ORAL ARGUMENT NOT REQUESTED

Case No. 19-1330

In the United States Court of Appeals for the Tenth Circuit

BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY, *et al.*,
Plaintiffs-Appellees

v.

SUNCOR ENERGY (U.S.A), INC., *et al.*,
Defendants-Appellants

On Appeal from the United States District Court
for the District of Colorado (Civ. No. 18-1672)
(The Honorable William J. Martinez, J.)

BRIEF OF APPELLEE

David G. Bookbinder
Niskanen Center
408 C Street NE
Washington, DC 20002
Tel: 202-548-4598

Marco Simons
Richard Herz
Sean Powers
Michelle Harrison
EarthRights International
1612 K Street NW #800
Washington, D.C. 20006
Tel: 202-466-5188
Fax: 202-466-5189

Kevin S. Hannon
The Hannon Law Firm
1641 Downing Street
Denver, CO 80218
Tel: 303-861-8800
Fax: 303-861-8855

STATEMENT REGARDING ORAL ARGUMENT

Appellees respectfully disagree that oral argument is needed to resolve this appeal. The two jurisdictional questions presented– the scope of appellate review and federal jurisdiction over the claims in this case – are easily resolved by existing doctrine and precedent.

TABLE OF CONTENTS

STATEMENT OF JURISDICTION....1

INTRODUCTION....1

STATEMENT OF THE CASE....2

SUMMARY OF THE ARGUMENT....5

ARGUMENT....7

I. This Court can only review removal under the federal officer statute; jurisdiction does not lie because no federal officer directed Defendants' actions....8

A. Review is limited to removal under the federal officer statute....8

B. The federal officer statute does not supply federal jurisdiction....11

1. Exxon's federal leases do not show it was "acting under" federal officers....11

2. Exxon was not sued because of work done under federal leases....16

3. Defendants have not shown a colorable federal defense....18

II. Jurisdiction does not lie under the general removal statute....18

A. Removal is governed by the well-pleaded complaint rule....18

B. Defendants' federal common law argument cannot be squared with the well-pleaded complaint rule....20

1. Jurisdiction cannot rest on unpled federal common law....20

2. Plaintiffs' claims do not fall under any recognized federal common law doctrine....24

3. This Court should not create new federal common law....31

C. There is no *Grable* jurisdiction 34

1. No federal issue is an essential element of Plaintiffs' claims 35

2. Plaintiffs' claims raise no substantial federal issues, since no federal law or decision is disputed or central to this case 41

3. Defendants' arguments would disrupt the federal/state balance.....43

D. The Clean Air Act does not completely preempt; it preserves state law 45

1. The CAA does not create an exclusive federal cause of action 47

2. The CAA does not have ordinary preemptive force here 49

E. There is no federal enclave jurisdiction where Plaintiffs' claims arise exclusively on non-federal land 50

III. There is no jurisdiction under the Outer Continental Shelf Lands Act 51

CONCLUSION 55

TABLE OF AUTHORITIES

CASES Page(s)

In re "Agent Orange" Products Liability Litigation,
635 F.2d 987 (2d Cir. 1980) 28, 32, 33, 34

Akin v. Ashland Chemical Co.,
156 F.3d 1030 (10th Cir. 1998) 50, 51 n.11

American Electric Power Co., Inc. v. Connecticut ("AEP"), 564 U.S. 410 (2011)..... 20, 25, 26, 27, 29 & n.6, 30, 31

American Fire & Casualty Co. v. Finn,
341 U.S. 6 (1951).....8, 23

American Insurance Association v. Garamendi,
539 U.S. 396 (2003).....37

Amoco Product Co. v. Sea Robin Pipeline Co.,
844 F.2d 1202 (5th Cir. 1988) 54

Arnold & Through Arnold v. Blue Cross & Blue Shield,
973 F. Supp. 726 (S.D. Tex. 1997).....22

Atherton v. FDIC,
519 U.S. 1 (2003).....22

Attorney Grievance Commission of Maryland v. Rheinstein,
750 F. App'x 225 (4th Cir. 2019).....10

Becker v. Ute Indian Tribe of the Uintah & Ouray Reservation,
770 F.3d 944 (10th Cir. 2014) 35, 37

Beneficial National Bank v. Anderson,
539 U.S. 1 (2003).....46

Bennett v. MIS Corp.,
607 F.3d 1076 (6th Cir. 2010) 13-14

Bennett v. Southwest Airlines Co.,
484 F.3d 907 (7th Cir. 2007) 39, 42, 44

Blanco v. Federal Express Corp., No. CIV-16-561,
2016 U.S. Dist. LEXIS 125349 (W.D. Okla. Sept. 15, 2016).....24

Board of County Commissioners v. Tennessee Gas Pipeline Co.,
850 F.3d 714 (5th Cir. 2017) 39

California v. BP P.L.C. ("*California I*"), No. 17-06011,
2018 U.S. Dist. LEXIS 32990 (N.D. Cal. Feb. 27, 2018) 4-5, 24 n.5

Carpenter v. Wichita Falls Independent School District,
44 F.3d 362 (5th Cir. 1995) 8

Caterpillar, Inc. v. Williams,
482 U.S. 386 (1987).....20, 21, 22, 35, 37

Cerny v. Marathon Oil Corp., No. SA-13-CA-562,
2013 U.S. Dist. LEXIS 144831 (W.D. Tex. Oct. 7, 2013).....46

City of New York v. Bob Moates' Sport Shop, Inc.,
253 F.R.D. 237 (E.D.N.Y. 2008).....28

City of New York v. BP P.L.C.,
325 F. Supp. 3d 466 (S.D.N.Y. 2018) 5 n.1, 26-27, 31

City of Oakland v. BP, P.L.C. ("*California II*"),
325 F. Supp. 3d 1017 (N.D. Cal. 2018)..... 5, 26-27, 31

City of Walker v. Louisiana,
877 F.3d 563 (5th Cir. 2017) 10

Clark v. Allen,
331 U.S. 503 (1947).....38

Claus v. Trammell,
773 F. App'x 103 (3d Cir. 2019) 10

County of San Mateo v. Chevron Corp.,
294 F. Supp. 3d 934
(N.D. Cal. 2018) 4, 11, 18, 22 n.3, 29-30, 31, 35, 36-37, 39, 44, 45, 51

In re Deepwater Horizon,
745 F.3d 157 (5th Cir. 2014) 52

Devon Energy Production Co., L.P. v. Mosaic Potash Carlsbad, Inc.,
693 F.3d 1195 (10th Cir. 2012) 8, 19, 21, 22, 23, 46, 47, 48

Doe v. Archdiocese of Denver,
413 F. Supp. 2d 1187 (D. Colo. 2006).....35

Eastern States Health & Welfare Fund v. Phillip Morris, Inc.,
11 F. Supp. 2d 384 (S.D.N.Y. 1998) 21

Emerson v. Kansas City Southern Railway Co.,
503 F.3d 1126 (10th Cir. 2007) 47

Empire HealthChoice Assurance, Inc. v. McVeigh,
547 U.S. 677 (2006).....41, 46

EP Operating Ltd. Partnership v. Placid Oil Co.,
26 F.3d 563 (5th Cir. 1994) 53

ExxonMobil Corp. v. EPA,
217 F.3d 1246 (9th Cir. 2000) 48

Fairfield Industries v. EP Energy E&P Co., L.P., No. H-12-2665,
2013 U.S. Dist. LEXIS 196376 (S.D. Tex. May 2, 2013).....54

Fajen v. Foundation Reserve Insurance Co.,
683 F.2d 331 (10th Cir. 1982) 25

Fayard v. Northeast Vehicle Services, LLC,
533 F.3d 42 (1st Cir. 2008).....48

Firstenberg v. City of Santa Fe,
696 F.3d 1018 (10th Cir. 2012) 19, 50

Fung v. Abex Corp.,
816 F. Supp. 569 (N.D. Cal. 1992).....51 n.10

Gee v. Texas,
769 F. App'x 134 (5th Cir. 2019) 10

Gilmore v. Weatherford,
694 F.3d 1160 (10th Cir. 2012) 34, 41

Goncalves v. Rady Children's Hospital San Diego,
865 F.3d 1237 (9th Cir. 2017) 12

Gonzales v. Ever-Ready Oil, Inc.,
636 F. Supp. 2d 1187 (D.N.M. 2008) 42, 44, 45

Grable & Sons Metal Products v.
Darue Engineering & Manufacturing,
545 U.S. 308 (2005) 6, 35, 36, 41, 43, 44, 45

Greene v. Citigroup, Inc., No. 99-1030,
2000 U.S. App. LEXIS 11350 (10th Cir. May 19, 2000) 11, 15-16

Grynberg Production Corp. v. British Gas, p.l.c.,
817 F. Supp. 1338 (E.D. Tex. 1993) 42 n.8

Gunn v. Minton,
568 U.S. 251 (2013) 34-35

Her Majesty The Queen In Right of the Province of Ontario v. City of Detroit,
874 F.2d 332 (6th Cir. 1989) 45

Illinois v. City of Milwaukee ("*Milwaukee I*"),
406 U.S. 91 (1972) 20, 27

Illinois v. Milwaukee ("*Milwaukee III*"),
731 F.2d 403 (7th Cir. 1984) 27

International Paper Co. v. Ouellette,
479 U.S. 481 (1987) 21, 34, 50

Isaacson v. Dow Chemical Co.,
517 F.3d 129 (2d Cir. 2008) 13, 16

Jackson v. Johns-Manville Sales Corp.,
750 F.2d 1314 (5th Cir. 1985) 26, 27, 29, 32

Kansas ex rel. Six v. Price,
No. 09-3181, 2009 U.S. App. LEXIS 29869 (10th Cir. Dec. 31, 2009) 9

Keltner v. SunCoke Energy, Inc., No. 3:14-cv-01374,
2015 U.S. Dist. LEXIS 67776 (S.D. Ill. May 26, 2015) 45-46

Kight v. Kaiser Foundation Health Plan,
34 F. Supp. 2d 334 (E.D. Va. 1999) 23 n.4

Laredo Offshore Constructors, Inc. v. Hunt Oil Co.,
754 F.2d 1223 (5th Cir. 1985) 53

Lu Junhong v. Boeing Co.,
792 F.3d 805 (7th Cir. 2015) 9

Mayor and City Council of Baltimore v. BP P.L.C.,
388 F. Supp. 3d 538 (D. Md. 2019).....4, 11, 17-18, 22, 35, 39, 45, 50, 51

Mays v. City of Flint,
871 F.3d 437 (6th Cir. 2017) 10, 12

McKay v. City & County of San Francisco, No. 16-cv-03561,
2016 U.S. Dist. LEXIS 178436 (N.D. Cal. Dec. 23, 2016).....40 n.7

Medellin v. Texas,
552 U.S. 491 (2008)..... 37-38

Medtronic, Inc. v. Lohr,
518 U.S. 470 (1996).....50

Merkel v. Federal Express Corp.,
886 F. Supp. 561 (N.D. Miss. 1995).....22

Merrell Dow Pharmaceuticals, Inc. v. Thompson,
478 U.S. 804 (1986).....8, 21, 25

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Manning,
136 S. Ct. 1562 (2016).....36

In re Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation,
488 F.3d 112 (2d. Cir. 2007) 15

Middlesex County Sewerage Authority v. National Sea Clammers Association,
453 U.S. 1 (1981).....28

Milwaukee v. Illinois ("*Milwaukee II*"),
451 U.S. 304 (1981).....26

Miree v. De Kalb County,
433 U.S. 25 (1977).....26, 33

Morrison v. Drummond Co., No. 2:14-CV-0406,
2015 U.S. Dist. LEXIS 35482 (N.D. Ala. Mar. 23, 2015) 46

