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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

The COUNTY OF SAN MATEO, individually and on behalf of THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

CHEVRON CORP., et al.,

Defendants.

CASE NO. 3:17-cv-04929-VC

REPLY TO DEFENDANTS' JOINT OPPOSITION TO PLAINTIFFS' MOTION FOR REMAND

Date: February 15, 2018
Time: 10:00 a.m.
Courtroom: 4, 17th Floor
Judge: Hon. Vince Chhabria

THE CITY OF IMPERIAL BEACH, a municipal corporation, individually and on behalf of THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. CHEVRON CORP., et al., Defendants.	CASE NO. 3:17-cv-04934-VC
THE COUNTY OF MARIN, individually and on behalf of THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. CHEVRON CORP., et al., Defendants.	CASE NO. 3:17-cv-04935-VC

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I. INTRODUCTION

Defendants' original Notice of Removal and current Joint Opposition to Plaintiffs' Motion to Remand, Doc. 195 ("Opp."), drastically and fundamentally misconstrue the substance of Plaintiffs' Complaints, spinning numerous grounds for removal out of fabricated allegations found nowhere in the Complaints. Contrary to Defendants' relentless assertions, *see, e.g.*, Opp. at 1–2, Plaintiffs' claims do not seek to "reshape the Nation's longstanding national economic and foreign policies," upend federal regulations, bind the hands of the President, or control worldwide greenhouse gas policy. As explained in Plaintiffs' Motion for Remand ("Mot."), Plaintiffs assert well-established California law causes of action for concrete injuries to their own coastlines, arising in public and private nuisance, product liability, negligence, and trespass. Mot. at 1:17–24.[1]

The Court should reject Defendants' assertion that federal common law provides any basis for removal jurisdiction. First, the federal common law claims on which Defendants rely have been displaced by the Clean Air Act, 42 U.S.C. § 7401 *et seq*. That displacement did not somehow convert all state law tort claims involving greenhouse gases into federal common law claims. Second, Defendants' arguments that federal law "controls" Plaintiffs' claims present at most an ordinary preemption defense that does not support removal jurisdiction. Finally, Plaintiffs' claims against producers and sellers for the wrongful promotion of dangerous fossil fuel products do not raise any "uniquely federal interest" warranting application of federal common law.

Plaintiffs' claims likewise do not "arise under" federal law under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005). No element of any claim depends on the interpretation or application of federal law, or otherwise necessarily raises disputed and substantial federal issues. Defendants' arguments that Plaintiffs' claims "implicate" foreign affairs and various federal regulations all misconstrue the Complaints, and raise only preemption defenses that do not create removal jurisdiction.

[1] All Docket references herein refer to the docket in Case No. 17-04929 unless otherwise indicated. Citations to paragraphs in the Complaint ("Compl.") refer to the corresponding paragraphs in the complaint filed by Plaintiff County of San Mateo, Doc. No. 1–2.

Nothing in the Clean Air Act completely preempts these cases. Plaintiffs' claims against Defendants for their wrongful marketing and promotion of fossil fuel products have no connection to the Act's regulatory framework governing point source emissions, and thus are not "within the scope" of the Act. Multiple courts have already rejected Defendants' argument that the Clean Air Act completely preempts all state law tort claims involving air pollution and instead have held that the Act expressly recognizes the "primary role" states play in regulating air pollution and affirmed the interest of California and other states in addressing climate change.

Defendants' remaining arguments are without merit. Plaintiffs' claims do not arise out of operations on the Outer Continental Shelf or arise on a federal enclave, and Defendants' tortious production, marketing, sale, and promotion of their defective products was not directed or controlled by a federal superior. There is no jurisdiction under the bankruptcy code because Plaintiffs' claims are an exercise of their police powers, do not relate to any bankruptcy proceeding, and should be remanded on equitable grounds in any event. For all these reasons, remand is proper.

II. ARGUMENT

A. Federal Common Law Does Not Confer Federal Jurisdiction over Plaintiffs' Claims.

No federal common law exclusively controls Plaintiffs' claims against sellers, producers, and marketers of fossil fuel products. Indeed, the federal common law on which Defendants rely no longer exists. At most, Defendants' construction of the cases suggests an ordinary preemption defense, which is not a basis for removal.

1. The Federal Common Law on Which Defendants Rely No Longer Exists.

i. *AEP* and *Kivalina* Held that the Clean Air Act Displaced the Federal Common Law.

The Supreme Court and Ninth Circuit held in *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011) ("*AEP*"), and *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012) ("*Kivalina*"), *cert. denied*, 133 S. Ct. 2390 (2013), respectively, that the *federal* Clean Air Act displaces *federal* common law nuisance claims regarding greenhouse gas emissions

from stationary sources. *See* Mot. at. 7:20-24, 8:9–10:6. Defendants' contention that those courts somehow "found" any and all state claims relating to global warming "to be governed by federal common law," Opp. at 7:15–17, cherry-picks and misconstrues portions of both opinions.

In *AEP,* the Supreme Court expressly *declined* to rule on the "academic question whether, in the absence of the Clean Air Act and the EPA actions the Act authorizes, the plaintiffs could state a federal common law claim for curtailment of greenhouse gas emissions because of their contribution to global warming." 564 U.S. at 423.[2] Defendants point to the Court's discussion of prior history of federal common law governing nuisance claims for interstate pollution to support their argument that the Court held federal common law governed the plaintiffs' public nuisance claims, Opp. at 7:26, 8:1–13, but ignore that the Court expressly held that "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon dioxide emissions from fossil-fuel fired power plants." *AEP*, 564 U.S. at 424.

Defendants' reading of *Kivalina* is similarly irreconcilable with the court's actual opinion. Defendants again conflate the court's recitation of the *history* of federal common law with a *holding* that federal common law would have governed the *Kivalina* plaintiffs' claims. *Id.* at 8:23–28. Instead, the Ninth Circuit followed the Supreme Court's ruling in *AEP*, and held that any federal common law claims the plaintiffs might have asserted had been displaced by the Clean Air Act, *without* determining whether federal common law would control in the absence of the Act:

> We need not engage in that complex issue and fact-specific analysis in this case, because we have direct Supreme Court guidance. The Supreme Court has already determined that Congress has directly addressed the issue of domestic greenhouse gas emissions from stationary sources and has therefore displaced *federal* common law.

[2] Defendants' reliance on the Court's dictum that "borrowing the law of a particular State would be inappropriate" is misplaced. *See* Opp. at 10:19–21. The statement, made without discussion, was not an endorsement of federal common law over state law, but instead an acknowledgement that the case involved eight States and New York City as plaintiffs all suing emitters holding permits in other states. *See AEP*, 564 U.S. at 418, 423. For that reason, selecting the law of one state to control the claims of all plaintiffs and defendants could well have been inappropriate.

Kivalina, 696 F.3d at 856 (emphasis added) (*citing AEP*, 564 U.S. at 423–24). If the plain language of the opinions were not enough to demonstrate Defendants' misleading characterization, it is noteworthy that the Supplemental Opposition submitted by some defendants admits *AEP* held federal common law has been displaced. Suppl. Opp. at 5, n. 22. Nothing in *AEP* or *Kivalina* holds that federal common law "governs" all claims involving global warming or greenhouse gas emissions.

ii. The Clean Air Act's Displacement of Federal Common Law Is Irrelevant to Plaintiffs' State Law Claims.

Defendants' blunt-force assertion that Plaintiffs' state law claims are "*necessarily* governed" by federal common law, Opp. at 10:10–21, is a classic bait and switch. As explained above, *AEP* and *Kivalina* held only that the Clean Air Act displaced the plaintiffs' *federal* common law claims. In evaluating what body of law the Clean Air Act had displaced, the Supreme Court emphasized that "[l]egislative 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." *AEP*, 564 U.S. at 423. For that reason, *AEP* explicitly left the plaintiffs' state law claims for consideration on remand, explaining that because "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.[3] The Ninth Circuit followed suit in *Kivalina*. 696 F.3d at 866 ("Once federal common law is displaced, state nuisance law becomes an available option to the extent it is not preempted by federal law . . . Kivalina may pursue whatever remedies it may have under state law to the extent their claims are not preempted." (Pro, J., concurring)). Other circuits have agreed that displacement of *federal* common law by the *federal* Clean Air Act does not dispose of *state* law claims. *See Bell v. Cheswick Generating Station*, 734 F.3d 188, 197 n.7 (3d Cir. 2013) (*AEP* "does nothing to alter our analysis," because displacement of federal common law is

[3] Defendants misstate Plaintiffs' position as arguing that "state law may full take the place of the now-displaced federal common law." Opp. at 13:22–24. As *AEP* makes clear, displacement of federal common law means that the federal statute, not federal common law, determines the extent, if any, to which state law claims are preempted.

governed by different principles from 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."). In sum, the Clean Air Act's displacement of *federal* common law does not dispose of Plaintiffs' *state* law claims.

2. Defendants' Ordinary Preemption Defenses Cannot Support Removal.

Because the Clean Air Act has displaced the federal common law Defendants seek to apply here, Defendants are left with only ordinary preemption defenses that do not support removal. Defendants argue that Plaintiffs' claims do not fit within the rule set out in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987) ("*Ouellette*"). Opp. at 10:22–11:18. In *Ouellette*, the Supreme Court addressed a choice of law issue under the federal Clean Water Act, holding that state law nuisance suits against transboundary stationary sources must apply the law of the source state ("source state rule"). 479 U.S. at 487. As explained in Plaintiffs' Motion, Mot. at 11:2–5, however, *Ouellette* has no bearing on removal jurisdiction: in that case removal rested on diversity jurisdiction, and the Court considered ordinary preemption under the Clean Water Act (a merits issue), not complete preemption (a jurisdictional issue). *Ouellette*, 479 U.S. at 499–500.

The "source state rule" established in *Ouellette* has been applied in the context of the Clean Air Act by several circuit courts, but only as applied to stationary sources holding permits under the Clean Air Act, and always in the context of ordinary preemption. *See, e.g.*, *Merrick*, 805 F.3d at 692, 695 (applying *Ouellette* to the Clean Air Act and finding no preemption of claims against permitted point source); *Bell*, 734 F.3d at 190, 194–95 (same); *N. Carolina ex rel. Cooper v. Tennessee Valley Auth.*, 615 F.3d 291, 310 (4th Cir. 2010) (denying relief where power plant emissions affecting North Carolina were not a public nuisance under source state law). As discussed in Plaintiffs' Motion, Mot. at 12:8–14, it is axiomatic that ordinary preemption defenses are not grounds for removal. *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 14 (1983). Thus, Defendants' *ordinary* preemption arguments under

Ouellette have no bearing on whether removal was proper here.[4] Defendants' logic not only fails to appreciate the distinction between suits against manufacturers and sellers for wrongfully promoting their products (on the one hand) and suits against permitted sources of pollution (on the other), but also would obviate the distinction between complete and ordinary preemption, turning the well-pleaded complaint rule on its head, and rendering any garden variety preemption defense into grounds for removal—an untenable result under *Grable*. *See Grable*, 545 U.S. at 313; *infra* Section II.B.

3. Plaintiffs' Claims Are Not Within the Scope of Federal Common Law.

i. Federal Common Law Does Not Extend to Wrongful Promotion and Marketing by Manufacturers and Sellers of Products.

Even if the federal common law principles Defendants champion had not been displaced (they have), and even if any court had held federal common law "controls" in cases against greenhouse gas emitters (none has), Defendants' argument would still fail. There is no federal common law applicable to claims against manufacturers and sellers arising out of their tortious promotion and marketing of products they knew were dangerous. Nor is there any "uniquely federal interest" warranting application of federal common law here.

Plaintiffs' claims focus on Defendants' wrongful production, promotion, and marketing of their fossil fuel products. Compl. ¶¶ 179–267. Defendants repeatedly misconstrue and recast Plaintiffs' claims and the relief sought, insisting that Plaintiffs seek to "regulate the conduct of out-of-state sources." Opp. 12:5.[5] But Plaintiffs do not seek injunctive relief that would compel

[4] Plaintiffs will address the applicability, if any, of *Ouellette* in the course of dealing with any asserted preemption arguments following disposition of this jurisdictional motion.

[5] Page after page of Defendants' Opposition is replete with assertions found nowhere in the Complaints, and false statements regarding Plaintiffs' prayer for relief, to the point that Plaintiffs' actual claims are virtually unrecognizable. All of Defendants' grandiose pronouncements about the scope of the Complaints are false. *See, e.g.*, Opp. at 10:1–3 (Plaintiffs' claims implicate "national and international policy regarding energy, the environment, the economy, and national security"); *id.* at 15:7–10 (Plaintiffs' claims "are thinly veiled attacks on federal foreign relations and regulatory decisions"); *id.* at 26:5–10 (Plaintiffs' pleading "questions whether, pursuant to a host of federal statutes, regulators should have struck the balance between the harms and benefits of Defendants' conduct differently"); *id.* at 29:24–25 ("The undeniable intent of Plaintiffs' claims

any regulatory agency to reconsider its regulations, nor do they seek to interfere with any permits held by any party under the Clean Air Act or any other law; rather, Plaintiffs seek damages and abatement—namely adaptation and mitigation measures within their geographic boundaries—against the manufacturers, marketers, and promoters of products they knew would cause harm. Mot. at 4:24–5:5 (citing Compl. ¶¶ 162–91 & Prayer).

Nothing supports applying any federal common law to Plaintiffs' claims. The instances where it is appropriate to develop federal common law are "few and restricted." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981). There must be a "uniquely federal interest," *id.*, and a "significant conflict" between federal policy or interests and state law. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507 (1988). Plaintiffs' claims against Defendants for their tortious promotion and marketing of fossil fuel products present no "uniquely federal interests" that would make application of federal common law appropriate here. First, global warming is not itself a "uniquely federal interest." Indeed, many state laws regulate emissions of greenhouse gases to address climate change and global warming, and the Ninth Circuit has expressly recognized California's interest in addressing this existential problem. *See, e.g.*, *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1093 (9th Cir. 2013) (upholding California global warming law regulating fossil fuels sold in interstate commerce). In *Rocky Mountain Farmers Union*, the Ninth Circuit rejected challenges to California's regulation of certain fuels despite the fact that the regulations might affect out-of-state producers of those fuels. The court noted that

> [b]ecause [greenhouse gases] mix in the atmosphere, all emissions related to transportation fuels used in California pose the same local risk to California citizens. That these climate change risks are widely-shared does not minimize California's interest in reducing them. . . . One ton of carbon dioxide emitted when fuel is produced in Iowa or Brazil harms Californians as much as one emitted when fuel is consumed in Sacramento.

