of civil rights cases. The parties dispute whether this provision means we only have appellate jurisdiction over the portion of the remand order rejecting federal-officer jurisdiction or whether the entire remand order falls within our purview.

Rhode Island argues that § 1447(d) only permits us to review the district court's order so far as it applies to the federal-officer jurisdiction argument. Though our Circuit has held that § 1447(d) generally prohibits review of remand orders with only narrow exceptions, see Ochoa Realty Corp. v. Faria, 815 F.2d 812, 815 (1st Cir. 1987), we have not yet addressed the precise question presented here. Though this is not a popularity contest, Rhode Island counts among its friends nearly all of the

circuits that have weighed in on the topic and have limited appellate review to federal officer or civil rights removal. See Bd. of Cty. Commissioners of Boulder Cty. v. Suncor Energy (U.S.A.) Inc., 965 F.3d 792, 802 (10th Cir. 2020); Mayor & City Council of Baltimore v. BP P.L.C., 952 F.3d 452, 459 (4th Cir. 2020), cert. granted sub nom. BP P.L.C. v. Mayor & City Council Baltimore, No. 19-1189 (U.S. Oct. 2, 2020); Cty. of San Matteo v. Chevron Corp., 960 F.3d 586, 595-96 (9th Cir. 2020), Jacks v. Meridian Resource Co., 701 F.3d 1224, 1229 (8th Cir. 2012); Patel v. Del Taco, Inc., 446 F.3d 996, 998 (9th Cir. 2006); Alabama v. Conley, 245 F.3d 1292, 1293 n.1 (11th Cir. 2001); Davis v. Glanton, 107 F.3d 1044, 1047 (3d Cir. 1997); State Farm Mut. Auto Ins. Co. v. Baasch, 644 F.2d 94, 97 (2d Cir. 1981).[2]

The oil companies tell us that a plain text reading of § 1447(d) easily answers this question. In short, the word "order" means the district court's entire remand order both times that it appears in § 1447(d), so we have appellate jurisdiction to review the entirety of the remand order and consider whether any of the grounds asserted below for jurisdiction are sufficient to keep this suit in federal court. They lean on the Seventh Circuit's

[2] The Supreme Court recently granted a writ of certiorari to resolve the circuit split on this question. BP P.L.C. v. Mayor & City Council Baltimore, No. 19-1189 (U.S. Oct. 2, 2020).

decision in Lu Junhong v. Boeing Co., which adopted this interpretation. 792 F.3d 805, 811 (7th Cir. 2015).

In Lu Junhong, the Seventh Circuit evaluated the provision at issue here and concluded that "to say that a district court's 'order' is reviewable is to allow appellate review of the whole order, not just of particular issues or reasons." 792 F.3d at 811. In its analysis, the Seventh Circuit primarily relied on the Supreme Court's decision in Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199 (1996). In Yamaha, the Court examined the scope of appellate jurisdiction over a district court order during an interlocutory appeal under 28 U.S.C. § 1292(b). 516 U.S. at 205. For its part, § 1292(b) provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals . . . may thereupon, in its discretion, permit an appeal to be taken from such order[.]

28 U.S.C. § 1292(b) (emphasis added); see Yamaha Motor Corp., 516 U.S. at 205 (quoting section and emphasizing same language). The Yamaha Court held that the language of § 1292(b) permitted an appellate court to review the entire order, rather than being bound by the district court's framing of the "controlling question."

516 U.S. at 205. The Seventh Circuit reasoned that Yamaha's understanding of "order" was the same interpretation called for in § 1447(d).

Seeing all of this, the oil companies rely on Lu Junhong and Yamaha for their conclusion that the entirety of the district court's remand order is fair game. The Seventh Circuit pronounced its interpretation of the word "order" in Lu Junhong to be "entirely textual," 792 F.3d at 812, and so the oil companies would have us resolve this question with the same allegedly textual approach.

We agree, of course, that we begin with the language of the statute. In re Fin. Oversight & Mgmt. Bd. for Puerto Rico, 919 F.3d 121, 128 (1st Cir. 2019), cert. denied sub nom. Assured Guar. Corp. v. Fin. Oversight & Mgmt. Bd. for Puerto Rico, 140 S. Ct. 855 (2020). But a plain text interpretation (of the sort the oil companies promote) is only appropriate where the statutory language that applies to the word "order" is unambiguous. See Babb v. Wilkie, 140 S. Ct. 1168, 1177 (2020) ("Where . . . the words of a statute are unambiguous, the judicial inquiry is complete.") (internal quotation marks and citation omitted) (alteration adopted). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." In re Fin. Oversight & Mgmt.

Bd. for Puerto Rico, 919 F.3d at 128 (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997)).

