Nos. 18-15499, 18-15502, 18-15503, 18-16376

IN THE

United States Court of Appeals for the Ninth Circuit

COUNTY OF SAN MATEO, Plaintiff–Appellee, v. CHEVRON CORPORATION, *et al.*, Defendants–Appellants.	Appeal No. 18-15499 No. 17-cv-4929-VC N.D. Cal., San Francisco Hon. Vince Chhabria presiding
CITY OF IMPERIAL BEACH, Plaintiff–Appellee, v. CHEVRON CORPORATION, *et al.*, Defendants–Appellants.	Appeal No. 18-15502 No. 17-cv-4934-VC N.D. Cal., San Francisco Hon. Vince Chhabria presiding
COUNTY OF MARIN, Plaintiff–Appellee, v. CHEVRON CORPORATION, *et al.*, Defendants–Appellants	Appeal No. 18-15503 No. 17-cv-4935-VC N.D. Cal., San Francisco Hon. Vince Chhabria presiding
COUNTY OF SANTA CRUZ, *et al.*, Plaintiff–Appellees, v. CHEVRON CORPORATION, *et al.*, Defendants–Appellants	Appeal No. 18-16376 No. 18-cv-00450-VC; 18-cv-00458-VC; 118-cv-00732-VC N.D. Cal., San Francisco Hon. Vince Chhabria presiding

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INTRODUCTION

Plaintiffs, six California counties and municipalities, filed a series of claims against Defendant fossil-fuel companies, in California state court under California statutes and common law, seeking to hold Defendants liable for the harms they caused to Plaintiffs and their residents—including by their production and wrongful promotion of fossil-fuel products that Defendants have long known would create greenhouse gas pollution with devasting consequences to coastal communities in California and elsewhere, while deliberately concealing that knowledge and misrepresenting the effects of their conduct. Contrary to Defendants' relentless assertions, Plaintiffs' causes of action do not seek to "reshape the nation's longstanding environmental, economic, energy, and foreign policies," Appellants' Brief ("Br.") at 1, or anything of the sort. Plaintiffs have instead asserted well-established California law causes of action for concrete injuries to infrastructure and public safety within their borders, sounding in public and private nuisance, product liability, negligence, and trespass.

After Defendants removed the public entities' lawsuits to the U.S. District Court for the Northern District of California on a variety of jurisdictional theories, the district court (Chhabria, J.) granted Plaintiffs' motion to remand, concluding that none of Plaintiffs' causes of action fall within any of the "small handful of small boxes" that create removal jurisdiction over state law claims. ER7–8. Defendants

now reassert the identical arguments they asserted unsuccessfully below, which, to the extent they may be considered on appeal at all, should be rejected in their entirety.

Plaintiffs previously demonstrated, in their June 6, 2018, Motion for Partial Dismissal of this appeal (Dkt. 41), that this Court's appellate jurisdiction is limited to considering a single issue: federal-officer jurisdiction under 28 U.S.C. § 1442. That is the only ground for removal presented that Congress, in the federal removal statute, 28 U.S.C. § 1446(d), authorized appellate courts to consider on an appeal from a remand order.

Binding circuit precedent holds that when a defendant asserts multiple grounds for removal in addition to federal-officer jurisdiction, review of an order remanding the case to state court is limited to considering the federal-officer argument. *See Patel v. Del Taco, Inc.*, 446 F.3d 996, 998 (9th Cir. 2006). Here, the district court correctly rejected Defendants' "dubious assertion of federal officer removal" because Defendants "have not shown a 'causal nexus' between [any] work performed under federal direction and the plaintiffs' claims, which are based on a wider range of conduct" than the commodity fuel sales to the federal government and standard contractual relationships on which Defendants rely. ER7–8 (citing *Cabalce v. Thomas E. Blanchard & Assocs., Inc.*, 797 F.3d 720, 727 (9th Cir. 2015)).

If the Court concludes it has jurisdiction to consider Defendants' other grounds for removal despite the limits on appealability of remand orders imposed by Congress, it should reject those grounds and affirm. Plaintiffs' claims do not arise under federal common law for the simple reason that they were pleaded under state law, and Defendants' vociferous argument that Plaintiffs' allegations are actually "governed by" federal common law, *see, e.g.*, Br. 1, is simply an assertion of federal preemption that is insufficient to support removal. Under the century-old well-pleaded complaint rule, "a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case." *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 14 (1983). Defendants' assertion that federal common law "governs" cannot create removal jurisdiction over Plaintiffs' claims.

Even if Defendants' preemption argument were not precluded by the well-pleaded complaint rule, it would still fail. As the district court recognized, any federal common law that might have been available to "govern" Plaintiffs' claims in these cases was displaced by Congress's enactment of the Clean Air Act ("CAA" or "the Act"), 42 U.S.C. §§ 7401, *et seq.* *See* ER3–4 (citing *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011) ("*AEP*")). As the district court further

recognized, the Supreme Court in *AEP* made clear that "once federal common law is displaced by a federal statute, there is no longer a possibility that state law claims could be superseded by the previously-operative federal common law." ER4.

Defendants' other grounds for removal are similarly meritless. Plaintiffs' claims are not completely preempted by the Clean Air Act; no court anywhere has held that the Clean Air Act completely preempts any state law claims, and the text and structure of the Act confirm that it does not. None of Plaintiffs' well-pleaded state law claims present "embedded" federal issues, because none of them require proof of any federal law issue as a necessary element. *See Grable & Sons Metal Prods., Inc. v. Darue Eng. & Mf'g*, 545 U.S. 308, 313–14 (2005); *Franchise Tax Bd.*, 463 U.S. at 13. Plaintiffs' claims also do not arise out of or in connection to activity on the Outer Continental Shelf ("OCS") within the jurisdictional grant of the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1349(b); nor is a federal enclave the "locus" in which any of Plaintiffs' claims arose, *Alvares v. Erickson*, 514 F.2d 156, 160 (9th Cir. 1975). None of Plaintiffs' claims relate to any past or present bankruptcy proceeding that would them removable under 28 U.S.C. §§ 1452(a) and 1334(b). Finally, none of Plaintiffs' claims are within the federal courts' admiralty jurisdiction under 28 U.S.C. § 1333. The district court rightly rejected every one of these arguments, ER5–7, and the Court should affirm.

JURISDICTIONAL STATEMENT

For the reasons set forth in Plaintiffs' Motion for Partial Dismissal and herein, 28 U.S.C. § 1447(d) limits this Court's jurisdiction to addressing the propriety of removal of this action pursuant to 28 U.S.C. § 1442 (federal-officer removal) only. *See* Plaintiff-Appellees' Motion for Partial Dismissal, Case No. 18-5499, Dkt. 41 (June 6, 2018); *infra* Argument Part I.

An addendum of pertinent statutory provisions is included at the end of the brief.

STATEMENT OF THE CASES

I. Filing of State Law Claims in State Court

Plaintiff public entities filed six separate lawsuits in California state court, asserting state-law claims against Defendants, major corporate members of the fossil fuel industry. Plaintiffs alleged that Defendants have known for decades about the direct link between fossil fuel use and global warming, yet engaged in a coordinated effort to conceal that knowledge from the general public and local governments; to discredit the growing body of scientific evidence documenting the potentially catastrophic impacts of fossil-fuel-triggered climate change, particularly on coastal communities whose infrastructures are most susceptible to injury from rising sea levels; and to promote continued and expanded use of their products without providing timely or effective warnings to customers or the public about these known

dangers. Plaintiffs and their residents now face enormous—and growing—costs associated with rising sea levels and a changing climate. *See, e.g.*, ER286–91. These lawsuits seek to require Defendants, rather than the public entities and local taxpayers, to bear their fair share of the costs of Defendants' wrongful conduct, by paying to abate the harms caused to the public entities' infrastructure produced by rising sea levels and other climate-related impacts.

II. Removal to Federal Court and Subsequent Remand

On August 24, 2017, Defendants removed the *San Mateo*, *Marin*, and *Imperial Beach* cases to federal court, alleging seven grounds for removal. *See* ER145–47. Grounds 1–4 and 6 relied on 28 U.S.C. § 1441(a), asserting that although the complaints pleaded only state law claims, they nonetheless fell within the district court's original federal question jurisdiction. *See* ER145–47 ¶¶5–8, 10. Fifth on the list was federal officer removal pursuant to 28 U.S.C. § 1442(a)(1). ER147 ¶9. The final ground cited the federal bankruptcy jurisdiction under 28 U.S.C. § 1452(a). *See* ER147 ¶11.

Defendants removed the *City of Santa Cruz* and *County of Santa Cruz* cases on January 19, 2018, and the *Richmond* case on February 2, 2018, asserting the same grounds. *See* No. 18-cv-00450 (N.D. Cal.) ECF No. 1; No. 18-cv-00458 (N.D. Cal.) ECF No. 1; No. 18-cv-00732 (N.D. Cal.) ECF No. 1. Defendant Marathon filed an

additional notice of removal on March 2, 2018, asserting the same grounds plus admiralty jurisdiction. ER55–77.

On March 16, 2018, the district court granted Plaintiffs' motion to remand the first three cases, rejecting each of Defendants' arguments in turn, including their "dubious assertion of federal officer removal." ER3–8.

On July 10, 2018, the court remanded the remaining cases for the same reasons, and adopted the reasons for admiralty jurisdiction set forth in *Coronel v. AK Victory*, 1 F. Supp. 3d 1175, 1178–89 (W.D. Wash. 2014). *See* ER1.

III. Plaintiffs' Motion to Dismiss

Defendants' notice of appeal acknowledges that 28 U.S.C. § 1447(d) "generally prohibits appellate review of remand orders," with exceptions only for civil rights cases and federal-officer removal. ER46. Defendants insist, however, that because they had included a federal-officer removal claim with their six other grounds for removal (seven with admiralty), they are entitled to appellate review of the district court's rejection of all potential grounds for removal, as a matter of right. *Id.*[1]

[1] Defendants also sought permission to raise the same set of issues through a certified interlocutory appeal under 28 U.S.C. § 1292(b), but this Court denied that request as an attempt to circumvent the limits on appellate review of remand orders set forth in 28 U.S.C. § 1447(d). *See* Order, Case No. 18-80049, Dkt. No. 7 (May 22, 2018).

Plaintiffs filed a motion for partial dismissal explaining that under established circuit precedent, Section 1447(d) limits appellate review to the federal-officer ground for removal only. *See* Case No. 18-5499, Dkt. 41 (June 6, 2018) ("MTD"). The motions panel referred the motion to the merits panel. Case No. 18-15499, Dkt. 58 (Aug. 20, 2018).

SUMMARY OF ARGUMENT

Defendants have asserted eight grounds for removal on appeal, but the Court only has jurisdiction to review one: federal-officer removal under 28 U.S.C. § 1442. "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise" except to the extent removal was based on federal officer or civil rights removal under 28 U.S.C. §§ 1442 & 1443 respectively. *See* 28 U.S.C. § 1447(d). It is settled law that other grounds for removal asserted in the same case are not reviewable. *See, e.g.*, *Patel v. Del Taco, Inc.*, 446 F.3d 996, 998 (9th Cir. 2006). Defendants may not bootstrap their seven other asserted grounds for removal—the vast bulk of their arguments—by also invoking Section 1447(d)'s narrow federal-officer exception.