National Audubon Society v. Department of Water,
869 F.2d 1196 (9th Cir. 1988) 26

National Farmers Union Insurance Cos. v. Crow Tribe of Indians,
471 U.S. 845 (1985).....20

In re National Security Agency Telecommunications Records Litigation,
483 F. Supp. 2d 934 (N.D. Cal. 2007).....42 n.8

Native Village of Kivalina v. ExxonMobil Corp.,
696 F.3d 849 (9th Cir. 2012) 20, 29, 30, 31

New SD, Inc. v. Rockwell International Corp.,
79 F.3d 953 (9th Cir. 1996) 24 n.5

Nicodemus v. Union Pacific Corp.,
440 F.3d 1227 (10th Cir. 2006) 36

O'Melveny & Myers v. FDIC,
512 U.S. 79 (1994).....32

Parish of Cameron v. Auster Oil & Gas Inc.,
No. 16-cv-530, 2018 U.S. Dist. LEXIS 78632 (W.D. La. Jan. 17, 2018).....54

Pet Quarters, Inc. v. Depository Trust & Clearing Corp.,
559 F.3d 772 (8th Cir. 2009) 40 n.7

Pivo Corp., LLC v. Maglione,
No. 19-12744-E, 2019 U.S. App. LEXIS 32171 (11th Cir. Oct. 25, 2019).....10

Plains Gas Solutions, LLC v. Tennessee Gas Pipeline Co., LLC,
46 F. Supp. 3d 701 (S.D. Tex. 2014).....54

Pritchett v. Office Depot, Inc.,
420 F.3d 1090 (10th Cir. 2005) 8

Ranjer Foods LC v. QFA Royalties LLC, C.A. No. 13-cv-00256,
2013 U.S. Dist. LEXIS 18132 (D. Colo. Feb. 8, 2013).....44

Rhode Island v. Chevron Corp.,
393 F. Supp. 3d 142 (D.R.I. 2019) 4, 11, 17, 22, 26, 35, 39, 45, 51

Rivet v. Regions Bank of Louisiana,
522 U.S. 470 (1998).....24

Rodrigue v. Aetna Casualty & Surety Co.,
395 U.S. 352 (1969).....52

Ronquille v. Aminoil Inc.,
No. 14-164, 2014 U.S. Dist. LEXIS 123224 (E.D. La. Sept. 4, 2014) 53

Rosseter v. Industrial Light & Magic,
No. C 08-4545 WHA,
2009 U.S. Dist. LEXIS 5307 (N.D. Cal. Jan. 27, 2009).....51 n.11

Sam L. Majors Jewelers v. ABX, Inc.,
117 F.3d 922 (5th Cir. 1997) 24 n.5

Savoie v. Huntington Ingalls, Inc.,
817 F.3d 457 (5th Cir. 2016) 17

Shamrock Oil & Gas Corp. v. Sheets,
313 U.S. 100 (1941).....8

Standard Fire Insurance Co. v. Knowles,
568 U.S. 588 (2013).....23

Stutes v. Gulfport Energy Corp., No. 6:16-cv-01253,
2017 U.S. Dist. LEXIS 159395 (W.D. La. June 30, 2017).....54

Targa Midstream Services LLC v. Crosstex Processing Servs. LLC,
No. H-14-2256, 2014 U.S. Dist. LEXIS 199746 (S.D. Tex. Nov. 25, 2014).....54

Tennessee Gas Pipeline v. Houston Casualty Insurance Co.,
87 F.3d 150 (5th Cir. 1996).....53

Texas Industries v. Radcliff Materials,
451 U.S. 630 (1981).....26

Virginia Uranium, Inc. v. Warren,
139 S. Ct. 1894 (2019).....33

Washington v. Monsanto Co.,
274 F. Supp. 3d 1125 (W.D. Wash. 2017).....51

Washington v. Monsanto Co.,
738 Fed. App'x 554 (9th Cir. 2018).....14

Watson v. Phillip Morris Cos.,
551 U.S. 142 (2007).....11-13, 15-16

Wayne v. DHL Worldwide Express,
294 F.3d 1179 (9th Cir. 2002).....24 n.5

West Virginia ex rel. McGraw v. Eli Lilly & Co.,
476 F. Supp. 2d 230 (E.D.N.Y. 2007).....40 n.7

Westridge Place Apartments LP v. Delph,
744 F. App'x 333 (8th Cir. 2018).....10

Winters v. Diamond Shamrock Chemical Co.,
149 F.3d 387 (5th Cir. 1998).....12-13, 16

Woodward Governor Co. v. Curtiss-Wright Flight Systems,
164 F.3d 123 (2d Cir. 1999).....32

Wyoming v. Livingston,
443 F.3d 1211 (10th Cir. 2006) 18

Young v. Masci,
289 U.S. 263 (1933).....27

FEDERAL STATUTES

28 U.S.C. § 1441 18

28 U.S.C. § 1442 .....5, 9, 11, 13

28 U.S.C. § 1443 9

28 U.S.C. § 1447 ..... 1, 8-9

42 U.S.C. § 7411 50

42 U.S.C. § 7416 49

42 U.S.C. § 7604 .....47, 49

43 U.S.C. § 1331 52

43 U.S.C. § 1332 14

OTHER AUTHORITIES

Restatement (Second) of Torts § 821B 33

Restatement (Second) of Torts § 828 33

STATEMENT OF JURISDICTION

This Court lacks jurisdiction over most of this appeal. 28 U.S.C. § 1447(d) permits review only of the district court's finding that it lacks federal officer jurisdiction.

INTRODUCTION

Defendants have altered the climate by selling fossil fuels at levels they knew would cause grave harm. For decades, they concealed and misrepresented this danger. Colorado communities are now suffering from fires, droughts, and other hazards caused or exacerbated by Defendants. Plaintiffs, three such communities, brought Colorado claims so Defendants pay their fair share for these Colorado injuries.

The merits of Plaintiffs' claims are not at issue. The only dispute here is whether Defendants can force them into federal court. In a well-reasoned opinion, Judge Martinez faithfully applied the doctrines governing removal and rejected each proffered basis for it. He was the fourth judge to correctly hold that this kind of case, pleaded under state law, belongs in state court.

Jurisdiction, in both the district court and this Court, is strictly limited. As a threshold matter, Congress has sharply constrained appellate review of remand orders. This Court's review is limited to Defendants' federal officer argument, which fails.

Regardless, there is no federal jurisdiction on any ground. Plaintiffs did not invoke federal law, and when plaintiffs do not do so, they can litigate in state court. That is fatal to Defendants' arguments. Their attempt to avoid this conclusion would upend black-letter removal law and sweep all manner of cases into federal court, contrary to the federalism and separation of powers concerns that animate removal's strict limits.

Defendants try to make this case *seem* federal, falsely painting it as an attempt to litigate a global solution to the climate crisis. As the district court recognized, however, this case does not seek to impose emission limits, stop fossil fuel use or production, or challenge any federal policymaking. As in similar tobacco and opioid litigation, Plaintiffs simply filed claims against responsible companies to recover damages and the added costs of protecting public property and public health under state law. The case Plaintiffs actually pled – against *these* companies for specific acts and local harms – does not implicate unique federal interests, or the need for a federal forum.

STATEMENT OF THE CASE

I. Plaintiffs are three Colorado local governments. They sued in Colorado state court under Colorado law for trespasses and nuisance occurring on their property in Colorado, and for the added costs of protecting their residents from the serious local hazards caused by an altered climate; Plaintiffs also bring

claims for violations of the Colorado Consumer Protection Act for Defendants' misleading fossil fuel promotion in Colorado. App. 73, 173-95.

Defendants are fossil fuel companies – Suncor Energy (U.S.A.) Inc., Suncor Energy Sales Inc., and Suncor Energy Inc. (collectively, Suncor), and Exxon Mobil Corporation (Exxon) – that have altered the climate and exacerbated the consequences of that alteration by selling massive quantities of fossil fuel, while promoting its unchecked use. App. 159-65. Since the late 1960s, Defendants did so with knowledge that fossil fuel use was altering the climate, risking catastrophic harms globally and in Colorado. App. 148-58. For decades, Defendants intentionally concealed and publicly misrepresented this danger, contributing to fossil fuels' continued overuse. App. 165-72.

Plaintiffs seek monetary remedies – damages and the costs of mitigating the present and reasonably certain future impacts of an altered climate in their communities. App. 194-95. They do not seek to stop fossil fuel production, sale, or use; they do not seek to regulate, or prohibit greenhouse gas emissions; and they do not challenge any federal permitting, licensing, regulatory or policy decisions. App. 74, 195.

II. Defendants removed this case to federal court, pressing seven grounds for federal jurisdiction. Judge Martinez remanded, rejecting each ground. App. 197

(Sept. 5, 2019 Remand Order ("Order")). Defendants appealed six of those grounds. *See* App. 253 (Notice of Appeal); Br. of Defs.-Appellants ("AB").

Plaintiffs moved to dismiss the appeal on all grounds other than the federal officer statute. *See* Pls.-Appellees' Mot. for Partial Dismissal (Sept. 20, 2019) ("Mot."); Pls.-Appellees' Reply Br. in Support of Mot. for Partial Dismissal (Oct. 10, 2019) ("Reply"). The motion was referred to the merits panel. Text Order (Oct. 11, 2019).

Defendants moved the district court to stay the remand pending appeal, which Judge Martinez denied. App. 255. Defendants asked this Court and then the Supreme Court to stay or recall the remand order; both denied Defendants' motions. Stay Order (Oct. 17, 2019); Supp. App. 109 (Recall Application Denial, Oct. 22, 2019 (Sotomayor, J.)).

III. Several similar cases are pending in other federal courts. Five courts – including the one below – ruled on jurisdiction, and each decision is on appeal. Three other courts also rejected each of the grounds pressed here. *Cty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal. 2018); *Rhode Island v. Chevron Corp.,* 393 F. Supp. 3d 142 (D.R.I. 2019); *Mayor and City Council of Baltimore v. BP P.L.C.,* 388 F. Supp. 3d 538 (D. Md. 2019). Only one court reached a different conclusion, finding *only* that jurisdiction lay because the claims were governed by federal common law. *California v. BP P.L.C.* ("*California I*"),

No. C 17-06011, 2018 U.S. Dist. LEXIS 32990 (N.D. Cal. Feb. 27, 2018). That federal common law claim was subsequently dismissed, based partly on a finding of Clean Air Act (CAA) displacement. *City of Oakland v. BP, P.L.C.* ("*California II*"), 325 F. Supp. 3d 1017 (N.D. Cal. 2018).[1]

SUMMARY OF THE ARGUMENT

The district court correctly applied removal doctrine and remanded to state court. This Court should affirm the doctrinal rules that govern removal and the remand.

I. This Court has jurisdiction to review one removal ground: whether jurisdiction lies under 28 U.S.C. § 1442, the federal officer statute. Congress made remand orders generally unreviewable. It authorized appeal with respect to federal officers, but did not authorize bootstrapping other arguments based on an assertion of federal officer jurisdiction. Removal is not proper under the federal officer statute; no federal officer instructed Defendants to sell fossil fuels at levels they *knew* would cause harm or how to promote them.

II. Even if appellate review were plenary, Defendants' other arguments lack merit. Removal under the general removal statute is governed by the well-pleaded complaint rule. Jurisdiction only lies when plaintiffs plead a federal cause

[1] Another case brought in federal court was dismissed on similar grounds. *City of N.Y. v. BP P.L.C.*, 325 F. Supp. 3d 466, 468 (S.D.N.Y. 2018) (*appeal pending*).

of action or explicitly invoke federal law as an element of their state claims; or where a federal statute completely preempts state law.

