Nos. 18-16663

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF OAKLAND and CITY AND COUNTY OF SAN FRANCISCO, Plaintiffs-Appellants, v. BP P.L.C.; et al., Defendants-Appellees.	Appeal No. 18-16663 Nos. 3:17-cv-06011-WHA, 3:17-cv-06012-WHA N.D. Cal., San Francisco Hon. William Alsup presiding

BRIEF FOR AMICI CURIAE STATES OF CALIFORNIA, CONNECTICUT, MARYLAND, MINNESOTA, NEW JERSEY, NEW YORK, OREGON, RHODE ISLAND, VERMONT, AND WASHINGTON AND THE DISTRICT OF COLUMBIA IN SUPPORT OF PLAINTIFF-APPELLANTS

XAVIER BECERRA
Attorney General of California
SALLY MAGNANI
Senior Assistant Attorney General
DAVID A. ZONANA
Supervising Deputy Attorney General
ERIN GANAHL
HEATHER LESLIE
Deputy Attorneys General
CALIFORNIA DEPARTMENT OF JUSTICE
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 210-7832
Fax: (510) 622-2270
Email: heather.leslie@doj.ca.gov
Attorneys for Amicus Attorney General, State of California
[Additional Counsel Listed on Signature Page]

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

FEDERAL CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page

IDENTITY AND INTEREST OF AMICI

The States of California, Connecticut, Maryland, Minnesota, New Jersey, New York, Oregon, Rhode Island, Vermont, and Washington and the District of Columbia ("Amici States") have an interest in maintaining our state courts' authority to adopt and enforce requirements of state common law—including monetary remedies—in cases involving fossil fuel producers and sellers. Here, the district court's Order Denying Motions to Remand threatens to divest state courts of authority to adjudicate a broad class of state common-law actions—those related to climate change. As explained below, the district court's order and Defendants' arguments below failed to consider the states' broad authority to address climate change issues.

In light of the costly impacts that climate change is already having within our borders, and because the harmful effects of climate change are likely to worsen in the near future, Amici States have a concrete interest in the ability of state courts to adjudicate climate change-related claims brought by our political subdivisions who are impacted by the conduct of fossil fuel producers and sellers.

INTRODUCTION

Plaintiffs appeal three orders from the district court, which in turn: (1) denied Plaintiffs' motion to remand their original complaint for state law public nuisance (ER0027-ER0035) ("Remand Order"); (2) granted Defendants' joint

motion to dismiss the amended complaint for failure to state a claim (ER0011-ER0026) ("12(b)(6) Order"); and (3) granted four Defendants' motions to dismiss for lack of personal jurisdiction (ER0003-ER0010) ("Jurisdiction Order"). Amici States agree with Plaintiffs that this appeal should be resolved by vacating the district court's Remand Order and directing that Plaintiffs' original actions be remanded to state court. Amici States also agree that, in the alternative, if the actions are not remanded, the district court's 12(b)(6) Order and Jurisdiction Order should be reversed and the cases remanded to district court for further proceedings.

In its Remand Order, the district court incorrectly held that Plaintiffs' nuisance claims "are necessarily governed by federal common law," based on "uniquely federal interests" implicated by climate change. ER0029. In support of its holding, the court relied on two lines of reasoning. First, it found that climate change is a unique federal interest that "cries out for a uniform and comprehensive solution". ER0030-ER0031.[1] But, in fact, all levels of government have vital and shared interest in addressing climate change. It is a problem that cries out for multiple complementary solutions from many actors, governmental and non-governmental. Second, the court found that Plaintiffs' claims raise an interstate or international dispute involving transboundary air pollution that triggers a unique

[1] *See also* Notice of Removal at ER0217, ER0219.

federal interest governed by federal common law, not state common law. ER0030-ER0033. However, in its subsequent ruling on Defendants' 12(b)(6) Motion, the court held that any such federal common law had been displaced or could not be fashioned. ER0019, ER0025. Under those circumstances, precedent holds that state law becomes available to plaintiffs absent preemption by the Clean Air Act or another statute (an issue that does not support removal and can be decided by a state court). Thus, the district court erred in dismissing, instead of remanding, Plaintiffs' state law claims.

Further, the district court's Remand Order incorrectly rejected the application of the well-pleaded complaint rule. Under that rule, Plaintiffs are masters of their claims and may avoid federal jurisdiction by exclusive reliance on state law, as they had in their original complaints. The artful pleading doctrine carves out an exception to that rule but neither of the two recognized branches of the artful pleading doctrine—(i) the necessity of deciding a federal issue or (ii) complete preemption—apply here. Lastly, Amici address the district court's Jurisdiction Order, because of the potentially far-reaching effects of its unduly narrow interpretation of this Court's precedent. Here, Plaintiffs have established personal jurisdiction based on allegations that some of Defendants' conduct and all of Plaintiffs' injuries occurred in California.

For these reasons, Amici States respectfully submit that the order denying Plaintiffs' motion to remand should be reversed, and in the alternative, the dismissal of Plaintiffs' claims and the granting of four defendants' personal jurisdiction motions should be reversed.