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is to set nationwide and global emissions standards.") *id.* at 48:9–11 ("Plaintiffs seek to use California tort law to override federal policy choices on the production and use of energy, including by our military and for purposes of national defense.").

730 F.3d at 1080–81 (citation and quotation omitted). As the court acknowledged, "If GHG emissions continue to increase, California may see its coastline crumble under rising seas, its labor force imperiled by rising temperatures, and its farms devastated by severe droughts." *Id.* at 1097.[6]

Second, as Plaintiffs explained at length previously, *see* Mot. at 16:16–19:26, the Clean Air Act itself rests on "cooperative federalism," under which the states' interests in regulating emissions play a "primary responsibility." *See, e.g.*, *Nat'l Audubon Soc'y v. Dep't of Water*, 869 F.2d 1196, 1203 (9th Cir. 1988) ("[T]here 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."); *Merrick*, 805 F.3d at 687 ("The Clean Air Act states that air pollution prevention and control is the primary responsibility of individual states and local governments. . . . Thus, it employs a 'cooperative federalism' structure under which . . . states are expressly allowed to employ standards more stringent than those specified by the federal requirements." (*citing* 42 U.S.C. § 7416)).

Third, it is well established that suits against sellers and manufacturers of products do not present "uniquely federal interests" warranting application of federal common law, even where important federal interests are raised. *See, e.g.*, *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1324 (5th Cir. 1985) (*en banc*) (state law, not federal common law, governed in cases against asbestos manufacturers); *In re Agent Orange Prod. Liab. Litig.*, 635 F.2d 987, 995 (2d Cir. 1980) (state law, not federal common law, governed class action tort case on behalf of millions of U.S. soldiers who had served in Vietnam against producers of Agent Orange, despite federal interest in the health of veterans). The fact that a product is sold in many states, or causes injury throughout all 50 states, does not create a "uniquely federal interest" warranting the application of federal common law. As the Fifth Circuit explained in *Jackson*, "A dispute . . . cannot become 'interstate,'

[6] *Accord, e.g.*, *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007) (Vermont regulations addressing greenhouse gas emissions standards for new automobiles not preempted by Clean Air Act). In considering ordinary preemption, the court noted Vermont's participation in the Regional Greenhouse Gas Initiative, a regional greenhouse gas cap and trade program and emphasized that the state's "regulation of greenhouse gases emitted from motor vehicles has a place in the broader struggle to address global warming." *Id.* at 339–40.

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." 750 F.2d 1314; *accord In re Agent Orange Product Liability Litigation*, 635 F.2d at 994 ("[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.").

Finally, there is no "uniquely federal interest" merely because the nature of the injury results from emissions of a pollutant regulated by the Clean Air Act. Courts have rejected preemption defenses against state law claims against manufacturers and sellers for environmental pollution, even when the products are federally regulated under the Act. *See e.g.*, *In re Methyl Tertiary Butyl Ether* ("*MTBE*") *Prods. Liab. Litig.*, 725 F.3d 65, 96 (2d Cir. 2013) (affirming judgment against producers of gasoline under state tort law for contamination of city's groundwater wells with MTBE, a gasoline additive regulated under the Clean Air Act).

ii. California Tort Law Recognizes Nuisance Claims Against Manufacturers for Wrongful Promotion of Dangerous Products.

Nuisance claims for wrongful promotion of products, as distinct from nuisance claims based on emissions, are well-recognized under California law. For example, the California Court of Appeal recently affirmed a judgment in a public nuisance action in the name of the People against lead paint manufacturers for "*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." *People v. ConAgra Grocery Prods. Co.*, 17 Cal. App. 5th 51, ___, 2017 WL 5437485, at *18 (2017) (emphasis added). At issue was not whether defendants actually applied the paint on interior walls, but whether they "affirmatively promoted lead paint for interior residential use while knowing of the public health hazard that such use would create." *Id.* at *19. As in the lead paint litigation, public nuisance liability here lies against Defendants based on "their intentional promotion of [their products] with knowledge of the public health hazard that this use would create," a claim entirely cognizable under California law. *See also Cty. of Santa Clara v. Atl. Richfield Co.*, 137 Cal. App. 4th 292, 310 (2006) (finding public nuisance claim properly stated against manufacturers of lead paint); *accord, e.g.*, *City of Modesto v. Dow Chem. Co.*, ___Cal. App. 5th ___, 2018 WL

317043, at *14 (Jan. 8, 2018) (manufacturer liability for participation in creating water contamination nuisance); *City of Modesto Redevelopment Agency v. Superior Court*, 119 Cal. App. 4th 28, 43 (2004), as *modified on denial of reh'g* (June 28, 2004) (same); *In re MTBE Prods. Liab. Litig.*, 457 F. Supp. 2d 455, 464 (S.D.N.Y. 2006) (same; applying California law). The fact that the manufacture, sale, and use of fossil fuels is legal and regulated by state and federal law does not immunize Defendants from the tortious distribution or marketing of those products under California law. *See Ileto v. Glock Inc.*, 349 F.3d 1191, 1214–15 (9th Cir. 2003) (nuisance claim was permitted against gun makers alleging manufacturer's marketing and distribution policies interfered with public rights even where the design, manufacture, and sale of guns was legal); *County of Santa Clara*, 137 Cal. App. 4th at 306, 309–11 (historic manufacture and distribution of lead paint "in accordance with all existing statutes does not immunize it from subsequent abatement as a public nuisance").

Far from a mislabeled federal common law claim, Plaintiffs plead straightforward state law claims and Defendants' authorities do nothing to change this. In *Wayne v. DHL Worldwide Express*, 294 F.3d 1179, 1185 (9th Cir. 2002), the court held that the Airline Deregulation Act's savings clause applied "federal common law to claims for loss of or damage to goods by interstate common carriers by air," but because the plaintiff did not allege his goods were lost or damaged, his claims "*d[id] not* arise under federal common law." Similarly, *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 923 (5th Cir. 1997), held that the claims fell under federal common law because the Airline Deregulation Act's savings clause *expressly* preserved federal common law claims concerning freight that existed before the Act, which is not the case for any law Defendants cite here. Lastly, *New SD, Inc. v. Rockwell Int'l Corp.*, 79 F.3d 953, 955 (9th Cir. 1996), reached only the narrow holding that "on government contract matters having to do with national security, state law is totally displaced by federal common law." *See L'Garde, Inc. v. Raytheon Space & Airborne*

Sys., 805 F. Supp. 2d 932, 942 (C.D. Cal. 2011) (differentiating *New SD* because it "concerns matters of national security that are simply not present here.").[7]

No federal common law bears on—much less exclusively controls—Plaintiffs' claims. And even if it did, the issue would only raise ordinary preemption that has no bearing on removal jurisdiction. Federal common law provides no basis for retaining this case in this Court.

B. Plaintiffs' Claims Do Not Provide for *Grable* Jurisdiction.

Plaintiffs' claims do not "arise under" federal law, and removal is not proper under *Grable*. Defendants assert, again and again, that Plaintiffs' claims are "bound up with," "implicate," and will "impact" federal interests, Opp. at 14:22–23, 15:6–10, and are therefore removable. But those assertions, even if they were accurate, seek to evade the actual test for "arising under" jurisdiction under *Grable* and its progeny.

State law claims only fall into the "'special and small' category of cases in which arising under jurisdiction still lies," *Gunn v. Minton*, 568 U.S. 251, 258 (2013), when 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. That is so only when, on the face of the complaint, 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. "*Grable* did not implicitly overturn the well-pleaded complaint rule." *California Shock Trauma Air Rescue v. State Comp. Ins. Fund*, 636 F.3d 538, 542 (9th Cir. 2011). It therefore remains "settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption." *Franchise Tax Bd. of State of Cal.*, 463 U.S. at 14.

[7] Moreover, *New SD* is of questionable validity, as multiple courts have held, because its reasoning is inconsistent with the test for federal question jurisdiction subsequently set out by the Supreme Court in *Grable*. *See 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" under *Grable* and *Empire*); *Raytheon Co. v. Alliant Techsystems, Inc.*, No. CIV 13-1048-TUC-CKJ, 2014 WL 29106, at *4 (D. Ariz. Jan. 3, 2014) (same).

1. No Question of Federal Law Is a Necessary Element of Any Claim Here.

Plaintiffs' claims do not "necessarily raise" any issue of federal law, because no "question of federal law is a *necessary element* of one of the well-pleaded state claims." *See Franchise Tax Bd. of State of Cal.*, 463 U.S. at 13 (emphasis added). The numerous issues Defendants identify as being "implicated" in the Complaints are at most ordinary preemption defenses that Defendants may raise on remand. "[N]o 'basic' or 'pivotal' federal question . . . impinges on" Plaintiffs' state law "right to relief," and therefore no federal question is "necessarily raised." *Lippitt v. Raymond James Fin. Servs., Inc.*, 340 F.3d 1033, 1046 (9th Cir. 2003), *as amended* (Sept. 22, 2003).

i. Defendants' Invocation of Foreign Affairs Misconstrues Plaintiffs' Claims, and Remains Unavailable as a Basis for *Grable* Removal.

Defendants' argument that Plaintiffs' claims will supposedly impede the ability of the President to negotiate with foreign states regarding climate change misrepresents the character of Plaintiffs' Complaints and misapplies the foreign relations doctrine. Defendants' assertions that Plaintiffs "seek to replace . . . international negotiations and Congressional and Executive decisions with their own preferred foreign policy," Opp. at 16:9–10, completely misrepresents the form and substance of the Complaints. Plaintiffs seek only damages, abatement, and equitable disgorgement for injuries arising out of Defendants' production and wrongful promotion of their products. There is no prayer for injunctive relief against anyone, let alone injunctions seeking sweeping international regulatory reforms.

Even if Defendants' caricature of the Complaints were accurate, the few cases cited do not stand for the proposition that the foreign affairs doctrine can serve as a predicate "federal issue" under *Grable*. Indeed it cannot, because when raised by a defendant and not on the face of the complaint, the doctrine at most serves as an ordinary preemption defense. Unsurprisingly, none of Defendants' cited cases involved *Grable* or any question of removal. All were initiated in federal court under expressly federal law theories, and in each case the *plaintiff* expressly raised the foreign affairs doctrine in its complaint, seeking to invalidate state legislation under the Supremacy Clause.

In *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), a trade association sued in federal district court to enjoin enforcement of Massachusetts legislation that penalized

companies doing business in Burma (Myanmar). The Court found the legislation was preempted by federal statutes imposing certain sanctions on Burma and by executive orders implementing those statutes. *Id.* at 386–88. The plaintiff's claims were expressly framed as federal constitutional challenges to the Massachusetts legislation, and no question of jurisdiction, let alone removal jurisdiction, was before the Court. Similarly, in *American Insurance Association v. Garamendi*, 539 U.S. 396, 412–14 (2003), the plaintiffs sued in federal district court to enjoin enforcement of a California statute directed at recovering insurance assets seized from Holocaust victims, arguing that the statute was preempted by executive agreements addressing recovery of the very same assets reached between the United States and Germany, Austria, and France under multiple Presidents. The Court found that California statute conflicted with the President's conduct of foreign affairs and was therefore preempted. *Id.* at 429.

Crosby and *Garamendi* did not address the threshold *Grable* question presented here: whether a "question of federal law is a *necessary element* of one of the [plaintiff's] state law claims." *Franchise Tax Bd. of State of Cal.*, 463 U.S. at 13 (emphasis added). To the contrary, they each involved a federal constitutional challenge, brought in federal court, to a state's explicit attempts to legislate in foreign affairs, and no state law claims were before the Court.

A more analogous case, cited in Plaintiffs' Motion, Mot. at 31:15–19, is *Provincial Government of Marinduque v. Placer Dome, Inc.*, 582 F.3d 1083 (9th Cir. 2009). There, a Philippine province sued an American mining company in Nevada state court, and alleged that the company caused extensive human and environmental harm to the Province over thirty years. *Id.* at 1085. The Province "contend[ed] that former Philippine President Ferdinand Marcos, in exchange for a personal stake in the mining operations, eased various environmental protections" to benefit the defendant, harming the Province. *Id.* The defendant removed, arguing the complaint "'tender[ed] questions of international law and foreign relations," and that the Province's claims were barred by the act of state doctrine, which requires deference to acts of foreign governments. *Id.* at 1085–86. The district court denied remand, but the Ninth Circuit reversed, holding "that the act of state doctrine is implicated here only defensively and the complaint does not 'necessarily raise a stated federal issue, actually disputed and substantial,'" under *Grable* and the well-pleaded

complaint rule. *Id.* at 1090–91. Although the complaint was "sprinkled with references to the Philippine government, Philippine law, and the government's complicity in the claimed damage," "[j]ust as raising the specter of political issues cannot sustain dismissal under the political question doctrine, neither does a general invocation of international law or foreign relations mean that an act of state is an essential element of a claim." *Id.* at 1091; *see also 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) (reversing denial of motion for remand based on act of state doctrine) ("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.").

The same analysis from *Marinduque* and *Patrickson* should prevail here. Defendants invoke the foreign relations doctrine as a defense, and no essential *prima facie* element of any of Plaintiffs' claims depend on its application. Foreign affairs are thus not "necessarily raised" in this case within the meaning of *Grable* and Defendants' arguments do not show otherwise.

ii. Plaintiffs' Claims Do Not "Require Federal-Law-Based" Cost–Benefit Balancing.