First, Defendants' leading argument – that unpled federal common law creates federal jurisdiction – fails because Plaintiffs pled only state law claims. Neither this Court nor the Supreme Court has ever recognized an exception to the well-pleaded complaint rule predicated on unpled federal common law. Even if one existed, Defendants could not remove *this* case because the federal common law of "transboundary pollution" has never been extended to such a case; and even Defendants argue that it has been displaced by the CAA and cannot provide relief. Defendants do not suggest that this Court should create *new* federal common law doctrine; and it is abundantly clear that the case against these private parties for these private acts does not involve the extraordinary circumstances justifying the creation of new federal common law or displacement of state authority.

Second, there is no embedded and substantial federal question in Plaintiffs' state law claims, and therefore no jurisdiction under the narrow doctrine recognized in *Grable & Sons Metal Products, Inc. v. Darue En'g & Mfg.,* 545 U.S. 308 (2005). Plaintiffs plead state law claims, and Defendants do not argue that federal law is an essential element of them, as they must. The vague federal concerns they invoke at best, create defenses, which are not a basis for jurisdiction.

Third, the CAA does not completely preempt state law, thereby creating

federal jurisdiction. The Act regulates emissions at their source, not how much fossil fuel Defendants sell or how they market it. Even with respect to those emissions, courts have unanimously rejected the argument that the Act completely preempts. Its plain text shows Congress intended to preserve state law and state jurisdiction.

Fourth, there is no jurisdiction under the federal enclave doctrine. Plaintiffs sue for their own injuries on their own lands, and explicitly disclaimed any injury occurring on any federal lands.

III. There is no jurisdiction under the Outer Continental Shelf Lands Act (OCSLA). This case does not mention nor directly implicate oil production on the Outer Continental Shelf (OCS). No court has ever held that OSCLA jurisdiction extends to injuries in land-locked states solely because the use of oil from the OCS contributed in (small) part to the harms.

ARGUMENT

Removal is only proper if there is original federal question jurisdiction over the claims, as actually pled by Plaintiffs. Plaintiffs exclusively pled state law claims, which implicate and are based only on Defendants' own specific, tortious and private acts; the district court properly held that jurisdiction does not lie.

Federal courts have limited jurisdiction, which is exercised in accordance with the strict requirements of actual doctrines, especially the well-pleaded

complaint rule. Jurisdiction is narrowly construed, *see Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1094-95 (10th Cir. 2005), because "removal raises significant federalism concerns . . . mandat[ing] strict construction of the removal statute." *Carpenter v. Wichita Falls Indep. Sch. District*, 44 F.3d 362, 365-66 (5th Cir. 1995) (internal citation omitted); *see also Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941). It is also "carefully guarded against expansion by judicial interpretation." *Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17 (1951); *see also Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 814 (1986) (cautioning that "careful judgments" are needed "in an area of uncertain jurisdiction").

Defendants' arguments are incompatible with a narrow construction of removal jurisdiction, the preservation of state authority, or judicial caution. They ask this Court to fashion new rules without limiting principles and to interpret the existing ones beyond any recognized application. Their failure to locate jurisdiction in existing doctrine is fatal because Defendants bear the burden of overcoming the presumption against jurisdiction. *See Devon Energy Prod. Co., L.P. v. Mosaic Potash Carlsbad, Inc.*, 693 F.3d 1195, 1201 (10th Cir. 2012).

I. This Court can only review removal under the federal officer statute; jurisdiction does not lie because no federal officer directed Defendants' actions.

A. Review is limited to removal under the federal officer statute.

Defendants concede appellate jurisdiction is founded solely on 28 U.S.C. §

1447(d). Nearly every circuit has ruled that such an appeal is limited to the appealable ground for removal: here, 28 U.S.C. § 1442, the federal officer removal statute. Plaintiffs have largely responded to Defendants' arguments on this issue, *see* Mot. & Reply, and make only a few additional points.

In 2011, Congress added the provision allowing appeal of Section 1442 removals to parallel the appealability of civil rights removals under 28 U.S.C. § 1443; before 2011, *every* circuit ruling limited such appeals to the Section 1443 issue. Reply at 4. Defendants claim that *Lu Junhong v. Boeing Co.*, 792 F.3d 805 (7th Cir. 2015) – which missed the prior line of Section 1443 caselaw – is more persuasive than scads of other cases, including from this Court. They are wrong.

In addition to cases previously cited, this Court in *Kansas ex rel. Six v. Price*, No. 09-3181, 2009 U.S. App. LEXIS 29869 (10th Cir. Dec. 31, 2009), also disagreed with *Lu Junhong*. This Court noted Section 1447(d)'s prohibition on review of remands based on lack of jurisdiction, *id.* at *1-2, but noted that the appellant had "invoked, among other statutes, 28 U.S.C. § 1443." *Id.* at *2. The Court then concluded it lacked jurisdiction over the remainder of the issues after satisfying itself that "[s]ection 1443 does not apply." *Id.*

Defendants assert that the majority rule cases predate *Lu Junhong*. AB 11-12. This is mostly because of its recency, but it is also wrong. The Fifth Circuit more recently rejected the argument that "the § 1447(d) exception for federal

officer jurisdiction allows us to review the entire remand order," citing its prior caselaw. *City of Walker v. Louisiana*, 877 F.3d 563, 566 n.2 (5th Cir. 2017). Plaintiffs demonstrated why the two cases purporting to follow *Lu Junhong* are not persuasive – one is a Fifth Circuit case prior to *Walker*; in the other, *Mays v. City of Flint*, 871 F.3d 437 (6th Cir. 2017), the issue was not litigated. Mot. at 7-8.

Defendants now attack *Walker* on the same basis, arguing appellate jurisdiction was not litigated. AB 13. But *Walker* followed precedent while *Mays* did not. In *Walker*, the appellants did not contend that all issues could be considered on appeal, likely because binding Fifth Circuit law precluded that argument, which the opinion noted. 877 F.3d at 566 n.2. In *Mays*, the parties assumed that the scope of the appeal was broader, which apparently caused the panel to overlook prior contrary caselaw. *See* Mot. at 8. *Mays* presents the paradigm for why unlitigated issues do not create precedent.

Other post-2015 decisions affirm the majority rule. *See, e.g., Pivo Corp., LLC v. Maglione*, __ F.3d __, No. 19-12744-E, 2019 U.S. App. LEXIS 32171, at *2-3 (11th Cir. Oct. 25, 2019); *Claus v. Trammell*, 773 F. App'x 103, 103 (3d Cir. 2019) (per curiam); *Gee v. Texas*, 769 F. App'x 134, 134 (5th Cir. 2019); *Atty. Griev. Comm'n of Md. v. Rheinstein*, 750 F. App'x 225, 226 (4th Cir. 2019); *Westridge Place Apts. LP v. Delph*, 744 F. App'x 333, 333 (8th Cir. 2018).

B. The federal officer statute does not supply federal jurisdiction.

The federal officer statute permits removal of suits "against or directed to" a federal "officer (or any person acting under that officer)" for acts "under color of such office." 28 U.S.C. § 1442(a)(1). To avail themselves of the statute, private parties must show: (1) that they "acted under the direction of a federal officer; (2) that there is a causal nexus between the plaintiff's claims and the acts the private corporation performed under the federal officer's direction; and (3) that there is a colorable federal defense." *Greene v. Citigroup, Inc.,* No. 99-1030, 2000 U.S. App. LEXIS 11350, at *6 (10th Cir. May 19, 2000) (unpublished). *See also Watson v. Phillip Morris Cos.*, 551 U.S. 142, 151 (2007).

Defendants meet none of the three requirements. The district court – and every court to consider Defendants' argument – rightly rejected federal officer jurisdiction. App. 238-44 (Order); *Rhode Island*, 393 F. Supp. 3d at 152; *San Mateo*, 294 F. Supp. 3d at 939; *Baltimore*, 388 F. Supp. 3d at 567-69. The concerns that animate the statute simply are not present; litigating this case in state court is not "'likely to disable federal officers from . . . enforc[ing] federal law'" nor "'deny a federal forum to an individual entitled to assert a federal claim of immunity.'" App. 242 (Order) (quoting *Watson*, 551 U.S. at 152).

1. Exxon's federal leases do not show it was "acting under" federal officers.

Defendants' argument that there is federal officer jurisdiction because Exxon

drills for oil on the OCS under federal leases suffers from two fatal flaws: (i) ordinary commercial production is not a governmental function, and (ii) the leases merely subject Exxon to federal law, not any special governmental control.

First, the statute "authorized removal by private parties only if they were authorized to act with or for [federal officers or agents] in affirmatively executing duties under . . . federal law." *Watson,* 551 U.S. at 151 (omissions in original; quotation marks omitted). Exxon's acts "must involve an effort . . . to help *carry out,* the duties or tasks of the federal superior," *id.* at 152 (emphasis original); but the leases simply gave it the right to recover fossil fuels from the OCS for sale on the broader commercial market. App. 62 § 2. That does not suffice.

While *Watson* held that certain types of government contractors fall within the statute, such cases involve an "unusually close" relationship with the government, where the assistance provided to federal officers goes "beyond simple compliance with the law" and "help[ed] officers fulfill . . . governmental tasks." 551 U.S. at 153 (discussing *Winters v. Diamond Shamrock Chemical Co.*, 149 F.3d 387 (5th Cir. 1998)); *see also Mays*, 871 F.3d at 444-46 (requiring "delegate[d] legal authority," and that contractor "helped to fulfill the federal government's tasks," pursuant to the "government's specifications"); *accord Goncalves v. Rady Children's Hosp. San Diego*, 865 F.3d 1237, 1247 (9th Cir. 2017) (contractor had "delegated . . . responsibility" to "act on the Government agency's behalf"

(quotation marks omitted)).

Here, Exxon is not acting "under color of [federal] office." 28 U.S.C. § 1442(a)(1). It is just a lessee, buying the right to develop the government's lands for its own commercial purposes. App. 241-42 (Order).

There are other problems. The private company must provide a service to or product for the government's *actual use*, pursuant to detailed government specifications, for unique governmental purposes. *Isaacson v. Dow Chem. Co.* 517 F.3d 129, 137 (2d Cir. 2008) (Agent Orange firms "were not simply regulated by federal law," they "received delegated authority" from and "carr[ied] out the duties" of the government). Exxon is not a government contractor providing services to the government. Defendants point to nothing showing Exxon develops the OCS specifically for the government's use; they note only the government's right-of-first-refusal during times of war, with no suggestion that it has ever been exercised. AB 40. There is no authority suggesting a lessee – or *potential* supplier – relationship satisfies the "acting under" test.

Nor do Defendants show that a contract to supply a generic product is enough to show an "unusually close" relationship. *See Watson*, 551 U.S. at 153; *Winters*, 149 F.3d at 398-400 (Agent Orange unavailable on the market in requested form was provided according to government's detailed specifications, under on-going supervision and threat of criminal sanction); *Bennett v. MIS Corp.*,

607 F.3d 1076, 1087-88 (6th Cir. 2010) (government dictated materials for mold removal in federal building and how activities were performed, and directly supervised remediation).

As the district court observed, the Agent Orange cases, which *Watson* found came within the statute, "were far different than the circumstances in this case." App. 243 (Order). Exxon's OCS fossil fuels are primarily for general sale; even if some fraction of the fuel *is* purchased by the government, the government is purchasing off-the-shelf, not pursuant to its specifications. *See Washington v. Monsanto Co.*, 738 F. App'x 554, 555 (9th Cir. 2018) (no jurisdiction where government "purchased off-the-shelf PCB products," but did not "direct[ ]" them to be produced "in a particular manner").

Exxon also has not shown why the government would *have* to develop the OCS if Exxon does not. It states that the OCS is a "vital natural resource," AB 39 (quoting 43 U.S.C. § 1332(3)), but that Act does not suggest that the federal government *must* develop the OCS, and certainly not at specified levels or regardless of the costs or impacts. 43 U.S.C. § 1332(3)-(6).

Second, Defendants assert that Exxon's standard OCS leases "subject [it] to . . . extensive [federal] control," but that "control" merely describes and requires compliance with federal laws and regulations. *See* AB 39-40. In exchange for the right to drill, Exxon, like any other lessee, agreed to abide by federal laws and

regulations. *See* App. 242 (Order). Mere "compliance . . . with federal laws, rules and regulations" is insufficient, "even if the private firm's activities are highly supervised and monitored." *Watson*, 551 U.S. at 153. Regardless, Defendants cite nothing for the extraordinary proposition that every condition in a lease or contract means that a company complying with those conditions is therefore "acting under color of law." Nothing in the leases shows the type of "subjection" or "control" necessary to constitute "acting under" federal direction. *Id.* at 151.

Defendants suggest that under the terms of one lease the government has "the right to control the rates of mining and production." AB 39. The fact that the government *could* set the rates of production, App. 50 § 10, does not mean it *has* required Exxon to produce a certain amount from the OCS, which removal requires. *Compare In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 488 F.3d 112, 129-30 (2d. Cir. 2007) (no jurisdiction where regulation permitted, but did not require, MTBE fuel additive as means of meeting fuel standard), *with Greene*, 2000 U.S. App. LEXIS 11350, at *6 (jurisdiction where suit was based on a clean-up remedy specifically *ordered* by EPA).

Defendants also imply that Exxon must maximize *its* recovery under the lease. AB 39. Not so. The cited provision – for "Diligence and Prevention of Waste" – merely requires "compl[iance] with all applicable law[]" regarding "sound conservation practices and prevention of waste." App. 64 § 10(b). Exxon

need not maximize its *own* recovery during the 10-year lease; it must act to maximize the "ultimate" recovery, including that of future leaseholders, by following the law so as not to waste the resource. *Id*.

***

Defendants "would expand the scope of the statute considerably, potentially bringing within its scope state-court actions filed against private firms in many highly regulated industries" and "[n]either language, nor history, nor purpose" suggest "Congress intended any such expansion." *Watson,* 551 U.S. at 153.

2. Exxon was not sued *because* of work done under federal leases.

Defendants must also show that "the acts for which they are being sued . . . occurred *because of* what they were asked to do by the Government." *Isaacson*, 517 F.3d at 137. Defendants here were not sued because of anything the government or a federal official required them to do. *Cf. Winters*, 149 F.3d at 398-400 ("the government specified the composition of Agent Orange" that caused the injuries); *Greene*, 2000 U.S. App. LEXIS 11350, at *6 (company was sued specifically *for implementing* the EPA-mandated clean-up).

The only source of federal direction Defendants allege is the OCS leases. Plaintiffs' claims and injuries, however, are based on Defendants' total fossil fuel sales and their deceptive marketing. As the district court found, no lease or federal

officer "instructed [Exxon] how much fossil fuel to sell or to conceal or misrepresent the dangers of its use, as alleged in this case," or "to market fossil fuels at levels they knew would allegedly cause harm to the environment." App. 242 (Order). *Accord Baltimore,* 388 F. Supp. 3d at 568-69.

Defendants' response – that the government *could* obligate lessees to produce at specified rates under *the lease*, AB 40 – is no response at all. Defendants do not dispute that the government *did not* instruct Exxon how much to sell overall; or how to promote fossil fuel use. That is the basis of Plaintiffs' claim, not the fraction Exxon produced pursuant to any lease.

Defendants cite *Savoie v. Huntington Ingalls, Inc.*, AB 41, but there the defendant was being held strictly liable for the federally-directed use of asbestos, which allegedly led to the death. 817 F.3d 457, 462, 465 (5th Cir. 2016). The case in inapposite. Exxon was not sued – and is not strictly liable – for doing something ordered by the government, for merely producing oil on the OCS or for the federal government; liability is sought for what it did across its corporate enterprise, considering its knowledge of the consequences of that behavior.

Thus, Exxon failed to establish the requisite "causal connection between the work performed under the leases and Plaintiffs' claims." App. 241 (Order). No court has recognized removal on such a tenuous basis, and each court to consider Defendants' argument has rejected it. *See Rhode Island,* 393 F. Supp. 3d at 152

("promotion and sale of fossil fuels abetted by a sophisticated misinformation campaign" not "justified by [ ] federal duty" (quotation marks omitted)); *Baltimore,* 388 F. Supp. 3d at 568-69 (same); *San Mateo,* 294 F. Supp. 3d at 939 (no "causal nexus" as claims were "based on a wider range of conduct").

3. Defendants have not shown a colorable federal defense.

Defendants do not establish a colorable federal defense that "aris[es] out of [the federal officer's] duty to enforce federal law." *Wyoming v. Livingston*, 443 F.3d 1211, 1224 (10th Cir. 2006) (quotation marks omitted). Naming supposed federal defenses without supporting facts or arguments, AB 43, does not show that defense is colorable. *See Baltimore*, 388 F. Supp. 3d at 568 ("the factual allegations must support a defense" (quotation marks omitted)). Nor does it show how the defense arises out of any duty to enforce federal law.

II. Jurisdiction does not lie under the general removal statute.

Defendants make four arguments for federal question jurisdiction under 28 U.S.C. § 1441, the general removal statute. Three of their arguments – that this case involves federal common law, a substantial federal question, and a federal enclave – are governed and foreclosed by the well-pleaded complaint rule. The fourth, complete preemption, fails to meet that exception's requirements.

A. Removal is governed by the well-pleaded complaint rule.

To find jurisdiction, courts must "look to the face of the complaint . . . and

ask, is it drawn so as to claim a right to recover under the Constitution and the laws of the United States." *Firstenberg v. City of Santa Fe*, 696 F.3d 1018, 1023 (10th Cir. 2012) (quotation marks omitted). Jurisdiction is only proper where the complaint shows that "federal law creates the cause of action" or "the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Id.* (quotation marks omitted).

Under this well-pleaded complaint rule, a plaintiff is "master of his claim" and "can elect the judicial forum – state or federal – based on how he drafts his complaint [and] . . . by exclusive reliance on state law." *Id.* (internal citations and quotation marks omitted). *Accord Devon*, 693 F.3d at 1202. Defendants cannot re-write Plaintiffs' complaint because they believe Plaintiffs' *should* have brought a different claim. *See id.* at 1206-07.

The only exception to the well-pleaded complaint rule is the doctrine of complete preemption. *Firstenberg*, 696 F.3d at 1023 & n.5.[2] Complete preemption is a "rare doctrine" that applies only where state law claims "fall within the scope of *federal statutes* intended by *Congress* completely to displace all state law[.]" *Devon*, 693 F.3d at 1204-05 (emphasis added, quotation marks omitted).

[2] In *Devon*, this Court addressed *Grable* as a second exception to the well-pleaded complaint rule, the only other being complete preemption. 693 F.3d at 1203-04. It makes no difference how *Grable* is characterized however, since the application of the doctrine remains the same. This Court has not recognized another exception.

B. Defendants' federal common law argument cannot be squared with the well-pleaded complaint rule.

Defendants contend that removal was proper because this case arises under federal common law, notwithstanding Plaintiffs' exclusive reliance on state law. They devote the lion's share of their brief to arguing federal common law should govern. AB 16-25. They are wrong that it governs, but whether it ultimately does or not is irrelevant under the well-pleaded complaint rule. The question is not whether a federal common law claim is the only possible claim. Nor is it whether federal jurisdiction *would* exist *if* Plaintiffs invoked federal common law – as in *Illinois v. City of Milwaukee* ("*Milwaukee I*"), 406 U.S. 91 (1972), *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), *American Electric Power Co., Inc. v. Connecticut ("AEP")*, 564 U.S. 411 (2011), and *Native Village of Kivalina v. ExxonMobil Corp. ("Kivalina")*, 696 F.3d 849 (9th Cir. 2012). *Compare* App. 210, 213-14 (Order) *with* AB 7-18. The question is whether jurisdiction lies *despite* Plaintiffs disclaiming federal law. It does not.

1. Jurisdiction cannot rest on unpled federal common law.

Jurisdiction must rest on what Plaintiffs actually pled because plaintiffs "may, by eschewing claims based on federal law, choose to have the cause heard in state court." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 399 (1987). Here, "the Complaint on its face pleads only state law claims and issues." App. 213 (Order).

There is "no controlling authority for [Defendants'] proposition that removal may be based on the existence of an [unpled] federal common law claim." *Id.* Indeed, the Supreme Court has been clear that "[j]urisdiction may not be sustained on a theory that the plaintiff has not advanced," *Merrell Dow*, 478 U.S. at 809 n.6, and this Court has held that "a suit arises under federal law *only* when the *plaintiff's statement* of his own cause of action shows that it is based on federal law." *Devon*, 693 F.3d at 1201 (emphasis added, quotation marks omitted). Thus, Defendants "cannot transform [this] action into one arising under federal law, thereby selecting the forum . . . as to do so would contradict the well-pleaded complaint rule." App. 213 (Order) (citing *Caterpillar*, 489 U.S. at 399).

Defendants do not seriously address the well-pleaded complaint rule or the district court's careful analysis of it. They suggest that focusing on the fact that only state law claims were pled exalts form over substance. AB 26. The law a plaintiff invokes, however, is not a "label," *contra id.*; it is the heart of the well-pleaded complaint rule.

No matter the language used, Defendants' argument that federal common law "governs," AB 4, or "supplies the rule of decision," AB 18, is an ordinary preemption argument. App. 215-17 (Order); *see Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987) (if a case "should be resolved by reference to federal common law," then "state law [is] preempted"); *E. States Health & Welfare Fund*

v. Phillip Morris, Inc., 11 F. Supp. 2d 384, 394 (S.D.N.Y. 1998). Ordinary preemption defenses are not a basis for federal jurisdiction or removal. *Caterpillar*, 482 U.S. at 392-93; *Devon*, 693 F.3d at 1203 n.4. Five courts have heard the same federal common law argument and four have rejected it; three correctly applied removal doctrine, saw Defendants' federal common law argument for the "cleverly veiled preemption argument" that it is, and properly remanded. *Baltimore*, 388 F. Supp. 3d at 555; *accord* App. 216-17 (Order); *Rhode Island*, 393 F. Supp. 3d at 148-49.[3]

While the *complete* preemption doctrine does allow removal, Defendants do not argue federal common law completely preempts, nor could they. "The Supreme Court and the Tenth Circuit have only recognized statutes as a basis for complete preemption," App. 226 (Order), because "[w]hether latent federal power should be exercised to displace state law is primarily a decision for Congress, not the federal courts." *Atherton v. FDIC*, 519 U.S. 213, 218 (1997) (quotation marks omitted). Simply, "federal common law cannot serve as the basis for complete preemption or removal jurisdiction." *Arnold & Through Arnold v. Blue Cross & Blue Shield*, 973 F. Supp. 726, 737 (S.D. Tex. 1997); *accord Merkel v. Fed. Express Corp.*, 886 F.

[3] *San Mateo* remanded because displaced federal common law could not be a basis for jurisdiction. 294 F. Supp. 3d at 937. *Infra* § II.B.2.b.

Supp. 561, 566 (N.D. Miss. 1995).[4]

Defendants' proposed basis for jurisdiction would also be broader than the narrow complete preemption doctrine, which demands that Congress provide "a federal cause of action" to replace the state claim. *Devon*, 693 F.3d at 1205 (quotation marks omitted). Defendants deny any such claim under federal common law. Even if federal common law could completely preempt, it would at least have to meet the same requirements as an act of Congress. *See Finn*, 341 U.S. at 17-18 (noting federal "jurisdiction . . . is carefully guarded against expansion by judicial interpretation").

