APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 19-1330

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

v.

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

Filed: July 7, 2020

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

McHUGH, Circuit Judge.

This appeal concerns whether federal court is the proper forum for a suit filed in Colorado state court by local governmental entities for the global warming-related damage allegedly caused by oil and gas companies in Colorado. Suncor Energy and ExxonMobil advanced seven bases for federal subject matter jurisdiction in re-

moving the action to federal court, each of which the district court rejected in its remand order. Suncor Energy and ExxonMobil now appeal, relying on six of those bases for federal jurisdiction. We hold, however, that 28 U.S.C. § 1447(d) limits our appellate jurisdiction to just one of them—federal officer removal under 28 U.S.C. § 1442(a)(1). And because we conclude ExxonMobil failed to establish grounds for federal officer removal, we affirm the district court's order on that basis and dismiss the remainder of this appeal.

I. BACKGROUND

Three local Colorado government entities—the County Commissioners of Boulder and San Miguel Counties and the City of Boulder (Plaintiffs-Appellees; collectively, the "Counties")—filed suit in Colorado state court on June 11, 2018, against Suncor Energy[1] and ExxonMobil Corporation (Defendants-Appellants, collectively, "Defendants"). The complaint asserts that the Counties face substantial and rising costs to protect people and property within their jurisdictions from the threat of global warming, including from increasing and intensified heat waves, wildfires, droughts, and floods across Colorado. The Counties allege that Defendants have substantially contributed to this local environmental harm by engaging in unchecked fossil fuel activity—producing, promoting, refining, marketing, and selling—which has resulted in excess greenhouse gas emissions. For decades after becoming aware of the dangers of global warming, the Counties further allege, Defendants continued to produce, promote, refine, market, and sell fossil fuels at levels that caused and contributed to negative climate alteration

[1] "Suncor Energy" includes Suncor Energy (U.S.A.) Inc.; Suncor Energy Sales Inc.; and Suncor Energy Inc.

without disclosing the harms posed by continued fossil fuel overuse. According to the complaint, Defendants misrepresented the dangers of unchecked fossil fuel use and acted to prevent and forestall changes in energy use that they knew were needed to limit the impact of global warming, thereby exacerbating the climate-related harm suffered by the Counties and their residents.

The complaint asserts state law claims for public and private nuisance, trespass, unjust enrichment, civil conspiracy, and violation of the Colorado Consumer Protection Act. Among other forms of relief, the Counties seek past and future compensatory damages to mitigate the impact of global warming in their respective jurisdictions, along with remediation and/or abatement of the attendant global warming-related environmental hazards they now face. The Counties do not seek "to enjoin any oil and gas operations or sales in the State of Colorado, or elsewhere, or to enforce emissions controls of any kind." App. 195. They ask the state court not "to stop or regulate" fossil fuel production or emissions, but instead to ensure Defendants pay a pro rata share of the costs the Counties have incurred and will incur based on Defendants' averred contribution to climate alteration, and to help remediate the harm the Counties claim has been and will be caused by Defendants' allegedly tortious and illegal conduct. App. 74.

On June 29, 2018, Defendants filed a notice of removal in federal district court for the District of Colorado, asserting seven grounds for federal jurisdiction. Five of these grounds relied upon the general removal statute, 28 U.S.C. § 1441(a), which allows for removal of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction." Of these five grounds, four were based on general federal question

jurisdiction[2]—that the Counties' claims (1) arose under federal common law; (2) were completely preempted by federal law; (3) implicated disputed and substantial federal issues under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005); and (4) arose in part from incidents that occurred on federal enclaves. The fifth claim of original federal jurisdiction was based on the Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(b). Additionally, Defendants relied on two other removal provisions: the bankruptcy removal statute, 28 U.S.C. § 1452, and the federal officer removal statute, 28 U.S.C. § 1442(a)(1).

The Counties filed a motion to remand pursuant to 28 U.S.C. § 1447(c) based on lack of federal subject matter jurisdiction. The district court granted this motion on September 5, 2019, rejecting all seven grounds for removal and remanding to the Colorado state court. *Bd. of Cty. Comm'rs. of Boulder County v. Suncor Energy (U.S.A.) Inc.* (*Boulder County I*), 405 F. Supp. 3d 947, 954–55 (D. Colo. 2019).

Defendants appealed the district court's remand order with respect to six of their seven asserted bases for removal (omitting a challenge to bankruptcy removal). They also moved in the district court for a stay of the remand order pending appeal. Notwithstanding the general bar to remand order appealability imposed by 28 U.S.C. § 1447(d), Defendants argued before the district court that the exception in § 1447(d) permitting review of federal officer removal under 28 U.S.C. § 1442 creates appellate jurisdiction to consider all of their asserted removal

[2] See 28 U.S.C. § 1331, which confers original jurisdiction on the federal district courts "of all civil actions arising under the Constitution, laws, or treaties of the United States."

bases. While acknowledging that this court has yet to determine the scope of appellate review of remand orders premised on the § 1447(d) exceptions, as well as circuit disagreement on that issue, Defendants asserted that plenary review was compelled by a Seventh Circuit decision interpreting the Supreme Court's holding in *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996). Defendants further contended that this court's interpretation of the Class Action Fairness Act's removal provision in *Coffey v. Freeport McMoran Copper & Gold*, 581 F.3d 1240 (10th Cir. 2009), "strongly suggests that it would review the district court's entire order, not simply the ground that permitted appeal." Defendants' Mot. for Stay of Remand Order, Dist. Ct. ECF No. 75 at 6.

The district court denied this motion to stay its remand order on October 7, 2019. *Bd. of Cty. Comm'rs of Boulder County v. Suncor Energy (U.S.A.) Inc.* (*Boulder County II*), 423 F. Supp. 3d 1066 (D. Colo. 2019). Noting the split of authority on the scope of appellate review of remand orders, as well as the lack of a controlling Tenth Circuit opinion, the district court reasoned that this court would likely "follow the weight of authority and find that the only ground subject to appeal is federal officer jurisdiction under § 1442." *Id.* at 1070. It disagreed with Defendants' reading of *Yamaha* and *Coffey*, finding instead that "*Coffey* suggests the Tenth Circuit would be unlikely to review aspects of a remand order that would otherwise be unreviewable"—here, all bases for federal question jurisdiction other than § 1442. *Id.* at 1071.

Defendants then filed motions in this court and the Supreme Court for a temporary stay of the remand order pending appeal, which both courts denied. The Counties filed a motion for partial dismissal based on the reviewa-

bility bar in § 1447(d), seeking to narrow the issues on appeal to only the propriety of federal officer removal.[3] It is to this issue of the scope of our appellate jurisdiction that we first turn.

II. SCOPE OF APPELLATE JURISDICTION

"'The authority of appellate courts to review district-court orders remanding removed cases to state court is substantially limited by statute,' namely, 28 U.S.C. § 1447(d)." *Mayor & City Council of Baltimore v. BP P.L.C.*, 952 F.3d 452, 459 (4th Cir. 2020) (quoting *Powerex Corp. v. Reliant Energy Servs.*, 551 U.S. 224, 229 (2007)). Consequently, "the threshold question in an appeal of a remand order is whether the district court's decision is reviewable notwithstanding the proscription set forth in 28 U.S.C. § 1447(d)."[4] *Am. Soda, LLP v. U.S. Filter Wastewater Grp.*, 428 F.3d 921, 924 (10th Cir. 2005). Section 1447(d) of the Judicial Code, Title 28 U.S.C., 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

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[3] The Counties also moved for summary affirmance based on issue preclusion, arguing the Fourth Circuit's ruling in *Mayor & City Council of Baltimore v. B.P. PLC*, 952 F.3d 452 (4th Cir. 2020)—which rejected the same federal officer removal argument brought here, in a case featuring ExxonMobil as a defendant—is a supervening change of law under 10th Cir. R. 27.3(A)(1)(b). *See also County of San Mateo v. Chevron Corp.*, 960 F.3d 586 (9th Cir. 2020) (rejecting the same federal officer removal argument in a case also featuring ExxonMobil as a defendant).

[4] We can thoroughly explore this question because "federal courts always have jurisdiction to consider their own jurisdiction." *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1093 (10th Cir. 2005).

section 1442 or 1443 of this title shall be reviewable by appeal or otherwise.

The primary clause of this statute is construed together with 28 U.S.C. § 1447(c), which describes two grounds for remand—lack of federal subject matter jurisdiction and a defect in removal procedure. *See Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995); *City of Albuquerque v. Soto Enters.*, 864 F.3d 1089, 1092–95 (10th Cir. 2017). "If a district court orders remand on either of these grounds, § 1447(d) absolutely prohibits appellate review of the order, and we adhere firmly to this prohibition even where we believe that the district court was plainly incorrect." *Kennedy v. Lubar*, 273 F.3d 1293, 1297 (10th Cir. 2001); *see also Powerex Corp.*, 551 U.S. at 238–39 ("Appellate courts must take th[e] jurisdictional prescription [of § 1447(d)] seriously, however pressing the merits of the appeal might seem."). "Thus, we have jurisdiction to review a remand order only if (1) the remand was for a reason other than lack of subject matter jurisdiction or a defect in the removal procedure or (2) the 'except' clause of § 1447(d) gives us jurisdiction." *Miller v. Lambeth*, 443 F.3d 757, 759 (10th Cir. 2006).

The roots of § 1447(d)'s primary clause stretch back to 1887. *Thermtron Prods. v. Hermansdorfer*, 423 U.S. 336, 343 (1976); *see Osborn v. Haley*, 549 U.S. 225, 262 (2007) (Scalia, J., dissenting) (stating that § 1447(d)'s "bar to appellate review is a venerable one"). The "except" clause was added via the 1964 Civil Rights Act, and allowed for appellate review only of remands of civil rights cases removed pursuant to 28 U.S.C. § 1443. *See Thermtron*, 423 U.S. at 342 n.7. Congress expanded this clause to provide for review of remands of cases removed pursuant to the federal officer removal statute, 28 U.S.C. § 1442, through the Removal Clarification Act of 2011, Pub. L. No. 112-51,

125 Stat. 545. This act amended § 1447(d) "by inserting '1442 or' before '1443.'" 125 Stat. at 546.

Here, the district court's remand order was premised on lack of subject matter jurisdiction, a § 1447(c) ground barred from review by § 1447(d). *Boulder County I*, 405 F. Supp. 3d at 955–56. This characterization was indisputably colorable. *See Powerex Corp.*, 551 U.S. at 234 ("[R]eview of the District Court's characterization of its remand as resting upon lack of subject-matter jurisdiction, to the extent it is permissible at all, should be limited to confirming that that characterization was colorable."). It was also indisputably in good faith. *See Archuleta v. Lacuesta*, 131 F.3d 1359, 1363 (10th Cir. 1997) ("[W]here a district court in good faith remands a case for lack of jurisdiction under § 1447(c), we do not have the power to review the remand."). The jurisdictional dispute thus concerns only the effect of § 1447(d)'s "except" clause on the scope of our appellate review of the district court's order.[5]

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[5] Appellate jurisdiction is also constrained by 28 U.S.C. § 1291, which empowers federal circuit courts to review only "final decisions of the district courts." In *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 352–53 (1976), the Supreme Court stated that "an order remanding a removed action does not represent a final judgment reviewable by appeal." But the Court disavowed this assertion in *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996), reasoning that while the abstention-based remand order at issue "d[id] not meet the traditional definition of finality," *id.* at 715, it was nonetheless appealable because it put the litigants "effectively out of [federal] court," *id.* at 714 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 10 n.11 (1983)). "We have acknowledged the central point of *Quackenbush*, i.e., that a remand order may be reviewed under 28 U.S.C. § 1291 as a final order or as a collateral order because [a] remand order puts the litigants effectively out of court." *In re Stone Container Corp.*, 360 F.3d 1216, 1219 (10th Cir. 2004) (internal quotation marks omitted). Consequently, § 1291 does not present a jurisdictional hurdle here.

Defendants assert that because their removal was premised partly on federal officer removal under § 1442, we have appellate jurisdiction to review the district court's entire remand order, not just the portion dispensing with the federal officer removal argument. The Counties disagree, asserting that the scope of our review must be confined to the district court's disposition of the § 1442 argument. We have yet to issue a precedential opinion deciding this question of appellate jurisdiction, which turns on statutory construction.[6] In doing so now, we adopt the narrower interpretation of the scope of § 1447(d) review advanced by the Counties.

A. The § 1447(d) Circuit Split

Before proceeding to the substantive statutory analysis, we pause to note disagreement among the courts of appeals over whether invoking a § 1447(d) exception in a petition for removal creates appellate jurisdiction over the district court's whole remand order, or only over that portion addressing the excepted basis. Six circuits—the Second, Third, Fourth, Eighth, Ninth, and Eleventh—hold that a remand order premised on a § 1447(c) ground is reviewable only to the extent it addresses a § 1442 (federal officer) or 1443 (civil rights) removal argument. *See 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

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[6] In *Sanchez v. Onuska*, No. 93-2155, 1993 WL 307897, at *1 (10th Cir. Aug. 13, 1993) (unpublished), we determined that § 1447(d) allowed for review of a remand order "[t]o the extent the removal is based upon § 1443," but that the remainder of the remand order was "not reviewable and must be dismissed for lack of jurisdiction." Unpublished decisions, of course, provide only persuasive authority. *See* 10th Cir. R. 32.1(A). After conducting our own analysis here, we adopt a position consistent with *Onuska*.

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); *Noel v. McCain*, 538 F.2d 633, 635 (4th Cir. 1976); *see also City of Baltimore*, 952 F.3d at 459 (rejecting arguments to depart from circuit precedent on the scope of § 1447(d) review via an appeal concerning functionally identical global warming-related state law claims); *County of San Mateo v. Chevron Corp.*, 960 F.3d 586, 595–98 (9th Cir. 2020) (same).

In 2015, the Seventh Circuit fractured this unanimity on the scope of appellate review created by § 1447(d), holding that the invocation of a § 1447(d) exception allows for plenary review of all other removal bases addressed in a remand order. *See Lu Junhong v. Boeing Co.*, 792 F.3d 805, 811 (7th Cir. 2015).[7] Unlike the other courts to ad-

[7] Two other circuits have since issued opinions following *Lu Junhong* on the scope of appellate review created by § 1447(d), but each has conflicting precedent on the issue.

In *Decatur Hospital Authority v. Aetna Health, Inc.*, 854 F.3d 292, 296 (5th Cir. 2017), the Fifth Circuit relied on *Lu Junhong*'s reasoning to hold the entire district court's remand order reviewable when one of the asserted grounds for removal is § 1442. In a subsequent opinion dismissing in part an appeal from a remand order, however, the Fifth Circuit noted in passing that while the defendant "d[id] not argue that the § 1447(d) exception for federal officer jurisdiction allows us to review the entire remand order," "[t]his court has rejected similar arguments in the past." *City of Walker v. Louisiana*, 877 F.3d 563, 566 n.2 (5th Cir. 2017) (citing *Robertson v. Ball*, 534 F.2d 63, 65–66 (5th Cir. 1976)); *see also Gee v. Texas*, 769 F. App'x 134, 134 & n.2 (5th Cir. 2019) (unpublished) (following *City of Walker*, while not citing *Decatur Hospital*, in holding that "[w]here a party has argued for removal on multiple grounds, we only have jurisdiction to review a district court's remand decision for compliance with [§ 1442 or 1443]").

dress the issue—which employed mostly summary analysis in refusing to extend the review granted by the § 1447(d) exceptions to any otherwise nonreviewable removal bases contained in a remand order—the Seventh Circuit engaged in a comprehensive discussion of statutory text and policy. As Defendants lean heavily on this reasoning, we examine it in some depth.