The first phrase of § 1447(d) ("[a remand] order . . . is not reviewable on appeal or otherwise") is clear that the section is an overall prohibition on appellate review of remand orders. The second phrase is where things get cloudy. Section 1447(d) provides for exceptions to that general prohibition on review ("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"), but is latently ambiguous because § 1447(d) "does not expressly contemplate the situation in which removal is done pursuant to [federal officer removal] and other grounds." Suncor Energy (U.S.A.) Inc., 965 F.3d at 805 (emphasis in original). In that circumstance (which is the case here), the provision leaves open whether the entire remand order or only the part that rejects federal-officer removal is reviewable.

Seeing this ambiguity, we are unmoved by the Seventh Circuit's reasoning in Lu Junhong because the "entirely textual" analysis there was premised on clarity that § 1447(d) lacks. See 792 F.3d at 812. The Tenth Circuit examined the same question we are faced with here and noted that to make its textual analysis function in Lu Junhong, the Seventh Circuit had to bend the rules.

> The Lu Junhong court impliedly conceded [that there is ambiguity § 1447(d)] in asserting that "Section 1447(d) itself authorizes review of the remand order, because the case was removed (in part) pursuant to § 1442." 792 F.3d at 811 (emphasis added). In other words, to convey its point that the plain language of § 1447(d) creates plenary review of a remand order upon invocation of a federal officer removal basis, the Seventh Circuit was forced to modify that language with a clarifying parenthetical entirely absent from the statutory text.

Suncor Energy (U.S.A.) Inc., 965 F.3d at 805. We are similarly unwilling, when faced with an ambiguous provision, to force an interpretation in the name of simplicity. Instead, we will conduct a more holistic analysis.

Beginning with the overall purpose of the statute, we note that the Supreme Court has weighed in on § 1447 when answering a different question, so we are not starting our work from scratch. See Powerex Corp. v. Reliant Energy Servs., Inc., 551 U.S. 224 (2007). We know that "[t]he authority of appellate courts to review district-court orders remanding removed cases to state court is substantially limited by [§ 1447]" and that if a district court says that it is remanding a case for lack of subject-matter jurisdiction (as it did here), we should only review whether that "characterization was colorable." Powerex Corp., 551 U.S. at 229, 234. Another strike against a broad reading yielding a searching review of the district court's remand order.

Turning to the structure of the provision, the point of § 1447(d), by its text, is to limit appellate review. The provision begins with a complete ban on our review of the remand order and then pivots to two precise exceptions. See § 1447(d) ("a remand order . . . is not reviewable"). This general ban is because, despite our best efforts, appeals can move at a glacial pace and "[l]engthy appellate disputes . . . would frustrate the purpose of § 1447(d)." Powerex Corp., 551 U.S. at 234. The oil companies tell us that it would not take much longer to review the entire order if we were already wading into the waters of the federal-officer removal question, but even if that were true here (and we are not confident it is) that does not change the section's purpose. See Christopher v. Stanley-Bostitch, Inc., 240 F.3d 95, 99 (1st Cir. 2001) ("[Section 1447(d)'s] limitation is intended to prevent prolonged litigation of the remand issue, and to minimize interference in state court proceedings by the federal courts, for reasons of comity.") (citation omitted).

Considering all of this, we are persuaded that to allow review of every alleged ground for removal rejected in the district court's order would be to allow § 1447(d)'s exception clause to swallow the general rule prohibiting review and, thus, a narrow construction is appropriate. See Suncor Energy (U.S.A.) Inc., 965 F.3d at 805 (interpreting the same provision and citing Comm'r of Internal Revenue v. Clark, 489 U.S. 726, 739 (1989) ("In construing

provisions . . . in which a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision.")).

One more thing: we assume Congress is "'aware of the universality of th[e] practice' of denying appellate review of remand orders when Congress creates a new ground for removal." Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 128 (1995) (alteration in original) (citation omitted) (addressing § 1447(d)). The final feather in the cap of this analysis then is that Congress amended this section as recently as 2011 and yet again refrained from clearly permitting plenary review of remand orders.[3] See Removal Clarification Act of 2011, Pub. L. No. 112-51, 125 Stat. 545 (2011).

This is where the oil companies' Yamaha argument resurfaces. Prior to the 2011 amendment to § 1447(d), Yamaha interpreted "order" to mean everything decided by the district

[3] Prior to its most recent amendment, § 1447(d) provided:

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

28 U.S.C. § 1447 (1996). Congress added the phrase "section 1442 or" to the exception clause and left the provision otherwise untouched.

court. 516 U.S. at 205. So, the reasoning goes, the relative Congressional inaction on § 1447(d) in 2011 was actually Congress ratifying the Yamaha understanding of the word "order" rather than the decades-long deluge of appellate court interpretations of § 1447 generally. See, e.g., Powerex Corp., 551 U.S. at 229; Christopher, 240 F.3d at 99. But Yamaha was interpreting the word "order" in a different provision, § 1292(b), and in a different procedural posture, an interlocutory appeal. No branch of statutory interpretation says that we should assume Congress is silently adopting court-determined definitions from other statutes when the law in question has its own long history of application and we are not going to plant that seed now.