The district court correctly rejected Defendants' "dubious" federal officer removal argument. ER7. To invoke federal-officer removal, private companies bear a "special burden" to establish that they acted under the government's "subjection, guidance, or control," with respect to the specific conduct that caused the plaintiff's

injuries. *Watson v. Philip Morris Cos., Inc.*, 551 U.S. 142, 151 (2007); *see* 28 U.S.C. § 1442. The various relationships Defendants assert between themselves and the federal government all boil down to either (i) contractual obligations that do not show the "unusually close" government oversight "involving detailed regulation, monitoring, or supervision" necessary to invoke federal jurisdiction, *Watson*, 551 U.S. at 149, or (ii) simple compliance with federal law in extracting fossil fuels. None provide a basis for removal.

If the Court determines it has jurisdiction to consider the other seven removal arguments Defendants assert, it should reject them all. Defendants' argument that federal common law "governs" Plaintiffs' claims cannot confer jurisdiction, because federal common law at most presents an ordinary preemption defense to Plaintiffs' state law claims, which must be adjudicated in state court on remand. "[P]reemption, without more, does not convert a state claim into an action arising under federal law." *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987). Nor are Plaintiffs' claims completely preempted by the Clean Air Act. 42 U.S.C. § 7401, *et seq*. Complete preemption arises only in the "extraordinary" situations where "Congress intends not merely to preempt a certain amount of state law, but also intends to transfer jurisdiction of the subject matter from state to federal court." *Wayne v. DHL Worldwide Express*, 294 F.3d 1179, 1183–84 (9th Cir. 2002). No court has held that the Clean Air Act completely preempts state law causes of action, and the text of the

Act itself makes clear that Congress intended to preserve the traditional state involvement in responding to injuries from air pollution, both through state regulation and through private tort remedies. *See, e.g.*, 42 U.S.C. §§ 7401(a)(3), 7416, 7604(e) .

The cases are also not removable under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005). The various federal interests Defendants assert are "implicated" by Plaintiffs' claims at most present federal preemption defenses, not embedded federal issues "necessarily raised" by Plaintiffs' state law claims. *See, e.g., Cal. Shock Trauma Air Rescue v. State Comp. Ins. Fund*, 636 F.3d 538 (9th Cir. 2011).

Plaintiffs' claims do not arise on the Outer Continental Shelf, within the federal enclave, out of any bankruptcy dispute, or within the scope of admiralty jurisdiction (a jurisdictional argument Defendants waived in the *San Mateo*, *Imperial Beach*, and *Marin* cases in any event). The district court correctly rejected all of Defendants' arguments, and remand was proper.

ARGUMENT

I. This Court Has Jurisdiction to Consider Only Defendants' Federal-Officer Removal Claims.

Although Defendants raise multiple theories of removal, this Court lacks jurisdiction to consider any of them except federal-officer removal under 28 U.S.C. § 1442.

Congress strictly limited appellate review of remand orders, providing that:

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

28 U.S.C. § 1447(d). As a result, so "long as a district court's remand is based . . . on lack of subject-matter jurisdiction . . . a court of appeals lacks jurisdiction to entertain an appeal of the remand order under § 1447(d)." *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127–28 (1995).

Under settled Ninth Circuit precedent, consistent with the majority view in the circuits, Section 1447(d) limits appellate review in a case asserting multiple removal theories to the propriety of the district court's rejection of removal under federal-officer jurisdiction (or civil rights jurisdiction that is inapplicable here. *See Patel*, 446 F.3d at 998; *see also Clark v. Kempton*, 593 Fed. Appx. 667, 668 (9th Cir. 2015); *Carter v. Evans*, 601 Fed. Appx. 527, 528 (9th Cir. 2015); *McCullough v.*

Evans, 600 Fed. Appx. 577, 578 (9th Cir. 2015); *U.S. Bank Nat'l Ass'n. v. Azam*, 582 Fed. Appx. 710, 711 (9th Cir. 2014).[2] A removing defendant may not circumvent Section 1447(d)'s appellate bar by including a flimsy federal-officer argument among numerous other non-reviewable grounds for removal.

Plaintiffs' Motion for Partial Dismissal explains why Defendants' attempts to overcome these cases have no merit, and Plaintiffs will not repeat those fully briefed arguments here. *See* MTD 9–22; MTD Reply 2–12.

II. The District Court Correctly Found No Basis for Federal-Officer Removal.

Defendants bury what the district court charitably referred to as their "dubious" federal-officer removal argument, ER7, deep in their brief, devoting fewer than four pages to the issue. Br. 63–66. The court below rightly rejected it.

"Historically, removal under § 1442(a)(1) and its predecessor statutes was meant to ensure a federal forum in any case where a federal official is entitled to raise a defense arising out of his official duties." *Arizona v. Manypenny*, 451 U.S. 232, 241 (1981). Because Congress was concerned that federal officials subject to

[2] As discussed in Plaintiffs' Motion for Partial Dismissal, *Patel* and the cases following it apply the majority among the circuits that have addressed the issue. *See, e.g.*, *Jacks v. Meridian Res. Co.*, 701 F.3d 1224, 1229 (8th Cir. 2012); *Alabama v. Conley*, 245 F.3d 1292, 1293 n.1 (11th Cir. 2001) (per curiam); *Davis v. Glanton*, 107 F.3d 1044 (3d Cir. 1997); *State Farm Mut. Auto. Ins. Co. v. Baasch*, 644 F.2d 94, 96 (2d Cir. 1981) (per curiam); *Noel v. McCain*, 538 F.2d 633, 635 (4th Cir. 1976); *but see Lu Junhong v. Boeing Co.*, 792 F.3d 805 (7th Cir. 2015).

state-court prosecution or civil suit might be subject to "local prejudice" or hostility against the federal government, removal therefore afforded a "federal forum in which to assert federal immunity defenses." *Id*. at 150.

Section 1442(a)(1) extends the same jurisdictional protections to private individuals and companies "acting under [an] officer" when "sued for any act under color of such office." 28 U.S.C. § 1442(a)(1). The canonical example is a private individual hired to drive federal officers to a raid on illegal distilleries. *See Watson*, 551 U.S. at 149. The party asserting federal-officer removal "bears the burden of showing . . . a causal nexus between its actions, taken pursuant to a federal officer's directions, and plaintiff's claims." *Goncalves By & Through Goncalves v. Rady Children's Hosp. San Diego*, 865 F.3d 1237, 1244 (9th Cir. 2017).

The Supreme Court has held that *some* government contractors may in *some limited* cases take advantage of extended protections of federal-officer jurisdiction, but only where "the relationship between the contractor and the Government is an unusually close one involving detailed regulation, monitoring, or supervision," as in the context of some military procurement contracts. *Watson*, 551 U.S. at 149; *see also Fidelitad, Inc. v. Insitu, Inc.*, 904 F.3d 1095, 1100 (9th Cir. 2018). Being a government contractor is never sufficient, by itself, to trigger federal-officer jurisdiction. Particularly, merely "producing goods for the United States military," does not suffice unless the military directed the particular aspect of the contractor's

performance that gave rise to the plaintiff's claims. *Fidelitad, Inc.*, 904 F.3d at 1100 (citing *Leite v. Crane Co.*, 749 F.3d 1117, 1123–24 (9th Cir. 2014)).

A claim that depends on conduct neither required nor supervised by a federal official cannot support removal under Section 1442. Neither the Supreme Court nor this Court has ever held that a company operating under a federal license or selling products to the government is, for that reason alone, "acting under" a federal official for purposes of federal jurisdiction. The cases universally require considerably more. *Compare Cabalce*, 797 F.3d at 728–29 (no removal absent "federal supervision or control" of specific aspect of contractor performance giving rise to injury), *with Leite*, 749 F.3d at 1124 (removal where "the very act that forms the basis of plaintiffs' claims—Crane's failure to warn about asbestos hazards—is an act . . . performed under the direction of the Navy"); *see also, e.g.*, *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 488 F.3d 112, 129–30 (2d. Cir. 2007) (no removal where government regulation permitted, but did not require, defendants to include fuel additive giving rise to suit).

Defendants claim they are entitled to federal-officer removal because a handful of Defendants' predecessors-in-interest "help[ed] produce something needed" by the government. Br. 65. That argument is doubly flawed: first because *all* government contractors provide goods and services that the government purports to need; second, because Plaintiffs' public-nuisance and other state tort claims

against Defendants are not based, to any significant extent, on those Defendants' sales of fossil-fuel products to governmental customers. *See* ER7. As the district court explained, there is no "'causal nexus'" between any "work performed under federal direction and the plaintiffs' claims, which are based on a wider range of conduct," *id*., including "[a]ffirmatively and knowingly concealing the hazards that Defendants knew would result from the normal use of their fossil fuel products" through misrepresentations about those products and deliberately discrediting "scientific information related to climate change," ER292 ¶181 (Public Nuisance Count).[3]

Defendants do not claim that the federal government had anything to do with their longstanding misrepresentation of their products' safety and suppression of evidence showing their contributions to catastrophic global warming. Yet that is the conduct at the core of the Complaints' allegations.

Defendants offer no convincing response to the district court's analysis or to the settled principles limiting the scope of federal-officer jurisdiction. Initially, they

[3] *See also* ER295 ¶192 (same); ER298–99 ¶¶206–11 (Strict Liability Failure to Warn Count describing similar failure to warn of known dangers, in addition to affirmative misrepresentations and marketing); ER309–10 ¶¶250–54 (Negligence Failure to Warn Count, same); ER300–03 ¶¶219, 221, 222 (Design Defect Claim describing similar false marketing and promotion); ER304, 306 ¶¶230 235(h) (Private Nuisance Count alleging same); ER307–08 ¶242 (Negligence Count, alleging ignoring and suppressing evidence of their products' effect on climate change); ER310 ¶261 (Trespass Count, alleging similar).

collect general precedent warning against an unduly narrow construction of the federal-officer removal provision. Br. 65. But none of those cases excuse Defendants from demonstrating—as the party bearing the burden of proof of establishing jurisdiction, *see, e.g.*, *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992)—that a federal officer directed them or controlled them in promoting their products through misrepresentations and suppressions of the truth, which is the core allegation underlying Plaintiffs' claims.

Defendants try to limit the Court's attention to a single claim—the design-defect claim—which Defendants contend depends on nothing more than Defendants' extraction and sale of fossil fuels. Br. 66. That is an incorrect characterization. The design-defect claim alleges that Defendants are liable because their products "have not performed as safely as an ordinary consumer would expect." ER301 ¶220; *see also Anderson v. Owens-Corning Fiberglas Corp.*, 53 Cal. 3d 987, 995–1003 (1991) (defining strict product liability for design defect). The Complaints then explain that Defendants' misleading marketing and denial of contrary scientific evidence "prevented reasonable consumers from forming an expectation that fossil fuel products" would be dangerous. *See, e.g.*, ER301–02 ¶221. But even if a design-defect claim could rest solely upon proof that Defendants produced and sold fossil fuels to the government (which Defendants surely would not concede when these

cases are adjudicated on the merits), there are at least three other reasons federal-officer jurisdiction has no application to Plaintiffs' claims.

First, while this Court has allowed federal-officer removal for military contractors whose challenged actions were conducted under close federal supervision,[4] Defendants point to no case in which removal rested on the simple sale of a generic commodity to the government.