Defendants doggedly insist that numerous federal statutes and regulations covering various agencies and private actors inject federal issues into Plaintiffs' cases. None of Defendants' citations, however, demonstrate that a "question of federal law is a necessary element of one of the well-pleaded state claims." *Franchise Tax Bd. of State of Cal.*, 463 U.S. at 13. Even if Defendants were correct that "[f]ederal law would necessarily govern the cost-benefit analysis required by Plaintiffs' nuisance claims," Opp. at 20:9–10—which Plaintiffs strongly reject—that contention at most presents another ordinary preemption defense to be argued in state court on remand. Defendants' semantic manipulations and laundry list of regulations that operate in parallel with state law tort duties, Opp. at 17:10–20:16, do not alter the fact that Plaintiffs' right to relief, and all elements of Plaintiffs' claims, stem from state law and do not depend on federal law as the basis for liability. Even if Defendants were correct that federal "weighing" regulations conflict with and preempt the state law undergirding Plaintiffs' claims, "preemption that stems from a conflict between federal and state law is a defense to a state law cause of action and, therefore,

does not confer federal jurisdiction over the case." *ARCO Envtl. Remediation, L.L.C. v. Dep't of Health & Envtl. Quality of Montana*, 213 F.3d 1108, 1114 (9th Cir. 2000).

As Plaintiffs made clear in their Motion, all the elements of all of Plaintiffs' claims are strictly rooted in California law. *See* Mot. at 4, 21–22 (listing substantive California law bases for elements of Plaintiffs' claims). Defendants' argument appears to be that because fossil fuels are heavily regulated, Plaintiffs' nuisance claims necessarily incorporate those regulations as an essential element. Opp. at 17:19–18:3. But California law recognizes nuisance causes of action for exactly the conduct alleged here, wholly independent of federal regulation: the production and promotion of a product for a hazardous use, with knowledge of the public health hazard that the use would create. *ConAgra*, 2017 WL 5437485, at *18–20 (affirming public nuisance judgment against lead paint manufacturers for wrongfully promoting lead paint for indoor use despite knowledge of public health hazards from such use); *County of Santa Clara*, 137 Cal. App. 4th at 306–10 (holding in same matter that representative public nuisance action was properly stated); *City of Modesto Redevelopment Agency*, 119 Cal. App. 4th at 40–41 (dry-cleaning chemical manufacturers' "affirmative acts or instructions could support a finding that those defendants assisted in creating a nuisance"); *Ileto*, 349 F.3d at 1209–15 (reversing dismissal of public nuisance claims against gun manufacturers subject to a federal regulatory scheme). Even if the state rights and duties Plaintiffs seek to enforce conflict with federal regulations—and they do not—that at most presents an ordinary preemption defense to be argued on remand. *See ARCO*, 213 F.3d at 1114; *Cal. Shock Trauma*, 636 F.3d 538 at 542.

The few cases Defendants cite are readily distinguished, because each of them depended on federal law to prove an essential element of a claim. *See* Mot. at 24–26. The Fifth Circuit case upon which Defendants heavily rely, *Bd. of Commissioners of Se. Louisiana Flood Prot. Auth.-E. v. Tennessee Gas Pipeline Co., L.L.C.*, 850 F.3d 714, 722–24 (5th Cir. 2017) ("*Tenn. Gas*"), involved negligence and nuisance claims nominally under Louisiana law that nonetheless "dr[ew] on federal law as the exclusive basis for holding Defendants liable for some of their actions," because Louisiana law did not create the duties the plaintiffs sought to enforce. The court found removal proper because the claims "cannot be resolved without a determination whether multiple

federal statutes create a duty of care that *does not otherwise exist* under state law," and federal law therefore formed an essential element. *Id.* at 723 (emphasis added). Here, California law recognizes causes of action, including nuisance, where a defendant knowingly produces and promotes a product for a use known to present a hazard to public health. *See* Mot. at 4, 21–22; *see also, e.g.*, *ConAgra*, 2017 WL 5437485, at *18–20. Federal law is not "required" here to establish a basis for liability that "does not otherwise exist under state law." *See Tenn. Gas*, 850 F.3d at 723.

Defendants' attempts to distinguish *Oregon ex rel. Kroger v. Johnson & Johnson*, 832 F. Supp. 2d 1250 (D. Or. 2011), and *In re Roundup Prod. Liab. Litig.*, No. 16-MD-02741-VC, 2017 WL 3129098 (N.D. Cal. July 5, 2017), are unavailing. In both cases, as in this case, the claims did not depend on federal law to establish an essential element. *See id.* The *Kroger* defendants argued that the complaint's state law consumer protection claims called into question the FDA's decision not to require a public recall of the defendant's over-the-counter pain medication. *Kroger*, 832 F. Supp. 2d at 1255. But the court found the allegations that the defendants conducted a "secret recall" were pled "not to challenge that conduct as a violation of federal law," but as evidence that the drugs were defective and that the defendants concealed the defect. *Id.* The issue of whether the FDA should have required a public recall was "not necessary to Plaintiff's complaint and [was] therefore insufficient to confer jurisdiction." *Id.* at 1256. In *In re Roundup*, the plaintiff alleged in state court that Monsanto's herbicide was carcinogenic, and Monsanto removed, arguing in relevant part that "federal law defines state-law burdens and obligations" regarding herbicides. 2017 WL 3129098, at *1. The court held "even if this were so," it would "only underscore[e] the problem with Monsanto's *Grable* analysis," because "[i]f that alone sufficed for federal jurisdiction, routine applications of the Supremacy Clause could be grounds for removal," which is "not what *Grable* stands for." *Id.*[8]

[8] Numerous district courts have rejected Defendants' arguments in multiple regulatory contexts. *Ware v. N. Cent. Indus., Inc.*, No. 6:17-CV-01287-MC, 2017 WL 5569258, at *4 (D. Or. Nov. 20, 2017) (remanding state law negligence and product liability claim against fireworks manufacturer, "despite the fact that warnings for fireworks are proscribed by federal law," because complaint did not challenge adequacy of federally mandated warnings, and "the dispute here is whether the warnings were appropriate considering [defendant]'s knowledge of the defect"); *Ilczyszyn v. Sw.*

Here, just as in *Kroger* and *In re Roundup*, the numerous federal statutes and regulations Defendants cite are not necessary elements of Plaintiffs' affirmative claims, and do not establish that those claims "arise under" federal law.

iii. Plaintiffs' Claims Are Not Collateral Attacks on Federal Regulation.

These cases do not seek to attack, modify, or evade federal regulations or federal law any more than they seek to alter U.S. foreign relations. Plaintiffs seek only damages, abatement, and disgorgement; no federal law is collaterally attacked in Plaintiffs' Complaints.

Defendants' cited cases all involved facial attacks on federal regulation, which are not present here. In *McKay v. City & Cty. of San Francisco*, No. 16-CV-03561 NC, 2016 WL 7425927, at *1–2 (N.D. Cal. Dec. 23, 2016), residents brought state law nuisance claims in state court to enjoin use of flightpaths—which had been reviewed and approved by the Federal Aviation Administration—alleging that the flightpaths created severe and unreasonable noise. *Id.* at *2. The court found removal was proper not merely because the case presented issues "includ[ing] aviation safety, management of national navigable airspace, and control over aircraft noise in that airspace," but because the injunctive relief sought was "tantamount to asking the Court to second guess the validity of the FAA's decision." *Id.* at *4. Because the complaint expressly asked the court to invalidate federal regulation, a substantial and disputed federal issue was necessarily present on the face of the complaint, and removal was proper. *Id.* at *4–5. Plaintiffs do not seek any injunctive relief, let alone an injunction that would invalidate or modify a federal agency's final regulatory decision.

Airlines Co., No. C-15-2768 EMC, 2015 WL 5157372, at *2 (N.D. Cal. Sept. 1, 2015) (remanding wrongful death claim against airline, finding in pertinent part "[t]hat the complaint makes reference to Defendants' improperly treating the situation as a security problem (thus potentially implicating TSA rules and regulations) does not make the claim dependent on a federal issue"); *McCarty v. Precision Airmotive Corp.*, No. 806CV1391T26TBM, 2006 WL 2644921, at *1 (M.D. Fla. Sept. 14, 2006) ("The fact that FAA rules and regulations may be relevant to defining the duty of care in a negligence case or the standard in a products liability case, however, does not elevate a typical state-law tort claim to one requiring resolution in a federal forum.").

Pet Quarters, Inc. v. Depository Trust & Clearing Corp., 559 F.3d 772 (8th Cir. 2009), is equally inapposite. The plaintiff filed an action in state court alleging that a stock borrowing program created and operated by the defendants facilitated a short-selling scheme that drove down the price of the plaintiff's stock and eventually put it out of business. *Id.* at 775. The court affirmed an order denying remand because the complaint expressly alleged that a stock borrowing program—which had been expressly approved and regulated by the Securities and Exchange Commission pursuant to 1975 amendments to the Securities Exchange Act of 1934—hindered competition "by its mere existence." *Id.* at 779. The court found removal proper because those allegations necessarily challenged "actions taken by the Commission in approving the creation of the Stock Borrow Program and the rules governing it," as a central basis for assigning liability. *Id.* Plaintiffs' claims here do not challenge any federal agency decisions, explicitly or implicitly. Once again, Plaintiffs' claims arise under California law from Defendants' hazardous products and their campaign of misinformation regarding those products. There is no allegation in Plaintiffs' Complaints analogous to the key language in the *Pet Quarters* complaint.[9]

Finally, Defendants' reliance on California Civil Code § 3482 is misplaced. That section states that "[n]othing which is done or maintained under the express authority of a statute can be deemed a nuisance." "However, to avoid nuisance liability" under that section, "the specific action causing the nuisance must be unequivocally authorized by statute." *Citizens for Odor Nuisance Abatement v. City of San Diego*, 8 Cal. App. 5th 350, 359 (Cal. Ct. App. 2017). Plaintiffs here allege that Defendants' wrongful promotion of vast amounts of fossil fuel products with knowledge of the threat they posed to public health caused or contributed to the nuisance.

[9] Defendants' brief citation to *Bennett v. Southwest Airlines Co.*, 484 F.3d 907, 910 (7th Cir. 2007), fairs no better. The court there observed that in *Grable* itself, federal jurisdiction was proper because "the state proceeding amounted to a collateral attack on a federal agency's action," and the plaintiff's requested relief would require the federal government to reimburse parties affected by the action. The *Bennett* plaintiff, by contrast, asserted traditional state law tort claims against an airline arising out of a crash, and the Seventh Circuit had already "held many times that claims related to air transport may be litigated in state court," notwithstanding intensive federal regulation of the industry. *See id.* at 912. The court found no *Grable* jurisdiction, and remanded to the district court with instructions to remand to state court. *Id.*

Defendants do not and cannot argue that those "specific action[s]," which are actionable under California law, were authorized by statute.[10]

iv. The Complaints Do Not "Implicate" Federal Duties to Disclose.

Defendants assert that Plaintiffs' promotion claims "implicate federal law duties to disclose." Opp. at 23:20. Each of Plaintiffs' claims can be resolved without finding that Defendants violated a federal duty to disclose. Plaintiffs' allegations that Defendants' campaign of disinformation included disinformation directed at regulators are evidence of Defendants' violations of state law duties—not substantive elements of some claim sounding in fraud.

Defendants attempt to graft a fraud cause of action that does not exist onto Plaintiffs' Complaints. Specifically, Defendants urge that the Complaints "rest on the premise that Defendants had a duty to inform federal regulators about known harms; that their statements were material to the regulators' decision not to curtail Defendants' conduct; and that Defendants' omissions made regulators unable to perform their duties," under various federal statutes. Opp. at 24:7–25:17. But none of Plaintiffs' causes of action has any of those premises as essential elements; Plaintiffs do not allege any "fraud on the EPA" or similar claim, or a fraud claim of any kind. The fact that Defendants failed to disclose known harms to both regulators and the public is *relevant evidence* to show that they violated state tort duties, but it does not mean that federal

[10] Regardless, compliance with federal or state regulatory requirements does not shield Defendants' conduct from tort liability. The general rule, virtually universally accepted, is that compliance with regulatory standards is a minimum standard, and that if the defendant reasonably should have done more, then it can be liable in common law tort. Restatement (Second) of Torts § 288C (1965), com. a, p. 40; *accord, e.g.*, 58 Am. Jur. 2d Nuisances § 395 ("A governmental license does not carry with it immunity for private injuries that may result directly from the exercise of the powers and privileges conferred."); *Ramirez v. Plough, Inc.*, 6 Cal. 4th 539, 547–48 (1993) ("Courts have generally not looked with favor upon the use of statutory compliance as a defense to tort liability…. This legislative or administrative minimum does not prevent a finding that a reasonable [person] would have taken additional precautions where the situation is such as to call for them." (citations omitted)); *Elsworth v. Beech Aircraft Corp.*, 37 Cal. 3d 540, 547 (1984) (manufacturer's compliance with federal aircraft safety regulations did not preclude liability for defective design). As explained in Section II.C, *infra*, Congress intended to preserve exactly the type of state law tort claims Plaintiffs bring here, despite having set a minimum standard with the Clean Air Act. *See also* Section II.C, *infra* at n. 18 & 19.

disclosure duties are essential elements of Plaintiffs' claims. *See In re Roundup Prods. Liab. Litig.*, 2017 WL 3129098, at *1 ("To be sure, evidence that Monsanto influenced the EPA may be indirectly relevant to the carcinogenicity inquiry, as collusion could undermine the value of the EPA's scientific conclusions. . . . But an issue is not 'necessary' to resolve for the purposes of federal-question jurisdiction simply because it has relevance.").[11]

Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341 (2001), and other cases Defendants cite involving express "fraud on the government" claims are inapposite. In *Buckman*, the plaintiffs explicitly brought a state law claim for "fraud-on-the-FDA," based on alleged misrepresentations that resulted in the FDA's approval of dangerous medical devices. *Id.* at 346–47. The Court held that preemption barred their state law fraud-on-the-FDA claim because the "federal statutory scheme amply empowers the FDA to punish and deter fraud" against it. *Id.* at 347–48, 353. The case did not consider any question of removability or jurisdiction.

