APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-16663

CITY OF OAKLAND, a Municipal Corporation, and The People of the State of California, acting by and through the Oakland City Attorney; CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, and The People of the State of California, acting by and through the San Francisco City Attorney Dennis J. Herrera,

Plaintiffs-Appellants,

v.

BP PLC, a public limited company of England and Wales; CHEVRON CORPORATION, a Delaware corporation; CONOCOPHILLIPS, a Delaware corporation; EXXON MOBIL CORPORATION, a New Jersey corporation; ROYAL DUTCH SHELL PLC, a public limited company of England and Wales; DOES, 1 through 10,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California
William Alsup, District Judge, Presiding,
D.C. Nos.
3:17-cv-06011-WHA
3:17-cv-06012-WHA

Argued and Submitted February 5, 2020
Pasadena, California

Filed May 26, 2020

Before: Sandra S. Ikuta, Morgan Christen, and Kenneth K. Lee, Circuit Judges.

OPINION

IKUTA, Circuit Judge:

Two California cities brought actions in state court alleging that the defendants' production and promotion of fossil fuels is a public nuisance under California law, and the defendants removed the complaints to federal court. We hold that the state-law claim for public nuisance does not arise under federal law for purposes of 28 U.S.C. § 1331, and we remand to the district court to consider whether there was an alternative basis for subject-matter jurisdiction.

I

In September 2017, the city attorneys for the City of Oakland and the City and County of San Francisco filed complaints in California state court asserting a California public-nuisance claim against five of the world's largest energy companies: BP p.l.c., Chevron Corporation, ConocoPhillips, Exxon Mobil Corporation, and Royal Dutch Shell plc.[1] The complaints

[1] Under California law, a city attorney may bring an action to abate a public nuisance "in the name of the people of the State of California," Cal. Civ. Proc. Code § 731, and so the complaints were brought in the name of the people of the State of Califor-

claim that the defendants are liable for causing or contributing to a public nuisance under California law. *See* Cal. Civ. Code §§ 3479, 3480, 3491, 3494; Cal. Civ. Proc. Code § 731. We refer to the plaintiffs collectively as the "Cities" and to the defendants collectively as the "Energy Companies."

According to the complaints, the Energy Companies' "production and promotion of massive quantities of fossil fuels" caused or contributed to "global warming-induced sea level rise," leading to coastal flooding of low-lying shorelines, increased shoreline erosion, salt-water impacts on the Cities' wastewater treatment systems, and interference with stormwater infrastructure, among other injuries. The complaints further allege that the Cities are incurring costs to abate these harms and expect the injuries will become more severe over the next 80 years. Accordingly, the Cities seek an order of abatement requiring the Energy Companies to fund a "climate change adaptation program" for Oakland and San Francisco "consisting of the building of sea walls, raising the elevation of low-lying property and buildings and building such other infrastructure as is necessary for [the Cities] to adapt to climate change."

In October 2017, the Energy Companies removed the Cities' complaints to federal court. The Energy Companies identified seven different grounds for subject-matter jurisdiction in their notices of removal, including that the Cities' public-nuisance claim was governed by federal common law because the claim implicates "uniquely federal interests."[2] After remov-

---

nia, acting by and through the city attorneys of Oakland and San Francisco.

[2] The notice of removal also asserted that the complaints are removable because the Cities' claim: (1) raises disputed and substantial federal issues, *see Grable & Sons Metal Prods., Inc v.*

al, the cases were assigned to the same district judge, Judge William H. Alsup.[3]

The Cities moved to remand the cases to state court on the ground that the district court lacked subject-matter jurisdiction. The district court denied the motion, concluding that it had federal-question jurisdiction under 28 U.S.C. § 1331 because the Cities' claim was "necessarily governed by federal common law." The district court reasoned that the Cities' public-nuisance claim raised issues relating to "interstate and international disputes implicating the conflicting rights of States or . . . relations with foreign nations" and that these issues had to be resolved pursuant to a uniform federal standard.

In response to the district court's ruling, the Cities amended their complaints to include a public-nuisance claim under federal common law.[4] The

---

Darue Eng'g & Mfg., 545 U.S. 308, 125 S.Ct. 2363, 162 L.Ed.2d 257 (2005); (2) is "completely preempted" by federal law; (3) arises out of operations on the outer Continental Shelf, *see* 43 U.S.C. § 1349(b); (4) implicates actions that the Energy Companies took "pursuant to a federal officer's directions," *see* 28 U.S.C. § 1442(a)(1); (5) arose on "federal enclaves"; and (6) is related to bankruptcy cases, *see* 28 U.S.C. §§ 1334(b), 1452(a).

[3] Other cities and counties in California filed similar cases against the Energy Companies and a number of other energy companies. Those cases were filed in California state court and removed to federal court, where they were assigned to Judge Vince G. Chhabria. Judge Chhabria remanded those cases to state court based on a lack of subject-matter jurisdiction. *See Cty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 939 (N.D. Cal. 2018). We resolve the appeal from that remand order in a concurrently filed opinion. *See Cty. of San Mateo v. Chevron Corp.*, 960 F.3d 586 (9th Cir. 2020).

[4] The Cities added the City of Oakland and the City and County of San Francisco as plaintiffs because federal law, unlike California law, does not allow a city attorney to bring a public-

amended complaints stated that the federal claim was added "to conform to the [district court's] ruling" and that the Cities "reserve[d] all rights with respect to whether jurisdiction [is] proper in federal court." The Energy Companies moved to dismiss the amended complaints.

In June 2018, the district court held that the amended complaints failed "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). The district court first determined that it would be inappropriate to extend federal common law to provide relief because "federal courts should exercise great caution before fashioning federal common law in areas touching on foreign affairs," and the Cities' claims "implicate[d] the interests of countless governments, both foreign and domestic." The district court then dismissed the state-law claim on the ground that it "must stand or fall under federal common law." The district court therefore dismissed the amended complaints for failure to state a claim. On the same day, the district court requested a joint statement from the parties regarding whether it was necessary to reach the pending motions to dismiss for lack of personal jurisdiction. *See* Fed. R. Civ. P. 12(b)(2). After BP, ConocoPhillips, Exxon, and Shell requested a ruling on the issue, the district court ruled that it lacked personal jurisdiction over those defendants and dismissed them. The district court then entered judgments in favor of the Energy Companies and against the Cities.

The Cities appeal the denial of their motions to remand, the dismissal of their complaints for failure to state a claim, and the district court's personal-

---

nuisance action in federal court in the name of the people of the State of California.

jurisdiction ruling. We have jurisdiction under 28 U.S.C. § 1291. We review questions of statutory construction and subject-matter jurisdiction de novo. *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1315 (9th Cir. 1998). "[S]tatutes extending federal jurisdiction . . . are narrowly construed so as not to reach beyond the limits intended by Congress." *Phillips v. Osborne*, 403 F.2d 826, 828 (9th Cir. 1968).

II

We first consider the Cities' argument that the district court erred in determining that it had federal-question jurisdiction under 28 U.S.C. § 1331. In undertaking this analysis, we consider only "the pleadings filed at the time of removal without reference to subsequent amendments." *Provincial Gov't of Marinduque v. Placer Dome, Inc.*, 582 F.3d 1083, 1085 n.1 (9th Cir. 2009) (citation omitted).

A

Federal-question jurisdiction stems from a congressional enactment, 28 U.S.C. § 1331, which provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." The scope of this statutory grant of jurisdiction is a matter of congressional intent, and the Supreme Court has determined that Congress conferred "a more limited power" than the full scope of judicial power accorded in the Constitution. *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 807, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986).[5] The general rule, referred to as the "well-

[5] Article III of the Constitution provides that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. Const. art. III, § 2. "[T]he constitutional meaning of 'arising un-

pleaded complaint rule," is that a civil action arises under federal law for purposes of § 1331 when a federal question appears on the face of the complaint. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). Because federal jurisdiction "depends solely on the plaintiff's claims for relief and not on anticipated defenses to those claims," *ARCO Envtl. Remediation, L.L.C. v. Dep't of Health & Envtl. Quality of Mont.*, 213 F.3d 1108, 1113 (9th Cir. 2000), "a case may *not* be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue," *Caterpillar*, 482 U.S. at 393, 107 S.Ct. 2425. Therefore, as the "master of the claim," the plaintiff can generally "avoid federal jurisdiction by exclusive reliance on state law." *Id.* at 392, 107 S.Ct. 2425.

There are a few exceptions to the well-pleaded-complaint rule, however.

1

First, in a line of cases, beginning with *Northern Pacific Railway Co. v. Soderberg*, 188 U.S. 526, 23 S.Ct. 365, 47 L.Ed. 575 (1903), and extending most recently to *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 125 S.Ct. 2363, 162 L.Ed.2d 257 (2005), the Supreme Court has recognized a "special and small category" of state-law claims that arise under federal law for purposes of § 1331 "because federal law is 'a necessary

---

der' may extend to all cases in which a federal question is 'an ingredient' of the action." *Merrell Dow Pharm.*, 478 U.S. at 807, 106 S.Ct. 3229 (quoting *Osborn v. Bank of U.S.*, 22 U.S. (9 Wheat.) 738, 823, 6 L.Ed. 204 (1824)).

element of the . . . claim for relief.'" *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 699, 126 S.Ct. 2121, 165 L.Ed.2d 131 (2006) (citation omitted). Only a few cases have fallen into this "slim category," *id.* at 701, 126 S.Ct. 2121, including: (1) a series of quiet-title actions from the early 1900s that involved disputes as to the interpretation and application of federal law, *see Hopkins v. Walker*, 244 U.S. 486, 489, 37 S.Ct. 711, 61 L.Ed. 1270 (1917) (federal jurisdiction was proper because "it [was] plain" that the case involved "a controversy respecting the construction and effect of" federal mining laws); *Wilson Cypress Co. v. Pozo*, 236 U.S. 635, 642–43, 35 S.Ct. 446, 59 L.Ed. 758 (1915) (federal jurisdiction was proper because the plaintiffs relied "upon [a] treaty with Spain and laws of the United States . . . to defeat [the] defendant's claim of title"); *Soderberg*, 188 U.S. at 528, 23 S.Ct. 365 (federal jurisdiction was proper because the plaintiff's claim"depend[ed] upon the proper construction of an act of Congress"); (2) a shareholder action seeking to enjoin a Missouri corporation from investing in federal bonds on the ground that the federal act pursuant to which the bonds were issued was unconstitutional, *see Smith v. Kan. City Title & Tr. Co.*, 255 U.S. 180, 201, 41 S.Ct. 243, 65 L.Ed. 577 (1921); and (3) a state-quiet title action claiming that property had been unlawfully seized by the Internal Revenue Service (IRS) because the notice of the seizure did not comply with the Internal Revenue Code, *see Grable*, 545 U.S. at 311, 125 S.Ct. 2363. In other cases where parties have sought to invoke federal jurisdiction for state-law claims, the Court has concluded that jurisdiction was lacking, even when the claims were premised on violations of federal law, *see Merrell Dow Pharm.*, 478 U.S. at 805–07, 106 S.Ct. 3229; *Moore v. Chesapeake & Ohio Ry. Co.*, 291 U.S. 205, 210, 54 S.Ct. 402, 78 L.Ed. 755

(1934), required remedies "contemplated by a federal statute," *Empire Healthchoice*, 547 U.S. at 690, 126 S.Ct. 2121, or required the interpretation and application of a federal statute in a hypothetical case underlying a legal malpractice claim, *see Gunn v. Minton*, 568 U.S. 251, 259, 133 S.Ct. 1059, 185 L.Ed.2d 72 (2013).

