ORAL ARGUMENT REQUESTED

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.)

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INTRODUCTION

Plaintiffs assert novel and sweeping claims that seek to hold defendants liable for the effects of climate change in their respective jurisdictions based on the lawful production, promotion, refining, marketing, and sale of fossil fuels not only in the United States, but throughout the world. Plaintiffs' alleged injuries result from greenhouse-gas emissions associated with the use of fossil fuels by billions of consumers worldwide, including plaintiffs themselves. Given the nature of plaintiffs' allegations, it is unsurprising that this case is removable to federal court on a number of grounds—most notably, on the ground that plaintiffs' claims arise under federal law. This lawsuit threatens to interfere with longstanding federal policies on matters of uniquely national importance, including energy policy, environmental protection, and foreign affairs. Despite plaintiffs' efforts artfully to plead their claims as novel state-law torts, federal jurisdiction exists over these claims.

Plaintiffs do little to refute that conclusion. Instead, they spend most of their brief rehashing the district court's flawed reasoning—and defendants have already explained why that reasoning falters. This Court should vacate the district court's order and remand the case so that it can proceed in federal court, where it belongs.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO REVIEW THE DISTRICT COURT'S ENTIRE REMAND ORDER

This Court has jurisdiction under 28 U.S.C. § 1447(d) to review "an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443." "To say that a district court's 'order' is reviewable is to allow appellate review of the *whole* order, not just particular issues or reasons." *Lu Junhong* v. *Boeing Co.*, 792 F.3d 805, 811 (7th Cir. 2015). The plain text of Section 1447(d) thus makes a district court's entire remand order reviewable in cases removed under Section 1442 or 1443—as the Fifth, Sixth, and Seventh Circuits have recognized. *See Mays* v. *City of Flint*, 871 F.3d 437, 442 (6th Cir. 2017); *Decatur Hospital Authority* v. *Aetna Health, Inc.*, 854 F.3d 292, 296 (5th Cir. 2017); *Lu Junhong*, 792 F.3d at 811. Because defendants premised removal in part on Section 1442, the federal-officer removal statute, this appeal is properly before the Court, and the Court is reviewing the district court's entire remand order, not simply the portion of the order addressing federal-officer removal.

Plaintiffs offer no compelling reason for this Court not to adopt the approach of the Fifth, Sixth, and Seventh Circuits, which is consistent with the Supreme Court's decision in *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199 (1996), as well as this Court's decision in *Coffey* v. *Freeport McMoran Copper & Gold*, 581 F.3d 1240 (2009), and is supported by the leading treatises

on federal jurisdiction, *see* 15A Charles A. Wright *et al.*, *Federal Practice and Procedure* § 3914.11, at 706 (2d ed. 2019) (Wright & Miller); 16 Daniel R. Coquillette *et al.*, *Moore's Federal Practice* § 107.156[2][g], at 107-527 (3d ed. 2019). Indeed, plaintiffs have no response at all to the Seventh Circuit's thorough decision in *Lu Junhong*, which explains why defendants' interpretation of Section 1447(d) best comports with the text and statutory purposes. As for the arguments that plaintiffs do make, they are unconvincing.

Plaintiffs first contend (Br. 9) that, before Congress passed the Removal Clarification Act of 2011, Pub. L. No. 112-51, 125 Stat. 545, the courts of appeals were uniform in their conclusion that the scope of appellate review under Section 1447(d) was limited to the ground for removal that permitted appeal. But the decisions from those courts either predated or ignored the Supreme Court's decision in *Yamaha*, which held that appellate jurisdiction under 28 U.S.C. § 1292(b) extended to "any issue fairly included within" an interlocutory certified order because the statute spoke in terms of the "*order* certified" and not "the particular question formulated by the district court." 516 U.S. at 205.

Plaintiffs next cite (Br. 9) another unpublished opinion from this Court concluding that the scope of appellate review under Section 1447(d) is limited to the specific ground that permitted appeal. *See Kansas ex rel. Six* v. *Price*, Civ. No. 09-3181, 2009 U.S. App. LEXIS 29869 (Dec. 31, 2009). But again, this

Court routinely declines to follow unpublished decisions that are not persuasive. *See, e.g.*, *Allen* v. *United Services Automobiles Association*, 907 F.3d 1230, 1293 n.5 (2018). The decision in *Six* is in that category, because it contradicts Section 1447(d)'s plain language, fails to mention *Yamaha* or *Coffey*, and predates the Removal Clarification Act.

Plaintiffs also argue (Br. 9-10) that the Court should discount the Fifth and Sixth Circuits' decisions. They suggest that *Mays*, *supra*, carries no weight because the issue was not briefed by the parties in that case. If that is plaintiffs' position, then they cannot rely on *City of Walker* v. *Louisiana*, 877 F.3d 563 (5th Cir. 2017), in which the parties did not fully brief the scope of appellate review under the exceptions in Section 1447(d). That explains why the *Walker* court limited its discussion of the issue to dicta in a footnote. *See id.* at 566 n.2. The *Mays* court, by contrast, incorporated by reference *Lu Junhong*'s comprehensive analysis. *See Mays*, 871 F.3d at 442. And in *Decatur Hospital*, *supra*, the Fifth Circuit expressly stated that the Seventh Circuit's analysis from *Lu Junhong* was correct, even if an earlier Fifth Circuit decision suggested otherwise. *See* 854 F.3d at 296-297.