The Seventh Circuit's reasoning in *Lu Junhong* relied primarily on the Supreme Court's decision in *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996). *Yamaha* addressed the meaning of 28 U.S.C. § 1292(b), which concerns a district court's certification of controlling questions of law to the courts of appeals for discretionary review. The *Yamaha* Court held that upon accepting an interlocutory appeal under § 1292(b), a federal court of appeals has jurisdiction over the whole "order," rather than being limited to review of the individual question (or questions) framed by the district court. 516 U.S. at 205. Per *Lu Junhong*'s interpretation of *Yamaha*'s holding, "[t]o say that a district court's 'order' is reviewable is to allow appellate review of the *whole* order, not just of particular issues or reasons." 792 F.3d at 811.

In *Mays v. City of Flint*, 871 F.3d 437, 442 (6th Cir. 2017), the Sixth Circuit cited *Lu Junhong* in holding that its jurisdiction to review an order remanding a case that was removed pursuant to § 1442 "also encompasses review of the district court's decision on the alternative ground for removal under 28 U.S.C. § 1441"—there, "substantial federal question" jurisdiction. However, *Mays* failed to distinguish two Sixth Circuit decisions from the 1970's—*Detroit Police Lieutenants & Sergeants Ass'n v. City of Detroit*, 597 F.3d 566, 567–68 (6th Cir. 1979), and *Appalachian Volunteers, Inc. v. Clark*, 432 F.2d 530, 534 (6th Cir. 1970)—that held appellate jurisdiction lacking to review any portion of a district court's remand order other than its ruling on § 1443 (at that time the only statutory exception in § 1447(d)).

In determining that § 1447(d) is best construed the same way, *Lu Junhong* analogized to another statute creating an exception to the general lack of appellate jurisdiction over remand orders. The Class Action Fairness Act ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4–14, creates federal subject matter jurisdiction over certain types of class actions and allows for appellate review "of 'an order of a district court' that has remanded after finding that the Act does not permit removal." 792 F.3d at 811 (quoting 28 U.S.C. § 1453(c)(1)). A prior Seventh Circuit decision, *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 451–52 (7th Cir. 2005), applied *Yamaha* in interpreting § 1453(c)(1) to allow for plenary review of remand orders addressing CAFA removal, even if such orders also address other bases for removal. *Lu Junhong* reasoned that *Brill* stood for the proposition "that once an appeal of a remand 'order' has been authorized by statute, the court of appeals may consider all of the legal issues entailed in the decision to remand." 792 F.3d at 811.

The *Lu Junhong* court deemed its interpretation of the word "order" in § 1447(d) to be "entirely textual":

> The Court remarked in *Kircher* [*v. Putnam Funds Trust*, 547 U.S. 633, 641 n.8 (2006)], that Congress has on occasion made the rule of § 1447(d) inapplicable to particular "orders"—and for this the Court cited, among other statutes, § 1447(d) itself. We take both Congress and *Kircher* at their word in saying that, if appellate review of an "order" has been authorized, that means review of the "order." Not particular reasons *for* an order, but the order itself.

Id. at 812.

And the *Lu Junhong* court further determined that § 1447(d)'s statutory purpose led to the same outcome:

> [Section] 1447(d) was enacted to prevent appellate delay in determining where litigation will occur. . . . But once Congress has authorized appellate review of a remand order—as it has authorized review of suits removed on the authority of § 1442—a court of appeals has been authorized to take the time necessary to determine the right forum. The marginal delay from adding an extra issue to a case where the time for briefing, argument, and decision has already been accepted is likely to be small.

Id. at 813 (citations omitted). Any concern that unscrupulous defendants will use the § 1447(d) exceptions as "a hook to allow appeal of some different subject" did not counsel a different result, because frivolous removals can lead to sanctions, and frivolous appeals can be dealt with summarily. *Id.*

B. Statutory Analysis

To decide the scope of our appellate review of the district court's remand order—and determine whether to follow *Lu Junhong* or the opposing weight of circuit authority on the issue—we must construe the meaning of § 1447(d)'s "except" clause de novo. *See United States v. Porter*, 745 F.3d 1035, 1040 (10th Cir. 2014).

"The goal of statutory interpretation is to ascertain the congressional intent and give effect to the legislative will." *In re Taylor*, 899 F.3d 1126, 1129 (10th Cir. 2018) (internal quotation marks omitted). "In conducting this analysis, we first turn to the statute's plain language," *id*, as "[a] statute clear and unambiguous on its face must be interpreted according to its plain meaning," *In re Geneva Steel Co.*, 281 F.3d 1173, 1178 (10th Cir. 2002).

"A statute is ambiguous when it is capable of being understood by reasonably well-informed persons in two or

more different senses." *United States v. Quarrell*, 310 F.3d 664, 669 (10th Cir. 2002) (internal quotation marks omitted). "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." *Ceco Concrete Const., LLC v. Centennial State Carpenters Pension Tr.*, 821 F.3d 1250, 1258 (10th Cir. 2016) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). If statutory meaning cannot be derived "merely by reference to the text, we may also look to traditional canons of statutory construction to inform our interpretation," *Conrad v. Phone Directories Co.*, 585 F.3d 1376, 1381 (10th Cir. 2009), and "may seek guidance from Congress's intent, a task aided by reviewing the legislative history," *In re Geneva Steel Co.*, 281 F.3d at 1178. "Ambiguous text can also be decoded by knowing the purpose behind the statute." *Id.*

Because text alone does not clarify the meaning of § 1447(d)'s "except" clause, we rely upon this full toolkit of statutory construction. *Cf. Watson v. Philip Morris Cos.*, 551 U.S. 142, 147 (2007) (using the "text's language, context, history, and purposes" to guide interpretation of the federal officer removal statute).

1. Text and Context

The "except" clause states "that an *order* remanding a case . . . removed pursuant to section 1442 or 1443 . . . shall be reviewable[.]" 28 U.S.C. § 1447(d) (emphasis added). Defendants seize upon this reference to "order," contending the "plain text of Section 1447(d) provides that, when a case is removed under Section 1442, the remand '*order*'—not just the applicability of the federal-officer ground for removal—is reviewable on appeal." Appellant Br. at 4; *see Lu Junhong*, 792 F.3d at 811 ("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."). We do not interpret the word "order" in isolation, however, for "[t]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000); *see also Deal v. United States*, 508 U.S. 129, 132 (1993) ("[T]he meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used."); *United States v. Villa*, 589 F.3d 1334, 1343 (10th Cir. 2009) ("[T]he meaning of statutory language, plain or not, depends on context." (quoting *Bailey v. United States*, 516 U.S. 137, 145 (1995)). Here, the specific context of the "except" clause adds ambiguity to the meaning of "order," because § 1447(d) "treats Section 1442 and 1443 removal as distinct from other removals." Appellee Mot. for Partial Dismissal at 12. As the Counties state, because the "except" clause refers to removals "pursuant to section 1442 or 1443," not pursuant to those sections *in part*, it "does not expressly contemplate the situation in which removal is done pursuant to one of these sections *and* other grounds." *Id.* And as a result, it also does not expressly contemplate the situation in which remand is granted regarding such mixed grounds for removal.

By modifying its reference to appealability in such way, § 1447(d)'s "except" clause leaves no clear answer to what scope of appellate review is applied when both enumerated (§ 1442 or 1443) and unenumerated bases for federal subject matter jurisdiction are addressed in the same remand order. The *Lu Junhong* court impliedly conceded as much 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. *Cf. BP Am., Inc. v. Oklahoma ex rel. Edmondson*, 613 F.3d 1029, 1033 (10th Cir. 2010) ("That second, italicized condition, however, appears nowhere in the statute, and we are not at liberty to take our editing pencils to what Congress has written."). We thus determine that the specific context in which "order" is used in the "except" clause creates ambiguity regarding the ambit of our jurisdiction over appeals of mixed remand orders like the one here.

Contextual analysis next requires "examining the subsection's structure." *In re Woods*, 743 F.3d 689, 694 (10th Cir. 2014); *see Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). That is, § 1447(d)'s primary clause—"An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise"—must inform the reading of its secondary exception. *See In re Woods*, 743 F.3d at 694 (finding the statute at issue "best understood by breaking the provision into its two principal parts," amounting to the general rule and its exception); *see also Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 25 (1988) (reasoning that a statutory subsection should be "read in its entirety" to divine the meaning of an exception). Because the structure of § 1447(d) exhibits "a scheme whereby a default rule is subject to an exception, we are guided by the interpretive principle that exceptions to a general proposition should be construed narrowly." *In re Woods*, 743 F.3d at 699; *see 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."). "Flowing from this interpretive principle . . . is the related concept that exceptions must not be interpreted so broadly as to swallow the rule." *In re Woods*, 743 F.3d at 699; *see Cuomo v. Clearing House Ass'n, L.L.C.*, 557 U.S. 519, 530 (2009) (rejecting an interpretation of a statutory exception that "would swallow the rule"); *Minter v. Prime Equip. Co.*, 451 F.3d 1196, 1212 (10th Cir. 2006) (reading the impeachment exception to Fed. R. Evid. 407 "narrowly, lest it swallow the rule"); *In re Annis*, 232 F.3d 749, 753 (10th Cir. 2000) (rejecting a broad construction of a statutory exemption that "would swallow the rule").

Application of these guidelines leads us to believe that the "except" clause must be narrowly construed. *See In re Woods*, 743 F.3d at 698. As the Counties note, § 1447(d)'s "overall thrust," embodied in its primary clause, "is to impose one of the most categorical bars to reviewability found anywhere in federal law." Appellee Mot. for Partial Dismissal at 12; *see Osborn*, 549 U.S. at 262 (Scalia, J., dissenting) (noting that "[f]ew statutes read more clearly" than the primary clause of § 1447(d)); *Gravitt v. Sw. Bell Tel. Co.*, 430 U.S. 723, 723 (1977) (per curiam) (noting the clause's "unmistakabl[e] command[]"); *see also Kircher v. Putnam Funds Tr.*, 547 U.S. 633, 642 (2006) ("Where the order is based on one of the [grounds enumerated in § 1447(c)], review is unavailable no matter how plain the legal error in ordering the remand." (alterations in original) (quoting *Briscoe v. Bell*, 432 U.S. 404, 413 n.13 (1977)). "Given that Congress has enacted [this] general rule" against remand reviewability, "we should not eviscerate that legislative judgment through an expansive reading of a somewhat ambiguous exception." *Clark*, 489 U.S. at 739. An expansive reading of § 1447(d)'s ambiguous "except"

clause to allow for plenary review would risk just such an evisceration: it would let defendants skirt "the primary operation of the provision," *see id.*—its absolute prohibition against appeal of the vast majority of subject matter jurisdiction-based remands—by simply including a colorable § 1442 or 1443 basis in their petition for removal. *Cf. Fed. Deposit Ins. Co. v. Alley*, 820 F.2d. 1121, 1124 (10th Cir. 1987) (holding that a prior version of "§ 1447(c) must be read disjunctively in order not to eviscerate the thrust of § 1447(d)"). A broad construction would likewise risk the exception swallowing the general rule, by turning § 1447(d)'s secondary clause into a jurisdictional loophole allowing appellants to do indirectly what they cannot do directly. If, alongside the two removal grounds it explicitly exempted, Congress intended the "except" clause to also lift the general bar to appellate jurisdiction over all unenumerated subject matter jurisdiction removal grounds, it could have clearly indicated this intent in the statutory text—for example, by modifying "pursuant to 1442 or 1443" with "in part." *Cf. Lu Junhong*, 792 F.3d at 811; Appellee Mot. for Partial Dismissal at 12.

Because Congress did not indicate any such intent, the phrase 'pursuant to section 1442 or 1443' must be construed "in a way that allows the rule's exception to function as just that—an exception." *In re Woods*, 743 F.3d at 699. Interpreting the "except" clause to create review of only its two enumerated removal bases, rather than all other bases rejected by a district court in an order also addressing those exceptions, serves to preserve, rather than erode, the "strong legislative mandate" against remand order reviewability, *Kennedy*, 273 F.3d at 1300, conveyed through § 1447(d)'s "long established policy," *In re Bear River Drainage Dist.*, 267 F.2d 849, 851 (10th Cir.

1959).[8] In thereby harmonizing § 1447(d)'s venerable baseline rule with its exception, the narrower interpretation of the scope of review created by the "except" clause preserves the subsection's overall structure and prevents "a serious and unacceptable risk of the exception consuming the rule." *In re Woods*, 743 F.3d at 700.

Instead of addressing this statutory context, Defendants argue that the scope of § 1447(d) review is clarified via *extra*-statutory context—namely, *Yamaha*'s interpretation of the word "order" in 28 U.S.C. § 1292(b). As introduced above, that provision permits a district court to certify an interlocutory order to the court of appeals for immediate discretionary review if the order "involves a controlling question of law as to which there is substantial difference of opinion."[9] In *Yamaha*, the Supreme Court determined whether, under § 1292(b), appellate courts can "exercise jurisdiction over any question that is included within the order that contains the controlling question of law identified by the district court[.]" 516 U.S. at 204. Per the text of § 1292(b), the Court held that "appellate juris-

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[8] *Cf. Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478, 480 (1978) (narrowly interpreting 28 U.S.C. § 1292(a)(1)'s "exception from the long-established policy against piecemeal appeals").

[9] Section 1292(b) reads, in relevant part:

> 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 which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order[.]

diction applies to the *order* certified to the court of appeals, and is not tied to the particular question formulated by the district court." *Id.* at 205. Therefore, "the appellate court may address any issue fairly included within the certified order." *Id.*

Even though *Yamaha* interpreted a distinct section of the Judicial Code concerning neither removal nor remand, the Court's interpretation of "order" might at first glance appear analogous, as both § 1292(b) and § 1447(d) contemplate the appealability of district court orders. *Cf. District of Columbia v. Carter*, 409 U.S. 418, 421 (1973) ("At first glance, it might seem logical simply to assume . . . that identical words used in two related statutes were intended to have the same effect."). But *Yamaha* did not "purport to establish a general rule governing the scope of appellate jurisdiction for every statute that uses that word." *City of Baltimore*, 952 F.3d at 460. While "there is a natural presumption that identical words used in different parts of the *same act* are intended to have the same meaning," *Atl. Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932) (emphasis added), no such presumption applies to the same word used in different statutes. And even regarding intra-statutory meaning, "the presumption is not rigid"—it "readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent." *General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595 (2004) (quoting *Atl. Cleaners*, 286 U.S. at 433). Put more succinctly, "[c]ontext counts." *Envtl. Defense v. Duke Energy Corp.*, 549 U.S. 561, 576 (2007). As such, the Supreme Court has "several times affirmed that identical language may convey varying content when used in different statutes, sometimes even in different provisions of the same statute." *Yates v. United States*, 574 U.S.

528, 537 (2015) (plurality opinion); *see id.* at 537–38 (listing examples).