To sum this up: we read § 1447(d) as prohibiting appellate review of district court orders remanding cases for lack of subject matter jurisdiction, except for the components of those orders, should they exist, where the district court rejects a defendant's attempt to remove a case under federal-officer removal or civil rights removal.

Federal-Officer Removal

With the question of our jurisdiction resolved, we turn to the merits that are within our purview: did the district court err when it concluded that it did not have subject-matter jurisdiction over this case pursuant to 28 U.S.C. § 1442(a)(1), the federal-officer removal statute? We review de novo a "district

court's decision to remand a case to state court," Amoche v. Guarantee Tr. Life Ins. Co., 556 F.3d 41, 48 (1st Cir. 2009), "and, thus, [the district court's] underlying conclusion[s]" as to subject matter jurisdiction, Rhode Island Fishermen's All., Inc. v. Rhode Island Dep't of Envtl. Mgmt., 585 F.3d 42, 47 (1st Cir. 2009).

Private actors sued in state court can remove the case to federal court where the private actor is "acting under [any federal officer], for any act under color of such office." 28 U.S.C. § 1442(a)(1); accord Camacho v. Autoridad de Telefonos de Puerto Rico, 868 F.2d 482, 486-87 (1st Cir. 1989). "Acting under" connotes "subjection, guidance, or control" and involves "an effort to assist, or to help carry out, the duties or tasks of the federal superior." Watson v. Phillip Morris Companies, Inc., 551 U.S. 142, 152 (2007) (citations omitted).

To succeed in their argument that federal-officer removal is proper in this case, the oil companies must show that they were acting under a federal officer's authority, that they will assert a colorable federal defense to the suit, and that there exists "a nexus" between the allegations in the complaint and conduct undertaken at the behest of a federal officer. Jefferson Cty., Ala. v. Acker, 527 U.S. 423, 431 (1999) (internal quotation marks and citations omitted). If the oil companies cannot

demonstrate all three of these elements, they cannot remove the case to federal court under § 1442.

To support their argument, the oil companies point us to three contracts with the federal government related to the production of oil and argue that they were "acting under" a federal officer because they "help[ed] the Government to produce an item that it needs." See Watson, 551 U.S. at 153. Specifically, these contracts involved (1) oil extraction from the Elk Hills Naval Petroleum Reserve, (2) oil extraction under the Outer Continental Shelf Land Act ("OCSLA"), and (3) CITGO fuel supply agreements. In the Elk Hills Reserve Contract, Standard Oil, a predecessor of Chevron, and the U.S. Navy entered into a contract whereby Standard would limit its extraction to ensure adequate reserves for the Navy, but Standard "could dispose of the oil they extracted as they saw fit." County of San Mateo v. Chevron Corp., 960 F.3d 586, 602 (9th Cir. 2020). In the OCSLA leases, some of the oil companies agreed to mineral leases with the U.S. Government to extract oil and natural gas from the Outer Continental Shelf, but there appears to be no "close supervision" of this extraction or production of oil "specially conformed to government use." See Suncor (U.S.A.), Inc., 965 F.3d at 822, 825. And finally, CITGO entered into a contract to provide oil to the Naval Exchange Service Command ("NEXCOM") service stations on naval bases. County of San Mateo, 960 F.3d at 600-01.

At first glance, these agreements may have the flavor of federal officer involvement in the oil companies' business, but that mirage only lasts until one remembers what Rhode Island is alleging in its lawsuit. Rhode Island is alleging the oil companies produced and sold oil and gas products in Rhode Island that were damaging the environment and engaged in a misinformation campaign about the harmful effects of their products on the earth's climate. The contracts the oil companies invoke as the hook for federal-officer jurisdiction mandate none of those activities. See Camacho, 868 F.2d at 486 (jurisdiction clearly proper where defendants were under "express orders, control[,] and directions of federal officers"). The Elk Hills Reserve contract and OCSLA lease address extraction, not distribution or marketing, and the NEXCOM contract only implicates any of those activities on Naval bases, which are explicitly not a part of Rhode Island's case. There is simply no nexus between anything for which Rhode Island seeks damages and anything the oil companies allegedly did at the behest of a federal officer. Accordingly, we conclude that the district court properly found that there is no subject-matter jurisdiction under the federal-officer removal statute.

CONCLUSION

Solely having appellate jurisdiction to review the district court's remand order to the extent that it denies federal-officer removal, we **affirm**. Costs awarded to Rhode Island.