ARGUMENT

I. PLAINTIFFS' CLAIMS DO NOT RAISE A "UNIQUELY FEDERAL INTEREST" THAT NECESSITATES REMOVAL.

A. Climate Change is Not a Uniquely Federal Interest.

While there are "a few areas, involving 'uniquely federal interests,… [that] are so committed by the Constitution and the laws of the United States to federal control that state law is pre-empted and replaced… [by] so-called 'federal common law[,]'" (*Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) *citing Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1980)), climate change is not such an area. The court's order and Defendants' arguments that climate change requires a uniform solution ignore the substantial impacts of climate change on our states and our states' vital role in responding to climate change. *See* ER0030-ER0031; ER0217-ER0219.

Within our state borders, climate change is causing a loss of land due to rising seas, reducing our drinking water supply by decreasing snowpack, harming air and water quality, reducing the productivity of our agriculture and aquaculture, decimating biodiversity and ecosystem health, and increasing the intensity of

severe storms and wildfires. *See, e.g., Massachusetts v. Envtl. Prot. Agency*, 549 U.S. 497, 522-23 (2007). Accordingly, as this Court has stated, "[i]t is well settled that the states have a legitimate interest in combatting the adverse effects of climate change on their residents." *Am. Fuel & Petrochemical Mfrs. v. O'Keeffe*, 903 F.3d 903, 913 (9th Cir. 2018), citing *Massachusetts*, 549 U.S. at 522-523. This Court has also expressly recognized California's interest in addressing this existential problem. *See, e.g., Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1107 (9th Cir. 2013) ("*Rocky Mountain I*") ("California should be encouraged to continue and to expand its efforts to find a workable solution to lower carbon emissions.") And, more broadly, this Court has already held that "there is not a 'unique federal interest' in protecting the quality of the nation's air. Rather, the primary responsibility for maintaining air quality rests on the states." *Nat'l Audubon Soc'y. v. Dep't of Water*, 869 F.2d 1196, 1203 (9th Cir. 1988).

Contrary to the position adopted by the district court—that action on climate change is a domain reserved exclusively to the federal government—States exercising their longstanding police powers to mitigate environmental harms have taken substantial steps in the past years to reduce climate-altering emissions and to

prepare the adaptation measures required to survive in a warming world.[2] For example, in 2006, California passed Assembly Bill 32, the Global Warming Solutions Act, which directed the California Air Resources Board to implement measures to reduce statewide greenhouse gas emissions to 1990 levels by 2020. Cal. Health & Safety Code, § 38500 et seq. (West through Ch. 1016 of 2018 Reg. Sess.). Subsequently, California passed Senate Bill 32, which codified the State's objective to reduce emissions to 40% below 1990 levels by 2030. *Id.* Washington law requires the largest electric utilities to meet a series of benchmarks on the amount of renewables in their energy mix, and to achieve 15% reliance on renewables by 2020. Wash. Rev. Code §§ 19.285.010-19.285.903 (West through 2018 Reg. Sess.). Oregon requires its largest utilities to achieve 20% reliance on renewables by 2020 and 50% by 2040 (Or. Rev. Stat. § 469A.052 (1)(c) and (h) (West through 2018 Reg. Sess.)) and to cease reliance on coal-generated electricity by 2030 (Or. Rev. Stat. § 757.518(2) (West through 2018 Reg. Sess.)). Oregon has also adopted a Clean Fuels Program to reduce the carbon intensity of fuel. Or.

---

[2] Nor do states have the luxury of time to wait for a comprehensive solution from the federal government. The overwhelming scientific consensus is that immediate and continual progress toward a near-zero greenhouse gas emission economy by mid-century is necessary to avoid catastrophic climate change impacts. *See, e.g.,* Intergovernmental Panel on Climate Change, 1.5°C Report, Summary for Policymakers, at 15, available at https://www.ipcc.ch/sr15/chapter/summary-for-policy-makers/ (last visited Mar. 18, 2019).

Rev. Stat. §§ 468A.265 to 468A.277 (West through 2018 Reg. Sess.); Or. Admin. R. 340-253-0000 through 340.253.8100 (West through 2018 Reg. Sess.). New Jersey's Global Warming Response Act requires reductions in carbon dioxide emissions culminating in a 2050 level that is 80% lower than the State's 2006 level. N.J. Stat. Ann. §§ 26:2C-37 to -44 (West through Ch. 169 of 2018 Reg. Sess.). Maryland recently amended its laws to require that utilities derive 25% of their sales from renewable sources by 2020, and to encourage, through tax credits and study methods, installation of energy storage measures that will facilitate the integration of renewable energy into its energy grid. Md. Laws Ch. 1 (2017) (Pub. Utils. § 7-703(b)(15)) (West through 2018 Reg. Sess.)); Md. Laws Ch. 389 (2017) (Tax Law § 10-719 (West through 2018 Reg. Sess.)); Md. Laws. Ch. 382 (2017) (West through 2018 Reg. Sess.). Connecticut has enacted a statutory scheme requiring utilities to source 25% of their energy from renewable sources by 2020 and 40% by 2030, while also creating funding sources for encouraging private renewable growth. *See* Conn. Gen. Stat. §§ 16-245a; 16-245n (Rev. 2019). Similarly, as part of its statewide goal to achieve a 40 percent reduction in greenhouse gas emissions by 2030 (compared to 1990 levels), New York has

adopted a Clean Energy Standard that requires that at least 50% of electricity to be generated from renewable sources by 2030.[3]