The Court has articulated a test for deciding when this exception to the well-pleaded-complaint rule applies. As explained in *Grable* and later in *Gunn*, 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*, 568 U.S. at 258, 133 S.Ct. 1059 (citing *Grable*, 545 U.S. at 314, 125 S.Ct. 2363). All four requirements must be met for federal jurisdiction to be proper. *Id.*

The Court has often focused on the third requirement, the question whether a case "turn[s] on substantial questions of federal law." *Grable*, 545 U.S. at 312, 125 S.Ct. 2363. This inquiry focuses on the importance of a federal issue "to the federal system as a whole." *Gunn*, 568 U.S. at 260, 133 S.Ct. 1059. An issue has such importance when it raises substantial questions as to the interpretation or validity of a federal statute, *see Smith*, 255 U.S. at 201, 41 S.Ct. 243; *Hopkins*, 244 U.S. at 489–90, 37 S.Ct. 711, or when it challenges the functioning of a federal agency or program, *see Grable*, 545 U.S. at 315, 125 S.Ct. 2363 (holding there was federal jurisdiction to address an action challenging the IRS's ability to satisfy tax delinquencies by seizing and disposing of property); *cf. Bennett v. Sw. Airlines Co.*, 484 F.3d 907, 911 (7th Cir. 2007) (holding that federal jurisdiction was lacking because, among other reasons, the plaintiffs did

not "challenge the validity of any federal agency's or employee's action"). Moreover, an issue may qualify as substantial when it is a "pure issue of law," *Empire Healthchoice*, 547 U.S. at 700, 126 S.Ct. 2121 (citation omitted), that directly draws into question "the constitutional validity of an act of Congress," *Smith*, 255 U.S. at 201, 41 S.Ct. 243, or challenges the actions of a federal agency, *see Grable*, 545 U.S. at 310, 125 S.Ct. 2363, and a ruling on the issue is "both dispositive of the case and would be controlling in numerous other cases," *Empire Healthchoice*, 547 U.S. at 700, 126 S.Ct. 2121 (citing *Grable*, 545 U.S. at 313, 125 S.Ct. 2363). By contrast, a federal issue is not substantial if it is "fact-bound and situation-specific," *see id.* at 701, 126 S.Ct. 2121, or raises only a hypothetical question unlikely to affect interpretations of federal law in the future, *see Gunn*, 568 U.S. at 261, 133 S.Ct. 1059. A federal issue is not substantial merely because of its novelty, *see id.* at 262, 133 S.Ct. 1059, or because it will further a uniform interpretation of a federal statute, *see Merrell Dow Pharm.*, 478 U.S. at 815–16, 106 S.Ct. 3229.

2

A second exception to the well-pleaded-complaint rule is referred to as the "artful-pleading doctrine." This doctrine "allows removal where federal law completely preempts a plaintiff's state-law claim," *Rivet v. Regions Bank of La.*, 522 U.S. 470, 475, 118 S.Ct. 921, 139 L.Ed.2d 912 (1998), meaning that "the preemptive force of the statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule,'" *Caterpillar*, 482 U.S. at 393, 107 S.Ct. 2425 (quoting *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987)). To have this effect, a federal statute must

"provide[ ] the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action." *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8, 123 S.Ct. 2058, 156 L.Ed.2d 1 (2003).

The Supreme Court has identified only three statutes that meet this criteria: (1) § 301 of the Labor Management Relations Act (the LMRA), 29 U.S.C. § 185, which "displace[s] entirely any state cause of action 'for violation of contracts between an employer and a labor organization,'" *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 23, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983) (citation omitted); (2) § 502(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132(a), which preempts state-law claims asserting improper processing of a claim for benefits under an employee-benefit plan regulation by ERISA, *Metro. Life Ins.*, 481 U.S. at 65–66, 107 S.Ct. 1542; and (3) §§ 85 and 86 of the National Bank Act, 12 U.S.C. §§ 85, 86, which provide the "exclusive cause of action for usury claims against national banks," *Beneficial Nat'l Bank*, 539 U.S. at 9, 123 S.Ct. 2058. In light of these cases, we have held that complete preemption for purposes of federal jurisdiction under § 1331 exists when Congress: (1) intended to displace a state-law cause of action, and (2) provided a substitute cause of action. *Hansen v. Grp. Health Coop.*, 902 F.3d 1051, 1057 (9th Cir. 2018) (citing *Beneficial Nat'l Bank*, 539 U.S. at 8, 123 S.Ct. 2058); *accord Hunter v. United Van Lines*, 746 F.2d 635, 642–43 (9th Cir. 1984).

B

We now consider whether the district court erred in concluding it had jurisdiction over the Cities' complaints under § 1331. At the time of removal, each

complaint asserted only a single cause of action for public nuisance under California law. Under the well-pleaded-complaint rule, the district court lacked federal-question jurisdiction unless one of the two exceptions to the well-pleaded-complaint rule applies.

1

We first consider whether the Cities' state-law claim for public nuisance falls within the "special and small category" of state-law claims that arise under federal law. *Empire Healthchoice*, 547 U.S. at 699, 126 S.Ct. 2121. The gist of the Cities' claim is that the Energy Companies' production and promotion of fossil fuels has resulted in rising sea levels, causing harm to the Cities. Under the Court's test, we must determine whether, by virtue of this claim, a federal issue is "(1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn*, 568 U.S. at 258, 133 S.Ct. 1059 (citing *Grable*, 545 U.S. at 314, 125 S.Ct. 2363).

Even assuming that the Cities' allegations could give rise to a cognizable claim for public nuisance under federal common law, *cf. Am. Elec. Power Co. v. Connecticut ("AEP")*, 564 U.S. 410, 423, 131 S.Ct. 2527, 180 L.Ed.2d 435 (2011), the district court did not have jurisdiction under § 1331 because the state-law claim for public nuisance fails to raise a substantial federal question. Adjudicating the claim does not require resolution of a substantial question of federal law: the claim neither requires an interpretation of a federal statute, *cf. Grable*, 545 U.S. at 310, 125 S.Ct. 2363; *Hopkins*, 244 U.S. at 489, 37 S.Ct. 711, nor challenges a federal statute's constitutionality, *cf. Smith*, 255 U.S. at 199, 41 S.Ct. 243. The Energy Companies also do not identify a legal issue neces-

sarily raised by the claim that, if decided, will "be controlling in numerous other cases." *Empire Healthchoice*, 547 U.S. at 700, 126 S.Ct. 2121 (citing *Grable*, 545 U.S. at 313, 125 S.Ct. 2363). Indeed, it is not clear that the claim requires an interpretation or application of federal law at all, because the Supreme Court has not yet determined that there is a federal common law of public nuisance relating to interstate pollution, *see AEP*, 564 U.S. at 423, 131 S.Ct. 2527, and we have held that federal public-nuisance claims aimed at imposing liability on energy producers for "acting in concert to create, contribute to, and maintain global warming" and "conspiring to mislead the public about the science of global warming," *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 854 (9th Cir. 2012), are displaced by the Clean Air Act, *id.* at 858.

Rather than identify a legal issue, the Energy Companies suggest that the Cities' state-law claim implicates a variety of "federal interests," including energy policy, national security, and foreign policy.[6] The question whether the Energy Companies can be held liable for public nuisance based on production and promotion of the use of fossil fuels and be required to spend billions of dollars on abatement is no doubt an important policy question, but it does not raise a substantial question of federal law for the purpose of determining whether there is jurisdiction under § 1331. *Cf. Empire Healthchoice*, 547 U.S. at 701, 126 S.Ct. 2121 (holding that the federal government's "overwhelming interest in attracting able workers to the federal workforce" and "in the health

---

[6] We do not address whether such interests may give rise to an affirmative federal defense because such a defense is not grounds for federal jurisdiction. *See, e.g.*, *Caterpillar*, 482 U.S. at 393, 107 S.Ct. 2425.

and welfare of the federal workers upon whom it relies to carry out its functions" was insufficient to transform a "state-court-initiated tort litigation" into a "federal case"). Finally, evaluation of the Cities' claim that the Energy Companies' activities amount to a public nuisance would require factual determinations, and a state-law claim that is "fact-bound and situation-specific" is not the type of claim for which federal-question jurisdiction lies. *Id.*; *see also Bennett*, 484 F.3d at 910 (holding that federal jurisdiction was lacking when the case required "a fact-specific application of rules that come from both federal and state law rather than a context-free inquiry into the meaning of a federal law").

Given that the Cities' state-law claim does not raise a substantial federal issue, the claim does not fit within the "slim category *Grable* exemplifies," *Empire Healthchoice*, 547 U.S. at 701, 126 S.Ct. 2121, and we need not consider the remaining requirements articulated in *Grable*.

2

The Energy Companies also argue that the Cities' state-law claim for public nuisance arises under federal law because it is completely preempted by the Clean Air Act. This argument also fails.

The Clean Air Act is not one of the three statutes that the Supreme Court has determined has extraordinary preemptive force. *See Ansley v. Ameriquest Mortg. Co.*, 340 F.3d 858, 862 (9th Cir. 2003). Rather, the Supreme Court has left open the question whether the Clean Air Act preempts a state-law nuisance claim under ordinary preemption principles. *AEP*, 564 U.S. at 429, 131 S.Ct. 2527 ("In light of our holding that the Clean Air Act displaces federal common law, the availability *vel non* of a state [nuisance] law-

suit depends, *inter alia*, on the preemptive effect of the federal Act."). Nor does the Clean Air Act meet either of the two requirements for complete preemption. *See, e.g.*, *Hansen*, 902 F.3d at 1057.