United States Court of Appeals
For the First Circuit

No. 19-1818

STATE OF RHODE ISLAND,

Plaintiff, Appellee,

v.

SHELL OIL PRODUCTS CO., L.L.C.; CHEVRON CORP.; CHEVRON USA, INC.; EXXONMOBIL CORP.; BP, PLC; BP AMERICA, INC.,; BP PRODUCTS NORTH AMERICA, INC.; ROYAL DUTCH SHELL P.L.C.; MOTIVA ENTERPRISES, L.L.C.; CITGO PETROLEUM CORP.; CONOCOPHILLIPS; CONOCOPHILLIPS CO.; PHILLIPS 66; MARATHON OIL CO.; MARATHON PETROLEUM CORP.; MARATHON PETROLEUM CO., L.P.; SPEEDWAY, L.L.C.; HESS CORP.; LUKOIL PAN AMERICAS L.L.C.; AND DOES 1-100,

Defendants, Appellants,

GETTY PETROLEUM MARKETING, INC.

Defendant.

JUDGMENT

Entered: October 29, 2020

This cause came on to be heard on appeal from the United States District Court for the District of Rhode Island and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The district court's remand order, to the extent that it denies federal-officer removal, is affirmed. Costs are awarded to Rhode Island.

By the Court:

Maria R. Hamilton, Clerk

cc: Neil F. X. Kelly, Corrie J. Yackulic, Matthew Kendall Edling, Victor Marc Sher, Jeffrey S. Brenner, David Charles Frederick, Brendan J. Crimmins, Grace W. Knofczynski, Neal S. Manne, Gerald J. Petros, Robin-Lee Main, Joshua S. Lipshutz, Theodore J. Boutrous Jr., Matthew Thomas Oliverio, Kannon K. Shanmugam, William Thomas Marks, Daniel J. Toal, Theodore V. Wells Jr.,

Jaren Janghorbani, John A. Tarantino, Patricia K. Rocha, Nicole J. Benjamin, Nancy Gordon Milburn, Philip H. Curtis, Matthew T. Heartney, John E. Bulman, Stephen John MacGillivray, Lisa S. Meyer, Nathan P. Eimer, Pamela R. Hanebutt, Raphael Janove, Ryan Walsh, Michael J. Colucci, Robert G. Flanders Jr., Timothy K. Baldwin, Jameson R. Jones, Margaret Tough, Sean C. Grimsley, Steven Mark Bauer, Robert P. Reznick, Stephen M. Prignano, James L. Stengel, Patrick C. Lynch, Jeffrey B. Pine, Shawn Patrick Regan, Shannon S. Broome, Ann Marie Mortimer, Jonathan A. Shapiro, Jason Christopher Preciphs, Jacob Scott Janoe, Evan Young, Matthew B. Allen, Megan Berge, Steven Paul Lehotsky, Peter D. Keisler, Tobias Loss-Eaton, Patrick Parenteau, Robert S. Peck, Seth Schofield, William M. Tong, Amy Christine Williams-Derry, Anthony Tarricone, Gerson H. Smoger, Peter Huffman, William A. Rossbach, Scott Lawrence Nelson, Matthew Hardin

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

STATE OF RHODE ISLAND, Plaintiff, v. CHEVRON CORP. et al., Defendants.	C.A. No. 18-395 WES

OPINION AND ORDER

WILLIAM E. SMITH, Chief Judge.

The State of Rhode Island brings this suit against energy companies it says are partly responsible for our once and future climate crisis. It does so under state law and, at least initially, in state court. Defendants removed the case here; the State asks that it go back. Because there is no federal jurisdiction under the various statutes and doctrines adverted to by Defendants, the Court GRANTS the State's Motion to Remand, ECF No. 40.

I. Background[1]

Climate change is expensive, and the State wants help paying for it. Compl. ¶¶ 8, 12. Specifically from Defendants in this case, who together have extracted, advertised, and sold a

[1] As given in the State's complaint. See Ten Taxpayer Citizens Grp. v. Cape Wind Assocs., 373 F.3d 183, 186 (1st Cir. 2004).

substantial percentage of the fossil fuels burned globally since the 1960s. Id. ¶¶ 7, 12, 19, 97. This activity has released an immense amount of greenhouse gas into the Earth's atmosphere, id., changing its climate and leading to all kinds of displacement, death (extinctions, even), and destruction, id. ¶¶ 53, 89–90, 199–213, 216. What is more, Defendants understood the consequences of their activity decades ago, when transitioning from fossil fuels to renewable sources of energy would have saved a world of trouble. Id. ¶¶ 106–46; 184–96. But instead of sounding the alarm, Defendants went out of their way to becloud the emerging scientific consensus and further delay changes — however existentially necessary — that would in any way interfere with their multi-billion-dollar profits. Id. ¶¶ 147–77. All while quietly readying their capital for the coming fallout. Id. ¶¶ 178–83.

Pleading eight state-law causes of action, the State prays in law and equity to relieve the damage Defendants have and will inflict upon all the non-federal property and natural resources in Rhode Island. Id. ¶¶ 225–315. Casualties are expected to include the State's manmade infrastructure, its roads, bridges, railroads, dams, homes, businesses, and electric grid; the location and integrity of the State's expansive coastline, along with the wildlife who call it home; the mild summers and the winters that are already barely tolerable; the State fisc, as vast sums are expended to fortify before and rebuild after the increasing and

increasingly severe weather events; and Rhode Islanders themselves, who will be injured or worse by these events. Id. ¶¶ 8, 12, 15–18, 88–93, 197–218. The State says it will have more to bear than most: Sea levels in New England are increasing three to four times faster than the global average, and many of the State's municipalities lie below the floodplain. Id. ¶¶ 59–61, 76.

This is, needless to say, an important suit for both sides. The question presently before the Court is where in our federal system it will be decided.

II. Discussion

Invented to protect nonresidents from state-court tribalism, 14C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3721 (rev. 4th ed. 2018), the right to remove is found in various statutes, which courts have taken to construing narrowly and against removal. Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108–09 (1941); Esposito v. Home Depot U.S.A., Inc., 590 F.3d 72, 76 (1st Cir. 2009); Rosselló-González v. Calderón-Serra, 398 F.3d 1, 11 (1st. Cir. 2004). Defendants cite several of these in their notice as bases for federal-court jurisdiction. Notice of Removal, ECF No. 1. None, however, allows Defendants to carry their burden of showing the case belongs here. See Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 97 (1921) ("[D]efendant must take and carry the burden of proof, he being the actor in the removal proceeding.").

A. General Removal

The first Defendants invoke is the general removal statute. 28 U.S.C. § 1441. Section 1441 allows a defendant to remove "any civil action brought in a State court of which the district courts of the United States have original jurisdiction." The species of original jurisdiction Defendants claim exists in this case is federal-question jurisdiction. 28 U.S.C. § 1331. They argue, in other words, that Plaintiff's case arises under federal law. Whether a case arises under federal law is governed by the well-pleaded complaint rule. Vaden v. Discover Bank, 556 U.S. 49, 60 (2009). The rule states that removal based on federal-question jurisdiction is only proper where a federal question appears on the face of a well-pleaded complaint. Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987). This rule operationalizes the maxim that a plaintiff is the master of her complaint: She may assert certain causes of action and omit others (even ones obviously available), and thereby appeal to the jurisdiction of her choice. Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 809 n.6 (1986); Caterpillar Inc., 482 U.S. at 392 ("[Plaintiff] may avoid federal jurisdiction by exclusive reliance on state law.").

The State's complaint, on its face, contains no federal question, relying as it does on only state-law causes of action. See Compl. ¶¶ 225–315. Defendants nevertheless insist that the

complaint is not well-pleaded, and that if it were, it would, in fact, evince a federal question on which to hang federal jurisdiction. Here they invoke the artful-pleading doctrine. "[A]n independent corollary of the well-pleaded complaint rule that a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint," Franchise Tax Bd. v. Constr. Laborers Vacation Tr. for S. Cal., 463 U.S. 1, 22 (1983), the artful-pleading doctrine is "designed to prevent a plaintiff from unfairly placing a thumb on the jurisdictional scales," López-Muñoz v. Triple-S Salud, Inc., 754 F.3d 1, 5 (1st Cir. 2014). See Wright & Miller, supra, § 3722.1. According to Defendants, the State uses two strains of artifice in an attempt to keep its case in state court: one based on complete preemption, the other on a substantial federal question. See Wright & Miller, supra, § 3722.1 (discussing the three types of case in which the artful pleading doctrine has applied).

1. Complete Preemption

Taking these in turn, Defendants first argue — and two district courts have recently held — that a state's public-nuisance claim premised on the effects of climate change is "necessarily governed by federal common law." California v. BP P.L.C., Nos. C 17-06011 WHA, C 17-06012 WHA, 2018 WL 1064293, at *2 (N.D. Cal. Feb. 27, 2018); accord City of New York v. BP P.L.C., 325 F. Supp. 3d 466, 471-72 (S.D.N.Y. 2018). Defendants, in essence, want the

Court to peek beneath the purported state-law façade of the State's public-nuisance claim, see the claim for what it would need to be to have a chance at viability, and convert it to that (i.e., into a claim based on federal common law) for purposes of the present jurisdictional analysis. The problem for Defendants is that there is nothing in the artful-pleading doctrine that sanctions this particular transformation.