Indeed, this Court recently rejected that possibility in *Washington v. Monsanto Co.*, 738 F. App'x. 554 (9th Cir. 2018). There, the State of Washington sued a PCB manufacturer, asserting public nuisance and other state law claims arising from environmental contamination caused when the chemicals were inevitably released into the environment. The defendant asserted federal-officer removal on the ground that it sold some of its product to the federal government. *See id*. at 555.[5] This Court rejected that assertion because the fact "that the federal government purchased off-the-shelf PCB products from" the defendant contractor

[4] *See, e.g.*, *Leite*, 749 F.3d at 1123–24 (removal of failure-to-warn case when military contractor "omitted any warning of asbestos hazards pursuant to the direction of Navy officers"); *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1249 (9th Cir. 2006) (the "military dictated the precise specifications of the aircraft" at issue).

[5] *See also* Brief of States of Oregon et al., *Washington v. Monsanto Co.*, No. 17-35641, 2018 WL 1215300 (9th Cir. Feb. 27, 2018).

did not subject that contractor to the degree of control and supervision required to extend the government's federal-immunity protections to that contractor. *Id*.

Washington was clearly correct. "Acting under" implies "subjection, guidance, or control," *Watson*, 551 U.S. at 151, and is completely lacking when the government merely purchases a generic, publicly available product. After all, a principal purpose of federal-officer removal is to ensure "a federal forum in which to assert federal immunity defenses," *id*. at 150, and the Supreme Court has made clear that federal contractors cannot claim immunity based on selling a product to the government unless the government specifically detailed the particular components of the product that gave rise to the claim against that contractor. *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 512 (1988).

Moreover, the premise of "acting under" removal is that a private party's close cooperation with the government could subject that private party to the same risk of anti-government bias that might be directed against federal officials themselves. *See Watson*, 551 U.S. at 151; *Durham v. Lockheed Martin Corp*., 445 F.3d 1247, 1253 (9th Cir. 2006). When a case involves a generic commodity, the fact that some (likely infinitesimal) portion of the sales were to federal-government purchases will not cause the seller to be associated with the government in any manner that would risk infecting the case with anti-government bias that would make the state courts inhospitable to any valid federal defenses.

Second, Defendants mischaracterize their alleged sales to the government. Although they imply that Defendant Chevron's predecessor Standard Oil extracted oil at Elk Hills Reserve for the government, Br. 64, the applicable contract in fact provides that Standard could dispose of its share of the oil "as it may desire" and that "[n]either Navy nor Standard shall have any preferential right to purchase any portion of the other's share of such production." ER206 § 7.

Defendants do not claim to have sold oil to the government pursuant to the OCSLA or other federal leases they cite, noting only that the leases compelled them to offer oil "to certain specified buyers" without saying who those buyers were. Br. 64 (citing ER186). What Defendants fail to disclose, though, is that the cited contract provisions simply describe the requirements of the governing federal statute. *See* ER186 § 15 (reciting requirements of the OCSLA). Mere compliance with those statutory commands does not support removal. *See Watson*, 551 U.S. at 152–53.

Defendants also allege that CITGO sold fuel to the Navy Exchange Service Command ("NEXCOM") for retail sale at Naval installations. Br. 65. But those contracts were to provide retail-quality gasoline and diesel fuel "to service stations on approximately forty U.S. Naval installations." ER138 ¶5. The NEXCOM contracts were straightforward commercial exchanges that did not require detailed, specialized government oversight in any respect. From all appearances, the fuel was sold to service members at Navy Exchanges for personal vehicles. *See* NEXCOM

Enterprise, Enterprise Info, *https://www.mynavyexchange.com/nex/enterprise-info* (accessed Jan. 15, 2019). Defendants cite no case in which removal was permitted because the defendant assisted the operation of an essentially commercial enterprise—through selling commodities for resale—with such an attenuated connection to the core services of the government as seen here.

Third, to the extent Defendants mean to argue that they were acting under federal officers because they were required by their contracts to produce and sell fossil fuels to *the general public*, that claim fails as well. If federal-officer jurisdiction cannot rest on the act of selling an off-the-shelf item to the government for use by the government, surely it cannot rest on selling that item to the public. There can be no federal-officer jurisdiction unless the defendant helps an official carry out "his official duty," *i.e.*, by "helping [an] official to enforce federal law." *Watson*, 551 U.S. at 151. Selling fuel to the public is not part of any federal official's law enforcement or other duties, so Defendants cannot claim that in selling oil to the public they were assisting in the performance of a federal duty. Nor can Defendants identify any other "official duty" they were helping a federal official perform when they sold fuel to the public (let alone when they wrongfully promoted it based on known falsehoods and misrepresentations).

Defendants' assertion that the government compelled them to extract and sell fossil fuels to the public is factually unsupported in any event, and again, it is

Defendant's burden to establish jurisdiction. Defendants assert that the OCSLA leases "mandated that Defendants 'shall' drill for oil and gas pursuant to government-approved exploration plans," Br. 64 (citing ER186-87). But the OCSLA leases simply *permit* oil companies to extract oil from federal property, so long as they comply with approved plans. *See* ER184 § 2 (giving lessees "the exclusive *right and privilege* to drill for, develop, and produce oil and gas resources") (emphasis added); ER185 § 9 (requiring that any drilling undertaken comply with certain plans).[6]

The Elk Hills contract was a typical unit-production arrangement that governed Standard Oil and the Navy's extraction of oil from a common pool in which both entities held ownership interests. *See United States v. Standard Oil Co. of Cal.*, 545 F.2d 624, 626-28 (9th Cir. 1976) (describing Reserve and contract). The point of the contract was to divide the pool's output in accordance with relative ownership rights and to ensure that Standard's extraction of its own share of the oil did not endanger the Navy's ability to preserve its share in the ground as a war reserve. *Id*. at 627–28. Although the contract *permitted* Standard to receive a certain amount of oil from the pool and allowed the Navy to *restrict* Standard's production

[6] Defendants also mention unspecified "strategic petroleum reserve leases," but do not describe their content or cite to such a lease in the record. *See* Br. 65. Any reliance on those leases is therefore forfeit. *See, e.g., Orr v. Plumb*, 884 F.3d 923, 932 (9th Cir. 2018).

in order to protect its share of the pool, nothing in the provisions Defendants cite *required* Standard to extract any oil at all. *See id*; *see also* ER197-98 § 1.a ("[T]he Reserve shall be developed and operated . . . *to the extent herein provided or hereafter authorized by the Navy* . . . in accordance with the provisions of this contract." (emphasis added)); ER201 § 4(b) (reserve shall be operated in a manner to "*permit* production" at a rate sufficient to produce amount to which Standard was entitled, subject to reduction by the Navy) (emphasis added).[7]

A defendant is not "acting under" a federal officer simply because the government has given the defendant license to engage in an activity, particularly when that activity (here, producing a product for sale to third parties and then wrongfully promoting it while knowing of its undisclosed hazards) does not assist the federal officer in enforcing federal law. *See Watson*, 551 U.S. at 152. After all, there is little risk that the successors to Standard Oil, CITGO, and the companies who drill on federal lands will face special bias resulting from their association with

[7] Defendants mischaracterize Section 4(b) of the contract as requiring production of a certain amount of oil "until the Navy had received its share of production." Br. 64 (quoting ER201 § 4(b)). Instead, the provision *allowed* Standard Oil to extract a certain amount of oil for *its own use*. *See* ER201 § 4(b) ("*Until Standard shall have received its share of production* . . . the Reserve shall be developed and operated in such a matter and to such extent as will . . . permit production . . . not less than 15,000 barrels of oil per day. . . ." (emphasis added)). The Navy's share was left in the ground for future use in the case of war. *See Standard Oil Co. of Cal.*, 545 F.2d at 627–28.

the federal government beyond what a company whose extraction and sales were wholly private would encounter.

The fact that permission came with conditions makes no jurisdictional difference either. *Contra* Br. 64. Being subject to federal regulation is not, in itself, a basis for removal. *See Watson*, 551 U.S. at 151–52. For example, manufacturing commercial aircraft requires a federal license and is subject to extensive federal rules and oversight. But that does not mean that Boeing is "acting under" federal officers when it produces airliners. *See Lu Junhong v. Boeing Co.*, 792 F.3d 805, 808–10 (7th Cir. 2015); *see also In re MTBE*, 488 F.3d 129–32.

There is no reason for a different result when the federal rules are written into a license or lease that would not otherwise implicate federal officer removal. Thus, in *Fidelitad, Inc.*, this Court rejected the defendant's argument "that it was not merely complying with federal regulations but also attempting to enforce specific provisions in [its] export licenses." 904 F.3d at 1100 (citing *Watson*, 551 U.S. at 152–53, 157). Being subject to federal rules (statutory, regulatory, or contractual) does not risk the defendant being subject to anti-government bias, and does not "disable federal officials from taking necessary action designed to enforce federal law." *Id*. at 152.

III. The District Court Properly Rejected Defendants' Other Removal Grounds as Well.

To the extent the Court determines it has jurisdiction to consider Defendants' other removal theories, it should affirm. Removal statutes are "strictly construed against federal court jurisdiction." *Durham*, 445 F.3d at 1253, and federal courts apply a "'strong presumption' against removal jurisdiction." *Gaus*, 980 F.2d at 566. The defendant thus "always has the burden of establishing that removal is proper," *id*., and any doubts are resolved in favor of remand, *see, e.g.*, *Matheson v. Progressive Specialty Ins. Co*., 319 F.3d 1089, 1090 (9th Cir. 2003). The district court properly applied those principles in these cases to reject each of Defendants' removal theories.

A. Plaintiffs' Claims Do Not Arise Under Federal Law.

Defendants' principal argument is that these cases are removable because Plaintiffs' claims, although asserted only as state law causes of action, nonetheless "arise under federal common law" and "thus are within the district court's original jurisdiction." Br. 29–30.[8] That argument is precluded by the well-pleaded complaint

[8] In *Kivalina*, Defendants Shell, Exxon, BP, Chevron, and Conocophillips took the opposite side of their federal common law argument here, expressly stating they "have never 'agreed' that 'greenhouse gas pollution . . . raises uniquely federal interests' within the meaning of federal common law doctrine." Answering Brief of Defendants-Appellees Shell Oil Company et al., *Native Village of Kivalina v. Exxon Mobil Corp.*, (No. 09-17490), 2010 WL 3299982, at *57 n.23 (9th Cir. June 30, 2010). "That 'global climate change is predominantly a matter of federal concern,"

rule and decades of precedent. Even if it were not, Defendants themselves have removed the linchpin of their argument by asserting that the federal common law upon which they rely was "displaced" by the Clean Air Act.

1. Defendants' "Arising Under" Theory Is a Veiled Preemption Argument Precluded by the Well-Pleaded Complaint Rule.

The "presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal question 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, 391–92 (1987). Under this rule, "a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." *Id*. This "rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Id*. at 392.