The states also have collaborated on successful regional solutions. Nine northeastern states (including several amici) are part of the Regional Greenhouse Gas Initiative, a cap-and-trade system codified and implemented through each participating state's laws and regulations, which places increasingly stringent limits on carbon pollution from power plants.[4] Since this initiative's implementation, the participating states have reduced power-sector carbon-dioxide emissions by more than 40%.[5] As the above examples illustrate, states have "great latitude" to exercise their general police powers to protect the health and welfare of all persons. *See Rocky Mountain Farmers Union v. Corey*, 913 F.3d 940, 946, (9th Cir. 2019) ("*Rocky Mountain II*"). Given the critical state and local interests that are implicated by climate change—and the numerous solutions that states have

---

[3] N.Y.S. Pub. Serv. Comm'n, Order Adopting a Clean Energy Standard (Aug. 1, 2016) (Case No. 15-E-0302), available at: https://www.nyserda.ny.gov/All%20Programs/Programs/Clean%20Energy%20Standard.

[4] *See* Elements of RGGI, available at https://www.rggi.org/program-overview-and-design/elements (last visited March 4, 2019). New Jersey is in the process of re-joining the Initiative as its tenth member. Rule Proposal, CO_2 Budget Trading Program, 50 N.J. Reg. 2482(a) (Dec. 17, 2018).

[5] David T. Stevenson, *A Review of the Regional Greenhouse Gas Initiative*, CATO Journal. Winter 2018, available at https://www.cato.org/cato-journal/winter-2018/review-regional-greenhouse-gas-initiative.

been spearheading—it is simply incorrect to characterize climate change as necessarily raising uniquely federal issues such that federal common law must preempt and replace state law and that climate change-related claims may only be adjudicated in federal court.

Indeed, the compatibility of state actions with federal interests in climate change is borne out by the breadth of cases state courts already hear related to climate change. A current database of United States Climate Change litigation maintained by the Sabin Center for Climate Change Law at Columbia Law School and Arnold & Porter Kaye Scholer LLP lists 284 past and ongoing lawsuits throughout the country that raise state-law claims related to climate change, over 90% of which are being or were adjudicated in state court.[6] The claims in these cases derive from a wide range of state laws. For example, state courts routinely address climate change in the context of challenges to land-use decisions under state equivalents to the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370m-12. *See, e.g.*, *Cleveland Nat'l Forest Found. v. San Diego Ass'n of Gov'ts*, 3 Cal. 5th 497, 397 P.3d 989 (2017); *Cascade Bicycle Club v. Puget Sound Reg'l Council*, 175 Wash. App. 494, 306 P.3d 1031 (Wash. Ct. App. 2013). State courts

---

[6] Sabin Center for Climate Change and the Environment and Arnold & Porter Kaye Scholer LLP, *U.S. Climate Change Litigation: State Law Claims*, Climate Change Litigation Database (last visited Mar. 4, 2019), http://climatecasechart.com/case-category/state-law-claims/.

also adjudicate the operation and validity of states' substantial regulatory efforts to reduce greenhouse gas emissions. *See, e.g. Cal. Chamber of Commerce v. State Air Res. Bd.*, 10 Cal. App. 5th 604, 614, 216 Cal. Rptr. 3d 694, 700 (Ct. App. 2017), *review denied* (June 28, 2017) (upholding California's economy-wide cap-and-trade program)*; New England Power Generators Ass'n, Inc. v. Dep't of Envtl. Prot.*, 480 Mass. 398, 400, 105 N.E.3d 1156, 1158 (2018) (upholding Massachusetts' greenhouse gas emissions limits for power plants). As with these hundreds of cases dealing with climate change, state courts can and should hear Plaintiffs' state nuisance claims concerning climate change.

Further, it is well established that suits against sellers and manufacturers of products do not present federal issues warranting application of federal common law, even if important federal interests are raised, and even if a product is sold or causes injury in many states. *See, e.g.*, *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1324 (5th Cir. 1985) (en banc) (state law, not federal common law, governed in cases against asbestos manufacturers); *In re Agent Orange Prod. Liab. Litig.*, 635 F.2d 987, 995 (2d Cir. 1980) (state law, not federal common law, governed class action tort case on behalf of millions of U.S. soldiers who had served in Vietnam against producers of Agent Orange, despite federal interest in the health of veterans).

B. A Federal Common Law Cause of Action That Has Been Displaced or Cannot Be Fashioned Does Not Provide a Basis for Denial of Remand or Dismissal of Plaintiffs' State Law Actions.