First, the statutory language does not indicate that Congress intended to preempt "every state law cause of action within the scope" of the Clean Air Act. *In re NOS Commc'ns, MDL No. 1357*, 495 F.3d 1052, 1058 (9th Cir. 2007); *see also Beneficial Nat'l Bank*, 539 U.S. at 11, 123 S.Ct. 2058 (holding that federal law provides the exclusive cause of action for usury claims against national banks such that there is "no such thing as a state-law claim of usury against a national bank"). Rather, the statute indicates that Congress intended to preserve state-law causes of action pursuant to a saving clause, 42 U.S.C. § 7416,[7] which "makes clear that states retain the right to 'adopt or enforce' common law standards that apply to emissions" and preserves "[s]tate common law standards . . . against preemption," *Merrick v. Diageo Ams. Supply, Inc.*, 805 F.3d 685, 690, 691 (6th Cir. 2015) (citation omitted). When a federal statute has a saving clause of this sort, Congress did not intend complete preemption, because "there would be nothing . . . to 'save'" if Congress intended to preempt every state cause of action within the scope of the statute. *In re NOS*, 495 F.3d at 1058. Moreover, the

[7] Section 7416 provides, "Except as otherwise provided in [statutory exceptions not applicable here] nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution," except that no state or local government may "adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation" provided for by the Clean Air Act and its implementing plan. 42 U.S.C. § 7416.

Clean Air Act's statement that "air pollution control at its source is the primary responsibility of States and local governments," 42 U.S.C. § 7401(a)(3), weighs against a conclusion that Congress intended to displace state-law causes of action.

Second, the Clean Air Act does not provide the Cities with a "substitute[ ]" cause of action, *Hansen*, 902 F.3d at 1057, that is, a cause of action that would allow the Cities to "remedy the wrong [they] assert[ ] [they] suffered," *Hunter*, 746 F.2d at 643. While the Clean Air Act allows a plaintiff to file a petition to seek judicial review of certain actions taken by the Environmental Protection Agency, 42 U.S.C. § 7607(b)(1), it does not provide a federal claim or cause of action for nuisance caused by global warming. Moreover, the Clean Air Act's citizen-suit provision, § 7604, permits actions for violations of the Clean Air Act, but it does not provide the Cities with a free-standing cause of action for nuisance that allows for compensatory damages, *see* § 7604(a); *Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 150 & n.3 (4th Cir. 1994). Thus, the Clean Air Act satisfies neither requirement for complete preemption.

* * *

In sum, because neither exception to the well-pleaded-complaint rule applies to the Cities' original complaints, the district court erred in holding that it had jurisdiction under 28 U.S.C. § 1331 at the time of removal.

III

Although the district court lacked jurisdiction under 28 U.S.C. § 1331 at the time of removal, that does not end our inquiry. This is because the Cities cured any subject-matter jurisdiction defect by amending

their complaints to assert a claim under federal common law. *See Pegram v. Herdrich*, 530 U.S. 211, 215 n.2, 120 S.Ct. 2143, 147 L.Ed.2d 164 (2000) (holding that there was "jurisdiction regardless of the correctness of the removal" because the "amended complaint alleged ERISA violations, over which the federal courts have jurisdiction"); *Singh v. Am. Honda Fin. Corp.*, 925 F.3d 1053, 1070 (9th Cir. 2019); *Retail Prop. Tr. v. United Bhd. of Carpenters & Joiners of Am.*, 768 F.3d 938, 949 & n.6 (9th Cir. 2014).[8] Thus, at the time the district court dismissed the Cities' complaints, there was subject-matter jurisdiction because the operative pleadings asserted a claim "arising under" federal common law. 28 U.S.C. § 1331. Based on this cure, the Energy Companies raise two arguments as to why we can affirm the district court's dismissals, even if there was no subject-matter jurisdiction at the time of removal.

First, the Energy Companies argue that the Cities waived the argument that the district court erred in refusing to remand the cases to state court because the Cities amended their complaints to assert a claim under federal common law. We disagree. The Cities moved for remand and stated, in their amended complaints, that they included a federal claim "to conform to the [district court's] ruling" and that they "reserve[d] all rights with respect to whether jurisdiction is proper in federal court." This was sufficient to preserve the argument that removal was improper. *See Caterpillar Inc. v. Lewis*, 519 U.S. 61, 73–74, 117

---

[8] We reject the Cities' argument that any subject-matter jurisdiction defect was not cured because they acted involuntarily when they added a federal claim to their complaints. Once a plaintiff asserts a federal claim, regardless whether the plaintiff does so under protest, the district court has subject-matter jurisdiction. *Cf. Pegram*, 530 U.S. at 215 n.2, 120 S.Ct. 2143.

S.Ct. 467, 136 L.Ed.2d 437 (1996); *Singh*, 925 F.3d at 1066.

Second, the Energy Companies argue that any impropriety with respect to removal can be excused because "considerations of finality, efficiency, and economy," *Lewis*, 519 U.S. at 75, 117 S.Ct. 467, weigh in favor of affirming the district court's dismissal of the Cities' complaints. Again, we disagree.

Section 1441(a) requires that a case be "fit for federal adjudication at the time [a] removal petition is filed." *Id.* at 73, 117 S.Ct. 467.[9] Because a party violates § 1441(a) if it removes a case that is not fit for federal adjudication, a district court generally must remand the case to state court, even if subsequent actions conferred subject-matter jurisdiction on the district court. *See, e.g.*, *O'Halloran v. Univ. of Wash.*, 856 F.2d 1375, 1380–81 (9th Cir. 1988) (directing a district court to remand a complaint to state court even though the plaintiff amended her complaint to assert violations of federal law after the district court denied a motion to remand).

There is, however, a narrow exception to this rule that takes into account "considerations of finality, efficiency, and economy." *Singh*, 925 F.3d at 1065 (quoting *Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 574, 124 S.Ct. 1920, 158 L.Ed.2d 866 (2004)). Specifically, when a jurisdictional defect has been cured after removal and the case has been tried

---

[9] Section 1441(a) provides, in relevant part:

> [A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1441(a).

in federal court, a violation of § 1441(a) can be excused if remanding the case to state court would be inconsistent "with the fair and unprotracted administration of justice." *Id.* (quoting *Lewis*, 519 U.S. at 77, 117 S.Ct. 467).

The decision to excuse a violation of § 1441(a) depends on the stage of the underlying proceedings. When a case "has been tried in federal court," "considerations of finality, efficiency, and economy become overwhelming," *Lewis*, 519 U.S. at 75, 117 S.Ct. 467, and in those circumstances, the Supreme Court has refused to "wipe out the adjudication postjudgment" so long as the there was jurisdiction when the district court entered judgment, *id.* at 77, 117 S.Ct. 467; *see also Grubbs v. Gen. Elec. Credit Corp.*, 405 U.S. 699, 702, 92 S.Ct. 1344, 31 L.Ed.2d 612 (1972). For instance, in *Lewis*, the Court excused a violation of § 1441(a) when the case was litigated in federal court for over three years, culminating in a six-day jury trial. 519 U.S. at 66–67, 117 S.Ct. 467. "Requiring [remand] after years of litigation," the Court explained, "would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention." *Id.* at 76, 117 S.Ct. 467 (quoting *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 836, 109 S.Ct. 2218, 104 L.Ed.2d 893 (1989)). We have extended this reasoning to cases where the district court resolves "state law issues on the merits" at summary judgment. *Singh*, 925 F.3d at 1071.[10] For instance, we excused a violation of

---

[10] We have held that this rule does not apply when we reverse the grant of summary judgment, such that there is no longer a "judgment on the merits." *Prize Frize, Inc. v. Matrix (U.S.) Inc.*, 167 F.3d 1261, 1266 (9th Cir. 1999), *superseded by statute on other grounds as recognized in Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 681 (9th Cir. 2006); *accord Emard v. Hughes Air-*

§ 1441(a) when, after extensive motion practice and discovery, the district court granted summary judgment in favor of the defendants. *Id.* at 1061–62. We reasoned that the case was sufficiently analogous to one in which there was a trial on the merits and therefore held that "[c]onsiderations of finality, efficiency, and economy" counseled in favor of excusing the violation of § 1441(a). *Id.* at 1071 (quoting *Lewis*, 519 U.S. at 75, 117 S.Ct. 467).

This reasoning, however, generally will not apply when a district court dismisses a complaint for failure to state a claim under Rule 12(b)(6). That rule is designed "to enable defendants to challenge the legal sufficiency of complaints without subjecting themselves to discovery," the cost of which can be "prohibitive." *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987). "[T]he purpose of a motion under Rule 12(b)(6) is to test the formal sufficiency of . . . [a] claim for relief; the motion is not a procedure for resolving a contest between the parties about the facts or the substantive merits of the plaintiff's case." 5B Arthur R. Miller et al., *Federal Practice & Procedure* § 1356 (3d ed. 2020). In contrast, a motion for summary judgment is designed to "test whether there is a genuine issue of material fact" and "often involves the use of pleadings, depositions, answers to interrogatories, and affidavits." *Id.* Moreover, summary judgment is appropriate only if the "movant is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(a), whereas "the usual course of action upon granting a defendant's Rule 12(b)(6) motion is to allow a plaintiff to amend his or her complaint," *Waste Control Specialists, LLC v. Envirocare of Tex.,*

---

craft Co., 153 F.3d 949, 962 (9th Cir. 1998), *abrogated on other grounds by Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 146, 121 S.Ct. 1322, 149 L.Ed.2d 264 (2001).

Inc., 199 F.3d 781, 786 (5th Cir.), *opinion withdrawn and superseded in part on reh'g*, 207 F.3d 225 (5th Cir. 2000).

In light of these differences, we agree with the Fifth Circuit that a dismissal under Rule 12(b)(6), unlike a grant of summary judgment, is generally "insufficient to forestall an otherwise proper remand." *Camsoft Data Sys., Inc. v. S. Elecs. Supply, Inc.*, 756 F.3d 327, 338 (5th Cir. 2014). We have recognized that the "concern for judicial economy" is slight when a case is pending for under a year, the plaintiff engages in no discovery, and the district court dismisses the case "at an early stage, prior to trial on the merits." *Dyer v. Greif Bros.*, 766 F.2d 398, 399, 401 (9th Cir. 1985), *superseded by statute on other grounds as stated in Beeman v. Olson*, 828 F.2d 620, 621 (9th Cir. 1987). A case consumes a "minimum of judicial resources" if it is pending for only a few months before it is dismissed under Rule 12(b)(6). *Waste Control Specialists*, 199 F.3d at 787. Likewise, the Sixth Circuit has recognized that "concerns for judicial economy" are insignificant when dismissal comes "so early in the pleadings stage that there has been minimal investment of the parties' time in discovery or of the court's time in judicial proceedings or deliberations." *Chivas Prods. Ltd. v. Owen*, 864 F.2d 1280, 1286–87 (6th Cir. 1988), *abrogated on other grounds by Tafflin v. Levitt*, 493 U.S. 455, 461, 110 S.Ct. 792, 107 L.Ed.2d 887 (1990). In short, "considerations of finality, efficiency, and economy" are rarely, if ever, "overwhelming" when a district court dismisses a case at the pleading stage before the parties have engaged in discovery.[11]

---

[11] In *Parrino v. FHP, Inc.*, we held that a defendant's failure to comply with a judge-made procedural requirement for removal did not warrant reversal of a dismissal under Rule 12(b)(6) and "remand of the matter to state court." 146 F.3d 699, 703

In this case, "considerations of finality, efficiency, and economy" are far from "overwhelming." *Lewis*, 519 U.S. at 75, 117 S.Ct. 467. When the district court entered judgments, the cases had been on its docket for less than a year—just over eight months. The parties engaged in motion practice under Rule 12, and there had been no discovery. Although the district court held hearings and the parties presented a "tutorial" on global warming, that is a relatively modest use of judicial resources as compared to, for example, three years of litigation, culminating in a six-day jury trial. *See id.* at 66–67, 117 S.Ct. 467. Because the district court dismissed these cases at the pleading stage, after they were pending for less than a year and before the parties engaged in discovery, we conclude that "considerations of finality, efficiency, and economy" are not "overwhelming." *Id.* at 75, 117 S.Ct. 467; *see Camsoft Data Sys.*, 756 F.3d at 338; *Waste Control Specialists*, 199 F.3d at 786; *Dyer*, 766 F.2d at 401; *Chivas Prods.*, 864 F.2d at 1286–87. Accordingly, if there was not subject-matter jurisdiction at the time of removal, the cases must proceed in state court.

IV

The district court did not address the alternative bases for removal asserted in the Energy Companies' notices of removal. And we generally do not consider issues "not passed upon below." *Am. President Lines, Ltd. v. Int'l Longshore &Warehouse Union, Alaska Longshore Div., Unit 60*, 721 F.3d 1147, 1157 (9th Cir. 2013) (quoting *Singleton v. Wulff*, 428 U.S. 106,

---

(9th Cir. 1998), *superseded by statute on other grounds as recognized in Abrego Abrego*, 443 F.3d at 681. But *Parrino* is not applicable when a case is removed in violation of § 1441(a), resulting in a "statutory defect" with respect to removal. *Grupo Dataflux*, 541 U.S. at 574, 124 S.Ct. 1920.

120, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976)). Accordingly, we remand these cases to the district court to determine whether there was an alternative basis for jurisdiction.[12] If there was not, the cases should be remanded to state court.[13] This panel will retain jurisdiction for any subsequent appeals arising from these cases.

VACATED AND REMANDED.[14]

---

[12] The district court requested supplemental briefing on how the concept of the "'navigable waters of the United States' . . . relates to the removal jurisdiction issue in th[e] case." As the Cities pointed out, however, the Energy Companies waived any argument related to admiralty jurisdiction by not invoking it in their notices of removal. *See* 28 U.S.C. § 1446(a) (notice of removal must "contain[ ] a short and plain statement of the grounds for removal"); *ARCO*, 213 F.3d at 1117 (notice of removal "cannot be amended to add a separate basis for removal jurisdiction after the thirty day period" (citation omitted)); *O'Halloran*, 856 F.2d at 1381 (same). Thus, the district court should confine its analysis to the bases for jurisdiction asserted in the notices of removal.

[13] We do not reach the question whether the district court lacked personal jurisdiction over four of the defendants. If, on remand, the district court determines that the cases must proceed in state court, the Cities are free to move the district court to vacate its personal-jurisdiction ruling. *Cf. Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 587–88, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999) (stating that in most instances "expedition and sensitivity to state courts' coequal stature should impel [a] federal court to dispose of [subject-matter jurisdiction] issue[s] first"); *Cerner Middle E. Ltd. v. Belbadi Enters. LLC*, 939 F.3d 1009, 1014 (9th Cir. 2019) (holding that the case should be remanded to state court based on a lack of subject-matter jurisdiction and declining to reach the issue of personal jurisdiction); *Special Invs., Inc. v. Aero Air, Inc.*, 360 F.3d 989, 994–95 (9th Cir. 2004).

[14] Each party shall bear its own costs on appeal.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 17-06011 WHA
and
No. C 17-06012 WHA

CITY OF OAKLAND, a Municipal Corporation, and THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through Oakland City Attorney BARBARA J. PARKER,

Plaintiffs,

v.

BP P.L.C., a public limited company of England and Wales, CHEVRON CORPORATION, a Delaware corporation, CONOCOPHILLIPS, a Delaware corporation, EXXON MOBIL CORPORATION, a New Jersey corporation, ROYAL DUTCH SHELL PLC, a public limited company of England and Wales, DOES, 1 through 10,

Defendants

AND RELATED CASE.

Signed June 25, 2018

ORDER GRANTING MOTION TO
DISMISS AMENDED COMPLAINTS

WILLIAM ALSUP, United States District Judge:

INTRODUCTION

In these "global warming" actions asserting claims for public nuisance, defendants move to dismiss for failure to state a claim. For the following reasons, the motion is GRANTED.

STATEMENT

These actions arise out of a vital function of our atmosphere—its thermostat function—that is, keeping the temperature of our planet within a habitable range. The atmosphere hosts water vapor and certain trace gases without which heat at Earth's surface would excessively radiate into space, leaving our planet too cold for life. One of those trace gases is carbon dioxide, a gas produced by, among other things, animal and human respiration, volcanoes and, more significantly here, combustion of fossil fuels like oil and natural gas. As heat radiates skyward, some of it passes close enough to molecules of carbon dioxide to be absorbed. These molecules then re-radiate the energy in all directions, including back toward Earth's surface. The more carbon dioxide in the air, the more this absorption and re-radiation process warms the surface. It turns out that even trace amounts of carbon dioxide in the air suffice to warm the atmosphere.[1]

The science dates back 120 years. In 1896, building on the findings by Irish scientist (and mountaineer) John Tyndall that carbon dioxide absorbed heat (whereas oxygen and nitrogen did not), Swedish scientist Svante Arrhenius published calculations that connected increases in the air's carbon dioxide with

---

[1] Our case involves all greenhouse gases, including methane, but "[c]arbon dioxide is by far the most important greenhouse gas" (Amd. Compls. ¶ 74).

increased global temperatures. Arrhenius, however, had no concern over global warming. Rather, his focus remained solving the mystery of the ice ages and their causes (Amd. Compls. ¶ 76; Svante Arrhenius, *On the Influence of Carbonic Acid in the Air Upon the Temperature of the Ground*, 41 Phil. Mag. & J. Sci. 237 (1896)).[2]

In 1938, scientist Guy Stewart Callendar published graphs plotting the warming of Earth using temperature records from around the world. One graph showed a 0.07 Centigrade rise in the mean temperatures of the planet from 1910 to 1930, while another showed a six to eight-percent rise in carbon dioxide in the air over the same period. Given Tyndall's earlier finding, Callendar concluded that one rise had caused the other, namely that more carbon dioxide had trapped more heat and caused the temperature to rise. Callendar, like Arrhenius, was not alarmed over the possibility of global warming. Guy S. Callendar, *The Artificial Production of Carbon Dioxide and Its Influence on Temperature*, 64 Q. J. Royal Meteorological Soc'y 223 (1938).

In 1957, oceanographer Roger Revelle and chemist Hans Suess published a critique of a then prevailing view that the oceans would absorb excessive airborne carbon dioxide and thus reduce the risk of an atmospheric buildup of carbon dioxide. Referring to the on-

---

[2] In 1859–1861, Tyndall discovered that the main gases in the atmosphere, nitrogen and oxygen, were transparent to infrared radiation but that carbon dioxide was opaque, meaning carbon dioxide absorbed infrared radiation. Tyndall recognized that carbon dioxide kept Earth warmer than would be the case without it. John Tyndall, *On the Absorption and Radiation of Heat by Gases and Vapours, and on the Physical Connexion of Radiation, Absorption, and Conduction*, 151 Phil. Trans. Royal Soc'y London 1 (1861).

going combustion of fossil fuels and release of carbon dioxide, they concluded: "[h]uman beings are now carrying out a large scale geophysical experiment of a kind that could not have happened in the past nor be reproduced in the future" (Amd. Compls. ¶ 77).

Revelle later obtained funding to measure the buildup of carbon dioxide in the atmosphere, arranging for scientist Charles David Keeling to reside on Mauna Loa in Hawaii to measure and graph the real-time concentrations of carbon dioxide. This project produced the famous Keeling Curve, a graph that shows a steady rise in atmospheric carbon dioxide, year after year, like clockwork (*id.* ¶ 78; *see also* NOAA, EARTH SYSTEMS RESEARCH LABORATORY, GLOBAL MONITORING DIVISION, https://www.esrl.noaa.gov/gmd/ccgg/trends/full.html (last visited June 15, 2018)).

From this brief history up to the Sixties, it would be wrong to conclude that scientists had sounded alarm bells for global warming. Arrhenius was more concerned with global cooling than warming. Revelle said a large-scale, one-time experiment was in progress, but he sounded no alarm bells at the time.

But alarm bells over climate change eventually did sound. In 1988, the United Nations established the Intergovernmental Panel on Climate Change ("IPCC"). Its main objective was to prepare—based on the best available scientific information—periodic assessments regarding all aspects of climate change, with a view of formulating realistic response strategies. The IPCC had three working groups: Working Group I assessed the scientific aspects of climate change, Working Group II assessed the vulnerability and adaptation of socioeconomic and natural systems to climate change, and Working Group III assessed

the mitigation options for limiting greenhouse gas emissions (Amd. Compls. ¶¶ 82–86).

The IPCC completed its first assessment report in 1990. The report made a persuasive case for anthropogenic interference with the climate system, and each subsequent report (about five to six years apart) incorporated advancements in measurements, observations, and modeling—and each presented a more precise picture of how our climate has changed, and what has changed it. The fifth assessment report, released in 2013, was abundantly clear:

> Warming of the climate system is unequivocal, and since the 1950s, many of the observed changes are unprecedented over decades and millennia. The atmosphere and ocean have warmed, the amounts of snow and ice have diminished, sea level has risen, and the concentrations of greenhouse gases have increased.