Plaintiffs finally cite (Br. 10) a slew of recent decisions from other courts of appeals which they say "affirm" the majority rule. Yet those decisions are mostly unpublished opinions from courts with binding precedent predating *Lu Junhong*'s comprehensive analysis, the Removal Clarification Act, and in some

cases even *Yamaha*. This Court should decline to follow those cases and instead should conclude that it has jurisdiction under Section 1447(d) to review the district court's entire remand order.

II. PLAINTIFFS' CLAIMS WERE PROPERLY REMOVED

This case is removable on a number of grounds, all of which are properly before this Court on appeal. The district court erred in rejecting those grounds, and plaintiffs' efforts to defend the district court's order are unpersuasive.

A. Removal Was Proper Because Plaintiffs' Claims Arise Under Federal Common Law

A defendant may remove a case to federal court if the plaintiffs' claims arise under federal common law. *See* 28 U.S.C. §§ 1331, 1441(a); *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 100 (1972). The issues to which federal common law applies "include[] the general subject of environmental law and specifically include[] ambient or interstate air and water pollution," *i.e.*, "transboundary pollution suits." *Native Village of Kivalina* v. *ExxonMobil Corp.*, 696 F.3d 849, 855 (9th Cir. 2012); *see American Electric Power Co.* v. *Connecticut*, 564 U.S. 410, 419 (2011). That describes plaintiffs' claims perfectly: those claims are based on interstate and international emissions of greenhouse gases over the course of decades, resulting in part from the use of fossil-fuel products produced or sold by defendants and consumed throughout the world. Federal common law therefore governs plaintiffs' claims, permitting removal.

Plaintiffs offer two responses to that straightforward syllogism. First, they contend that removal under these circumstances would violate the well-pleaded complaint rule. Second, plaintiffs argue that federal common law does not govern their claims in any event. Plaintiffs are mistaken on both counts.

1. Plaintiffs' primary argument (Br. 20-24) is that federal jurisdiction cannot rest on "unpleaded federal common law." *Id.* at 20. By that, plaintiffs apparently mean that, if the complaint does not affirmatively invoke federal common law, then federal jurisdiction does not exist—even if federal common law in fact provides the rule of decision for the claims asserted. To hold otherwise, plaintiffs say, would violate the well-pleaded complaint rule. That is incorrect.

As the Supreme Court has long recognized, if the "dispositive issues stated in the complaint require the application of federal common law," the action "arises under" federal law for purposes of the federal-question jurisdiction statute, 28 U.S.C § 1331. *Milwaukee*, 406 U.S. at 100. And if jurisdiction is present under that statute, removal from state court is permitted. *See* 28 U.S.C. § 1441(a).

Whether a plaintiff claims to rely on state law is not dispositive to the jurisdictional analysis. *See* Br. of Appellants 18 (collecting cases). And that only makes sense. Whenever a plaintiff raises a common-law claim, a threshold choice-of-law question arises: which sovereign's law supplies the rule of

decision for that claim? *See, e.g.*, *Gorsuch, Ltd., B.C.* v. *Wells Fargo National Bank Association*, 771 F.3d 1230, 1236 n.7 (10th Cir. 2014). That is especially true where, as here, the complaint pleads common-law claims without asserting under which sovereign's law those claims arise. *See* App. 173-182. While the inquiry typically turns on which *State's* common law governs the claim, it can also turn on whether *federal* law governs the claim. *See United States* v. *Standard Oil Co.*, 332 U.S. 301, 307-309 (1947); *United States* v. *Swiss American Bank, Ltd.*, 191 F.3d 30, 42-44 (1st Cir. 1999). That is not merely a question of pleading; it is a substantive inquiry for a court to resolve based on the federal standard for determining whether federal common law applies. *See* Br. of Appellants 18-22; pp. 8-13, *infra*. If federal common law does govern the claim at issue, then federal jurisdiction is present. *See Milwaukee*, 406 U.S. at 100.

That approach is perfectly consonant with the well-pleaded complaint rule. Under that rule, federal jurisdiction is present only when "the plaintiff's statement of his own cause of action shows that it is based on federal law." *Salzer* v. *SSM Health Care of Oklahoma Inc.*, 762 F.3d 1130, 1134 (10th Cir. 2014). Yet that is exactly what defendants are asserting: based solely on the allegations in the complaint, federal common law supplies the rule of decision for plaintiffs' common-law claims. And because a plaintiff cannot "block removal" by attempting to "disguise [an] inherently federal cause of action,"

Wright & Miller § 3722.1, at 131-132, the well-pleaded complaint rule is satisfied. Defendants are decidedly not asserting that removal rests on any preemption defense. *See* Br. of Appellees 21.