In its Remand Order, the district court also found that Plaintiffs' claims, although pled under state common law, entailed adjudicating an interstate or international dispute involving transboundary air pollution—a subject-matter that purportedly raises a unique federal interest necessarily governed by federal common law. ER0030-ER0033. Subsequently, however, after Plaintiffs amended their complaints to add federal common law causes of action, the district court ruled that there was *no* federal common law available because it had been displaced by the Clean Air Act, and because the court declined to "fashion[] federal common law." ER0025.[7] At that point, the district court should have held that in the absence of federal common law, Plaintiffs could pursue any state common law claims that were not preempted by statute. *See Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 429 (2011) ("*AEP*"). And because Plaintiffs could pursue their state-law claims, the district court should have revisited its decision not to remand the cases to state court, or at least declined to exercise supplemental

[7] As to Defendants' conduct inside the United States, the district court found that Plaintiffs' claims have been displaced by the Clean Air Act. ER0019. And, as to Defendants' conduct outside the United States, the district court declined to fashion federal common law out of concern that doing so would "touch[] on foreign affairs." ER0025.

jurisdiction over the state law claims and thus dismissed Plaintiffs' actions without prejudice to refile in state court.[8] Instead, however, the district court summarily dismissed Plaintiffs' state-law claims on the ground that "plaintiffs' nuisance claims must stand or fall under federal common law." ER0025.

The court's dismissal of Plaintiffs' state claims is directly contrary to the precedent of the Supreme Court and this Court. In cases where plaintiffs have alleged both federal and state common-law claims against greenhouse gas emitters, the Supreme Court and this Court have dismissed the federal claims—but not the state law claims—on the ground that they were displaced, and held that the state claims are viable unless preempted by statute. First, in *AEP*, states and other plaintiffs sued five major electric power companies in federal court, alleging that the companies' greenhouse-gas emissions violated the federal common law or, in the alternative, state tort law. 564 U.S. at 418. Although the Supreme Court concluded that the plaintiffs' federal nuisance claims were displaced by the Clean Air Act, the Court expressly declined to invalidate the plaintiffs' state-law

[8] To the extent Defendants raise a preemption defense, that is not a basis for denying remand, but rather is an issue that state courts are equipped to handle. Except in cases of complete preemption, "a case may not be removed on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the complaint, and even if both parties concede that the federal defense is the only question truly at issue." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 386 (1987).

nuisance claims. *Id.* at 429. The Court identified "preemption" as the standard that would determine the availability of state nuisance law, not displacement. *Compare id.* with ER0025; *see also Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 497 (1987).

Next, in this Circuit, in *Native Village of Kivalina v. ExxonMobil Corp.* ("*Kivalina*"), plaintiff municipality brought both federal and state nuisance claims in federal court against multiple entities for harms resulting from their climate-altering emissions. 696 F.3d 849, 853, 859 (9th Cir. 2012). The district court granted the defendants' motion to dismiss the federal claims, separately stating that the court "declines to assert supplemental jurisdiction over the remaining state-law claims which are dismissed without prejudice to their presentation in a state court action." *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 882–83 (N.D. Cal. 2009), *aff'd on other grounds*, 696 F.3d 849 (9th Cir. 2012). On appeal, this Court applied *AEP's* holding that the Clean Air Act addresses "domestic greenhouse gas emissions from stationary sources and has therefore displaced federal common law." *Kivalina*, 696 F.3d at 856 (emphasis added). As the concurrence explained: "Displacement of the federal common law does not leave those injured by air pollution without a remedy," because "[o]nce federal common law is displaced, state nuisance law becomes an available option to the extent it is not preempted by federal law." *Id.* at 866 (Pro, J., concurring).

In its Remand Order, the district court acknowledged this line of precedent, stating that its order "presumes that when congressional action displaces federal common law, state law becomes available to the extent it is not preempted by statute." ER0032, *citing AEP*, 564 U.S. at 429. But, when it reached this very point of the analysis in its 12(b)(6) Order—having concluded that federal common law was displaced or could not be fashioned—the district court presumed the opposite and held that Plaintiffs' state law claims were not available (without any analysis or finding of preemption).

Anathema to both *AEP* and *Kivalina*, the district court's holding and Defendants' argument conflate the relationship between federal statutes and federal common law, on the one hand, with the relationship between federal law and state law, on the other. As *AEP* and *Kivalina* hold, when a federal statute has displaced whatever federal common law might otherwise apply to claims against emitters of greenhouse gases, there is no federal common law for such claims to "arise under," and federal common law therefore cannot form the basis of federal jurisdiction or displace state law. At that point, federal common law is irrelevant to the jurisdictional issue before this Court.

II. THE WELL-PLEADED COMPLAINT RULE ALSO COMPELS REMAND OF PLAINTIFFS' ORIGINAL ACTIONS TO STATE COURT.

Had it properly determined in its Remand Order that federal common law did not displace Plaintiffs' state law claims, the district court should then have applied

a traditional remand analysis to determine its jurisdiction. Under such analysis, and contrary to the arguments Defendants have raised on this score, the district court should have remanded Plaintiffs' claims to state court.