Defendants try to avoid the well-pleaded complaint rule by asserting that Plaintiffs' claims "are *governed* by federal common law," rather than saying they are *preempted* by federal law. Br. 30 (emphasis added). It is true that if federal

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they argued then, "has nothing to do with whether private damages claims raise 'uniquely federal interests' *of the type that justify applying federal common law*." *Id.*; *see also id.* at *56–60.

common law *completely* preempted Plaintiffs' state claims, there would be federal jurisdiction under the complete-preemption doctrine. *See Caterpillar*, 482 U.S. at 393 ("Once an area of state law has been completely preempted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law."). But Defendants do not make that complete-preemption argument as to federal common law (because they cannot): the only complete-preemption argument they make pertains to the Clean Air Act, not federal common law. *See* Br. § II.C, 56–58.

When Defendants say that federal common law "governs" Plaintiffs' claims, they mean that "our federal system does not permit [this] controversy to be resolved under state law" and that federal common law provides the exclusive alternative. *Id.* 31. That describes ordinary preemption, and not complete (federal-jurisdiction-conferring) preemption. Whenever federal law preempts state law, our federal system forbids application of state law to the case, leaving federal law the only authority to "govern" the plaintiff's claims. And the Supreme Court has long made clear that "preemption, without more, does not convert a state claim into an action arising under federal law." *Metro. Life Ins. Co.*, 481 U.S. at 65.

Defendants' argument is thus a double evasion: an attempted end-run around both the well-pleaded complaint rule and the requirements for complete preemption. The district court rightly rejected it. ER3–5; *Goepel v. Nat'l Postal Mail Handlers*

Union, a Div. of LIUNA, 36 F.3d 306, 311–12, (3d Cir. 1994) ("[T]he only state claims that are 'really' federal claims and thus removable to federal court are those that are preempted completely by federal law." (citing *Franchise Tax Bd.*, 463 U.S. at 13)); *Allstate Ins. Co. v. 65 Sec. Plan*, 879 F.3d 90, 94 (3d Cir. 1989) ("Although Allstate may have federal-common-law claims analogous to the claims set forth in its state-court complaint, it nevertheless has the right to insist upon litigating its state-law claims in the Court of Common Pleas."). Defendants mostly ignore these jurisdictional hurdles, content to simply re-assert that state law claims preempted by federal common law "arise under" federal law for removal purposes.[9]

[9] Defendants cite only three inapposite cases in support of this dubious proposition. Br. 30. The district court's decision in *City of Oakland v. BP p.l.c.*, 325 F. Supp. 3d 1017 (N.D. Cal. 2018), simply adopted the same theory asserted in this case (at the urging of the same Defendants) and is wrong for the reasons already discussed. The court in *Wayne* had no occasion to decide the question presented here, because the court found that federal common law did not apply. 294 F.3d at 1184–85. The question in *New SD, Inc. v. Rockwell Int'l Corp.*, 79 F.3d 953 (9th Cir. 1996), was whether federal common law contract principles applied to a military subcontract action that incorporated federal procurement regulations. *See id*. at 954–55. The plaintiff did not dispute that if it did, removal was proper. *See id*.

Moreover, to the extent the panels in *Wayne* (2002) and *New SD* (1996) assumed that the applicability of federal common law justified removal under the "substantial federal question" doctrine, the Supreme Court subsequently pared the doctrine back substantially. *See Gunn v. Minton*, 568 U.S. 251, 258 (2013) (describing recent "effort to bring some order to this unruly doctrine" in *Grable* (2005)); *Babcock Servs., Inc. v. CH2M Hill Plateau Remediation Co.*, No. 13-CV-5093-TOR, 2013 WL 5724465, at *4 (E.D. Wash. Oct. 21, 2013) (noting that the premise of *New SD* is "no longer sound" after *Grable*); *Raytheon Co. v. Alliant Techsystems, Inc.*, No. CIV 13-1048-TUC-CKJ, 2014 WL 29106, at *4 (D. Ariz. Jan. 3, 2014) (same); Part

Defendants' reliance on *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), and *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304 (1981), Br. 32–33, is unavailing. In *Ouellette*, the action was removed from Vermont state court on diversity grounds, and the Court considered only whether the Clean Water Act preempted the common law cases of action as alleged—not whether any basis for jurisdiction existed beside diversity. 479 U.S. at 500. *City of Milwaukee* began when the State of Illinois filed a complaint in federal court, expressly seeking to abate an alleged nuisance "under federal common law." 451 U.S. at 310. The Court considered whether the Clean Water Act displaced certain federal common law nuisance claims related to water pollution, but did not present any issue of removability. *Id.* These cases have nothing to do with the removability of well-pled state law claims.

III.D, *infra*. On the other hand, if the panels assumed the cases were removable because the relevant federal common law completely preempted the state law at issue, the cases remain inapt because the federal common law at issue in those cases (interpretation of military contracts in *New SD* and the "released valuation doctrine" in *Wayne*) have nothing to do with the federal common law invoked here. At all events, neither decision purported to establish a general rule permitting removal of any case in which the defendant claims that federal common law preempts the plaintiffs' state causes of action, even if the requirements of *Grable* or complete preemption are not met.

2. Defendants Cannot Premise Removal on a Federal Common Law That No Longer Exists.

Even if Defendants were right that Plaintiffs' state law causes of action could be transformed into a federal cause of action insofar as they were "governed" by federal common law (which they are not), their argument would still fail, because Defendants do not challenge the district court's ruling that the relevant "federal common law" has been displaced by the Clean Air Act. ER4–5 (citing *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012), *cert. denied*, 569 U.S. 1000 (2013); *AEP*, 564 U.S. at 410); *see* Br. 38–39. The district court sensibly concluded that a nonexistent federal common law cannot provide a basis for removal. ER4–5.

Federal common law has always been interstitial—created by courts only if Congress has failed to act, and subject to displacement if Congress subsequently legislates in the same area. *See, e.g.*, *AEP*, 564 U.S. at 423. When Congress steps in, its authority and intentions displace *all* of the prior judicial policy judgments, including the substance of the federal standard and such ancillary questions as whether federal law should preempt state law on the same subject and when preempted state law claims should be subject to removal. *See id.* at 429.

The Supreme Court made this abundantly clear in *AEP*, explaining that "[i]n light of our holding that the Clean Air Act displaces federal common law, the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect *of*

the federal Act." 564 U.S. at 429 (emphasis added); *see also Kivalina*, 696 F.3d at 866 (Pro, J., concurring) ("Once federal common law is displaced, state nuisance law becomes an available option to the extent it is not preempted by federal law.").[10]

So, too, with removal. The "touchstone of the federal district court's removal jurisdiction is . . . the intent of Congress." *Metro. Life Ins. Co.*, 481 U.S. at 66. Defendants try to support removal by resurrecting portions of the common law that they argue was displaced by the CAA. Although *AEP* and *Kivalina* clearly held that the CAA dispatched preexisting federal common law, Defendants insist that this body of law was only partly displaced and that even though the CAA entirely displaced the common law's *remedies*, enough remains of the common law itself to "govern"—*i.e.*, eliminate—Plaintiffs' state law claims. Br. 38–39. Defendants do not explain what, exactly, is left of the federal common law after *AEP*. It would be odd enough to claim that there is a federal common law that "governs" claims but provides no remedies. But Defendants must also admit that federal common law no

[10] Displacement of *federal* common law by the *federal* Clean Air Act does not address, much less dispose of, preemption of *state* law claims. *See, e.g.*, *AEP*, 564 U.S. at 423 ("Legislative displacement of federal common law does not require the 'same sort of evidence of a clear and manifest [congressional] purpose' demanded for preemption of state law."); *Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685, 693 (6th Cir. 2015) ("There are fundamental differences . . . between displacement of federal common law by the [Clean Air] Act and preemption of state common law by the Act."); *Bell v. Cheswick Generating Station*, 734 F.3d 188, 197 n.7 (3d Cir. 2013) (*AEP* "does nothing to alter our analysis" of CAA preemption because displacement of federal common law is governed by different principles than preemption of state law).

longer provides any substantive rules governing conduct either—that is now the function of the CAA. *See, e.g.*, *City of Milwaukee*, 451 U.S. at 314 n.7. Seemingly, the only function of Defendants' empty shell of remaining federal common law is to allow them to avoid the requirements of establishing complete preemption.

Unsurprisingly, Defendants offer no case authority or other support for the illogical proposition that Congress intended to retain an unspecified "governing" federal common law cause of action under the Clean Air Act, but intended that cause of action to have no remedy, without making any of those intentions explicit in the Act's text. The opposite is true: once an act of Congress displaces a particular body of law, that pre-statutory law ceases to exist.

Nothing in *AEP* or *Kivalina* countenances Defendants' displacement-as-to-remedies-only argument. The Supreme Court explained in *AEP* that when "Congress addresses a question previously governed by a decision rested on federal common law . . . the need for such an unusual exercise of law-making by the federal courts [*i.e.*, the interstitial common-law] disappears." 564 U.S. at 423. With it disappears whatever common law principles the courts had previously adopted, for "it is primarily the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest." *Id*. at 423–24; *see also City of Milwaukee*, 451 U.S. at 315 ("Our commitment to the separation of powers is too fundamental to continue to rely on federal common law . . . when Congress has addressed the

problem." (quotations omitted)). Similarly, this Court in *Kivalina* held that there were no federal common law remedies (injunctive or compensatory) because a statute displaced *the entirety of the federal common law*, including the cause of action upon which any remedy must depend. *See, e.g.*, 696 F.3d at 857 ("[D]isplacement of a federal common law right of action means displacement of remedies."); *id*. ("Thus, under current Supreme Court jurisprudence, if a cause of action is displaced, displacement is extended to all remedies."); *id*. ("Judicial power can afford no remedy unless a right that is subject to that power is present."); *id*. at 858 ("In sum, the Supreme Court has held that federal common law addressing greenhouse gas emissions has been displaced by Congressional action," full stop).[11]

[11] Plaintiffs do not concede that federal common law would have applied to their state law claims in the absence of the CAA, because those claims rest on Defendants' tortious failures to warn, over-promotion and over-marketing of their dangerous products, and campaigns of deception and denial. There is no "uniquely federal" interest nor "significant conflict" between federal policy or interests and state law in such conduct. *Boyle*, 487 U.S. at 640; *see also, e.g.*, *Am. Fuel & Petrochem. Mfrs. v. O'Keeffe*, 903 F.3d 903, 913 (9th Cir. 2018) ("It is well settled that the states have a legitimate interest in combatting the adverse effects of climate change on their residents."); *Rocky Mountain Farmers Union v. Corey*, ___ F.3d ___, 2019 WL 254686 at * 2 (9th Cir., Jan. 18, 2019) ("The California legislature is rightly concerned" with the "dreadful environmental impacts" of climate change); *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1080–81 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2875 (2014) ("That these climate change risks are widely-shared does not minimize California's interest in reducing them."); *Nat'l Audubon Soc'y v. Dep't of Water*, 869 F.2d 1196, 1203 (9th Cir. 1988) (despite interstate pollution effects, "there is not 'a uniquely federal interest' in protecting the quality of the nation's air"); *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1324 (5th Cir. 1985) (*en banc*) (claims against asbestos manufacturers "cannot become 'interstate,'

As the Supreme Court and this Court explained in *AEP* and *Kivalina*, the only preemption question now is whether the CAA preempts state law claims—and both courts left this issue open. Because the matter before this Court is limited to the propriety of removal, the question is even narrower: whether the CAA *completely* preempts Plaintiffs' claims. As explained next, it does not.