Such is the case here: The contextual differences between § 1292(b), which speaks generally of any interlocutory district court order, and § 1447(d), which speaks specifically of remand orders with two express underlying bases, strongly suggest that the word "order" conveys varying content in the two statutes. Section 1292(b) broadly "permit[s] an appeal to be taken from *such order*," referring to "an order not otherwise appealable under this section"—that is, *any* non-final district court order besides the three specialized interlocutory varieties outlined in § 1292(a). *See In re Bear River*, 267 F.2d at 851 (stating that § 1292(b) "applies generally to 'a civil action' in which 'an order not otherwise appealable under this section' is made"). Section 1447(d), on the other hand, specifies the orders exempted from its general bar on reviewability with multiple identifying layers: "an order *remanding* a case . . . *removed pursuant to section 1442 or 1443*." (emphasis added). Because § 1292(b) imposes limits on neither the type of order that may be certified for review nor the underlying basis for such order, an appellate court reasonably "may address any issue fairly included within the certified order." *Yamaha*, 516 U.S. at 205. But because § 1447(d) *does* limit the orders that shall be reviewable by both type (remand) and basis (those removed pursuant to § 1442 or 1443), such limiting language is sensibly read to cabin appellate review to the two enumerated removal bases contemplated by the statute, thereby animating a discrete kind of district court remand order. *Cf. Gustafson v. Alloyd Co.*, 513 U.S. 561, 577 (1995) ("Just as the absence of limiting language in § 17(a) [of the Securities Act of 1933] resulted in broad coverage, the presence of limiting language in § 12(2) requires a narrow construction."); *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307

(1961) (reading the words surrounding "discovery" in a section of the tax code to "strongly suggest that a precise and narrow application was intended"). In short, "there is such variation in the connection in which the words are used" in each statute "as reasonably to warrant the conclusion that they were employed . . . with different intent." *Carter*, 409 U.S. at 421 (quoting *Atl. Cleaners & Dyers*, 286 U.S. at 433).

Strengthening our determination that "order" was employed with different intent in the two statutes is the basic observation that, while both § 1292(b) and § 1447(d) concern appellate review of lower court orders, they point in opposite directions. As the district court reasoned in rejecting Defendants' motion for a stay, "§ 1292(b) expressly authorizes appellate review of orders certified by the district court, while § 1447(d) explicitly bars review of any kind, with only two specified, narrow exceptions." *Boulder County II*, 423 F. Supp. 3d at 1071; *see also Feidt v. Owens Corning Fiberglas Corp.*, 153 F.3d 124, 130 (3d Cir. 1998) ("Section 1447(d) prohibits review of a particular type of district court order, namely a remand order under section 1447(c), whereas section 1292(b) is a more general grant of appellate jurisdiction."). The Fourth Circuit expanded on this fundamental divergence in its opinion rejecting the same *Yamaha*-based textual argument advanced by Defendants:

> [Section] 1292(b) permits appellate review of important issues before final judgment, but it does not make otherwise non-appealable questions reviewable. Reading "order" to authorize plenary review thus makes sense in the § 1292(b) context, as § 1292(b) only affects the timing of review for otherwise appealable questions. But giving the word "order" the same

> meaning in the § 1447(d) context would mandate review of issues that are ordinarily unreviewable, period—even following a final judgment.

City of Baltimore, 952 F.3d at 460. We find this analysis persuasive. Put another way, to read "order" the same way in both § 1292(b) and § 1447(d) would ignore the distinction between a statute that "governs *when* an appellate court may review a particular question within its discretion" and one that "limits *which* issues are 'reviewable on appeal or otherwise.'" *Id.* (quoting § 1447(d)). Ignoring this distinction between the "*when*" and "*which*" of appealability would cut against the Supreme Court's directive to "take th[e] jurisdictional prescription [of § 1447(d)] seriously, however pressing the merits of the appeal might seem," *Powerex Corp.*, 551 U.S. at 238–39, contravene the mandate against expanding the limited statutory jurisdiction of the federal courts by judicial decree, *see Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994), and lead us into an interpretive pitfall the Court has repeatedly flagged—that is, "[t]he tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them," a tendency that "has all the tenacity of original sin and must constantly be guarded against," *Wachovia Bank v. Schmidt*, 546 U.S. 303, 319 (2006) (quoting Walter Wheeler Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 Yale L.J. 333, 337 (1933)).

These differences between the two statutes, expressed in terms of both structure and function, have important practical application in assessing appellate jurisdiction, as both this court and others have noted. For example, *In re Bear River* addressed a district court's use of § 1292(b) to certify a controlling question of law contained in its order

remanding a case to state court. 267 F.2d at 850. We held that appellate jurisdiction to review the remand order was lacking, because § 1447(d)'s specific prohibition overrode § 1292(b)'s general grant of jurisdiction: "While the generality of § 1292(b) might seem sufficient to encompass a remand order, it does not expressly either amend or repeal § 1447(d)," which "applies specially to prohibit appeals from remand orders." *Id.* at 851. In addressing the same issue decades later, the Third Circuit likewise concluded that "the jurisdictional bar of section 1447(d) trumps the power to grant leave to appeal in section 1292(b)," because "a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum." *Feidt*, 153 F.3d at 130 (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976)).

Bear River and *Feidt* provide added authority for our conclusion that the contextual contrast between the two statutes—§ 1292(b) being a general grant of appellate jurisdiction, and § 1447(d) being a specific prohibition of it—leads to the natural conclusion that the same word employed in each provision conveys a distinct meaning. *See, e.g.*, *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001) (phrase "wages paid" means different things in different parts of Title 26 of the United States Code); *Shell Oil Co.*, 519 U.S. at 343–44 (term "employee" means different things in different parts of Title VII); *Carter*, 409 U.S. at 420 ("Whether the District of Columbia constitutes a 'State or Territory' within the meaning of any particular statutory or constitutional provision depends upon the character and aim of the specific provision involved."). Thus, *Yamaha*'s construction of "order" in § 1292(b) "does not compel symmetrical construction" of the same word "in the discrete . . . context[]" of § 1447(d). *See Cleveland Indians Baseball Co.*, 532 U.S. at 213. To

the contrary, our analysis of § 1292(b) and § 1447(d) indicates that while the word "order" in the former statute allows for plenary review of all issues contained in a certified order, its use in the "except" clause contemplates remand orders addressing cases removed solely pursuant to § 1442 or 1443, and thus favors limiting remand order review to those specifically delineated removal bases.

Besides marshalling *Yamaha*, Defendants assert that our opinion in *Coffey v. Freeport McMoran Copper & Gold*, 581 F.3d 1240 (10th Cir. 2009), also "counsels in favor of review of the district court's entire order, not simply the ground that permitted appeal." Appellant Br. at 11. Like the district court, we are not convinced.

Coffey concerned a provision of CAFA, 28 U.S.C. § 1453(c)(1), that states "notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed." The defendants in *Coffey* removed to federal court based on both CAFA and the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), and the district court remanded after determining it lacked subject matter jurisdiction under either statute. 581 F.3d at 1242. When the defendants appealed that remand order under § 1453(c)(1), the plaintiffs argued that appellate jurisdiction existed to review only whether removal was proper under CAFA, and not to review "the district court's order with respect to the CERCLA determination." *Id.* at 1247.

We held that § 1453(c)(1) did allow for discretionary review of the district court's determination regarding both the CAFA and CERCLA removal bases. *Id.* We found support for this conclusion in both *Yamaha*'s inter-

pretation of § 1292(b) and the Seventh Circuit's application of *Yamaha* to § 1453(c)(1). In *Brill*, the Seventh Circuit determined it was "free to consider any potential error in the district court's decision, not just a mistake in application of [CAFA]," because "[w]hen a statute authorizes interlocutory appellate review, it is the district court's entire decision that comes before the court for review." 427 F.3d at 451–52 (citing *Yamaha*, 516 U.S. at 205). In *Coffey,* we "agree[d] with the *Brill* court that *Yamaha*'s analysis applies equally to" § 1453(c)(1). 581 F.3d at 1247. That statute "speaks in terms of the court of appeals accepting an appeal 'from an *order* of a district court granting or denying a motion to remand a class action.'" *Id.* (quoting § 1453(c)(1)). And it has "no language limiting the court's consideration solely to the CAFA issues in the remand order." *Id.*

We went on to hold, however, that while jurisdiction to review the district court's disposition of CERCLA removal existed, that jurisdiction was discretionary, and was best declined under the circumstances. *Id.* at 1247–48. We reasoned that if remand had been granted solely on the CERCLA issue, § 1447(d) would bar review of the district court's order. *Id.* at 1247. Therefore, review of that issue would not fit within § 1453(c)(1)'s purpose, which is "to develop a body of appellate law interpreting [CAFA] without unduly delaying the litigation of class actions." *Id.* (alteration in original) (quoting S. Rep. No. 109-14, at 49 (2005)).

Defendants thus correctly note that this circuit has "already applied *Yamaha*'s rationale to another statutory provision concerning removal." Appellant Br. at 14. But we reject their argument that the removal provision construed in *Coffey* "contains statutory language that mirrors the language of [§] 1447(d) in all relevant aspects."

Id. To reiterate, we emphasized in *Coffey* that § 1453(c)(1) contains "no language limiting the court's consideration solely to the CAFA issues in the remand order." 581 F.3d at 1247. However, § 1447(d), as discussed above, *does* have limiting language. While § 1453(c)(1) concerns "an order . . . to remand a class action," § 1447(d) concerns "an order remanding a case . . . *removed pursuant to section 1442 or 1443*." (emphasis added). "Class action" identifies a broad category of case, which a defendant can remove to federal court via any number of bases besides those created by CAFA.[10] *See* 28 U.S.C. § 1332(d)(1) (defining "class action" as "any civil action filed under [Federal Rule of Civil Procedure 23] or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons"); *id.* § 1453(b) (CAFA provision easing the requirements for class action removal). But "removed pursuant to section 1442 or 1443" identifies specific statutory removal bases that must be addressed in any corresponding remand order. Thus, while the language of § 1453(c)(1) does not limit the reviewing court to consider solely "CAFA issues in the remand order," the language of § 1447(d) can be read to limit the reviewing court to consider solely "[§ 1442 or 1443] issues in the remand order." *See Coffey*, 581 F.3d at 1247. If, as Defendants assert, § 1453(c)(1) mirrored the language of § 1447(d) in all relevant aspects, it would instead speak of an order to remand a class action "removed pursuant to section 1453(b)," the CAFA-specific removal provision.

Other textual differences between the statutes also counsel against applying *Coffey*'s interpretation of

[10] State court class actions were removable prior to the Class Action Fairness Act, provided they met the general requirements of 28 U.S.C. § 1446. CAFA simply made the removal of class actions easier. *See id.* § 1453(b).

§ 1453(c)(1) to § 1447(d)'s "except" clause. Section 1453(c)(1) allows for appellate jurisdiction over orders "granting or denying a motion to remand a class action," while the § 1447(d) exceptions call only for appellate review of orders granting such motions. More significantly, § 1453(c)(1), like § 1292(b), vests discretion regarding whether to allow review with the court, *see Edmondson*, 613 F.3d at 1033, while the appellate jurisdiction created by the § 1447(d) exceptions is mandatory. *Compare* § 1453(c)(1) ("[A] court of appeals *may accept* an appeal from an order of a district court." (emphasis added)), *and* § 1292(b) ("The Court of Appeals . . . *may thereupon, in its discretion, permit* an appeal to be taken from such order." (emphasis added)), *with* § 1447(d) ("[A]n order remanding a case . . . removed pursuant to section 1442 or 1443 . . . *shall be reviewable*." (emphasis added)). These differences reflect opposing statutory thrusts: § 1447(d) being a provision that forecloses appellate jurisdiction, with two narrow exceptions, and § 1453(c)(1), like § 1292(b), being a provision that creates appellate jurisdiction—indeed, that explicitly carves it from § 1447(d)'s general prohibition. *See* § 1453(c)(1) ("except that notwithstanding § 1447(d) . . . ."). The distinction between granting control over appellate jurisdiction to the court, and ceding such control to the defendant—who is sole master of her petition for removal—further suggests the definition of "order" applied to § 1292(b) in *Yamaha* and imported to § 1453(c)(1) in *Coffey* is a poor fit for the unique context of § 1447(d). In other words, a more expansive scope of jurisdiction is sensible when the appellate courts may exercise their discretion as gatekeepers, but

not when the defendant holds the key to appellate review.[11]

One further lesson relevant to our present task can be drawn from *Coffey*'s construction of § 1453(c)(1). The appellate discretion granted by that statute over whether to accept review of remand orders is framed as an either/or proposition: "a court of appeals may accept *an appeal from an order* . . . granting or denying a motion to remand a class action," not *part* of an appeal. 28 U.S.C. § 1453(c)(1) (emphasis added). Under Defendants' reading of "an appeal from an order"—which would create "appellate review of the *whole* order, not just of particular issues or reasons," *Lu Junhong*, 792 F.3d at 811—the court of appeals would be required to exercise its discretion by either accepting review of the *entire* remand order (in effect, review of all bases for removal rejected by the district court and challenged by the defendant), or disclaiming appellate review entirely. It would not be permitted to chart a middle path by choosing to review only "particular issues or reasons" underlying the remand order. *See id.*

But such a middle path is exactly what was chosen in *Coffey*. We elected to review only one of the rejected bases for removal challenged by the defendants (the CAFA basis) while declining to exercise jurisdiction over the other (the CERCLA basis). *See* 581 F.3d at 1247–48. And we in-

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[11] Compare, for example, the *Yamaha* Court's broad interpretation of the discretionary appellate jurisdiction created by 28 U.S.C. § 1292(b) with the narrow interpretation given by federal courts to the specific exceptions to the final judgment rule found in § 1291(a), which create mandatory appellate jurisdiction. *See generally United States v. Solco I, LLC*, — F.3d —, No. 19-4089, 2020 WL 3407013 (10th Cir. June 22, 2020).

terpreted § 1453(c)(1) to allow for this jurisdictional partitioning based on our reading of the statutory purpose: that § 1453(c)(1) was aimed at developing CAFA doctrine in the courts of appeals, and that review of CERCLA removal would clearly not advance that purpose and would also not otherwise be allowable under § 1447(d). *Id.* Likewise here: section 1447(d) was aimed at accelerating litigation on the merits, *see Powerex Corp.*, 551 U.S. at 238, and reviewing the non-§ 1442 grounds for removal would clearly not advance that purpose and would also not otherwise be allowable under § 1447(d). *Coffey* therefore supports disclaiming appellate jurisdiction over aspects of a remand order "that would otherwise be unreviewable." *Boulder County II*, 423 F. Supp. 3d at 1071; *see also Parson v. Johnson & Johnson*, 749 F.3d 879, 893 (10th Cir. 2014) (declining to exercise § 1453(c)(1) jurisdiction over the district court's decision to remand for lack of diversity jurisdiction, based in part on the absence of "freestanding appellate jurisdiction" over that non-CAFA ruling, "a factor we found significant in *Coffey*").

In sum, bearing in mind that "[a]mbiguity is a creature not of definitional possibilities but of statutory context," *Brown v. Gardner*, 513 U.S. 115, 118 (1994), our analysis of *Yamaha* and *Coffey* indicates that the word "order" in the singular statutory context of § 1447(d)'s "except" clause should not be read the same as it is in § 1292(b) and § 1453(c)(1). Specifically, comparing the three statutes convinces us that while "order" allows for plenary review in both § 1292(b) and § 1453(c)(1), the same word used in § 1447(d) extends appellate jurisdiction to only the § 1442 or 1443 removal bases addressed in a district court's remand. Statutory context is thus sufficient to lift the textual ambiguity that cloaks the "except" clause, revealing the narrower construction of § 1447(d) appealability to be the proper one.