Plaintiffs originally each pled a single cause of action for public nuisance under state law. In reviewing the district court's order denying Plaintiffs' motions to remand, this Court must determine whether remand was proper "on the basis of the pleadings at the time of removal." *Broadway Grill, Inc. v. Visa Inc.*, 856 F.3d 1274, 1277 (9th Cir. 2017). Plaintiffs amended their complaints to add a federal cause of action only "in order to conform their complaint with the Court's" order denying remand. Plaintiffs' Response to Notice re Amended Complaints at 1, *City of Oakland v. BP P.L.C., et al.*, 2018 WL 3609055 (N.D. Cal. 2018), ECF No. 202. These amendments have no bearing on whether removal was proper in the first instance. *Abada v. Charles Schwab & Co.*, 300 F.3d 1112, 1117 (9th Cir. 2002) ("Jurisdiction is based on the complaint as originally filed and not as amended.")

In arguing for removal, Defendants face a significant burden. The removal statute is "strictly construed against removal jurisdiction." *Provincial Gov't of Marinduque v. Placer Dome, Inc.*, 582 F.3d 1083, 1087 (9th Cir. 2009); *see also Hunter v. Philip Morris USA*, 582 F.3d 1039, 1042 (9th Cir. 2009) ("the court resolves all ambiguity in favor of remand to state court."). Further, under the well-pleaded complaint rule, the plaintiff is "master of the claim; he or she may avoid

federal jurisdiction by exclusive reliance on state law." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). This rule is a "powerful doctrine" that "severely limits the number of cases in which state law 'creates the cause of action' that may be initiated in or removed to federal district court[.]" *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 9–10 (1983).

It is against this backdrop that federal courts have adopted a narrow set of exceptions under the "artful pleading" doctrine, where a defendant may remove a case that on its face pleads only state-law claims. *See Redwood Theatres, Inc. v. Festival Enter., Inc.*, 908 F.2d 477, 479 (9th Cir. 1990), *see also Hunter v. United Van Lines*, 746 F.2d 635, 640 (9th Cir. 1984); 14C Charles Alan Wright, Arthur R. Miller, Federal Practice and Procedure § 3722.1 (Rev. 4th ed. 2018). Here, neither of the recognized exceptions apply.

A. Removal is Not Warranted on the Basis of *Grable* Jurisdiction.

The first recognized exception to the well-pleaded complaint rule that the district court briefly addressed and Defendants raised, is referred to as *Grable* jurisdiction. *See* ER0033-ER0034 (*citing Wayne v. DHL Worldwide Express*, 294 F.3d 1179, 1184 (9th Cir. 2002); ER0214-ER0220 (*citing Grable & Sons Metal Prods. v. Darue Engineering & Mfg.*, 545 U.S. 308, 313-14 (2005)). To establish *Grable* jurisdiction, Defendants must demonstrate that Plaintiffs' actions fall into a "special and small category" of cases in which "a federal issue is: (1) necessarily

raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn v. Minton*, 568 U.S. 251, 258 (2013), *citing Grable*, 545 U.S. at 313-14. The district court's Remand Order and Defendants' notice of removal, however, establish none of the *Grable* requirements for federal jurisdiction.

Plaintiffs' claims raise no federal issue, let alone one that is actually disputed, substantial, and capable of resolution in federal court without disrupting the federal-state balance approved by Congress. Defendants argued that Plaintiffs' claims touch upon various federal interests implicated by climate change such as national security, foreign affairs, and economic prosperity. ER0217, ER0219. These federal *interests* are not federal *issues* under the meaning of *Grable*. Claims raise federal issues when they "turn on substantial questions of federal law… ." *Grable,* 545 U.S. at 312 (citing *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 as the "classic example" because, though pled as a state law claim, the "principal issue in the case was the federal constitutionality of the bond issue.") Plaintiffs' claims do not require the Court answer any question of federal law. They request an abatement fund to remedy local harms resulting from the conduct of the producers and marketers of fossil fuels, not to compel the federal government to alter its national security strategy, foreign policy, or economic regulations. ER0396; ER0450. And their claims turn on state-law issues, not

federal ones. As another court in the Northern District correctly held in response to similar arguments from defendants in *County of San Mateo v. Chevron Corp.*, 294 F.Supp.3d 934, 938 (N.D. Cal. 2018), "gestur[ing] to federal law and federal concerns in a generalized way," does not raise any substantial or actually disputed federal issue. "The mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." *Merrell Dow Pharms., Inc., v. Thompson*, 478 U.S. 804, 813 (1986); *see also Bennett v. Southwest Airlines Co.*, 484 F.3d 907, 909-910 (7th Cir. 2007) (remanding tort claims regarding airline crash despite "national regulation of many aspects of air travel.")