Nothing Defendants cite provides a basis for upending the well-pleaded complaint rule. *Standard Fire Insurance Co. v. Knowles*, 568 U.S. 588, 595 (2013), held only that a non-binding stipulation does not supersede CAFA's requirement that courts aggregate the value of class claims. It does not deal with the general removal statute or the well-pleaded complaint rule.

Defendants also suggest this Court should follow a few out-of-circuit decisions that erroneously ignored the well-pleaded complaint rule. AB 18. As the district court recognized, these cases "are not persuasive," because they "contradict

[4] *Kight v. Kaiser Found. Health Plan*, AB 18, cites nothing showing federal common law can completely preempt, and cannot be reconciled with that doctrine or *Caterpillar*. 34 F. Supp. 2d 334, 340-41 (E.D. Va. 1999).

Caterpillar and the tenets of the well-pleaded complaint rule . . . fail to cite any Supreme Court or other controlling authority" and rely on cases, namely *Milwaukee I*, where "the plaintiff invoked federal common law and jurisdiction." App. 215 (Order).[5] The un-published, in-circuit decision Defendants cite – *Blanco v. Fed. Express Corp.*, No. CIV-16-561, 2016 U.S. Dist. LEXIS 125349, at *7-8 (W.D. Okla. Sept. 15, 2016) – mistakenly relied on *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 475 (1998), which addressed statutory complete preemption. *Id.* at *7-8.

***

Resting jurisdiction on unpled federal common law is not authorized by precedent from this Court or the Supreme Court. This Court should not create a new basis for removal.

2. Plaintiffs' claims do not fall under any recognized federal common law doctrine.

Even if unpled federal common law could provide jurisdiction, it cannot

[5] *See Wayne v. DHL Worldwide Express*, 294 F.3d 1179, 1184 (9th Cir. 2002) (citing *Milwaukee I* for proposition that jurisdiction exists, *if* a claim arises under federal common law; finding claims *did not* so arise); *California I*, 2018 U.S. Dist. LEXIS 32990, at *14 (same, citing *Wayne* and *Milwaukee I*); *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 926 (5th Cir. 1997) (same); *New SD, Inc. v. Rockwell Int'l Corp.*, 79 F.3d 953, 955 (9th Cir. 1996) (removal – in government contract case where federal law governed contract – without reference to well-pleaded complaint rule or *Caterpillar*).

here, because no recognized federal common law doctrine covers Plaintiffs' claims. The federal common law of interstate pollution has never covered municipal claims against private companies; at best, such claims are "questionable and not settled." App. 213 (Order). Plaintiffs cannot be forced to plead novel federal common law claims, and jurisdiction cannot rest on questionable grounds. *See Merrell Dow*, 478 U.S. at 814 (recognizing "need for careful judgments . . . in an area of uncertain jurisdiction"); *Fajen v. Found Res. Ins. Co.*, 683 F.2d 331, 333 (10th Cir. 1982) (noting that "doubts are to be resolved against removal").

Defendants argue that any "claims . . . *related* to interstate (and indeed international) emissions are governed by federal common law, not state law." AB 16 (emphasis added). This inaccurately describes the recognized scope of federal common law. As the district court observed, it is also the opposite of what Exxon argued in *Kivalina*. App. 203 (Order) at n.1; Supp. App. 70-75.

The federal common law of interstate pollution exists only in a narrow class of "true" interstate disputes, and this is not such a case. The Supreme Court also held that the Clean Air Act substantially narrowed – and perhaps eliminated – whatever federal common law previously existed. *See AEP*, 564 U.S. at 423-25. With this context, Defendants' suggestion that Plaintiffs necessarily had to plead federal common law claims falls apart.

a. After *Erie*, there is no general federal common law, only narrow areas

of "specialized federal common law." *Id.* at 420-21. Congress is primarily responsible for creating rules in areas of national concern *and* for displacing state law. *Milwaukee v. Illinois* ("*Milwaukee II*"), 451 U.S. 304, 312-13 (1981); *Miree v. De Kalb Cty.*, 433 U.S. 25, 31-32 (1977). Absent Congressional authorization, federal common law arises and displaces state law only where "a federal rule of decision is necessary to protect uniquely federal interests . . . in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations." *Tex. Indus. v. Radcliff Materials*, 451 U.S. 630, 640-41 (1981).

While "true interstate disputes require application of federal common law," those involve "the conflicting rights of states," *Nat'l Audubon Soc'y v. Dep't of Water*, 869 F.2d 1196, 1205 (9th Cir. 1988), or "the rights and duties of states as discrete political entities." *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1324-25 (5th Cir. 1985). Thus, the Supreme Court has recognized only suits "brought by one State to abate pollution emanating from another State" as pollution cases governed by "specialized federal common law." *AEP*, 564 U.S. at 421.

Defendants would incorrectly expand this federal common law to cover any case where interstate pollution is a step in the causal chain. AB 21-23 (citing *City*

of N.Y., 325 F. Supp. 3d at 471-72; *California II*, 325 F. Supp. 3d at 1024). Federal common law, however, does not govern every dispute involving interstate or international conduct or effects. *See Illinois v. Milwaukee* ("*Milwaukee III*"), 731 F.2d 403, 411 n.3 (7th Cir. 1984) (citing *Young v. Masci*, 289 U.S. 263, 258-59 (1933)); *Jackson*, 750 F.2d at 1324-25. The conduct, parties, and relief at issue in *this* case simply do not fall within the narrow boundaries of the recognized federal common law of interstate pollution.

Plaintiffs are not states, and the Supreme Court has never recognized local government standing to invoke federal common law. *See AEP*, 564 U.S. at 422. Plaintiffs also do not seek to control or enjoin out-of-state emitters, rather they "sue for harms caused by Defendants' sale of fossil fuels." App. 210, 227-28 (Order). The fact that out-of-state third-party emitters are steps in the causal chain – between Defendants' acts and Plaintiffs' injuries – does not implicate "conflicting rights of states," the way it does in true interstate pollution cases. Take *Milwaukee I*. *See* 406 U.S. at 104. If Illinois law could be used to shut down a pollution source in Wisconsin, Illinois would be invading Wisconsin's sovereign prerogatives; but if Wisconsin law did not provide a remedy, that would invade Illinois' sovereign prerogatives to protect its citizenry; federal common law was needed to accommodate both states' sovereignty.

Liability for a seller does not implicate the concerns that arise in suits

against emitters; and seller liability is not an implicit regulation of third-parties, such as consumers. For example, governmental lawsuits against tobacco and opioid companies for deceptive business practices – which caused public health crises – were and are not regulation of smokers and opioid *users*. Nor is a case against gun distributors "about an individual right to keep and bear arms;" it is about the "obligation to follow federal and state law applicable to the sale and marketing of firearms, the violation of which causes a public nuisance in a different geographical location through gun trafficking." *City of N.Y. v. Bob Moates' Sport Shop, Inc.*, 253 F.R.D. 237, 242-43 (E.D.N.Y. 2008). Federal common law has never supplied a cause of action against a product seller. Rather, courts have consistently refused to recognize an expansive federal common law that covers such conduct, even when national security is involved. *See In re "Agent Orange" Prod. Liab. Litig.*, 635 F.2d 987, 993-95 (2d Cir. 1980).

The remedies sought here also do not raise the same concerns as an injunction to shut down out-of-state pollution. With an injunction, an affected state has an effective veto over out-of-state acts. With monetary remedies, even if there are different state rules, that merely means Defendants might compensate victims in some states, but not others. Indeed, the Supreme Court has never recognized a federal common law for damages in interstate pollution cases. *See Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 21 (1981). This is

because "ensuring the availability of compensation for injured plaintiffs is predominately a matter of state concern." *Jackson*, 750 F.2d at 1325.

Exxon's own prior arguments – in *Kivalina* – make Defendants' current position that Plaintiffs necessarily plead federal common law untenable. There, Exxon argued that "a federal common law claim cannot seek damages," Supp. App. 70, and that state sovereignty, which local governments do not possess, "is the *sine qua non* of access to the federal common law of public nuisance," *id.* at 74-75. Defendants cannot establish jurisdiction based on an unpled claim they previously disclaimed and should not be heard to complain about Plaintiffs' choice to omit such a claim.

b. The displacement of federal common law, recognized in *AEP* and *Kivalina*, also supports Plaintiffs' exclusive reliance on state law. Both cases were brought in federal court, where plaintiffs explicitly pled federal (and state) common law, App. 207 (Order); and both addressed liability for interstate *emissions*, 564 U.S. at 415; 696 F.3d at 853-54. Those cases thus addressed specific conduct – which is "not at issue here," App. 210 (Order) – that was grounded in the federal common law recognized in *Milwaukee I*.[6]

More importantly, as *San Mateo* recognized, Defendants misstate both *AEP*

[6] Therefore, *AEP*'s dicta that it would have been inappropriate to adopt state law as the rule of decision for a federal claim seeking to *enjoin* out-of-state *emitters* is of no moment. *Compare* AB 20 (citing *AEP*, 564 U.S. at 422) *with supra* § II.B.2.a.

and *Kivalina*, AB 19-20; neither held that all "state law claims *relating* to global warming are superseded by federal common law." 294 F. Supp. 3d at 937 (emphasis added). Both ruled that any preexisting federal common law – for direct interstate greenhouse gas emissions – had been displaced by the CAA, and that its prior scope was "academic." *AEP*, 564 U.S. at 423-25; *Kivalina*, 696 F.3d at 856-57.

Critically, neither case held that federal common law precluded state common law, even with respect to source emission claims. Both courts held open whether state law provided relief, subject to ordinary *statutory* preemption analysis. *AEP*, 564 U.S. at 429 ("the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act"); *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."). By recognizing that state law remained open, these decisions confirm that federal common law does **not** necessarily govern or provide the exclusive cause of action in all climate cases.

Federal statutes displace federal common law far more easily than they preempt state law. *AEP*, 564 U.S. at 423 ("displacement of federal common law does not require the same sort of evidence of a clear and manifest congressional purpose demanded for preemption of state law" (quotation marks omitted)). Thus,

even if the CAA displaced federal common law, Plaintiffs are simply following the viable path these decisions left open. *See Kivalina*, 696 F.3d at 866 (Pro. J., concurring) (Kivalina may "refil[e] [its state law nuisance claim] in state court, and . . . pursue whatever remedies it may have under state law").

AEP and *Kivalina* make clear that federal common law cannot continue to preempt once displaced by statute; the question then is whether the *statute* preempts. *AEP*, 564 U.S. at 429; *Kivalina*, 696 F.3d at 866 (Pro J., concurring). If displaced law cannot preempt, it cannot be a basis for federal jurisdiction. *San Mateo*, 294 F. Supp. 3d at 937 (a case cannot be removed "on the basis of federal common law that no longer exists"). Defendants previously argued that the federal common law they claim governs this case has been substantially displaced by the CAA; they won this argument in *California II*, 325 F. Supp. 3d at 1024, and *City of N.Y.*, 325 F. Supp. 3d at 472. *AEP* forecloses their argument that federal common law necessarily governs but has been displaced.

3. This Court should not create new federal common law.

Because the established federal common law doctrine does not apply, this Court would need to create *new* federal common law to preempt Plaintiffs' claims – assuming, again, that such preemption is a basis for removal. Defendants do not argue that new federal common law is necessary, and their allusions to non-specific interests and uniformity concerns, AB 22-25, are far from sufficient –

particularly where the United States is not a party, no federal regulatory scheme is threatened, and traditional state police powers are implicated.