To be sure, in some circumstances a plaintiff can "avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 392 (1987). For example, a plaintiff could assert only claims under a state employment-discrimination statute and not claims under Title VII. *See, e.g.*, *Rains* v. *Criterion Systems, Inc.*, 80 F.3d 339, 344 (9th Cir. 1996). But here, plaintiffs cannot assert common-law claims that "exclusive[ly] re[ly] on state law," *Caterpillar*, 482 U.S. at 392, for the simple reason that state common law *cannot govern* torts concerning interstate pollution. A claim is not well-pleaded under state law where the very nature of the claim goes beyond the authority of the State to regulate. Because plaintiffs' claims must be "resolved by reference to federal common law," *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 488 (1987), they necessarily arise under federal law, and the "well-pleaded complaint rule does not bar removal." *California* v. *BP p.l.c.*, Civ. No. 17-6011, 2018 WL 1064293, at *5 (N.D. Cal. Feb. 27, 2018) (citing *Wayne* v. *DHL Worldwide Express*, 294 F.3d 1179, 1184 (9th Cir. 2002)), *appeal pending*, No. 18-16663 (9th Cir.).

2. Plaintiffs concede that "true interstate disputes require application of federal common law." Br. 26 (citation omitted). And they do not dispute

that the Supreme Court in *American Electric Power*, *supra*, and the Ninth Circuit in *Kivalina*, *supra*, applied federal common law to the climate-change-related claims before them. Instead, plaintiffs offer a variety of reasons why, in their view, "*this* case simply do[es] not fall within the narrow boundaries of the recognized federal common law of interstate pollution." Br. 27. Plaintiffs are wrong.

a. Plaintiffs primarily contend that federal common law does not govern here because this is not a lawsuit "brought by one State" to "control or enjoin out-of-state emitters." Br. 26, 27. But federal common law can apply even in suits in which neither a State nor the federal government is a party. *See*, *e.g.*, *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 511 (1988); *Helfrich* v. *Blue Cross & Blue Shield Association*, 804 F.3d 1090, 1095-1104 (10th Cir. 2015); *Sam L. Majors Jewelers* v. *ABX, Inc.*, 117 F.3d 922, 929 (5th Cir. 1997). And if anything, this lawsuit "invade[s] . . . sovereign prerogatives" more, not less, than a typical suit by a State against an out-of-state actor. Br. of Appellees 27. Here, three local governments are attempting to use state law to impose what is in effect a debilitating tax on the production and sale of fossil fuels across the Nation and around the world. That is "an effective veto over out-of-state acts" and implicates the sovereign prerogatives of *all* fifty States and the federal government. *Id.* at 28.

That plaintiffs are seeking "monetary remedies" instead of injunctive relief makes no difference. Br. of Appellees 27-28. Plaintiffs' pleadings belie any notion that they seek damages *qua* damages; instead, they are seeking a monetary award as a vehicle for regulating defendants' conduct. *See Ouellette*, 479 U.S. at 498 n.19. They accuse defendants, for example, of engaging in "unchecked production, promotion, refining, marketing and sale of fossil fuels," as well as "unabated" fossil-fuel activities, and warn that "[d]efendants plan to increase their fossil fuel activities in the future." App. 74, 77, 171. In so doing, plaintiffs exemplify the maxim that "[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct." *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959); *see also*, *e.g.*, *Kurns* v. *Railroad Friction Products Corp.*, 565 U.S. 625, 637 (2012).

Nor is it consequential that plaintiffs have "fixated on an earlier moment in the train of industry"—production or sales rather than emissions. *California*, 2018 WL 1064293, at *4. The complaint still contains more than 80 references to greenhouse-gas "emissions," *see*, *e.g.*, App. 13—an implicit recognition that, absent those emissions, plaintiffs' claims would not exist. Because this action is a classic "transboundary pollution suit[]," *Kivalina*, 696 F.3d at 855, federal common law governs.

The Second Circuit's decision in *In re Agent Orange Product Liability Litigation*, 635 F.2d 987 (1980), does not require a contrary result. There, the

court declined to fashion a federal common-law rule governing manufacturer liability to veterans for personal injury because of Agent Orange exposure. *See id.* at 987, 993. That was largely because, in the court's view, the federal government had not yet expressed a clear policy on how to balance the welfare of veterans with the military's need to obtain materials from suppliers. *See id.* at 994-995. This case is different. To begin with, the Supreme Court has already determined that interstate pollution "is a matter of federal, not state, law" and "should be resolved by reference to federal common law." *Ouellette*, 479 U.S. at 488. In addition, through the Clean Air Act, Congress has already "entrust[ed]" the Environmental Protection Agency with the "complex balancing" of "competing interests" involved in determining greenhouse-gas emissions levels. *American Electric Power*, 564 U.S. at 427. Given that Congress has already selected a federal agency to perform the precise balancing called for by plaintiffs' public-nuisance claims, it would be odd for state law to govern those claims here.