Defendants argue Plaintiffs' claims raise federal issues because nuisance claims "require[] a plaintiff to prove that the defendants' conduct is unreasonable: in other words, the gravity of the harm must outweigh the social utility of the defendants' conduct." ER0216 (internal citations omitted). However, the state court can evaluate the impact of Defendants' marketing, consider the relevance of any federal regulation, make a determination as to the unreasonableness of Defendants' conduct under state law without resolving a federal issue, and craft an equitable remedy pursuant to state common law.[9] State courts across the country

[9] The district court acknowledged that "plaintiffs' theory [of liability] mirrors the sort of state-law claims that are traditionally applied to products made in other states and sold nationally," but the court sought to distinguish those cases on the

have evaluated the balancing element of nuisance claims in cases of complex and widespread environmental contamination, even when there is related federal regulation on the same topic. For example, a California appellate court held several multinational lead paint companies responsible for the abatement of lead-paint contamination in ten local jurisdictions pursuant to a public nuisance theory. *People v. ConAgra Grocery Prod. Co.*, 17 Cal. App. 5th 51, 169 (Ct. App. 2017), *reh'g denied* (Dec. 6, 2017), *review denied* (Feb. 14, 2018), *cert. denied sub nom. ConAgra Grocery Prod. Co. v. California*, 139 S. Ct. 377 (2018), and *cert. denied sub nom. Sherwin-Williams Co. v. California*, 139 S. Ct. 378 (2018). In *ConAgra*, the state court had to evaluate the local threat of the nationwide marketing conduct of large multinational corporations. And, as in these cases, *ConAgra* involved matters subject to significant federal regulation. Among other measures, Congress banned lead paint in 1978 and the federal Centers for Disease Control set a level of concern for blood lead levels. *Id.* at 73.

---

grounds that the alleged nuisance was caused by a products' use in California and sought abatement only with respect to California buildings. ER0031 at fn. 2. The distinction does not hold. Here, clearly some of Defendants' products were sold in California. ER0369; ER0437. Further, Plaintiffs are seeking abatement only with respect to their land and infrastructure. ER0398; ER0452. Finally, that use of Defendants' products elsewhere also contributed to the harm to Plaintiffs in California may raise choice of law questions, but it does not necessarily raise a federal issue.

Finally, removal of Plaintiffs' state-law claims would most certainly disrupt the federal-state balance struck by Congress. State courts are the most appropriate venue for state law tort claims. "Federalism concerns require that [federal courts] permit state courts to decide whether and to what extent they will expand state common law… ." *City of Philadelphia v. Lead Indus. Ass'n, Inc.*, 994 F.2d 112, 123 (3d Cir. 1993). When there is "no federal cause of action and no preemption of state remedies[,]" Congress likely intended for the claims to be heard in state court. *Grable,* 545 U.S. at 318. There is no unique circumstance here supporting deviation from this general rule.

Federal courts have also recognized that state courts should decide complex environmental cases. The Second Circuit remanded claims brought by the New Hampshire Attorney General and the Sacramento District Attorney against corporations that used methyl tertiary butyl ether ("MTBE") as a gasoline additive. *In re Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation*, 488 F.3d 112, 136 (2nd Cir. 2007). The Second Circuit held that the mere fact that defendants "refer to federal legislation by way a defense" was insufficient to establish federal jurisdiction. *Id.* at 135. While "a question of federal law [was] lurking in the background… '[a] dispute so doubtful and conjectural, so far removed from plain necessity [was] unavailing to extinguish the jurisdiction of the states.'" *Id.* at 135-136, citing *Gully v. First Nat'l Bank*, 299 U.S. 109, 117 (1936).

The Supreme Court of New Hampshire ultimately held Exxon Mobil Corporation liable under negligence and strict liability law. *State v. Exxon Mobil Corp.*, 168 N.H. 211, 218 (2015). Thus, state courts have been and continue to be the proper venue for environmental cases such as these. To hold otherwise would upset the balance of power between state and federal courts.

State-law claims related to climate change, without more, do not necessarily raise federal issues warranting federal jurisdiction. Thus, *Grable* is inapplicable.

B. The Clean Air Act is a Model of Cooperative Federalism that Cannot Support Removal on Complete Preemption Grounds.

The second recognized exception to the well-pleaded complaint rule raised by Defendants, though not addressed in the district court's Remand Order, is "complete preemption". ER0220-ER0224. Amici address the argument here because Defendants' construction is incorrect, and stretches complete preemption in a way that would severely constrain state courts in a field that states have traditionally occupied—protecting the health and welfare of their citizens. *See Rocky Mountain II,* 913 F.3d at 945-946 (Noting that the Constitution's drafters "respected the rights of individual states to pass laws that protected human welfare, … and recognized their broad police power to accomplish this goal.") (citations omitted).

"Complete preemption is really a jurisdictional rather than a preemption doctrine, as it confers exclusive federal jurisdiction in certain instances where

Congress intended the scope of federal law to be so broad as to entirely replace any state-law claim." *Dennis v. Hart*, 724 F.3d 1249, 1254 (9th Cir. 2013) (internal quotation and citation removed). An ordinary preemption defense to a state-law claim is not enough for removal—because state courts are perfectly capable of adjudicating such defenses. *See Retail Prop. Trust v. United Broth. of Carpenters & Joiners*, 768 F.3d 938, 946-947 (9th Cir. 2014). Complete preemption is rare, having been recognized only in three instances by the Supreme Court, none of which involve any claims related to environmental protection, let alone the Clean Air Act.[10] *Retail Prop. Trust*, 768 F.3d at 947-948, fn. 5 (citations omitted); *see also ARCO Envtl. Remediation, L.L.C. v. Dep't of Health & Envtl. Quality*, 213 F.3d 1108, 1114 (9th Cir. 2000) (Comprehensive Environmental Response, Compensation, and Liability Act does not completely preempt state-law action).