To justify federal common law, Defendants must show "a significant conflict between some federal policy or interest and the use of state law." *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87-88 (1994) (internal citations and quotation marks omitted). The "application of federal common is particularly inappropriate" where, as here, "no substantial rights or duties of the United States hinge on its outcome." *Woodward Governor Co. v. Curtiss-Wright Flight Sys.*, 164 F.3d 123, 128 (2d Cir. 1999). *Accord In re "Agent Orange" Prod. Liab. Litig.*, 635 F.2d at 993-94.

Defendants must, but cannot show a "uniquely federal interest." *Woodward*, 164 F.3d at 128. "[T]o be 'uniquely federal' and thus a sufficient predicate for the imposition of a federal substantive rule, an interest must relate to an articulated congressional policy or directly implicate the authority and duties of the United States as sovereign." *Jackson*, 750 F.2d at 1325. Defendants broadly declare Plaintiffs' case will weigh the "utility of their production of fossil-fuel products," which (without explanation) they claim "implicates the federal government's interest in setting national and international policy on matters involving energy, the environment, and national security." AB 23. This case is not about the abstract utility of fossil fuels; instead the question is "whether it is unreasonable [for

Defendants] to engage in [their specific] conduct without paying for the harm done." Restatement (Second) of Torts, § 821B cmt. i; *see also id.* § 828 cmt. e. Nor are such generalized or "highly abstract" federal interests in fossil fuel policy – which certainly has not been expressed in any legally binding way – sufficient. *See Miree*, 433 U.S. at 31-33 (interest cannot be "speculative" or a "remote . . . possibility").

Defendants also fail to identify a concrete conflict with even those insufficient federal interests. Defendants have not argued that any specific federal statute or regulation governs their conduct or conflicts with these claims. *See Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019) ("Invoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law; a litigant must point specifically to a constitutional text or a federal statute that does the displacing or conflicts with state law.") (Gorsuch, J., three judge opinion) (quotation marks omitted). Nor have they identified where the federal government has balanced the benefits of Defendants' specific conduct against Plaintiffs' injuries. *See In re "Agent Orange" Prod. Liab. Litig.*, 635 F.2d at 994-95 (federal common law unnecessary where Congress had "not determined what the federal policy is with respect to the reconciliation of [ ] two competing interests").

Finally, Defendants complain about the possibility of 50 different states'

rules applying, AB 24, but there is no federal problem with *private parties* being subject to varying rules; "there is no federal interest in uniformity for its own sake." *In re "Agent Orange" Prod. Liab. Litig.*, 635 F.2d at 993-94. *See also O'Melveny & Myers*, 512 U.S. at 88. Defendants cite *Ouellette*, 479 U.S. at 496-97, AB 24, but there a federal law included a permitting scheme for particular levels of discharge, which might be disrupted if an affected state's law could apply. No uniform federal scheme governs the level of fossil fuel promotion or sales. The possibility of different tort standards faces every producer who sells goods and causes harm in different states; it does not justify a single federal tort standard.

***

In Exxon's words, even if "global climate change is predominately a matter of federal concern," that "has nothing to do with whether private damages claims raise uniquely federal interests of the type that justify applying federal common law." Supp. App. 71.

C. There is no *Grable* jurisdiction.

The "*Grable*" or "'substantial question' branch of federal question jurisdiction is exceedingly narrow." *Gilmore v. Weatherford*, 694 F.3d 1160, 1171 (10th Cir. 2012). Jurisdiction lies over state law claims *only* if they contain "a federal issue [that] is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state

balance approved by Congress." *Gunn v. Minton*, 568 U.S. 251, 258 (2013).

"Grable did not in any way abrogate the well-pleaded complaint rule." *Doe v. Archdiocese of Denver*, 413 F. Supp. 2d 1187, 1192 (D. Colo. 2006). Thus, "a *defendant* cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law." *Caterpillar*, 482 U.S. at 399. Defendants' contrary argument was correctly rejected by the district court and each court to consider it. App. 217-25 (Order); *San Mateo*, 294 F. Supp. 3d at 938; *Rhode Island*, 393 F. Supp. 3d at 150-51; *Baltimore*, 388 F. Supp. 3d at 558-61.

1. No federal issue is an essential element of Plaintiffs' claims.

Jurisdiction is improper in cases that "implicate" federal issues, AB 28, 30; it only lies in the "small category" where a substantial, disputed federal issue is an "essential element" of *plaintiff's* claims. *Becker v. Ute Indian Tribe of the Uintah & Ouray Reservation*, 770 F.3d 944, 947-48 (10th Cir. 2014) (internal quotation marks omitted). That is, the state law claim must "turn on" a question of federal law. *Grable*, 545 U.S. at 312. Jurisdiction is inappropriate where "federal law is merely alleged as a barrier to" the success of a state law claim. *Becker*, 770 F.3d at 948 (internal quotation marks omitted)).

Defendants cannot meet the "essential element" requirement. Defendants' liability is based on their promotion and sale of fossil fuels at levels that caused a

trespass and nuisance to Plaintiffs under Colorado law, and which violated Colorado's consumer protection law. To succeed, Plaintiffs need not prove any issue of federal law. Thus, while "there are federal *interests* in addressing climate change[,] Defendants have failed to establish . . . that a federal *issue* is a 'necessary element' of [these] state law claims." App. 221-22 (Order) (internal citations and quotations marks omitted).

The cases where jurisdiction lies confirm it does not here. For example, *Grable* applies where "a state-law cause of action is 'brought to enforce' a duty created by [federal law] because the claim's very success depends on giving effect to a federal requirement." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Manning*, 136 S. Ct. 1562, 1570 (2016). *See also Grable*, 545 U.S. at 315 (issue was whether proper notice was given under federal statute); *Nicodemus v. Union Pac. Corp.*, 440 F.3d 1227, 1235 (10th Cir. 2006) (federal issue was part of plaintiffs' case-in-chief).

Defendants say that Plaintiffs' claims raise issues that "relate to" foreign affairs and somehow "collateral[ly] attack" government cost-benefit analyses, AB 28, but they do not even try to show that either is an "essential element" of Plaintiffs' claims. They "'gesture'" at "'federal concerns in a generalized way'" but have "not pointed to a specific issue of federal law that [must] be resolved to adjudicate the state law claims." App. 222 (Order) (quoting *San Mateo*, 294 F.

Supp. 3d at 938). Innumerable cases raise federal concerns; at most they create defenses, and are not a basis for jurisdiction.

a. Defendants "point to no specific foreign policy that is essential to resolving the Plaintiffs' claims." App. 220 (Order). Instead, they ignore the essential element requirement. AB 27-33.

Defendants cite a *preemption* case, *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), to erroneously imply that any case that could "'more than incidental[ly] [a]ffect'" foreign affairs satisfies *Grable.* AB 29 (quoting 539 U.S. at 418) (alterations in original). *Garamendi* did not set out the test for jurisdiction; it addressed the foreign affairs preemption *defense*. Defendants can argue preemption in state court, but "it is now settled law that a case may *not* be removed on the basis of . . . pre-emption." *Caterpillar*, 482 U.S. at 393; *see also Becker*, 770 F.3d at 948.

Regardless, Defendants misstate the preemption standard they cite, AB 29, and cannot meet it. A mere effect on foreign policy does not suffice. Plaintiffs rely on generally applicable tort law, so the state has a "serious claim to be addressing a traditional state responsibility." *Garamendi*, 539 U.S. at 419 n.11. Thus, Defendants must show a *conflict* with a federal act that is "fit to preempt" state law. *Id*. at 416, 418-20 & n.11. Foreign policy that lacks the force of law cannot preempt, even where state law has serious foreign policy implications. *Medellin v.*

Texas, 552 U.S. 491, 523-32 (2008). The Presidential statements and Senate resolution Defendants cite are not law. Defendants also do not show any conflict with these nebulous policy statements.

All sorts of state laws affect foreign relations and are not preempted. *Clark v. Allen*, 331 U.S. 503, 517 (1947). Under Defendants' view of preemption, every state law or initiative affecting the output of carbon would be preempted; given their conflation of preemption and jurisdiction, any case involving such state law would be heard in federal court. That is not the law.

Finally, even if a mere effect on foreign policy could create federal jurisdiction, Defendants fail to show one. They speculate that Plaintiffs' claims would somehow affect the federal government's purported "policy of pursuing economic growth rather than imposing emission limits under imbalanced international agreements." AB 29. Assuming, generously, that Defendants accurately state U.S. policy, Plaintiffs do not seek to impose emission limits or enforce international agreements. *See* App. 220 (Order). And Defendants do not show that requiring Defendants to pay for the harms they have caused – rather than foisting those costs onto local taxpayers – would impede economic growth. Nor do they show how this suit constrains the President's authority engage in international agreements or with other nations; they make no claim that it conflicts with current international obligations or creates new ones. App. 220 (Order). Defendants cannot

simply "gesture" at impacts to U.S. foreign relations. *Id*. 222.

b. Defendants' second purported federal concern – the unfounded assertion that this case is a "collateral attack" on federal regulations and cost-benefit analyses, AB 28 – also fails the essential element requirement. Plaintiffs do not attack any federal regulatory decision; even if there is an implicit conflict, "Plaintiffs' state law claims do not have as an element any aspect of federal law or regulations. Plaintiffs do not allege that any federal regulation or decision is unlawful, or a factor in their claims . . . ." App. 221 (Order). *See also Baltimore*, 388 F. Supp. 3d at 559-60; *Rhode Island*, 393 F. Supp. 3d at 151; *San Mateo*, 294 F. Supp. 3d at 938. Defendants do not dispute this, which ends the inquiry.

Defendants' cases do not suggest that federal regulations are "necessarily" raised by Plaintiffs' claims. *Board of Commissioners v. Tennessee Gas Pipeline Co.*, 850 F.3d 714 (5th Cir. 2017), upheld jurisdiction where federal law was "the exclusive basis for holding Defendants liable" for some claims, *id.* at 722; but a "federal regulatory scheme is only relevant" if it "provides the underlying legal basis for" plaintiffs' claims, *id.* at 724. It does not here. Likewise, *Bennett v. Southwest Airlines Co.*, 484 F.3d 907, 909 (7th Cir. 2007), *rejected* an indistinguishable argument – that federal jurisdiction existed over all commercial air travel suits based on federal authority over air safety – as "well beyond the scope" of *Grable.*

Defendants say Plaintiffs seek a determination – that Defendants' activities are unreasonable – which was or could not be achieved through the regulatory process. AB 31. This does not show that any federal law or action is an *element* of Plaintiffs' claims. Even if Plaintiffs' claims were at odds with some unidentified federal assessment, again it would be relevant only to an ordinary preemption defense, not jurisdiction. App. 232 (Order).

Regardless, as the district court observed, Plaintiffs are not "asking [any] [c]ourt to consider whether the government's decisions to permit fossil fuel use and sale are appropriate." *Id.* Thus, even if relevant, Plaintiffs' claims do not depend on overturning the validity of a federal act or regulation.[7] Moreover, the government has made no policy decision that companies should be able to produce and sell fossil fuels at any level, while concealing and misrepresenting the dangers of those activities, and yet not contribute to any of the harms caused by the actions. *Supra* § II.B.3.

[7] In *Pet Quarters, Inc. v. Depository Trust & Clearing Corp.*, 559 F.3d 772 (8th Cir. 2009), the claims required the court to determine the validity of the federal government's conduct – a program approved by the SEC – not just the defendant's conduct. *Id.* at 779. In *West Virginia ex rel. McGraw v. Eli Lilly & Co.*, 476 F. Supp. 2d 230, 234 (E.D.N.Y. 2007), the state's claims depended on its obligation to make certain payments under federal law. Similarly, in *McKay v. City & County of San Francisco*, No. 16-cv-03561, 2016 U.S. Dist. LEXIS 178436, at *13-15 (N.D. Cal. Dec. 23, 2016), the court rejected the notion that merely implicating federal interests in the management of national airspace creates jurisdiction, but upheld removal because the plaintiff's claims required showing that an FAA-determined flight path was a nuisance.