b. Plaintiffs further contend (Br. 29-31) that, because *American Electric Power* and *Kivalina* held that the Clean Air Act displaced federal common-law remedies, state law fills the void, and removal based on federal common law is impermissible. For starters, whether federal common law has been displaced is relevant to the merits inquiry of whether plaintiffs can state a claim for relief, not the jurisdictional inquiry of whether federal common law

governs plaintiffs' claims. *See Standard Oil*, 332 U.S. at 316; *City of Oakland* v. *BP p.l.c.*, 325 F. Supp. 3d 1017, 1028 (N.D. Cal. 2018), *appeal pending*, No. 18-16663 (9th Cir.). Even more importantly, plaintiffs' approach would turn the rule of *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), on its head. Federal common law governs claims implicating "uniquely federal interests" that make it "inappropriate for state law to control." *Texas Industries, Inc.* v. *Radcliffe Materials, Inc.*, 451 U.S. 630, 640-641 (1981). That Congress has so comprehensively addressed the subject so as to leave no room for *federal* common-law remedies cannot mean that *state* common-law remedies suddenly become viable.

Plaintiffs also suggest (Br. 29-30) that *American Electric Power* and *Kivalina* left open the possibility that some climate-change-related claims (such as theirs) might be governed by state law. Not so. The determination that federal common law applies to a cause of action necessarily means that state law does not. *Milwaukee*, 451 U.S. at 313 n.7. By concluding that climate-change-related public-nuisance claims are governed by federal common law, *American Electric Power* and *Kivalina* necessarily established that state law cannot be applied to such claims, however they are packaged.

In *American Electric Power*, the Supreme Court left "open for consideration" only the narrow question whether the Clean Air Act preempted state-

law nuisance claims based on "the law of each State where the defendants operate power plants." 564 U.S. at 429. Plaintiffs, by contrast, have pleaded state-law claims that challenge fossil-fuel production, sales, and related emissions around the globe. *Kivalina* is similarly unhelpful to plaintiffs: although the concurrence mused that the plaintiff could refile its state-law claims in state court, *see* 696 F.3d at 866 (Pro, J.), the viability of those claims was neither presented to, nor addressed by, the majority.[1]

B. Removal Was Proper Because Plaintiffs' Claims Raise Disputed And Substantial Federal Issues

Even if federal common law did not govern plaintiffs' claims, this suit would still be removable under *Grable & Sons Metal Products, Inc.* v. *Darue Engineering & Manufacturing*, 545 U.S. 308 (2005). By alleging that defendants' production and promotion of fossil fuels is a public nuisance, plaintiffs are necessarily contending that the amount of fuels that defendants have produced, and the amount of greenhouse-gas emissions resulting from the combustion of those fuels, is unreasonable. The adjudication of that question raises substantial and disputed federal issues, permitting removal to federal court. Plaintiffs' contrary arguments lack merit.

[1] Plaintiffs argue (Br. 29) that ExxonMobil cannot now assert that federal common law governs this lawsuit because it contended in *Kivalina* that federal common law does not permit the recovery of damages. The Ninth Circuit did not adopt that position. *See Kivalina*, 696 F.3d at 855.

1. Plaintiffs' primary contention is that no federal issue is an "essential element" of their claims. Br. 35. Federal jurisdiction will lie, however, if "plaintiff's claims will directly and significantly affect American foreign relations." *Republic of Philippines* v. *Marcos*, 806 F.2d 344, 352 (2d Cir. 1986). Here, plaintiffs' claims "implicate countless foreign governments and their laws and policies." *City of New York* v. *BP p.l.c.*, 325 F. Supp. 3d 466, 478 (S.D.N.Y. 2018), *appeal pending*, No. 18-2188 (2d Cir.). A judgment deeming fossil-fuel production a public nuisance would directly interfere with the United States' foreign policy of resisting reductions in greenhouse-gas emissions that are not accompanied by enforceable commitments from other nations to achieve similar reductions. *See* S. Res. 98, 105th Cong., 1st Sess. (1997); Br. of Appellants 28-30.

In addition, adjudicating plaintiffs' public-nuisance claims would require a court to decide whether any alleged harms caused by defendants' conduct in extracting, refining, and promoting fossil fuels outweigh the enormous societal benefits of those activities. *See* Restatement (Second) of Torts §§ 826-831 (1979). Yet the federal government has already conducted such weighing of the costs and benefits of fossil-fuel production and use. *See*, *e.g.*, 42 U.S.C. § 13384; 43 C.F.R. § 3162.1(a). Indeed, the federal government "affirmatively promotes fossil fuel use in a host of ways, including beneficial tax provisions, permits for imports and exports, subsidies for domestic and overseas projects,

and leases for fuel extraction on federal land." *Juliana* v. *United States*, No. 18-36082, 2020 WL 254149, at *4 (9th Cir. Jan. 17, 2020). Plaintiffs offer no explanation for how their public-nuisance claims can be resolved *without* second-guessing the balance already struck by federal law.

2. With respect to whether the federal issues implicated are also substantial, plaintiffs do not dispute the "importance . . . to the federal system as a whole," *Gunn* v. *Minton*, 568 U.S. 251, 260 (2013), of resolving whether domestic fossil-fuel producers can be held liable for the alleged effects of global warming notwithstanding the Nation's longstanding policy of addressing global warming through multilateral agreements. Nor do they quibble with the importance of determining whether the social costs of fossil-fuel production outweighs its benefits. Instead, they contend that the federal issues involved are insubstantial because "no federal law or decision is disputed or central to this case." Br. 41. That is not only untrue, *see* p. 13-14 *supra*, but also irrelevant. "A case should be dismissed for want of a substantial federal question only when the federal issue is (1) wholly insubstantial or obviously frivolous, (2) foreclosed by prior cases which have settled the issue one way or another, or (3) so patently without merit as to require no meaningful consideration." *Nicodemus* v. *Union Pacific Corp.*, 440 F.3d 1227, 1236 (10th Cir. 2006) (citation omitted). Plaintiffs do not, and cannot, argue that this case satisfies any of those criteria.

3. Finally on this point, plaintiffs contend that permitting removal under these circumstances would "disrupt the federal/state balance." Br. 43. But the "sovereign prerogatives" to force reductions in greenhouse-gas emissions are already "lodged in the [f]ederal [g]overnment." *Massachusetts* v. *EPA*, 549 U.S. 497, 519 (2007). The "balance of federal and state judicial responsibilities" thus requires a federal forum. *Grable*, 545 U.S. at 314.

Plaintiffs respond that "[n]othing suggests Congress intended federal courts" to exercise jurisdiction over cases such as this one. Br. 43-44. Quite the opposite. Congress has made clear that challenges to federal emissions standards under the Clean Air Act belong in federal court. *See, e.g.*, 42 U.S.C. § 7607(b). The Act was designed to "channel[] review of final EPA action exclusively to the court of appeals, regardless of how the grounds for review are framed." *California Dump Truck Owners Association* v. *Nichols*, 784 F.3d 500, 506 (9th Cir. 2015) (emphasis and citation omitted). Similarly, Congress vested the federal judiciary with jurisdiction over private enforcement actions under the Act. *See* 42 U.S.C. § 7604(a).

Plaintiffs also predict that exercising jurisdiction in cases such as this one will open the floodgates to "any case presenting an alleged conflict with any federal regulation, policy, or international agreement." Br. 44. That concern is misplaced. Plaintiffs' claims "address the national and international

geophysical phenomenon of global warming," *California*, 2018 WL 1064293, at *2—hardly a common scenario in run-of-the-mill tort suits.

C. Removal Was Proper Because Federal Law Would Completely Preempt Plaintiffs' Claims If They Arose Under State Law

Plaintiffs' claims are also completely preempted by federal law—in particular, the Clean Air Act. The Act has been the source of "extensive[]" nationwide emissions regulations, *North Carolina ex rel. Cooper* v. *Tennessee Valley Authority*, 615 F.3d 291, 298 (4th Cir. 2010), and, in conjunction with the Administrative Procedure Act, outlines specific and exclusive procedures for parties—including state and local governments—to challenge nationwide emissions standards in federal court. *See* Br. of Appellants 35. Plaintiffs bypassed those procedures by filing this action in state court, seeking to impose restrictions on interstate and international greenhouse-gas emissions resulting from the combustion of defendants' fossil fuels. Plaintiffs' arguments that they may nevertheless proceed with this lawsuit are unavailing.

Plaintiffs begin by reiterating the district court's conclusion that the Clean Air Act's citizen-suit provisions cannot support complete preemption because they do not provide for damages. *See* Br. 47-48. But as this Court has explained, "mirror-like symmetry between the federal and state remedies is not required to support a determination of complete preemption." *Devon Energy Production Co.* v. *Mosaic Potash Carlsbad, Inc.*, 693 F.3d 1195, 1207 (2012). All that is necessary is that the statute "vindicate the same basic right

or interest" as state tort law in this case. *Id.* That is true here: the Act's citizen-suit provisions permit plaintiffs to challenge permissible greenhouse-gas emissions levels, which is precisely what plaintiffs aim to do through this action. *See* p. 10, *supra*; *see also Garmon*, 359 U.S. at 247.

Devon is distinguishable on that ground. There, the plaintiff sued an energy company for damages caused by the unapproved drilling of a well on land owned by the Bureau of Land Management. *See Devon*, 693 F.3d at 1198-1200. This Court understandably concluded that the availability of an action under the Administrative Procedure Act against the agency could not support a preemption argument: the plaintiff's "interest in being free from harm from parties drilling without first obtaining the [agency's] approval" was "too far removed from the interest that would be vindicated by an APA proceeding—*viz.*, an interest in ensuring . . . that the [agency] properly manages the [land]." *Id.* at 1207. Here, however, plaintiffs' interest in ensuring that greenhouse-gas emissions levels remain low enough to avoid harm from global climate change is an interest protected by the Clean Air Act's procedures.

Plaintiffs next argue that the Clean Air Act cannot completely preempt state law because the Act's saving clause "expressly preserves many state common law causes of action." Br. 48 (citation omitted); *see* 42 U.S.C. § 7604(e). The narrowly worded saving clause, however, merely permits state regulation of *local* emissions, rather than the interstate and international

emissions at issue here. After all, the Supreme Court has already held that state law cannot extend to pollution sources outside of a State's territorial jurisdiction. *See Ouellette*, 479 U.S. at 493-494; *see also Province of Ontario* v. *City of Detroit*, 874 F.2d 332, 342-343 (6th Cir. 1989) (concluding that the Clean Air Act's saving clause preserved actions under state environmental law against in-state point sources).