To support complete preemption, the defendant must establish that Congress both: (1) intended to displace the state-law cause of action; and (2) provided a substitute federal cause of action. *See Caterpillar*, 482 U.S. at 393; *Moore-*

---

[10] The Supreme Court has recognized complete preemption under only three statutes: (1) Section 301 of the Labor Management Relations Act, *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists*, 390 U.S. 557, 558-62 (1968); (2) Section 502(a) of the Employee Retirement Income Security Act of 1974, *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65-67 (1987); and (3) Sections 85 and 86 of the National Bank Act, *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 7-11 (2003).

Thomas v. Alaska Airlines, Inc., 553 F.3d 1241, 1245–46 (9th Cir. 2009) (no complete preemption where the statute does not provide a federal cause of action). Congress plainly did not intend to displace such state-law claims as the Plaintiffs bring here. The Clean Air Act declares that "air pollution prevention … is the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3). To that end, Congress included two broad savings clauses in the Act, a citizen suit savings clause (42 U.S.C. § 7604(e)) and a states' rights savings clause (42 U.S.C. § 7416). *See, e.g., Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 854 (9th Cir. 2002) (as amended) (where a savings clause exists, state law is preempted only "to the extent that actual conflict persists between state and federal policies"); *Am. Fuel & Petrochemical Mfrs. v. O'Keeffe*, 134 F. Supp. 3d 1270, 1285-86 (D. Or. 2015) (finding the Act's savings clause is "sweeping and explicit"), *aff'd* 903 F.3d 903 (9th Cir. 2018). By preserving the authority of States to "adopt or enforce . . . any requirement respecting the control or abatement of air pollution, (42 U.S.C. § 7416), the states' rights savings clause "clearly encompasses common law standards." *Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685, 690 (6th Cir. 2015) (emphasis added); *see also In re MTBE*, 488 F.3d at 135 (holding that state-law remedies were available to address MTBE in groundwater, and that the Act did not completely preempt the claims).

In addition to being in direct tension with the cooperative federalism approach and savings provisions of the Act, Defendants' complete preemption argument fails because it is premised on the availability of nationwide emission regulations under the Clean Air Act. ER0221. But those provisions of the Act do not apply to them. Defendants, who are being sued as producers and sellers of fossil fuels, not as emitters regulated by the Act, fail to explain how the Act could completely preempt state-law claims against parties who do not assert they are regulated under the Act. Nor can they. "There is no federal pre-emption in vacuo, without a constitutional text or a federal statute to assert it," and Defendants are unable to point to any "enacted statutory text" that would support preemption. *See Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988).

III. THE DISTRICT COURT'S NARROW INTERPRETATION OF PERSONAL JURISDICTION WOULD HAVE FAR REACHING ADVERSE CONSEQUENCES.

After it dismissed Plaintiffs' claims for failure to state a claim, the court also took the unnecessary step of dismissing Defendants Exxon, BP, ConocoPhillips, and Royal Dutch Shell for lack of personal jurisdiction.[11] ER0003. As discussed below, the district court's reasoning is inconsistent with case law and constitutes a

[11] This Court need only reach the jurisdiction question if it affirms the district court's denial of remand, but reverses the district court's dismissal of Plaintiffs' claims for failure to state a claim.

troublingly-restrictive view of the test for personal jurisdiction. It would deny redress to injured parties when the source of their injury is widespread or occurs in any significant part outside of the forum.

Specific personal jurisdiction exists where three factors are met: "(1) the defendant must either purposefully direct his activities toward the forum or purposefully avail himself of the privileges of conducting activities in the forum; (2) the claim must arise out of or relate to the defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e., it must be reasonable." *Axiom Foods, Inc. v. Acerchem Int'l, Inc.*, 874 F.3d 1064, 1068 (9th Cir. 2017) (internal citations omitted). The "arise out of or relate to" factor was the only one at issue below. The Ninth Circuit has adopted a "but for" test for determining whether a claim "arises out of or relates to" the defendant's forum activities. *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 385 (9th Cir. 1988), *overruled on other grounds*, *Carnival Cruise Lines v. Shute,* 499 U.S. 585 (1991).[12] The but-for test requires "*some nexus* between the cause of action and the defendant's activities in the forum." *Shute* at 385 (emphasis added);

[12] The Supreme Court "has yet to definitively resolve the appropriate scope of the 'arise out of or relate to' requirement for specific jurisdiction." *Miller Yacht Sales, Inc. v. Smith*, 384 F.3d 93, 104 (3d Cir. 2004) *citing Carnival Cruise Lines, Inc.*, 499 U.S. at 589 (declining to reach issue).

see also Adidas Am., Inc. v. Cougar Sport, Inc., 169 F. Supp. 3d 1079, 1085, 1092–93 (D. Or. 2016).