We recognize, however, that the question of ambiguity is close, as our extended exegesis necessarily implies. And the circuit split on which way § 1447(d)'s purportedly plain meaning cuts also indicates that the "except" clause is "capable of being understood by reasonably well-informed persons in two or more different senses." *Quarrell*, 310 F.3d at 669 (quotation marks omitted). *Compare, e.g.*, *Lu Junhong*, 792 F.3d at 812 (calling its "application of *Yamaha Motor* and *Brill* to the word 'order' in § 1447(d) . . . entirely textual"), *and Decatur Hosp. Auth. v. Aetna Health, Inc.*, 854 F.3d 292, 296 (5th Cir. 2017) (stating its conclusion that § 1442 removal creates plenary review "flows from the text of § 1447(d)"), *with Glanton*, 107 F.3d at 1047 (dismissing appeal insofar as it challenged non-§ 1443 ground "follows from the clear text of § 1447(d)"), *and Jacks*, 701 F.3d at 1229 (retaining jurisdiction over part of remand order addressing § 1442, while rejecting jurisdiction over part addressing federal common law, based on "[t]he plain language of § 1447(d)"). In this circuit, such a clear divergence in the appellate courts on statutory plain meaning is not conclusive evidence of ambiguity, but it is worthy of some consideration. *In re S. Star Foods, Inc.*, 144 F.3d 712, 715 (10th Cir. 1998). Because the text of § 1447(d) is "arguably ambiguous," *see Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1097 (10th Cir. 2005), and has been interpreted inconsistently by the circuit courts, we venture beyond text and context to seek further elucidation of the "except" clause's scope of review. As we now discuss, the additional tools of statutory construction confirm our primary, context-based reading.

2. Presumption Against Jurisdiction

If an ambiguity is found in the text, "[w]e then look to presumptions that might aid our analysis." *Pritchett*, 420 F.3d at 1094. "Because the jurisdiction of federal courts is

limited, there is a presumption against our jurisdiction." *Merida Delgado v. Gonzales*, 428 F.3d 916, 919 (10th Cir. 2005) (quotation marks omitted); *see Kokkonen*, 511 U.S. at 377. This presumption is manifested in "the deeply felt and traditional reluctance of th[e Supreme] Court to expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes." *Romero v. Int'l Term. Op. Co.*, 358 U.S. 354, 379 (1959). Thus, "statutes conferring jurisdiction on federal courts are to be strictly construed, and doubts resolved against federal jurisdiction." *F & S Const. Co. v. Jensen*, 337 F.2d 160, 161 (10th Cir. 1964). This includes statutes authorizing federal appellate jurisdiction. *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 579 (1987); *see, e.g.*, *Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 42 n.1 (1970) ("[O]ur practice of strict construction of statutes authorizing appeals dictates that we not give an expansive interpretation to the word 'State' [in 28 U.S.C. § 1254].").

The presumption against jurisdiction also applies with full force to removal. Interpreting a precursor to the general removal statute, 28 U.S.C. § 1441, the Court determined in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941), that "[d]ue regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Id.* at 108–09 (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)); *see also Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17 (1951) ("The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation." (interpreting § 1441)). As a result, "removal statutes[] are to be narrowly construed in light of our constitutional role as limited tribunals." *Pritchett*, 420 F.3d at 1094–95; *see also Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 32 (2002).

Pritchett v. Office Depot, Inc. concerned the removal provisions of CAFA. *See* 420 F.3d at 1092. We acknowledged in *Pritchett* that while Congress sought to expand federal jurisdiction via those provisions, "when that expansion is made effective is what is at issue . . . , and that is an issue we approach cautiously." *Id.*. at 1097 n.7 (citing *Shamrock*, 313 U.S. at 108–09); *see also Becenti v. Vigil*, 902 F.2d 777, 780 (10th Cir. 1990) (acknowledging that while Congress could authorize removal of tribal court actions against federal officers, at issue was whether it "has in fact done so" via 28 U.S.C. § 1442, and that the court "must be careful not to expand the jurisdiction of the federal courts beyond Congressional mandates"). Because this case concerns the scope of Congress's desired expansion of the specific exceptions to § 1447(d)'s general bar on remand order reviewability, we must likewise "approach cautiously." And while *Pritchett* and *Becenti* referenced statutes governing the procedure for removal, rather than "[p]rocedure after removal generally," *see* 28 U.S.C. § 1447, their logic should equally apply to § 1447(d), which governs removal's jurisdictional corollary. *See also* 28 U.S.C. §§ 1441–1455 (containing the chapter of the Judicial Code addressing "Removal of Cases from State Courts").

"Thus, if there is ambiguity as to whether the instant statute confers federal jurisdiction over this case, we are compelled to adopt a reasonable, narrow construction." *Pritchett*, 420 F.3d at 1095. By confining appellate review to only the § 1442 basis for removal, and not the handful of alternate § 1447(c) bases advanced by Defendants, the Counties' reading of § 1447(d) "is clearly the narrower of the two." *See Conrad v. Phone Directories, Inc.*, 585 F.3d 1376, 1382 (10th Cir. 2009). And it is also a reasonable reading, as evidenced by our contextual analysis and the weight of circuit authority interpreting the "except"

clause. The presumption against jurisdiction thus supports our decision to adopt that reading.

3. Legislative Ratification

A second presumption that can help parse ambiguous text is the principle of legislative ratification—that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change," or when it "adopts a new law incorporating sections of a prior law." *Lorillard v. Pons*, 434 U.S. 575, 580–81 (1978); *see Consolidation Coal Co. v. Dir., Office of Workers' Comp. Programs*, 864 F.3d 1142, 1148 (10th Cir. 2017); *Bd. of Cty. Comm'rs v. E.E.O.C.*, 405 F.3d 840, 845 (10th Cir. 2005).

Both parties rely on this presumption to draw divergent meaning from Congress's passage of the Removal Clarification Act of 2011, which authorized appellate review of orders remanding cases removed pursuant to § 1442. Defendants contend that this revision to § 1447(d) incorporated the *Yamaha* Court's prior interpretation of the word "order," because "Congress is of course presumed to be aware of judicial interpretations of relevant statutory text." Appellant Br. at 10. As has been made clear, however, "*Yamaha* did not interpret the scope of § 1447(d), let alone involve a remand order." *City of Baltimore*, 952 F.3d at 460–61. And at the date of the Clarification Act's passage, *every* court of appeals to address the issue in a published opinion interpreted § 1447(d)'s "except" clause to create appellate jurisdiction only over the asserted § 1443 basis for removal, not the entire remand order. This included eight circuits[12] in a line of authority

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[12] *See 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); *Thornton v. Holloway*,

that continued unbroken following the 1996 decision in *Yamaha*. *See also County of San Mateo*, 960 F.3d at 597 (stating that when the Clarification Act was passed, "no circuit court had applied *Yamaha* to § 1447(d) or discussed its applicability in that context").

Against this "backdrop of unanimous judicial interpretation," *id.*, the Clarification Act's sole revision to § 1447(d) was to insert "1442 or" before "1443," 125 Stat. at 546. Such a minor change evidences Congress's intent to adopt the existing appellate consensus regarding proper construction of the "except" clause. *See Lindahl v. Office of Personnel Mgmt.*, 470 U.S. 768, 782 (1985) (reasoning that the fact Congress amended a statute "without explicitly repealing" the established interpretation given it by the Court of Claims "gives rise to a presumption that Congress intended to embody [that court's interpretation] in the amended version"); *see also Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85 (2006) ("[W]hen 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well." (quoting *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998))). Legislative history affirms this intent to incorporate the established contemporaneous judicial interpretation: As the House Report on the Act stated, the revision to § 1447(d) "permit[ted] judicial review of § 1442 cases that are remanded, *just as they are with civil rights cases*." H.R. Rep. No. 112–17, pt. 1, at 7 (2011) (emphasis added). *Cf. Cannon v. Univ. of Chicago*, 441 U.S. 677, 696–

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70 F.3d 522, 523 (8th Cir. 1995); *State Farm Mut. Auto Ins. Co. v. Baasch*, 644 F.2d 94, 97 (2d Cir. 1981); *Noel v. McCain*, 538 F.2d 633, 635 (4th Cir. 1976); *Robertson*, 534 F.2d at 65; *AppalachianVolunteers*, 432 F.2d at 534.

98 (1979) (presuming Congress was aware of the prior federal district and circuit court interpretation of Title VI of the 1964 Civil Rights Act "and that that interpretation reflects their intent" with respect to Title IX, whose drafters "explicitly assumed that it would be interpreted and applied as Title VI had been").

"Absent a clear statutory command to the contrary, we assume that 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*, 516 U.S. at 128 (alteration in original) (quoting *United States v. Rice*, 327 U.S. 742, 752 (1946)). Likewise, we will assume Congress was aware of the universality of denying plenary review of remand orders under the § 1447(d) "except" clause when it augmented that provision with a second narrow statutory avenue for appeal. Thus, if any judicial interpretation of relevant statutory text was ratified by Congress via 2011's Removal Clarification Act, it was the unanimous treatment of the scope of appellate review created by § 1447(d)'s civil rights exception by three quarters of the courts of appeals, and not the *Yamaha* Court's contrary reading of a single word in a distinct statute.[13]

4. Statutory Purpose

"Where the language of a statute is arguably ambiguous, courts also look to public policy considerations to cast further elucidation on Congress'[s] likely intent." *Pritchett*, 420 F.3d at 1097. "Section 1447(d) reflects Congress's longstanding 'policy of not permitting interruption of the

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[13] We join the Fourth and Ninth Circuits in reaching this conclusion. *See City of Baltimore*, 952 F.3d at 460–61; *County of San Mateo*, 960 F.3d at 597.

merits of a removed case by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed.'" *Powerex Corp.*, 551 U.S. at 238 (quoting *Rice*, 327 U.S. at 751); *see Dalrymple v. Grand River Dam Auth.*, 145 F.3d 1180, 1185 n.8 (10th Cir. 1998) (referencing the "strong congressional policy against review of remand orders 'in order to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues'" (quoting *Thermtron*, 423 U.S. at 351)); *see also Osborn*, 549 U.S. at 227 (labeling § 1447(d) an "antishuttling provision[]").

Defendants argue that mandating review of the complete remand order "comports with" this statutory purpose of preventing delay, because

> [o]nce Congress has permitted appellate review of a remand order, an appellate court "has been authorized to take the time necessary to determine the right forum," and "[t]he marginal delay from adding an extra issue to a case where the time for briefing, argument, and decision has already been accepted is likely to be small."

Appellant Opp. to Mot. for Partial Dismissal at 9 (quoting *Lu Junhong*, 792 F.3d at 813). The leading treatise on federal civil procedure agrees: Although "it has been held that review [under § 1447(d)] is limited to removability under § 1443," it should "instead be extended to all possible grounds for removal underlying the order," for "[o]nce an appeal is taken there is little to be gained by limiting review." 15A Charles A. Wright et al., *Federal Practice and Procedure* § 3914.11, at 706 (2d ed. 2019); *see* Appellant Opp. to Mot. for Partial Dismissal at 9.

The Counties contend this argument "is not obvious on its face," because "a court of appeals may be able to summarily dispose—even in an expedited manner—of a weak argument under Section 1442 . . . while it may require more time to consider a range of other, more complex federal jurisdictional issues." Appellee Mot. for Partial Dismissal at 10; *see, e.g.*, *Robertson v. Ball*, 534 F.2d 63, 66 n.5 (5th Cir. 1976) (contemplating summary dismissal of "an appeal from a remand when the removal purportedly based on § 1443 does not even colorably fall" under that statute). It was also not obvious to this court in *Coffey*: there, we declined to exercise discretionary jurisdiction over the remand order's non-CAFA issue because doing so would conflict with § 1453(c)(1)'s purpose of "develop[ing] a body of appellate law interpreting [CAFA] *without unduly delaying the litigation of class actions.*" 581 F.3d at 1247 (second alteration in original) (emphasis added) (quoting S. Rep. No. 109-14, at 49 (2005)).

This case provides a prime example of the potential delay occasioned by adding more complex federal jurisdictional issues to the appellate docket. As the district court reasoned in denying Defendants' motion to stay the remand order: "Unlike the situation in [*Lu*] *Junhong*, where 'the marginal delay from adding an extra issue to [a] case . . . ['] would be small . . . the time needed to address the numerous additional jurisdictional issues in this case would be significant." *Boulder County II*, 423 F. Supp. 3d at 1071. In *Lu Junhong*, besides § 1442, the Seventh Circuit needed to review only one other source of federal jurisdiction (admiralty jurisdiction under 28 U.S.C. § 1333). *See* 792 F.3d at 808. But here, expanding review to the entire remand order would force this court to grapple with complex judge-made doctrines of "arising under" jurisdiction—implicating federal common law, contested and substantial embedded federal issues, *see Grable*, 545

U.S. at 312–13, and the complete preemption doctrine[14]—in addition to more "bespoke jurisdictional law," *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142, 151 (D.R.I. 2019), pertaining to federal enclaves and the outer continental shelf. The pages of the Federal Supplement are rapidly filling with the extended discussions occasioned by application of these doctrines to global warming-based state law actions. *See, e.g.*, *Boulder County I*, 405 F. Supp. 3d at 956–79; *Mayor & City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538, 551–67 (D. Md. 2019), *aff'd*, 952 F.3d 452 (4th Cir. 2020).

It is thus not apparent that expanding the scope of § 1447(d) review will lead to merely marginal delay in litigation on the merits. To the contrary, the extra analysis necessitated by a broad interpretation has significant potential to foment "protracted litigation of jurisdictional is-

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[14] Federal district courts have come out differently on these meaty issues of federal question jurisdiction, further demonstrating the potential for delay if this court was forced to weigh in on their proper resolution. *Compare California v. BP P.L.C.*, Nos. 17-06011 & 17-06012, 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018) (unpublished) (denying remand of global warming-related action and exercising federal subject matter jurisdiction based on federal common law), *rev'd sub nom City of Oakland v. BP P.L.C.*, 960 F.3d 570 (9th Cir. 2020), *and City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466 (S.D.N.Y. 2018) (finding federal common law governed state common law global warming-related claims), *with Bd. of Cty.Comm'rs of Boulder County v. Suncor Energy (U.S.A.) Inc.*, 405 F. Supp. 3d 947 (D. Colo. 2019) (granting remand of similar global warming action and rejecting jurisdiction under federal common law, *Grable*, and complete preemption), *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142 (D.R.I. 2019) (same), *Mayor & City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538 (D. Md. 2019) (same), *aff'd*, 952 F.3d 452 (4th Cir. 2020), *and County of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal. 2018) (same), *aff'd*, 960 F.3d 586 (9th Cir. 2020).

sues," *Thermtron*, 423 U.S. at 351, "and prolong the interference with state jurisdiction that § 1447(d) clearly seeks to minimize," *Lambeth*, 443 F.3d at 760, thereby frustrating the statute's "clear Congressional policy of expedition," *Appalachian Volunteers, Inc. v. Clark*, 432 F.2d 530, 533 (6th Cir. 1970). Statutory purpose thus lends further support to our conclusion that the review granted by § 1447(d)'s "except" clause must be confined to the enumerated removal bases, for "[a] textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored." *Medina v. Catholic Health Initiatives*, 877 F.3d 1213, 1226 (10th Cir. 2017) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law* 63–65 (2012)). This is especially so because a holding that only the explicit exceptions in § 1447(d) are appealable, besides shortening the travel time of this particular "intercourt shuttle," *Osborn*, 549 U.S. at 244, could also prevent some gratuitous trips entirely—for example, by encouraging parties with weak § 1442 or 1443 removal arguments to forego appeals,[15] or omit those two bases for removal in the first place.

