

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff,

v.

EXXON MOBIL CORPORATION,

Defendant.

Civil Action No. 19-CV-12430-WGY

**ORAL ARGUMENT REQUESTED**

**EXXON MOBIL CORPORATION'S OPPOSITION TO PLAINTIFF'S MOTION FOR  
REMAND TO THE MASSACHUSETTS SUPERIOR COURT FOR SUFFOLK COUNTY**

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## INTRODUCTION

Plaintiff the Commonwealth of Massachusetts, acting through its Attorney General (“Plaintiff” or “MAAG”), cannot avoid federal jurisdiction simply because it has omitted the language of federal law from its complaint.<sup>1</sup> Notwithstanding the state law labels, this is a federal case. Plaintiff seeks to use state consumer protection law as a vehicle to stop Defendant Exxon Mobil Corporation (“ExxonMobil”) from producing and selling fossil fuels. Although Plaintiff argues “the Commonwealth does not seek to enjoin” that conduct, *see* Motion For Remand (“Mot.”) at 3, Plaintiff’s position is belied by the four corners of the complaint. As just one example, Plaintiff alleges that ExxonMobil’s fossil fuel products could never be considered “safe and environmentally beneficial” because “the development, production, refining, and consumer use of ExxonMobil fossil fuel products” increase “greenhouse gas emissions.” Compl. ¶¶ 601-02, 645. If ExxonMobil’s fossil fuel products cannot be considered “safe” under Massachusetts law, then MAAG is in effect demanding they not be sold at all.

This lawsuit second-guesses longstanding federal decision-making about national and international energy policy and environmental protection. Plaintiff therefore cannot make its *prima facie* case without necessitating the resolution of substantial, disputed questions of federal law. This suit also involves causes of action that arise, if at all, under federal common law, and implicates actions ExxonMobil undertook at the direction of federal officers. Finally, this lawsuit meets the requirements of the Class Action Fairness Act (“CAFA”). Litigation about the appropriate use of fossil fuels and the global issues presented by climate change belongs in a federal forum. Removal is proper and Plaintiff’s Motion should be denied.

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<sup>1</sup> ExxonMobil submits this opposition brief subject to, and without waiver of, its personal jurisdiction objections.

### **SUMMARY OF PLAINTIFF’S COMPLAINT**

Plaintiff’s complaint includes four causes of action. The first two relate to purported investor deception regarding an alleged failure to disclose facts about financial risk posed by climate change and the “proxy cost of carbon” used by ExxonMobil. The third and fourth relate to alleged consumer deception in connection with ExxonMobil’s sale of its fossil fuel products.

The second cause of action (regarding the proxy cost of carbon) was copied nearly verbatim from a similar complaint previously filed by the New York Attorney General (“NYAG”). And that claim failed. After “twelve days of trial and testimony from eighteen witnesses” the Honorable Barry Ostrager last month found NYAG failed to establish that ExxonMobil violated New York law “in connection with its public disclosures concerning how ExxonMobil accounted for past, present and future climate change risks.” *People v. Exxon Mobil Corporation*, 2019 N.Y. Slip Op. 51990(U), 2019 WL 6795771, at \*1; *see also id.* at \*30 (NYAG “failed to prove, by a preponderance of the evidence, that ExxonMobil made any material misstatements or omissions about its practices and procedures that misled any reasonable investor”). In other words, Justice Ostrager soundly rejected a claim nearly identical to Plaintiff’s second cause of action here.<sup>2</sup> *See, e.g., id.* at \*20-\*21.

The face of the complaint demonstrates that this case is about more than marketing statements and is at least in part intended to cause a reduction in the use or sale of fossil fuels:

- “[P]roduction and consumer use of such transportation fuels is a leading cause of climate change that endangers public health and consumer welfare.” Compl. ¶ 35.
- “[C]ontinued investment in ExxonMobil’s fossil fuel business and production and use of ExxonMobil’s fossil fuel products would bring about cataclysmic outcomes for

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<sup>2</sup> Plaintiff points out that ExxonMobil did not remove the case brought by NYAG. *See* Mot. 6 n.5. That case did not include the same type of consumer protection claims asserted here that appear to be aimed at reducing or stopping the sale of fossil fuel products. In any event, to the extent that this Court deems Plaintiff’s securities-related causes of action as non-federal, this Court has supplemental jurisdiction over them under 28 U.S.C. § 1367(a).

humankind.” *Id.* ¶ 39.

- The “production and use of ExxonMobil’s fossil fuel products emit large volumes of the dangerous greenhouse gas pollution that is causing disruptive climate change impacts.” *Id.* ¶ 600.
- “[T]he world must swiftly shift away from fossil fuel energy or else face catastrophic impacts to humankind and the environment.” *Id.* ¶ 767.

Notably, these and similar allegations are not addressed in Plaintiff’s Motion.

### **FACTUAL BACKGROUND**

A fuller factual background of this litigation is included in ExxonMobil’s Notice of Removal. Plaintiff argues the Court “must ignore Exxon’s factual allegations of conspiracy,” but this factual background provides additional context regarding the allegations of the complaint. *See* Mot. 2. Justice Ostrager, in finding ExxonMobil made no material misstatements regarding climate change risk, took particular note of “events leading up to the filing of the Complaint . . . including certain politically motivated statements by former New York Attorney General Eric Schneiderman,” and characterized the civil action that office pursued as “an ill-conceived initiative of the Office of the Attorney General.” *Exxon Mobil Corporation*, 2019 WL 6795771, at \*1, \*26.