Bader Farms, Inc. v. Monsanto Co., No. 1:16-CV-299 SNLJ, 2017 WL 633815 (E.D. Mo. Feb. 16, 2017), is likewise distinguishable. There, the plaintiff brought a fraudulent concealment claim that turned on the defendants' violation of a duty established under federal law. The plaintiff alleged that the defendants' misrepresentations to the Animal and Plant Health Inspection Service ("APHIS") about a genetically modified seed led to widespread illegal use of an unapproved herbicide on crops grown from those modified seeds. *Id*. at *1–2. The court determined that the fraud claim turned on defendant's duty to inform APHIS that releasing the seed for use would lead to illegal use of the herbicide, a responsibility enumerated under the Federal Plant Protection Act. *Id*. at *3. The court found that because the plaintiff's fraudulent concealment claim expressly relied on a federal law duty to inform a federal agency, those federal duties were necessary elements of

[11] *See also Organic Consumers Ass'n v. Gen. Mills, Inc.*, 235 F. Supp. 3d 226, 232 (D.D.C. 2017) (granting motion to remand case alleging granola bars containing herbicide glyphosate were improperly labeled as "healthy" and "natural" where federal law did not require disclosure of presence of herbicide, because "[a]lthough the complaint includes these allegations, plaintiffs' legal claim is that it is the undisclosed presence of glyphosate *in conjunction with* labels or advertisements of the products as 'natural' and 'healthy' that violates [District of Columbia law]" and "[t]hat claim does not require the application of existing federal disclosure regulations" (emphasis added)).

the plaintiff's claim, and removal was therefore proper under *Grable*. *Id.* Because there is no fraud claim in this case, and particularly no claim for fraud against a federal agency, no duty to disclose to any federal agency is necessarily raised here.

Tennnessee Gas does not apply here because, as discussed above, the plaintiffs' state law tort claims there could not be resolved without a determination whether "multiple federal statutes create[d] a duty of care that d[id] not otherwise exist under state law." Opp. at 25:11–12, *quoting Tenn. Gas*, 850 F.3d at 723. The specific duties the plaintiffs alleged existed, if at all, under the federal Clean Water Act and the Rivers & Harbors Act, and were not independently recognized under Louisiana tort law. *Id.* at 722. Thus, the complaint on its face alleged a federal question. Similarly, in *Boyeson v. South Carolina Electric & Gas Co.*, No. 3:15-CV-04920-JMC, 2016 WL 1578950 (D.S.C. Apr. 20, 2016), the plaintiffs sued over flooding due to a federally controlled dam whose operations were governed by the Federal Power Act and a license issued by the Federal Energy Regulatory Commission ("FERC"). *Id*. at *1, *3. The complaint specifically invoked the defendant's federal duty to operate the dam in compliance with the FERC license, and the court agreed that the FERC license was the sole source of the defendant's duty of care. *Id*. at *5. Because the plaintiffs did not establish an alternative theory sounding in state law, a federal issue necessarily arose. Here, Plaintiffs' liability theory does not incorporate or depend on any federal standards. *See* Mot. at 21:23–22:17.

Finally, the plaintiffs in *County of Santa Clara v. Astra USA, Inc.*, 401 F. Supp. 2d 1022 (N.D. Cal. 2005), brought state law tort and contract claims, explicitly alleging that the defendants violated federal statutory and contractual drug pricing schemes, leading the plaintiff to be overcharged for drugs. *Id.* at 1025. The court determined that at least four causes of action could be resolved only by determining whether federal law imposed a duty on the defendants to offer discounted prices. *Id.* at 1026–27. Here, for all the reasons discussed above, California law imposes independent duties on Defendants, and the Complaints do not depend on federal duties.

2. Federal Questions Are Not Disputed in the Complaint, and Would Not Meet *Grable*'s Substantiality Requirement If They Were.

i. There Are No Disputed Federal Questions.

Because no federal questions are raised by the Complaints, there are no disputed federal questions. *Cf. Shanks v. Dressel*, 540 F.3d 1082, 1093 (9th Cir. 2008) (no *Grable* jurisdiction where plaintiff alleged defendant city violated its own municipal code with respect to building permit at federally registered historic place, but claim turned on compliance with municipal code only, and building's listing as federal historic place was "not controverted"). Defendants' insistence that the Complaints seek to subvert foreign policy, national security, and virtually all environmental regulation, Opp. at 26:2–11, does not make it so.

The paragraphs in the Complaints that Defendants cite do not support their position. Paragraph 222(c) alleges that Defendants misled customers, consumers, regulators, and the general public regarding the dangers of global warming, in support of Plaintiffs' product defect claim. Paragraph 182 alleges that Defendants' conduct "substantially and negatively affects the interests of the public at large" in various ways. Paragraph 212 alleges that Plaintiffs are entitled to punitive and exemplary damages. Paragraph 235 alleges that the dangers and harms imposed by Defendants' conduct outweigh their products' social utility. None of the paragraphs Defendants cite facially dispute any federal issue.

ii. No Substantial Federal Question Is Raised.

The Supreme Court has held that "substantiality" in the *Grable* analysis depends on "the importance of the issue to the federal system as a whole." *Gunn*, 568 U.S. at 260. The Court has identified three non-exclusive factors to weigh in determining substantiality, all of which Defendants completely ignore: (1) whether the case involves pure questions of law, (2) whether rulings in the case will control in many other cases, and (3) whether the federal government has a strong interest in litigating the claims in a federal forum. *See MDS (Canada) Inc. v. Rad Source Techs., Inc.*, 720 F.3d 833, 842 (11th Cir. 2013) (citations omitted).

Defendants have not shown that Plaintiffs' claims turn on pure questions of federal law, despite the numerous issues they claim are "implicated." Indeed, all of Plaintiffs' causes of action

depend on highly fact-bound questions involving California nuisance law and other California-specific causes of action. Defendants also have not shown that decisions here will control in other cases, except through their unsupported, ominous assertions that Plaintiffs' claims will upend huge swaths of federal law. Plaintiffs' claims do not seek to modify the federal energy or regulatory scheme, and the remedies sought will not control outside their respective jurisdictions. Finally, the federal government is not a party to any of these cases.

There is no blanket exception to *Grable's* substantiality requirement for cases that bear on certain specific federal concerns. Defendants point menacingly at broad federal policy considerations, namely foreign policy and national security, and pronounce that these cases will impact "the intersection of federal energy and environmental regulations," to suggest that federal issues are *per se* substantial. Opp. at 26:15–16. But none of their citations stand for the proposition that cases "implicating" pollution, foreign affairs, or energy are automatically removable under *Grable*.

For the reasons stated in Plaintiffs' Motion (Mot. at 25–26), *In re National Security Agency Telecommunications Records Litigation*, 483 F. Supp. 2d 934 (N.D. Cal. 2007), is inapposite. The court there held that "the state secrets privilege play[ed] a unique role" in the cases before it, in that it "require[d] dismissal if national security concerns prevent plaintiffs from proving the *prima facie* elements of their claim," and observed that the federal government had already appeared and stated its intention to assert the privilege. *Id.* at 942. Under those unique circumstances, the court found removal proper. *Id.* at 943. *Grynberg Production Corp. v. British Gas, p.l.c.*, 817 F. Supp. 1338 (E.D. Tex. 1993), also rested on unique facts. There, in a dispute over mineral rights in the Republic of Kazakhstan, one defendant argued that Kazakhstan was an indispensable party under Federal Rule of Civil Procedure 19(a), and the Kazakh government wrote to the court to express its views on the dispute and its "strident opposition" to the resolution of Kazakh mineral rights in an American court. *Id.* at 1356–57. More importantly, the court found that the complaint "necessarily" alleged "issues of federal international relations law" by seeking specific performance of a mineral rights contract in Kazakhstan. *Id.* at 1358–59. The facts here are worlds apart from Defendants' cases. Defendants' mere incantation of foreign relations, or national

security, or federal regulations, untethered from the allegations in Plaintiffs' Complaints, does not mean a "substantial" federal issue is necessary and actually disputed, and does not support the Court's jurisdiction.

3. Federal Jurisdiction Here Would Upset Principles of Federalism.

As they do with all other elements of the *Grable* analysis, Defendants wholly misrepresent the substance of Plaintiffs' Complaints and ignore the applicable legal standards to argue that "congressional judgment about the sound division of labor between state and federal courts," favors federal jurisdiction. *Grable*, 545 U.S. at 313. To the contrary, the balance struck by Congress favors state court jurisdiction, and—resolving all doubts in favor of remand, as the Court must—Defendants' arguments fail.

The Supreme Court has instructed that "the 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 state courts may take jurisdiction over those claims. *Grable*, 545 U.S. at 318. Defendants wholly ignore those guidelines, and instead simply assert that Plaintiffs' claims "without question [are] intended to have a regulatory effect on Defendants' world-wide conduct," and are "collateral challenges to CAA emissions standards," that should be heard in federal court. Opp. at 27:26–28:22.

Plaintiffs seek only damages and abatement, for which there is no federal cause of action. Congress provided states the "primary" role in protecting air quality (42 U.S.C. § 7401(a)(3)), and explicitly saved from preemption private rights of action under state laws for remedies unavailable under the Clean Air Act's citizen suit provision. 42 U.S.C. §§ 7416, 7604(e). There is no federal right of action for the relief Plaintiffs seek. Instead, Plaintiffs are exercising their state law rights preserved and fostered by Congress. *See, e.g.*, *Nat'l Audubon Soc'y*, 869 F.2d at 1203 ("the primary responsibility for maintaining the air quality rests on the states"); *In re MTBE Prods. Liab. Litig.*, 725 F.3d at 96 ("[T]he presumption that Congress did not intend [under the Clean Air Act] to preempt state law tort verdicts is particularly strong.").

At bottom, Plaintiffs' California tort remedies are limited in scope. Plaintiffs seek only damages and abatement, and only within their respective geographic boundaries. *See* Cal. Civ.

Proc. Code § 731; *California v. M & P Investments*, 213 F. Supp. 2d 1208, 1216 (E.D. Cal. 2002), *aff'd in part, dismissed in part*, 46 F. App'x 876 (9th Cir. 2002)). Plaintiffs do not seek injunctive relief, let alone injunctive relief that would bind the conduct of other state or federal officers that would be outside the scope of Section 731. *See id.* at 1215 (citing *People v. Hy-Lond Enters. Inc.*, 93 Cal. App. 3d 734, 753 (1979)); Mot. at 32:19–33:10. Plaintiffs do not seek to regulate conduct across the globe, and would not have the authority to do so if they tried. There is no basis to conclude that the balance struck by Congress favors federal jurisdiction.[12]

C. The Clean Air Act Does Not Completely Preempt Plaintiffs' State Law Claims.

Defendants' argument the Clean Air Act completely preempts the complaints here fails to meet the high bar required to demonstrate that the Act completely preempts state law tort claims related to emissions, let alone claims alleging the tortious marketing and promotion conduct at issue here.[13] Ultimately, Defendants' argument boils down to another ordinary preemption defense, which cannot confer federal jurisdiction.

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[12] Defendants again cite inapposite cases. *Kurns v. R.R. Friction Prod. Corp.*, 565 U.S. 625, 637 (2012), did not analyze *Grable*, and held that the state common law tort claims were substantively preempted by the field-preemptive force of the federal Locomotive Inspection Act, which does not preserve state law tort claims. *Massachusetts v. E.P.A.*, 549 U.S. 497, 505 (2007), also did not involve a *Grable* analysis, and involved a direct challenge to EPA's conduct, asking the court expressly to determine "whether EPA has the statutory authority to regulate greenhouse gas emissions from new motor vehicles; and if so, whether its stated reasons for refusing to do so are consistent with the statute." *California Dump Truck Owners Ass'n v. Nichols*, 784 F.3d 500, 507 (9th Cir. 2015), also not a *Grable* case, involved a suit to enjoin enforcement of a California regulation, expressly approved by the EPA and implementing EPA regulations, the practical and legal effect of which was "to challenge both the EPA" and the EPA approved implementation plan. Finally, *McKay*, 2016 WL 7425927, at *4, involved a challenge to a specific FAA order changing the flightpath of commercial planes over plaintiffs' houses, and thus a "collateral challenge to the final decision of the FAA" approving the flight plan, which was properly heard in federal court. None of Defendants' cases are analogous to Plaintiffs' claims here.

[13] Nor is the foreign affairs doctrine grounds for complete preemption. Defendants cite no authority for the proposition that the foreign affairs doctrine—a judicially created doctrine—may serve as the basis for complete preemption, which requires clear congressional intent. Neither of the cases Defendants cite regarding the foreign affairs doctrine arose in the context of a motion to remand or even complete preemption. *See* Opp. at 29:7–16 (citing *Garamendi*, 539 U.S. at 418, and *People of State of California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871, at *14 (N.D. Cal. Sept. 17, 2007)). Both cases were filed originally in federal court and both addressed generalized issues of the lawsuit's effect on foreign affairs—with no mention of the specific

Defendants' argument rest on the false premise that these lawsuits are backdoor attempts "to set nationwide and global emissions standards." Opp. at 29:25; *see also id.* at 29:24–30:8. It bears repeating that the conduct that forms the basis of Plaintiffs' claims is Defendants' contribution to a nuisance through the wrongful marketing and promotion of fossil fuels products, the defective nature of those products, and Defendants' failure to warn of the effects of those defective products. Compl. ¶¶ 162–91, Prayer. It is a gross misrepresentation to argue that Plaintiffs seek to set emissions standards for sources worldwide, when the Complaint expressly seeks only money damages and abatement of a nuisance within the geographic boundary of the jurisdictions through adaptation and mitigation measures. There is no request for relief that would impact the rights of sources permitted under the Clean Air Act or otherwise interfere with the Act's regulatory framework.