Plaintiffs finally contend (Br. 49-50) that defendants have not overcome the presumption that the Clean Air Act lacks ordinary preemptive force. Yet the Supreme Court already determined that the Clean Water Act could preempt a state-law nuisance claim, *see Ouellette*, 479 U.S. at 494, and "there is little basis for distinguishing the Clean Air Act from the Clean Water Act" in that regard. *Bell* v. *Cheswick Generating Station*, 734 F.3d 188, 196 (3d Cir. 2013) (citation omitted). Accordingly, when state common law threatens to regulate emissions generated beyond state borders, the Clean Air Act preempts that law. *See Cooper*, 615 F.3d at 298. That is precisely what plaintiffs are seeking to do through this lawsuit. [2]

[2] Plaintiffs highlight (Br. 46) that the Supreme Court has applied complete preemption to only three statutes, yet neglect to mention the decisions of lower federal courts holding that other statutes have complete preemptive effect. *See*, *e.g.*, *In re Miles*, 430 F.3d 1083, 1092 (9th Cir. 2005) (Section 303(i) of the Bankruptcy Code).

D. Removal Was Proper Under The Federal-Officer Removal Statute

The federal-officer removal statute provides an additional source of jurisdiction over plaintiffs' claims. *See* 28 U.S.C. § 1442(a)(1). Plaintiffs' suit is against "person[s] acting under" officers of the United States; those persons advance colorable federal claims; and the charged conduct—fossil-fuel extraction—occurred at the direction of the federal officers. *Id.* Plaintiffs' contrary arguments lack merit.

1. Plaintiffs first contend (Br. 11-16) that ExxonMobil was not "acting under" a federal officer when it extracted oil from the outer continental shelf. *See Greene* v. *Citigroup, Inc.*, Civ. No. 99-1030, 2000 WL 647190, at *2 (10th Cir. May 19, 2000). That is incorrect. ExxonMobil and its affiliates are participants in a decades-long leasing program with the Department of the Interior. *See* App. 38-40. As a government contractor, ExxonMobil is *obligated* to "develop[] the leased area" diligently so as to "maximiz[e] the ultimate recovery of hydrocarbons from the leased area." App. 64 (§ 10). All drilling takes place only "in accordance with an approved exploration plan (EP), development and production plan (DPP) or development operations coordination document (DODC) [as well as] approval conditions," all of which are subject to extensive review and approval by federal authorities and must conform to "diligence" and "sound conservation practices." App. 64 (§§ 9-10).

The cases cited by plaintiffs in which courts have found federal-officer jurisdiction to be present are not to the contrary. *See* Br. 12-14. Those cases merely provide examples of relationships between officers and federal contractors that are *sufficient* to establish jurisdiction; they do not demonstrate that equivalent relationships are *necessary* to do so. *See Goncalves* v. *Rady Children's Hospital San Diego*, 865 F.3d 1237, 1245 (9th Cir. 2017). In any event, contrary to plaintiffs' suggestion (Br. 13-14), the federal government did not contract with ExxonMobil and its affiliates to produce "generic," "off-the-shelf" products. Rather, ExxonMobil was specifically directed to *extract oil* from the outer continental shelf, in accordance with the national policy of utilizing this "vital natural resource reserve." 43 U.S.C. § 1332(3). And while plaintiffs posit (Br. 13) that the government's actual use of the oil extracted from the outer continental shelf, rather than a right of first refusal, is necessary for the government to have provided the necessary level of control or guidance over ExxonMobil's activity, they offer no explanation for why that is so.

Citing *Watson* v. *Philip Morris Cos.*, 551 U.S. 142 (2007), plaintiffs next assert (Br. 14-15) that the requirements imposed on ExxonMobil by the leases with the federal government demand no more than compliance with federal law. But the "compliance" to which the Supreme Court referred in *Watson*

differed greatly from the requirements imposed on ExxonMobil here. In *Watson*, the Court cited as examples of mere "compliance" "[t]axpayers who fill out complex federal tax forms" and "airline passengers who obey federal regulations prohibiting smoking." 551 U.S. at 152. ExxonMobil, by contrast, is obligated to follow detailed specifications concerning the extraction of oil pursuant to a contract. *See* App. 64.