Here, for example, though Plaintiff accuses ExxonMobil of “recycl[ing] the same tired conspiracy theories regarding the Commonwealth’s investigation” that it claims have been rejected by other courts,<sup>3</sup> *see* Mot. 3, it does not (and cannot) dispute most of what ExxonMobil laid out regarding the genesis and conduct of this investigation and the filing of the lawsuit. *See* Notice of Removal (“NOR”) at 3. Plaintiff does not dispute Attorney General Healey participated in a press conference on March 29, 2016, with a coalition of state attorneys general in which she stated “there’s nothing we need to worry about more than climate change,” and pledged to undertake

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<sup>3</sup> As described in the Notice of Removal, some courts have issued decisions summarily rejecting ExxonMobil’s allegations (without examining supporting evidence) and others, including one that examined the evidence in a contested hearing, have credited these allegations. NOR 4-5, nn. 6-8.

“quick, aggressive action.” *Id.* Nor does Plaintiff dispute that Attorney General Healey announced a predetermined investigation into ExxonMobil that day. *Id.* Indeed, Attorney General Healey declared—without receiving a single ExxonMobil document or examining any ExxonMobil witnesses—that there was a “troubling disconnect between what Exxon knew” and what it “chose to share with investors and with the American public.” *Id.*

Plaintiff does not dispute that the press conference was the product of closed-door meetings with climate activists and plaintiffs’ lawyers or that the activists’ efforts to find “a single sympathetic state attorney general” to help began many years earlier. *Id.* at 3-4. Nor does Plaintiff dispute that some of those same activists met earlier in 2016 to discuss an “Exxon campaign” with an express goal of establishing ExxonMobil as a “corrupt institution” and to “delegitimize” ExxonMobil “as a political actor.” *Id.* at 4.

MAAG initiated the investigation underlying this suit in 2016, but accuses ExxonMobil of stonewalling. Mot. 1. Plaintiff correctly points out that ExxonMobil both moved to quash MAAG’s civil investigative demand (“CID”) in Massachusetts state court<sup>4</sup> and filed a separate, federal action in the Northern District of Texas against MAAG for violation of ExxonMobil’s free speech and other constitutional rights.<sup>5</sup> Plaintiff neglects to mention that it was *MAAG that requested a*

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<sup>4</sup> The summary proceedings that followed the motion to quash were limited to evaluating the CID’s validity under the authorizing statute and principles of personal jurisdiction. Neither the Massachusetts Superior Court nor the Massachusetts Supreme Judicial Court addressed ExxonMobil’s free speech or constitutional arguments. *See In re Civil Investigative Demand No. 2016-EPD-36*, 2017 WL 627305, at \*4 n.2 (Mass. Super. Jan. 11, 2017); *Exxon Mobil Corp. v. Attorney General*, 479 Mass. 312, 328-29 (2018).

<sup>5</sup> MAAG misleadingly implies that the Northern District of Texas held that it lacked personal jurisdiction to resolve ExxonMobil’s claims. *See, e.g.*, Mot. 1, 5. In fact, after holding jurisdictional discovery was warranted, *Exxon Mobil Corp. v. Healey*, 215 F. Supp. 3d 520, 523-24 (N.D. Tex. 2016), a decision MAAG conveniently omits, the court ultimately transferred the case to Judge Caproni in the Southern District of New York based on *venue*. *Exxon Mobil Corp. v. Healey*, No. 4:16-cv-00469-K (N.D. Tex. March 29, 2017), Dkt. 180. But that was not a determination on personal jurisdiction. Indeed, a Texas court properly exercised jurisdiction over out-of-state

*tolling agreement from ExxonMobil*, agreeing not to seek any documents or depose any witnesses pursuant to the CID pending the final resolution of the two aforementioned actions (one of which is still pending). NOR 5. Notwithstanding that agreement, Plaintiff claims MAAG continued its investigation “through other means,” without explaining how or claiming to have examined ExxonMobil documents or witnesses. Mot. 5. Nor does Plaintiff provide any justification for the rush to file this suit on the eve of ExxonMobil’s multi-week NYAG trial. *See* NOR 5-6.

### **ARGUMENT**

A “removing party bears the burden of persuasion vis-à-vis the existence of federal jurisdiction.” *BIW Deceived v. Local S6, Indus. Union of Marine & Shipbuilding Workers of Am.*, 132 F.3d 824, 831 (1st Cir. 1997). If that burden is met for a single cause of action, a district court can exercise supplemental jurisdiction over any remaining related causes of action. *City of Chicago v. Int’l Coll. of Surgeons*, 522 U.S. 156, 165-66 (1997); 28 U.S.C. § 1367. While the “well-pleaded complaint” rule generally prohibits the removal of cases premised only on state law, “the artful pleading doctrine allows a federal court to peer beneath the local-law veneer of a plaintiff’s complaint in order to glean the true nature of the claims presented.” *Lopez-Munoz v. Triple-S Salud, Inc.*, 754 F.3d 1, 4-5 (1st Cir. 2014). Under the *Grable* doctrine, “federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress.” *Gunn v. Minton*, 568 U.S. 251, 258 (2013). Removal is also appropriate when federal common law governs what the plaintiff labels as “purely state law

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officials who similarly targeted ExxonMobil for its viewpoints on issues of public concern. *Exxon Mobil Corp.*, No. 096-297222-18, 2018 Tex. Dist. LEXIS 1 (Tarrant Cty. Tex. Apr. 24, 2018), *appeal filed*, No. 02-18-00106-CV (Tex. App.—Fort Worth, Apr. 2, 2018). Judge Caproni’s decision is currently on appeal to the Second Circuit. *Exxon Mobil Corp. v. Schneiderman*, 316 F. Supp. 3d 679, 687 (S.D.N.Y. 2018), *appeal docketed*, No. 18-1170 (2d Cir. Apr. 23, 2018).

claims”—“[w]hen federal law applies . . . it follows that the question arises under federal law, and federal question jurisdiction exists.” *New SD, Inc. v. Rockwell Int’l Corp.*, 79 F.3d 953, 954-55 (9th Cir. 1996). Other statutes have their own generously construed removal provisions, including the federal officer removal statute (“FORS”) and CAFA. *Jefferson County v. Acker*, 527 U.S. 423, 431 (1999); *Brown v. Mortg. Elec. Registration Sys., Inc.*, 738 F.3d 926, 931 n.6 (8th Cir. 2013).

### **I. This Case Necessarily Raises Disputed and Substantial Federal Issues**

ExxonMobil properly removed this suit because Plaintiff’s “state-law claim[s] necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.” *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 314 (2005). Plaintiff’s suit is inextricably tied to uniquely federal interests involving foreign affairs, energy policy, and environmental regulation. “Based on the totality of the circumstances,” therefore, “the federal ingredients of the case predominate.” *One & Ken Valley Hous. Grp. v. Maine State Hous. Auth.*, 716 F.3d 218, 224 (1st Cir. 2013) (rejecting “single-factor test”).<sup>6</sup>

***Plaintiff’s affirmative claims necessarily raise several federal issues.*** Federal issues are disputed in this case.<sup>7</sup> Under the guise of state consumer protection law, Plaintiff would have this

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<sup>6</sup> In view of the First Circuit’s guidance that a court should consider the “totality of the circumstances” in evaluating the “federal ingredients” of a case, this Court should decline to follow decisions that failed to undertake this holistic view of *Grable* jurisdiction. *See, e.g., Cty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 938 (N.D. Cal. 2018), *appeal filed sub nom. Marin v. Chevron Corp.*, No. 18-15503 (9th Cir. Mar. 27, 2018); *Mayor & City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538, 558-61 (D. Md. 2019), *appeal filed* No. 19-1644 (4th Cir. June 18, 2019); *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142, 150-51 (D.R.I. 2019), *appeal filed sub nom. Rhode Island v. Shell Oil Prods. Co.*, No. 19-1818 (Aug. 9, 2019); *Bd. of Comm’rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, 405 F. Supp. 3d 947, 965-68 (D. Colo. 2019), *appeal filed* No. 19-1330 (10th Cir. Sept. 9, 2019). Appeals are pending in each case.

<sup>7</sup> Plaintiff points to other courts that have remanded climate change public nuisance cases that were removed under *Grable*. *See* Mot. 12-13 (citing *Rhode Island* and *Baltimore* decisions). ExxonMobil believes those cases were incorrectly decided and both are on appeal.

Court punish ExxonMobil for advertising claims, “even if . . . technically true,” *see* Compl. ¶ 245, because Plaintiff deems the production and use of fossil fuels to be unsafe.<sup>8</sup> *See, e.g., id.* ¶¶ 600-02. Plaintiff’s causes of action are therefore not about consumer protection or representations made in advertisements in Massachusetts, but the fact that the products are manufactured and sold *at all*. *See, e.g. id.*, ¶ 713 (ExxonMobil cannot lawfully claim it is “working to decrease . . . its overall carbon footprint” while simultaneously exploring, developing, and producing fossil fuels); ¶¶ 704, 712 (ExxonMobil cannot lawfully advertise efforts to develop “algae biofuels” without decreasing investments in “global fossil fuel exploration, development, and production activities”). MAAG’s position appears to be that ExxonMobil cannot make accurate statements about its carbon footprint or algae biofuels unless it also stops or decreases fossil fuel production. This amounts to a demand that ExxonMobil cease its production or sales of fossil fuel products. *See, e.g., id.* ¶ 600 (the “production and use of ExxonMobil’s fossil fuel products emit large volumes of the dangerous greenhouse gas pollution that is causing disruptive climate change impacts”).

Litigation that attacks the extraction and promotion of fossil fuel energy, and corresponding emissions, necessarily implicates two federal issues. First, because this suit attempts to supplant delicate international negotiations regarding climate and energy policy, it “touches on foreign relations” and therefore “must yield to the National Government’s policy.” *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 413 (2003) (expressing “concern for uniformity in this country’s dealings with foreign nations.”). This country’s climate change foreign policy has for decades tried to balance environmental policy with economic development. *See* The White House, Statement by President Trump on the Paris Climate Accord (June 1, 2017),

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<sup>8</sup> MAAG’s assertion that fossil fuels are not safe means this case will turn on a legal question rather than a “fact- and context-specific determination[.]” Mot. 15 (distinguishing *Grable*).

<https://www.whitehouse.gov/briefings-statements/statement-president-trump-paris-climate-accord/> (citing financial burdens and energy restrictions as reasons to vacate the Paris Agreement). Plaintiff's lawsuit improperly seeks to put its finger on the scale. *Cf. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 381, 388 (2000) (striking down Massachusetts law that "undermine[d] the President's capacity . . . for effective diplomacy" by "compromis[ing] the very capacity of the President to speak for the Nation"); *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1026 (N.D. Cal. 2018) (Alsup, J.) ("Because this relief would effectively allow plaintiffs to govern conduct and control energy policy on foreign soil, we must exercise great caution.").

Plaintiff's affirmative claims assume, in conflict with current federal priorities, that "the world must swiftly shift away from fossil fuel energy." *See, e.g.*, Compl. ¶ 767; *see also id.* ¶ 811 (requiring determination of whether "substantially curtailing the use of fossil fuels is necessary to stabilize the increase in global average temperature and reduce the risk of catastrophic climate change"); *id.* ¶ 774 (citing 940 C.M.R. § 3.05(1), which would have this Court evaluate the "safety," "utility," and "benefit to be derived from the use" of fossil fuels). Nor are the foreign-policy implications of Plaintiff's causes of action mere conjecture—the federal government has confirmed that lawsuits that seek to address climate change "undermine the exclusive grants of authority to the representative branches of the federal government to conduct the Nation's foreign policy." *See* Brief of the United States as Amicus Curiae in Support of Appellees and Affirmance, *City of Oakland v. BP, P.L.C.*, No. 18-16663 (May 17, 2019), Dkt. 97, at 16 ("Efforts to address climate change, including in a variety of multilateral fora, have for decades been a focus of U.S. foreign policy."). *Cf. City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 476 (S.D.N.Y. 2018) (Keenan, J.) (concluding that similar litigation would "severely infringe upon the foreign-policy decisions that are squarely within the purview of the political branches of the U.S. Government").



Second, Plaintiff’s claims would require a factfinder to question the careful balance Congress and federal agencies have struck between greenhouse gas regulation and the nation’s energy needs. *See, e.g.*, Clean Air Act, 42 U.S.C. § 7401(c)<sup>9</sup>; Final Carbon Pollution Standards for New, Modified and Reconstructed Power Plants, 80 Fed. Reg. at 64683-84 (EPA considering impacts of “wildfire” and “extreme precipitation events”); *see also City of Oakland*, 325 F. Supp. 3d at 1023 (“Without those fuels, virtually all of our monumental progress would have been impossible.”); *Bd. of Comm’rs of Se. La. Flood Prot. Auth.-E. v. Tenn. Gas Pipeline Co.*, 850 F.3d 714, 725 (5th Cir. 2017) (*Grable* removal appropriate where “the scope and limitations of a complex federal regulatory framework are at stake” in state law claims).

Plaintiff’s request that a state court substitute its judgment for the federal government on these issues—and impose significant penalties and injunctive relief based on Plaintiff’s say-so—constitutes a “collateral attack on an entire [federal] regulatory scheme . . . premised on the notion that [the scheme] provides inadequate protection.”<sup>10</sup> *Bd. of Comm’rs*, 850 F.3d at 724 (quotations omitted). Removal is appropriate here. *See, e.g., Bryan v. BellSouth Commc’ns, Inc.*, 377 F.3d 424, 430 (4th Cir. 2004) (consumer protection suit “effectively challenge[d]” the filed rate set by FCC); *Hill v. BellSouth Telecomms., Inc.*, 364 F.3d 1308, 1317 (11th Cir. 2004) (same).

***The federal issues raised by this suit are substantial.*** A case with implications for federal energy, economic, and environmental regulatory policy surely raises substantial federal issues. Contrary to what MAAG argues, resolution of this case has broad significance for the federal

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<sup>9</sup> *See also* Energy Reorganization Act of 1974, 42 U.S.C. § 5801; Mining and Minerals Policy Act, 30 U.S.C. § 21a; Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201.

<sup>10</sup> MAAG’s position that it does not “challenge[] the propriety of the federal government’s actions,” *see* Mot. 15, is contradicted by its pre-suit conduct and membership in the Green 20, which in 2016 announced their intentions to “step into [the legislative] breach” caused by “gridlock in Washington,” through “creative[]” and “aggressive[]” use of their official powers to end the world’s reliance on fossil fuels. *See* NOR 3.

government as MAAG’s position conflicts with federal policy. *See* Mot. 14 (*citing Municipality of Mayagüez v. Corporación Para el Desarrollo del Oeste, Inc.*, 726 F.3d 8, 14 (1st Cir. 2013)).<sup>11</sup> Indeed, to the extent MAAG seeks to reduce or eliminate the sale of fossil fuel products, this case sits at the intersection of federal energy and environmental regulations, while necessarily implicating foreign policy and national security considerations. The substantiality inquiry is satisfied when the federal issues in a case concern even one of these subjects. *See Gunn*, 568 U.S. at 260 (substantiality determination dictated by “the importance of the issue to the federal system as a whole”); *In re Nat’l Sec. Agency Telecomms. Records Litig.*, 483 F. Supp. 2d 934, 943 (N.D. Cal. 2007) (application of state secrets privilege “substantial” federal issue); *Grynberg Prod. Corp. v. British Gas, P.L.C.*, 817 F. Supp. 1338, 1356 (E.D. Tex. 1993) (“[Q]uestions of international relations are almost always substantial.”). As in *Board of Commissioners*, the validity of Plaintiff’s claims “would require that conduct subject to an extensive federal permitting scheme is in fact subject to implicit restraints that are created by state law.” 850 F.3d at 724. “The implications for the federal regulatory scheme of the sort of holding that [Plaintiff] seeks . . . are substantial.” *Id.*

***Federal jurisdiction would not disturb the principles of federalism.*** Given that federal courts are the appropriate fora for litigation with national and international repercussions, federal jurisdiction is “consistent with congressional judgment about the sound division of labor between state and federal courts.” *Grable*, 545 U.S. at 313. Plaintiff argues it has a strong sovereign interest in “securing an honest marketplace” through enforcement of its state consumer protection law. Mot. 16. But this is no garden variety consumer protection suit—it is climate change litigation that

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<sup>11</sup> *Mayagüez* does not help Plaintiff; there, a breach of contract case did not raise any substantial issues of importance to the federal government. 726 F.3d at 14-15. In contrast, here, MAAG’s implicit and collateral attack on federal decisions regarding climate change have tremendous importance to the federal government.

could have sweeping impacts on national and international economies and polices. Accepting federal jurisdiction here will not meaningfully alter the relative caseloads of state and federal courts. *Cf. Rhode Island Fishermen’s All., Inc. v. Rhode Island Dep’t of Env’tl. Mgmt.*, 585 F.3d 42, 52 (1st Cir. 2009) (rejecting notion that “sui generis” ligation would lead to a “‘horde of cases’ wending their way to federal courts”).

***Judge Wolf did not decide whether Plaintiff’s complaint presents a federal question.*** In arguing against federal jurisdiction under *Grable*, MAAG mischaracterizes Judge Wolf’s order addressing whether this action is related to another pending action against ExxonMobil. Mot. 8-9. Judge Wolf did not opine on the grounds asserted in ExxonMobil’s Notice of Removal, including whether *Grable* applies here.<sup>12</sup> Dkt. 11. All he determined was that this suit is not related to another matter under Local Rule 40.1(g). *Id.* MAAG’s suggestion otherwise is disingenuous.<sup>13</sup>

Nor is the fact that this is nominally a consumer protection suit brought by MAAG dispositive. *See* Mot. 9-11.<sup>14</sup> This is not an ordinary consumer protection suit in which federal issues (like the potential violation of the Controlled Substances Act in *City of Worcester v. Purdue*

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<sup>12</sup> Judge Wolf also did not consider whether Plaintiff’s claims actually arise under federal common law or whether federal jurisdiction is proper under FORS or CAFA. *See* Dkt. 11.

<sup>13</sup> So too is any suggestion that the parties’ joint motion to extend deadlines established the law that governs this case. *See* Mot. 1 n.1 (citing Dkt. 7 as evidence that “this is an action by the Attorney General under Chapter 93A, only”).

<sup>14</sup> The Massachusetts cases Plaintiff cites in support of remand here are factually and legally distinguishable. *See, e.g., Cablevision of Boston Ltd. v. Flynn*, 710 F. Supp. 23, 26-27 (D. Mass. 1989) (Young, J.) (assertion of “pre-emption jurisdiction”); *Callahan v. Sw. Airlines*, 2018 WL 5849476, at \*6-8 (D. Mass. Sept. 26, 2018) (federal issues not “substantial” in negligence claims about wheelchair access); *Massachusetts v. Fremont Inv. & Loan*, 2007 WL 4571162, at \*3 (D. Mass. Dec. 26, 2007) (removal argument more properly construed as preemption); *Alshrafi v. Am. Airlines*, 321 F. Supp. 2d 150, 164-65 (D. Mass. 2004) (federal issues not “sufficiently important” where single plaintiff barred from boarding a plane); *Sec’y of Commonwealth v. Scottrade, Inc.*, 327 F. Supp. 3d 345, 351-52 (D. Mass. 2018) (court could determine whether defendant “violated its own policies or reasonably supervised its employees without assessing” federal law); *Commonwealth v. Philip Morris Inc.*, 942 F. Supp. 690, 695 (D. Mass. 1996) (“arising under” argument premised on purported “federal motive for pursuing a state claim”).

*Pharma L.P.*, No. 18-11958-TSH, Dkt. 36 (D. Mass. Nov. 21, 2018)) might play an ancillary role. This is climate change litigation brought under the guise of state law. It is intended to have impacts on national and international policies, and MAAG's positions are in direct conflict with congressional and Executive Branch decisions. Courts in the First Circuit have allowed removal of other state law claims brought in state court by state attorneys general that raise substantial federal questions. *See, e.g., Almond v. Capital Properties, Inc.*, 212 F.3d 20 (1st Cir. 2000) (approving of removal of state law contract claims brought by Attorney General of Rhode Island because they implicated substantial questions of federal law); *In re Pharm. Indus. Average Wholesale Price Litig.*, 457 F. Supp. 2d 77, 79, 82 (D. Mass. 2006) (denying motion to remand consumer fraud case that turned on a Medicare statute definition).<sup>15</sup> Moreover, issues raised in Chapter 93A litigation are not unique under Massachusetts law—§ 2(a) must be interpreted consistently with the Federal Trade Commission Act. *See* G.L. c. 93A § 2(b).

## **II. Climate Change-Based Causes of Action Arise Under Federal Common Law**

Removal was also proper because Plaintiff's claims—though putatively asserted under state law—arise under federal common law, which governs in areas that implicate “uniquely federal interests” such that application of state law would be inappropriate. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 855 (9th Cir. 2012) (federal common law appropriate for “the general subject of environmental law and specifically . . . ambient or interstate air and water pollution.”); *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 421-22 (2011) (“AEP”).

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<sup>15</sup> The court distinguished this case from *In re Pharm. Indus. Average Wholesale Price Litig.*, 457 F. Supp. 2d 65, 70 (D. Mass. 2006), a case cited by Plaintiff. *See* Mot. 10, n.8. In the case cited by Plaintiff, the state law action “sought relief solely under the state Medicaid statute,” which did not incorporate any federal definitions or otherwise implicate federal law. *See In re Pharm. Indus. Average Wholesale Price Litig.*, 457 F. Supp. 2d at 80. Here, in contrast, the federal government has a strong interest in the policy issues and regulatory schemes MAAG's suit implicitly challenges.

*Federal common law, not state consumer protection law, provides the appropriate rule of decision here.* Irrespective of labeling, claims “‘arise under’ federal law if the dispositive issues stated in the complaint require the application of federal common law.”<sup>16</sup> *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972) (“*Milwaukee I*”); *United States v. Standard Oil Co.*, 332 U.S. 301, 307 (1947) (federal common law, not state law, governs claims involving “matters essentially of federal character”). Federal common law must be applied to claims that involve “an overriding federal interest in the need for a uniform rule of decision,” regardless of whether a state statute purports to address the relevant claim. *Milwaukee I*, 406 U.S. at 105 n.6 (nuisance claims alleging pollution from multiple states call “for applying federal law”).<sup>17</sup>

Cases like this one that seek relief for the interstate impacts of global greenhouse gas emissions are governed by federal common law, not state law. *Cf. AEP*, 564 U.S. at 418-19 (plaintiffs “alleged that public lands, infrastructure, and health were at risk from climate change” and sought to hold the defendants liable); *Kivalina*, 696 F.3d at 853-54 (plaintiffs sought to redress impacts allegedly resulting from the defendant energy companies’ “emissions of large quantities of greenhouse gases”).<sup>18</sup> This is precisely why both Judge Alsup in the Northern District of California and Judge Keenan in the Southern District of New York recently determined that climate change-related claims against ExxonMobil arose under federal common law. *City of New*

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<sup>16</sup> Plaintiff argues that Chapter 93A provides the rule of decision here because Plaintiff has not alleged claims for “pollution abatement.” Mot. 17-18.

<sup>17</sup> See also *Resolution Trust Corp. v. Gladstone*, 895 F. Supp. 356, 362-63 (D. Mass. 1995) (applying federal common law because there was “a significant interest in having a uniform standard of liability govern the conduct of directors and officers of federally chartered, federal insured, savings and loan institutions”).

<sup>18</sup> Plaintiff claims that ExxonMobil cannot now rely on *Kivalina* because it argued in appellate briefing in that case that federal common law did not apply. See Mot. 17 n.17. Regardless of what ExxonMobil argued then, the Ninth Circuit held otherwise. See *Kivalina*, 696 F.3d at 855 (citing *AEP*, 564 U.S. at 420-21).

*York*, 325 F. Supp. 3d at 472 (claims “based on the ‘transboundary’ emission of greenhouse gases . . . arise under federal common law and require a uniform standard of decision”); *California v. BP P.L.C.*, 2018 WL 1064293, at \*2 (N.D. Cal. Feb. 27, 2018) (Alsup, J.) (claims “which address the national and international geophysical phenomenon of global warming—are necessarily governed by federal common law”).

Federal common law is particularly appropriate here because one aim of Plaintiff’s suit is to address global effects caused by the production and global use of fossil fuels (rather than discrete local harms caused by the marketing of a product). The complaint’s allegations repeatedly evince an intent to compel ExxonMobil to stop selling fossil fuels and mitigate the purported impacts of climate change. *See, e.g.*, Compl. ¶ 713 (complaining of ExxonMobil’s “unabated, business-as-usual rapid exploration, development, and production of fossil fuel reserves”); *see also* ¶ 743 (same); ¶ 767 (“[T]he world must swiftly shift away from fossil fuel energy or else face catastrophic impacts to humankind and the environment.”). Indeed, the practical impact of this litigation and its request for “comprehensive injunctive relief,” *see* Compl. VIII.B, would require this Court to judge whether it is appropriate and safe to produce, sell, or market fossil fuels and determine what amount of greenhouse gas emissions are reasonable. *Cf. California v. Gen. Motors Corp.*, 2007 WL 2726871, at \*8 (N.D. Cal. Sept. 17, 2007) (court could not resolve climate change-based claims without “mak[ing] an initial decision as to what is unreasonable in the context of carbon dioxide emissions”). Without greenhouse gas emissions and their purported worldwide impact, Plaintiff’s causes of action would not exist.<sup>19</sup>

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<sup>19</sup> Plaintiff’s attempts to plead around the inevitably federal (and thus, non-viable) nature of these claims should not be rewarded. *Cf. City of Oakland*, 325 F. Supp. 3d at 1029 (dismissing climate change nuisance claims because “the problem at hand clearly deserves a solution best addressed by [the political] branches”); *City of New York*, 325 F. Supp. 3d at 476 (dismissing similar claims).

Because Plaintiff's suit is premised on interstate pollution that causes climate change, it implicates uniquely federal interests and should be governed by federal common law. *See BP*, 2018 WL 1064293, at \*1, 3 (claims "premised on [a deceptive promotion] theory" were still governed by federal common law because a "patchwork of fifty different answers to the same fundamental global issue would be unworkable"); *Kivalina*, 696 F.3d at 855-56; *AEP*, 564 U.S. at 422 (in cases like this, "borrowing the law of a particular State would be inappropriate").

***Any potential displacement of Plaintiff's federal common law remedies does not preclude the application of federal common law.*** Plaintiff criticizes ExxonMobil for citing *Kivalina* and *AEP* in support of its assertion of federal common law because ExxonMobil argued successfully in *Kivalina* that federal common law was displaced by the Clean Air Act. Mot. 16-17. In doing so, Plaintiff improperly conflates the jurisdictional source of law question with a merits determination. The fact that federal common law may ultimately prove to be displaced by the Clean Air Act, *see Kivalina*, 696 F.3d at 856-57; *City of Milwaukee v. Illinois*, 451 U.S. 304, 332 (1981) ("*Milwaukee II*") (Congress's comprehensive overhaul of the Clean Water Act meant "no federal common-law remedy was available"), is a premature merits determination with no bearing on federal jurisdiction. More than "two centuries of jurisprudence affirm[s] the necessity of determining jurisdiction before proceeding to the merits." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 98 (1998); *Lawless v. Steward Health Care Sys., LLC*, 894 F.3d 9, 18 (1st Cir. 2018) (court surveying its subject-matter jurisdiction "reviews a plaintiff's complaint not to judge the merits, but to determine whether [it] has the authority to proceed") (quotations omitted).

In other words, the "proper mode of analysis" for whether a case involves a "uniquely federal question" is a "two-part approach [that] involves what may be characterized as the source question and the substance question." *United States v. Swiss American Bank, Ltd.*, 191 F.3d 30, 43

(1st Cir. 1999) (the source question asks whether “the source of the controlling law [should] be federal or state” and the substance question asks how the substance of the rule should be defined). “As long as the source of the rule to be applied is federal,” the “case is one ‘arising under’ federal law,” and “the answer to the source question suffices, regardless of what the answer to the substance question eventually may prove to be.” *Id.* at 45;<sup>20</sup> *see also Standard Oil*, 332 U.S. at 305, 316-17 (first determining federal common law applied then holding it allowed no remedy).

*Kivalina* undertook this very two-step analysis—first, addressing the “threshold question[] of whether [the plaintiffs’ nuisance theory was] viable under federal common law” and second, determining that dismissal was required because a federal statute displaced the plaintiffs’ requested remedy. 696 F.3d at 855-58.<sup>21</sup> That federal common law ultimately may not afford Plaintiff a remedy does not impact the threshold question—whether federal common law governs the claims in the first instance. *Cf. Swiss American Bank*, 191 F.3d at 45 (“[I]mportunings about the suitability and ready availability of state law do not inform a proper resolution of the source question.”).

### **III. This Action Challenges Activities That ExxonMobil Undertook at the Direction of Federal Officers**

FORS allows removal of this action because federal officers directed ExxonMobil to engage in activities at the heart of Plaintiff’s complaint. *See* 28 U.S.C. § 1442(a)(1) (allowing removal by “person acting under” federal officer).<sup>22</sup> Plaintiff does not dispute that ExxonMobil is

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<sup>20</sup> The *Swiss American* court also found that the concepts of “displacement” and “preemption” were not related to the source question. 191 F.3d at 44 n.6.

<sup>21</sup> *See also Gen. Motors Corp.*, 2007 WL 2726871, at \*16 (if case were justiciable first inquiry would be “whether there exists a federal common law claim for nuisance that would authorize Plaintiff’s action for damages against the Defendant automakers for creating and contributing to global warming,” and if “such a common law claim exists, the next step in the inquiry would be to determine whether the available statutory guidelines . . . displace the common law claim”).

<sup>22</sup> Removal under this statute is appropriate when, as here, “(1) [a] defendant can demonstrate it was acting under the direction of a federal officer or agency; (2) the defendant has a colorable defense under federal law; and (3) a causal connection exists between the defendant’s acts or



a “person” within the meaning of the statute, that it has colorable federal defenses, or that ExxonMobil “acted under” federal officers when extracting and producing fossil fuels pursuant to federal leases. *See* NOR 14-15; *id.* Ex. 12 §§ 9-10 (requiring that ExxonMobil diligently develop, explore, and extract fossil fuels, including according to plans reviewed and approved by federal authorities); Ex. 11 § 10 (similar). Plaintiff argues, instead, that there is no nexus between this suit and activities directed by federal officers because its complaint “does not challenge Exxon’s drilling activities or its development of oil and gas on federal lands” and “has nothing to do with efforts to stop or reduce Exxon’s production or sale of its fossil fuel products.” Mot. 18.

Plaintiff’s characterization of the complaint as having “nothing to do” with stopping ExxonMobil’s production or sale of its fossil fuel products is in tension with the complaint’s actual language. To illustrate, Plaintiff alleges that “even if it is technically true” that ExxonMobil’s fossil fuel products “improve internal combustion engine performance and/or efficiency,” they could never be considered “safe and environmentally beneficial” because “the development, production, refining, and consumer use of ExxonMobil fossil fuel products” increase “greenhouse gas emissions.” *See* Compl. ¶¶ 601-02, 645. Plaintiff’s suit is thus ultimately directed at stopping or reducing the actions federal leases obliged ExxonMobil to pursue, namely the production and sale of fossil fuels. *Cf. Mesa v. California*, 489 U.S. 121, 131 (1989) (FORs removal appropriate when there is a “causal connection between what the officer has done under asserted official authority and the state prosecution”) (quotations omitted).

Plaintiff’s argument that the federal government had no role in the purportedly misleading marketing undertaken by ExxonMobil in Massachusetts fails for the same reason. *See* Mot. 19.

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omissions and the claims asserted by the plaintiff.” *O’Connell v. Foster Wheeler Energy Corp.*, 544 F. Supp. 2d 51, 53 (D. Mass. 2008).

Removal is proper in suits “for *or relating to* any act under color of [federal] office.” *In re Commonwealth’s Motion to Appoint Counsel*, 790 F.3d 457, 471 (3d Cir. 2015) (quotations omitted). Here, according to Plaintiff, ExxonMobil’s federally-directed actions “are a major cause of global climate change” and will have “serious, life-threatening, and costly impacts on the people of the Commonwealth.” *See* Compl. ¶¶ 54-69, 222-52. The First Circuit has cautioned that, because “a federal forum should be available when particular litigation implicates a cognizable federal interest,” FORS “should not be read in a ‘narrow’ or ‘limited’ manner . . . nor should the policy underlying it ‘be frustrated by a narrow, grudging interpretation.’” *Camacho v. Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482, 487 (1st Cir. 1989) (quoting *Willingham v. Morgan*, 395 U.S. 402, 407 (1969)) (citations omitted). Because Plaintiff is seeking to reduce or eliminate the sale of fossil fuel products, the FORS causal nexus requirement is satisfied.

#### **IV. Plaintiff’s Lawsuit Is Removable Under CAFA**

ExxonMobil appropriately removed this case under CAFA because (1) this action is in essence a class action on behalf of more than 100 Massachusetts consumers; (2) there is minimal diversity between ExxonMobil and the consumers for whom Plaintiff seeks relief; and (3) the amount in controversy exceeds \$5,000,000. 28 U.S.C. § 1332(d)(1), (2), (5); *see also id.* § 1453(b). Plaintiff challenges only whether this case is appropriately categorized as a “class action.”

Plaintiff purports to have brought this action under Chapter 93A § 4, on behalf of Massachusetts consumers and investors and “in the public interest.” *See, e.g.*, Compl. ¶¶ 1-2, 51, 791, 804, 818, 828, VII.A. It is “in substance a class action” and so is properly removable under CAFA. *See Addison Automatics, Inc. v. Hartford Cas. Ins. Co.*, 731 F.3d 740, 742 (7th Cir. 2013) (recognizing plaintiff’s “artificial attempt to disguise the true nature of the suit”); *see also Addison Automatics, Inc. v. Netherlands Ins. Co.*, 2015 WL 461958, at \*3 (D. Mass. Feb. 4, 2015). This is particularly imperative in a case with national and international ramifications, as “CAFA’s primary

objective is to ensur[e] Federal court consideration of interstate cases of national importance.” *See Dart Cherokee Basin Operating Co. v. Owens*, 574 U.S. 81, 89 (2014).

In arguing otherwise, Plaintiff cites five non-binding Court of Appeals decisions.<sup>23</sup> The First Circuit has not addressed this question, and none of the decisions cited by Plaintiff addressed it in the context of the Massachusetts consumer protection statute at issue here. That distinction is important because CAFA defines “class action” with reference to “any civil action filed under rule 23 of the Federal Rules of Civil Procedure or *similar State statute or rule of judicial procedure*.” 28 U.S.C. § 1332(d)(1)(B) (emphasis added). Massachusetts courts have described “action[s] brought by the Attorney General under [Chapter 93A] § 4” as “comparable to a class action.” *See, e.g., Commonwealth v. Chatham Dev. Co.*, 49 Mass. App. Ct. 525, 528-29 (2000); *see also Commonwealth v. DeCotis*, 366 Mass. 234, 246 (1974) (seeing “no logical reason for a distinction” between “an action brought by the Attorney General under [§] 4” and “a class action brought by a consumer under G.L. c. 93A, [§] 9” for purposes of fashioning relief).

Plaintiff’s answer to *Chatham* is that it predates CAFA and the case did not involve federal jurisdiction. *See* Mot. 20 n.21. And Plaintiff says nothing about *DeCotis* and its comparison

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<sup>23</sup> Plaintiff cites *Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 216-17 (2d Cir. 2013); *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 667 (9th Cir. 2012); *Washington v. Chimei Innolux Corp.*, 659 F.3d 842, 847-50 (9th Cir. 2011); *West Virginia v. CVS Pharmacy, Inc.*, 646 F.3d 169, 176 (4th Cir. 2011); and *LG Display Co. v. Madigan*, 665 F.3d 768, 771-72 (7th Cir. 2011). Plaintiff cites these cases in support of its argument that “CAFA does not provide a basis for removal” of “*parens patriae* actions in the public interest,” but does little to establish that this case fits that mold. *See* Mot. 19-20. Neither the Complaint nor Chapter 93A make any reference to MAAG’s *parens patriae* authority. *Cf.* G.L. c. 93, §§ 9, 12 (Massachusetts Antitrust Act referring to “*parens patriae*” actions). Moreover, it is not clear how the First and Second Causes of Action—brought only on behalf of a discrete, identifiable group of private individuals and institutions, i.e., Massachusetts investors in ExxonMobil securities—are aimed at protecting the welfare of the Commonwealth. *Cf. W. Virginia ex rel. McGraw v. Comcast Corp.*, 705 F. Supp. 2d 441, 450 (E.D. Pa. 2010) (“no quasi-sovereign interest” over state’s claims on behalf of “a discrete group of Comcast’s premium subscribers”).

between class actions and Chapter 93A § 4 actions brought by the Attorney General. CAFA’s legislative history—also ignored by Plaintiff—states that its provisions are to be “interpreted liberally” and that “lawsuits that resemble a purported class action should be considered class actions for the purpose of applying these provisions.” S. Rep. No. 109-14, at 35 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 34. Moreover, “Congress considered and rejected an amendment that would have exempted class actions filed by an attorney general from removal under CAFA.” *In re Katrina Canal Litig. Breaches*, 524 F.3d 700, 705 (5th Cir. 2008) (citing 151 Cong. Rec. S1157-02, S 1158, 2005 WL 309648 (Feb. 9, 2005)). None of the decisions cited by Plaintiff grappled with similar facts—a consumer protection statute that has been likened to a class action by state courts—rendering those decisions inapplicable.<sup>24</sup>

### **CONCLUSION**

For all the foregoing reasons and those set forth in ExxonMobil’s Notice of Removal, Plaintiff’s Motion should be denied. Federal court is the appropriate forum for uniquely federal issues of this magnitude, which should be governed by federal law. Any different result would allow a single state, through creative pleading, to reshape longstanding national and international policy decisions about the appropriate use of fossil fuels and potential impacts of climate change. This federal lawsuit should be heard by this Court.

### **REQUEST FOR ORAL ARGUMENT**

ExxonMobil respectfully requests, pursuant to Local Rule 7.1(d), a hearing for the presentation of oral argument regarding Plaintiff’s Motion.

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<sup>24</sup> The same is true of Plaintiff’s citation to *Mississippi ex rel. Hood v. AU Optronics Corp.*, see Mot. 19 n. 18, which explicitly did not address the issue here, see 571 U.S. 161, 167 n. 2 (2014) (noting that the “class action” determination was not subject of appeal).

DATE: January 9, 2020

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Thomas C. Frongillo, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

/s/ Thomas C. Frongillo

Thomas C. Frongillo