Despite Defendants vain attempts to recast the nature and purpose of Plaintiffs' claims, they do not fall "within the scope" of the Clean Air Act, as they must for complete preemption to apply. *Dennis v. Hart*, 724 F.3d 1249, 1254 (9th Cir. 2013). A claim is only "within the scope" of a federal statute if (1) the plaintiff could have brought its claim under that federal statute, and (2) there is "no other independent legal duty" under state law that the defendant violated. *Marin Gen. Hosp. v. Modesto & Empire Traction Co.*, 581 F.3d 941, 946 (9th Cir. 2009) (no complete preemption where claims could not have been brought under federal statute). Plaintiffs could not have brought their claims under the Clean Air Act because the Act does not regulate the marketing or promotion of fossil fuels, nor does it authorize equitable abatement funds against fossil fuel companies for those activities. Nor can Defendants satisfy the "no other legal duty" prong, because California law imposes a duty not to promote and sell products that cause a nuisance. *See, e.g.*, *ConAgra*, 2017 WL 5437485, at *12 & *68 (upholding public nuisance liability of lead paint manufacturers for their "affirmative promotion of lead paint for interior use," despite "knowing that such use would pose a serious risk of harm to children").

Congressional intent required for complete preemption. For the reasons discussed in Section II.B.1.i, *supra*, the foreign affairs doctrine does not support removal under *Grable*, and it is equally inapposite here.

Indeed, courts have allowed state law claims for deceptive marketing against manufacturers even where their products led to emissions of air pollutants regulated under the Clean Air Act. For example, in *In re Volkswagen "Clean Diesel" Litig.*, 2016 WL 5347198 (Va. Cir. Ct. 2016), and *Counts v. Gen. Motors, LLC*, 237 F. Supp. 3d 572 (E.D. Mich. 2017), vehicle owners asserted state law claims for deceptive advertising and fraud against manufacturers based on false claims about emissions performance. Defendants argued that the Clean Air Act preempted such claims under 42 U.S.C. § 7543(a), which prohibits states from "enforce[ing] any standards relating to the control of emissions from new motor vehicles." Rejecting the defense, the courts held that the state tort claims arose out of tortious behavior beyond the mere control of emissions. *In re Volkswagen "Clean Diesel" Litig.*, 2016 WL 5347198, at *5–6 (distinguishing state law claims based on tortious behavior beyond alleged noncompliance with emissions standards); *see also Counts*, 237 F. Supp. 3d at 591–92 (claims not preempted where "the gravamen of Plaintiffs' claims, like in *Volkswagen*, focus on 'the deceit about compliance, rather than the need to enforce compliance.'").[14] These cases highlight the distinct legal duties associated with deceptive marketing claims, as opposed to claims for emissions themselves.

Further, there are no grounds for complete preemption because the Clean Air Act provides only a right of action for violations of emissions standards or violation of an EPA order, and does not provide a private right to compensatory damages. *Sullivan v. First Affiliated Sec., Inc.*, 813 F.2d 1368, 1372 (9th Cir. 1987) ("If . . . federal law provides no remedy, the state claim cannot be recharacterized as federal, as no federal claim exists . . . and removal is improper."). Defendants' attempt to reframe the issue in these cases as a "mismatch in remedies," Opp. 33:15–23, is unavailing. *Caponio v. Boilermakers Local 549*, cited by Defendants, is distinguishable, as the plaintiff there could have brought her claims under the operable federal statute. No. 16-CV-03919-

[14] In contrast, in *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 264 F. Supp. 3d 1040, 1057 (N.D. Cal. 2017), the court held that Wyoming was preempted from enforcing its State Implementation Plan provisions in a way that effectively attempted to enforce a "standard relating to the control of emissions from new motor vehicles," in violation of 42 U.S.C. § 7543(a).

VC, 2017 WL 1477133, at *1 (N.D. Cal. Apr. 25, 2017) (difference in remedies available under state law claims for employment discrimination claims were not sufficient to avoid ERISA complete preemption where Congress had intended to make ERISA the sole civil enforcement mechanism for employment discrimination claims).[15] Here, the Clean Air Act lacks a private cause of action that could encompass the state tort claims Plaintiffs assert.

The critical distinction between the remedies available under the Clean Air Act and state tort law claims was highlighted by the Iowa Supreme Court in *Freeman v. Grain Processing Corp.*, 848 N.W.2d 58 (Iowa 2014). In holding that the Clean Air Act did not preempt residents' state law claims against emissions from a corn milling facility, the court emphasized that unlike the civil money penalties that may be 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 owners of real property to "obtain compensatory damages, punitive damages, and injunctive relief. . . in particular locations for actual harms." *Id.* at 69. Application of complete preemption would leave Plaintiffs without a cause of action to seek relief for the injuries to real property Plaintiffs have suffered and will continue to suffer as a result of Defendants' conduct. Where the Clean Air Act "does not provide a federal cause of action" that encompasses Plaintiffs' claims, "complete preemption . . . cannot exist." *See Moore-Thomas v. Alaska Airlines, Inc.*, 553 F.3d 1241, 1245–46 (9th Cir. 2009) (holding no complete preemption because Railway Labor Act does not provide an exclusive federal cause of action).

Even if Plaintiffs' claims fell within the scope of the Clean Air Act, which they do not, Defendants' arguments founder on the cases cited in Plaintiffs' Motion—all of which either reject complete preemption of state law nuisance claims against point sources,[16] or reject ordinary

[15] *California Dump Truck Owners Ass'n v. Nichols*, 784 F.3d 500 (9th Cir. 2015), cited by Defendants, Opp. at 33:21–23, is inapposite. *California Dump Truck* was an ordinary preemption case and thus does not speak to complete preemption principles. *Id.* at 501.

[16] *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) (denying removal based on complete preemption because "the plain language of the [Clean Air Act's] savings clause . . . clearly indicates that Congress did not wish to abolish state control"); *Morrison v. Drummond Co.*, No. 2:14-CV-0406-SLB, 2015 WL 1345721 (N.D. Ala. Mar. 23, 2015), at *3–*4 (remanding because "this [state law tort] case does

preemption of such claims.[17] Defendants attempt to distinguish the case law on the grounds that those cases applied the law of the source state, emphasizing that under the "source state rule," plaintiffs are preempted from bringing nuisance claims under the law of state in which the injury occurs. Opp. at 31 (citing *Ouellette,* 479 U.S. at 495–96). But Defendants once again confuse ordinary preemption with complete preemption. As explained in Section II.A.2, *supra*, the source state rule is an ordinary preemption defense, and ordinary preemption defenses are not grounds for removal jurisdiction. Defendants cite no case where a court found *complete* preemption under the Clean Air Act, and Plaintiffs are aware of none.

Defendants' arguments that the Clean Air Act's savings clauses, 42 U.S.C. §§ 7416 & 7604(e), are of no import here, Opp. at 33:3–14, also fail. In allowing state law claims against permitted emitters, courts have relied on two express savings clauses in the Clean Air Act, both of which emphasize the primary role of the state common law in the preservation of air quality. *See, e.g.*, *Merrick*, 805 F.3d at 690 ("The states' rights savings clause of the Clean Air Act expressly preserves the state common law standards on which plaintiffs sue."); *Bell*, 734 F.3d at 190–91 (finding no preemption of state tort claims after considering the Clean Air Act savings clauses). Defendants' citation to *AEP* does not negate the cooperative federalism framework established by the Clean Air Act, but instead highlights congressional intent for federal air pollution regulation

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not support a finding that the Clean Air Act has completely preempted plaintiff's state common law causes of action"); *Cerny v. Marathon Oil Corp.*, No. CIV.A. SA-13-CA-562, 2013 WL 5560483 (W.D. Tex. Oct. 7, 2013), at *8 ("Plaintiffs' claims are not completely preempted and . . . federal question jurisdiction is lacking."); *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) (action for civil penalties against operator of mining equipment improperly permitted under state law was not removable because "Congress limited [Clean Air Act] preemption to emission standards, and declined to completely preempt the regulation of nonroad engines"); *Gutierrez v. Mobil Oil Corp.*, 798 F. Supp. 1280, 1281–86 (W.D. Tex. 1992) (remanding claims against stationary source polluter, finding "[t]he Clean Air Act does not create federal court jurisdiction" and "does not preempt source-state common law claims against a stationary source").

[17] *See, e.g.*, *Merrick*, 805 F.3d at 695 (allowing claims for nuisance, trespass and negligence for emissions from whiskey distillery); *Bell*, 734 F.3d at 190–91 (allowing state tort claims to proceed against coal-burning electrical generation facility); *Little v. Louisville Gas & Elec. Co.*, 33 F. Supp. 3d 791, 817 (W.D. Ky. 2014) (allowing homeowners' tort claims over dust and coal ash from power plant).

conducted "in combination with state regulators." *AEP*, 564 U.S. at 427. That the Act envisions states as primarily responsible for maintaining air quality undermines arguments in favor of finding congressional intent for complete preemption of state law claims, even if state responsibility is exercised in tandem with EPA. *See* Mot. at 16:16–18:16 (citing 42 U.S.C. § 7401(a)(3)).

D. The Actions Are Not Based on Defendants' Activities on Federal Lands or at the Direction of the Federal Government.

1. There Is No Outer Continental Shelf Lands Act Jurisdiction.

The maximally broad Fifth Circuit two-part test Defendants advance requires (1) that the conduct complained of "constituted an 'operation' 'conducted on the Outer Continental Shelf'" ("OCS"), *In re Deepwater Horizon*, 745 F.3d 157, 163 (5th Cir. 2014), and (2) that the plaintiff "would not have been injured 'but for'" the operation, *Recar v. CNG Producing Co.*, 853 F.2d 367, 369 (5th Cir. 1988).[18] Neither element is satisfied here.

The first, "operation" prong of Defendants' test is not satisfied because the harms Plaintiffs have suffered were not caused by "injurious physical acts" on the OCS. *Par. of Plaquemines v. Total Petrochemical & Ref. USA, Inc.*, 64 F. Supp. 3d 872, 895 (E.D. La. 2014). The Fifth Circuit defines "operation" for OCSLA jurisdictional purposes as "the doing of some physical act" on the OCS. As stated in Plaintiffs' Motion, Plaintiffs' injuries do not arise from the discrete physical operations any Defendant has conducted on the OCS, but rather from the defective nature of Defendants' fossil fuel products, Defendants' injection of those products into the market without sufficient warnings of their products' known dangers, Defendants' promotion of those products for known dangerous uses, and Defendants' decades-long campaign of misinformation to undermine public understanding of those dangers, all of which activities have at most a distant relationship to the OCS. *See* Mot. at 35:28–36:17. The Complaints allege injuries stemming from the nature of Defendants' fossil fuel products no matter where and in what form they are extracted, and Defendants' promotion of them—not from the literal physical acts any Defendant conducted

[18] Plaintiffs do not concede that the jurisdictional grant Defendants draw from Fifth Circuit case law under the Outer Continental Shelf Lands Act ("OSCLA") is correct, or that the Ninth Circuit would adopt it. *See* Mot. at 34:15–35:11 (discussing standards for OCSLA jurisdiction).

on the OCS. *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 state waters, even though some claims "involved pipelines that ultimately stretch to the OCS"); *see also* Mot. at 36, n.16 (collecting cases).

Defendants have not and cannot meet the second, "but-for" prong of the OSCLA jurisdiction test they advocate. District courts applying the Fifth Circuit rule have held that "the 'but-for' test is not limitless," and that the "argument the 'but-for' test extends jurisdiction to any claim that would not exist but for offshore production lends itself to absurd results" by creating jurisdiction over cases only "tangentially related to offshore oil production on the OCS." *Plains Gas Sols., LLC v. Tennessee Gas Pipeline Co., LLC*, 46 F. Supp. 3d 701, 704–05 (S.D. Tex. 2014) (remanding case alleging unlawful assignment of natural gas processing contract and unlawful closure of onshore gas pipeline valve, because activities that caused injury were not physical acts conducted on the OCS). Defendants have submitted declarations purporting to show that large volumes of oil and gas have been produced from the OCS, and that OCS drilling currently "provides approximately 17 percent of the nation's oil production and about five percent of domestic national gas production," and may have accounted for as much as 30% of domestic oil production and 20% of domestic natural gas production in or about 2005. Opp. at 35, n.19; Declaration of J. Keith Couvillion in Support of Defendants' Joint Opposition to Motion to Remand, Doc. 195–01, ¶¶ 6, 9, 12 & Ex. C, Doc. 195–204. But Defendants go only so far as to say "some portion of the alleged injuries would not have occurred absent Defendants' operations on the OCS." Opp. at 36, n.20. "Some portion" by its very nature does not establish "but for" causation; Plaintiffs would still have suffered these injuries without the extraction that took place on the OCS. This partial attribution is insufficient to meet Defendants' burden on a motion for remand. *See* Mot. at 36, n.16. Defendants' argument 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).

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 drilling mud additives and other asbestos-containing products manufactured by the defendants. *Id.* at *1. The defendants removed under OSCLA, arguing that the plaintiff was exposed to drilling mud containing asbestos while working on a semi-submersible on the OCS. *Id.* The plaintiff alleged, however, that he worked in the oil industry for ten years, and spent only nine months employed on the OCS. *Id.* at *3. Because "asbestosis is a cumulative and progressive disease," the court was unable on the record before it "to conclude that [the plaintiff] would have developed asbestosis from the nine months he worked offshore regardless of the approximate nine years he worked on land-based oil rigs." *Id.* at *4. 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, and therefore "resolving all doubts regarding the propriety of removal in favor of remand," the court granted remand. *Id.* The court expressly distinguished *In re Deepwater Horizon*, where "it was 'undeniable'" that the pollutants that injured the plaintiff migrated directly from a facility operating at the OCS, and found instead that jurisdiction was inappropriate "given the uncertainty regarding whether [plaintiff's] working offshore for less than one year could have caused him to develop asbestosis." *Id.*[19]

That analysis applies here. On a motion for remand, Defendants' burden is to establish that Plaintiffs would not have been injured but-for Defendants' OCS "operations." Defendants' proffer purports to show that "substantial volumes" of oil and gas have been extracted from the OCS over many years, but does not quantify any contribution to Plaintiffs' injuries, let alone argue that Plaintiffs would not have been injured but-for Defendants' OCS "operations."