2. Plaintiffs next contend (Br. 16-18) that defendants have not established the requisite "causal nexus" between the claims alleged and actions taken under federal direction. *See*, *e.g.*, *Greene*, 2000 WL 647190, at *2. In particular, plaintiffs fault defendants for not establishing that their activities taken at government direction specifically caused the harms of which they complain. But that is not the test. "[D]emanding a showing of a specific government direction . . . [goes] beyond what § 1442(a)(1) requires, which is only that the charged conduct *relate to* an act under color of federal office." *Sawyer* v. *Foster Wheeler LLC*, 860 F.3d 249, 258 (4th Cir. 2017); *see also*, *e.g.*, *Papp* v. *Fore-Kast Sales Co.*, 842 F.3d 805, 813 (3d Cir. 2016). Taking plaintiffs' causal theory as true, *see Jefferson County* v. *Acker*, 527 U.S. 423, 432 (1999), defendants' "worldwide" supply of fossil fuels—which necessarily encompasses activities taken at federal direction—caused the injuries of which

plaintiffs complain. *See* App. 92. While defendants dispute that theory, a defendant need not admit causation in order to effectuate removal. *See Maryland* v. *Soper*, 270 U.S. 9, 32-33 (1926).

3. Plaintiffs next challenge (Br. 16-18) defendants' assertion of colorable federal defenses. *See Greene*, 2000 WL 647190, at *2. Plaintiffs first complain (Br. 18) that defendants have not fully developed those defenses in their briefing before this Court. But that is unsurprising given the early stage of the litigation: the parties have engaged in no factual development or merits briefing on plaintiffs' claims. Plaintiffs forget that the purpose of the federal-officer removal statute is to "secure that the validity of the [federal] defense will be tried in federal court," *Isaacson* v. *Dow Chemical Corp.*, 517 F.3d 135, 139 (2d Cir. 2008)—not to permit removal only in cases in which the defendant has *already* established that the defense is meritorious.[3]

Plaintiffs also fault defendants for not establishing that the articulated federal defenses "arise[] out of the [federal officer's] duty to enforce federal law." Br. 18 (quoting *Wyoming* v. *Livingston*, 443 F.3d 1211, 1224 (10th Cir.

[3] To the extent that the Court desires a fuller articulation of the merits of defendants' federal defenses, it may judicially notice their recently filed motion to dismiss for failure to state a claim in the parallel state-court proceeding. *See St. Louis Baptist Temple, Inc.* v. *Federal Deposit Insurance Corp.*, 605 F.2d 1169, 1172 (10th Cir. 1979); Motion to Dismiss for Failure to State a Claim 6-21, *Board of County Commissioners of Boulder County* v. *Suncor Energy (U.S.A.), Inc.*, Civ. No. 18-30349 (Boulder Cty. Dist. Ct. Dec. 9, 2019).

2006)). But no such requirement exists. The statute requires only the "averment of *a* federal defense," *Mesa* v. *California*, 489 U.S. 121, 139 (1989) (emphasis added), which includes federal preemption—a defense that arises out of the Supremacy Clause's operation on state law, not any duty imposed on the federal officer. *See Pretlow* v. *Garrison*, 420 Fed. Appx. 798, 801 (10th Cir. 2011); *Goncalves*, 865 F.3d at 1249. Regardless, defendants' invocation of the government-contractor defense passes even the plaintiffs' heightened test. *See Sawyer*, 860 F.3d at 255.

E. Removal Was Proper Because This Action Arises In Part From Activities In Federal Enclaves

Federal jurisdiction also exists because plaintiffs' claims "arise from incidents occurring in federal enclaves." *Akin* v. *Ashland Chemical Co.*, 156 F.3d 1030, 1034 (10th Cir. 1998). Specifically, plaintiffs allege that defendants' conduct has contributed to an insect infestation across Rocky Mountain National Park; an increased flood risk in the Uncompahgre National Forest; and "heat waves, wildfires, droughts, and floods" in both locations. App. 73, 80, 111, 116, 127.

Plaintiffs contend (Br. 50) that those allegations do not support jurisdiction under the federal-enclaves doctrine because one enclave is not expressly "mentioned" in the complaint and the other is merely "referenced." But as defendants already explained, *see* Br. of Appellants 44, that is of no moment. "Failure to indicate the federal enclave status and location" of relevant events

"will not shield plaintiffs from the consequences of . . . federal enclave status." *Fung* v. *Abex Corp.*, 816 F. Supp. 569, 571 (N.D. Cal. 1992). Plaintiffs attempt to distinguish *Fung* on the ground that it "was apparent from the face of the complaint" in that case that the "toxic exposure" alleged occurred in a federal enclave. Br. 51 n.10. But this case is no different: the complaint makes clear that plaintiffs are seeking damages for harm allegedly caused by defendants in federal enclaves. *See* App. 73, 80, 111, 116, 127.

Next, plaintiffs assert (Br. 51) that their disclaimer of "damages or abatement for injuries" occurring on federal land precludes jurisdiction. But the relevant inquiry is whether events pertinent to liability took place within a federal enclave. *See Akin*, 156 F.3d at 1034. That is obviously the case here, given that the complaint cites the alleged harms in federal enclaves as a basis for the asserted claims.

F. Removal Was Proper Because Plaintiffs' Claims Arise Out Of ExxonMobil's Operations On The Outer Continental Shelf

This case is also removable under the Outer Continental Shelf Lands Act (OCSLA). *See* 43 U.S.C. § 1349(b). Plaintiffs do not dispute that defendants engage in operations on the outer continental shelf. *See* Br. 52. Indeed, ExxonMobil and its affiliates have explored and recovered oil and gas on the shelf for decades. *See* App. 92-93. Nor do plaintiffs dispute that their claims targeting defendants' worldwide fossil-fuel business necessarily sweep in those operations. *See* Br. 52. After all, plaintiffs allege that ExxonMobil has

released "billions of tons of the excess greenhouse gas emissions in the atmosphere," and they take issue with *all* of ExxonMobil's activities that allegedly "exacerbated dangerous alterations in the climate." App. 76, 173.

Instead, plaintiffs argue (Br. 52-53) that defendants have failed to establish a sufficient causal connection between the alleged claims and defendants' operations on the outer continental shelf. But the connection necessary is not nearly as onerous as plaintiffs suggest. OCSLA grants federal courts jurisdiction over all actions "arising out of, or in connection with" operations on the outer continental shelf. 43 U.S.C. § 1349(b)(1). That language is "broad," *Baker* v. *Hercules Offshore, Inc.*, 713 F.3d 208, 213 (5th Cir. 2013), and Congress "intended" for it to "extend[] to the entire range of legal disputes that it knew would arise relating to resource development" on the outer continental shelf, *Laredo Offshore Constructors, Inc.* v. *Hunt Oil Co.*, 754 F.2d 1223, 1228 (5th Cir. 1985).

Even if plaintiffs were correct that some "direct" connection is necessary, *see* Br. 52, they can hardly contend that such a connection is absent. Plaintiffs' own complaint alleges that "[t]he emissions traceable to [ExxonMobil's] products . . . were a substantial factor in bringing about and aggravating the resulting climate change impacts and will continue to contribute to [those] impacts for the foreseeable future." App. 160. In other words, plain-

tiffs allege that ExxonMobil's products—many of which derive from operations on the outer continental shelf—are a "but for" cause of their injuries. *See* Dan B. Dobbs *et al.*, *The Law of Torts* § 189, at 631-632 (2d ed. 2019). While defendants dispute that contention, federal jurisdiction is present under that theory as alleged. *See*, *e.g.*, *Firstenberg* v. *City of Santa Fe*, 696 F.3d 1018, 1023 (10th Cir. 2012).

Plaintiffs respond that it would be "absurd" to conclude that "jurisdiction lies whenever oil *sourced* from the [outer continental shelf] is some *part* of the conduct that creates injury." Br. 53-54. But the Court need not reach such a conclusion to hold that jurisdiction under OCSLA is present. This is far from a typical tort suit; plaintiffs are instead making the novel argument that *all* of the fossil fuels produced by defendants' over at least the last *60 years* have resulted in emissions that, in conjunction with all other fossil-fuel emissions around the world, caused global warming. App. 102-106, 159-165. To find jurisdiction present under OCSLA here, the Court need only conclude that plaintiffs' sweeping theory of liability necessarily depends on oil-exploration and production activities on the outer continental shelf. Indeed, to the extent that plaintiffs are suggesting that it is impossible to determine whether fossil fuels derived from any particular location constitute a but-for cause of their injuries, they are simply illustrating why their novel lawsuit ultimately cannot succeed.

Finally, plaintiffs challenge as "speculative" (Br. 54) defendants' assertion that this suit "threatens to impair the total recovery of the federally[] owned materials from the reservoir or reservoirs underlying" the outer continental shelf. *See Amoco Production Co.* v. *Sea Robin Pipeline Co.*, 844 F.2d 1202, 1210 (5th Cir. 1988). One need not speculate about the effect on oil-exploration efforts of the imposition of damages on energy companies for the very act of producing products developed from oil. To the contrary, the primary purpose of this and similar lawsuits is to discourage energy companies from developing and producing fossil fuels.

For the foregoing reasons, federal jurisdiction lies under OCSLA, in addition to the myriad other bases for jurisdiction discussed above. Defendants therefore properly removed this case to federal court, and the district court erred in granting plaintiffs' motion to remand.

CONCLUSION

The remand order of the district court should be vacated and the case remanded for further proceedings.

Respectfully submitted,

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JANUARY 22, 2020

CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I, Kannon K. Shanmugam, counsel for appellant Exxon Mobil Corporation and a member of the Bar of this Court, certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7), that the attached Reply Brief of Appellants is proportionally spaced, has a typeface of 14 points or more, and contains 6,499 words.

/s/ Kannon K. Shanmugam
KANNON K. SHANMUGAM

JANUARY 22, 2020

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 Reply Brief of Appellants, as submitted in digital form via the Court's electronic-filing system, has been scanned for viruses using Malwarebytes Anti-Malware (version 2020.01.21.08, updated Jan. 21, 2020) 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.

/S/ Kannon K. Shanmugam
KANNON K. SHANMUGAM

JANUARY 22, 2020

CERTIFICATE OF SERVICE

I, Kannon K. Shanmugam, counsel for appellant Exxon Mobil Corporation and a member of the Bar of this Court, certify that, on January 22, 2020, the attached Reply Brief of Appellants 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.

/s/ Kannon K. Shanmugam
KANNON K. SHANMUGAM

JANUARY 22, 2020