2. Plaintiffs' claims raise no substantial federal issues, since no federal law or decision is disputed or central to this case.

The "mere need to apply federal law in a state-law claim will [not] suffice" for removal; the federal issue must be substantial. *Grable*, 545 U.S. at 313. In this case, which raises numerous state law and factual questions, the asserted federal issues "are not central to Plaintiffs' claims"; removal was improper. App. 224 (Order).

To determine substantiality, courts "'look[] to whether the federal law issue is central to the case,'" and when "a case "'involve[s] substantial questions of state as well as federal law," this factor weighs against asserting federal jurisdiction.'" *Id.* (quoting *Gilmore*, 694 F.3d at 1175) (alterations in original). A substantial federal issue should also pose a discrete *legal* question, which is not fact-dependent. *See Gilmore*, 694 F.3d at 1174 (courts "distinguish[ ] between 'a nearly pure issue of law' that would govern 'numerous' cases and issues that are 'fact-bound and situation specific'" (quoting *Empire HealthChoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 700-01 (2006)).

Plaintiffs' claims involve numerous and substantial questions of state law, whose application depends on disputed facts. App. 224-25 (Order). Defendants' liability turns on whether they caused and are responsible for trespass, interfered with Plaintiffs' property rights and the rights of the public, or violated Colorado's consumer protection act. These are issues of state law and fact only.

Defendants do not claim this case turns on the meaning of any federal rule. They do not concede the factual allegations, deny they will challenge those facts, or otherwise suggest factual disputes will not prove central to this case. There is no discrete federal legal issue, and thus no federal jurisdiction.

Defendants ignore that the presence of significant state law and factual questions forecloses their argument. They simply claim energy and environmental regulation, foreign policy and national security are each substantial federal interests. AB 32. Such broad federal jurisdiction is at odds with the *Grable* doctrine's strict limits.

Defendants inexplicably cite *Bennett*, AB 32, but it proves Plaintiffs' point; jurisdiction is improper in cases involving "fact-specific application[s] of rules" and state law, rather than "context-free inquir[ies] into the meaning of a federal law." 484 F.3d at 910; *accord Gonzales v. Ever-Ready Oil, Inc.*, 636 F. Supp. 2d 1187, 1194 (D.N.M. 2008) (rejecting jurisdiction where "claim does not involve a pure issue of federal" law but "the application of a mixture of federal and state law to fact").[8]

[8] Defendants also cite two out-of-circuit, district court decisions, but neither undertook the analysis required by *Gilmore*. Indeed, *Grynberg Prod. Corp. v. British Gas, p.l.c.*, 817 F. Supp. 1338, 1356 (E.D. Tex. 1993), pre-dates *Grable* itself. And *In re NSA Telecomms. Records Litig.*, 483 F. Supp. 2d 934 (N.D. Cal. 2007), did not even require the federal law to be an "element" of plaintiff's claim, *id.* at 942, contrary to binding Supreme Court authority.

"This case is quite different from those where jurisdiction was found." App. 224 (Order). "[I]n *Grable*, 'the meaning of the federal statute . . . appear[ed] to be the only legal or factual issue contested.'" *Id*. (quoting 545 U.S. at 315) (omission and alteration in original). Similarly, in *Nicodemus*, construction of a federal land grant was the only contested legal or factual issue. *Id*.

Defendants twist this observation and claim the district court rejected their argument because federal issues were not the *only* legal or factual issues, AB 32, but that is incorrect.[9] As the above discussion makes clear, the district court actually found the issues insubstantial on at least two independent grounds: "the issues raised by Defendants are not central to Plaintiffs' claims, and the claims are rife with legal and factual issues that are not related to the federal issues." App. 224 (Order) (internal quotation marks and citations omitted)).

3. Defendants' arguments would disrupt the federal/state balance.

Jurisdiction would also conflict with the Supreme Court's caution against federalizing issues in ways that "upset[ ] the state-federal line drawn (or at least assumed) by Congress." *Grable*, 545 U.S. at 314. Nothing suggests Congress

[9] The district court applied *Gilmore*, which relied on the Supreme Court's decision in *Empire.* App. 224. Defendants fault the court for not applying *Nicodemus*, AB 32; but *Gilmore* and *Empire* post-date and supersede it, to the extent that *Nicodemus* adopted a different standard, which it did not.

intended federal courts to be the forum for this or every climate case – and certainly not every trespass, nuisance or unjust enrichment case relating to federal environmental or energy policy or foreign affairs. AB 32.

If Defendants' amorphous federal concerns suffice, *Grable* could be used to remove countless cases. Any preemption case would qualify, as would any case presenting an alleged conflict with any federal regulation, policy or international agreement. Nearly any tort claim for environmental harm could be removed on the basis of inconsistency with some federal cost-benefit analysis. Defendants' arguments would entail that "'many (if not all) state tort claims that involve the balancing of interests and are brought against federally regulated entities would be removable', [but] '*Grable* does not sweep so broadly.'" App. 223 (Order) (quoting *San Mateo*, 294 F. Supp. 3d at 938). *See also Gonzales*, 636 F. Supp. 2d at 1195 (rejecting jurisdiction that would result in "a flood of cases"); *Bennett*, 484 F.3d at 911 ("mov[ing] a whole category of suits to federal court" was inconsistent with congressional judgment); *Ranjer Foods LC v. QFA Royalties LLC*, C.A. No. 13-cv-00256, 2013 U.S. Dist. LEXIS 18132, at *8 (D. Colo. Feb. 8, 2013) (rejecting removal based merely on the existence of "federally-regulated communications or activities").

Finally, *Grable* requires "judgments about congressional intent." 545 U.S. at 318 (internal quotation marks omitted). Here, Congress has not provided a claim

for damages against these Defendants and has expressly preserved state law. Neither the Clean Air Act, its implementing regulations, nor any other federal statute, provides a cause of action (much less an exclusive one) to deal with Defendants' conduct. *Infra* § II.D.1. This "combination" is an "important clue to Congress' conception of the scope of jurisdiction." *Grable*, 545 U.S. at 318; *cf. Gonzales*, 636 F. Supp. 2d at 1196.

D. The Clean Air Act does not completely preempt; it preserves state law.

The district court carefully considered and correctly rejected Defendants' argument that the Clean Air Act completely preempts Plaintiffs' state law claims. Complete preemption only exists if Congress intends to create federal jurisdiction over these claims. It clearly did not. The CAA does not address the conduct or relief at issue; even as to the conduct it addresses, it preserves state authority, refuting any argument that Congress intended to create an exclusive area of federal law.

Every court to consider whether the CAA completely preempts similar claims has held it does not. *San Mateo*, 294 F. Supp. 3d at 937-38; *Rhode Island*, 393 F. Supp. 3d at 149-50; *Baltimore*, 388 F. Supp. 3d at 561-63. Indeed, no court has held that the CAA completely preempts *any* state claims. *E.g. Her Majesty The Queen In Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332, 342-44 (6th Cir. 1989); *Keltner v. SunCoke Energy, Inc.*, No. 3:14-cv-01374, 2015 U.S.

Dist. LEXIS 67776, at *12 (S.D. Ill. May 26, 2015); *Cerny v. Marathon Oil Corp.*, No. SA-13-CA-562, 2013 U.S. Dist. LEXIS 144831, at *8-9 (W.D. Tex. Oct. 7, 2013); *Morrison v. Drummond Co.*, No. 2:14-CV-0406, 2015 U.S. Dist. LEXIS 35482, at *8 (N.D. Ala. Mar. 23, 2015). Here again, Defendants ask this Court to break new ground, contrary to governing law.

"Complete preemption is a rare doctrine, one that represents an extraordinary pre-emptive power." *Devon*, 693 F.3d at 1204 (quotation marks and internal citation omitted). The Supreme Court has recognized it "in only three areas": Section 301 of the Labor Management Relations Act, Section 502 of the Employee Retirement Income Security Act, and "actions for usury against national banks under the National Bank Act." *Id.* at 1204-05. It requires finding two distinct types of preemptive intent: (1) Congress must intend for federal law to preempt the state law at issue; and (2) it must intend to create jurisdiction by providing an exclusive federal cause of action to replace the preempted state law. *See id.* at 1205-06; *Ben. Nat'l Bank v. Anderson*, 539 U.S. 1, 9 & n.5 (2003) (complete preemption exists "only if Congress intended [the Act] to provide the exclusive cause of action" for specific claim).

"If Congress intends a preemption instruction completely to displace ordinarily applicable state law, and to confer federal jurisdiction thereby, it may be expected to make that atypical intention clear." *Empire*, 547 U.S. at 698.

Moreover, any "pre-emption analysis starts with the assumption that the historic police powers of the States are not to be superseded . . . unless that is the clear and manifest purpose of Congress." *Emerson v. Kan. City S. Ry. Co.*, 503 F.3d 1126, 1129 (10th Cir. 2007) (quotation marks omitted).

1. The CAA does not create an exclusive federal cause of action.

The Court should begin with the second step, whether Congress intended to create federal jurisdiction. *Devon*, 693 F.3d at 1205-06. Such intent cannot be found unless Congress creates an exclusive "federal remedy" that replaces state law and "vindicate[s] the same basic right or interest that would otherwise be vindicated under state law." *Id.* at 1207. The citizen suit provisions Defendants invoke do not do so.

First, under the CAA, Plaintiffs can only petition or challenge EPA regulations, or bring suit for injunctive relief against violators of EPA's emission limits, with civil penalties going to the federal government. 42 U.S.C. §§ 7604(a), (f)-(g). Plaintiffs here do not seek to regulate emissions, impose liability on emitters, or set emission standards. *See* App. 220, 227, 231 (Order); *contra* AB 35. The Act does not speak to the conduct at issue here – selling fossil fuels at levels that are negligent, concealing and misrepresenting their dangers, and creating a nuisance and trespass – or the relief – compensatory damages and the abatement of local harms. App. 228-29, App. 232 (Order).

This Court rejected an argument similar to Defendants' in *Devon*. 693 F.3d at 1207. There, Mosaic sued Devon for drilling an unauthorized well on federal land where Mosaic had mining rights. *Id*. at 1199-1200. Devon argued that Mosaic's state common law claims were completely preempted because Mosaic had "a private federal remedy under the APA against the [federal government]." *Id*. at 1206. This Court rejected that argument because APA relief "would not have compensated Mosaic for any damages," holding that "the availability of an administrative remedy *against the [government]* has no bearing on whether Mosaic's state law claims *against Devon* have been completely supplanted by a private federal cause of action." *Id.* at 1207 (quotation marks omitted). So too here. Defendants cite *Fayard v. Northeast Vehicle Services, LLC*, but it too *rejected* a nearly identical complete preemption argument because it was not "clear that the [statute] provide[d] redress for the kind of nuisance claims" at issue. 533 F.3d 42, 47-48 (1st Cir. 2008). CAA suits simply do not vindicate the same interests that Plaintiffs' tort and consumer protection claims do.

Second, with respect to the source emissions that it does regulate, the CAA "expressly preserves many state common law causes of action, including tort actions for damages." App. 228 (Order). *See also ExxonMobil Corp. v. EPA*, 217 F.3d 1246, 1254 (9th Cir. 2000) (CAA "explicitly protects the authority of the state to regulate air pollution"). The plain text of the citizen suit provision forecloses the

conclusion that Congress intended it to be an exclusive cause of action, even where plaintiffs seek relief from an emitter, which Plaintiffs do not. The savings clause states that the CAA does not "restrict any right which any person . . . 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). It further states that nothing in the Act "shall be construed to prohibit, exclude, or restrict any State, local, or interstate authority" – like Plaintiffs – "from . . . obtaining any judicial remedy or sanction in any State or local court . . . against the United States . . . under State or local law respecting control and abatement of air pollution." *Id; see also* 42 U.S.C. § 7416. Defendants' suggestion that the savings clause "is exceedingly narrow" is confounding. AB 37. Congress went out of its way to preserve state law *and* state court jurisdiction, even in cases against the federal government.

2. The CAA does not have ordinary preemptive force here.

Defendants must also establish that the CAA has ordinary preemptive force. As they have failed to show the required intent to create jurisdiction, the Court should leave any preemption decision to the state court. Nonetheless, Defendants' showing is inadequate.

The CAA does not expressly preempt. Defendants suggest it impliedly does because this case conflicts with EPA's regulation of greenhouse gas emissions. *See*

AB 35-37. EPA, however, regulates sources of emissions, like cars and factories. *See* 42 U.S.C. § 7411. Defendants point to nothing in the statute or regulations that addresses the sales at issue here; nor do they explain how this case is inconsistent with the regulatory scheme in place. *E.g.*, *Ouellette*, 479 U.S. at 494-96. They thus fall far short of their burden of overcoming the presumption against preemption in a case implicating such substantial local concerns. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996).

E. There is no federal enclave jurisdiction where Plaintiffs' claims arise exclusively on non-federal land.

The federal enclave doctrine only permits removal if actions "arise from incidents occurring" on federal lands deemed "federal enclaves." *See Akin v. Ashland Chem. Co.,* 156 F.3d 1030, 1034 (10th Cir. 1998). The key factor is the location of the plaintiff's injury. *See id.* at 1035 & n.5; *Baltimore,* 388 F. Supp. 3d at 566. The well-pleaded complaint rule governs the determination. *Firstenberg,* 696 F.3d at 1023. There is no federal jurisdiction here, because Plaintiffs' claims and injuries "are alleged to arise exclusively on non-federal land." App. 237-38 (Order).

Defendants falsely state that "plaintiffs claim to have suffered multiple injuries" in two national parks, AB 44, but one is never mentioned *at all* in the Complaint, and the other is "referenced only as a descriptive landmark" and "example of the regional trends." App. 237 (Order). The Complaint is clear:

Plaintiffs seek compensation *only* for injuries occurring "'within their respective jurisdictions'" and expressly "'**do not** seek damages or abatement for injuries to or occurring to federal lands.'" App. 237 (quoting Plaintiffs' complaint).[10] That ends the inquiry. *See also Rhode Island,* 393 F. Supp. 3d at 152; *Baltimore,* 388 F. Supp. 3d at 565; *Washington v. Monsanto Co*., 274 F. Supp. 3d 1125, 1132 (W.D. Wash. 2017).

Defendants suggest the standard is "whether events pertinent to liability" took place within a federal enclave, AB 44. None of the cases they cite apply that standard.[11] It does not matter: Defendants cite *no* "pertinent events" on federal enclaves.

III. There is no jurisdiction under the Outer Continental Shelf Lands Act.

Every court to consider Defendants' argument under OCSLA has rejected it. *See, e.g., San Mateo*, 294 F. Supp. 3d at 938-39; *Baltimore*, 388 F. Supp. 3d at 566-67; *Rhode Island*, 393 F. Supp. 3d at 151-52. OCSLA "define[s] a body of law

[10] *Fung v. Abex,* 816 F. Supp. 569, 571 (N.D. Cal. 1992) held that federal enclave jurisdiction existed where toxic exposure on a federal enclave was apparent from the face of complaint, despite plaintiff's failure to specify it.

[11] In *Rosseter v. Indus. Light & Magic*, the court held that "*all* pertinent events took place" in the federal enclave since "all alleged acts of discrimination took place" there. No. C 08-04545 WHA, 2009 U.S. Dist. LEXIS 5307 at *5-6 (N.D. Cal. Jan. 27, 2009) (emphasis added). *Accord Akin*, 156 F.3d at 1035 n.4 (place of exposure was "the singularly relevant fact" (quotation marks omitted)).

applicable to the seabed, the subsoil, and the fixed structures" on the OCS, *Rodrigue v. Aetna Cas. & Sur. Co.,* 395 U.S. 352, 355 (1969), which consists of "submerged lands," 43 U.S.C. § 1331. Federal courts only have jurisdiction over injuries arising *directly* out of physical activities on the OCS or disputes *directly* involving OCS activities. "[J]urisdiction under OCSLA makes little sense for injuries in a landlocked state that are alleged to be caused by conduct that is not specifically related to the OCS." App. 247 (Order).

OCSLA jurisdiction requires that "(1) the activities that caused the injury constituted an operation conducted on the [OCS] that involved the exploration and production of minerals, and (2) the case arises out of, or in connection with the operation." *In re Deepwater Horizon*, 745 F.3d 157, 163 (5th Cir. 2014) (quotation marks omitted). The district court rightly held that Plaintiffs' claims do not arise out of and are not connected to any OCS operations. App. 245 (Order). The challenged activities – the sale and deceptive promotion of fossil fuels – are not "operation[s] conducted on" the OCS. While Exxon's OCS oil production might qualify as an "operation," Defendants are not being sued for merely producing on the OCS. It is those broader activities – taken with knowledge about the consequences of unchecked fossil fuel use – that give rise to Plaintiffs' claims.

For jurisdiction, a case must "arise *directly* out of OCS operations." App. 245 (Order) (collecting cases). Although Defendants cherry-pick language to

suggest a more tenuous connection suffices, AB 46, the cited cases show the opposite. In *Tennessee Gas Pipeline v. Houston Casualty Insurance Co.,* 87 F.3d 150 (5th Cir. 1996), the court applied a "but for" test and found jurisdiction where a vessel *physically struck* "a platform secured to the [OCS]." *Id.* at 152, 155. At no point did the court suggest the test is whether OCS operations "contribute to the injuries." *Compare* AB 46 *with* App. 248 (Order) ("No case holds removal is appropriate if some fuels from the OCS *contribute* to the harm."). Another case concerned toxic exposure; although the plaintiff worked onshore, he "provided direct support" for OCS rigs, and "his work on and in support of the OCS structures and materials coming into the . . . land base provide[d] a sufficient connection." *Ronquille v. Aminoil Inc.,* No. 14-164, 2014 U.S. Dist. LEXIS 123224, at *8 (E.D. La. Sept. 4, 2014). *See also Laredo Offshore Constructors, Inc. v. Hunt Oil Co.,* 754 F.2d 1223, 1229 (5th Cir. 1985) (OCS platform construction contract was "intimately connected" with OCS operations); *EP Operating Ltd. P'ship v. Placid Oil Co.,* 26 F.3d 563, 570 (5th Cir. 1994) (partition action to determine ownership rights over pipeline on OCS floor).

That some of "ExxonMobil's oil was apparently sourced from the OCS does not create the required connection." App. 246 (Order). Indeed, a finding that jurisdiction lies whenever oil *sourced* from the OCS is some *part* of the conduct that creates injury hundreds of miles away would be an "absurd result" and

dramatically expand the statute's scope. App. 248 (Order). "No court has read OCSLA so expansively." App. 247 (Order). *Accord, e.g., Par. of Cameron v. Auster Oil & Gas Inc.,* No. 16-cv-530, 2018 U.S. Dist. LEXIS 78632, at *12 (W.D. La. Jan. 17, 2018); *Stutes v. Gulfport Energy Corp.,* No. 6:16-cv-01253, 2017 U.S. Dist. LEXIS 159395, at *40 (W.D. La. June 30, 2017); *Plains Gas Solutions, LLC v. Tenn. Gas Pipeline Co., LLC*, 46 F. Supp. 3d 701, 705 (S.D. Tex. 2014); *Fairfield Indus. v. EP Energy E&P Co., L.P.,* No. H-12-2665, 2013 U.S. Dist. LEXIS 196376, at *12-15 (S.D. Tex. May 2, 2013). At least one other court has refused to extend OCSLA jurisdiction to torts "that occurred entirely onshore . . . merely because some of the gas . . . originated on the OCS." *Targa Midstream Servs. LLC v. Crosstex Processing Servs. LLC,* No. H-14-2256, 2014 U.S. Dist. LEXIS 199746, at *12 (S.D. Tex. Nov. 25, 2014).

Defendants' suggestion – that if Plaintiffs succeed, damages would "substantially discourage production" on the OCS, AB 47 – was also rightly rejected. "[A] case cannot be removed under OCSLA based on speculative impacts; immediate and physical impact is needed." App. 248 (Order); *e.g.*, *Amoco Prod. Co. v. Sea Robin Pipeline Co.,* 844 F.2d 1202, 1210 (5th Cir. 1988) (contract dispute over OCS oil "necessarily and physically" had "immediate bearing on" production of particular OCS well).

CONCLUSION

Plaintiffs filed state law claims and no doctrine converts them into federal claims. Defendants' contrary arguments would federalize all manner of state claims, upending the traditional limits on federal jurisdiction and protections for state authority. This Court should affirm the district court's remand.

Dated: December 20, 2019

Respectfully submitted,

/s/ Sean Powers
Sean Powers
Marco Simons
Richard Herz[12]
Michelle Harrison
EarthRights International
1612 K Street N.W., Suite 401
Washington, D.C. 20006
Telephone: (202) 466-5188
Fax: (202) 466-5189
E-mail: sean@earthrights.org
E-mail:marco@earthrights.org
E-mail: rick@earthrights.org
E-mail: michelle@earthrights.org

Kevin S. Hannon
THE HANNON LAW FIRM, LLC
1641 Downing Street
Denver, CO 80218
Telephone: (303) 861-8800
Fax: (303) 861-8855
E-mail: khannon@hannonlaw.com

[12] Based in CT; admitted in NY; does not practice in DC's courts.

David Bookbinder
NISKANEN CENTER
820 First Street, NE, Suite 675
Washington, DC 20002
E-mail: dbookbinder@niskanencenter.org

CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I, Sean Powers, counsel for appellees – Board of County Commissioners of Boulder County, Board of County Commissions of San Miguel County, and the City of Boulder – and a member of the Bar of this Court, certify, pursuant to Federal Rule of Appellate Procedure 27(d)(2)(A), that the attached Brief of Appellees is proportionally spaced, has a typeface of 14 points or more, and contains 12,952 words.

December 20, 2019

/s/ Sean Powers

Sean Powers

CERTIFICATE OF DIGITAL SUBMISSION, ANTIVIRUS SCAN, AND PRIVACY REDACTIONS

I hereby certify, pursuant to the Tenth Circuit CM/ECF User's Manual that the attached Brief of Appellees, as submitted in digital form via the Court's electronic-filing system, has been scanned for viruses using Webroot SecureAnywhere (version 9.0.26.61, updated June 10, 2019) and, according to that program, is free of viruses. I also certify that any hard copies submitted are exact copies of the document submitted electronically, and that all required privacy redactions have been made.

December 20, 2019

/**s**/ Sean Powers

Sean Powers

CERTIFICATE OF SERVICE

I, Sean Powers, counsel for appellees – Board of County Commissioners of Boulder County, Board of County Commissions of San Miguel County, and the City of Boulder – and a member of the Bar of this Court, certify, that, on December 20, 2019, the attached Brief of Appellees was filed with the Clerk of the Court through the electronic-filing system. I further certify that all parties required to be served have been served.

December 20, 2019

/s/ Sean Powers

Sean Powers