[19] Defendants' contrary citation to *Ronquille v. Aminoil Inc.*, No. CIV.A. 14-164, 2014 WL 4387337, at *2 (E.D. La. Sept. 4, 2014), is inapposite. There, the asbestos plaintiff alleged that his exposure occurred "as a result of his work at [defendant's] land base," but it was undisputed that his work was done "on and in support of . . . structures and materials" that were ultimately used on OCS platforms. The court found, with no discussion, that because the *only* alleged source of exposure was necessarily directly related to OCS operations, there was a "sufficient connection" to satisfy the but-for test. *Id.* Here, by contrast, it is undisputed that the large majority of Defendants' production and all of their marketing, promotion, and disinformation campaign were wholly unrelated to operations on the OCS. The reasoning in *Hammond* is more appropriate and analogous, and the limited analysis in *Ronquille* does not apply on the facts here.

2. Plaintiffs' Claims Do Not "Arise" Within the Federal Enclave.

i. Plaintiffs' Claims "Arise" Where Plaintiffs Have Been Injured—on Non-Federal Land.

There is no federal enclave jurisdiction here, and Defendants' arguments both misapply the law and misconstrue the facts. Federal enclave jurisdiction exists only "over tort claims that *arise on* 'federal enclaves.'" *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1250 (9th Cir. 2006) (emphasis added). Courts in this district and many others have held that tort claims "arise" within the federal enclave for jurisdictional purposes 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); *see also Amtec Corp. v. U.S. Centrifuge Sys., L.L.C.*, No. CV-12-RRA-1874-NE, 2012 WL 12897212, at *10 (N.D. Ala. Dec. 6, 2012), *objections overruled sub nom. Amtec Corp. v. US Centrifuge Sys. LLC*, No. 5:12-CV-1874-RRA, 2013 WL 12147712 (N.D. Ala. May 29, 2013) ("Whether courts look to the 'locus,' 'nexus,' 'pertinent events,' or 'elements,' the one consistent approach in all of these cases appears to be that they looked to the state law which created the claim to determine where it arose" to determine enclave jurisdiction for removal purposes) (collecting cases); *In re High-Tech Employee Antitrust Litig.*, 856 F. Supp. 2d 1103, 1125 (N.D. Cal. 2012) (rejecting argument that "federal enclave doctrine applies as long as some of the alleged events occurred on the federal enclave," and holding that it "only applies when the locus in which the claim arose is the federal enclave itself").

Here, all of Plaintiffs' claims have actual injury as an element. *See* Mot. at 43:15–44:23. Each claim becomes complete and therefore "arises" as a matter of California law where the alleged injuries occur, and Plaintiffs' claimed injuries all occurred and will occur on non-federal land. Defendants argue that references in the complaint to "California's Pacific coast," and "beaches, parks, roads" and "communities," necessarily mean Plaintiffs seek to recover for injuries to federal property within their borders. Opp. at 40:14–17. Plaintiffs, however, do not allege that they have suffered injury in the form of harm to federal lands, and do not seek to recover for any such injuries. Contrary to Defendants' assertions, the sea level rise reports incorporated into the Complaints expressly disclaim jurisdiction over federal lands, and disclaim authority to remediate

or recover for damages to those lands. *See* Mot. at 38:23–40:6 & nn.18–21 (explaining that Plaintiffs' sea level rise vulnerability reports expressly exclude harms to federal lands). Resolving all doubts in favor of remand, as the Court must, *e.g.*, *Matheson v. Progressive Specialty Ins. Co.*, 319 F.3d 1089, 1090 (9th Cir. 2003), all Plaintiffs' injuries have occurred and will occur on non-federal land, and Plaintiffs' claims therefore arise outside the federal enclave.

Contrary to Defendants' argument, the *Totah* court did not find enclave jurisdiction existed because the "principal conduct at issue in the case" occurred on federal land. Opp. at 40:9. Instead, the court found that under substantive libel law, "the substance and consummation of the tort occurs when and where the third person receives, reads, and comprehends the libelous matter." *Totah*, 2011 WL 1324471, at *2. The plaintiff's libel claim thus "arose" when and where that "last event necessary to render the tortfeasor liable" occurred, which was on the Presidio. *Id.* Here, the consummation of the torts occurs where Plaintiffs' have suffered and will suffer injuries: on non-federal lands within their respective jurisdictions. *Accord Sparling v. Doyle*, No. EP-13-CV-00323-DCG, 2014 WL 2448926, at *3–5 (W.D. Tex. May 30, 2014) (because unfair business practices claim under California law required substantive showing of "causation and injury-in-fact," the claim "accrue[d]" and "arose" for enclave jurisdiction purposes "where [decedent] suffered injury").

ii. Defendants Cannot Show "All Pertinent Events" at Issue Occurred on a Federal Enclave.

Defendants' argument that enclave jurisdiction exists where "pertinent events" occurred within the federal enclave misstates the law as explained above, and misconstrues the very cases Defendants cite. Where tortious activities "allegedly occur partially inside and partially outside the boundaries of an enclave," defendants bear a "higher burden" because "the state's interest increases proportionally, while the federal interest decreases." *Ballard v. Ameron Int'l Corp.*, No. 16-CV-06074-JSC, 2016 WL 6216194, at *3 (N.D. Cal. Oct. 25, 2016).[20] Defendants have not

[20] Defendants' citation to *Ballard* for the proposition that enclave jurisdiction is proper where "the 'federal interest' in regulating the conduct at issue is high enough," Opp. at 39, misconstrues the court's discussion that the federal interest in controlling conduct *decreases*, and federal jurisdiction

shown or attempted to show that all or even a substantial portion of the conduct that allegedly harmed Plaintiffs occurred within the federal enclave, and a proper reading of the Complaints shows that the vast majority of Defendants' bad conduct occurred outside it.

Defendants' cited cases stand at most for the proposition that enclave jurisdiction will lie where "*all* pertinent events," *Rosseter v. Indus. Light & Magic*, No. C 08-04545 WHA, 2009 WL 210452, at *2 (N.D. Cal. Jan. 27, 2009) (emphasis added), or at least "*the vast majority* of the alleged [tortious] acts," *Klausner v. Lucas Film Entm't Co.*, No. 09-03502 CW, 2010 WL 1038228, at *4 (N.D. Cal. Mar. 19, 2010) (emphasis added), occurred within the federal enclave. *See also Stiefel v. Bechtel Corp.*, 497 F. Supp. 2d 1138, 1148 (S.D. Cal. 2007) (federal enclave doctrine applied to state law tort claims where "all the pertinent allegations" occurred at a military base); *Taylor v. Lockheed Martin Corp.*, 78 Cal. App. 4th 472, 481 (2000) (state law wrongful termination claim arose on federal enclave where plaintiff had not "ever worked for [defendant] outside the enclave"). Indeed, all of Defendants cases cite back to *Snow v. Bechtel Const. Inc.*, 647 F. Supp. 1514, 1521 (C.D. Cal. 1986), in which it was "concede[d]" that "*all* pertinent events occurred on a federal enclave" (emphasis added) and there was therefore exclusive federal jurisdiction over the action. None of Defendants' cases support the position they advocate, that federal jurisdiction is implicated even where, as here, all or the vast majority of the alleged conduct occurs *outside* the federal enclave.

Defendants have at most shown that one Defendant operated at the Elk Hills Naval Petroleum Reserve to some degree for some period of time, and one Defendant sold oil and gas to the Navy Exchange Service Command. Opp. at 38:17–39:5. Plaintiffs' claims stem, however, from Defendants' production of fossil fuels despite knowledge that such production would lead to sea level rise, and their campaign to downplay those risks. The face of Plaintiffs' Complaints do not allege that any "pertinent events" occurred within the federal enclave, and resolving all doubt in favor of remand, the overwhelming majority of the conduct at issue occurred on non-federal land—

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is less appropriate, the more of the tortious conduct occurred outside the federal enclave. *Ballard*, 2016 WL 6216194, at *3 (*citing Akin v. Big Three Indus., Inc.*, 851 F. Supp. 819, 825 & n.4 (E.D. Tex. 1994)).

in Defendants' corporate offices, research facilities, and production facilities outside the federal enclave. *Cf. Ballard*, 2016 WL 6216194, at *3 (remanding state law asbestos-related claims where plaintiff had worked for defendant on military base, but asbestos exposure there was "just a small portion of the total exposure: one of 17 locations and during six months of the years-long exposure period"). Even under Defendants' "pertinent acts" theory—which is not the correct standard—Defendants have not met their burden.

E. Defendants Were Not "Acting Under" Federal Officers in Their Tortious Conduct.

Defendants' various contractual agreements with the federal government do not provide a basis for removal under the federal officer removal statute, 28 U.S.C. § 1442(a)(1). That statute requires a defendant to demonstrate a causal nexus between the plaintiff's claims and the actions the defendant took pursuant to a federal officer's "subjection, guidance, or control." *See Watson v. Philip Morris Cos., Inc.*, 551 U.S. 142, 151 (2007); *Cabalce v. Thomas E. Blanchard & Assocs., Inc.*, 797 F.3d 720, 727 (9th Cir. 2015). "[T]he 'critical' question under the federal officer removal statute is 'to what extent defendants acted under federal direction at the time they engaged in the conduct now being sued upon.'" *Arness v. Boeing N. Am., Inc.*, 997 F. Supp. 1268, 1275 (C.D. Cal. 1998) (*quoting Ryan v. Dow Chem. Co.*, 781 F. Supp. 934, 946 (E.D.N.Y. 1992)). Conduct "under the general auspices" of the government, "such as being a participant in a regulated industry," is insufficient for removal. *Fung v. Abex Corp.*, 816 F. Supp. 569, 572 (N.D. Cal. 1992).

Defendants argue that Standard Oil's performance under a joint operation contract with the Navy, some Defendants' compliance with leases of OCS land from the government, and CITGO's sales of gasoline and diesel to the government establish federal jurisdiction. But none of Defendants' conduct under those contracts relates to "the conduct now being sued upon"—their massive production of defective fossil fuel products, wrongful promotion of those products, and failure to warn. *See Arness*, 997 F. Supp. at 1275.

1. Standard Oil's Operations Under the Elk Hills Reserve Contract Have No Causal Nexus to Plaintiffs' Injuries.

Defendants rely heavily on the Unit Plan Contract between Chevron's predecessor Standard Oil and the U.S. Navy to argue that Standard Oil acted as a federal officer. But the Unit Plan Contract ("UPC") was just that—a negotiated contract governing the respective rights of Standard Oil and the Navy in a shared oil field. The Elk Hills Reserve was "expressly made subject to pre-existing private ownership," and the government and Standard Oil's respective ownership in the oil field were settled under the contract, with the Navy taking approximately a 75% ownership stake, and Standard taking approximately 25%. *See United States v. Standard Oil Co. of California*, 545 F.2d 624, 626 (9th Cir. 1976); Not. of Rem. Ex. D § 2(d). This type of agreement "was at that time and still is a common arrangement in the petroleum industry where two or more owners have interests in a common pool." *Id.* In "consideration for Standard curtailing its production" to retain the oil reserve for a time of emergency, Standard was permitted under the contract to extract the lesser of 25 million barrels or one-third of its owned interest in the reserve's "Shallow Oil Zone." *Standard Oil Co. of California*, 545 F.2d at 627–28.

The terms of the UPC do not demonstrate the kind of control of Standard's conduct that would give rise to federal enclave jurisdiction, and grants far more freedom than Defendants admit. First, it does not *require* production of 15,000 barrels of oil per day from the reserve as Defendants assert. Opp. at 43:2–6. To the contrary, it requires that the reserve be "developed and operated in a manner and to such extent as will . . . *permit* production . . . at a rate sufficient to produce therefore not less than 15,000 barrels per day." Not. of Rem. Ex. D § 4(b). The next section explains that "Standard shall be *permitted* to receive from production . . . 15,000 barrels of oil per day," until certain conditions were met. *Id.* at Ex. D § 5(d). That is, 15,000 barrels of oil per day was essentially the in-kind rate at which Standard would be compensated under the contract, until its 25 million barrel or one-third ceiling was reached—not a minimum mandated level of production. The contract represented a *curtailment* of Standard's production. As Plaintiffs already correctly argued in their Motion, therefore, Standard could have complied fully with the terms of the contract by producing no oil at all from the reserve. Mot. at 50:9–12.

Other terms also make clear that Standard was not coerced or compelled to manage and develop the reserve in place of the government. For example, the "Operating Committee" supervising "exploration, prospecting, development, and producing operations on the Reserve" consisted of "two petroleum engineers, one of whom shall be appointed by and shall represent Navy, and the other shall be appointed by and represent Standard." *Id.* § 3(b). If either party desired to drill an exploratory well, the proposal went first before an Engineering Committee composed of three representatives from Standard and three from the Navy, any non-unanimous decision of which was reviewable by the Secretary of the Navy. *Id.* § 4(e)(1), (e)(2). If the Secretary or Committee denied the proposal, however, "the party proposing the drilling of such well shall, notwithstanding such determination, be entitled to have such well drilled but the cost of drilling and equipping such well shall be borne solely be such party." *Id.* Finally, Standard had "the right to take delivery, and make such disposition, of the production allocated to it [t]hereunder as it may desire," and "[n]either Navy nor Standard [had] any preferential right to purchase any portion of the other's share of such production." *Id.* § 7.

Critically, none of the aspects of the Elk Hills Reserve over which the Navy *did* exert control—principally its decision to dramatically restrict production from the reserve for more than 30 years—has a "causal nexus" to Plaintiff's injuries. The UPC did not require Standard or any Defendant to produce massive volumes of fossil fuel (it in fact curtailed production), did not dictate how Standard or any Defendant sold or marketed fossil fuels, and most importantly did not require Standard or any Defendant to withhold known risks inherent in its products. And in any event, the amount of oil Standard may have produced from the Elk Hills Reserve is vanishingly small compared to Defendants' total production as alleged, and is too small to satisfy the requirement for a causal connection between "their actions taken under federal direction and Plaintiffs' claims." *Bailey v. Monsanto Co.*, 176 F. Supp. 3d 853, 870 (E.D. Mo. 2016). The specific conduct that caused Plaintiffs' injuries was not controlled in any way by the UPC.[21]

[21] *Cf. Meyers v. Chesterton*, No. CIV.A. 15-292, 2015 WL 2452346, at *6 (E.D. La. May 20, 2015) (rejecting federal officer removal because "nothing about the Navy's oversight prevented the defendants from complying with any state law duty to warn"); *N.J. Dep't of Envtl. Prot. v. Exxon*

2. There Is No Causal Nexus Between Plaintiffs' Injuries and Any Conduct of Defendants Undertaken Pursuant to OCSLA Leases or NEXCOM Contracts.