The potential for this latter result speaks to the Counties' "moral hazard" policy argument—that allowing for an expanded scope of review "would encourage removing parties to assert frivolous federal officer claims in order to bring otherwise nonappealable removal arguments to the court of appeals." Appellee Mot. for Partial Dismissal at 10. Similar moral hazard issues of appealability have

[15] *Cf. Coffey v. Freeport McMoran Copper & Gold*, 581 F.3d 1240, 1242 n.2 (10th Cir. 2009) ("Defendants also argued that removal was authorized under 28 U.S.C. § 1442(a)(1). The district court disagreed, and that portion of the district court's decision [wa]s not . . . challenged on appeal."). *Coffey* was decided before Congress expanded § 1447(d)'s "except" clause to encompass § 1442 removal.

not escaped judicial notice. In *Abney v. United States*, 431 U.S. 651 (1977), the Supreme Court held that a criminal defendant may immediately appeal a district court's rejection of her motion to dismiss an indictment on double jeopardy grounds "based on the special considerations permeating claims of that nature." *Id.* at 663. But it further determined that "obviously, such considerations do not extend" to allow the appeal of "other claims presented to, and rejected by, the district court in passing on the accused's motion to dismiss." *Id.* "Any other rule would encourage criminal defendants to seek review of, or assert, frivolous double jeopardy claims in order to bring more serious, but otherwise nonappealable questions to the attention of the courts of appeals prior to conviction and sentence." *Id.* And while *Abney* was confined to the criminal context, "the concern expressed in *Abney* . . . bears on civil cases as well." *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 49–50 (1995).

In *Lu Junhong*, the Seventh Circuit reasoned that sanctions and summary resolutions are sufficient tools to combat citing § 1442 or 1443 in a notice of removal merely as "a hook to allow appeal of some different subject." 792 F.3d at 813; *see also* Wright et al., *supra*, § 3914.11, at 706 (acknowledging the "plausible concern" that interpreting § 1447(d) to allow for review of otherwise nonreviewable removal bases would lead to frivolous removal arguments, but arguing that "[s]ufficient sanctions are available to deter" that "sorry possibility"). But should the scope of § 1447(d) review be expanded, we harbor serious doubt that either tool will prove dexterous enough to prevent the delay of litigation on the merits Congress so clearly sought to avoid. As one Amicus notes, "[i]f alleging federal-officer removal opens the door to appellate review of all other asserted bases for removal, no lawyer would neglect to find a defensible, if inadequate, way to assert that

peculiar form of removal to avoid the bar on interlocutory appeal for all other justifications for removal." Brief of Nat'l Lg. of Cities as Amicus Curiae at 17 n.4; *cf. Robertson*, 534 F.2d at 66 n.5 (expressing concern that appeals from remands of removals under § 1443 could "be used as a dilatory tactic"); *County of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 939 (N.D. Cal. 2018) (describing defendants' § 1442 argument as "dubious" in a case featuring substantially similar state law global warming-related causes of action and asserted grounds for removal), *aff'd*, 960 F.3d 586 (9th Cir. 2020).

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In sum, while the text of § 1447(d)'s "except" clause is arguably ambiguous, statutory context clarifies that the word "order" in that provision must be construed differently than the word "order" in 28 U.S.C. § 1292(b) and § 1453(c)(1). And the proper construction of the statute is the narrower one adopted by the majority of federal circuits. We therefore hold that when a district court issues a remand order premised on a § 1447(c) ground, we are empowered to review that order only to the extent it addresses the removal bases explicitly excepted from § 1447(d)—in this case, removal under 28 U.S.C. § 1442.

III. FEDERAL OFFICER REMOVAL

Having determined 28 U.S.C. § 1447(d) supplies appellate jurisdiction only to review the district court's rejection of removal based on federal officer jurisdiction, we now address that issue. Questions of removal are reviewed de novo. *Frederick v. Hartford Underwriters Ins. Co.*, 683 F.3d 1242, 1245 (10th Cir. 2012). ExxonMobil, as the party asserting federal officer removal, bears the burden of establishing jurisdiction by a preponderance of the

evidence.[16] *Dutcher v. Matheson*, 733 F.3d 980, 985 (10th Cir. 2013). This burden is met by "a substantial factual showing," *Wyoming v. Livingston*, 443 F.3d 1211, 1225 (10th Cir. 2006), that supports "'candid, specific and positive' allegations," *In re MTBE Prods. Liab. Litig.*, 488 F.3d 112, 130 (2d Cir. 2007) (quoting *Willingham v. Morgan*, 395 U.S. 402, 408 (1969)).

The federal officer removal statute permits removal of state court actions filed against "any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office." 28 U.S.C. § 1442(a)(1). The statute's "'basic purpose' is to protect against the interference with federal operations that would ensue if a state were able to arrest federal officers and agents acting within the scope of their authority and bring them to trial in a state court for an alleged state-law offense." *City of Baltimore*, 952 F.3d at 461 (quoting *Watson*, 551 U.S. at 150). Three fears animate this purpose: that "[s]tate-court proceedings may reflect 'local prejudice' against unpopular federal laws or federal officials," *Watson*, 551 U.S. at 150, "disable federal officials from taking necessary action designed to enforce federal law," *id.* at 152, or "deprive federal officials of a federal forum in which to assert federal immunity defenses,"[17] *id.* at 150.

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[16] Suncor Energy asserts no basis for federal officer removal. *See* Appellant Br. at 38–39. However, unlike the typical removal petition, which requires joinder of all defendants, § 1442 allows for independent removal of an entire case by only one of several named defendants. *See Akin v. Ashland Chem Co.*, 156 F.3d 1030, 1034 (10th Cir. 1998).

[17] Our precedent elevates this statutory concern above others. *See Christensen v. Ward*, 916 F.2d 1462, 1484 (10th Cir. 1990) ("The primary purpose for the removal statute is to assure that defenses of official immunity applicable to federal officers are litigated in federal

In short, "the removal provision was an attempt to protect federal officers from interference by hostile state courts." *Willingham*, 395 U.S. at 405. Unlike other removal statutes, it should "be liberally construed to give full effect to th[at] purpose[]." *Colorado v. Symes*, 286 U.S. 510, 517 (1932).

Section 1442(a)(1) removal can apply to private persons "who lawfully assist" federal officers "in the performance of [their] official duty," *Davis v. South Carolina*, 107 U.S. 597, 600 (1883), meaning the private person must be "authorized to act with or for [federal officers or agents] in affirmatively executing duties under . . . federal law," *Watson*, 551 U.S. at 151 (alterations in original) (quoting *City of Greenwood v. Peacock*, 384 U.S. 808, 824 (1966)). And § 1442(a)(1) has also been interpreted to allow removal by private corporations that meet the statutory requirements. *See, e.g.*, *Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 135–36 (2d. Cir. 2008).

> A private corporation may remove a case under § 1442(a)(1) if it can show: (1) that it acted under the direction of a federal officer; (2) that there is a causal nexus between the plaintiff's claims and the acts the private corporation performed under the federal officer's direction; and (3) that there is a colorable federal defense to the plaintiff's claims.[18]

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court." (citing *Willingham v. Morgan*, 395 U.S. 402, 406–07 (1969)); *see also Jefferson County v. Acker*, 527 U.S. 423, 447 (1999) (Scalia, J., concurring in part) (asserting the "main point" of the statute "is to give officers a federal forum in which to litigate the merits of immunity defenses").

[18] A colorable federal defense "constitutes the federal law under which the action against the federal officer arises for Art. III purposes." *Mesa v. California*, 489 U.S. 121, 136 (1989). This is required because the statute itself does not create a federal question, but

Greene v. Citigroup, Inc., No. 99-1030, 2000 WL 647190, at *2 (10th Cir. May 19, 2000) (unpublished); *see also Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 254 (4th Cir. 2017).

ExxonMobil asserts federal officer removal jurisdiction based on its long-term mining of the Outer Continental Shelf ("OCS") for fossil fuels under government leases. Appellant Br. at 38; *see, e.g.*, App. 49, 62 ("Oil and Gas Lease of Submerged Lands Under the Outer Continental Shelf Lands Act."). To address this argument, we first lay out the regulatory background of these mineral leases.

The OCS "is a vast underwater expanse" beginning several miles off the coastline and extending seaward for roughly two hundred miles. *Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588, 592 (D.C. Cir. 2015). Its "subsoil and seabed appertain to the United States and are subject to its jurisdiction and control." 43 U.S.C. § 1331(a). "Billions of barrels of oil and trillions of cubic feet of natural gas lie beneath the OCS." *Jewell*, 779 F.3d at 592. Pursuant to the Outer Continental Shelf Lands Act ("OCSLA"), the United States Department of the Interior ("DOI") administers a federal leasing program to develop and exploit the oil and gas resources in these submerged lands in a sustainable manner. App. 38; *see* 43 U.S.C. §§ 1331–1356(b); *Jewell*, 779 F.3d at 592 ("The [OCSLA] created a framework to facilitate the orderly and environmentally responsible exploration and extraction of oil and gas deposits on the OCS."). Under OCSLA, the Interior Secretary "is authorized to grant to the highest responsible qualified bidder or bidders by competitive bidding . . . any oil and gas

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"merely serves to overcome the 'well-pleaded complaint' rule which would otherwise preclude removal even if a federal defense were alleged." *Id.*

lease" on the OCS, in exchange for payment of royalties. 43 U.S.C. § 1337(a)(1); *see County of San Mateo*, 960 F.3d at 602 ("[T]he government grants the lessee the right to explore and produce oil and gas resources in the submerged lands of the outer Continental Shelf, and in exchange the lessee agrees to pay the government rents and royalties."). ExxonMobil has participated in this competitive leasing program for decades and continues to conduct oil and gas operations under OCS leases. App. 40; *see* App. 61 (June 2016 DOI letter notifying ExxonMobil that its "bid for the [OCS] block described above is accepted"); App 62 (Ten-year ExxonMobil OCS lease starting July 1, 2016).

OCS lessees are required to conduct drilling in accordance with federally approved exploration, development, and production plans and conditions. App. 64 § 9 (2016 lease exemplar); *see* 30 C.F.R. §§ 550.200–.299 (outlining the plans and documents that must be submitted to and approved by the Bureau of Ocean Energy Management before starting to drill under OCS leases). These plans must "conform to sound conservation practices to preserve, protect, and develop minerals resources and maximize the ultimate recovery of hydrocarbons from the leased area." App. 64 § 10. Lessees are obligated to "exercise diligence in the development of the leased area and in the production of wells located thereon," to "prevent unnecessary damage to, loss of, or waste of leased resources," and to "comply with all applicable laws, regulations and orders related to diligence, sound conservation practices and prevention of waste." App. 64 § 10. A much earlier OCS lease, from 1979, further stated that "[a]fter due notice in writing, the Lessee shall drill such wells and produce at such rates as the Lessor may require in order that the Leased Area or any part thereof may be properly

and timely developed and produced in accordance with sound operating principles." App. 50 § 10.

DOI officials reserve the right to obtain "prompt access" to facilities and records of private OCS lessees for the purpose of federal safety, health, or environmental inspections. App. 64 § 12 (2016 lease). The federal government can precondition an OCS lease on a right of first refusal to purchase all production "[i]n time of war or when the President of the United States shall so prescribe." App. 68 § 15(d). The government also mandates that twenty percent of all crude or natural gas produced pursuant to OCS leases be offered to small or independent refiners, "as defined in the Emergency Petroleum Allocation Act of 1973." App. 68 § 15(c).

ExxonMobil argues that its participation in the OCS leasing program under these terms and conditions satisfies the "acting under" element of federal officer removal. Appellant Br. at 38. We disagree.

"The statutory phrase 'acting under' describes 'the triggering relationship between a private entity and a federal officer.'" *City of Baltimore*, 952 F.3d at 462 (quoting *Watson*, 551 U.S. at 149). While "[t]he words 'acting under' are broad," they are "not limitless." *Watson*, 551 U.S. at 147. In this context, "under" describes a relationship between private entity and federal superior typically involving "subjection, guidance, or control." *Id.* at 151 (quoting *Webster's New International Dictionary* 948 (2d ed. 1953)). Thus, a "private person's 'acting under' must involve an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior." *Id.* at 152. This "help or assistance necessary to bring a private person within the scope of the statute does *not* include simply *complying* with the law . . . , even if the regulation is highly detailed

and even if the private firm's activities are highly supervised and monitored." *Id.* at 152–53. Rather, "there must exist a 'special relationship' between" private firm and federal superior that goes beyond the fulfillment of regulatory or statutory requirements. *Isaacson*, 517 F.3d at 137 (quoting *Watson*, 551 U.S. at 157).

In *Watson*, the Supreme Court addressed whether the Philip Morris Companies were "acting under" a federal officer or agency when they advertised cigarettes as "light" in compliance with detailed Federal Trade Commission supervision of cigarette testing. 551 U.S. at 146–47. As private contracting was not at issue, the Court disclaimed deciding "whether and when particular circumstances may enable private contractors to invoke the statute." *Id.* at 154. In an effort to establish the necessary amount of federal direction, however, the defendants highlighted various lower court cases that held government contractors could invoke § 1442 removal, "at least when the relationship between the contractor and the Government is an unusually close one involving detailed regulation, monitoring, or supervision." *Id.* at 153. The Court unanimously rejected this attempt to analogize the highlighted "close supervision" over contractors to "intense regulation" of firms, because "the private contractor in such cases is helping the Government to produce an item that it needs." *Id.* That is, "[t]he assistance that private contractors provide federal officers goes beyond simple compliance with the law and helps officers fulfill other basic governmental tasks." *Id.*

The *Watson* Court illustrated this point by reference to a Fifth Circuit case, *Winters v. Diamond Shamrock Chemical Co.*, 149 F.3d 387 (5th Cir. 1998). *Winters* involved tort claims brought against chemical firms premised on their production of the defoliant known as Agent

Orange under a Department of Defense contract for use in the Vietnam War. The Fifth Circuit concluded that both the "acting under" and causal nexus elements needed for a private company to remove under § 1442 were satisfied, due to "the government's detailed specifications concerning the make-up, packaging, and delivery of Agent Orange, the compulsion to provide the product to the government's specifications, and the on-going supervision the government exercised over the formulation, packaging, and delivery of Agent Orange." *Id.* at 400. The chemical companies "provid[ed] the Government with a product that it used to help conduct a war," and "at least arguably . . . performed a job that, in the absence of a contract with a private firm, the Government itself would have had to perform." *Watson*, 551 U.S. at 154. As such, they had a "special relationship" with the government, *see id.* at 157, whereby they "help[ed] *carry out*[] the duties or tasks of the federal superior," *id.* at 152.

The Phillip Morris Companies also claimed § 1442 removal was appropriate because the FTC had delegated testing authority to an industry-financed laboratory and the companies were "acting pursuant to that delegation." *Id.* at 153–54. The Court disagreed, finding "no evidence of any delegation of legal authority from the FTC to the industry association to undertake testing on the Government agency's behalf." *Id.* at 156.

Watson teaches that a private contractor's compliance with statutory or regulatory mandates, even if complex, is insufficient to satisfy the "acting under" requirement for federal officer removal. Rather, the company must agree to help carry out the duties of the federal superior under that superior's strict guidance and control. *See In re MTBE*, 488 F.3d at 125 ("describing the need for some

government intervention or control, other than that contemplated by a generally applicable regulatory scheme, as 'regulation plus'" (quoting *Bakalis v. Crossland Sav. Bank*, 781 F. Supp. 140, 145 (E.D.N.Y. 1991))). In addition, this closely supervised and directed work must help federal officers fulfill basic government needs, accomplish key government tasks, or produce essential government products—that is, it must stand in for critical efforts the federal superior would be required to undertake itself in the absence of a private contract, with wartime production being the paradigmatic example. *Compare Ruppel v. CBS Corp.*, 701 F.3d 1176, 1181 (7th Cir. 2016) ("Cases in which the Supreme Court has approved removal involve defendants working hand-in-hand with the federal government to achieve a task that furthers an end of the federal government."), *with County of San Mateo*, 960 F.3d at 600 ("[A] person is not 'acting under' a federal officer when the person enters into an arm's- length business arrangement with the federal government or supplies it with widely available commercial products or services."). Alternately, the requisite "special relationship" can be established through the explicit delegation of legal authority to act on the federal superior's behalf.