The report was also clear as to the cause, stating that it was "extremely likely" that "human influence has been the dominant cause of the observed warming since the mid-20th century" (*ibid.*).[3]

The science acknowledges that causes beyond the burning of fossil fuels are also at work. Deforestation has been and remains a significant contributor to the rise in carbon dioxide. Others include volcanoes and wildfires in greater numbers. Nevertheless, even acknowledging these other contributions, climate scientists are in vast consensus that the combustion of fossil fuels has, in and of itself, materially increased carbon dioxide levels, which in turn has materially increased the median temperature of the planet,

---

[3] The IPCC anticipates the release of a special report in October 2018 and the sixth assessment report in 2021.

which in turn has accelerated ice melt and raised (and continues to raise) the sea level.

In sum, in the last 120 years, the amount of carbon dioxide (and methane) in the air has increased, with most of the increase having come in recent decades. During that time, the median temperature of Earth has increased 1.8 degrees Fahrenheit. Glaciers around the world have been shrinking. Ice sheets over Greenland and Antarctica have been melting. The sea level has risen by about seven centimeters since 1993 (about seven to eight inches since 1900). As our globe warms and the seas rise, coastal lands in Oakland and San Francisco will, without erection of seawalls and other infrastructure, eventually become submerged by the navigable waters of the United States (*id.* ¶¶ 86–90, 124–36).

Defendants Chevron Corporation, Exxon Mobil Corporation, BP p.l.c., Royal Dutch Shell plc, and ConocoPhillips are the five largest investor-owned (as opposed to state-owned) producers of fossil fuels in the world, as measured by the greenhouse gas emissions allegedly generated from the use of the fossil fuels they have produced. They are the first (Chevron), second (Exxon), fourth (BP), sixth (Shell) and ninth (ConocoPhillips) largest cumulative producers of fossil fuels worldwide and are collectively responsible for over eleven percent of all carbon dioxide and methane pollution that has accumulated in the atmosphere since the Industrial Revolution (*id.* ¶ 94).

Defendants have allegedly long known the threat fossil fuels pose to the global climate. Nonetheless, they continued to extract and produce them in massive amounts while engaging in widespread advertising and communications campaigns meant to promote the sale of fossil fuels. These campaigns portrayed fossil fuels as environmentally responsible and

essential to human well-being and downplayed the risks of global warming by emphasizing the uncertainties of climate science or attacking the credibility of climate scientists (*id.* ¶¶ 95–123).

In September 2017, Oakland and San Francisco commenced these actions in state court. The original complaints each asserted a single claim for public nuisance under California law. After defendants removed the actions to this district, an order dated February 27, 2018, denied plaintiffs' motions to remand (Dkt. Nos. 1, 134).[4]

Given the international scope of plaintiffs' claims and that the very instrumentality of the anticipated coastal flooding is uniquely federal—namely, the navigable waters of the United States—one threshold issue presented by these cases was whether federal common law should govern (rather than state law). The February 27 order concluded:

> Plaintiffs' claims for public nuisance, though pled as state-law claims, depend on a global complex of geophysical cause and effect involving all nations of the planet (and the oceans and atmosphere). It necessarily involves the relationships between the United States and all other nations. It demands to be governed by as universal a rule of apportioning responsibility as is available. This order does not address whether (or not) plaintiffs have stated claims for relief. But plaintiffs' claims, if any, are governed by federal common law. Federal jurisdiction is therefore proper.

---

[4] All docket numbers herein refer to the docket in Case No. 17-cv-06011-WHA.

Plaintiffs have since amended their complaints to plead a separate claim for public nuisance under federal common law. The amended complaints also substituted defendant ConocoPhillips for its subsidiary, ConocoPhillips Company, and added the City of Oakland and the City and County of San Francisco as plaintiffs to the federal nuisance claims, among other additions. On March 21, to standing room only, counsel and their experts conducted a science tutorial for the undersigned judge. Defendants now move to dismiss the amended complaints for failure to state a claim (Dkt. Nos. 174, 199, 225). This order follows full briefing, oral argument, and supplemental briefing.[5]

ANALYSIS

The issue is not over science. All parties agree that fossil fuels have led to global warming and ocean rise and will continue to do so, and that eventually the navigable waters of the United States will intrude upon Oakland and San Francisco. The issue is a legal one—whether these producers of fossil fuels should pay for anticipated harm that will eventually flow from a rise in sea level.

The sole claim for relief is for "public nuisance," a claim governed by federal common law. The specific nuisance is global-warming induced sea level rise. Plaintiffs' theory, to repeat, is that defendants' sale of fossil fuels leads to their eventual combustion, which leads to more carbon dioxide in the atmosphere, which leads to more global warming and consequent ocean rise.

---

[5] At the Court's invitation, the United States submitted an amicus brief on the question of whether or not (and the extent to which) federal common law affords the relief requested by plaintiffs. The Attorneys General of eighteen States also submitted amicus briefs (Dkt. Nos. 224, 236, 245).

The scope of plaintiffs' theory is breathtaking. It would reach the sale of fossil fuels anywhere in the world, including all past and otherwise lawful sales, where the seller knew that the combustion of fossil fuels contributed to the phenomenon of global warming. While these actions are brought against the first, second, fourth, sixth and ninth largest producers of fossil fuels, anyone who supplied fossil fuels with knowledge of the problem would be liable. At one point, counsel seemed to limit liability to those who had promoted allegedly phony science to deny climate change. But at oral argument, plaintiffs' counsel clarified that any such promotion remained merely a "plus factor." Their theory rests on the sweeping proposition that otherwise lawful and everyday sales of fossil fuels, combined with an awareness that greenhouse gas emissions lead to increased global temperatures, constitute a public nuisance.[6]

A public nuisance under federal common law, both sides agree, is an "unreasonable interference with a right common to the general public," as set forth in the Restatement (Second) of Torts § 821B(1) (1979). Putting aside momentarily the important issue of displacement, a successful public nuisance claim therefore requires proof that a defendant's activity unreasonably interferes with the use or enjoyment of a public right and thereby causes the public-at-large substantial and widespread harm. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 855 (9th

---

[6] This clarification seems to have been aimed at avoiding the *Noerr-Pennington* doctrine and other free speech issues inherent in predicating liability on publications designed to influence public policy. *See E. R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

Cir. 2012) (citing *Missouri v. Illinois*, 200 U.S. 496, 521 (1906)).

No plaintiff has ever succeeded in bringing a nuisance claim based on global warming. But courts that have addressed such claims, as well as the parties here, have turned to the Restatement to analyze whether the common law tort of nuisance can be applied in this context.[7]

Section 821B of the Restatement sets forth three tests for whether an interference with a public right is unreasonable:

> (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
>
> (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
>
> (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

To be held liable for a public nuisance, a defendant's interference with a public right can either be intentional, or unintentional and otherwise actiona-

---

[7] Although plaintiffs analogize these actions to earlier lawsuits against "Big Tobacco," only one court has ever sustained a public nuisance theory against a tobacco company. *Evans v. Lorillard Tobacco Co.*, No. 04-2840A, 2007 WL 796175 (Mass. Super. Ct. Feb. 7, 2007). Every other court to reach the issue, however, has rejected a public nuisance theory. *See, e.g.*, *Allegheny Gen. Hosp. v. Phillip Morris*, 228 F.3d 429, 446 (3d Cir. 2000); *Texas v. Am. Tobacco Co.*, 14 F. Supp. 2d 956, 972–73 (E.D. Tex. 1997).

ble under principles controlling liability for negligence, recklessness, or abnormally dangerous activities. Restatement § 821B cmt. e. Where, as alleged here, the interference is intentional, "it must also be unreasonable." *Ibid.* This determination, in turn, involves "the weighing of the gravity of the harm against the utility of the conduct," guidance for which is set forth in Sections 826 through 831 of the Restatement. *Ibid.* If the interference was unintentional, the principles governing negligence, recklessness, or abnormally dangerous activities also "embody in some degree the concept of unreasonableness." *Ibid.*

The commentary to Sections 826 through 831 explain, among other things, that "in determining whether the gravity of the interference with the public right outweighs the utility of the actor's conduct, it is necessary to consider the extent and character of the interference, the social value that the law attaches to it, the character of the locality involved and the burden of avoiding the harm placed upon members of the public." *Id.* at § 827 cmt. a. Relatedly, in evaluating the utility of the conduct, "it is necessary to consider the social value that the law attaches to the primary purpose of the conduct, the suitability of the conduct to the character of the locality and the impracticality of preventing or avoiding the invasion." *Id.* at § 828 cmt. a.

With respect to balancing the social utility against the gravity of the anticipated harm, it is true that carbon dioxide released from fossil fuels has caused (and will continue to cause) global warming. But against that negative, we must weigh this positive: our industrial revolution and the development of our modern world has literally been fueled by oil and coal. Without those fuels, virtually all of our monumental progress would have been impossible. All of

us have benefitted. Having reaped the benefit of that historic progress, would it really be fair to now ignore our own responsibility in the use of fossil fuels and place the blame for global warming on those who supplied what we demanded? Is it really fair, in light of those benefits, to say that the sale of fossil fuels was unreasonable?

This order recognizes but does not resolve these questions, for there is a more direct resolution from the Supreme Court and our court of appeals, next considered.[8]

1. DISPLACEMENT.

The Supreme Court has held that the Clean Air Act and the EPA's authority thereunder to set emission standards have displaced federal common law nuisance claims to enjoin a defendant's emission of greenhouse gases. *Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410 (2011) ("*AEP*"). In *Kivalina*, our court of appeals extended the Clean Air Act displacement rule to claims for damages based on an oil producer's *past* emissions. 696 F.3d 849. In other words, Congress has vested in the EPA the problem

[8] Another problem involves timing. Although plaintiffs allege that global warming has already caused sea level rise, Oakland and San Francisco have yet to build a seawall or other infrastructure for which they seek reimbursement. The United States Army Corps of Engineers has already proposed projects to address the problem and is likely to help protect plaintiffs' property and residents. Oakland and San Francisco may eventually incur expense over and above federal outlays, but that is neither certain nor imminent. If and when those expense items are actually incurred, defendants will still be in business and will be good for any liability. Requiring them to pay now into an anticipatory "abatement fund" would be like walking to the pay window before the race is over.

of greenhouse gases and has given it plenary authority to solve the problem at the point of emissions.

Here, by contrast, defendants stand accused, not for their own emissions of greenhouse gases, but for their sale of fossil fuels to those who eventually burn the fuel. Is this distinction enough to avoid displacement under *AEP* and *Kivalina*? The harm alleged by our plaintiffs remains a harm caused by fossil fuel *emissions*, not the mere extraction or even sale of fossil fuels. This order holds that, were this the only distinction, *AEP* and *Kivalina* would still apply. If an oil producer cannot be sued under the federal common law for their own emissions, *a fortiori* they cannot be sued for someone else's.

The amended complaints, however, add another dimension not addressed in *AEP* or *Kivalina*, namely that the conduct and emissions contributing to the nuisance arise *outside* the United States, although their ill effects reach *within* the United States. Specifically, emissions from the use of defendants' fossil fuels abroad send greenhouse gases into our atmosphere, warm our globe, melt its ice, raise sea levels, and, via the navigable waters of the United States, threaten coastal flooding in Oakland and San Francisco. The February 27 order concluded that because plaintiffs' nuisance claims centered on defendants' placement of fossil fuels into the flow of international commerce, and because foreign emissions are out of the EPA and Clean Air Act's reach, the Clean Air Act did not necessarily displace plaintiffs' federal common law claims. Nevertheless, these claims are foreclosed by the need for federal courts to defer to the legislative and executive branches when it comes to such international problems, as now explained.

2. INTERFERENCE WITH SEPARATION OF POWERS AND FOREIGN POLICY.

The Supreme Court has given us caution in formulating new claims under federal common law. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). *Sosa* and earlier decisions "cast doubt on the authority of courts to extend or create private causes of action even in the realm of domestic law, where [the Supreme Court] has 'recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases.'" *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1402 (2018) (citing *Sosa*, 542 U.S. at 727). The Supreme Court has also "remain[ed] mindful that it does not have the creative power akin to that vested in Congress." *AEP*, 564 U.S. at 422. One consideration weighing in favor of judicial caution is where "modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity." *Sosa*, 542 U.S. at 728.

As explained above, plaintiffs' claims require a balancing of policy concerns—including the harmful effects of greenhouse gas emissions, our industrialized society's dependence on fossil fuels, and national security. Through the Clean Air Act, Congress "entrust[ed] such complex balancing to the EPA in the first instance, in combination with state regulators." *AEP*, 564 U.S. at 427. And, not long ago, the problem wasn't too much oil, but too little, and our national policy emphasized the urgency of reducing dependence on foreign oil. In enacting the Energy Policy Act of 1992, for example, Congress expressed that it was "the goal of the United States in carrying out energy supply and energy conservation research and development . . . to strengthen national energy security by

reducing dependence on imported oil." 42 U.S.C. § 13401. In our industrialized and modern society, we needed (and still need) oil and gas to fuel power plants, vehicles, planes, trains, ships, equipment, homes and factories. Our industrial revolution and our modern nation, to repeat, have been fueled by fossil fuels.

In light of *AEP*, plaintiffs shift their focus to sales of fossil fuels worldwide, beyond the reach of the EPA and the Clean Air Act. This shift to foreign lands, however, runs counter to another cautionary restriction, the presumption against extraterritoriality. The Supreme Court has cautioned that where recognizing a new claim for relief under federal common law could affect foreign relations, courts should be "particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Sosa*, 542 U.S. at 727. In *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), the Supreme Court held that the principles underlying the presumption against extraterritoriality also constrain courts considering claims brought under the Alien Tort Statute. The presumption "serves to protect against unintended clashes between our laws and those of other nations" and "helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches." *Id.* at 115–16 (citations and internal quotation marks omitted). While courts "typically apply the presumption to discern whether an Act of Congress regulating conduct applies abroad," *Kiobel* recognized that "the danger of unwarranted judicial interference in the conduct of foreign policy is magnified" where "the question is not what Congress has done but instead what courts may do." *Id.* at 116. And where a

claim "reaches conduct within the territory of another sovereign," concerns of "unwarranted judicial interference" in foreign policy "are all the more pressing." *Id.* at 117. Importantly, "[t]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns." *Jesner*, 138 S. Ct. at 1403.

Here, plaintiffs seek to impose liability on five companies for their production and sale of fossil fuels worldwide. These claims—through which plaintiffs request billions of dollars to abate the localized effects of an inherently global phenomenon—undoubtedly implicate the interests of countless governments, both foreign and domestic. The challenged conduct is, as far as the complaints allege, lawful in every nation. And, as the United States aptly notes, many foreign governments actively support the very activities targeted by plaintiffs' claims (USA Amicus Br. at 18). Nevertheless, plaintiffs would have a single judge or jury in California impose an abatement fund as a result of such overseas behavior. Because this relief would effectively allow plaintiffs to govern conduct and control energy policy on foreign soil, we must exercise great caution.

Global warming is already the subject of international agreements. The United States is also engaged in active discussions with other countries as to whether and how climate change should be addressed through a coordinated framework (*ibid.*). The Montreal Protocol on Substances that Deplete the Ozone Layer, signed by 197 countries to eliminate chlorofluorocarbons (CFCs), demonstrates that global cooperation can work, even if getting there remains difficult. Everyone has contributed to the problem of global warming and everyone will suffer the conse-

quences—the classic scenario for a legislative or international solution.

This order fully accepts the vast scientific consensus that the combustion of fossil fuels has materially increased atmospheric carbon dioxide levels, which in turn has increased the median temperature of the planet and accelerated sea level rise. But questions of how to appropriately balance these worldwide negatives against the worldwide positives of the energy itself, and of how to allocate the pluses and minuses among the nations of the world, demand the expertise of our environmental agencies, our diplomats, our Executive, and at least the Senate. Nuisance suits in various United States judicial districts regarding conduct worldwide are far less likely to solve the problem and, indeed, could interfere with reaching a worldwide consensus.

Plaintiffs argue against this result on several grounds. *First*, plaintiffs argue that adjudication of plaintiffs' claims would not infringe on the role of the political branches because the undersigned judge need not weigh or consider the social utility of defendants' conduct. The commentary to Section 826 of the Restatement explains that in some scenarios harm may be "so severe" that the conduct becomes unreasonable "as a matter of law," and that in such situations monetary recovery is available "regardless of the utility of the activity in the abstract." Restatement § 826 cmt. b. Plaintiffs similarly rely on Section 829A, which provides:

> An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if the harm resulting from the invasion is severe and greater than the other should be required to bear without compensation.

Plaintiffs claim that the harm alleged in these actions is "undeniably severe" such that global warming constitutes a nuisance as a matter of law. But in *AEP*, the Supreme Court addressed public nuisance claims based on similar allegations of harm, and nonetheless cautioned that policy questions concerning global warming require an "informed assessment of competing interests" and that "[a]long with the environmental benefit potentially achievable, our Nation's energy needs and the possibility of economic disruption must weigh in the balance." 564 U.S. at 427.

Plaintiffs next cite to Section 821B, comment i (entitled "Action for damages distinguished from one for injunction") which provides:

> In determining whether to award damages, the court's task is to decide whether it is unreasonable to engage in the conduct without paying for the harm done. Although a general activity may have great utility it may still be unreasonable to inflict the harm without compensating for it. In an action for injunction the question is whether the activity itself is so unreasonable that it must be stopped. It may be reasonable to continue an important activity if payment is made for the harm it is causing, but unreasonable to continue it without paying.

This question of reasonableness nevertheless falls squarely within the type of balancing best left to Congress (or diplomacy). Judge Martin Jenkins rejected a similar argument in *People of the State of California v. General Motors Corp.*, No. 06-cv-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007). There, the State of California sued several automakers for contributing to global warming. California argued that because it sought damages, resolution of its fed-

eral common law public nuisance claim would not require the district court to determine whether the defendants' actions had been unreasonable, but rather whether the interference suffered by California was unreasonable. *Id.* at *8. Judge Jenkins disagreed that this distinction would allow him to avoid making policy determinations, explaining that "regardless of the relief sought, the Court is left to make an initial decision as to what is unreasonable in the context of carbon dioxide emissions." *Ibid.* So too here.

Finally, plaintiffs point to Section 826, which provides:

> An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if (a) the gravity of the harm outweighs the utility of the actor's conduct, or (b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.

Plaintiffs claim that they can be compensated pursuant to subsection (b), which does not require weighing the utility of defendants' conduct. The commentary to this section is clear, however, that "[i]f imposition of this financial burden would make continuation of the activity not feasible, the weighing process for determining unreasonableness is similar to that in a suit for injunction." Restatement § 826 cmt. f. In these actions alone, two plaintiffs seek billions of dollars each in the form of an abatement fund. It seems a near certainty that judgments in favor of the plaintiffs who have brought similar nuisance claims based on identical conduct (let alone those plaintiffs who have yet to file suit) would make the continuation of defendants' fossil fuel production "not feasible." This order accordingly disagrees that it could ignore the

public benefits derived from defendants' conduct in adjudicating plaintiffs' claims. In the aggregate, the adjustment of conflicting pros and cons ought to be left to Congress or diplomacy.[9]

Second, plaintiffs point to the Court of Appeals for the Second Circuit's decision in *AEP*, where the court held that a global-warming nuisance claim did not present non-justiciable political questions, a conclusion affirmed by an equally-divided Supreme Court. *AEP*, 564 U.S. at 420 n.6. As previously explained, however, *AEP* addressed different claims. To be sure, the Second Circuit disagreed that it had been asked "to fashion a comprehensive and far-reaching solution to global climate change, a task that arguably falls within the purview of the political branches." *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 325 (2d Cir. 2009), *rev'd on other grounds*, 564 U.S. 410 (2011). But in doing so, the court highlighted that the plaintiffs there sought only to limit emissions from six domestic coal-fired electricity plants, and that "[a] decision by a single federal court concerning a common law of nuisance cause of action, brought by domestic plaintiffs against domestic companies for domestic conduct, does not establish a *national or international* emissions policy (assuming that emissions caps are even put into place)." *Ibid.* (emphasis

---

[9] The parties have identified seven similar actions brought by cities and counties across the country. *Cty. of San Mateo v. Chevron Corp., et al.*, No. 17-cv-4929 (N.D. Cal.); *City of Imperial Beach v. Chevron Corp., et al.*, No. 17-cv-4934 (N.D. Cal.); *Cty. of Marin v. Chevron Corp., et al.*, No. 17-cv-4935 (N.D. Cal.); *Cty. of Santa Cruz v. Chevron Corp., et al.*, No. 18-cv-450 (N.D. Cal.); *City of Santa Cruz v. Chevron Corp., et al.*, No. 18-cv-458 (N.D. Cal.); *City of Richmond v. Chevron Corp., et al.*, No. 18-cv-732 (N.D. Cal.); *City of New York v. BP P.L.C., et al.*, No. 18-cv-182 (S.D.N.Y.); *King Cty. v. BP P.L.C., et al.*, No. 18-2-11859-0 (Sup. Ct. King Cty., Wash.).

in original). Here, the claims are plainly not so limited.

Third, plaintiffs argue that *Sosa* and its progeny are not instructive because those decisions arose in the context of the Alien Tort Statute. The Alien Tort Statute simply provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. "The statute provides district courts with jurisdiction to hear certain claims, but does not expressly provide any causes of action." *Kiobel*, 569 U.S. at 114–15. This grant of jurisdiction is "read as having been enacted on the understanding that the common law would provide a cause of action for [a] modest number of international law violations." *Sosa*, 542 U.S. at 724. Federal courts may therefore "recognize private claims [for such violations] under federal common law." *Id.* at 732. The broader point made by the Supreme Court in these decisions is that federal courts should exercise great caution before fashioning federal common law in areas touching on foreign affairs. For the reasons explained above, such concerns of caution are squarely presented here. The federal common law claims must be dismissed.

* * *

The foregoing disposes of the federal common law claims in their entirety. The amended complaints also assert a state law claim for public nuisance. For the reasons stated in the February 27 order denying remand, however, plaintiffs' nuisance claims must stand or fall under federal common law. Accordingly, plaintiffs' state law claims must also be dismissed.

CONCLUSION

It may seem peculiar that an earlier order refused to remand this action to state court on the ground that plaintiffs' claims were necessarily governed by federal law, while the current order concludes that federal common law should not be extended to provide relief. There is, however, no inconsistency. It remains proper for the scope of plaintiffs' claims to be decided under federal law, given the international reach of the alleged wrong and given that the instrumentality of the alleged harm is the navigable waters of the United States. Although the scope of plaintiffs' claims is determined by federal law, there are sound reasons why regulation of the worldwide problem of global warming should be determined by our political branches, not by our judiciary.

In sum, this order accepts the science behind global warming. So do both sides. The dangers raised in the complaints are very real. But those dangers are worldwide. Their causes are worldwide. The benefits of fossil fuels are worldwide. The problem deserves a solution on a more vast scale than can be supplied by a district judge or jury in a public nuisance case. While it remains true that our federal courts have authority to fashion common law remedies for claims based on global warming, courts must also respect and defer to the other co-equal branches of government when the problem at hand clearly deserves a solution best addressed by those branches. The Court will stay its hand in favor of solutions by the legislative and executive branches. For the reasons stated, defendants' motion to dismiss is GRANTED.

IT IS SO ORDERED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 17-06011 WHA
No. C 17-06012 WHA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

BP P.L.C., *et al.*,

Defendants.

Signed February 27, 2018

ORDER DENYING MOTIONS TO REMAND

WILLIAM ALSUP, United States District Judge:

INTRODUCTION

In these "global warming" actions asserting claims for public nuisance under state law, plaintiff municipalities move to remand. For the following reasons, the motions are DENIED.

STATEMENT

Oakland and San Francisco brought these related actions in California Superior Court against defendants BP p.l.c, Chevron Corporation, ConocoPhillips Company, Exxon Mobil Corporation, and Royal Dutch

Shell plc. Defendants are the first (Chevron), second (Exxon), fourth (BP), sixth (Shell) and ninth (ConocoPhillips) largest cumulative producers of fossil fuels worldwide (Compls. ¶ 10).

Burning fossil fuels adds carbon dioxide to that already naturally present in our atmosphere. Plaintiffs allege that the combustion (by others) of fossil fuels produced by defendants has increased atmospheric levels of carbon dioxide and, as a result, raised global temperatures and melted glaciers to cause a rise in sea levels, and thus caused flooding in Oakland and San Francisco (Oakl. Compl. ¶¶ 38, 48, 50; SF Compl. ¶¶ 38, 49, 51).

The complaints do not seek to impose liability for direct emissions of carbon dioxide, which emissions flow from combustion in worldwide machinery that use such fuels, like automobiles, jets, ships, train engines, powerplants, heating systems, factories, and so on. Rather, plaintiffs' state law nuisance claims are premised on the theory that—despite long-knowing that their products posed severe risks to the global climate—defendants produced fossil fuels while simultaneously engaging in large scale advertising and public relations campaigns to discredit scientific research on global warming, to downplay the risks of global warming, and to portray fossil fuels as environmentally responsible and essential to human well-being (Oakl. Compl. ¶¶ 11, 62–83; SF Compl. ¶¶ 11, 63–84).

The complaints further allege that accelerated sea level rise has and will continue to inundate public and private property in Oakland and San Francisco. Although plaintiffs (and the federal government through the Army Corps of Engineers) have already taken action to abate the harm of sea level rise, the magnitude of such actions will continue to increase.

The complaints stress that a severe storm surge, coupled with higher sea levels, could result in loss of life and extensive damage to public and private property (Oakl. Compl. ¶¶ 84–92; SF Compl. ¶¶ 85–93).

Based on these allegations, each complaint asserts a single cause of action under California public nuisance law. As relief, such complaints seek an abatement fund to pay for seawalls and other infrastructure needed to address rising sea levels (Oakl. Compl. ¶¶ 93–98; SF Compl. ¶¶ 94–99, Relief Requested ¶ 2).

Defendants removed these actions. Plaintiffs now move to remand to state court. This order follows full briefing and oral argument.[1]

ANALYSIS

Plaintiffs' nuisance claims—which address the national and international geophysical phenomenon of global warming—are necessarily governed by federal common law. District courts have original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States," including claims brought under federal common law. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 850 (1985) (citing 28 U.S.C. § 1331). Federal jurisdiction over these actions is therefore proper.

Federal courts, unlike state courts, do not possess a general power to develop and apply their own rules of

---

[1] Six similar actions, filed by the County of San Mateo, City of Imperial Beach, County of Marin, County of Santa Cruz, City of Santa Cruz and City of Richmond, respectively, are pending in this district before Judge Vince Chhabria (Case Nos. 17-cv-4929, 17-cv-4934, 17-cv-4935, 18-cv-0450, 18-cv-0458, 18-cv-0732). In comparison to the instant cases, these actions assert additional claims (including product liability, negligence, and trespass) against additional defendants.

decision. *City of Milwaukee v. Illinois*, 451 U.S. 304, 312 (1981) ("*Milwaukee II*"). Federal common law is appropriately fashioned, however, where a federal rule of decision is "necessary to protect uniquely federal interests." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981). While not all federal interests fall into this category, uniquely federal interests exist in "interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations." *Id.* at 641. In such disputes, the "nature of the controversy makes it inappropriate for state law to control." *Ibid.*

In *Illinois v. City of Milwaukee*, 406 U.S. 91, 107 n.9 (1972) ("*Milwaukee I*"), for example, the Supreme Court applied federal common law to an interstate nuisance claim, explaining that:

> Federal common law and not the varying common law of the individual States is, we think, entitled and necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of a State against improper impairment by sources outside its domain. The more would this seem to be imperative in the present era of growing concern on the part of a State about its ecological conditions and impairments of them. In the outside sources of such impairment, more conflicting disputes, increasing assertions and proliferating contentions would seem to be inevitable. Until the field has been made the subject of comprehensive legislation or authorized administrative standards, only a federal common law basis can provide an adequate means for dealing with such claims as alleged federal rights.

The Supreme Court has continued to affirm that, post-*Erie*, federal common law includes the general

subject of environmental law and specifically includes ambient or interstate air and water pollution. *Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 421 (2011) ("*AEP*"). Both our court of appeals and the Supreme Court have addressed the viability of the federal common law of nuisance to address global warming. The parties sharply contest the import of these decisions.

The plaintiffs in *AEP* brought suit against five domestic emitters of carbon dioxide, alleging that by contributing to global warming, those defendants had violated the federal common law of interstate nuisance, or, in the alternative, state tort law. 564 U.S. at 418. The Supreme Court recognized that environmental protection "is undoubtedly an area within national legislative power, one in which federal courts may fill in statutory interstices, and, if necessary, even fashion federal law." *Id.* at 421 (internal quotes and citations omitted). It held, however, that because the Clean Air Act "[spoke] directly" to the issue of carbon-dioxide emissions from domestic power-plants, the Act displaced any federal common law right to seek an abatement of defendants' emissions. *Id.* at 424–25. *AEP* did not reach the plaintiffs' state law claims. Instead, Justice Ginsburg explained that "the availability *vel non* of a state lawsuit depend[ed], *inter alia*, on the preemptive effect of the federal Act," and left the matter open for consideration on remand. *Id.* at 429.

Our court of appeals addressed similar claims in *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012) ("*Kivalina*"). Citing to *AEP*, the appellate court held that the Clean Air Act also displaced federal common law nuisance claims for *damages* caused by global warming. *Id.* at 856. *Kivalina* underscored that "federal common law can ap-

ply to transboundary pollution suits," and that most often such suits are—as here—founded on a theory of public nuisance. *Id.* at 855. But *Kivalina* also failed to reach the plaintiffs' state law claims, which the district court had dismissed without prejudice to their re-filing in state court. *Id.* at 858; *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 882–83 (N.D. Cal. 2009) (Judge Saundra Brown Armstrong).

Here, as in *Milwaukee I*, *AEP*, and *Kivalina*, a uniform standard of decision is necessary to deal with the issues raised in plaintiffs' complaints. If ever a problem cried out for a uniform and comprehensive solution, it is the geophysical problem described by the complaints, a problem centuries in the making (and studying) with causes ranging from volcanoes, to wildfires, to deforestation to stimulation of other greenhouse gases—and, most pertinent here, to the combustion of fossil fuels. The range of consequences is likewise universal—warmer weather in some places that may benefit agriculture but worse weather in others, *e.g.*, worse hurricanes, more drought, more crop failures and—as here specifically alleged—the melting of the ice caps, the rising of the oceans, and the inevitable flooding of coastal lands. Taking the complaints at face value, the scope of the worldwide predicament demands the most comprehensive view available, which in our American court system means our federal courts and our federal common law. A patchwork of fifty different answers to the same fundamental global issue would be unworkable. This is not to say that the ultimate answer under our federal common law will favor judicial relief. But it is to say that the extent of any judicial relief should be uniform across our nation.

Plaintiffs raise three primary arguments in seeking to avoid federal common law. None are persuasive.

First, plaintiffs argue that—in contrast to earlier transboundary pollution suits such as *AEP* and *Kivalina*—plaintiffs' nuisance claims are brought against *sellers* of a product rather than direct *dischargers* of interstate pollutants. Extending federal common law to the current dispute, plaintiffs caution, would extend the scope of federal nuisance law well beyond its original justification. To be sure, plaintiffs raise novel theories of liability. And it is also true, of course, that the development of federal common law is necessary only in a "few and restricted instances." *Milwaukee II*, 451 U.S. at 313. As explained above, however, the transboundary problem of global warming raises exactly the sort of federal interests that necessitate a uniform solution. This is no less true because plaintiffs assert a novel theory of liability, nor is it less true because plaintiffs' theory mirrors the sort of state-law claims that are traditionally applied to products made in other states and sold nationally.[2]

Plaintiffs' reliance on *National Audubon Society v. Department of Water*, 869 F.2d 1196 (9th Cir. 1988), is also misplaced. There, our court of appeals held

---

[2] Notably, in support of their theory of liability plaintiffs cite decisions where the alleged nuisance was caused by a product's use *in California*. In *People v. ConAgra Grocery Products Company*, 17 Cal. App. 5th 51 (2017), the plaintiffs sued producers and manufacturers of lead paint, arguing that the defendants deceptively minimized its dangers and promoted its use. The plaintiffs there, however, sought abatement only with respect to products used in California buildings. Similarly, the claims in *Ileto v. Glock Inc.*, 349 F.3d 1191 (9th Cir. 2003), concerned the manufacture and marketing of firearms but stemmed from the shooting of six individuals in Los Angeles. Plaintiffs' claims here, by contrast, are not localized to California and instead concern fossil fuel consumption worldwide.

that federal nuisance law did not extend to claims concerning a California agency's diversion of water from a lake wholly within the state. Although the water diversion may have led to air pollution in both California and Nevada, our court of appeals found that it was "essentially a domestic dispute" in which application of state law would not be inappropriate. *Id.* at 1204–05. The court underscored, however, that the Supreme Court does consider the application of state law inappropriate (and the application of federal law appropriate) in "those interstate controversies which involve a state suing sources outside of its own territory." *Id.* at 1205.

Second, plaintiffs contend that—even if their claims are tantamount to the interstate pollution claims raised in *AEP* and *Kivalina*—the Clean Air Act displaces such federal common law claims. Moreover, they argue, *International Paper Company v. Ouellette*, 479 U.S. 481 (1987), held that once federal common law is displaced, state law once again governs.

This order presumes that when congressional action displaces federal common law, state law becomes available to the extent it is not preempted by statute. *AEP*, 564 U.S. at 429. But while *AEP* and *Kivalina* left open the question of whether nuisance claims against *domestic emitters* of greenhouse gases could be brought under state law, they did not recognize the displacement of the federal common law claims raised here. Emissions from domestic sources are certainly regulated by the Clean Air Act, but plaintiffs here have fixated on an earlier moment in the train of industry, the earlier moment of production and sale of fossil fuels, not their combustion.

Through the Clean Air Act, Congress established a comprehensive state and federal scheme to control air

pollution in the United States. 42 U.S.C. § 7401 *et seq*. The central elements of this comprehensive scheme are (1) the Act's provisions for uniform national standards of performance for new stationary sources of air pollution, § 7411, (2) the Act's provisions for uniform national emission standards for certain air pollutants, § 7412, (3) the Act's promulgation of primary and secondary national ambient air quality standards, §§ 7408–09, and (4) the development of national ambient air quality standards for motor vehicle emissions, § 7521. The Clean Air Act displaced the nuisance claims asserted in *Kivalina* and *AEP* because the Act "spoke directly" to the issues presented—*domestic* emissions of greenhouse gases. The same cannot be said here.

Plaintiffs' nuisance claims center on an alleged scheme to produce and sell fossil fuels while deceiving the public regarding the dangers of global warming and the benefits of fossil fuels. Plaintiffs do not bring claims against emitters, but rather bring claims against defendants for having put fossil fuels into the flow of international commerce. Importantly, unlike *AEP* and *Kivalina*, which sought only to reach domestic conduct, plaintiffs' claims here attack behavior worldwide. While some of the fuel produced by defendants is certainly consumed in the United States (emissions from which are regulated by the Clean Air Act), greenhouse gases emanating from overseas sources are equally guilty (perhaps more so) of causing plaintiffs' harm. Yet these foreign emissions are out of the EPA and Clean Air Act's reach.

For displacement to occur, "[t]he existence of laws generally applicable to the question is not sufficient; the applicability of displacement is an issue-specific inquiry." *Kivalina*, 696 F.3d at 856. In *Milwaukee I*, the Supreme Court considered multiple statutes po-

tentially affecting the federal question but ultimately concluded that no statute directly addressed the question and accordingly held that the federal common law public nuisance claim had not been displaced. 406 U.S. at 101–03. Here, the Clean Air Act does not provide a sufficient legislative solution to the nuisance alleged to warrant a conclusion that this legislation has occupied the field to the exclusion of federal common law.

Third, the well-pleaded complaint rule does not bar removal of these actions. Federal jurisdiction exists in this case if the claims necessarily arise under federal common law. *Wayne v. DHL Worldwide Express*, 294 F.3d 1179, 1184 (9th Cir. 2002). Plaintiffs concede that our court of appeals recognized this rule, but contend that it should be ignored as dicta. To the contrary, in support *Wayne* cited *Milwaukee I*, where the Supreme Court explained that a claim "'arises under' federal law if the dispositive issues stated in the complaint require the application of federal common law." 406 U.S. at 100.[3]

Plaintiffs' claims for public nuisance, though pled as state-law claims, depend on a global complex of geophysical cause and effect involving all nations of the planet (and the oceans and atmosphere). It necessarily involves the relationships between the United

---

[3] Plaintiffs' remaining authorities on this point are inapposite. Contrary to plaintiffs, our court of appeals found that it lacked subject-matter jurisdiction over the state-law claims asserted in *Patrickson v. Dole Food Company* because it was merely possible that "the federal common law of foreign relations *might* arise as an issue." 251 F.3d 795, 803 (9th Cir. 2001) (emphasis added). Similarly, the complaint in *Provincial Government of Marinduque v. Placer Dome, Inc.*, 582 F.3d 1083, 1090 (9th Cir. 2009), did not raise federal law on its face, but rather implicated it "only defensively."

States and all other nations. It demands to be governed by as universal a rule of apportioning responsibility as is available. This order does not address whether (or not) plaintiffs have stated claims for relief. But plaintiffs' claims, if any, are governed by federal common law. Federal jurisdiction is therefore proper.

The foregoing is sufficient to deny plaintiffs' motions for remand. It is worth noting, however, that other issues implicated by plaintiffs' claims also demonstrate the proprietary of federal common law jurisdiction. Importantly, the very instrumentality of plaintiffs' alleged injury—the flooding of coastal lands—is, by definition, the navigable waters of the United States. Plaintiffs' claims therefore necessarily implicate an area quintessentially within the province of the federal courts. *See Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 772 (7th Cir. 2011). This issue was not waived, as defendants timely invoked federal common law as a grounds for removal.

CONCLUSION

For the foregoing reasons, plaintiffs' motions for remand are DENIED.

CERTIFICATION UNDER 28 U.S.C. § 1292(b)

The district court hereby certifies for interlocutory appeal the issue of whether plaintiffs' nuisance claims are removable on the ground that such claims are governed by federal common law. This order finds that this is a controlling question of law as to which there is substantial ground for difference of opinion and that its resolution by the court of appeals will materially advance the litigation. (This certification, however, is not itself a stay of proceedings.)

IT IS SO ORDERED.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-16663

CITY OF OAKLAND, a Municipal Corporation, and The People of the State of California, acting by and through the Oakland City Attorney; CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, and The People of the State of California, acting by and through the San Francisco City Attorney Dennis J. Herrera,

Plaintiffs-Appellants,

v.

BP PLC, a public limited company of England and Wales; CHEVRON CORPORATION, a Delaware corporation; CONOCOPHILLIPS, a Delaware corporation; EXXON MOBIL CORPORATION, a New Jersey corporation; ROYAL DUTCH SHELL PLC, a public limited company of England and Wales; DOES, 1 through 10,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California
William Alsup, District Judge, Presiding,
D.C. Nos.
3:17-cv-06011-WHA
3:17-cv-06012-WHA

Argued and Submitted February 5, 2020
Pasadena, California

Filed May 26, 2020

Amended August 12, 2020

Before: Sandra S. Ikuta, Morgan Christen, and Kenneth K. Lee, Circuit Judges.

ORDER

The opinion filed on May 26, 2020, appearing at 960 F.3d 570 (9th Cir. 2020), is amended as follows:

At page 585, footnote 12, replace:

<The district court requested supplemental briefing on how the concept of the " 'navigable waters of the United States' … relates to the removal jurisdiction issue in th[e] case." As the Cities pointed out, however, the Energy Companies waived any argument related to admiralty jurisdiction by not invoking it in their notices of removal. *See* 28 U.S.C. § 1446(a) (notice of removal must "contain[ ] a short and plain statement of the grounds for removal"); *ARCO*, 213 F.3d at 1117 (notice of removal "cannot be amended to add a separate basis for removal jurisdiction after the thirty day period" (citation omitted)); O'Halloran, 856 F.2d at 1381 (same). Thus, the district court should confine its analysis to the bases for jurisdiction asserted in the notices of removal.>

with

<The Energy Companies identified six alternate bases for subject-matter jurisdiction in their notices of removal. *See supra* note 2. On appeal, the Energy

Companies identified admiralty jurisdiction, 28 U.S.C. § 1333, as a seventh alternate basis for jurisdiction. As the Cities point out, however, the Energy Companies waived any argument related to admiralty jurisdiction by not invoking it in their notices of removal. *See* 28 U.S.C. § 1446(a) (notice of removal must "contain[ ] a short and plain statement of the grounds for removal"); *ARCO*, 213 F.3d at 1117 (notice of removal "cannot be amended to add a separate basis for removal jurisdiction after the thirty day period" (citation omitted)); O'Halloran, 856 F.2d at 1381 (same). Because the deadline for amending the notices of removal has passed, the Energy Companies may not rely on admiralty jurisdiction as a basis for removal on remand. Moreover, the Energy Companies' related argument that there is federal-question jurisdiction, 28 U.S.C. § 1331, because "the instrumentality of the alleged harm is the navigable waters of the United States," fails for the reasons set forth in Part II, *supra*.>

* * *

With this amendment, the panel has unanimously voted to deny Defendants-Appellees' Petition for Panel Rehearing and/or Rehearing En Banc (ECF No. 175).

The full court has been advised of the Petition for Panel Rehearing and/or Rehearing En Banc, and no Judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The Petition for Panel Rehearing and/or Rehearing En Banc is **DENIED**. No further petitions for rehearing or rehearing en banc may be filed.