Defendants' leases of OCS territory for oil and gas production also do not confer federal officer jurisdiction, because they are simple commercial oil and gas leases, and they do not direct the conduct that Plaintiffs allege caused their injuries.[22] The leases and leasing scheme at most show that some Defendants have profitably leased federal lands, and, most critically, do not show any "involve[ment in] an effort to assist, or to help carry out, the duties or tasks of [a] federal superior." *Watson*, 551 U.S. at 152. Defendants cite no case where an OCSLA lease was held to give rise to federal officer removal jurisdiction, and Plaintiffs are unaware of any.

The terms of the example lease Defendants provide and the regulations they cite do not show, more importantly, that the Defendant lessees are required by the government to commit the acts Plaintiffs allege harmed them: produce and sell massive amounts of fossil fuel products knowing those products were dangerous, fail to warn of the known risks, mislead the public regarding those risks, and promote their dangerous use. Plaintiffs do not allege that Defendants' compliance or non-compliance with the terms of any OCS lease caused their injuries. Merely contracting with the government does not give rise to federal officer removal where, as here, the conduct that *caused injury* was not directed by the government. *See, e.g.*, *Parlin v. DynCorp Int'l,*

Mobil Corp., 381 F. Supp. 2d 398, 404–05 (D.N.J. 2005) (defendant not "acting under" federal officer when improperly *disposing* of toxic substances even though government may have exerted control over defendant's *production* of those materials); *Faulk v. Owens-Corning Fiberglass Corp.*, 48 F. Supp. 2d 653, 663 n. 14 (E.D. Tex. 1999) (rejecting federal officer removal and stating that "Defendants can bury this Court in federal government regulations controlling their actions. But if there is no causal nexus between Defendants' actions in response to this control and the Plaintiffs' claims, then the government did not "make them do it" since the "it" was never under government control.").

[22] Defendants' representation that the sample OCSLA lease mandated drilling, Opp. at 44:4–45:2, mischaracterizes the text of the lease, which merely requires that the lessee's exploration plan obtain a government blessing before any exploration occurs. *See* Not. of Rem. Ex. C § 9 ("The Lessee shall conduct all operations on the lease or unit in accordance with an approved exploration plan (EP), development and production plan (DPP) or development operations coordination document (DOCD)"). Defendants do not point to an Exploration Plan or otherwise mandating drilling.

Inc., 579 F. Supp. 2d 629, 635–36 (D. Del. 2008) (remanding state law wrongful death case against contractor providing police services to Department of State in Baghdad, where claim arose from defendant's alleged failure to provide adequate security for job applicants, and defendant did not show alleged tortious behavior was done at government's behest); *cf. K2 Am. Corp. v. Roland Oil & Gas, LLC*, 653 F.3d 1024, 1032 (9th Cir. 2011) (in *Grable* context, "mere fact that the Secretary of the Interior must approve oil and gas leases" did not create jurisdiction over claim involving oil lease on Indian land held in trust by United States).[23]

The contracts between NEXCOM and Defendant CITGO fail to provide a basis for federal officer removal for the same reasons. The NEXCOM contracts are commercial contracts for procurement of retail-quality, commodity gasoline and diesel fuel. By their own terms, they call for provision of fuel that identical or comparable to that sold at retail by CITGO,[24] that "compl[ies] with standard specification for automotive gasoline" and "standard specification for diesel fuel,"[25]

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[23] *Natural Resources Defense Council, Inc. v. Hodel*, 865 F.2d 288, 291–92 (D.C. Cir. 1988), does not establish that all conduct pursuant to OCSLA leases satisfies "acting under" jurisdiction. That case merely recites the purposes of the OCSLA, but does not show, as Defendants contend, that the government itself would engage in oil and gas exploration on the OCS but for the OCSLA leases. Defendants still are unable to cite any case where a court has found "acting under" jurisdiction based on the presence of an OCSLA lease.

[24] Declaration of Arnold Walton in Support of Defendants' Joint Opposition to Motion to Remand, Ex. A, Doc. 195-07 at 13 (CITGO-000012) ("The Contractor must provide high quality product identical to or the same product as supplied [at] the Contractors commercially operated service stations."); Walton Ex. B, Doc. 195-08 at 14 (CITGO-000043) ("Gasoline products supplied by CITGO under this contract shall be comparable to gasoline products supplied to other retail gasoline facilities owned, operated, or bearing the same name as CITGO marketed in the same geographic area . . .); Walton Decl. Ex. C, Doc. 195-09 at 14 (CITGO000103 ("The Contractor shall furnish branded motor fuel products of the same type, grade, and octane that are furnished to commercial retail facilities owned, operated, or bearing the same name as the Contractor . . . ."); Walton Decl. Ex. D, Doc. 195-10 at 42 (CITGO-000235) (purchased fuel "shall be comparable to motor fuel products supplied to commercial retail gasoline sales facilities supplied by the Contractor"); Walton Decl. Ex. E, Doc. 195-11 at 21 (CITGO-000373) (same); Walton Decl. Ex. F, Doc. 195-12 at 19 (CITGO-000420) (same); Walton Decl. Ex. G, Doc. 195-13 at 12 (CITGO-000506) (same).

[25] Walton Decl. Ex. D, Doc. 195-10 at 38, 42 (CITGO-000231, 000235) ("Gasoline products provided will comply with 'standard specification for automotive gasoline . . . and diesel fuel with standard specification for diesel fuel . . . per the American Society for Testing and Materials . . . ."); Walton Decl. Ex. E, Doc. 195-11 at 21 (CITGO-000373) (same); Walton Decl. Ex. F, Doc. 195-12 at 19 (CITGO-000420) ("Gasoline and petroleum fuel products will comply with standard

and that complies with environmental laws and regulations.[26] The defective nature of Defendants' products, Defendants' failure to warn of known risks, and Defendants' massive production, sale, and wrongful promotion of fossil fuels are not directed by the government's purchase of gasoline and diesel under the NEXCOM contracts.[27]

3. Defendants Do Not Demonstrate That They Performed Jobs the Federal Government Would Have Undertaken in Their Absence.

Defendants do not and cannot demonstrate that "the Government itself would have had to perform" the culpable conduct that caused Plaintiffs' injuries in defendants' absence. *See Watson*, 551 U.S. at 153–54. Defendants' evidence at best shows mutually beneficial procurement contracts and leases that allow them to profit privately from the exploitation of public resources. Nothing in these materials demonstrates government control over the Defendants' boardroom decisions to withhold information about the dangers inherent in their products. Defendants point to no evidence that the government would have directed them to do so, or would have done so itself.[28]

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specification for automotive gasoline . . . per the American Society for Testing and Materials."); Walton Decl. Ex. G, Doc. 195-13 at 19 (CITGO-000506) (same).

[26] Walton Decl. Ex. D, Doc. 195-10 at 38 (CITGO000243) ("Supplies delivered under this contract shall conform to all federal, state, and local environmental requirements applicable to the geographic location of the receiving activity on the date of delivery."); Walton Decl. Ex. E, Doc. 195-11 at 20 (CITGO-000372) (same); Walton Decl. F, Doc. 195-12 at 18 (CITGO-000419) (same); Walton Decl. Ex. G, Doc. 195-13 at 12 (CITGO-000506) (same).

[27] Defendants cite *Bailey v. Monsanto Co.*, 176 F. Supp. 3d 853, 870 (E.D. Mo. 2016), for the proposition that a defendant is always "acting under" a government agent when it sells a product "directly to the government." But the *Bailey* court found Monsanto was acting under a government agent "only with respect to the PCBs that Old Monsanto sold directly to the government, or to others at the direction of the government," not because the government was the buyer, but because "the government *required* the use of PCBs in certain products during the relevant time period." *Id.* The court ultimately granted remand in any event, because the volume of PCBs Monsanto sold to the government constituted just "slightly more than one one hundredth of a percent" of Monsanto's total PCB sales, which under the circumstances was insufficient to show a causal nexus with the alleged injuries. *Savoie v. Huntington Ingalls, Inc.*, 817 F.3d 457, 465 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 339 (2016), is distinguishable for the same reason. There, the defendant shipyard was subject to "detailed specifications" from the Navy, "that required the use of asbestos," and therefore was acting under its federal superior when it exposed the plaintiff to asbestos, causing his mesothelioma.

[28] Defendants' citations are distinguishable from the facts here. In *Benson v. Russell's Cuthand Creek Ranch, Ltd.*, 183 F. Supp. 3d 795, 198–99 (E.D. Tex. 2016), the National Resources

F. This Court Lacks Jurisdiction Under the Bankruptcy Removal Statutes.

The bankruptcy jurisdiction and removal statutes, 28 U.S.C. §§ 1334(b) and 1452(a) respectively, do not provide federal jurisdiction here for three primary reasons: (1) the Plaintiffs brought these actions to enforce their police or regulatory power, which is expressly outside the statute's scope; (2) there is no "close nexus" between the Plaintiffs' claims and any confirmed bankruptcy plans sufficient to conclude that Plaintiffs' actions are "related to" a bankruptcy case; and (3) regardless of the Court's determination on the first two points, equity demands remand of these purely state law actions.

1. Plaintiffs Bring These Actions to Enforce Their Police and Regulatory Powers.

i. Plaintiffs' Actions Are Exercises of Police Power Under Both the Pecuniary Interest and Public Policy Tests.

The bankruptcy removal statute expressly exempts from removal civil actions by governmental units to enforce their police or regulatory powers. 28 U.S.C. §1452(a). Courts apply two tests to determine when an action constitutes an exercise of police or regulatory power, and satisfying either the "pecuniary interest" or the "public policy" test brings an action within the bounds of the police power carveout. *See* Mot. at 53:1–10; *City & Cty. of San Francisco v. PG & E Corp.*, 433 F.3d 1115, 1124–26 (9th Cir. 2006) (unfair business practices claims seeking restitution against debtor satisfied both tests and was remanded under police power carveout). The Plaintiffs' claims here satisfy both tests. Defendants do not seriously contend the Plaintiffs

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Conservation Service ("NRCS"), a division of the USDA, partnered with the defendant to construct levees and perform other tasks pursuant to NRCS's mandated Wetland Reserve Program. The court found that the defendant "was a partner with NRCS and in many ways stood fully in the place of the government" in executing plans under the Wetland Reserve Program, which were both controlled in every detail by the government, and which the government would have had to do absent the defendant's participation. *Id.* at 802. Similarly, *Takacs v. Am. Eurocopter, L.L.C.*, 656 F. Supp. 2d 640, 643 (W.D. Tex. 2009), stemmed from the crash of a helicopter owned by United States Customs and Border Protection ("CBP") and manned by government personnel. The defendant helicopter company was "responsible for performing program management, aircraft maintenance, logistics, supply, and electronic data processing support to ensure that CBP's aircraft are operational and ready," which the court found with "little doubt" assisted CBP in its duties and provided CBP with services it otherwise would have performed itself. *Id.* at 645. Those facts are a far cry from Defendants' contentions here.

misapplied either test in their Motion, (*see* Opp. at 53:6–23), and their only counterargument is that the Court should accept a bankruptcy court's incorrect evaluation of the issue, under a different statute, as issue determinative. Opp. at 52:11–53:4.

A claim fails the pecuniary interest test only where it "is pursued *solely* to advance a pecuniary interest of the governmental unit." *In re Universal Life Church, Inc.*, 128 F.3d 1294, 1299 (9th Cir. 1997) (IRS's revocation of church's tax-exempt status was exercise of police power because it promoted public welfare, despite IRS seeking millions of dollars in back taxes) (citations omitted) (emphasis added). Defendants do not, and cannot, rebut the Plaintiffs' primary motivation for bringing these claims: to protect the public health and welfare from sea level rise. *See* Mot. at 53:11–54:21; Compl. ¶¶ 12, 13(c). Instead, the Defendants revert to a crass argument that the primary purpose of this litigation is to "fill city coffers." Opp. at 53:17. They do not, however, counter Plaintiffs' long line of Ninth Circuit authority rejecting the notion that a governmental entity must have no pecuniary motive whatsoever when exercising its police powers to avail itself of the carveout. *See* Mot. at 54:3–21 (discussing case law); *see, e.g.*, *In re Universal Life Church, Inc.*, 128 F.3d at 1298–99. Instead, the Defendants simply reiterate the types of relief sought in these actions, and hope that the Court agrees that such reiteration will magically convert the primary purpose of Plaintiffs' claims into one solely in search of pecuniary advantage. This is not the case, and removal via the pecuniary interest test is improper.

"Under the 'public [policy]' test, the court determines whether the government seeks to effectuate public policy or to adjudicate private rights. If the government seeks the former, the exception applies; if the government seeks the latter, it does not." *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1109 (9th Cir. 2005) (state's Clayton Act suit on behalf of electricity consumers satisfied both public purpose and pecuniary interest tests to avoid automatic stay) (citations omitted). "A suit does not satisfy the 'public purpose' test if it is brought *primarily* to advantage discrete and identifiable individuals or entities rather than some broader segment of the public." *Id.* (emphasis added). The Plaintiffs' claims do not seek primarily to advantage a discrete and identifiable entity rather than a broader segment of the public. Plaintiffs are public, democratic entities composed of the public and acting on behalf of the public. Taken individually, each of the

Plaintiffs' claims effectuate the protection of public health and welfare and mitigation of future harms to the public.[29] *See generally In re MTBE Prods. Liab. Litig.*, 488 F.3d at 133 (reversing denial of motion to remand state tort law action to rectify pollution impacts on groundwater resources, where "the clear goal of the[] proceedings [was] to remedy and prevent environmental damage with potentially serious consequences for public health, a significant area of state policy"). Recovery here in the form of abatement and damages will go toward additional sea level rise resiliency planning, adaptation, and mitigation that broadly protects the Plaintiffs' citizens. *See* Mot. at 53:19–54:21. The public policy test confirms that these actions are not removeable.

ii. This Court Is Not Bound by the Bankruptcy Court's Police Powers Determination.