Here, ExxonMobil's OCS leases do not contemplate the "close supervision of the private entity by the Government," *Isaacson*, 517 F.3d at 137, needed to bring a federal contractor relationship within these strict parameters. We agree with the district court's determination that under the OCS leases "the government does not control the manner in which Defendants drill for oil and gas, or develop and produce the product." 405 F. Supp. 3d at 976; *accord City of Baltimore*, 952 F.3d at 466 ("[T]he leases do not appear to dictate that Defendants extract fossil fuels in a particular manner. . . . [n]or do they appear to vest the government with control over the composition of

oil or gas to be refined and sold to third parties." (citations and quotation marks omitted)); *see also County of San Mateo*, 960 F.3d at 602–03 (holding the OCS leases do not require lessees to act under the government's "close direction"). As the physical mining of OCS fuels is not subject to DOI's "detailed and ongoing control," *see Betzner v. Boeing Co.*, 910 F.3d 1010, 1015 (7th Cir. 2018), and as OCS-produced fuel need not conform to "highly detailed . . . specifications," *see Sawyer*, 860 F.3d at 253, ExxonMobil was not "acting under" a federal superior within the meaning of the federal officer statute. *Compare Bennett v. MIS Corp.*, 607 F.3d 1076, 1087–88 (6th Cir. 2010) (holding a mold remediation firm whose workers were directly supervised by on-site federal officers and escorted at all times by federal personnel, and whose "closely monitored" contract work was subject to "explicit parameters for site containment and waste disposal," satisfied the "acting under" requirement), *with Cabalce v. Thomas E. Blanchard & Assocs.*, 797 F.3d 720, 728 (9th Cir. 2015) (holding a company that contracted to store and destroy fireworks seized by the government did not act under a federal officer due to a "lack of any evidence of the requisite federal control or supervision over the handling of the seized fireworks").

ExxonMobil disputes the district court's finding of insufficient government control by asserting that "the operative leases explicitly afford the federal government the right to control the rates of mining and production." Appellant Br. at 40. It supports this contention by reference to a single clause in the 1979 lease: "After due notice in writing, the Lessee shall drill such wells and produce at such rates as the Lessor may require in order that the leased area . . . may be properly and timely developed[.]" App. 50 § 10. There is no similar clause in the 2016 lease,

however, and no indication that the 1979 language remains in effect. *See* App. 50 § 3 (stating that the 1979 lease shall cover an initial five-year period, to be extended "so long thereafter" as production from or operation on the leased parcel continues). Additionally, there is no showing the government ever gave notice of its intent to direct ExxonMobil's drilling activity or rates of production by means of the OCS leases. The same is true with respect to the government's wartime right of first refusal over ExxonMobil's OCS output. Even if the exercise of these rights could create the necessary level of federal supervision, an issue we do not decide, ExxonMobil points us to no authority for the proposition that the reservation of such rights alone creates the "special relationship" needed for a private firm to invoke § 1442. *Cf. Mays v. City of Flint*, 871 F.3d 437, 447 (6th Cir. 2017) (disagreeing with the argument that the government's potential ability to intervene supports the invocation of federal officer removal in the absence of actual intervention). As a result, ExxonMobil has not met its "burden of providing 'candid, specific and positive' allegations that [it] w[as] acting under federal officers." *In re MTBE*, 488 F.3d at 130 (quoting *Willingham*, 395 U.S. at 408); *see also City of Baltimore*, 952 F.3d at 466 n.9 ("[T]he lack of any specificity as to federal direction leaves us unable to conclude that the leases rise to the level of an unusually close relationship, as required by the first 'acting under' prong.").

ExxonMobil's other attempts to parse the lease language in support of federal officer removal are likewise unavailing, *see Cabalce*, 797 F.3d at 729, because most of the contractual terms "are mere iterations of the OCSLA's regulatory requirements." *City of Baltimore*, 952 F.3d at 465; *accord County of San Mateo*, 960 F.3d at 603; *see, e.g.*, 43 U.S.C. § 1337(a)(1) (authorizing OCS leases to be granted "under regulations promulgated in

advance"); *Jewell*, 779 F.3d at 594 (describing OCSLA as "a statute with a 'structure for every conceivable step to be taken' on the path to development of an OCS leasing site." (quoting *California v. Watt*, 668 F.2d 1290, 1297 (D.C. Cir. 1981))). For example, the plans and documents required by DOI to drill under OCS leases, which ExxonMobil advances as evidence of the government's "extensive control," Appellant Br. at 39, are detailed in Bureau of Ocean Energy Management regulations. *See* 30 C.F.R. §§ 550.211–.228 ("Contents of Exploration Plans"); *id.* § 550.241–.262 ("Contents of Development and Production Plans and Development Operations Coordination Documents"). And other lease terms cited by ExxonMobil as proof of close federal oversight—the requirement that a fifth of OCS production be offered to small or independent refiners, and the government's reservation of a wartime right of first refusal—are also duplications of regulatory details furnished by OCSLA. *See* 43 U.S.C. § 1337(b)(7) (OCS lessees must "offer 20 per centum of the crude oil, condensate, and natural gas liquids produced on such lease . . . to small or independent refiners"); *id.* § 1341(b) ("In time of war, or when the President shall so prescribe, the United States shall have the right of first refusal to purchase at the market price all or any portion of any mineral produced from the outer Continental Shelf."). Compliance with such legal requirements, no matter their complexity, cannot by itself create the "acting under" relationship required to support a federal officer claim. *Watson*, 551 U.S. at 153. Something more is needed—there must be "regulation plus." *In re MTBE*, 488 F.3d at 125 (quoting *Bakalis*, 781 F. Supp. at 145). And here, this "plus" factor is absent from what appear to be "standard-form" leases containing mostly "boilerplate" provisions. *See County of San Mateo*, 960 F.3d at 602; *City of Baltimore*, 952 F.3d at 465.

A holding that "simple compliance" with the statutory and regulatory requirements embedded in these standard-form, boilerplate lease terms satisfies the "acting under" relationship would risk "expand[ing] the scope of the statute considerably" to include "state-court actions filed against private firms in many highly regulated industries." *See Watson*, 551 U.S. at 153 ("Neither language, nor history, nor purpose lead us to believe that Congress intended any such expansion."). Such a result is incompatible with the *Watson* Court's careful articulation of when a private firm can invoke federal officer removal. We thus agree with the Fourth and Ninth Circuits that "the willingness to lease federal property or mineral rights to a private entity for the entity's own commercial purposes, without more[,]' cannot be 'characterized as the type of assistance that is required' to show that the private entity is 'acting under' a federal officer." *County of San Mateo*, 960 F.3d at 603 (quoting *City of Baltimore*, 952 F.3d at 465).

Additionally, the OCS leases do not meet the "acting under" parameters because they do not call for production specially conformed to government use—the type of contract that "involve[s] an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior." *Watson*, 551 U.S. at 152. *See Sawyer*, 860 F.3d at 255 (stating that courts often find the "acting under" requirement satisfied "where a contractor seeks to remove a case involving injuries arising from equipment that it *manufactured for the government*"); *Mays*, 871 F.3d at 445 ("[A] government contractor entitled to removal would presumably be contractually required to follow the federal government's specifications in making products or providing services.").

In the Agent Orange cases, for example, the military provided precise specifications to private firms that "included use of the two active chemicals in unprecedented quantities for the specific purpose of stripping certain areas of Vietnam of their vegetation." *Winters*, 149 F.3d at 399; *see also Betzner*, 910 F.3d at 1015 (holding that Boeing "acted under the military's detailed and ongoing control" in "manufactur[ing] heavy bomber aircraft for the United States Air Force"); *Sawyer*, 860 F.3d at 253, 255 (holding that a contractor "acted under the Navy" in manufacturing boilers "to match highly detailed ship specifications and military specifications provided by the Navy"). Here, ExxonMobil is not tailoring its output to detailed federal formulations customized to meet pressing federal needs. Rather, it is leasing federal land to facilitate commercial production of a standardized, undifferentiated consumer product. *See Jewell*, 779 F.3d at 607 (determining DOI's decision "not to earmark the point of consumption of OCS-derived energy" was rational "[b]ecause oil and natural gas are fungible and traded on integrated global markets"). And even assuming federal authorities purchase some of the fuel extracted by ExxonMobil from the OCS—the same as other buyers on the global markets—supplying the government "with widely available commercial products or services" does not create the special relationship or assistance necessary to trigger "acting under" removal. *County of San Mateo*, 960 F.3d at 600. Clearly, then, this "arrangement is not the procurement relationship that in previous cases has allowed a private firm to enjoy the benefit of federal officer removal." *City of Walker v. Louisiana*, 877 F.3d 563, 571 (5th Cir. 2017).

Lastly, ExxonMobil cannot show the delegation of legal authority that the *Watson* Court hypothesized would be sufficient to conclude a private corporation was "acting

under" a government superior. No highlighted lease provision "establish[es] the type of formal delegation that might authorize [ExxonMobil] to remove the case." *Watson*, 551 U.S. at 156; *see County of San Mateo*, 960 F.3d at 602 ("The leases do not require that lessees act on behalf of the federal government."). And "neither Congress nor federal agencies normally delegate legal authority to private entities without saying that they are doing so." *Watson*, 551 U.S. at 157.

Our determination that ExxonMobil was not "acting under" federal officers in drilling pursuant to OCS leases is not altered by the OCS's status as a "vital national resource reserve held by the Federal Government for the public." 43 U.S.C. § 1332(3). While the leasing of OCS mining rights at least arguably implicates national energy needs, the facilitation of fossil fuel resource development by private companies is not a critical federal function in the same vein as law enforcement, *see Watson*, 551 U.S. at 151 (referencing a "private person" who "acts as an assistant to a federal official in helping that official to enforce federal law"); *Fidelitad, Inc. v. Insitu, Inc.*, 904 F.3d 1095, 1099 (9th Cir. 2018) (stating that the "paradigm" for a private party's § 1442 removal is a "person acting under the direction of a federal law enforcement officer"), military manufacturing, *see Papp v. Fore-Kast Sales Co.*, 842 F.3d 805, 813 (3d Cir. 2016) (labeling a government contract to manufacture military aircraft "an archetypal case" of a private firm acting under a federal officer), or wartime production, *see Isaacson*, 517 F.3d at 137 (reasoning that defendants "provide[d] a product that the Government was using during war" and that it otherwise "would have had to produce itself"). This conclusion is "a matter of statutory purpose," *Watson*, 551 U.S. at 152: As the Ninth Circuit reasoned in rejecting an identical § 1442 removal argument, by leasing government land for the

commercial extraction of fossil fuels, private oil and gas firms are not "engaged in an activity so closely related to the government's function" that they might face the "significant risk of state-court 'prejudice'" that animates federal officer removal. *County of San Mateo*, 960 F.3d at 603 (quoting *Watson*, 551 U.S at 152); *see Watson*, 551 U.S. at 152 ("When a company subject to a regulatory order (even a highly complex order) complies with the order, it does not ordinarily create a significant risk of state-court 'prejudice.'").[19]

While "private contractors performing tasks for the government are sometimes covered under section 1442," ExxonMobil "take[s] this idea too far." *Panther Brands, LLC v. Indy Racing Lg., LLC*, 827 F.3d 586, 590 (7th Cir. 2016). The OCS leases "represent arms-length commercial transactions whereby ExxonMobil agreed to certain terms (that are not at issue in this case) in exchange for the right to use government-owned land for [its] own commercial purposes." *Boulder County I*, 405 F. Supp. 3d at 977. Such mineral rights leases—which call for neither products nor services specially tailored to meet fundamental federal needs—do not fulfill the "acting under" el-

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[19] State-court claims against oil and gas firms operating under federal mineral leases also do not "disable federal officials from taking necessary action designed to enforce federal law." *Watson*, 551 U.S. at 152. As an example of this risk, *Watson* cited *Tennessee v. Davis*, 100 U.S. 257 (1879), where a federal revenue officer was charged with murder in state court for killing a man during a sanctioned raid on an illegal distillery. That type of hostile provincial proceeding, and others that might similarly "paralyze the operations of the [federal] government," *id.* at 263, is inapposite to the typical suit against a government contractor, which does not center on federal officers "enforcing a locally unpopular national law," *Wyoming v. Livingston*, 443 F.3d 1211, 1222 (10th Cir. 2006).

ement of federal officer removal. The district court therefore correctly rejected the attempt to remove this action under 28 U.S.C. § 1442(a)(1). Because ExxonMobil has not established it sufficiently assisted a federal superior's duties through its participation in the OCS leasing program, we decline to reach the additional § 1442(a)(1) removal requirements of a causal nexus and a colorable federal immunity defense. *See Riggs v. Airbus Helicopters, Inc.*, 939 F.3d 981, 990 n.9 (9th Cir. 2019).

IV. CONCLUSION

Title 28, U.S. Code § 1447(d) empowers us to review only the district court's decision regarding removal under 28 U.S.C. § 1442(a)(1). ExxonMobil failed to establish proper grounds for federal officer removal. We therefore **AFFIRM** the district court's remand order to the extent it rejects removal under § 1442(a)(1) and **DISMISS** the remainder of this appeal. The Counties' motions for partial dismissal and for summary affirmance are granted and dismissed as moot, respectively.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

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

v.

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

Filed: September 5, 2019

ORDER

MARTINEZ, United States District Judge.

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

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

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

I. BACKGROUND

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

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

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

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

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

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

II. LEGAL STANDARD

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

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

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

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

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

III. ANALYSIS

A. Federal Question Jurisdiction

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

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

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

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

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

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

1. Whether Federal Law Creates the Cause of Action

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

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

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

a. Relevant Case Law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at *3.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Defendants cite no controlling authority for the proposition that removal may be based on the existence of an unplead federal common law claim—much less based on one that is questionable and not settled under controlling law. Defendants rely on the Supreme Court's holding that the statutory grant of jurisdiction over cases arising under the laws of the United States "will support claims founded upon federal common law." *Nat'l Farmers Union Ins. Cos.*, 471 U.S. at 850–53. However, the plaintiffs

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

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

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

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

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

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

c. Ordinary Preemption

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

When ordinary preemption applies, the federal court "'lacks the power to do anything other than remand to the state court where the preemption issue can be addressed and resolved.'" *Colbert*, 485 S. Supp. 2d at 1243 (citation omitted). Ordinary preemption is thus a defense to the complaint, and does not render a state- law claim removable to federal court. *Hansen v. Harper Excavating, Inc.*, 641 F.3d 1216, 1221 (10th Cir. 2011); *see also Caterpillar*, 482 U.S. at 392–93 (under the well-pleaded complaint rule,

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

courts must ignore potential defenses such as preemption).

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

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

Because an ordinary preemption defense does not support remand, Defendants' federal common law argument could only prevail under the doctrine of complete preemption. Unlike ordinary preemption, complete preemption "is so 'extraordinary' that it 'converts an ordinary state law common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" *Caterpillar*, 482 U.S. at 393 (citation omitted).

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

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

The substantial question doctrine "captures the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues." *Grable*, 545 U.S. at 312. To invoke this branch of federal question jurisdiction, the Defendants must show that "a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn*, 568 U.S. at 258.

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

a. Necessarily Raised

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

ernment"; 26—the claims "are a collateral attack on federal regulatory oversight of energy and the environment").