The district court read the but-for test far too narrowly, transforming it into a requirement that Defendants' forum activities directly and exclusively cause Plaintiffs' injuries. A defendant's forum-based activities, however, need not cause the *entire* harm, particularly where a portion of the defendant's conduct took place in the forum but the source of the injury is dispersed or involves the totality of a defendant's national conduct. *See, e.g., Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 899 (9th Cir. 2002) (the "but for" test was satisfied where defendants' conduct caused harm both in and outside of California).

Further, the district court's grounds for distinguishing Plaintiffs' cases regarding libel and patent law were erroneous. In *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775-776 (1984), the Supreme Court held that the plaintiff could sue in New Hampshire for nationwide damages for libel, even though only a small fraction of the harm-causing behavior occurred there. Similarly, in *Dubose v. Bristol-Myers Squibb Co.*, 2017 WL 2775034 at *4 (N.D. Cal. June 27, 2017), the court held it had jurisdiction where a South Carolina resident sued foreign corporations in California over a product that the defendants had tested in California and many other states, rejecting the notion of an "arbitrary" numerical threshold, such as 25 or 50 percent, for in-state conduct when the injury is caused

by conduct spread across many jurisdictions. The district court distinguished these cases from *Keeton* and *Dubose* on the grounds that it lacks "a causal chain sufficiently connecting plaintiffs' harm and defendants' California activities." ER0009. But the court provided no basis for its determination that the causal chain here is broken, or for differentiating the causal chain in *Keeton* or *Dubose*. In those libel and patent cases, as here, the totality of national conduct created the harm to the plaintiffs, and the defendants' forum activity accounted for a slice of that harm-causing activity.

Clearly, there is "some nexus" between Plaintiffs' cause of action and the Defendants' contact with California. *See Shute*, 897 F.2d at 385. Defendants do not dispute that they produce, market, and sell large volumes of fossil fuels in California. Nor can they dispute that Plaintiffs' claimed injuries center on their production, marketing and sales of fossil fuels. Thus, Defendants are subject to specific personal jurisdiction because the production, sales and marketing of fossil fuels are an undeniable part of the unbroken chain of events leading to sea level rise, regardless of whether Defendants' California-related activities constitute only a portion of Defendants' injurious behavior.

CONCLUSION

For the reasons above, amici urge this Court to reverse the decision below and to remand these actions to state court. In the alternative, if the actions are not remanded, the district court's additional orders should be reversed and the cases remanded to district court for further proceedings.

Dated: March 20, 2019

Respectfully submitted,

WILLIAM TONG
Attorney General
State of Connecticut
55 Elm Street, P.O. Box 120
Hartford, CT 06106

BRIAN E. FROSH
Attorney General
State of Maryland
200 Saint Paul Place
Baltimore, MD 21202

KEITH ELLISON
Attorney General
State of Minnesota
102 State Capitol
75 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155

GURBIR S. GREWAL
Attorney General
State of New Jersey
Hughes Justice Complex
25 Market Street
Trenton, NJ 08625

LETITIA JAMES
Attorney General
State of New York
28 Liberty Street, 23rd Floor
New York, NY 10005

ELLEN F. ROSENBLUM
Attorney General
State of Oregon
1162 Court Street, N.E.
Salem, OR 97301

XAVIER BECERRA
Attorney General of California
SALLY MAGNANI
Senior Assistant Attorney General

s/ Heather Leslie
HEATHER LESLIE
ERIN GANAHL
Deputy Attorneys General
DAVID A. ZONANA
Supervising Deputy Attorney General
Attorneys for Amicus Attorney General,
State of California

PETER F. NERONHA
Attorney General
State of Rhode Island
150 South Main Street
Providence, RI 02903

THOMAS J. DONOVAN, JR.
Attorney General
State of Vermont
109 State Street
Montpelier, VT 05609

ROBERT W. FERGUSON
Attorney General
State of Washington
P.O. Box 40100
Olympia, WA 98504

KARL A. RACINE
Attorney General
The District of Columbia
One Judiciary Square
441 4th Street, N.W., Suite 600 South
Washington, D.C. 20001

CERTIFICATE OF SERVICE

I certify that on March 20, 2019, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all other participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: March 20, 2019 *s/ Heather Leslie*

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 18-16663

I am the attorney or self-represented party.

This brief contains 5,828 **words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- ○ complies with the word limit of Cir. R. 32-1.
- ○ is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ◉ is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ○ is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ○ complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one):*
  - ○ it is a joint brief submitted by separately represented parties;
  - ○ a party or parties are filing a single brief in response to multiple briefs; or
  - ○ a party or parties are filing a single brief in response to a longer joint brief.
- ○ complies with the length limit designated by court order dated [ ].
- ○ is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/ Heather Leslie **Date** 03/20/2019

(use "s/[typed name]" to sign electronically-filed documents)

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov