No. 19-1644

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MAYOR AND CITY COUNCIL OF BALTIMORE,
Plaintiff – Appellee,
v.
BP P.L.C., et al.,

Defendants – Appellants.

Appeal from the United States District Court
for the District of Maryland, No. 1:18-cv-02357-ELH
The Honorable Ellen L. Hollander

PLAINTIFF-APPELLEE'S RESPONSE BRIEF

Victor M. Sher
Matthew K. Edling
Sher Edling LLP
100 Montgomery St., Suite 1410
San Francisco, CA 94104
(628) 231-2500
vic@sheredling.com
matt@sheredling.com

Andre M. Davis
Suzanne Sangree
Baltimore City Law Department
100 N. Holliday Street, Suite 109
Baltimore, MD 21202
(443) 388-2190
andre.davis@baltimorecity.gov
suzanne.sangree2@baltimorecity.gov

Counsel for Plaintiff – Appellee Mayor and City Council of Baltimore

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INTRODUCTION

The Mayor and City Council of Baltimore ("Plaintiff" or "Baltimore") has asserted claims arising exclusively under Maryland law. Baltimore, as master of its complaint, properly brought its state-law case in state court, to which the District Court correctly remanded it. The Court should affirm and return this case to Maryland Circuit Court.

U.S. District Court Judge Hollander issued a detailed order granting Baltimore's motion for remand - just as federal courts in California and Rhode Island have done in similar actions brought by governmental entities to address localized harms flowing from the defendants' wrongful conduct in producing, promoting, and marketing fossil fuels while misleading the public about the known dangers those products present. *Cty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal. 2018) ("*San Mateo*"), *appeal pending*, Nos. 18-15499, 18-15502, 18-15503, 18-16376 (9th Cir.); *Rhode Island v. Chevron Corp.*, __ F. Supp. 3d __, 2019 WL 3282007 (D.R.I. July 22, 2019), *appeal filed* Aug. 9, 2019.[1]

[1] Judge Hollander rejected the contrary conclusion from a third case, *California v. BP p.l.c.*, No. C 17-06011 WHA, 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018), *appeal pending*, No. 18-16663 (9th Cir.), because that decision "look[ed] beyond the face of the plaintiffs' well-pleaded complaint," and its conclusions were "at odds with the firmly established principle that ordinary preemption does not give rise to federal question jurisdiction." Joint Appendix ("JA.") 15.

This Court's appellate jurisdiction is limited to considering a single issue: federal-officer jurisdiction under 28 U.S.C. § 1442. Decades-old circuit precedent uniformly holds that where a defendant asserts multiple grounds for removal in addition to federal-officer jurisdiction, review of an order granting remand is limited to considering the asserted federal-officer ground only. *See Noel v. McCain*, 538 F.2d 633, 635 (4th Cir. 1976). The district court correctly concluded that Defendants "failed to plausibly assert that the acts for which they have been sued" (namely decades of "promoting, selling, and concealing the dangers of fossil fuel products") "were carried out 'for or relating to'" any obligation to implement the directives of a federal superior within the meaning of § 1442. Accordingly, the court rejected federal officer jurisdiction. JA.366. This Court should affirm, ending its inquiry there.

If the Court determines it has jurisdiction to consider Defendants' other grounds for removal, it should still affirm. Baltimore's claims were pleaded under Maryland law. Assuming *arguendo* that Baltimore could have pursued its claims under a federal common law theory, the potential availability of a federal claim cannot support removal jurisdiction unless federal law "completely preempts" state law claims. Under the century-old "well-pleaded complaint rule," "a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint, and

even if both parties admit that the defense is the only question truly at issue in the case." *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 14 (1983).

Here, Defendants do not even have a meritorious argument that federal common law preempts Maryland law, let alone completely preempts it. As the district court recognized, any federal common law that might have been available to govern Plaintiff's claims in these cases was displaced by Congress's enactment of the Clean Air Act ("CAA" or "the Act"), 42 U.S.C. §§ 7401, *et seq.* *See* JA.346 (citing *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011) ("*AEP*")). The Supreme Court in *AEP* made clear that once federal common law has been displaced by a federal statute, there is no longer a possibility that state law claims could be superseded by the previously operative federal common law. *Id.* Defendants' other grounds for removal are equally meritless. The district court correctly rejected every one of these arguments, JA.356–75, and if the Court determines it has jurisdiction to review them, it should affirm.

JURISDICTIONAL STATEMENT

Pursuant to 28 U.S.C. § 1447(d), this Court's jurisdiction is limited to determining the appropriateness of removal pursuant to 28 U.S.C. § 1442 (federal-officer jurisdiction).

ISSUES PRESENTED

Whether 28 U.S.C. § 1447(d) entitles Defendants to obtain appellate review of all possible grounds for removal, or instead limits this Court's jurisdiction to reviewing the district court's rejection of federal-officer removal only; and whether the district court properly granted Baltimore's motion to remand to state court.

STATEMENT OF THE CASE

I. Filing of State Law Claims in State Court

On July 20, 2018, Plaintiff filed suit in Maryland state court asserting eight state-law claims against Defendants, major corporate members of the fossil fuel industry. JA.38–174 (Complaint). Plaintiff alleged that Defendants have known for decades about the direct link between fossil fuel use and global warming, yet engaged in a coordinated effort to conceal that knowledge; to discredit the growing body of scientific evidence documenting potentially catastrophic impacts of fossil-fuel-triggered climate change; and to promote continued and expanded use of their products without providing warnings about these known dangers. *See, e.g.*, JA.45–47. Plaintiff and its residents now face enormous and growing costs associated with rising seas, increasing storms, heatwaves, and other impacts caused by Defendants' wrongful conduct. *See, e.g.*, JA.80–89.

II. Removal to Federal Court and Subsequent Remand

On July 31, 2018, Defendants removed to federal court, alleging eight grounds for federal jurisdiction: (1) that Baltimore's state law claims are "governed by" federal common law; (2) that Baltimore's claims necessarily raise disputed and substantial issues of federal law that must be adjudicated in a federal forum; (3) that Baltimore's claims are completely preempted by the Clean Air Act, and/or other federal statutes and the Constitution; and that jurisdiction is provided by (4) the Outer Continental Shelf Lands Act; (5) the federal officer removal statute; (6) an alleged relation of the claims to federal enclaves; (7) an alleged relation to federal bankruptcy cases; and (8) admiralty jurisdiction. JA.178–231 (Notice of Removal).

On June 10, 2019, the district court rejected each of Defendants' arguments, including their invocation of the federal officer removal statute, since Defendants:

> [F]ailed plausibly to assert … that the charged conduct was carried out 'for or relating to' the alleged official authority. …They have not shown that a federal officer controlled their total production and sales of fossil fuels, nor is there any indication that the federal government directed them to conceal the hazards of fossil fuels or prohibited them from providing warnings to consumers.

JA.365 (citations omitted).

On July 31, 2019, the district court denied Defendants' motion to stay the remand order pending resolution of this appeal in the Fourth Circuit, noting that 28 U.S.C. § 1447(d) strictly limits review to Defendants' assertion of federal officer removal under 28 U.S.C. § 1442(a)(1)—an assertion that, the district court noted,

had not been demonstrated to possess "a substantial likelihood of success[.]" *See* Doc. 81 at 255, Ex. E to Defs. Mot. to Stay Pending Appeal (Aug. 9, 2019) (Memorandum Opinion denying motion to stay pending appeal). The court entered a joint stipulation between the parties staying the remand order pending resolution of Defendants' motion to stay in this Court, which is pending. Doc. 80, Defendants' Motion to Stay Pending Appeal (Aug. 9, 2019); JA.376 (Consent Order).

SUMMARY OF ARGUMENT

Defendants asserted eight grounds for removal on appeal, but the Court has jurisdiction to review only one: federal-officer removal under 28 U.S.C. § 1442. "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise" except to the extent removal was based on federal-officer jurisdiction under 28 U.S.C. § 1442, or civil rights jurisdiction under 28 U.S.C. § 1443. *See* 28 U.S.C. § 1447(d). It is settled law that other grounds for removal addressed in an order granting remand are not reviewable. *See, e.g.*, *Noel*, 538 F.2d at 635.

To successfully invoke federal-officer removal, private entities must meet a "special burden" to establish that they acted under the government's "subjection, guidance, or control," with respect to the specific conduct that caused the plaintiff's injuries. *Watson v. Philip Morris Cos., Inc.*, 551 U.S. 142, 151 (2007). The various relationships Defendants assert with the federal government all boil down to either

(i) contractual obligations that do not show the "unusually close" government oversight "involving detailed regulation, monitoring, or supervision" necessary to invoke federal jurisdiction, *id.* at 149, or (ii) simple compliance with federal law in extracting fossil fuels. None provide a basis for removal. The district court correctly held: "defendants have failed to plausibly assert that the acts for which they have been sued were carried out 'for or relating to' the alleged federal authority." JA.366.

Even if the Court had jurisdiction to review all eight bases for jurisdiction the Defendants have asserted, each fails. Federal common law cannot provide a basis for removal, because Defendants have at best argued that federal common law preempts Baltimore's claims, which could not support jurisdiction even if it were correct, and the federal common law on which Defendants rely has been displaced by the CAA in any event. Plaintiff's claims are also not completely preempted by the CAA; no court anywhere has held that the CAA completely preempts state law, and the text and structure of the Act confirm it does not. None of Plaintiff's well-pleaded state law claims present "embedded" federal issues, because none require proof of any federal law issue as a necessary element. *See Grable & Sons Metal Prods., Inc. v. Darue Eng. & Mf'g*, 545 U.S. 308, 313–14 (2005); *Franchise Tax Bd.*, 463 U.S. at 13. Plaintiff's claims also do not arise out of or in connection to activity on the Outer Continental Shelf ("OCS") within the jurisdictional grant of the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1349(b); nor is any

federal enclave the "locus" in which any of Plaintiff's claims arose. None of Plaintiff's claims relate to any past or present bankruptcy proceeding that would render them removable under 28 U.S.C. §§ 1452(a) and 1334(b). Finally, none of Plaintiff's claims are within the federal courts' admiralty jurisdiction under 28 U.S.C. § 1333.

ARGUMENT

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

This Court lacks jurisdiction to consider any basis for removal other than federal-officer removal under 28 U.S.C. § 1442. Congress has strictly limited appellate review of remand orders:

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

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

Under longstanding Fourth Circuit precedent, and consistent with the majority view across the circuits, a remand order is reviewable only to the extent it falls within § 1447's enumerated exceptions: § 1442 federal-officer removal or § 1443 civil

rights removal. This Court's opinion in *Noel* more than forty years ago was unambiguous: "Jurisdiction to review remand of a § 1441(a) removal is not supplied by also seeking removal under § 1443(1)." 538 F.2d at 635.

Defendants' contention that the Removal Clarification Act of 2011, Pub. L. 112-51, 125 Stat. 545 & 546, effectively overturned *Noel* is meritless. The Act amended § 1447(d) by inserting the words "1442 or" before "1443," with no other changes. Congress's addition of § 1442 as a second exception to within 1447(d) does not alter *Noel*'s holding that courts of appeals only have jurisdiction to review those bases for removal expressly exempted from the general statutory bar. The Fourth Circuit has indeed continued to apply *Noel*'s reading of § 1447(d) to bar review beyond § 1442 and § 1443 since the Removal Clarification Act. *See Attorney Grievance Comm'n of Md. v. Rheinstein*, 750 F. App'x 225, 226 (4th Cir. 2019) (per curiam) (dismissing appeal from remand order as to all asserted bases for removal other than § 1442), *petition for cert. filed*, No. 19-140 (July 30, 2019); *Lee v. Murraybey*, 487 F. App'x 84 (4th Cir. 2012) (dismissing bases for appeal other than § 1443). There is no basis in logic or statutory interpretation to conclude that Congress intended circuit courts to treat non-appealable removal grounds differently depending on whether a defendant has attempted to anchor them to § 1442 rather than § 1443.

The majority of circuits has likewise held that § 1447(d) strictly limits appellate jurisdiction over remand orders to federal-officer or civil rights arguments. *See, e.g.*, *Patel v. Del Taco, Inc.*, 446 F.3d 996, 998 (9th Cir. 2006) (limiting review to basis for removal for which § 1447(d) authorized appeal); *Jacks v. Meridian Res. Co.*, 701 F.3d 1224, 1229 (8th Cir. 2012) (§ 1447(d) precluded the court from consideration of removal based on federal common law, and limited review to removal under the federal-officer statute and Class Action Fairness Act); *Davis v. Glanton*, 107 F.3d 1044, 1047 (3d Cir. 1997) (hearing appeal of remand order concerning § 1443 but dismissing appeal as to § 1441 arguments "for want of appellate jurisdiction" based on "clear text of § 1447(d)"). The Third and Ninth Circuits have both recently reaffirmed those holdings. *See, e.g. Wong v. Kracksmith, Inc.*, 764 F. App'x 583 (9th Cir. 2019) (per curiam) (dismissing appeal for lack of jurisdiction except as to removal under § 1443); *Claus v. Trammell*, 773 F. App'x 103 (3d Cir. 2019) (per curiam) (same).

Defendants rely on two cases that expanded the scope of § 1447(d) review: *Lu Junhong v. Boeing Co.*, 792 F.3d 805, 811 (7th Cir. 2015), and *Mays v. City of Flint, Mich.*, 871 F.3d 437, 442 (6th Cir. 2017), *cert. denied sub nom. Cook v. Mays*, 138 S. Ct. 1557 (2018). But *Mays* cited *Lu Junhong* as its sole case authority in support of jurisdiction, and *Lu Junhong* rested its jurisdictional analysis exclusively

on *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996).[2] *Yamaha*, however, did not involve a remand order at all, but an order certifying an interlocutory appeal under 28 U.S.C. § 1292(b), which permits appeal where the underlying district court order raises a "controlling question of law as to which there is substantial ground for difference of opinion," and interlocutory review would expedite final resolution of the case as a whole. *Yamaha*, 516 U.S. at 205; 28 U.S.C. § 1292(b). Based on § 1292(b)'s plain text, the Supreme Court in *Yamaha* held that if a court of appeals decides to accept a district court's certification, it may extend its interlocutory review to any question "fairly included within the certified order," and jurisdiction is "not tied to the particular [controlling question of law] formulated by the district court." *Id.* at 205.

Yamaha did not purport to establish a general rule governing the scope of appellate jurisdiction for every statute using the word "order." The Supreme Court

[2] In a footnote, Defendants also cite *Decatur Hosp. Auth. v. Aetna Health, Inc.*, 854 F.3d 292 (5th Cir. 2017), which likewise relied on *Lu Junhong*. But as Defendants acknowledge, the Fifth Circuit has issued conflicting authority on this question, and has also *denied* review of remand orders beyond federal officer jurisdiction for lack of jurisdiction under § 1447(d). *See City of Walker v. Louisiana*, 877 F.3d 563, 566 (5th Cir. 2017) (no jurisdiction to review remand order to the extent premised on federal question removal; appellate jurisdiction limited to appropriateness of federal-officer and Class Action Fairness Act removal); *Gee v. Texas*, 769 F. App'x 134 (5th Cir. 2019) (per curiam) ("Where a party has argued for removal on multiple grounds, we only have jurisdiction to review a district court's remand decision for compliance with [§§ 1442 or 1443].").

has often "affirmed that identical language may convey varying content when used in different statutes," which is why statutory language must also be construed in the specific context of its use. *Yates v. United States*, 135 S. Ct. 1074, 1082 (2015) (plurality). *Yamaha*'s reasoning makes sense in the context of § 1292(b), which authorizes district courts to certify almost any non-final order that in the court's view presents a "controlling question of law" for expedited, interlocutory review. In that context, giving the circuit court discretion to review related issues in the same order advances the statutory purpose of efficient and expeditious resolution. *See* 28 U.S.C. § 1292(b) (authorizing certification only where "immediate appeal from the order may materially advance the ultimate termination of the litigation"). Congress's clear intent expressed in § 1447(d), by contrast, was to limit appellate review of remand orders to two theories for removal. Congress did not grant courts of appeal discretionary powers under § 1447(d) like those available under § 1292(b), to reject certification and to review issues beyond the certified question if certification is accepted. On its face, section "1447(d) bars [appellate] review 'even if the remand order is manifestly, inarguably erroneous.'" *In re Norfolk S. Ry. Co.*, 756 F.3d 282, 287 (4th Cir. 2014) (quoting *Lisenby v. Lear*, 674 F.3d 259, 261 (4th Cir. 2012)).

Congress has made only two bases for removal reviewable on appeal or otherwise. Yet Defendants' interpretation of § 1447(d) would allow appeal of non-reviewable grounds for removal *as of right* whenever a removing defendant has

asserted federal officer jurisdiction. By comparison, § 1292(b) may open a wide range of issues to appeal, but it does so only in specific procedural postures and does not create a *right* to appeal. A § 1292(b) appeal is permitted only upon the concurrence of both the district court and the court of appeals that a controlling question of law exists as to which reasonable minds could differ. Defendants' reading of § 1447(d) would deny the circuit courts' gatekeeping role, and would permit them no ability to control their own dockets.

Relatedly, § 1292(b) does not make otherwise non-appealable questions reviewable, but rather permits appellate review of important issues before final judgment. Stated differently, § 1292(b) governs *when* an appellate court may review a particular question within its discretion, while § 1447(d) strictly limits *which* issues are "reviewable on appeal or otherwise." Defendants' interpretation of § 1447(d) would mandate appellate review of issues that are ordinarily prohibited from review *at all*, even following a final judgment.

Defendants insist that this Court's precedent is wrong, and that the minority position should control. As discussed above, their reasoning is unpersuasive. More importantly, however, that is not an argument this Court can accept because *Noel* remains binding. *See, e.g.*, *United States v. Prince-Oyibo*, 320 F.3d 494, 498 (4th Cir. 2003) (circuit panels are bound by circuit precedent "[a]bsent an en banc

overruling or a superseding contrary decision of the Supreme Court"). Defendants' suggestion that this appeal should be heard *en banc* is premature.

In sum, although 28 U.S.C. § 1442(a)(1) allows Defendants to appeal the district court's rejection of federal-officer removal, their federal-officer argument does not confer a right to appeal the district court's rejection of *other* non-reviewable grounds.

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

Defendants devote fewer than four pages to federal-officer removal, the only argument this Court has jurisdiction to consider. Appellants' Opening Brief at 40–43 ("AOB"). The court below found that Defendants had "failed to plausibly assert that the acts for which they have been sued were carried out 'for or relating' to the alleged federal authority," JA.366 (order granting remand), "or even that removal of this case under the federal officer removal statute raises a complex, serious legal question," Doc. 81 at 255 (order denying stay pending appeal). Every court that has addressed federal-officer jurisdiction in the context of climate litigation against fossil-fuel company defendants has likewise rejected it.

To achieve federal-officer removal, Defendants must establish that they "act[ed] under" a federal officer when they engaged in the conduct giving rise to Baltimore's claims. 28 U.S.C. § 1442(a)(1). "Historically, removal under § 1442(a)(1) and its predecessor statutes was meant to ensure a federal forum in any

case where a federal official is entitled to raise a defense arising out of his official duties." *Arizona v. Manypenny*, 451 U.S. 232, 241 (1981). Because Congress was concerned that federal officials subject to state-court prosecution or civil suit might be subject to "local prejudice" or hostility against the federal government, removal afforded a "federal forum in which to assert federal immunity defenses." *Id.* at 150.

Section 1442(a)(1) extends the same jurisdictional protections to private individuals and companies "acting under [an] officer" when "sued for any act under color of such office." 28 U.S.C. § 1442(a)(1). The paradigmatic example is a private individual hired to drive federal officers to a raid on illegal distilleries. *See Watson*, 551 U.S. at 149. The removing party must show that it was "acting under" the federal officer and must raise a "colorable federal defense." *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 254 (4th Cir. 2017). The removing party must also establish "a sufficient connection between the charged conduct and asserted official authority" by showing that the conduct for which it has been sued was done "for or relating to" the federal authority at issue. *Id.* at 257–58.

Defendants here point to a handful of contracts with federal entities related to fossil fuel extraction and sale over the past century, and contend those arrangements show they were acting under federal officers within the meaning of § 1442(a)(1) when they engaged in the wrongful conduct of which Baltimore complains. The district court properly rejected this argument, holding that the "attenuated

connection between the wide array of conduct for which defendants have been sued and the asserted official authority is not enough to support removal under 1442(a)(1)." JA.365 (citing *San Mateo*, 294 F. Supp. 3d at 939).

A. Defendants Have Not Shown They "Acted Under" Federal Officers.

Defendants contend that a subset of them were "acting under" federal officers when they extracted and sold fossil fuels pursuant to occasional contracts with the federal government. AOB41–42. To prove that it was acting under a federal officer within the meaning of § 1442(a)(1), however, a defendant must establish both that it was "involve[d in] an effort to *assist*, or to help *carry out*, the duties or tasks of [a] federal superior" and that its relationship with the federal superior "involve[d] 'subjection, guidance, or control.'" *Watson v. Philip Morris Cos., Inc.*, 551 U.S. 142, 151–52 (2007). The unremarkable contractual relationships cited by Defendants do not satisfy their burden.

Defendants first point to a 1944 Unit Plan Contract between Standard Oil (a Chevron predecessor) and the U.S. Navy governing the "joint operation and development" of the Elk Hills Reserve, a strategic petroleum reserve spanning properties owned by the Navy and Standard. AOB41; JA.214–15, JA.241–259. 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." *United States v. Standard Oil Co. of Cal.*, 545 F.2d 624, 626 (9th Cir. 1976)

(discussing Elk Hills Reserve contract); *see also, e.g.*, JA.248 at § 2(d) (assigning approximately 75% ownership of the pool to the Navy and 25% to Standard Oil). In "consideration for Standard curtailing its production" to retain the oil reserve for a time of emergency, Standard held rights to extract specified volumes of oil from certain zones of the pool. *Standard Oil Co. of Cal.*, 545 F.2d at 627–28. The contract *reduced* Standard Oil's production, and Standard could have complied with the contract by producing no oil at all from it. The terms Defendants cite merely required that both Standard and the Navy maintain the pool such that it *would be capable* of producing not less than 15,000 barrels per day if called upon by the Navy to do so. *See* JA.250 at § 4(b). Nothing in the contract comes close to the "subjection, guidance, or control" needed to establish that Defendants were acting under a federal officer. *See Watson*, 551 U.S. at 152.

Next, Defendants rely on two mineral leases between the Department of the Interior and certain defendants. AOB41–42, JA.212–14, JA.233–39. Defendants cite no case—and Plaintiff has found none—where a voluntary choice by a private party to lease property or mineral rights from the federal government transform later activity on the leased property into activity under the control of a federal officer. The Supreme Court has held unambiguously that "the help or assistance necessary to bring a private party within the scope of the statute does *not* include simply *complying* with the law," including contractual obligations. *Watson*, 551 U.S. at 152.

The leases here do not require Defendants to extract fossil fuels in a particular manner, do not dictate the composition of oil or gas to be refined and sold to third parties, and do not remotely purport to affect the content or methods of Defendants' communications with customers, consumers, and others about Defendants' products and their relationship to global warming. The leases are irrelevant.

Finally, Defendants reference certain commercial contracts under which one Defendant agreed to supply fuel to the Navy Exchange Service Command (NEXCOM), which NEXCOM resold at a discount to active duty military, retirees, reservists, and their families. AOB42. A company's voluntary decision to provide a commodity to the government for resale does not alone render it a federal officer in cases alleging the product was defective or that defendants' behavior was otherwise tortious. Under Defendants' logic, any manufacturer of any product would be entitled to remove any state law product liability claim against it if the manufacturer sold one of its products to a government entity at some point in time. *Cf. Watson*, 551 U.S. at 153 (rejecting federal officer removal where it "would expand the scope ... potentially bringing within its scope state-court actions filed against private firms in many highly regulated industries"). Such an expansive view of Section 1442(a)(1) would ignore its historical purpose of preventing state court interference with or prejudice against federal operations, *Sawyer*, 860 F.3d at 258, and would federalize huge swaths of state common law contract and tort litigation.

B. No Nexus Exists Between Defendants' Challenged Actions in This Case and The Directions of Any Federal Officer.

Federal-officer jurisdiction requires that the defendant establish a "sufficient connection or association" between the acts it performed under the government's direction and the plaintiff's claims. *Sawyer*, 860 F.3d at 258 (quotation omitted). The district court found Defendants failed to satisfy this element because they "ha[d] not shown that a federal officer controlled their total production and sales of fossil fuels, nor is there any indication that the federal government directed them to conceal the hazards of fossil fuels or prohibited them from providing warnings to customers," which is the central conduct at issue in Plaintiff's claims. JA.365; *accord San Mateo*, 294 F. Supp.3d at 939 ("defendants have not shown a 'causal nexus' between the work performed under federal direction and the plaintiffs' claims, which are based on a wider range of conduct"); *Rhode Island*, 2019 WL 3282007, at *5 (same).

Because there was no delegation of authority from any federal agency to Defendants, nor any direct control over Defendants' challenged conduct, a sufficient nexus is absent. Plaintiff's claims have nothing to do with what Defendants allege they have done under federal direction. This Court has rejected federal officer removal in cases where, as here, defendants failed to show that government "restricted or prohibited them from providing additional safeguards or information to consumers." *Compare Sawyer*, 860 F.3d at 258, *with In re Wireless Telephone Radio Frequency Emissions Prods. Liab. Litig.*, 327 F. Supp. 2d 554, 563 (D. Md.

2004) (granting motion to remand); *see also Meyers v. Chesterton*, No. CIV.A. 15-292, 2015 WL 2452346, at *6 (E.D. La. May 20, 2015), *order vacated, appeal dismissed sub nom. Meyers v. CBS Corp.*, No. 15-30528, 2015 WL 13504685 (5th Cir. Oct. 28, 2015) (dismissing as moot). (rejecting federal officer removal because "nothing about the Navy's oversight prevented the Defendants from complying with any state law duty to warn").

Defendants try to limit the Court's attention to a single element of Baltimore's design-defect claim, which alleges that Defendants' products "have not performed as safely as an ordinary consumer would expect them to." JA.160 at ¶253. The complaint explains, however, that Defendants' misleading marketing and denial of contrary scientific evidence "prevented reasonable consumers from forming an expectation that fossil fuel products" would be dangerous. *See*, *e.g.*, JA.161 at ¶254. No federal officer directed or required any Defendant to mislead consumers or the public, or to promote and sell products based on their longstanding campaign of disinformation.

For all these reasons, the district court correctly held the "attenuated connection" between the conduct Plaintiff alleges and the limited relationships some Defendants purport to have held at certain times with the federal government cannot support removal under § 1442. JA.365.

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

To the extent the Court determines it has jurisdiction to consider Defendants' other removal theories, it should affirm. Courts must "construe removal jurisdiction strictly" because it implicates "significant federalism concerns." *Lontz v. Tharp*, 413 F.3d 435, 440 (4th Cir. 2005). Accordingly, the burden always remains with the removing party. *Id.* at 439. "[I]f federal jurisdiction is doubtful, a remand to state court is necessary." *Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811, 816 (4th Cir. 2004) (en banc). The district court properly applied those principles and remanded this case in its entirety.

A. Plaintiff's Claims Do Not Arise Under Federal Law.

Defendants' principal argument is that this case is removable because Plaintiff's Maryland-law causes of action "arise under federal common law" supposedly because "federal common law must provide the rule of decision." AOB15. That argument is precluded by the well-pleaded complaint rule and decades of precedent. Even if it were not, Defendants have jettisoned the core of their argument by asserting that the federal common law upon which they rely was "displaced" by the CAA. AOB48–51.

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

The "presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal question jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 391–92 (1987). "[A] case may not be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." *Id*. The rule "makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Id*. at 392.

Defendants try to evade the well-pleaded complaint rule by asserting that Plaintiff's claims "are *governed by* federal common law," while carefully avoiding the phrase "*preempted by*" federal common law. AOB15 (emphasis added). It is true that if federal common law *completely* preempted Plaintiff's state claims under a proper application of that term of art, there would be federal jurisdiction. *See Caterpillar*, 482 U.S. at 393. But Defendants do not make a complete-preemption argument as to federal common law. The only complete-preemption argument they make pertains to the Clean Air Act. *See* AOB48–51.

When Defendants say that federal common law "governs" Plaintiff's claims, they mean that "our federal system does not permit [this] controversy to be resolved

under state law" and that federal common law provides the exclusive alternative. *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). But that formulation describes ordinary preemption, and not complete (federal-jurisdiction-conferring) preemption, explained in Part III.B, *infra*. Whenever federal law preempts state law, the Constitution's supremacy clause forbids application of state law, leaving federal law as the only authority to "govern" the plaintiff's claims. The Supreme Court has long made clear that "preemption, without more, does not convert a state claim into an action arising under federal law." *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987); *see also Goepel v. Nat'l Postal Mail Handlers Union, a Div. of LIUNA*, 36 F.3d 306, 311–12 (3d Cir. 1994) ("[T]he only state claims that are 'really' federal claims and thus removable to federal court are those that are preempted *completely* by federal law." (emphasis added) (citing *Franchise Tax Bd.*, 463 U.S. at 13)). Defendants' argument is thus a double evasion: an attempted end-run around both the well-pleaded complaint rule and the requirements for complete preemption.

The district court correctly held that Defendants' position was a "cleverly veiled preemption argument." JA.341. Their reasoning would turn the well-pleaded complaint rule on its head. The court in *Rhode Island* correctly summarized the central problem with the Defendants' theory there when it rejected identical arguments from many of the same defendants and granted remand:

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

Rhode Island, 2019 WL 3282007, at *2.

Defendants' reliance on *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), AOB28–29, is unavailing. In *Ouellette*, the action was removed from Vermont state court on diversity grounds, and the Court considered only whether the Clean Water Act preempted the common law cases of action as alleged—not whether any basis for jurisdiction existed beside diversity. 479 U.S. at 500.

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

Even if Baltimore's state law causes of action could be transformed into a federal cause of action, Defendants' argument that federal common law "controls" would still fail, because the relevant federal common law has been displaced by the CAA. *See* JA.346 (citing *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012), *cert. denied*, 569 U.S. 1000 (2013); *AEP*, 564 U.S. at 410); AOB30–31.[3]

[3] The district court below did not determine whether any federal common law claims survived the Clean Air Act, because it found Defendants' arguments failed under the well-pleaded complaint rule.

Federal common law has always been interstitial—created by courts only where Congress has failed to act, and always subject to displacement by statute. *See, e.g.*, *AEP*, 564 U.S. at 423. When Congress steps in, statutory authority displaces *all* federal common law within its scope. Statutory displacement overrides the federal common law's substance along with such ancillary questions as whether federal law should preempt state law on the same subject, and when preempted state law claims may be subject to removal. *See id.* at 429.

The Supreme Court made abundantly clear in *AEP* that "[i]n light of our holding that the CAA displaces federal common law, the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect *of the federal Act*." 564 U.S. at 429 (emphasis added); *see also Kivalina*, 696 F.3d at 866 (Pro, J., concurring) ("Once federal common law is displaced, state nuisance law becomes an available option to the extent it is not preempted by federal law.").

So, too, with removal. The "touchstone of the federal district court's removal jurisdiction is ... the intent of Congress." *Metro. Life Ins. Co.*, 481 U.S. at 66. Although *AEP* and *Kivalina* clearly held that the CAA obviated preexisting federal common law, Defendants insist that he CAA only displaced common law *remedies*, and that enough remains for the federal common law to "govern"—*i.e.*, preempt—Plaintiff's state-law claims. AOB30–31. It would be odd enough to claim that there is a federal common law that "governs" claims yet provides no remedy. But

Defendants must also admit that federal common law no longer provides any substantive rules governing conduct either—that is now the function of the CAA. *See, e.g.*, *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 314 n.7 (1981). Defendants leave it to the reader to imagine what exactly remains of the federal common law after *AEP*. Seemingly, the only function Defendants are sure remains for the empty federal common law husk is allowing them to avoid establishing the requirements of complete preemption in support of removal.

Nothing in *AEP* or *Kivalina* supports Defendants' displacement-as-to-remedies-only argument. The Supreme Court explained in *AEP* that when "Congress addresses a question previously governed by a decision rested on federal common law ... the need for such an unusual exercise of law-making by the federal courts [*i.e.*, the interstitial common-law] disappears." 564 U.S. at 423. With it disappears whatever common law principles the courts had previously adopted, for "it is primarily the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest." *Id*. at 423–24; *see also City of Milwaukee*, 451 U.S. at 315 ("Our commitment to the separation of powers is too fundamental to continue to rely on federal common law ... when Congress has addressed the problem." (quotations omitted)). Similarly, the court in *Kivalina* held that there were no federal common law remedies (injunctive or compensatory) because a statute

displaced the *entirety* of the federal common law, including the cause of action upon which any remedy must depend. *See, e.g.*, 696 F.3d at 857.[4]

The Supreme Court in *AEP* and the Ninth Circuit in *Kivalina* made clear that the only relevant preemption issue that may arise in this case is a merits question left for the state court to consider on remand: whether the CAA preempts Baltimore's

[4] Plaintiff does not concede that federal common law would have applied to their state law claims in the absence of the CAA, because those claims rest on Defendants' tortious failures to warn, over-promotion and over-marketing of their dangerous products, and campaigns of deception and denial. There is neither a "uniquely federal" interest, nor a "significant conflict" between federal policy or interests and state law, concerning such conduct. *Boyle v. United Tech Corp.*, 487 U.S. 500, 640 (1988); s*ee, e.g.*, *Rocky Mountain Farmers Union v. Corey*, 913 F.3d 940, 945 (9th Cir. 2019) ("The California legislature is rightly concerned" with the "dreadful environmental impacts" of climate change); *Am. Fuel & Petrochem. Mfrs. v. O'Keeffe*, 903 F.3d 903, 913 (9th Cir. 2018), *cert. denied sub nom. Am. Fuel & Petrochem. Mfrs. v. O'Keeffe*, 139 S. Ct. 2043 (2019) ("It is well settled that the states have a legitimate interest in combatting the adverse effects of climate change on their residents."); *Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685, 687 (6th Cir. 2015) ("air pollution prevention and control is the primary responsibility of individual states and local governments"); *Nat'l Audubon Soc'y v. Dep't of Water*, 869 F.2d 1196, 1203 (9th Cir. 1988) (despite interstate pollution effects, "there is not 'a uniquely federal interest' in protecting the quality of the nation's air"); *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 340 (D. Vt. 2007) (rejecting preemption of state auto emissions standards, holding in part that "[state] regulation of greenhouse gases emitted from motor vehicles has a place in the broader struggle to address global warming"); *cf. Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1324 (5th Cir. 1985) (*en banc*) (claims against asbestos manufacturers "cannot become 'interstate,' in the sense of requiring the application of federal common law, merely because the conflict is not confined within the boundaries of a single state"); *In re Agent Orange Prod. Liab. Litig.*, 635 F.2d 987, 994 (2d Cir. 1980) (despite federal interest in millions of veterans who served in Vietnam exposed to Agent Orange, "there is no federal interest in uniformity for its own sake... . The fact that application of state law may produce a variety of results is of no moment," and is "the nature of a federal system.").

Maryland law claims. Because the matter on appeal is limited to the appropriateness of removal, the question before this Court is far narrower: whether the CAA *completely* preempts Plaintiff's claims. As explained next, it does not.

B. Plaintiff's Claims Are Not Completely Preempted by the CAA.

Defendants fail to meet the high bar required to show the CAA completely preempts Plaintiff's claims to the extent that they relate to emissions, AOB48–51, let alone complete preemption of the defective product, tortious marketing, and promotional conduct at issue here. The Supreme Court recognizes a narrow "corollary" to the well-pleaded complaint rule, which only applies where "the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim.'" *Caterpillar*, 482 U.S. at 393 (quoting *Metro. Life Ins. Co.*, 481 U.S. at 65). The district court correctly found that "the absence of any indication" that Congress intended the CAA to be the exclusive remedy for injuries stemming from air pollution, let alone climatic changes, is "[f]atal" to Defendants' complete preemption arguments. JA.355; *accord Rhode Island*, 2019 WL 3282007, at *4 ("No court has [held that the CAA completely preempts state law], and neither will this one."); *San Mateo*, 294 F. Supp. 3d at 938 (same).

The Fourth Circuit recognizes a presumption against complete preemption that may only be rebutted in the rare circumstance where "federal law 'displace[s]

entirely any state cause of action.'" *Lontz v. Tharp*, 413 F.3d 435, 440 (4th Cir. 2005) (quoting *Franchise Tax Bd.*, 463 U.S. at 23). Thus, "[t]o remove an action on the basis of complete preemption, a defendant must establish that the plaintiff has a 'discernible federal [claim]' and that 'Congress intended [the federal claim] to be the exclusive remedy for the alleged wrong.'" *Pinney v. Nokia*, 402 F.3d 430, 449 (4th Cir. 2005) (quoting *King v. Marriott Int'l, Inc*., 337 F.3d 421, 425 (4th Cir. 2003)). A defendant must "establish congressional intent to extinguish similar state claims by making the federal cause of action exclusive," and a court must "resolv[e] reasonable doubts against complete preemption." *Lontz*, 413 F.3d at 441.

The Supreme Court has expressed great "reluctan[ce] to find th[e] extraordinary pre-emptive power" required for complete preemption, *Metro. Life Ins. Co.*, 481 U.S. at 65, holding only three statutes (none at issue here) have complete preemptive effect. *Lontz*, 413 F.3d at 441. It is unsurprising that Defendants are unable to cite a single case holding that the CAA completely preempts any state law tort claims. To the contrary, there are many cases rejecting any notion that the Act completely preempts similar claims.[5] Courts often reject even

[5] *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").

ordinary preemption defenses under the Act and allow state law claims arising from air pollutants to proceed.[6]

1. Congress Did Not Intend the CAA to Displace Plaintiff's State Law Claims.

At least three statutory provisions preclude Defendants' contention that Congress intended the CAA to completely preempt all state-law claims involving air-pollution emissions.

First, in enacting and later amending the CAA, Congress expressly found "that air pollution prevention ... and air pollution control at its sources is the primary responsibilities of States and local governments." 42 U.S.C. § 7401(a)(3). Far from revealing congressional intent to entirely preclude state-law measures that address air pollution, that finding demonstrates Congress's understanding that such measures are important and should continue.

Second, Congress included a provision in the CAA expressly stating that, with limited exceptions not relevant here, nothing in the chapter governing air quality and emissions limitations "shall preclude or deny the right of any State or political

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[6] *See Bell v. Cheswick Generating Station*, 734 F.3d 188, 198 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2696 (2014) (allowing state tort claims to proceed against coal-fired power plant, holding that "[i]f Congress intended to eliminate such private causes of action, 'its failure even to hint at' this result would be 'spectacularly odd'"); *Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685, 690 (6th Cir. 2015) (allowing claims for nuisance, trespass, and negligence for emissions from distillery because "the Clean Air Act expressly preserves the state common law standards on which plaintiffs sue").

subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution," except those "less stringent than the standard or limitation" provided for by the CAA. 42 U.S.C. § 7416. Congress thereby made clear that, although the CAA sets a *floor* for emissions standards and limitations, it does not restrict the rights of States and local governments to enforce *stricter* standards governing emission, control, or abatement of air pollution.[7]

Third, Congress included another savings clause in the CAA, which specifies that "nothing in" the chapter governing citizen suits "shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief." 42 U.S.C. § 7604(e). This provision clarifies that Congress did not intend the Act to provide the exclusive means of enforcing air quality standards. *See Bell*, 734 F.3d at 197–98 (CAA "serve[s] as a regulatory floor, not a ceiling," and "states are free to impose higher standards on their own sources of pollution, and ... state tort law is a permissible way of doing so").

Finally, Defendants' reliance on 42 U.S.C. § 7607, AOB48–49, is misplaced. That provision establishes the exclusive means of challenging actions of the

[7] Baltimore's requested relief does not seek to restrict any party's carbon emissions, but we highlight this savings clause to illustrate Congress's unambiguous intent not to completely preempt state law in the areas affected by the Act.

Administrator of the federal Environmental Protection Agency. That is not what Plaintiff is doing.

2. The CAA Provides No Substitute Cause of Action.

In addition to its affirmative preservation of state law claims, the Act cannot have complete preemptive force here because it does not provide a private cause of action that substitutes for state law tort claims. In the rare cases where the Supreme Court has found complete preemption, it has relied not only on congressional intent that federal law provide an exclusive remedy, but also on the presence of a specific federal cause of action encompassing, and therefore replacing, the state law claim. *See Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 7–9 (2003); *Metro. Life Ins. Co.*, 481 U.S. at 62–63, 65–66. As this Court has emphasized, "a vital feature of complete preemption is the existence of a federal cause of action that replaces the preempted state cause of action." *King*, 337 F. 3d at 425.

The CAA's citizen-suit provision creates a right of action only for violations of emissions standards or violation of an EPA order. *See* 42 U.S.C. § 7604. The Act does not regulate defective products, marketing, or promotion at all, let alone create a right of action for related claims or provide a right to compensatory damages or authorize equitable abatement. *See Freeman v. Grain Processing Corp.*, 848 N.W.2d 58, 69 (Iowa 2014) (holding CAA did not preempt state tort action for emissions and emphasizing distinction between state law and CAA remedies). Without any federal

cause of action to remedy Plaintiff's injuries, complete preemption cannot operate here.

C. Plaintiff's Claims Are Not Removable Under *Grable*.

Defendants' invocation of *Grable* dramatically overreads the scope of jurisdiction federal courts may assert over state law complaints, and misconstrues the relief Plaintiff seeks. The Supreme Court has unambiguously held that state law causes of action 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), if they "really and substantially involv[e] a dispute or controversy respecting the validity, construction or effect of [federal] law." *Grable*, 545 U.S. at 313. A well-pleaded state law cause of action does not "arise under" federal law for removal purposes unless the affirmative case "will necessarily require application" of federal law such that the plaintiff cannot meet its *prima facie* burden without relying on a federal standard. *Gunn*, 586 U.S. at 258.

Federal jurisdiction exists over a wholly state-law complaint only in the limited circumstance where a federal issue is: "(1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Id.* at 258. If a federal issue is only "lurking in the background," state law claims do not arise under federal law and removal is improper. *Pinney*, 402 F.3d at 445.

Defendants assert at various points that Plaintiff's state law claims are "bound up with," "implicate," or "seek to replace" a variety of ill-defined "federal interests," laws, and agency activities. AOB33, 37, 38. "These are, if anything, premature defenses, which even if ultimately decisive, cannot support removal." *Rhode Island*, 2019 WL 3282007, at *5 (rejecting *Grable* jurisdiction). Nothing in Baltimore's Complaint necessarily involves disputed and substantial questions of federal law, as required under *Grable*.

1. Plaintiff's Complaint Does Not "Necessarily Raise" Any "Actually Disputed" Issues of Federal Law.

Plaintiff's Complaint does not "necessarily raise" any "disputed" issue of federal law, substantial or otherwise. A complaint satisfies this element only where a "question of federal law is a *necessary element* of one of the well-pleaded state claims." *Franchise Tax Bd.*, 463 U.S. at 13 (emphasis added). "If a plaintiff can establish, without the resolution of an issue of federal law, all of the essential elements of his state law claim, then the claim does not necessarily depend on a question of federal law." *Pinney*, 402 F.3d at 442.

Defendants do not argue that Plaintiff's claims require the interpretation of federal law but insist instead that some elements of some of Plaintiff's causes of action would conflict with various federal regulatory determinations. AOB34–37. But this Court has repeatedly held that "a plaintiff's right to relief for a given claim necessarily depends on a question of federal law only when *every* legal theory

supporting the claim requires the resolution of a federal issue." *Flying Pigs, LLC v. RRAJ Franchising, LLC*, 757 F.3d 177, 182 (4th Cir. 2014). "In other words, if the plaintiff can support his claim with even one theory that does not call for an interpretation of federal law, his claim does not 'arise under' federal law for purposes of § 1331." *Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811, 817 (4th Cir. 2004).

a. Circuit Precedent Forecloses Defendants' "Collateral Attack" and "Duty to Disclose" Arguments.

This Court in *Pinney* squarely rejected Defendants' central argument that *Grable* creates jurisdiction in any case where "federal law has required agencies to weigh the costs and benefits" of activity indirectly related to a defendant's tortious conduct, AOB34, or where a defendant's alleged misleading statements could also have violated federal disclosure duties, AOB37–38. In *Pinney*, the district court denied a motion to remand, finding the plaintiffs' allegations that Nokia fraudulently withheld information about radiation emitted by their cell phones "necessarily depend[ed] on the resolution of a substantial federal question" because cell phone radiation is regulated by the FCC. 402 F.3d at 441.

Reversing the district court, this Court observed that the well-pleaded complaint rule controls the court's consideration of a motion to remand and found that "the elements of each of the [plaintiffs'] claims depend only on the resolution of questions of state law," and thus were not removable. *Id.* at 445. The Court reasoned a mere "connection between [those claims and] the federal scheme

regulating wireless telecommunications," *id.* at 49, was insufficient. Rather, "for removal to be proper under the substantial federal question doctrine, a plaintiff's ability to establish the necessary elements of his state law claims must rise or fall on the resolution of a question of federal law." *Id.*[8] Defendants' argument here that Baltimore's claims are removable because they allegedly require analyzing conduct that is separately subject to "determinations made by federal agencies," AOB36, is identical to Nokia's arguments in *Pinney* and fails as a matter of law.

None of Baltimore's claims depend on federal law to create the right to relief, none incorporates a federal tort duty that Defendants allegedly violated, and none turn on any application or interpretation of federal law. There is, in short, no federal question. "On the defendants' theory, many (if not all) state tort claims that involve the balancing of interests and are brought against federally regulated entities would be removable. *Grable* does not sweep so broadly." *San Mateo*, 294 F. Supp. 3d at 938.

[8] Numerous other courts routinely reject federal subject matter jurisdiction where, as in *Pinney*, the case takes place against a backdrop of federal regulation but no claim relies on a federal right to relief or turns on interpreting federal law. *See, e.g.*, *Becker v. Ute Indian Tribe of the Uintah & Ouray Reservation*, 770 F.3d 944, 947–48 (10th Cir. 2014) (no federal question jurisdiction over a breach of contract claim against Indian Tribe even though contract required approval from U.S. Secretary of the Interior); *K2 Am. Corp. v. Roland Oil & Gas, LLC*, 653 F.3d 1024, 1032 (9th Cir. 2011) ("[t]he mere fact that the Secretary of the Interior must approve oil and gas leases does not raise a federal question").

In the cases Defendants cite, the plaintiff's claims did not merely touch on a defendant's federally regulated conduct; rather, the right to relief itself grew directly out of federal regulation. In *Board of Commissioners of Southeast Louisiana Flood Protection Authority v. Tennessee Gas Pipeline Co.*, 850 F.3d 714, 720–21 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 420 (2017), for example, the plaintiff alleged that various companies had increased regional flood risk by dredging canals. Although the plaintiff's claims were framed under state law, the court found removal proper because the complaint itself "dr[ew] on [the federal Rivers and Harbors Act] as the *exclusive basis* for holding Defendants liable for some of their actions," which were not subject, under Louisiana law, to the duties the plaintiffs sought to enforce—backfilling the canals and performing other regional flood mitigation. *Id.* at 722–23 (emphasis added). Therefore, "[t]he absence of any state law grounding for the duty ... for the Defendants to be liable means that that duty would have to be drawn from federal law." *Id.* at 723. Here, by contrast, the relief Plaintiff seeks, and the duties it seeks to enforce, are drawn exclusively from traditional precepts of Maryland law.

b. The Army Corps of Engineers' Authority Over Infrastructure in Navigable Waters Has Nothing to Do with Plaintiff's Claims.

Like Defendants' other ill-defined federal regulatory considerations purportedly at stake, their invocation of navigable waters is, at most, a preemption

defense incapable of generating federal jurisdiction. The mere possibility that some mitigation infrastructure may require a federal permit does not mean a federal question is "necessarily raised" by the Complaint. AOB36. And contrary to Defendants' assertion that the "[a]djudication of Plaintiff's claims requires evaluation of the adequacy of complex Corps decisions," AOB37, no element of any of Plaintiff's claims requires such an analysis. Unsurprisingly, Defendants cite no authority for that proposition.[9]

c. Defendants' Invocation of Foreign Relations Is Not a Basis for Federal Jurisdiction.

Defendants also argue that Plaintiff's claims are federal in character because they supposedly conflict with the United States' "longstanding policy of pursuing economic growth rather than imposing emissions limits under imbalanced international agreements." AOB39. Even if that were true—and it is not, because Plaintiff seeks neither to limit emissions nor impose "imbalanced international agreements"—it would not satisfy *Grable*, because the foreign relations doctrine is a preemption doctrine and has never supplied substantive federal law. "Under the foreign affairs doctrine, state laws that intrude on th[e] exclusively federal power [to administer foreign affairs] are preempted, under either the doctrine of conflict

[9] Defendants' reliance on *Tennessee Gas Pipeline*, 850 F.3d at 714, is misplaced. The court there found federal jurisdiction proper in that case, not because a federal permit would eventually be required to authorize the relief requested, but because federal law supplied the duty at issue. *Id.* at 721, 723.

preemption or the doctrine of field preemption." *Gingery v. City of Glendale*, 831 F.3d 1222, 1228 (9th Cir. 2016).

Foreign affairs field preemption only applies where a state "take[s] a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420 n. 11 (2003). Here, the only possible "state action" is Plaintiff's pleading generally applicable tort claims in an area of traditional state responsibility. Likewise, conflict preemption requires a "clear conflict" between state and federal law, *id*. at 420, which Defendants have not even attempted to identify. Even if the foreign affairs defense could create a basis for removal jurisdiction here—it does not—no necessary element in any of Plaintiff's claims substantially impinges on the federal government's foreign policy prerogative.

Even if foreign affairs preemption might, under some circumstances, provide a basis for "arising under" jurisdiction, a state's action must "produce something more than incidental effect in conflict with express foreign policy of the National Government" to intrude on the executive's foreign affairs power. *Garamendi*, 539 U.S. at 420; *see also Provincial Gov't of Marinduque v. Placer Dome, Inc.*, 582 F.3d 1083, 1091 (9th Cir. 2009) ("Just 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."); *San Mateo*, 294 F. Supp. 3d at 938 ("The mere potential for foreign policy implications ... does not raise the kind of actually disputed, substantial issue necessary for *Grable* jurisdiction."). Defendants gesture toward "environmental constraints" that could supposedly "plac[e] the United States at a competitive disadvantage." AOB39. But that result, even if credited, is exactly the kind of "incidental effect" that *Garamendi* held was outside the scope of the doctrine. 539 U.S. at 420.

2. Defendants Have Not Shown That the Complaint Raises Questions of Federal Law That Are "Substantial" to the Federal System.

Defendants also have not met their burden of identifying any federal question that is "substantial" within *Grable*'s meaning. A federal issue is "substantial" if it presents "a nearly pure issue of law" that "could turn on a new interpretation of a federal statute or regulation which will govern a large number of cases .... Conversely, federal jurisdiction is disfavored for cases that are 'fact-bound and situation-specific' or which involve substantial questions of state as well as federal law." *Bender v. Jordan*, 623 F.3d 1128, 1130 (D.C. Cir. 2010).

Defendants do not point to any aspect of this case that will control many other cases raising the same purported federal issues, or how Plaintiff's localized, fact-specific, state law claims justify a federal forum. Their bald argument that this case

"sits at the intersection of federal energy and environmental regulatory policy, and implicates foreign policy and national security," AOB40, is insufficient.

3. Congress Has Struck the Balance of Judicial Responsibility in Favor of State Courts Hearing State Law Claims.

Congress has struck the jurisdictional balance in favor of Plaintiff's claims being heard in state court. "[T]he combination of no federal cause of action and no preemption of state remedies" is "an important clue to Congress's conception of the scope of jurisdiction to be exercised under § 1331," and indicates that federal jurisdiction is not favored. *Grable*, 545 U.S. 318. Finding jurisdiction absent a private federal cause of action "flout[s], or at least undermine[s], congressional intent." *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 812 (1986).

The "congressionally approved balance of federal and state judicial responsibilities" favors state court jurisdiction here. *Grable*, 545 U.S. 314. Redressing the kinds of deceptive marketing and promotion campaigns at issue here comes within the traditional police power of the states. *See In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 488 F.3d 112, 133–34 (2d Cir. 2007) ("*MTBE*") (allowing government entity to seek monetary relief against refiners to remedy and prevent environmental damage); *see also, e.g.*, *Soto v. Bushmaster Firearms Int'l, LLC*, 331 Conn. 53, 137 (2019) ("The regulation of advertising that threatens the public health, safety, and morals has long been considered a core exercise of the states' police powers.").

D. Plaintiff's Claims Are Not Removable Under the Outer Continental Shelf Lands Act.

OCSLA does not provide a basis for jurisdiction here because Defendants "offer no basis ... to conclude that the City's claims for injuries stemming from climate change would not have occurred but for defendants' extraction activities on the OCS." JA.362; *accord San Mateo*, 294 F. Supp. 3d at 938–39; *Rhode Island*, 2019 WL 3282007, at *5.

OCSLA jurisdiction covers disputes where physical activities on the OCS caused the alleged injuries, or where the dispute actually and directly involves OCS drilling and exploration activities, such as contract disputes involving OCS contractors. The method and location of Defendants' production of fossil fuel products is immaterial to Plaintiff's claims, and Defendants' arguments would "open the floodgates to cases that could invoke OCSLA jurisdiction far beyond its intended purpose." *Plaquemines Par. v. Palm Energy Offshore, LLC*, No. CIV.A. 13-6709, 2015 WL 3404032, at *5 (E.D. La. May 26, 2015). Defendants' overbroad formulation of OCSLA's jurisdictional grant would bring into federal court any case involving facts traceable to deep sea oil drilling, no matter how remote. Congress did not intend such "absurd results." *Plains Gas Sols., LLC v. Tennessee Gas Pipeline Co.*, 46 F. Supp. 3d 701, 704–05 (S.D. Tex. 2014).

The Fourth Circuit has not ruled on the outer limits of OCSLA jurisdiction, and Defendants instead rely on cases from the Fifth Circuit. But Defendants'

arguments fail even under a maximally broad reading of the Fifth Circuit cases. In *In re Deepwater Horizon* the Fifth Circuit held:

> Courts typically assess jurisdiction under [§ 1349] in terms of whether (1) the activities that caused the injury constituted an 'operation' 'conducted on the outer Continental Shelf' that involved the exploration and production of minerals, and (2) the case 'arises out of, or in connection with' the operation.

745 F.3d 157, 163 (5th Cir. 2014). "[T]he term 'operation' contemplate[s] the doing of some physical act on the [OCS]." *EP Operating Ltd. P'ship v. Placid Oil Co.*, 26 F.3d 563, 567 (5th Cir. 1994). And a case "arises out of, or in connection with" the operation when (1) the plaintiff "would not have been injured 'but for'" the operation, *Recar v. CNG Producing Co.*, 853 F.2d 367, 369 (5th Cir. 1988), and (2) granting relief "thus threatens to impair the total recovery of the federally-owned minerals" from the OCS. *EP Operating Ltd. P'ship*, 26 F.3d at 570.

Fifth Circuit courts have treated OCSLA's jurisdictional grant as broad but have nonetheless held that "the 'but-for' test ... is not limitless" and must be applied in light of the statute's overall goals. *Plains Gas Sols.*, 46 F. Supp. 3d at 704–05. The

> argument that the 'but-for' test extends jurisdiction to any claim that would not exist but for offshore production lends itself to absurd results; under [such a] view, an employment dispute brought by an employee of an onshore processing facility would fall within the OCSLA because, but for the activities on the OCS, the facility and the employment relationship would not exist.

Plains Gas Sols., 46 F. Supp. 3d at 705.

Plaintiff's injuries here were not caused by, do not arise from, and do not interfere with physical "operations" on the OCS. Rather, the injuries stem from the nature of the products themselves and Defendants' knowledge of their dangerous effects. Plaintiff's injuries arise no matter where or by what "operations" the products' constituent elements were originally extracted. Defendants' cases finding OCSLA jurisdiction, AOB43–46, do not deviate from that rule. In each, the injuries complained of were caused by physical activity actually occurring on the OCS related to fossil fuel extraction, or were contract disputes concerning those activities. *See, e.g.*, *Deepwater Horizon*, 745 F.3d at 162–64 (upholding OCSLA jurisdiction where injuries directly resulted from oil spill caused by explosion on offshore oil platform).

Hammond v. Phillips 66 Co., No. 2:14CV119-KS-MTP, 2015 WL 630918 (S.D. Miss. Feb. 12, 2015), is instructive. The plaintiff alleged he suffered asbestosis from exposure to the defendant manufacturers' asbestos-containing products. *Id.* at *1. The defendants removed under OCSLA, arguing that the plaintiff was exposed to asbestos while working on the OCS. *Id.* The plaintiff alleged, however, that he spent only nine months employed on the OCS out of ten years in the industry. *Id.* at *3. Because "asbestosis is a cumulative and progressive disease," the court found OCSLA jurisdiction lacking "given the uncertainty regarding whether [plaintiff]

working offshore for less than one year could have caused him to develop asbestosis." *Id*. at *4.

As in *Hammond*, Defendants are not able to establish that Plaintiff would not have been injured but-for Defendants' OCS "operations." They make no attempt to quantify any contribution to Plaintiff's injuries from their exploration or drilling on the OCS, much less that Plaintiff would have no cause of action if Defendants had refrained from drilling on the OCS.

E. Plaintiff's Claims Are Not Removable Under the Federal Enclave Doctrine.

Defendants assert that federal enclave jurisdiction is proper because one of the Defendants (and a predecessor of another) conducted a few operations on federal enclaves for unspecified periods of time. AOB46–48. The district court correctly held that these facts are insufficient to establish that federal enclaves were the "locus" in which Plaintiff's claims arose. JA.359–60; *accord San Mateo*, 294 F. Supp. 3d at 939; *Rhode Island*, 2019 WL 3282007, at *5.

Federal question jurisdiction exists over tort claims that *arise on* federal enclave lands. *See, e.g.*, *Stokes v. Adair*, 265 F.2d 662, 665–66 (4th Cir. 1959). Here, the Complaint expressly disclaims injuries to any federal property in Baltimore. JA.43, n.2 (limiting scope of claims to "non-federal lands" within the geographic boundaries of Baltimore City). Moreover, even if some portion of Defendants' tortious conduct did occur on federal land, Plaintiff's claims "arose" only once all

the elements of the claim were complete, which occurred only when and where the Plaintiff suffered injuries—i.e. on non-federal land. *See San Mateo*, 294 F. Supp. 3d at 939 (rejecting the arguments in the same context because federal land "was not the locus in which the claim arose").

Defendants' argument that enclave jurisdiction exists whenever any "pertinent events" occurred within the federal enclave misstates the law. AOB47. Even if this Court were to apply Defendants' unsupported "pertinent events" standard, enclave jurisdiction would be absent because the pertinent events here—Defendants' deceptive marketing and promotion and Plaintiff's consequent injuries—occurred outside federal enclaves. Defendants' proposed enclave jurisdiction standard would open the removal floodgates to any state law action in which some de minimis fraction of the facts occurred on an enclave. But even the out-of-circuit district court authority they cite applied federal enclave jurisdiction where "the majority" of the pertinent events took place on a federal enclave. *Jamil v. Workforce Res., LLC*, No. 18-CV-27-JLS (NLS), 2018 WL 2298119, at *4 (S.D. Cal. May 21, 2018).[10]

[10] Contrary to Defendants' contentions, *Rosseter v. Indus. Light & Magic*, No. C 08-04545 WHA, 2009 WL 210452 (N.D. Cal. Jan. 27, 2009), does not hold that a defendant's operations outside a federal enclave are irrelevant to enclave jurisdiction. Rather it held that the defendants' operations outside of a federal enclave were "not pertinent in establishing *the location of the events that constitute[d] the discrimination*" giving rise to the case. *Id.* at *2 (emphasis added).

F. Plaintiff's Claims Are Not Removable Under the Bankruptcy Removal Statute.

The district court was also correct that Plaintiff's claims are not removable under the Bankruptcy Removal Statute because (1) Defendants "failed to demonstrate a 'close nexus' between this action and any bankruptcy proceeding"; and (2) Plaintiff's claims are exempt from removal under 28 U.S.C. § 1452 as an exercise of Plaintiff's police or regulatory powers. JA.366–71.

1. The Claims Are Not Related to Bankruptcy Proceedings.

Removal is not appropriate under 28 U.S.C. §§ 1452(a) and 1334 because Plaintiff's claims are not "relate[d] to" any bankruptcy case. Section 1452(a) only allows for removal of claims arising "under section 1334 of this title." Section 1334(b), in turn, vests district courts with original jurisdiction over "all civil proceedings arising under title 11, or arising in or related to cases under title 11." Although each Section 1334(b) subclause has been interpreted to create its own basis for jurisdiction, here Defendants rely only on the "related to" subclause. *See* JA.220–21 at ¶72.

Defendants allege jurisdiction based on the bankruptcy of a single Chevron subsidiary, Texaco Inc. ("Texaco"), thirty years ago. Before a debtor's Chapter 11 plan is confirmed, "related to" jurisdiction broadly encompasses matters that "could conceivably have any effect on the estate being administered in bankruptcy." *Owens-III, Inc. v. Rapid Am. Corp. (In re Celotex Corp.)*, 124 F.3d 619, 625 (4th Cir. 1997).

After confirmation, "related to" jurisdiction is substantially narrower and requires the claims to have a "close nexus" to a reorganized debtor's confirmed plan that "must affect an integral aspect of the bankruptcy process." *Valley Hist. Ltd. P'ship v. Bank of N.Y.*, 486 F.3d 831, 836 (4th Cir. 2007). No "close nexus" exists where, as here, the matter at issue "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).

There is no connection—let alone a "close nexus"—between Plaintiff's claims and Texaco's Chapter 11 plan confirmed in 1988. *See* JA.222 at ¶74. Resolving this case involves no bankruptcy law question that would "affect the interpretation, implementation, consummation, execution, or administration of the confirmed plan." *Valley Hist. Ltd. P'ship*, 486 F.3d at 836–37 (citation omitted); *see also San Mateo*, 294 F. Supp. 3d at 939. That reasoning applies with added force here, where no named Defendants have undergone bankruptcy, and the only identified bankruptcy is a 30-year-old confirmed plan of a defendant's subsidiary. Defendants vaguely argue that "Plaintiff's claims are based on the actions of Defendants' predecessors, subsidiaries, and affiliates ... many of which *may* also be operating under confirmed bankruptcy cases." AOB52 (emphasis added). "This remote connection does not bring this case within the Court's 'related to' jurisdiction." JA.368.

2. This Police Power Action Is Exempt from Removal.

In any event, the district court properly held that Plaintiff's claims are exempt from removal under 28 U.S.C. 1452(a) as an exercise of Plaintiff's police or regulatory powers. JA.369.

The Fourth Circuit applies two interrelated inquiries—the public purpose and pecuniary purpose tests—to decide whether an action is an exercise of a governmental entity's police and regulatory power. *See Safety-Kleen, Inc. (Pinewood) v. Wyche*, 274 F.3d 846, 865 (4th Cir. 2001) (in context of automatic stay provision, state agency's enforcement of regulations to deter environmental misconduct at a landfill fell within police power exception).[11] First, a court must "determine the primary purpose" of the entity's action. *Id.*

> If the purpose of the law is to promote 'public safety and welfare,' or to 'effectuate public policy, then the exception applies. On the other hand, if the purpose of the law relates 'to the protection of the government's pecuniary interest in the debtor's property, or to 'adjudicate private rights,' then the exception is inapplicable.

Id. (citations and quotation marks omitted).

[11] The language of the removal exception for police power functions is nearly identical to language exempting government enforcement actions from the automatic stay in bankruptcy proceedings under 11 U.S.C. § 362(b)(4), and courts thus look to cases interpreting Section 362(b)(4) for guidance in interpreting Section 1452(a). *City & Cty. of San Francisco v. PG & E Corp.*, 433 F.3d 1115, 1123 (9th Cir. 2006), *cert. denied*, 549 U.S. 882 (2006) (holding that the two statutes were designed to work in tandem and should be interpreted consistently).

Baltimore does not seek to protect any interest it holds in any bankruptcy debtor's property, but instead to remediate public harm and protect the public well-being. *See, e.g.*, *id.* ¶¶ 1, 8, 212. There is no requirement that the government act for free, so long as the action's "primary purpose" is protecting the public welfare. *Safety-Kleen, Inc.*, 274 F.3d at 865. Punitive damages, moreover, serve not to enrich Plaintiff, but to deter harmful conduct, and do not undermine the exercise of police power. *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 492 & n.9 (2008); *see also San Mateo*, 294 F. Supp. 3d at 939 ("Bankruptcy removal did not apply because these suits are aimed at protecting the public safety and welfare and brought on behalf of the public."); *Rhode Island*, 2019 WL 3282007, at *5 (rejecting bankruptcy jurisdiction because "this is an action designed primarily to protect the public safety and welfare" (quotation omitted)).

G. There Is No Admiralty Jurisdiction.

A tort claim comes within admiralty jurisdiction only when it satisfies both the "location" and "connection to maritime activity" tests. *Jerome B. Grubart v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995). Defendants cannot satisfy either.

The district court correctly concluded that Defendants' appeal to admiralty jurisdiction "begins and ends with the location test." JA.373. Where, as here, the injury suffered is on land, the location test requires a showing that the alleged tort

was caused by a vessel on navigable water. *Grubart*, 513 U.S. at 534. Even if Defendants could establish that fossil fuel production or extraction occurs on vessels, AOB54, that would not satisfy the location test here because there is no allegation that those "vessels" *caused* Plaintiff's injuries on land. The Complaint alleges that the proximate cause of Plaintiff's injuries arises from the dangerous nature of the products themselves and from Defendants' wrongful and misleading promotion. *See, e.g.*, JA.47 at ¶10; JA.90–91 at ¶¶94, 95; JA.92 at ¶102; JA.140 at ¶193.

Independently, Defendants fail the maritime connection test, which requires that "the *general character of the activity* giving rise to the incident shows *a substantial relationship* to traditional maritime activity." *Grubart*, 513 U.S. at 533–34 (emphasis added) (quotations omitted). The relevant inquiry is whether the specific injurious activity arose from a traditional subject of admiralty law, *e.g.*, navigation. The wrongful, deceptive marketing and over-promotion of fossil fuels at issue here has nothing to do with navigable waters and does "not require the special expertise of a court in admiralty as to navigation or water-based commerce." *Myhran v. Johns-Manville Corp.*, 741 F.2d 1119, 1122 (9th Cir. 1984). Moreover, oil and gas production—even from floating drilling platforms—is not a "traditional maritime activity." In *Herb's Welding, Inc. v. Gray*, the Supreme Court concluded that the "exploration and development of the Continental Shelf are not themselves

maritime commerce" and activities upon "drilling platforms [are] not even suggestive of traditional maritime affairs." 470 U.S. 414, 422, 425 (1985).

Defendants' assertion that "oil and gas drilling on navigable waters about a vessel is recognized to be maritime commerce" misstates the law. In *Barker v. Hercules Offshore, Inc.*, 713 F.3d 208, 215–216 (5th Cir. 2013), the court acknowledged that certain floating oil and gas drilling platforms "are considered *vessels* under maritime law," but conceded that "the Supreme Court in *Herb's Welding* rejected the Fifth Circuit's [prior] view that 'offshore drilling is maritime commerce.'" *Id.* at 216. The Fifth Circuit's holding to the contrary in *Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 538 (5th Cir. 1986), has been expressly abrogated following *Herb's Welding* and *Barker*.

Even if Plaintiff's claims arose in admiralty, which they do not, state law admiralty claims brought in state court are not removable under 28 U.S.C. § 1441 absent some independent jurisdictional basis, such as diversity or federal question jurisdiction. *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 371 (1959); *Cassidy v. Murray*, 34 F. Supp. 3d 579, 584 (D. Md. 2014); *Rhode Island*, 2019 WL 3282007, at *5 (rejecting admiralty jurisdiction because "state-law claims cannot be removed based solely on federal admiralty jurisdiction"). Defendants ignore this jurisdictional requirement. Federal court admiralty jurisdiction "is 'exclusive' only as to … maritime proceedings in rem." *Madruga v. Superior Court of State of Cal.*,

346 U.S. 556, 561 (1954). There is no plausible basis for characterizing Plaintiff's case as an *in rem* proceeding, and federal jurisdiction therefore could not be exclusive here. For *in personam* cases like this one, the "saving to suitors" clause in 28 U.S.C. § 1333 "leave[s] state courts competent to adjudicate maritime causes of action." *Madruga*, 346 U.S. at 560 (quotations omitted). Here, Plaintiff exercised its congressionally protected right to file state law claims in state court, and § 1333 therefore prohibits removal on the basis of admiralty.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court affirm the district court's order granting remand.

Dated: August 27, 2019

/s/ Victor M. Sher

Victor M. Sher
vic@sheredling.com
Matthew K. Edling
matt@sheredling.com
Sher Edling LLP
100 Montgomery Street, Suite 1410
San Francisco, CA 94014
(628) 231-2500

Andre M. Davis
andre.davis@baltimorecity.gov
Suzanne Sangree
suzanne.sangree2@baltimorecity.gov
Baltimore City Law Department
100 N. Holliday Street, Suite 109
Baltimore, MD 21202
(443) 388-2190

Attorneys for Plaintiff – Appellee the Mayor and City Council of Baltimore

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the undersigned certifies that this brief complies with the applicable typeface, type-style, and type-volume limitations. This brief was prepared using a proportionally spaced type (Times New Roman, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 12,931 words. This certificate was prepared in reliance on the word-count function of the word-processing system used to prepare this brief.

Dated: August 27, 2019 /s/ *Victor M. Sher*
Victor M. Sher

CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: August 27, 2019

/s/ *Victor M. Sher*
Victor M. Sher

STATUTORY ADDENDUM

Pursuant to Fourth Circuit Local Rule 28(b) and Federal Rule of Appellate Procedure 28(f), this addendum includes pertinent statutes, reproduced verbatim:

Statute **Page**

11 U.S.C. § 362(b)(4). Automatic stay

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay—

…

> **(iv)** for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or

. . .

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

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

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

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

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

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

. . . .

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

28 U.S.C. § 1441(a). Removal of Civil Actions

(a) Generally.--Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

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

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

> **(1)** The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.
> **(2)** A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.
> **(3)** Any officer of the courts of the United States, for or relating to any act under color of office or in the performance of his duties;
> **(4)** Any officer of either House of Congress, for or relating to any act in the discharge of his official duty under an order of such House.

(b) A personal action commenced in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the

United States and is a nonresident of such State, wherein jurisdiction is obtained by the State court by personal service of process, may be removed by the defendant to the district court of the United States for the district and division in which the defendant was served with process.

(c) Solely for purposes of determining the propriety of removal under subsection (a), a law enforcement officer, who is the defendant in a criminal prosecution, shall be deemed to have been acting under the color of his office if the officer—

(1) protected an individual in the presence of the officer from a crime of violence;
(2) provided immediate assistance to an individual who suffered, or who was threatened with, bodily harm; or
(3) prevented the escape of any individual who the officer reasonably believed to have committed, or was about to commit, in the presence of the officer, a crime of violence that resulted in, or was likely to result in, death or serious bodily injury.

(d) In this section, the following definitions apply:

(1) The terms "civil action" and "criminal prosecution" include any proceeding (whether or not ancillary to another proceeding) to the extent that in such proceeding a judicial order, including a subpoena for testimony or documents, is sought or issued. If removal is sought for a proceeding described in the previous sentence, and there is no other basis for removal, only that proceeding may be removed to the district court.
(2) The term "crime of violence" has the meaning given that term in section 16 of title 18.
(3) The term "law enforcement officer" means any employee described in subparagraph (A), (B), or (C) of section 8401(17) of title 5 and any special agent in the Diplomatic Security Service of the Department of State.
(4) The term "serious bodily injury" has the meaning given that term in section 1365 of title 18.
(5) The term "State" includes the District of Columbia, United States territories and insular possessions, and Indian country (as defined in section 1151 of title 18).
(6) The term "State court" includes the Superior Court of the District of Columbia, a court of a United States territory or insular possession, and a tribal court.

28 U.S.C. § 1443. Civil rights cases

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

> **(1)** Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;
> **(2)** For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

28 U.S.C § 1447. Procedure after removal generally

…

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

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

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

…

42 U.S.C. § 7401. Congressional findings and declaration of purpose

(a) Findings

The Congress finds--

…

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

…

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

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

42 U.S.C. § 7604. Citizen suits

…

(e) Nonrestriction of other rights

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

> **(1)** bringing any enforcement action or obtaining any judicial remedy or sanction in any State or local court, or
> **(2)** bringing any administrative enforcement action or obtaining any administrative remedy or sanction in any State or local administrative agency, department or instrumentality, against the United States, any department, agency, or instrumentality thereof, or any officer, agent, or employee thereof under State or local law respecting control and abatement of air pollution. For provisions requiring compliance by the United States, departments, agencies,

instrumentalities, officers, agents, and employees in the same manner as nongovernmental entities, see section 7418 of this title.

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

…

(b) Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411of this title,,[3] any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1)of this title), any determination under section 7521(b)(5)[1] of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days

after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

…

43 U.S.C. § 1349. Citizens suits, jurisdiction and judicial review

…

(b) Jurisdiction and venue of actions

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

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

…