Defendants' argument that application of the police power carveout is subject to collateral estoppel in the context of this Motion to Remand is unavailing.

First, this Court is under an independent duty to establish its own subject matter jurisdiction under the removal statute. *See California ex rel. Sacramento Metro. Air Quality Mgmt. Dist. v. United States*, 215 F.3d 1005, 1009 (9th Cir. 2000) (finding removal improper in state law air pollution claims against United States on *sua sponte* analysis of subject matter jurisdiction); *In re Asbestos Litig.*, No. CV 01-1790-PA, 2002 WL 649400, at *2 (D. Or. Feb. 1, 2002) (independent duty to determine whether removal to district court was proper, despite transfer order from another court exercising bankruptcy jurisdiction). This duty requires the Court to evaluate the police power carveout in 28 U.S.C. § 1452(a), which prohibits removal jurisdiction over claims falling within

[29] Counts I, II, and V are all brought under California's nuisance statutes, including the Public Nuisance Enabling Statute, the express purposes of which are to eliminate public and private nuisances and to thereby protect human health and safety. *See, e.g.*, *San Remo Hotel L.P. v. City & Cty. of San Francisco*, 27 Cal. 4th 643, 701 (2002) (citing Cal. Civ. Proc. Code § 731 noting that "[t]he law has long recognized, for example, that government might, in the exercise of the police power, act to proscribe a nuisance"). Counts III, IV (strict products liability), and VI, VII (negligence), all represent efforts to hold defendants accountable for wrongful promotion of their products that has caused and will continue to cause the exacerbation of climate change, which damage natural resources and create health and safety hazards in their jurisdictions. Count VIII (trespass) seeks to remedy the intrusion of rising seas on the Plaintiffs' property, which causes injury to property and infrastructure on which citizens rely.

the carveout. The Court should not rely on a wholly unrelated inquiry—the applicability of a discharge provision in a bankruptcy plan—to establish its subject matter jurisdiction.

Second, Defendants fail to carry their burden on their argument that collateral estoppel (issue preclusion) applies. *See Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1050–51 (9th Cir. 2008) (party seeking estoppel bears burden). For a prior issue to have a preclusive effect it must be (1) the same issue; (2) actually litigated and determined; (3) by a valid and final judgment; (4) as to which the determination is essential to the judgment. Restatement (Second) of Judgments § 27 (1982). Defendants provide no analysis to prove that application of a discharge provision in a bankruptcy plan is an identical issue to the propriety of removal jurisdiction here. *See In re Pac. Gas & Elec. Co.*, 281 B.R. 1, 11 (Bankr. N.D. Cal. 2002) ("whether the automatic stay [under the Bankruptcy Code] does or does not apply has little to do with whether actions—stayed or not—may be removed [under § 1452(a)]"), *aff'd sub nom. City & Cnty. of San Francisco v. PG&E Corp.*, 433 F.3d 1115 (9th Cir. 2006). Nor have Defendants shown that application of the discharge provision was necessary to the bankruptcy court's judgment in light of the court's application of the provision in a hypothetical context.[30]

Defendants' only citation on collateral estoppel both contravenes their position and demonstrates that evaluating an issue in a different procedural setting, under a different statutory provision, does not have a subsequent preclusive effect. *See* Opp. at 53:3–4, *citing Wabakken v. California Dep't of Corr. & Rehab.*, 801 F.3d 1143 (9th Cir. 2015) (adverse decision on

[30] The bankruptcy court's determination that the Plaintiffs' claims were discharged turned on application of the post-bar dates:

> Because Plaintiffs chose not to file proofs of claims, the analysis could stop here and I could rule in PEC's favor…. I agree with PEC that the Complaints do not set forth post-Effective Date claims and instead concern only pre-Effective Date (and pre-petition) conduct and harm.

In re Peabody Energy Corp. ("*Peabody*"), No. 16-42529 (Bankr. E.D. Mo. Mar. 15, 2017), ECF No. 3514, at 9. The court's subsequent analysis was performed under a hypothetical in which the bar dates did not apply: "*Assuming* that the Plaintiffs *were* allowed to with their PEC Causes of Action notwithstanding the bar dates, I examine [other issues]." *Id.*

whistleblower retaliation administrative claim did not preclude litigation of retaliation issue in later action for damages).

2. Plaintiffs' Actions Are Not "Relate[d] to" Bankruptcy Proceedings.

Jurisdiction under the bankruptcy statutes is not proper for a second reason: these actions are not "related to" any bankruptcy proceedings under 28 U.S.C. § 1334(b). Defendants recite the broad "any conceivable effect" test for "related to" jurisdiction (Opp. at 49:5–11), but because that test applies only *before* bankruptcy plan confirmation, it is irrelevant here—where both Peabody Energy Corporation and Arch Coal, Inc., have confirmed plans.[31] Post-confirmation "related to" jurisdiction is substantially narrower and—as Defendants do not contest—exists only if the underlying claims have a "close nexus" to the bankruptcy and involve the "interpretation, implementation, consummation, execution, or administration of the confirmed plan." *In re Pegasus Gold Corp.*, 394 F.3d 1189, 1194 (9th Cir. 2005) (finding "related to" jurisdiction because the plaintiff alleged a breach of the confirmed plan and fraud in the inducement in connection with agreeing to the plan). There is no "close nexus" where a case "could have existed entirely apart from the bankruptcy proceeding and did not necessarily depend upon resolution of a substantial question of bankruptcy law." *In re Ray*, 624 F.3d 1124, 1135 (9th Cir. 2010) (no "related to" jurisdiction over claims brought by a would-be real estate purchaser against debtor and actual purchaser following plan confirmation, even though action involved interpretation of the bankruptcy court's sale order).

Resolving the underlying state tort law claims here will not require this Court to interpret, implement, consummate, execute, or administer either confirmed plan, and thus the requisite "close nexus" is absent. *See In re Pegasus Gold Corp.*, 394 F.3d at 1194. Rather, these issues can and do "exist[] entirely apart from the bankruptcy proceeding and d[o] not necessarily depend upon a resolution of a substantial question of bankruptcy law." *In re Ray*, 624 F.3d at 1135.

Defendants' only opposition is that the bankruptcy court's consideration of the Peabody

[31] *In re Arch Coal, Inc.*, No. 16-40120 (Bankr. E.D. Mo. Sept. 15, 2016), ECF No. 1334; *Peabody,* No. 16-42529, ECF No. 2763.

Plan's discharge provisions somehow related the Plaintiffs' claims to those bankruptcy proceedings. *See* Opp. at 49:19–51:4. But they offer no authority to suggest that the bankruptcy court's treatment of these exclusively state law tort claims magically converts them into "substantial questions of bankruptcy law," or that these claims would not have existed in the absence of the bankruptcy proceeding. *See id.* Rather, the Plaintiffs' claims sound in tort, and are brought to effectuate Plaintiffs' police power to protect the health and welfare of their citizens.

Defendants' reliance on the unpublished *In re Valley Health Sys.*, 584 F. App'x 477 (9th Cir. 2014), decision is misplaced. There, the debtor's plan contained a specific provision providing that the retirement participants were not entitled to plan distributions, would have no recourse to the debtor, and would only receive benefits from the remaining plan assets. *Id.* at 479. After the plan was confirmed, former employees and retirement plan participants brought a mandamus petition against the debtor and other defendants alleging breach of the plan and similar claims—in essence a direct attack on the plan provision. *Id.* at 478. Unlike here, the underlying claims would not have existed in the absence of that specific plan language. *See also In re Wilshire Courtyard*, 729 F.3d 1279, 1289 (9th Cir. 2013) (in income tax dispute arising out of a transaction described in detail and consummated under the confirmation order, "related to" jurisdiction hinged on "a close look at the economics of the transaction as detailed in the plan").

Defendants' next argument—that Plaintiffs' claims are related to unidentified Doe defendants' pre-confirmation bankruptcy proceeding—is similarly specious. *See* Opp. at 51:5–52:5. Determining whether a claim is "related to" the bankruptcy plan or proceeding requires a case-by-case analysis based on "the whole picture." *In re Wilshire Courtyard*, 729 F.3d at 1289. Defendants provide no facts whatsoever that would allow the Court to determine whether these claims relate to an unidentified bankruptcy, and therefore such bankruptcies cannot be grounds for removal. Each of the cases Defendants cite references a specific bankruptcy proceeding against which the court evaluated "relation to" jurisdiction and removability, and therefore does not

support the Defendants' theory.[32] Defendants' reliance on cases describing the cause of action for equitable indemnity under California law is equally misplaced; none supports bankruptcy removal premised on unidentified debtors or bankruptcy proceedings.[33]

3. Equity Demands Remand.

28 U.S.C. § 1452(b) compels equitable remand here. Defendants incant, to no effect, the axiom that federal courts should decide cases within their jurisdiction. Opp. at 54:2–6 (citing a case discussing *Younger* abstention, not bankruptcy removal). As described in Plaintiffs' Motion and herein at length, this action falls outside the scope of federal subject matter jurisdiction, and, regardless, § 1452(b) gives this Court discretion to remand Plaintiffs' cases "on any equitable ground."

Critically, the resolution of Peabody and Arch's motions to discharge Plaintiffs' claims under their respective bankruptcy plans should direct this inquiry. If, on appeal, it is determined that Plaintiffs' claims are not discharged, then the claims necessarily do not offend those bankruptcy proceedings and jurisdiction under 28 U.S.C. § 1334, and attendant removal under 28 U.S.C. § 1452(a) would be improper. If the claims are found to be discharged, then the claims against Peabody and Arch will be dismissed, and whatever tenuous thread that may have tied the

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[32] *In re Dow Corning Corp.*, 86 F.3d 482, 486 (6th Cir. 1996) (assessing products liability compensatory and punitive damages claims for relation to Dow Corning's bankruptcy); *In re Washington Mut., Inc. Sec., Derivative & ERISA Litig.*, No. 2:08-MD-1919 MJP, 2009 WL 3711614, at *2 (W.D. Wash. Nov. 2, 2009) (assessing state law fraud, negligent misrepresentation, breach of fiduciary duty, and statutory claims' relation to Washington Mutual bankruptcy); *Parke v. Cardsystems Sols., Inc.*, No. C 06-04857 WHA, 2006 WL 2917604 (N.D. Cal. Oct. 11, 2006) (finding that, despite being "related to" a bankruptcy, the facts of the case compelled equitable remand because of the "limited connection to a debtor's bankruptcy case").

[33] *See Am. Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 591 (1978) ("California common law equitable indemnity doctrine should be modified to permit a concurrent tortfeasor to obtain partial indemnity from other concurrent tortfeasors on a comparative fault basis."); *Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 1197–98 (1988) ("[A] defendant may pursue a comparative equitable indemnity claim against other tortfeasors either (1) by filing a cross-complaint in the original tort action or (2) by filing a separate indemnity action after paying more than its proportionate share of the damages through the satisfaction of a judgment or through a payment in settlement"); *Allen v. Southland Plumbing, Inc.*, 201 Cal. App. 3d 60, 64 (1988) ("[T]he policies underlying the principles of equitable indemnity support . . . permit[ting] Allen to cross-complain against dissolved corporation . . .").

remaining claims to those proceedings will have been conclusively severed. Maintaining the claims against the remaining thirty-four defendants in this Court under the bankruptcy removal statute, in the absence of any bankrupt defendants, would offend many of the factors supporting equitable remand, including the effect of the action on the administration of the bankrupt estate (none); the extent to which state law claims predominate (completely); the difficulty of applicable state law (difficult, and properly left to the state courts to resolve); the remoteness of the action to any bankrupt estate (remote); and prejudice to the plaintiff from removal (effectively depriving Plaintiffs of their mastery of their complaints under the well-pleaded complaint rule). *See, e.g.*, *Hopkins v. Plant Insulation Co.*, 349 B.R. 805, 813 (N.D. Cal. 2006) (describing factors for remand); *Parke*, 2006 WL 2917604, at *4–5 (equitably remanding where the case exclusively involved state law, issues were complex and novel, and relation to bankruptcy proceedings of only one of the many defendants was at best tangential).

Potential impacts on the bankruptcy plans or distributions thereunder do not support this Court's jurisdiction or override the propriety of equitable remand. *See In re Peak Web LLC*, 559 B.R. 738, 742 (Bankr. D. Or. 2016) (equitable remand appropriate where, *inter alia*, potential liability in underlying claims did not interfere with administration of reorganization plan), *aff'd sub nom. Mach. Zone, Inc. v. Peak Web, LLC*, No. 16-03083-PCM, 2017 WL 517796 (D. Or. Feb. 7, 2017). The subject bankruptcy plans are confirmed, and no bankruptcy issues need to be considered to resolve Plaintiffs' state tort law claims.

Defendants' reiteration that this case presents a welter of federal issues is a figment of their reimagination of the Complaints. For the reasons described in the Motion and herein, this case contemplates state law exclusively and defendants fail with their myriad attempts to distort the Complaints to fit them within the bounds of any removal statute.

Instead, this case contemplates injuries to three California jurisdictions arising out of Defendants' wrongful marketing and promotion activities. This case does not concern, as Defendants suggest, the regulatory framework for greenhouse gases. Even if it did, remand here supports the federal-state balance approved by Congress in the Clean Air Act, which retains in the state courts traditional tort actions to address these plaintiffs' injuries and damages arising out of

air pollution. *See* 42 U.S.C. § 7604(e) & Section II.C, *supra*. Comity is therefore served by reserving these state law questions to the state courts, as Congress intended.

Finally, Defendants fail to rebut Plaintiffs' argument that these cases undeniably present complex state law legal issues, and that removal via bankruptcy jurisdiction could result in the U.S. Bankruptcy Court for the Eastern District of Missouri hearing complex issues of California law.

III. CONCLUSION

For the reasons explained above, this Court lacks jurisdiction over these actions, and should remand them to the California Superior Courts where Plaintiffs properly filed them.

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