B. Plaintiffs' Claims Are Not Completely Preempted by the Clean Air Act.

Establishing complete preemption is far more demanding than demonstrating ordinary preemption. *See City of Milwaukee*, 451 U.S. at 316–17. Indeed, the "United States Supreme Court has identified only three federal statutes that satisfy this test." *Ansley v. Ameriquest Mortg. Co.*, 340 F.3d 858, 862 (9th Cir. 2003).

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in the sense of requiring the application of federal common law, merely because the conflict is not confined within the boundaries of a single state"); *In re Agent Orange Prod. Liab. Litig.*, 635 F.2d 987, 994 (2d Cir. 1980) (despite federal interest in millions of veterans who served in Vietnam exposed to Agent Orange, "there is no federal interest in uniformity for its own sake. . . . The fact that application of state law may produce a variety of results is of no moment" and is "the nature of a federal system."). Given Defendants' concession that whatever federal common law may once have applied has since been displaced by the CAA, however, this Court need not—and should not—reach this issue. *See AEP*, 564 U.S. at 423 (declining to address "academic question" of availability of federal common law claim "in the absence of the Clean Air Act").

Unsurprisingly, Defendants cannot cite *any* case holding that the CAA completely preempts any state-law claim—and there are many cases holding to the contrary.[12]

Complete preemption arises only in the "extraordinary" situations where "Congress intends not merely to preempt a certain amount of state law, but also intends to transfer jurisdiction of the subject matter from state to federal court." *Wayne*, 294 F.3d at 1183–84. A defendant can establish complete preemption only by demonstrating that "Congress clearly manifested an intent to convert state law claims into federal-question claims." *Id.* at 1184. That showing requires proof that Congress: (1) intended to displace that state-law cause of action *and* (2) provided a substitute federal cause of action. *See Caterpillar*, 482 U.S. at 393 (complete preemption arises only when Congress has manifested its intent to "convert[] an ordinary state common-law complaint into one stating a federal claim"); *Moore-Thomas v. Alaska Airlines, Inc.*, 553 F.3d 1241, 1245–46 (9th Cir. 2009) (no complete preemption where the statute "does not provide a federal cause of action, without which complete preemption . . . cannot exist" (quoting 5 Moore's Federal

[12] *See, e.g.*, *Her Majesty The Queen In Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332, 342–43 (6th Cir. 1989); *Morrison v. Drummond Co.*, No. 2:14-cv-0406-SLB, 2015 WL 1345721, at *3–*4 (N.D. Ala. Mar. 23, 2015); *Cerny v. Marathon Oil Corp.*, No. SA-13-CA-562, 2013 WL 5560483, at *8 (W.D. Tex. Oct. 7, 2013); *California ex rel. Sacramento Metro. Air Quality Mgmt. Dist. v. Hardesty Sand & Gravel*, No. 2:11-CV-02278 JAM, 2012 WL 639344, at *5 (E.D. Cal. Feb. 24, 2012); *Gutierrez v. Mobil Oil Corp.*, 798 F. Supp. 1280, 1281–86 (W.D. Tex. 1992).

Practice § 103.45[3][b] (3d ed. 2008)); *accord Lopez-Munoz v. Triple-S Salud*, 754 F.3d 1, 5 (1st Cir. 2014); *Pinney v. Nokia*, 402 F.3d 430, 450 (4th Cir. 2005); *Ry. Labor Execs. Ass'n v. Pittsburgh & Lake Erie R.R. Co.*, 858 F.2d 936, 942 (3d Cir. 1988). Defendants cannot satisfy either criterion.

1. Congress Did Not Intend the Clean Air Act to Displace Plaintiffs' State Law Claims.

Three provisions in the CAA definitively refute Defendants' contention that Congress intended the CAA to completely preempt all state-law claims involving air-pollution emissions, let alone claims like Plaintiffs' that seek only localized abatement and do not seek to alter emissions standards or limits. As this Court has recognized, "there is not 'a uniquely federal interest' in protecting the quality of the nation's air. Rather, the primary responsibility for maintaining the air quality rests on the states." *Nat'l Audubon Soc'y v. Dep't of Water*, 869 F.2d 1196, 1203 (9th Cir. 1988).[13]

First, in enacting and later amending the CAA, Congress expressly found "that air pollution prevention . . . and air pollution control at its sources is the primary responsibilities of States and local governments." 42 U.S.C. § 7401(a)(3). Far from

[13] This Court has similarly acknowledged California's strong interest in addressing climate change. *Rocky Mountain Farmers Union*, 730 F.3d at 1080–81 ("That these climate change risks are widely-shared does not minimize California's interest in reducing them"); *see also Rocky Mountain Farmers Union*, ___ F.3d ___, 2019 WL 254686 at *2; *Am. Fuel & Petrochem. Mfrs.*, 903 F.3d at 913.

revealing congressional intent to displace state-law measures that address air pollution, that finding demonstrates Congress's understanding that such measures are important and should continue.

Second, Congress included a provision in the CAA expressly stating that, except as otherwise provided in statutory sections not applicable here, nothing in the chapter governing air quality and emissions limitations (including the only statutory provisions Defendants rely on) "shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution," except that no State or local government may "adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation" provided for by the CAA and its implementing plans. 42 U.S.C. § 7416. Congress thereby made clear that, although the CAA sets a *floor* for emissions standards and limitations, it does not restrict the rights of States and local governments to create or enforce *stricter* standards governing emission, control, or abatement of air pollution.

Third, Congress included another savings clause in the CAA, which specifies that "nothing in" the chapter governing citizen suits "shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief."

42 U.S.C. § 7604(e). As this Court has observed, "a savings clause is fundamentally incompatible with complete field preemption" of the sort Defendants seek to rely on here. *In re NOS Commc'ns, MDL No. 1357*, 495 F.3d 1052, 1058 (9th Cir. 2007).

Defendants' reliance on 42 U.S.C. § 7607, Br. 56–57, is misplaced. By its express terms, that provision establishes the exclusive means of challenging actions of the Administrator of the federal Environmental Protection Agency. That is not what Plaintiffs are doing—and the above-referenced provisions of the CAA express Congress's intent to preserve other types of state common-law actions related to emissions.[14]

2. The Clean Air Act Provides No Substitute Cause of Action.

This Court has warned that "a state-law claim may be recharacterized as a federal claim only when the state-law claim is preempted by federal law *and* when it is apparent from a review of the complaint that federal law provides plaintiff a cause of action to remedy the wrong he asserts he suffered." *Hunter v. United Van Lines*, 746 F.2d 635, 642–43 (9th Cir. 1984) (emphasis added). "When federal law

[14] Courts thus routinely find that the CAA does not preempt (much less *completely* preempt) state common law claims. *See, e.g.*, *Bell v. Cheswick Generating Station*, 734 F.3d 188, 198 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2696 (2014); *Merrick*, 805 F.3d at 690; *Keltner v. SunCoke Energy, Inc.*, No. 3:14-CV-01374-DRHPMF, 2015 WL 3400234, at *4 (S.D. Ill. May 26, 2015); *Bearse v. Port of Seattle*, No. C09-0957RSL, 2009 WL 3066675, at *4 (W.D. Wash. Sept. 22, 2009); *Tech. Rubber Co. v. Buckeye Egg Farm, L.P.*, No. 2:99-CV-1413, 2000 WL 782131, at *4–*5 (S.D. Ohio June 16, 2000); *Ford v. Murphy Oil U.S.A., Inc.*, 750 F. Supp. 766, 772–73 (E.D. La. 1990); *Freeman v. Grain Processing Corp.*, 848 N.W.2d 58 (Iowa 2014).

displaces state law without supplanting it, a plaintiff cannot be deemed to be attempting to avoid a federal cause of action; there is no federal cause of action to avoid. In such a case, federal preemption operates only as a defense." *Id.* at 643.

Defendants fail to identify any federal cause of action that would even arguably provide a remedy for the injuries Plaintiffs assert. For example, nuisance claims for wrongful promotion of products are well-recognized under California law, and plainly outside the scope of the CAA's citizen-suit provision. *See, e.g.*, *People v. ConAgra Grocery Prod. Co.*, 17 Cal. App. 5th 51, 84 (Cal. Ct. App. 2017), *reh'g denied* (Dec. 6, 2017), *review denied* (Feb. 14, 2018), *cert. denied sub nom. ConAgra Grocery Prod. Co. v. California*, 139 S. Ct. 377 (2018), and *cert. denied sub nom. Sherwin-Williams Co. v. California*, 139 S. Ct. 378 (2018) (affirming judgment against lead paint manufacturer defendants for nuisance caused by their "affirmative promotion of lead paint for interior use, not their mere manufacture and distribution of lead paint or their failure to warn of its hazards"). Defendants do not claim that federal law provides a substitute remedy for such harms. To the contrary, they insist that no such federal cause of action exists. Br. 56–57. Defendants' own position defeats their complete-preemption argument.

C. Plaintiffs' Claims Are Not Removable Under *Grable* as Raising Disputed and Substantial Federal Issues.

Defendants also cannot invoke federal question jurisdiction under *Grable*, which recognized a "'special and small' category of cases in which arising under

jurisdiction still lies," *Gunn*, 568 U.S. at 258, if they "really and substantially involv[e] a dispute or controversy respecting the validity, construction or effect of [federal] law." *Grable*, 545 U.S. at 313 (quoting *Shulthis v. McDougal*, 225 U.S. 561, 569 (1912)); *Gunn*, 568 U.S. at 258 (same). Under *Grable*, federal jurisdiction exists over a wholly state-law complaint only in the limited circumstance where 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.

Defendants assert that these standards are met because Plaintiffs' state law claims—which rest on the cities' and counties exercise of core police power authority—somehow interfere with variety of ill-defined "federal interests" and laws. Br. 46. But this is simply another repackaging of Defendants' assertion that federal law preempts Plaintiff's state law claims. This Court has been clear that "*Grable* did not implicitly overturn the well-pleaded complaint rule," and thus does not provide an exception to the rule against removal on the basis of a federal preemption defense. *Cal. Shock Trauma Air Rescue v. State Comp. Ins. Fund*, 636 F.3d 538, 542 (9th Cir. 2011). Instead, "a state-law claim will present a justiciable federal question only if it satisfies *both* the well-pleaded complaint rule *and*" *Grable*'s four elements. *Id.* (emphases in original). Defendants fail to meet their burden for any of those elements.

1. Plaintiffs' Complaints Do Not "Necessarily Raise" Issues of Federal Law.

Because of the well-pleaded complaint rule, a federal question is not necessarily raised within the meaning of *Grable* unless a "question of federal law is a *necessary element* of one of the well-pleaded state claims." *Franchise Tax Bd.*, 463 U.S. at 13 (emphasis added). Defendants do not and cannot argue that the Plaintiffs' claims "require resolution of a substantial question of federal law, or even interpreting federal law." *Franchise Tax Bd.*, 463 U.S. at 13. It is only Defendants' *defenses* that require such an inquiry.

***Foreign Affairs*:** "Under the foreign affairs doctrine, state laws that intrude on th[e] exclusively federal power [to administer foreign affairs] are preempted, under either the doctrine of conflict preemption or the doctrine of field preemption." *Gingery v. City of Glendale*, 831 F.3d 1222, 1228 (9th Cir. 2016). At the outset, then, the foreign affairs doctrine presents at most a federal preemption *defense* that cannot provide a basis for jurisdiction under *Grable*:

> Because such political judgments are not within the competence of either state or federal courts, we can see no support for the proposition that federal courts are better equipped than state courts to deal with cases raising such concerns. . . . If federal courts are so much better suited than state courts for handling cases that might raise foreign policy concerns, Congress will surely pass a statute giving us that jurisdiction.

Patrickson v. Dole Food Co., 251 F.3d 795, 804 (9th Cir. 2001), *aff'd in part, cert. dismissed in part*, 538 U.S. 468 (2003). Defendants are unable to cite any case where

the foreign policy doctrine served as a basis for *Grable* removal jurisdiction, and Plaintiffs are aware of none.

***"Collateral Attack" on Federal Regulations*:** Defendants are also incorrect that Plaintiffs' nuisance claims are removable under *Grable* because they would supposedly require the "state court [to] second-guess . . . federal agencies' balancing of harms and benefits" with respect to fossil fuels and carbon emissions, and various activities of the Army Corps of Engineers. *See* Br. 49, 51–52. Even if the state tort duties underlying Plaintiffs' claims covered identical ground and weighed identical factors as the regulations Defendants cite and were for that reason unenforceable, that would at most present a potential federal preemption defense *in state court* on remand. As the court below correctly 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. *Grable* does not sweep so broadly." ER6.

The cases Defendants cite highlight the fatal flaws in their argument. In every case cited, the plaintiff's claims did not merely touch on a defendant's federally regulated conduct; rather, *the claimed right to relief itself* grew directly out of federal regulation or expressly challenged a federal regulatory decision.[15] Here, by contrast,

[15] *See Bd. of Comm'rs of Se. La. Flood Prot. Auth.-E. v. Tenn. Gas Pipeline Co., L.L.C.*, 850 F.3d 714, 720–21 (5th Cir. 2017) ("*Tennessee Gas Pipeline*"), *cert.*

none of the Plaintiffs' claims require proof of a federal regulatory violation, seek to invalidate any federal decision, or otherwise depend on federal law to create the right to relief.

There is also no substantive overlap between the elements of proof for Plaintiffs' state law tort claims and the various regulatory considerations cited by Defendants. An agency's prospective, generalized, policy-oriented "balancing" pursuant to regulatory authority fundamentally differs in kind from the backward-

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denied, 138 S. Ct. 420 (2017) (affirming denial of motion to remand where state law claims "dr[ew] on federal law as the *exclusive basis* for holding Defendants liable for some of their actions," and "[could not] be resolved without a determination whether multiple federal statutes create a duty of care that does not otherwise exist under state law"); *Pet Quarters, Inc. v. Depository Tr. & Clearing Corp.*, 559 F.3d 772, 779 (8th Cir. 2009) (affirming removal of state securities violation claim challenging federally approved "Stock Borrow Program," where plaintiff alleged program "by its mere existence, hinders competition," and therefore "directly implicate[d] actions taken by the [SEC] in approving the creation of the Stock Borrow Program and the rules governing it"); *Bennett v. Southwest Airlines Co.*, 484 F.3d 907, 912 (7th Cir. 2007) (finding no subject-matter jurisdiction over state law tort claim against airline arising from crash, holding "that some standards of care used in tort litigation come from federal law does not make the tort claim one 'arising under' federal law" for removal purposes); *Bader Farms, Inc. v. Monsanto Co.*, No. 1:16-CV-299 SNLJ, 2017 WL 633815, at *2–3 (E.D. Mo. Feb. 16, 2017) (fraudulent concealment claims rested on defendant's alleged withholding of material information from the Department of Agriculture, and therefore necessarily raised a federal question because the information defendants were required to disclose was defined by federal regulations that "in large part, . . . identif[y] the duty to provide information and the materiality of that information"); *McKay v. City & Cty. of San Francisco*, No. 16-CV-03561 NC, 2016 WL 7425927, at *1–2 (N.D. Cal. Dec. 23, 2016) (denying motion to remand where plaintiffs alleged state law nuisance resulting from noise under commercial flightpath, necessarily challenging the Federal Aviation Administration's final decision approving the flightpath).

looking, case-specific factor-weighing a court conducts in adjudicating a common law tort suit. The critical distinction was highlighted by the Iowa Supreme Court in *Freeman v. Grain Processing Corp.*, 848 N.W.2d 58 (Iowa 2014). Holding that the CAA did not preempt residents' state law claims over pollution from a corn milling facility, the court emphasized that unlike the civil penalties imposed under the Act to protect the public at large, "the common law focuses on special harms to property owners caused by pollution at a specific location" allowing individual plaintiffs to "obtain compensatory damages, punitive damages, and injunctive relief . . . in particular locations for actual harms." *Id.* at 69. So too here. The Plaintiffs' common law claims have no overlap with the various regulatory laws and agency decisions Defendants gesture toward, and none of Plaintiffs' claims implicitly or explicitly attack, challenge, or seek to change any federal regulatory decision.

Defendants' assertion that adjudicating Plaintiffs' claims would require a court to "judge the adequacy of multiple complex and intertwined decisions by Congress and the Corps," such as whether "various levee and seawall projects[] unreasonably have failed to prevent Plaintiffs' injuries," Br. 52, finds no support in the Complaints. Plaintiffs did not bring suit against the Army Corps or Congress and did not ask for relief that would alter any actions of the Corps; the tortious conduct at issue here is Defendants' marketing and promotion of products they knew would cause Plaintiffs harm, and the failure to warn of those harms. California law creates

Plaintiffs' right to relief. Determining whether a hypothetical abatement project would be "authorized by the Corps," Br. 52, would involve a fact-bound and situation-specific inquiry that, even if necessary, would not satisfy *Grable*'s separate substantiality requirement. *See, e.g.*, *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677 (2006) at 700–01 (a "nearly pure issue of [federal] law" that "would govern number [other] cases" is more likely to be substantial than a "fact-bound and situation-specific" inquiry).

"Need for Uniform Federal Standards": Defendants' argument that *Grable* jurisdiction is proper because of the supposed need for federal uniformity finds no support in any case law, and other circuits have squarely rejected it. The claim that federal law provides the sole, uniform basis for a decision is just another way of saying that federal law preempts Plaintiffs' claims, which is, again, no basis for removal.

The Fourth Circuit rejected a similar attempt to circumvent *Grable* in *Pinney v. Nokia*, 402 F.3d 430 (4th Cir. 2005). The defendant in *Pinney* argued for a novel "sufficient connection" test, which would ask whether "a plaintiff's state law complaint is sufficiently connected to a federal regulatory regime as to which Congress has expressed a need for uniform implementation and interpretation." *Id.* at 448. If the claims were so connected, "that connection c[ould] provide a basis for

federal question jurisdiction even if no explicitly federal claim is pled." *Id.* In reversing the district court's denial of remand, the Fourth Circuit held:

> By Nokia's reasoning, even if the Pinney plaintiffs can establish the necessary elements of their claims without resolving a question of federal law, the cases are still removable under the substantial federal question doctrine because of a connection between the federal scheme regulating wireless telecommunications and the Pinney plaintiffs' state claims. That is not enough. The Supreme Court has been quite clear that for removal to be proper under the substantial federal question doctrine, a plaintiff's ability to establish the necessary elements of his state law claims must rise or fall on the resolution of a question of federal law.

Id. at 448–49.

Defendants' argument here is indistinguishable from the argument rejected in *Pinney*, namely that an undefined "uniform federal standard would be needed" because climate change is a topic of national interest on which Congress has generally spoken. *See* Br. 52–53. A generalized interest in federal uniformity does not make federal law an essential element of any of Plaintiffs' claims, and is insufficient to create federal jurisdiction. *Cf. In re Agent Orange Prod. Liab. Litig.*, 635 F.2d 987, 994 (2d Cir. 1980) ("[T]here is no federal interest in uniformity for its own sake. . . . The fact that application of state law may produce a variety of results is of no moment" and is "the nature of a federal system.").

2. Defendants Have Not Shown That the Complaints Raise Questions of Federal Law That Are "Substantial" to the Federal System as a Whole.

Even if a question of federal law were necessarily raised and actually disputed,

Defendants have not met their burden of proving any such question is "substantial" under *Grable*. The "substantiality inquiry under Grable looks . . . to the importance of the issue to the federal system as a whole." *Gunn*, 568 U.S. at 260. The Supreme Court has not precisely defined *Grable*'s substantiality element, but has noted two cases that "illustrat[e]" the types of disputes that satisfy this element. *Id.* The first is *Grable* itself, where the federal government had a "direct interest in the availability of a federal forum to vindicate its own administrative action" in seizing and selling property in a tax dispute. *Id.* (quoting *Grable*, 545 U.S. at 315). The second is *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921), where the plaintiff's claims "depend[ed] upon the determination of the constitutional validity of an act of Congress which [was] directly drawn in question." *Gunn*, 568 U.S. at 261. By contrast, "fact-bound and situation-specific" matters not directly involving the federal government "are not sufficient to establish federal arising under jurisdiction." *Id.* at 263.

Defendants do not engage the Supreme Court's directive, but broadly assert that Plaintiffs' claims "implicat[e]" issues of national importance, namely energy policy, national security, and foreign policy. Br. 54. As the illustrative cases make clear, however, the fact that a particular topic is of national interest or importance is not the same as being substantial to the *federal system as a whole*. Unlike *Grable*, the federal government has no direct interest in this litigation between private parties

over discrete monetary remedies for local harm that are "fact-bound and situation-specific." Unlike *Smith*, no party challenges the constitutionality or viability of any federal enactment. To the contrary, the asserted claims and the relief sought will affect only the parties before the court. The cases simply are not "substantial" within *Grable*'s meaning.

3. Congress Has Struck the State-Federal Balance in Favor of State Courts Hearing State Law Claims.

Finally, state adjudication of Plaintiffs' claims is entirely consistent with the state-federal balance Congress has struck. "[T]he combination of no federal cause of action and no preemption of state remedies" is "an important clue to Congress's conception of the scope of jurisdiction to be exercised under § 1331," and indicates that federal jurisdiction is unavailable. *Grable*, 545 U.S. at 318. Defendants themselves insist that federal law provides no avenue for addressing the kinds of injuries alleged in this case. Moreover, as discussed, the Clean Air Act includes broad savings clauses, leaving substantial room for state courts to adjudicate state claims relating to air pollution. To find jurisdiction in such cirumstances "flout[s], or at least undermine[s], congressional intent." *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 812 (1986).

D. These Cases Are Not Removable Under the Outer Continental Shelf Lands Act.

The OCSLA does not provide a basis for jurisdiction here because Defendants cannot establish "that the plaintiff's injuries would not have accrued *but for* the defendants' activities on the [OCS]." ER6 (citing *In re Deepwater Horizon*, 745 F.3d 157, 163 (5th Cir. 2014)). As the cases illustrate, OCSLA jurisdiction is intended to cover disputes where physical activities on the OCS caused the alleged injuries, or where the dispute actually and directly involves OCS drilling and exploration activities, such as contract disputes between OCS operations contractors. The method and location of Defendants' production of fossil fuel products is immaterial to Plaintiffs' claims, and Defendants' arguments would "open the floodgates to cases that could invoke OCSLA jurisdiction far beyond its intended purpose." *Plaquemines Par. v. Palm Energy Offshore, LLC*, No. CIV.A. 13-6709, 2015 WL 3404032, at *5 (E.D. La. May 26, 2015).[16]

First, Plaintiffs' injuries were not caused by "injurious physical acts" of any Defendant on the OCS. *Par. of Plaquemines v. Total Petrochem. & Ref. USA, Inc.*, 64 F. Supp. 3d 872, 895 (E.D. La. 2014); *Tennessee Gas Pipeline v. Houston Cas.*

[16] Defendants' overbroad formulation of the OCSLA jurisdictional grant would bring into federal court not only this case, but any case involving facts traceable to deep sea oil drilling, no matter how far-flung and remote—for example, a routine personal injury action against a tanker truck driver stemming from an car accident in Tennessee would be removable simply because the tanker carried gasoline refined from oil extracted from OCS.

Ins. Co., 87 F.3d 150, 154 (5th Cir. 1996) (defining "operation" as "the doing of some physical act" on the OCS). Instead, the injuries arise from the defective nature of Defendants' fossil fuel products, Defendants' knowledge of their dangerous effects, and from the campaign of misinformation that undermined public understanding of those dangers—no matter where or by what "operations" the products were extracted. *See Parish of Plaquemines*, 64 F. Supp. 3d at 894–96 (no OCSLA jurisdiction over pollution claims from oil and gas exploration and production in Louisiana waters, even though some claims "involved pipelines that ultimately stretch to the OCS").

While Defendants attempt to suggest (without actually admitting) that their OCS activities are sufficiently pervasive to have a material effect on climate change, Br. 59, Defendants "have not shown that the plaintiffs' causes of action would not have accrued but for the defendants' activities on the shelf." ER6.

Hammond v. Phillips 66 Co., No. 2:14CV119-KS-MTP, 2015 WL 630918 (S.D. Miss. Feb. 12, 2015), is instructive on this point. The plaintiff there alleged that he suffered asbestosis and related lung disease from exposure to the defendant manufacturers' asbestos-containing products. *Id.* at *1. The defendants removed under OCSLA, arguing that the plaintiff was exposed to asbestos while working on a semi-submersible on the OCS. *Id.* The plaintiff alleged, however, that he spent only nine months employed on the OCS out of his ten years in the industry. *Id.* at

*3. Because "asbestosis is a cumulative and progressive disease," the court was "unable to conclude that 'a "but-for" connection' exist[ed]" between the plaintiff's injury and his time working on the OCS. *Id.* at *4. The court found that the defendant had failed to establish OCSLA jurisdiction "given the uncertainty regarding whether [plaintiff] working offshore for less than one year could have caused him to develop asbestosis." *Id*.

As in *Hammond*, Defendants here must establish that Plaintiffs would not have been injured but-for Defendants' OCS "operations." Defendants purport to show that substantial volumes of oil and gas have been extracted from the OCS over time. But they make no attempt to support that allegation by quantifying any contribution to Plaintiffs' injuries, much less claim that Plaintiffs would have had no cause of action if Defendants had refrained from any drilling on the OCS.

E. These Cases Are Not Removable Under the Federal Enclave Doctrine.

Federal enclave jurisdiction exists only "over tort claims that arise on 'federal enclaves.'" *Durham*, 445 F.3d at 1250 (9th Cir. 2006). The district court properly held that there was no enclave jurisdiction because federal land "was not the locus in which the claim arose." ER6; *see also Alvares v. Erickson*, 514 F. 2d 156, 160 (9th Cir. 1975) (enclave jurisdiction "depends upon . . . the locus in which the claim arose."), *disapp'd on other grounds by Local 144 Nursing Home Pension Fund v. Demisay*, 508 U.S. 581 (1993).

Tort claims "arise" once the underlying tort is complete as a matter of substantive law. *See Totah v. Bies*, No. C 10-05956 CW, 2011 WL 1324471, at *2 (N.D. Cal. Apr. 6, 2011); *In re High-Tech Empl. Antitrust Litig.*, 856 F. Supp. 2d 1103, 1125 (N.D. Cal. 2012) (rejecting that "federal enclave doctrine applies as long as some of the alleged events occurred on the federal enclave," and applying the "locus" standard). Here, all of Plaintiffs' claims have *actual injury* as an element. *See, e.g.*, ER295–311 (¶¶187, 199, 213, 224, 236, 245, 255, 264). Each claim therefore "arises," where the injuries occur—here, within Plaintiffs' jurisdictions, not on federal enclaves.

Even if this Court were to apply Defendants' unsupported "pertinent events" standard, enclave jurisdiction would be absent because the pertinent events here—Defendants' deceptive marketing and promotion and Plaintiffs' consequent injuries—occurred outside federal enclaves. Further, that standard would open the removal floodgates to any state law action in which some de minimis—but "pertinent"—fraction of the facts occurred on an enclave, which is inconsistent with the limited jurisdiction of the federal courts. *See, e.g.*, *Ballard v. Ameron Int'l Corp.*, No. 16-CV-06074-JSC, 2016 WL 6216194, at *3 (N.D. Cal. Oct. 25, 2016) (denying removal in asbestos exposure case where, inter alia, only one of seventeen exposure sites was a federal enclave). Defendants should bear a "higher burden" where pertinent events occur off an enclave because the state's "interest increases

proportionally, while the federal interest decreases." *Id.* (citation omitted). Defendants' isolated references to a federal petroleum reserve and naval installations, Br. 62, do not establish that the "locus" where the claims arose was any federal enclave.

F. These Cases Are Not Removable Under the Bankruptcy Removal Statute.

The Bankruptcy Removal Statute authorizes removal of claims arising "under section 1334 of this title," which vests district courts with original jurisdiction over "all civil proceedings . . . related to cases under title 11." 28 U.S.C. §§ 1334(b); 1452(a).[17] However, "action[s] by . . . governmental unit[s] to enforce . . . police or regulatory power" are exempt from removal under Section 1452(a).

1. The Claims Are Not Related to Bankruptcy Proceedings.

Post-confirmation "related to" jurisdiction exists only where there is a "sufficiently close nexus . . . between the [case to be removed] and the original bankruptcy proceeding," *In re Pegasus Gold Corp.*, 394 F.3d 1189, 1191 (9th Cir. 2005), such as where the case "'*affects* the interpretation, implementation, consummation, execution, or administration of the confirmed plan,'" *In re Wilshire Courtyard*, 729 F.3d 1279, 1289 (9th Cir. 2013) (emphasis added). A claim does not bear a "close nexus" where it "could have existed entirely apart from the bankruptcy

[17] While each subclause of section 1334(b) creates an independent basis for jurisdiction, Defendants here assert only "related to" jurisdiction. *See* Br. 67–68.

proceeding and did not necessarily depend upon resolution of a substantial question of bankruptcy law." *In re Ray*, 624 F.3d 1124, 1135 (9th Cir. 2010).

Here, the only connection Defendants assert between this litigation and any bankruptcy proceeding is the fact that three Defendants have gone through chapter 11 proceedings in the past, giving rise to the possibility that a portion of Plaintiffs' claims regarding those Defendants may be barred by the terms of their chapter 11 plans. Br. 67–68. Defendants cite no binding authority holding that such a slim nexus is sufficient—a notable omission since litigation against formerly bankrupt companies is commonplace.[18] Resolving this case requires no interpretation of any bankruptcy plan or law. At most, a question may someday arise about whether a previous bankruptcy discharge precludes enforcement of a portion of the judgment in this case against a particular Defendant. But that straightforward application of a plan's terms would in no way *affect* the interpretation or implementation of the plan going forward. *See generally* ER21–313 (San Mateo County's complaint).

2. These Police Power Actions Are Exempt from Removal.

In any event, the district court properly held that these actions are "aimed at protecting the public safety and welfare and brought on behalf of the public," and thus not removable under Section 1452(a)'s exception. ER7.

[18] *In re Valley Health Sys.*, 584 F. App'x 477 (9th Cir. 2014), is inapposite as well as nonprecedential. There, unlike here, the complaint raised a direct attack on a provision in the post-confirmation bankruptcy plan. *Id*. at 478.

Civil actions by governmental units generally fall within the bankruptcy removal exception so long as the suit "seeks to effectuate public policy" rather than "adjudicate private rights," *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1109 (9th Cir. 2005). The exception is inapplicable where the suit serves a purely "pecuniary purpose," *City & Cty. of San Francisco v. PG & E Corp.*, 433 F.3d 1115, 1125 (9th Cir. 2006); *see also id.* at 1124 ("If the action primarily seeks to protect the government's pecuniary interest, the automatic stay applies. If the suit primarily seeks to protect the public safety and welfare, the automatic stay does not apply").[19] Defendants do not dispute on appeal that these claims clearly effectuate the public policy of protecting public "safety and welfare." ER7; *see* Br. 69; *see also Lawton v. Steele*, 152 U.S. 133, 136 (1894) (extent and limits of police power include power to abate public nuisances). Instead, Defendants resist remand solely on the ground that the suit seeks monetary relief. Br. 69. That argument fails.

Only actions pursued "solely" to advance the government's pecuniary interest in a bankrupt estate fail the "pecuniary interest" test and are therefore removable. *See In re Universal Life Church*, 128 F.3d 1294, 1298–99 (9th Cir. 1997) ("most government actions . . . have some pecuniary component," which "does not abrogate

[19] Cases interpreting the police power exception to the automatic stay provision, 11 U.S.C. § 362(b)(4), are equally applicable to the removal statute. *See PG & E Corp.*, 433 F.3d at 1123.

their police power function"); *PG & E Corp.*, 433 F.3d at 1124–1125 (action seeking civil penalties and restitution an exercise of police power).

Here, to protect their residents, Plaintiffs seek abatement of dangerous environmental conditions and damages for injuries resulting from Defendants' prior course of conduct, as well as punitive remedies to ensure that Defendants do not repeat their tortious conduct. Far from an "economic windfall," Br. 69, this relief would be commensurate with Plaintiffs' damages and Defendants' wrongfulness, and will directly effectuate Plaintiffs' protection of public welfare and resources. These police power actions are not "related to" a bankruptcy and removal is inappropriate.[20]

G. Defendants' Invocation of Admiralty Jurisdiction Is Waived and Meritless.

1. Defendants Waived the Right to Assert Admiralty Jurisdiction as a Basis for Removal.

In deciding the propriety of removal, the court is limited to the grounds timely asserted in the notice of removal filed within 30 days of a defendant being served with the complaint; "alternative bases for removal jurisdiction" outside those timely asserted in the notice cannot be considered. *ARCO Envtl. Remediation, L.L.C. v.*

[20] Even if the Court determines that these cases are "related to" bankruptcies and that the exception does not apply, it must still remand to allow the district court to determine whether equitable remand to state court is appropriate. 28 U.S.C. § 1452(b).

Dep't of Health & Envtl. Quality of Montana, 213 F.3d 1108, 1117 (9th Cir. 2000); *see also O'Halloran v. Univ. of Washington*, 856 F.2d 1375, 1381 (9th Cir. 1988); 28 U.S.C. § 1446(b). Defendants did not raise admiralty jurisdiction as a basis for removal until Defendant Marathon Petroleum Corp.'s Supplemental Notice of Removal in the later-filed *City of Santa Cruz*, *County of Santa Cruz*, and *City of Richmond* cases. *Compare* ER141–77, *with* ER55–77. Therefore, even if admiralty were grounds for removal, which it is not, it could only form a basis for removal for the actions in which it was timely asserted, and would not apply to the *County of San Mateo*, *County of Marin*, and *City of Imperial Beach* cases.

2. Admiralty Jurisdiction Alone Is Not Grounds for Removal.

The district court rejected Defendants' invocation of admiralty jurisdiction by expressly adopting the reasoning of *Coronel v. AK Victory*, 1 F. Supp. 3d 1175, 1178–89 (W.D. Wash. 2014). *See* ER1. The court in *Coronel* explained that it is a well-established rule, which has persisted "throughout the history of federal admiralty jurisdiction—from the Judiciary Act of 1789 . . . and up to the present," that the "saving to suitors" clause in 28 U.S.C. § 1333 prohibits removal absent some other jurisdictional basis. *Coronel*, 1 F. Supp. 3d at 1187; *see also, e.g.*, *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1069 (9th Cir. 2001) (maritime claims brought in state court "are not removable under 28 U.S.C. § 1441 absent some other jurisdictional basis"). The 2011 amendments to 28 U.S.C. § 1441 did not change this

long-standing rule. *See Coronel*, 1 F. Supp. 3d. at 1179. Defendants' brief fails to cite any law to the contrary, and even omits *Coronel* entirely from Defendants' argument. *See* Br. at 69–71.

3. There Is No Admiralty Jurisdiction Here.

A tort claim only comes within admiralty jurisdiction when it satisfies both the "location" and "connection to maritime activity" tests. *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995); *In re Mission Bay Jet Sports, LLC*, 570 F.3d 1124, 1126 (9th Cir. 2009). Defendants have not established that Plaintiffs' claims satisfy either test.

Where the injury suffered is on land, as here, the location test requires a showing that the alleged tort was caused by a vessel on navigable water. *Grubart*, 513 U.S. at 534 (citing 46 U.S.C. § 30101(a) (formerly 46 App. U.S.C. § 740)); *Ali v. Rogers*, 780 F.3d 1229, 1235 (9th Cir. 2015). Even if Defendants could establish that fossil fuel extraction occurs on vessels, Br. 69, such a finding does not satisfy the location test here because there is no allegation in the Complaints, nor have Defendants even contended, that those "vessels" *caused* Plaintiffs' injuries on land. The Complaints instead allege that the proximate cause of Plaintiffs' injuries arises from the dangerous nature of the products themselves and from Defendants' wrongful and misleading promotion of those products with knowledge of their dangers, not from any Defendant's operation of floating drilling platforms.

Defendants also fail to meet the maritime connection test, which requires that "the *general character of the activity* giving rise to the incident shows *a substantial relationship* to traditional maritime activity." *Grubart*, 513 U.S. at 533–34 (emphasis added) (quotations omitted). For a tort to have a "substantial relationship" with traditional maritime activity, the activity must be "a proximate cause of the incident." *Id.* at 541. Oil and gas production—even from floating drilling platforms—is not a "traditional maritime activity." In *Herb's Welding, Inc. v. Gray*, the Supreme Court concluded that the "exploration and development of the Continental Shelf are not themselves maritime commerce." 470 U.S. 414, 425 (1985). The relevant inquiry is whether the specific injurious activity was related to a traditional subject of admiralty law, *e.g.*, navigation.[21] Defendants' wrongful, deceptive marketing and promotion of fossil fuels—the injurious conduct at issue in Plaintiffs' cases—has nothing to do with navigable waters. Those land-based activities do "not require the special expertise of a court in admiralty as to navigation or water-based commerce." *Myhran v. Johns-Manville Corp.*, 741 F.2d 1119, 1122 (9th Cir. 1984).

[21] In *Theriot v. Bay Drilling Corp*., cited by Defendants, the Fifth Circuit likewise engaged in a more nuanced approach than the blanket rule Defendants promote, holding maritime law governed because the contract at issue "did not merely touch incidentally on a vessel, but directly addressed the use and operation of the [drilling barge]." 783 F.2d 527, 538–39 (5th Cir. 1986).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court affirm the district court's orders granting remand.

Respectfully submitted,

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Dated: January 22, 2019

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6

Instructions for this form: http://www.ca9.uscourts.gov/forms/form17instructions.pdf

9th Cir. Case Number(s) 18,15499, 18-15502, 18-15503, 18-16376

The undersigned attorney or self-represented party states the following:

○ I am unaware of any related cases currently pending in this court.

◉ I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.

○ I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

Signature s/ Victor M. Sher **Date** Jan 23, 2019

*(use "*s/[typed name]*" to sign electronically-filed documents)*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(g), I certify that this brief complies with the type-volume limitation of Circuit Rules 32-1(a) and 32-2(b). This brief contains 14,684 words, excluding the parts of the brief exempted by Federal Rules of Appellate Procedure 32(f), and is in response to a longer joint brief.

This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the document has been prepared in a proportionally spaced typeface using Microsoft Word 2016, Times New Roman 14-point font.

/s/ Victor M. Sher
Victor M. Sher

CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2019, I caused a copy of the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Victor M. Sher
Victor M. Sher

ADDENDUM

Pursuant to Ninth Circuit Rule 28-2.7, this addendum includes pertinent statutes, reproduced verbatim:

Statute **Page**

28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1292(b). Interlocutory decisions

. . . .

(b) 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: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

. . . .

28 U.S.C. § 1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

. . . .

28 U.S.C. § 1334(b). Bankruptcy cases and proceedings

. . . .

(b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

. . . .

28 U.S.C. § 1442(a). Federal officers or agencies sued or prosecuted

(a) A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

(3) Any officer of the courts of the United States, for or relating to any act under color of office or in the performance of his duties;

(4) Any officer of either House of Congress, for or relating to any act in the discharge of his official duty under an order of such House.

. . . .

28 U.S.C. § 1446(b). Procedure for removal of civil actions

. . . .

(b) Requirements; generally.--(1) The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

. . . .

28 U.S.C. § 1446(d). Procedure of removal of civil actions

. . . .

(d) Notice to adverse parties and State court.--Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

. . . .

28 U.S.C. § 1447(d). Procedure after removal generally

. . . .

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

. . . .

28 U.S.C. § 1452(a). Removal of claims related to bankruptcy cases

(a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

. . . .

42 U.S.C. § 7401(a)(3). Congressional findings and declaration of purpose

. . . .

(3) that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments;

. . . .

42 U.S.C. § 7416. Retention of State Authority

Except as otherwise provided in sections 1857c-10(c), (e), and (f) (as in effect before August 7, 1977), 7543, 7545(c)(4), and 7573 of this title (preempting certain State regulation of moving sources) nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 7411 or section 7412 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

42 U.S.C. § 7604(e). Citizen Suits

. . . .

(e) Nonrestriction of other rights

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency). Nothing in this section or in any other law of the United States shall be construed to prohibit, exclude, or restrict any State, local, or interstate authority from—

(1) bringing any enforcement action or obtaining any judicial remedy or sanction in any State or local court, or

(2) bringing any administrative enforcement action or obtaining any administrative remedy or sanction in any State or local administrative agency, department or instrumentality,

against the United States, any department, agency, or instrumentality thereof, or any officer, agent, or employee thereof under State or local law respecting control and abatement of air pollution. For provisions requiring compliance by the United States, departments, agencies, instrumentalities, officers, agents, and employees in the same manner as nongovernmental entities, see section 7418 of this title.

. . . .

42 U.S.C. § 7607. Administrative proceedings and judicial review

. . . .

(b) Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title,,2 any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination

under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. Where a final decision by the Administrator defers performance of any nondiscretionary

statutory action to a later time, any person may challenge the deferral pursuant to paragraph (1).

. . . .

(d) Rulemaking

(1) This subsection applies to—

(A) the promulgation or revision of any national ambient air quality standard under section 7409 of this title,

(B) the promulgation or revision of an implementation plan by the Administrator under section 7410(c) of this title,

(C) the promulgation or revision of any standard of performance under section 7411 of this title, or emission standard or limitation under section 7412(d) of this title, any standard under section 7412(f) of this title, or any regulation under section 7412(g)(1)(D) and (F) of this title, or any regulation under section 7412(m) or (n) of this title,

(D) the promulgation of any requirement for solid waste combustion under section 7429 of this title,

(E) the promulgation or revision of any regulation pertaining to any fuel or fuel additive under section 7545 of this title,

(F) the promulgation or revision of any aircraft emission standard under section 7571 of this title,

(G) the promulgation or revision of any regulation under subchapter IV-A of this chapter (relating to control of acid deposition),

(H) promulgation or revision of regulations pertaining to primary nonferrous smelter orders under section 7419 of this title (but not including the granting or denying of any such order),

(I) promulgation or revision of regulations under subchapter VI of this chapter (relating to stratosphere and ozone protection),

(J) promulgation or revision of regulations under part C of subchapter I of this chapter (relating to prevention of significant deterioration of air quality and protection of visibility),

(K) promulgation or revision of regulations under section 7521 of this title and test procedures for new motor vehicles or engines under section 7525 of this title, and the revision of a standard under section 7521(a)(3) of this title,

(L) promulgation or revision of regulations for noncompliance penalties under section 7420 of this title,

(M) promulgation or revision of any regulations promulgated under section 7541 of this title (relating to warranties and compliance by vehicles in actual use),

(N) action of the Administrator under section 7426 of this title (relating to interstate pollution abatement),

(O) the promulgation or revision of any regulation pertaining to consumer and commercial products under section 7511b(e) of this title,

(P) the promulgation or revision of any regulation pertaining to field citations under section 7413(d)(3) of this title,

(Q) the promulgation or revision of any regulation pertaining to urban buses or the clean-fuel vehicle, clean-fuel fleet, and clean fuel programs under part C of subchapter II of this chapter,

(R) the promulgation or revision of any regulation pertaining to nonroad engines or nonroad vehicles under section 7547 of this title,

(S) the promulgation or revision of any regulation relating to motor vehicle compliance program fees under section 7552 of this title,

(T) the promulgation or revision of any regulation under subchapter IV-A of this chapter (relating to acid deposition),

(U) the promulgation or revision of any regulation under section 7511b(f) of this title pertaining to marine vessels, and

(V) such other actions as the Administrator may determine.

The provisions of section 553 through 557 and section 706 of Title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies. This subsection shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of Title 5.

. . . .

(e) Other methods of judicial review not authorized
Nothing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in this section.

43 U.S.C. § 1349(b). Citizen suits, jurisdiction and judicial review

. . . .

(b) Jurisdiction and venue of actions

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

(2) Any resident of the United States who is injured in any manner through the failure of any operator to comply with any rule, regulation, order, or permit issued pursuant to this subchapter may bring an action for damages (including reasonable attorney and expert witness fees) only in the judicial district having jurisdiction under paragraph (1) of this subsection.

. . . .

46 U.S.C. § 30101(a). Extension of jurisdiction to cases of damage or injury on land

(a) The admiralty and maritime jurisdiction of the United States extends to and includes cases of injury or damage, to person or property, caused by a vessel on navigable waters, even though the injury or damage is done or consummated on land.

. . . .