The closest the doctrine gets to doing so is called complete preemption. Compare Defs.' Opp'n to Pl.'s Mot. to Remand 9, ECF No. 87 ("[T]he Complaint pleads claims that arise, if at all, under federal common law . . . .") and id. at 19 ("[Plaintiff's claims] are necessarily governed by federal common law."), with Franchise Tax Bd., 463 U.S. at 24 ("[I]f a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law."); see also Mayor of Balt. v. BP P.L.C., Civil Action No. ELH-18-2357, 2019 WL 2436848, at *6–7 (D. Md. June 20, 2019). Complete preemption is different from ordinary preemption, which is a defense and therefore does not provide a basis for removal, "even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case." Franchise Tax Bd., 463 U.S.

at 14, 24.[2] It is a difference of kind, moreover, not degree: complete preemption is jurisdictional. López-Muñoz, 754 F.3d at 5; Lehmann v. Brown, 230 F.3d 916, 919-920 (7th Cir. 2000); Wright & Miller, supra, § 3722.2. When a state-law cause of action is completely preempted, it "transmogrifies" into, Lawless v. Steward Health Care Sys., LLC, 894 F.3d 9, 17-18 (1st Cir. 2018), or less dramatically, "is considered, from its inception, a federal claim, and therefore arises under federal law," Caterpillar Inc., 482 U.S. at 393. The claim is then removable pursuant to Section 1441. Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 8 (2003).

Congress, not the federal courts, initiates this "extreme and unusual" mechanism. Fayard v. Ne. Vehicle Servs., LLC, 533 F.3d 42, 47-49 (1st Cir. 2008); see, e.g., Beneficial Nat'l Bank, 539 U.S. at 8 ("[W]here this Court has found complete pre-emption . . . the federal statutes at issue provided the exclusive cause

[2] Defendants cite Boyle v. United Technologies Corp. early in their brief, and highlighted it at oral argument, as recommending that this Court consider the State's suit as one implicating "uniquely federal interests" and consequently governed by federal common law. 487 U.S. 500, 504 (1988). Boyle was not a removal case, but rather one brought in diversity, where the Court held that federal common law regarding the performance of federal procurement contracts preempts, in the ordinary sense, state tort law. Id. at 502, 507-08, 512. Boyle therefore does not help Defendants. And although of no legal moment, it is nonetheless a matter of historical interest that out of all his opinions, Boyle was the one Justice Scalia would have most liked to have had back. Gil Seinfeld, The Good, the Bad, and the Ugly: Reflections of a Counterclerk, 114 Mich. L. Rev. First Impressions 111, 115 & n. 9 (2016).

of action for the claim asserted and also set forth procedures and remedies governing that cause of action." (emphasis added)); Caterpillar Inc., 482 U.S. at 393 ("On occasion, the Court has concluded that the pre-emptive force of a statute is so extraordinary that it converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." (quotation marks omitted) (emphasis added)); Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63–64 (1987) ("Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." (emphasis added)); López-Muñoz, 754 F.3d at 5 ("The linchpin of the complete preemption analysis is whether Congress intended that federal law provide the exclusive cause of action for the claims asserted by the plaintiff." (emphasis added)); Fayard, 533 F.3d at 45 ("Complete preemption is a short-hand for the doctrine that in certain matters Congress so strongly intended an exclusive federal cause of action that what a plaintiff calls a state law claim is to be recharacterized as a federal claim." (first emphasis added)); Marcus v. AT&T Corp., 138 F.3d 46, 55 (2d Cir. 1998) ("[T]here is no complete preemption without a clear statement to that effect from Congress." (emphasis added)); Wright & Miller, supra, § 3722.2 ("In concluding that a claim is completely preempted, a federal court finds that Congress desired not just to provide a federal defense to a state-law claim but

also to replace the state-law claim with a federal law claim . . . ." (emphasis added)). Without a federal statute wielding — or authorizing the federal courts to wield — "extraordinary pre-emptive power," there can be no complete preemption. Metro. Life Ins. Co., 481 U.S. at 65.

Defendants are right that transborder air and water disputes are one of the limited areas where federal common law survived Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). See, e.g., Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 420–21 (2011); Illinois v. City of Milwaukee, 406 U.S. 91, 103 (1972) ("When we deal with air and water in their ambient or interstate aspects, there is a federal common law."). At least some of it, though, has been displaced by the Clean Air Act ("CAA"). See Am. Elec. Power Co., 564 U.S. at 424 (holding that "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants"); Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 856–58 (9th Cir. 2012). But whether displaced or not, environmental federal common law does not — absent congressional say-so — completely preempt the State's public-nuisance claim, and therefore provides no basis for removal. Cf. Marcus, 138 F.3d at 54 ("After Metropolitan Life, it would be disingenuous to maintain that, while the [Federal Communications Act of 1934] does not preempt state law claims directly, it manages

to do so indirectly under the guise of federal common law.").

With respect to the CAA, Defendants argue it too completely preempts the State's claims. The statutes that have been found to completely preempt state-law causes of action — the Employee Retirement Income Security Act, for example, see Metro. Life Ins. Co., 481 U.S. at 67 — all do two things: They "provide[] the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action." Beneficial Nat'l Bank, 539 U.S. at 8; Fayard, 533 F.3d at 47 ("For complete preemption, the critical question is whether federal law provides an exclusive substitute federal cause of action that a federal court (or possibly a federal agency) can employ for the kind of claim or wrong at issue."). Defendants fail to point to where in the CAA this happens. As far as the Court can tell, the CAA authorizes nothing like the State's claims, much less to the exclusion of those sounding in state law. In fact, the CAA itself says that controlling air pollution "is the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3); see Am. Elec. Power Co., 564 U.S. at 428 ("The Act envisions extensive cooperation between federal and state authorities . . . ."); EPA v. EME Homer City Generation, L.P., 572 U.S. 489, 537 (2014) (Scalia, J., dissenting) ("Down to its very core, the Clean Air Act sets forth a federalism-focused regulatory strategy.").

Furthermore, in its section providing for citizen suits, the

CAA saves "any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief." 42 U.S.C. § 7604(e). One circuit court has taken this language as an indication that "Congress did not wish to abolish state control" over remediating air pollution. Her Majesty the Queen in Right v. City of Detroit, 874 F.2d 332, 343 (6th Cir. 1989); see also Am. Fuel & Petrochemical Mfrs. v. O'Keefe, 903 F.3d 903 (9th Cir. 2018) ("Air pollution prevention falls under the broad police powers of the states, which include the power to protect the health of citizens in the state." (quotation marks omitted)). Elsewhere, the Act protects "the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution . . . ." 42 U.S.C. § 7416. A statute that goes so far out of its way to preserve state prerogatives cannot be said to be an expression of Congress's "extraordinary pre-emptive power" to convert state-law into federal-law claims. Metro. Life Ins. Co., 481 U.S. at 65. No court has so held, and neither will this one.[3]

[3] Defendants toss in an argument that the foreign-affairs doctrine completely preempts the State's claims. The Court finds this argument without a plausible legal basis. See Mayor of Balt., 2019 WL 2436848, at *12 ("[T]he foreign affairs doctrine is inapposite in the complete preemption context." (quotation marks omitted)).

2. Grable Jurisdiction

There is, as mentioned above, a second brand of artful pleading of which Defendants accuse the State. They aver the State has hid within their state-law claims a "federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 314 (2005). If complete preemption is a state-law cloche covering a federal-law dish, Grable jurisdiction is a state-law recipe requiring a federal-law ingredient. Although the latter, like the former, is rare. See Empire Healthchoice Assurance, Inc. v. McVeigh, 547 U.S. 677, 699 (2006) (describing Grable jurisdiction as lying in a "special and small category" of cases). And it too does not exist here, because Defendants have not located "a right or immunity created by the Constitution or laws of the United States" that is "an element and an essential one, of the [State]'s cause[s] of action." Gully v. First Nat. Bank in Meridian, 299 U.S. 109, 112 (1936).

The State's are thoroughly state-law claims. Compl ¶¶ 225-315. The rights, duties, and rules of decision implicated by the complaint are all supplied by state law, without reference to anything federal. See id. Defendants' best cases are all distinguishable on this point. See Gunn v. Minton, 568 U.S. 251, 259 (2013) (finding Grable jurisdiction lies where "[t]o prevail

on his legal malpractice claim . . . [plaintiff] must show that he would have prevailed in his federal patent infringement case . . . [which] will necessarily require application of patent law to the facts of [his] case"); Grable, 545 U.S. at 314–15 (same where plaintiff "premised its superior title claim on a failure by the IRS to give it adequate notice, as defined by federal law"); Bd. of Comm'rs v. Tenn. Gas Pipeline Co., 850 F.3d 714, 722 (5th Cir. 2017) (same where "[plaintiff's] complaint draws on federal law as the exclusive basis for holding [d]efendants liable for some of their actions"); One & Ken Valley Hous. Grp. v. Me. State Hous. Auth., 716 F.3d 218, 225 (1st Cir. 2013) (same where "the "dispute . . . turn[s] on the interpretation of a contract provision approved by a federal agency pursuant to a federal statutory scheme" (quotation marks omitted)); R.I. Fishermen's All., Inc. v. R.I. Dep't of Envtl. Mgmt., 585 F.3d 42, 50 (1st Cir. 2009) (same where the federal question "is inherent in the state-law question itself because the state statute expressly references federal law").

By mentioning foreign affairs, federal regulations, and the navigable waters of the United States, Defendants seek to raise issues that they may press in the course of this litigation, but that are not perforce presented by the State's claims. Accord Cty. of San Mateo v. Chevron Corp., 294 F. Supp. 3d 934, 938 (N.D. Cal. 2018) (declining to exercise Grable jurisdiction where

"defendants have not pointed to a specific issue of federal law that must necessarily be resolved to adjudicate the state law claims" and instead "mostly gesture to federal law and federal concerns in a generalized way"); cf. R.I. Fishermen's All., 585 F.3d at 49 (upholding exercise of Grable jurisdiction where it was "not logically possible for the plaintiffs to prevail on [their] cause of action without affirmatively answering the embedded question of . . . federal law"). These are, if anything, premature defenses, which even if ultimately decisive, cannot support removal. See Merrell Dow, 478 U.S. at 808 ("A defense that raises a federal question is inadequate to confer federal jurisdiction."); Franchise Tax Bd., 463 U.S. at 13 (holding that state-law claim did not support federal jurisdiction where "California law establish[ed] . . . [the relevant] set of conditions, without reference to federal law . . . [which would] become[] relevant only by way of a defense to an obligation created entirely by state law, and then only if appellant has made out a valid claim for relief under state law"). Nor, for that matter, can the novelty of this suite of issues as applied to claims like the State's. Merrell Dow, 478 U.S. at 817.

B. Less-General Removal

The Court will be brief in dismissing Defendants' arguments under bespoke jurisdictional law. The Outer Continental Shelf Lands Act does not grant federal jurisdiction here, see 43 U.S.C.

§ 1349(b): Defendants' operations on the Outer Continental Shelf may have contributed to the State's injuries; however, Defendants have not shown that these injuries would not have occurred but for those operations. See In re DEEPWATER HORIZON, 745 F.3d 157, 163–64 (5th Cir. 2014). There is no federal-enclave jurisdiction: Although federal land used "for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings," U.S. Const. art. I, § 8, cl. 17, exists in Rhode Island, and elsewhere may have been the site of Defendants' activities, the State's claims did not arise there, especially since its complaint avoids seeking relief for damages to any federal lands. See Washington v. Monsanto Co., 274 F. Supp. 3d 1125, 1132 (W.D. Wash. 2017) (holding that exercise of federal-enclave jurisdiction improper where "Washington avowedly does not seek relief for [toxic-chemical] contamination of federal territories").

No causal connection between any actions Defendants took while "acting under" federal officers or agencies and the allegations supporting the State's claims means there are not grounds for federal-officer removal, 28 U.S.C. § 1442(a)(1): Defendants cannot show the alleged promotion and sale of fossil fuels abetted by a sophisticated misinformation campaign were "justified by [their] federal duty." Mesa v. California, 489 U.S. 121, 131–32 (1989). They are also unable to show removal is proper under the bankruptcy-removal statute, 28 U.S.C. § 1452(a), or

because of admiralty jurisdiction, 28 U.S.C. § 1333(1). Not the former because this is an action "designed primarily to protect the public safety and welfare." McMullen v. Sevigny (In re McMullen), 386 F.3d 320, 325 (1st Cir. 2004); see 28 U.S.C. § 1452(a) (excepting from bankruptcy removal any "civil action by a governmental unit to enforce such governmental unit's police or regulatory power"); In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 488 F.3d 112, 133 (2d Cir. 2007) (rejecting bankruptcy removal in cases whose "clear goal . . . [was] to remedy and prevent environmental damage with potentially serious consequences for public health, a significant area of state policy"). And not the latter either because state-law claims cannot be removed based solely on federal admiralty jurisdiction. See, e.g., Coronel v. AK Victory, 1 F. Supp. 3d 1175, 1187-88 (W.D. Wash. 2014); Gonzalez v. Red Hook Container Terminal LLC, 16-CV-5104 (NGG) (RER), 2016 WL 7322335, at *3 (E.D.N.Y. Dec. 15, 2016) (relying on "longstanding precedent holding that admiralty issues, standing alone, are insufficient to make a case removable").

III. Conclusion

Federal jurisdiction is finite. See, e.g., U.S. Const. art. III, § 2, cl. 1. So while this Court thinks itself a fine place to litigate, the law is clear that the State can take its business elsewhere if it wants — by pleading around federal jurisdiction — unless Defendants provide a valid reason to force removal under

statutes "strictly construed." Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28, 32 (2002); Great N. Ry. Co. v. Alexander, 246 U.S. 276, 280 (1918) ("[A] suit commenced in a state court must remain there until cause is shown for its transfer under some act of Congress."). Because Defendants' attempts in this regard fall short, the State's Motion to Remand, ECF No. 40, is GRANTED. The remand order shall be stayed for sixty days, however, giving the parties time to brief and the Court to decide whether a further stay pending appeal is warranted.

IT IS SO ORDERED.

William E. Smith
Chief Judge
Date: July 22, 2019