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

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

The *CA I* and *City of New York* decisions do not support Defendants' argument that the foreign policy issues raise substantial questions of law. Defendants note, for example, that the *City of New York* court dismissed the claims there on the merits "for severely infring[ing] upon

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

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

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

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

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

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

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

Id. (internal citations omitted).

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

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

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

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

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

b. Substantiality

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

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

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

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

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

B. Jurisdiction Through Complete Preemption

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

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

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

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

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

1. Complete Preemption Based on Emissions Standards

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

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

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

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

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

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

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

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

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

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

Id. at *4.

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

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

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

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

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

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

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

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

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

2. Complete Preemption Based on the Foreign Affairs Doctrine

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

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

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

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

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

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

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

In *Baltimore*, the court held that the foreign affairs doctrine is "inapposite in the complete preemption context." 2019 WL 2436848, at *12. It explained that "complete preemption occurs only when Congress intended for federal law to provide the 'exclusive cause of action' for the claim asserted." *Id.* "That does not exist here." *Id.* "That is, there is no congressional intent regarding the preemptive force of the judicially-crafted foreign affairs doctrine, and the doctrine obviously does not supply any substitute causes of action." *Id.* The *State of Rhode Island* court also rejected complete preemption under the foreign affairs doctrine, relying on *Baltimore* and finding the argument to be "without a plausible legal basis." 2019 WL 3282007, at *4 n. 3.

3. Complete Preemption Under Federal Common Law

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

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

C. Federal Enclave Jurisdiction

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

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

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

occur there such that there is no federal enclave jurisdiction.

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

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

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

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

D. Federal Officer Jurisdiction

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

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

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

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

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

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

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

Id. (internal citations omitted).

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

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

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

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

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

Similarly, Defendants have not shown that a federal officer instructed them how much fossil fuel to sell or to conceal or misrepresent the dangers of its use, as alleged in this case. They also have not shown that federal officer directed them to market fossil fuels at levels they knew would allegedly cause harm to the environment. At most, the leases appear to represent arms-length commercial transactions whereby ExxonMobil agreed to certain terms (that are not in issue in this case) in exchange for the right to use government-owned land for their own commercial purposes.

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

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

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

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

Baltimore also counsels against finding federal jurisdiction under the federal officer removal statute. It found that the defendants failed plausibly to show that the charged conduct was carried out "for or relating to" the alleged official authority, as they did not show "that a federal officer controlled their total production and sales of fossil fuels, nor is there any indication that the federal government directed them to conceal the hazards of fossil fuels or prohibited them from providing warnings to consumers." *Baltimore*, 2019 WL 2436848, at *17. The court concluded, "[c]ase law makes clear that this attenuated connection between the wide array of conduct for which defendants have been sued and the asserted official authority is not enough to support removal under § 1442(a)." *Id.*; *see also State of Rhode Island*, 2019 WL 3282007, at

*5 (finding no causal connection between any actions Defendants took while "acting under" federal officers or agencies, and thus no grounds for federal-officer removal); *San Mateo*, 294 F. Supp. 3d at 939 (defendants failed to show a "causal nexus" between the work performed under federal direction and the plaintiffs' claims for injuries stemming from climate change because the plaintiffs' claims were "based on a wider range of conduct").

E. Jurisdiction Under the Outer Continental Shelf Lands Act

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

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

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

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

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

As the *Baltimore* court found, "[e]ven under a 'broad' reading of the OCSLA jurisdictional grant endorsed by the Fifth Circuit [in *Deepwater Horizon*], defendants fail to demonstrate that OCSLA jurisdiction exists." 2019 WL 2436848, at *16. "Defendants were not sued merely for producing fossil fuel products, let alone for merely producing them on the OCS." *Id*. "Rather, the City's claims are based on a broad array of conduct, including defendants' failure to warn consumers and the public of the known dangers associated with fossil fuel products, all of which occurred globally." *Id*. The defendants there offered "no basis to enable th[e] Court to conclude that the City's claims for injuries stemming from climate change would not have occurred but for defendants' extraction activities on the OCS." *Id.*; *see also San Mateo*, 294 F. Supp. 3d at 938–39 ("Removal under OCSLA was not warranted because even if some of the activities that caused the alleged injuries stemmed from operations on the [OCS], the defendants have not shown that the plaintiffs' causes of action would not have accrued *but for* the defendants' activities on the shelf" (emphasis in original)).

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

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

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

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

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

F. Jurisdiction as the Claims Relate to Bankruptcy Proceedings

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

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

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

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

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

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

As discussed in *Baltimore*, "Defendants fail to demonstrate that there is a 'close nexus' between this action and any bankruptcy proceedings . . . at most, defendants have only established that some day a question *might* arise as to whether a previous bankruptcy discharge precludes the enforcement of a portion of the judgment in this case against" the defendant. 2019 WL 2436848, at *19 (emphasis in original). "This remote connection does not bring this case within the Court's "related to" jurisdiction under 28 U.S.C. § 1334(b). *Id.*

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

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

IV. CONCLUSION

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

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

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

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

v.

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

Filed: October 7, 2019

ORDER

MARTINEZ, United States District Judge.

This matter is before the Court on Defendants' Motion for a Stay of the Remand Order Pending Appeal filed September 13, 2019 (ECF No. 75). Defendants seek to stay this Court's Order of September 5, 2019 (ECF No. 69) that granted Plaintiffs' Motion to Remand and ordered that the case be remanded to Boulder County District Court, Colorado. Plaintiffs filed a response to the motion on September 19, 2019 (ECF No. 77), and Defendants filed a Reply on September 23, 2019 (ECF No. 78). For

the reasons explained below, Defendants' Motion for a Stay of the Remand Order Pending Appeal is denied.

I. BACKGROUND

Plaintiffs filed suit in Boulder County asserting state law claims of public nuisance, private nuisance, trespass, unjust enrichment, violation of the Colorado Consumer Protection Act, and civil conspiracy. The claims arise from Plaintiffs' contention that they face substantial and rising costs to protect people and property within their jurisdictions from the dangers of climate alteration. Plaintiffs allege that Defendants substantially contributed to climate alteration through selling fossil fuels and promoting their unchecked use while concealing and misrepresenting their dangers. Plaintiffs seek monetary damages from Defendants, requiring them to pay their *pro rata* share of the costs of abating the impacts on climate change they have allegedly caused through their tortious conduct.

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

The Court recognized in its Order granting Plaintiffs' Motion to Remand that Plaintiffs' claims implicate important issues involving climate change caused in part by the burning of fossil fuels. (ECF No. 69 at 55.) It found, however, that Defendants did not meet their burden of showing that federal jurisdiction exists on the six grounds upon which they based their removal: (1) federal question jurisdiction—that Plaintiffs' claims arise under federal common law, and that this action necessarily and unavoidably raises disputed and substantial federal issues that give rise to jurisdiction under *Grable & Sons Metal Products, Inc.* v. *Darue Eng'g & Mfg.*, 545 U.S. 308 (2005); (2) complete preemption; (3) federal enclave jurisdiction; (4)

jurisdiction because the allegations arise from action taken at the direction of federal officers; (5) jurisdiction under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(b); and (6) jurisdiction under 28 U.S.C. § 1452(a) because the claims are related to bankruptcy proceedings.

Defendants assert that the Court should stay its remand order pending an appeal to the United States Court of Appeals for the Tenth Circuit. They note that courts have disagreed about whether climate change tort claims necessarily arise under federal common law, permitting removal to federal court. They further note that after the filing of the notice of appeal in this case, cases presenting this disputed question are now pending in four federal courts of appeals.

Defendants argue in support of their motion that the conflict of authority on this complex legal question and the state of climate change litigation nationwide justify the entry of a stay of this Court's remand order pending the appeal. Such a stay will protect Defendants' appellate rights while providing the Tenth Circuit with an opportunity to weigh in on issues that other federal courts of appeals are considering. Defendants argue that the lack of a stay, by contrast, will irreparably harm them because they will be subject to duplicative proceedings in federal and state court, and could effectively lose their right to appeal. Finally, Defendants argue that given the nature of Plaintiffs' claims related to climate change and the public interests involved, the balance of harms tilts decidedly in Defendants' favor.

II. ANALYSIS

A. The Jurisdictional Grounds Subject to Appellate Review

"Generally speaking, federal courts of appeals may not review district court remand orders." *BP Am., Inc. v. Oklahoma ex rel. Edmondson*, 613 F.3d 1029, 1032 (10th Cir. 2010). This is mandated by 28 U.S.C. § 1447(d), which states that "[a]n order remanding a case to the State court from which is was removed is not reviewable on appeal or otherwise." Section 1447(d) "generally prohibits appellate review of remand orders based on a district court's lack of subject matter jurisdiction," as here. *City and Council of Baltimore v. BP P.L.C.* [*"Baltimore"*], 2019 WL 3464667, at *3 (D. Md. July 31, 2019) (citing *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 230 (2007)). Congress's purpose in limiting appellate review of remand orders in § 1447(d) "is to avoid 'prolonged litigation on threshold nonmerits questions.'" *Id.* (quoting *Powerex*, 551 U.S. at 237.) As the *Baltimore* court noted, "[t]his rule is strict; it bars review 'even if the remand order is manifestly, inarguably erroneous,' . . . and even if the 'erroneous remand[ ] has undesirable consequences' for federal interests." *Id.* (quoting *Powerex Corp.*, 551 U.S. at 237; *In Re Norfolk S. Ry. Co.*, 756 F.3d 282, 287 (4th Cir. 2014)).

Based on the foregoing, appellate review would be foreclosed as to almost every basis under which Defendants relied in their Notice of Removal based on the Court's finding of lack of subject matter jurisdiction. Section 1447(d) does, however, contain exceptions to the bar of appellate review for claims brought under 28 U.S.C. §§ 1442 and 1443. Here, since Defendants asserted federal officer jurisdiction under § 1442, an appeal of the remand order is appropriate on that ground. Defendants argue that since an appeal is appropriate as to federal officer

jurisdiction, the United States Court of Appeals of the Tenth Circuit may review the entire order and all grounds for removal addressed there. Plaintiffs argue, on the other hand, that the remaining grounds for removal other than federal officer jurisdiction are plainly unreviewable pursuant to § 1447(d).

There is a split of authority on that issue, and the Tenth Circuit has not definitively decided the issue. Eight Circuits have found, consistent with Plaintiffs' argument, that appellate jurisdiction is limited to the portion of the remand order tied to an express exception in § 1447(d).[1] *Accord Baltimore*, 2019 WL 3464667, at *4 (noting majority rule in holding that "only the issue of federal officer removal would be subject to review on defendants' appeal of the remand"). The Tenth Circuit also found to this effect in an unpublished decision. *Sanchez v. Onuska*, 1993 WL 307897, at *1 (10th Cir. 1993) ("the portion of the remand order in this case concerning the § 1441(c) removal is not reviewable and must be dismissed for lack of jurisdiction"). Only the Sixth and Seventh Circuits have found that the entire order is reviewable in that instance.[2] This

[1] *See City of Walker v. Louisiana*, 877 F.3d 563, 567 n.2 (5th Cir. 2017); *Jacks v. Meridian Res. Co., LLC,* 701 F.3d 1224, 1229 (8th Cir. 2012); *Alabama v. Conley,* 245 F.3d 1292, 1293 n.1 (11th Cir. 2001); *State Farm Mutual Auto. Ins. Co. v. Baasch*, 644 F.2d 94, 96, 97 (2d Cir. 1981); *Davis v. Glanton,* 107 F.3d 1044, 1047 (3d Cir. 1997); *Noel v. McCain*, 538 F.2d 633, 635 (4th Cir. 1976); *Appalachian Volunteers, Inc. v. Clark*, 432 F.2d 530, 534 (6th Cir. 1970); *Patel v. Del Taco Inc,* 446 F.3d 996, 998 (9th Cir. 2006).

[2] *See Lu Junhong v. Boeing Co.*, 792 F.3d 805, 813 (7th Cir. 2015); *Mays* v. *City of Flint*, 871 F.3d 437, 442 (6th Cir. 2017). The Sixth Circuit in *Mays* did not, however, acknowledge a previous Sixth Circuit decision in *Appalachian Volunteers, Inc. v. Clark*, 432 F.3d 530, 534 (6th Cir. 1970), that followed the majority rule, and the parties conceded in *Mays* that the entire remand order was reviewable. Another decision cited by Defendants, *Decatur Hosp. Auth. v. Aetna*

Court finds it likely that the Tenth Circuit will follow the weight of authority and find that the only ground subject to appeal is federal officer jurisdiction under § 1442, consistent with its unpublished opinion in *Sanchez*.

Defendants rely, however, on the Tenth Circuit's decision in *Coffey v. Freeport McMoran Copper & Gold*, 581 F.3d 1240, 1247 (10th Cir. 2009), arguing it "strongly suggests" the Tenth Circuit would review the Court's "entire order" (ECF No. 75 at 6). They also rely on the Supreme Court's decision in decision in *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996). The Court finds these cases unpersuasive.

Unlike *Sanchez*, which turned on the Tenth Circuit's reading of Section 1447(d), *Coffey* analyzed the language in the Class Action Fairness Act ("CAFA"). CAFA provides that "notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand." 581 F.3d at 1247 (quoting 28 U.S.C. § 1453(c)(1)). *Coffey* observed that § 1453(c)(1) contained "no language limiting the court's consideration solely to the CAFA issues in the remand order," and expressly authorized appellate review. *Id.* Here, by contrast, the plain language of Section 1447(d) makes remand orders "not reviewable," with two narrow exceptions.

Health, Inc., 854 F.3d 292 (5th Cir. 2017), does not necessarily support their argument. *Decatur* held only that a remand based on a *procedural defect* (timeliness) was reviewable in its entirety where it included a Section 1442 argument. *Id.* at 296. *Decatur* acknowledged that the court "cannot review a remand order (or a portion thereof) expressly based on a Section 1447(c) ground when the basis for removal is a statute that, like Section 1441, Section 1447(d) does not specifically exempt from Section 1447(c)'s bar."

Further, even though the Tenth Circuit in *Coffey* found it had discretion to review the whole order, it declined to do so, reasoning that since there would have been no appellate jurisdiction over the remand order absent the CAFA issue, review of the non-CAFA issue would "not fit within the reasons behind §1453(c)(2)," *i.e.* to "develop a body of appellate law interpreting [CAFA] without unduly delaying the litigation of class actions." *Id. Accord Parson v. Johnson & Johnson*, 749 F.3d 879, 892-93 (10th Cir. 2014) (declining to exercise discretion to review non-CAFA basis of remand order in part because "absent our jurisdiction over the CAFA remand order, there would have been no freestanding appellate jurisdiction to review the district court's ruling on diversity jurisdiction"). Thus, *Coffey* suggests the Tenth Circuit would be unlikely to review aspects of a remand order that would otherwise be unreviewable.

In *Yamaha*, the Supreme Court addressed the question whether, in an interlocutory appeal under 28 U.S.C. § 1292(b), a court of appeals could review only the particular question certified by the district court, or could instead address any issue encompassed in the district court's certified order. The Court concluded that a court of appeals may address "any issue fairly included within the certified order," and not only the particular question certified. *Yamaha*, 516 U.S. at 205. It observed that "the text of § 1292(b) indicates" that "appellate jurisdiction applies to the *order* certified to the court of appeals, and is not tied to the particular question formulated by the district court." *Id.* It is questionable whether this analysis would apply to § 1447(d), as § 1292(b) expressly authorizes appellate review of orders certified by the district court, while § 1447(d) explicitly bars review of any kind, with only two specified, narrow exceptions.

Also, as the Tenth Circuit noted in *Coffey*, *Yamaha*'s holding that appellate jurisdiction extended to the entire order certified for interlocutory appeal (rather than the particular issue certified) was discretionary. *Coffey*, 581 F.3d at 1247 ("the appellate court *may* address any issue fairly included within the certified order") (quoting *Yamaha,* 516 U.S. at 205) (emphasis added). So even if Defendants are correct that *Yamaha* authorizes the Tenth Circuit to review issues beyond the federal officer statute, *Yamaha* does not require such consideration. And *Coffey* suggests that the Tenth Circuit is unlikely to go beyond review of the issue that gives it jurisdiction. That suggestion seems particularly apt in this case given the fact that there are so many substantive arguments for jurisdiction which would need to be addressed. Unlike the situation in *Junhong*, where 'the marginal delay from adding an extra issue to case where the time for briefing, argument, and decision has already been accepted" would be small, 792 F.3d at 813, the time needed to address the numerous additional jurisdictional issues presented in this case would be significant.

B. Whether a Stay of the Remand Order is Appropriate

The power to grant a stay pending review of an appeal has been described as "part of a court's 'traditional equipment for the administrative of justice.'" *Nken v. Holder*, 556 U.S. 418, 427 (2009) (citation omitted). It is "'firmly imbedded in our judicial system,' . . . and 'a power as old as the judicial system.'" *Id.* (citation omitted). Similarly, the power to "hold an order in abeyance" is "inherent", and allows a court "to act responsibly." *Id*. at 426–27.

On the other hand, a court "may not resolve a conflict between considered review and effective relief by reflexively holding a final order in abeyance pending review."

Nken, 556 U.S. at 427. "A stay is an 'intrusion into the ordinary processes of administrative and judicial review' . . . and accordingly 'is not a matter of right, even if irreparable injury might otherwise result. . . .'" *Id.* (internal and external citations omitted). "The parties and the public, while entitled to both careful review and a meaningful decision, are also generally entitled to the prompt execution of orders. . . ." *Id.*

A stay is ultimately "'an exercise of judicial discretion,' and '[t]he propriety of its issue is dependent upon the circumstances of the particular case.'" *Nken*, 556 U.S. at 433 (quoting *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672–73 (1926)). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.*

A court must consider four factors in determining whether a stay is warranted under the standard test: "'(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicable will be irreparably injured absent a stay; (3) whether issuance of the say will substantially injure the other parties interested in the proceeding; and (4) where the public risk lies.'" *Nken*, 556 U.S. at 434 (quoting *Hilton v. Braunskill*, 481 U.S. at 770 (1987)). The Supreme Court noted in *Nken* that there is substantial overlap between these and the factors governing preliminary injunctions "because similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined." *Id.*; *see also Warner v. Gross*, 776 F.3d 721, 728 (10th Cir. 2015).

The first two factors are the most critical. *Nken*, 556 U.S. at 434. Defendants argue that "[i]n cases where the

appealing party demonstrates that 'the three 'harm' factors tip decidedly in its factor,' it need only show that the appeal will raise issues 'so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation.'" (ECF No. 75 at 3 (quoting *F.T.C. v. Mainstream Mktg. Servs., Inc.* ("*Mainstream II*"), 345 F.3d 850, 852 (10th Cir. 2003) (internal quotation marks omitted)).) The Tenth Circuit has recently clarified in connection with the appeal of a preliminary injunction that "any modified test which relaxes one of the prongs" and "thus deviates from the standard test is impermissible." *Diné Citizens Against Ruining Our Env't v. Jewell,* 839 F.3d 1276, 1282 (10th Cir. 2016). This holding has been interpreted to also apply to a stay pending an appeal, given the substantially same standards governing grants of preliminary injunctions and stays pending appeal. *Grogan v. Renfrow*, 2019 WL 2764404, at *4 (N.D. Okla. July 2, 2019); *Pueblo of Pojoaque v. New Mexico*, 233 F. Supp. 3d 1021, 1113–15 (D.N.M. 2017).

1. Likelihood of Success on the Merits

The Court turns to the first factor—whether Defendants have made a strong showing of likelihood of success on the merits. To satisfy this standard it is "not enough that the chance of success on the merits be '"better than negligible.'" *Nken*, 556 U.S. at 434 (citation omitted). The Court finds that Defendants have not made such a showing as to federal officer jurisdiction under 28 U.S.C. § 1442.

While Defendants argue that this case raises "complex and novel questions regarding jurisdiction" that have "divided multiple district courts" (ECF No. 75 at 7), this is not true as to the issue of federal officer removal jurisdiction. Defendants have cited no case that has accepted this

argument in the context of climate change claims against companies, such as Defendants, that market and sell fossil fuels. Moreover, in the cases cited by Defendants, federal control was obvious for substantial periods of time, and the defendants in those cases established the necessary causal nexus between a significant period of federal control and the claims that is wholly absent here. The cases demonstrate the high degree of federal control needed to provide jurisdiction under this statute. *See, e.g., Fina Oil & Chem. Co.,* 995 F. Supp. 705, 712 (E.D. Tex. 1998); *Lalonde v. Delta Field Erection*, 1998 U.S. Dist. LEXIS 23946, at *29-30, 20 (M.D. La. Aug. 5, 1998). Defendants' essentially "attempt to re-hash the same argument(s)" as to why they believe they have a substantial basis for federal officer jurisdiction, which "does not demonstrate a likelihood of success on appeal." *Mainstream Mktg. Servs., Inc. v. F.T.C.* ("*Mainstream I*"), 284 F. Supp. 2d 1266, 1275 (D. Colo. 2003).

It is a closer question as to whether Defendants have demonstrated a likelihood of success if the Tenth Circuit were to review the other bases for federal jurisdiction, particularly in regard to the issue of whether Plaintiffs' claims arise under federal common law. This is the one jurisdictional ground that federal district courts are divided on, with two courts finding that jurisdiction exists on this basis and three courts finding that jurisdiction does not. *Compare California* v. *BP p.l.c.* ("*CA I*"), 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018); *City of Oakland v. BP p.l.c. ("CA II*), 325 F. Supp. 3d 1017 (N.D. Cal. June 25, 2018); *and City of New York v. BP p.l.c.*, 325 F. Supp. 3d 466 (S.D.N.Y. July 19, 2018); *with State of Rhode Island v. Chevron Corp.*, 2019 WL 3282007 (D. R.I. July 22, 2019); *Mayor and City Council of Baltimore v. BP P.L.C.* ("*Baltimore*"), 2019 WL 2436848 (D. Md. June 10, 2019), *appeal docketed*, No. 19-1644 (4th Cir. June 18, 2019); *and Cnty.*

of San Mateo v. Chevron Corp., 294 F. Supp. 3d 934 (N.D. Cal. 2018), *appeal docketed*, No. 18-15499 (9th Cir. May 27, 2018).

Given this split of authority, Defendants may have shown that this issue is so "'serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation.'" *Mainstream II*, 345 F.3d at 852. However, the Court finds that Defendants have not shown a strong likelihood of success on the merits on this issue, which is the applicable test. *Nken*, 556 U.S. at 434. The United States District Court for the Northern District of California that decided *CA I* and *CA II* (and which the *City of Oakland* court relied on) cited *American Electric Power Co., Inc. v. Connecticut,* 564 U.S. 410 (2011), and *Kivalina v. Exxon Mobil Corp.,* 696 F.3d 849 (9th Cir. 2012), in support of its finding of federal question jurisdiction. However, the plaintiffs in those cases expressly invoked federal claims, unlike this case which involves only state law claims asserted in state court, and those cases appear to be inapplicable. Moreover, as noted in this Court's Order of Remand, *CA I*, *CA II*, and *City of Oakland* did not address the well pleaded complaint rule, under which this Court found that federal jurisdiction did not exist. Defendants have not made any new argument that suggests they have a strong likelihood of success on the merits on this issue. Defendants also do not make any meaningful showing that there is federal question jurisdiction under *Grable,* or on any of the other grounds upon which they assert federal jurisdiction, and no cases have found jurisdiction under such arguments.

2. Irreparable Injury

"To constitute irreparable harm, an injury must be certain, great, actual 'and not theoretical.'" *Heideman v.*

S. Salt Lake City, 348 F.3d 1182, 1189 (10th Cir. 2003) (citation omitted). "Irreparable harm is not harm that is merely 'serious or substantial.'" *Id*. (citation omitted). "[S]imply showing some 'possibility of irreparable injury'" also fails to show irreparable injury. *Nken*, 556 U.S. at 434–35 (citation omitted).

The Court finds that Defendants have failed to establish this element. Defendants first argue that they will suffer irreparable harm if a stay is not granted because they will be forced to litigate this same case before the Tenth Circuit and in Colorado state court, and could face burdensome discovery in state court. The Court rejects this argument. The Supreme Court has made clear that "injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough" to show irreparable harm. *Sampson v. Murray,* 415 U.S. 61, 90 (1974); *see also Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974) ("[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury"); *Washington v. Monsanto Co.*, 2018 U.S. Dist. LEXIS 48501 (W.D. Wash. Mar. 23, 2018) (finding in a similar case where a private corporation was arguing removability under the federal officer statute that there was no irreparable injury even though "Defendants will incur some additional costs of pursuing an appeal without a stay").

Defendants also argue that state court proceedings could be potentially duplicative, mooted or otherwise wasteful if the Tenth Circuit rules in their favor. Similarly, they assert that the appeal could become moot if the state court enters judgment before the appeal is resolved, meaning that they would lose their appeal rights. Again, these arguments are "simply too speculative to rise to the level of 'irreparable injury.'" *Phoenix Glob. Ventures, Inc.*

v. Phoenix Hotel Assocs., Ltd., 2004 WL 24079, at *8 (S.D.N.Y. Nov. 23, 2004) (quoting *Jayaraj v. Scappini*, 66 F.3d 36, 39 (2d Cir. 1995)); *see also Baltimore*, 2019 WL 3464667, at *5; *Hall v. Dixon,* 2011 WL 767173, at *8-9 (S.D. Tex. Feb. 25, 2011).

Similarly, Defendants' argument that discovery could be unduly burdensome in state court is speculative. Moreover, Defendants would be subject to similar discovery if they were proceeding in federal court, and "the interim proceedings in state court may well advance the resolution of the case in federal court." *Baltimore*, 2019 WL 3464667, at *6; *see also Cesca Therapeutics, Inc. v. SynGen Inc.,* 2017 WL 1174062, at *4–5 (E.D. Cal. Mar. 30, 2017) (finding that an argument as to "the loss of financial resources and time spent on discovery during the pendency" of the appeal "is not convincing", and noting that where, as here, a case is "in its earliest stages," "the risk of harm" to Defendants "if discovery proceeds is low").

Nor would state court rulings present "issues of comity." (*See* ECF No. 75 at 9.) It is not unusual for cases to be removed after substantial state litigation. 28 U.S.C. § 1450 recognizes this, and provides that "[a]ll injunctions, orders and other proceedings" in state court prior to removal remain in force unless "dissolved or modified" by the district court.

Finally, Defendants argue irreparable injury because "it is not entirely clear 'how procedurally, [this case] would make [its] way from state court back to federal court and whether [its] doing so would offend the Anti-[I]njunction Act, 28 U.S.C. § 2283, or the notions of comity underpinning it.'" (ECF No. 75 at 10 (quoting *Barlow v. Colgate Palmolive Co*, 772 F.3d 1001, 1014 n. 2 (4th Cir. 2014) (Wynn J., concurring in part and dissenting in

part)).) This argument is rejected. Justice Wynn's partial concurring opinion made no finding that returning from the state court to federal court would actually offend the Anti-Injunction Act or the notions of comity; he only noted that the majority opinion had not addressed the issue or the procedure for how the case would make its way back to state court. *Barlow*, 772 F.3d at 1014. It is this Court's view that federal courts are fully capable of ensuring that the proceeding in state court returns to federal court if a remand order is vacated, including by enjoining state proceedings if the state court failed to give effect to the decision reversing remand. *See Bryan v. BellSouth Communcs., Inc.,* 492 F.3d 231, 240 (4th Cir. 2007); *In re Meyerland Co.,* 910 F.2d 1257, 1263 (5th Cir. 1990).[3]

3. *Whether Plaintiffs Would Be Substantially Injured if a Stay is Entered and the Public Risk*

The last two factors merge and are considered together when the party opposing a stay is a governmental body, as here. *See Nken*, 556 U.S. at 435. Defendants argue that a stay will not permanently deprive Plaintiffs of access to state court, it will only delay the vindication of their claim. They also argue that the Complaint demonstrates the lack of harm, as a substantial portion of the damages Plaintiffs seek stems from purported costs that they have not yet incurred and may not incur for decades.

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[3] The Tenth Circuit's decision in *Chandler v. O'Bryan,* 445 F.2d 1045 (10th Cir. 1971), cited by Defendants, does not say otherwise. It held only that the Tenth Circuit could not enjoin a case that had been remanded to state court in a prior federal proceeding. *Id*. at 1057–58. Similarly, the First Circuit's decision in *FDIC* v. *Santiago Plaza,* 598 F.2d 634, 636 (1st Cir. 1979), is inapposite, as it held only that a district court cannot enjoin a state court proceeding once it has remanded the case to state court as it lacks jurisdiction.

Defendants assert that this does not counsel against a stay. Defendants also assert that Plaintiffs "'would actually be served by granting a stay,' because they would not 'incur additional expenses from simultaneous litigation before a definitive ruling on appeal is issued.'" (ECF No. 75 at 11 (quoting *Raskas v. Johnson & Johnson*, 2013 WL 1818133, at *2 (E.D. Mo. Apr. 29, 2013)).)

The Court disagrees, finding that the last two factors also weigh against a stay. As the District of Maryland found in the *Baltimore* case, "[t]his case is in its earliest stages and a stay pending appeal would further delay litigation on the merits" of the claims. 2019 WL 3464667, at *6. Plaintiffs' claims in this case were filed over a year ago. The Court agrees with *Baltimore*'s finding that "[t]his favors denial of a stay, particularly given the seriousness of the [Plaintiffs'] allegations and the amount of damages at stake." *Id.* Moreover, the public interest is furthered by the timely conclusion of legal disputes, *Desktop Images v. Ames,* 930 F. Supp. 1450, 1452 (D. Colo. 1996), and not by the interference with state court proceedings, *Maui Land & Pineapple Co. v. Occidental Chem. Corp.,* 24 F. Supp. 2d 1083, 1087 (D. Haw. 1998).

III. CONCLUSION

Based on the foregoing, Defendant's request for a stay of the remand order is denied. Defendants have not shown a likelihood of success or irreparable injury, or that the other factors weigh in favor of a stay. Accordingly, the Court **ORDERS** as follows:

1. Defendant's Motion for Stay of Remand Pending Appeal filed September 13, 2019 (ECF No. 75) is **DENIED**; and

2. The Clerk shall **REMAND** this case to Boulder County District Court, and shall terminate this action.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 19-1330

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

v.

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

Filed: October 17, 2019

ORDER

Before: LUCERO and McHUGH, Circuit Judges.

Appellants request an emergency stay of the district court's remand order pending this court's determination of their appeal. In deciding whether to grant a stay pending appeal, this court considers, "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the

stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (internal quotation marks omitted). The decision whether to grant a stay involves "an exercise of judicial discretion," *id.* at 433 (internal quotation marks omitted), and "[t]he party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion," *id.* at 433-34.

Upon consideration, we conclude that Appellants have not made the necessary showing to warrant entry of a stay pending appeal. Accordingly, the motion for stay is denied. The deadline for Appellees to file a response to the motion is vacated, and Appellants' motion for clarification is denied as moot.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk