CITY OF BALTIMORE

BERNARD C. "JACK" YOUNG
Mayor

DEPARTMENT OF LAW
DANA P. MOORE, ACTING CITY SOLICITOR
100 N. HOLLIDAY STREET
SUITE 101, CITY HALL
BALTIMORE, MD 21202

June 11, 2020

Honorable Videtta A. Brown
Circuit Court for Baltimore City
8th Judicial Circuit

Re: Mayor and City Council of Baltimore v. BP P.L.C. et al., Case No.: 24-C-18-004219

Dear Judge Brown,

The Mayor and City Council of Baltimore (the "City") submits the recent decision in *City of Oakland v.BP plc*, No. 18-16663, __ F.3d __, 2020 WL 2702680 (9th Cir. May 26, 2020) (Ex. A) in further support of its opposition to Defendants' Motion to Dismiss for Failure to State a Claim. The opinion supports the City's position here that its claims are not governed by federal common law, preempted by the Clean Air Act, or otherwise barred by federal law.

In *Oakland*, the public entity plaintiffs asserted state law nuisance claims similar to those asserted in the City's complaint. The fossil-fuel industry defendants, including many of the defendants here, removed, and the district court denied the plaintiffs' motion to remand, concluding that the plaintiffs' claim "was 'necessarily governed by federal common law.'" 2020 WL 2703701 at *3. The district court, in a decision relied on heavily by defendants here, then granted the defendants' Rule 12(b)(6) motion to dismiss, reasoning that it would be inappropriate to extend federal common law to provide relief. *Id.*

The Ninth Circuit reversed the district court's remand order and vacated the 12(b)(6) ruling. The Court of Appeals held flatly that "the state-law claim for public nuisance does not arise under federal law" for purposes of federal jurisdiction. *Id.* at *2. Because the Ninth Circuit found subject matter jurisdiction lacking at the time of removal, the district court orders granting the defendants' motions to dismiss for failure to state a claim, and granting some defendants' motions to dismiss for lack of personal jurisdiction, were vacated. *Id.* at *9.

The Ninth Circuit rejected the district court's holding that the public entity plaintiffs' claims were necessarily governed by federal common law. Specifically, the Ninth Circuit held that the plaintiffs' state law public nuisance claim "fail[ed] to raise a substantial federal question" because it neither required "interpretation of a federal statute," "nor challenge[d] a federal statute's constitutionality." The court further concluded that the defendants' generalized invocation of "a variety of 'federal interests,'" similar to those raised as a purported bar to relief in Defendants' motion to dismiss here, "including energy policy, national security, and foreign policy," failed to raise any substantial question of federal law. *Id.* at *5–*6 (citations omitted).

CITY OF BALTIMORE

BERNARD C. "JACK" YOUNG
Mayor

DEPARTMENT OF LAW
DANA P. MOORE, ACTING CITY SOLICITOR
100 N. HOLLIDAY STREET
SUITE 101, CITY HALL
BALTIMORE, MD 21202

June 11, 2020

Honorable Videtta A. Brown
Circuit Court for Baltimore City
8th Judicial Circuit

Re: Mayor and City Council of Baltimore v. BP P.L.C. et al., Case No.: 24-C-18-004219

Dear Judge Brown,

The Mayor and City Council of Baltimore (the "City") submits the recent decision in *City of Oakland v.BP plc*, No. 18-16663, __ F.3d __, 2020 WL 2702680 (9th Cir. May 26, 2020) (Ex. A) in further support of its opposition to Defendants' Motion to Dismiss for Failure to State a Claim. The opinion supports the City's position here that its claims are not governed by federal common law, preempted by the Clean Air Act, or otherwise barred by federal law.

In *Oakland*, the public entity plaintiffs asserted state law nuisance claims similar to those asserted in the City's complaint. The fossil-fuel industry defendants, including many of the defendants here, removed, and the district court denied the plaintiffs' motion to remand, concluding that the plaintiffs' claim "was 'necessarily governed by federal common law.'" 2020 WL 2703701 at *3. The district court, in a decision relied on heavily by defendants here, then granted the defendants' Rule 12(b)(6) motion to dismiss, reasoning that it would be inappropriate to extend federal common law to provide relief. *Id.*

The Ninth Circuit reversed the district court's remand order and vacated the 12(b)(6) ruling. The Court of Appeals held flatly that "the state-law claim for public nuisance does not arise under federal law" for purposes of federal jurisdiction. *Id*. at *2. Because the Ninth Circuit found subject matter jurisdiction lacking at the time of removal, the district court orders granting the defendants' motions to dismiss for failure to state a claim, and granting some defendants' motions to dismiss for lack of personal jurisdiction, were vacated. *Id*. at *9.

The Ninth Circuit rejected the district court's holding that the public entity plaintiffs' claims were necessarily governed by federal common law. Specifically, the Ninth Circuit held that the plaintiffs' state law public nuisance claim "fail[ed] to raise a substantial federal question" because it neither required "interpretation of a federal statute," "nor challenge[d] a federal statute's constitutionality." The court further concluded that the defendants' generalized invocation of "a variety of 'federal interests,'" similar to those raised as a purported bar to relief in Defendants' motion to dismiss here, "including energy policy, national security, and foreign policy," failed to raise any substantial question of federal law. *Id*. at *5–*6 (citations omitted).

CITY OF BALTIMORE

BERNARD C. "JACK" YOUNG
Mayor

DEPARTMENT OF LAW
DANA P. MOORE, ACTING CITY SOLICITOR
100 N. HOLLIDAY STREET
SUITE 101, CITY HALL
BALTIMORE, MD 21202

The Ninth Circuit also found no "complete" preemption under the Clean Air Act, because "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," and also because the Act "does not provide ... a substitute cause of action"—both of which are necessary elements to establish jurisdiction-conferring complete preemption. *Id*. (citations omitted).

Oakland supports denial of the Defendants' Motion to Dismiss, as it rejects Defendants' arguments that Plaintiffs' claims are controlled or barred by federal law.

Respectfully Submitted,

Suzanne Sangree
Director of Affirmative Litigation

Cc/Counsel of Record via electronic service

EXHIBIT A

KeyCite Yellow Flag - Negative Treatment
Distinguished by Massachusetts v. Exxon Mobil Corporation, D.Mass., May 28, 2020

2020 WL 2702680
United States Court of Appeals, Ninth Circuit.

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.

No. 18-16663
|
Argued and Submitted February 5, 2020 Pasadena, California
|
Filed May 26, 2020

Synopsis

Background: Cities brought public nuisance actions in state court against energy companies, alleging that companies' production and promotion of fossil fuels caused or contributed to global warming that induced a sea-level rise. After consolidation and removal, the United States District Court for the Northern District of California, William H. Alsup, J., 2018 WL 1064293, denied companies' motion to remand, and later, 325 F.Supp.3d 1017, and granted companies' motion to dismiss for failure to state a claim. Cities appealed.

Holdings: The Court of Appeals, Ikuta, Circuit Judge, held that:

[1] cities' state-law claims did not raise a substantial federal question, as exception to well-pleaded complaint rule;

[2] cities' state-law claims did not fall within artful pleading doctrine, as exception to well-pleaded complaint rule; and

[3] considerations of finality, efficiency, and economy did not excuse the lack of federal question jurisdiction at time of removal.

Vacated and remanded.

Procedural Posture(s): On Appeal; Motion for Remand; Motion to Dismiss for Failure to State a Claim.

West Headnotes (21)

[1] **Federal Courts** Statutes, regulations, and ordinances, questions concerning in general

Questions of statutory construction are reviewed de novo.

[2] **Federal Courts** Jurisdiction

Questions of subject matter jurisdiction are reviewed de novo.

[3] **Federal Courts** Limited jurisdiction; jurisdiction as dependent on constitution or statutes

Statutes extending federal jurisdiction for federal courts are narrowly construed so as not to reach beyond the limits intended by Congress.

[4] **Federal Courts** Substantiality of federal question

The scope of Congress's statutory grant of federal question jurisdiction to federal district courts is a matter of congressional intent, and Congress conferred a more limited power than the full scope of federal judicial power accorded in the Constitution. U.S. Const. art. 3, § 2, cl. 1; 28 U.S.C.A. § 1331.

[5] **Federal Courts** "Well-pleaded complaint" rule

Under the well-pleaded complaint rule, a civil action arises under federal law, for purposes of federal question jurisdiction in the district courts, when a federal question appears on the face of the complaint. 28 U.S.C.A. § 1331.

[6] **Federal Courts** "Well-pleaded complaint" rule

Federal Courts Defenses and anticipation thereof

Under the well-pleaded complaint rule, federal question jurisdiction depends solely on the plaintiff's claims for relief and not on anticipated defenses to those claims. 28 U.S.C.A. § 1331.

[7] **Removal of Cases** Allegations in Pleadings

Because under the well-pleaded complaint rule federal question jurisdiction depends solely on the plaintiff's claims for relief and not on anticipated defenses to those claims, 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. 28 U.S.C.A. §§ 1331, 1441(a).

[8] **Federal Courts** "Well-pleaded complaint" rule

Under the well-pleaded complaint rule, the plaintiff, as the master of the claim, can generally avoid federal question jurisdiction by exclusive reliance on state law. 28 U.S.C.A. § 1331.

[9] **Federal Courts** State-law claims and causes of action

An exception to the well-pleaded complaint rule, with respect to federal question jurisdiction, applies to a special and small category of state-law claims for which federal law is a necessary element of the claim for relief, and under the exception, 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. 28 U.S.C.A. § 1331.

[10] **Federal Courts** Substantiality of federal question

The inquiry concerning whether a case asserting state-law claims turns on a substantial question of federal law, as element for exception to well-pleaded complaint rule with respect to federal question jurisdiction, focuses on the importance of a federal issue to the federal system as a whole. 28 U.S.C.A. § 1331.

[11] **Federal Courts** Substantiality of federal question

Federal Courts State-law claims and causes of action

Federal Courts "Well-pleaded complaint" rule

A federal issue in a case asserting state-law claims is not substantial, as element for exception to well-pleaded complaint rule with respect to federal question jurisdiction, merely because of its novelty, or because it will further a uniform interpretation of a federal statute. 28 U.S.C.A. § 1331.

[12] **Removal of Cases** Allegations in Pleadings

States Preemption in general

The artful-pleading doctrine, as exception to well-pleaded complaint rule with respect to federal question jurisdiction, allows removal to federal court where federal law completely preempts a plaintiff's state-law claim, meaning that the preemptive force of a federal 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, and 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. 28 U.S.C.A. §§ 1331, 1441(a).

[13] **Federal Courts** Environment and health

Cities' actions asserting energy companies' liability under California law for a public nuisance, based on allegations that companies' production and promotion of fossil fuels caused or contributed to global warming that induced a sea-level rise, did not fall within special and small category of state-law claims for which federal law was a necessary element of the claim for relief, as exception to well-pleaded complaint rule with respect to federal question jurisdiction; even assuming that cities' allegations could give rise to cognizable claim for public nuisance under federal common law relating to interstate pollution, state-law claim for public nuisance did not raise a substantial federal legal issue, even if it implicated federal policy questions concerning energy policy, national security, and foreign policy, and state-law claim was fact-bound and situation-specific. 28 U.S.C.A. § 1331; Cal. Civ. Code §§ 3479, 3480, 3491, 3494.

1 Cases that cite this headnote

[14] **Federal Courts** State-law claims and causes of action

A state-law claim that is fact-bound and situation-specific is not the type of claim for which federal question jurisdiction lies because federal law is a necessary element of the claim for relief. 28 U.S.C.A. § 1331.

[15] **Nuisance** Nature and elements of public nuisance in general

Removal of Cases Allegations in Pleadings

States Particular cases, preemption or supersession

Cities' actions asserting energy companies' liability under California law for a public nuisance, based on allegations that companies' production and promotion of fossil fuels caused or contributed to global warming that induced a sea-level rise, did not fall within artful pleading doctrine, as an exception to well-pleaded complaint rule with respect to federal question jurisdiction, which exception would allow removal to federal court if federal law completely preempted a state-law claim; Clean Air Act (CAA) did not have the extraordinary preemptive force needed for the artful pleading doctrine. 28 U.S.C.A. §§ 1331, 1441(a); Clean Air Act §§ 101(a)(3), 116, 42 U.S.C.A. §§ 7401(a)(3), 7416.

[16] **Federal Courts** Cases "Arising Under" Federal Law; Federal-Question Jurisdiction

Once a plaintiff asserts a federal claim, regardless of whether the plaintiff does so under protest, the district court has subject matter jurisdiction based on federal question jurisdiction. 28 U.S.C.A. § 1331.

[17] **Removal of Cases** Review

Plaintiffs, by moving for remand after removal, preserved for appellate review their claim that their action could not be removed from state court based on federal question jurisdiction, though after denial of their remand motion they stated in their amended complaints that they were including a federal common-law claim in order to conform to the district court's ruling while stating that they reserved all rights with respect to whether jurisdiction is proper in federal court. 28 U.S.C.A. §§ 1331, 1441(a).

[18] **Removal of Cases** Want of jurisdiction or of cause for removal

If a case was not fit for federal adjudication when it was removed from state court, a district

court generally must remand the case to state court, even if subsequent actions conferred subject matter jurisdiction on the district court, but under a narrow exception that takes into account considerations of finality, efficiency, and economy, if a jurisdictional defect has been cured after removal and the case has been tried in federal court, unfitness for federal adjudication at time of removal can be excused if remanding the case to state court would be inconsistent with the fair and unprotracted administration of justice. 28 U.S.C.A. § 1441(a).

[19] **Federal Civil Procedure** Pleading, Defects In, in General

Motions to dismiss for failure to state a claim are designed to enable defendants to challenge the legal sufficiency of complaints without subjecting themselves to discovery, the cost of which can be prohibitive. Fed. R. Civ. P. 12(b)(6).

[20] **Removal of Cases** Want of jurisdiction or of cause for removal

Dismissal for failure to state a claim is generally insufficient to implicate the narrow exception to the general rule that a case that was not fit for federal adjudication when it was removed must be remanded to state court, which exception takes into account considerations of finality, efficiency, and economy if a jurisdictional defect has been cured after removal. 28 U.S.C.A. § 1441(a); Fed. R. Civ. P. 12(b)(6).

[21] **Removal of Cases** Want of jurisdiction or of cause for removal

Considerations of finality, efficiency, and economy were not overwhelming and thus they did not excuse the lack of federal question jurisdiction at time of removal by energy companies, as would support an exception to general rule that a case that was not fit for federal adjudication when it was removed must be remanded to state court, in cities' actions asserting energy companies' liability under California law for a public nuisance, based on allegations that companies' production and promotion of fossil fuels caused or contributed to global warming that induced a sea-level rise; entry of judgment was based on the grant of companies' motion to dismiss for failure to state a claim, case had been on district court's docket for only eight months, and no discovery had been conducted. 28 U.S.C.A. §§ 1331, 1441(a); Clean Air Act §§ 101(a)(3), 116, 42 U.S.C.A. §§ 7401(a)(3), 7416; Fed. R. Civ. P. 12(b)(6).

Attorneys and Law Firms

Michael Rubin (argued), Barbara J. Chisholm, Rebecca Moryl Lee, and Corinne F. Johnson, Altshuler Berzon LLP, San Francisco, California; Victor M. Sher and Matthew K. Edling, Sher Edling LLP, San Francisco, California; Barbara J. Parker, City Attorney; Maria Bee, Special Counsel; Erin Bernstein, Supervising Attorney; Malia McPherson, Deputy; Office of the City Attorney, Oakland, California; Dennis J. Herrera, City Attorney; Ronald P. Flynn, Chief Deputy; Yvonne R. Meré, Chief, Complex Litigation; Matthew D. Goldberg and Robb W. Kapla, Deputies; City Attorney's Office, San Francisco, California; for Plaintiffs-Appellants.

Theodore J. Boutrous, Jr. (argued), Andrea E. Neuman, and William E. Thomson, Gibson Dunn & Crutcher LLP, Los Angeles, California; Joshua S. Lipshutz, Gibson Dunn & Crutcher LLP, San Francisco, California; Neal S. Manne, Johnny W. Carter, Erica Harris, and Steven Shepard, Susman Godfrey LLP, Houston, Texas; Herbert J. Stern and Joel M. Silverstein, Stern & Kilcullen LLC, Florham Park, New Jersey; for Defendant-Appellee Chevron Corporation.

Kannon K. Shanmugam (argued), Paul Weiss Rifkind Wharton & Garrison LLP, Washington, D.C.; Theodore V. Wells Jr., Daniel J. Toal, and Jaren Janghorbani, Paul Weiss Rifkind Wharton & Garrison LLP, New York, New York; Jonathan W. Hughes, Arnold & Porter Kaye Scholer LLP, San Francisco, California; Matthew T. Heartney and John D. Lombardo, Arnold & Porter Kaye Scholer LLP, Los Angeles, California; Jameson R. Jones and Sean C. Grimsley, Bartlit Beck Herman Palenchar & Scott LLP, Denver, Colorado; Tracie J. Renfroe and Carol M. Wood, King & Spalding LLP, Houston, Texas; M. Randall Oppenheimer

and Dawn Sestito, O'Melveny & Myers LLP, Los Angeles, California; Daniel B. Levin, Munger Tolles & Olson LLP, Los Angeles, California; Jerome C. Roth and Elizabeth A. Kim, Munger Tolles & Olson LLP, San Francisco, California; David C. Frederick and Brendan J. Crimmins, Kellogg Hansen Todd Figel & Frederick P.L.L.C., Washington, D.C.; for Defendants-Appellees BP PLC, ConocoPhillips, Exxon Mobil Corporation, and Royal Dutch Shell PLC.

Jonathan Brightbill (argued) and Eric Grant, Deputy Assistant Attorneys General; R. Justin Smith and Christine W. Ennis, Trial Attorneys; Environment and Natural Resources Division, United States Department of Justice, Washington, D.C.; for Amicus Curiae United States.

Michael Burger, Morningside Heights Legal Services, Inc., New York, New York, for Amici Curiae National League of Cities, U.S. Conference of Mayors, and International Municipal Lawyers Association.

Michael R. Lozeau and Richard T. Drury, Lozeau Drury LLP, Oakland, California, for Amici Curiae Conflict of Laws and Foreign Relations Law Scholars.

Gerson H. Smoger, Smoger & Associates P.C., Dallas, Texas; Robert S. Peck, Center for Constitutional Litigation P.C., Washington, D.C.; for Amici Curiae Senators Sheldon Whitehouse, Dianne Feinstein, Richard Blumenthal, Mazie K. Hirono, Edward J. Markey, and Kamala D. Harris.

Seth Davis, Berkeley, California; Ruthanne M. Deutsch and Hyland Hunt, Deutsch Hunt PLLC, Washington, D.C.; for Amici Curiae Legal Scholars.

John W. Keker, Matthew Werdegar, and Dan Jackson, Keker Van Nest & Peters LLP, San Francisco, California; Harold Hongju Koh and Conor Dwyer Reynolds, Rule of Law Clinic, Yale Law School, New Haven, Connecticut; for Amici Curiae Former U.S. Government Officials.

James R. Williams, County Counsel; Greta S. Hansen, Chief Assistant County Counsel; Laura S. Trice, Lead Deputy County Counsel; Tony LoPresti, Deputy County Counsel; Office of County Counsel, County of Santa Clara, San José, California; for Amicus Curiae California State Association of Counties.

Daniel P. Mensher and Alison S. Gaffney, Keller Rohrback L.L.P., Seattle, Washington, for Amici Curiae Robert Brulle, Center for Climate Integrity, Justin Farrell, Benjamin Franta, Stephan Lewandowsky, Naomi Oreskes, Geoffrey Supran, and Union of Concerned Scientists.

Kenneth L. Adams, Adams Holcomb LLP, Washington, D.C.; William A. Rossbach, Rossbach Law PC, Missoula, Montana; for Amici Curiae Mario J. Molina, Michael Oppenheimer, Bob Kopp, Friederike Otto, Susanne C. Moser, Donald J. Wuebbles, Gary Griggs, Peter C. Frumhoff, and Kristina Dahl.

Ian Fein, Natural Resources Defense Council, San Francisco, California; Peter Huffman, Natural Resources Defense Council, Washington, D.C.; for Amicus Curiae Natural Resources Defense Council.

Xavier Becerra, Attorney General; Sally Magnani, Senior Assistant Attorney General; David A. Zonana, Supervising Deputy Attorney General; Erin Ganahl and Heather Leslie, Deputy Attorneys General; Attorney General's Office, Sacramento, California; William Tong, Brian E. Frosh, Keith Ellison, Gurbir S. Grewal, Letitia James, Ellen F. Rosenblum; Peter F. Neronha, Thomas J. Donovan Jr., Robert W. Ferguson, and Karl A. Racine, Attorneys General; for Amici Curiae States of California, Connecticut, Maryland, Minnesota, New Jersey, New York, Oregon, Rhode Island, Vermont, and Washington, and the District of Columbia.

Steven P. Lehotsky, Michael B. Schon, and Jonathan D. Urick, U.S. Chamber Litigation Center, Washington, D.C.; Peter D. Keisler, C. Frederick Beckner III, Ryan C. Morris, and Tobias S. Loss-Eaton, Sidley Austin LLP, Washington, D.C.; for Amicus Curiae Chamber of Commerce of the United States of America.

Corbin K. Barthold and Cory L. Andrews, Washington Legal Foundation, Washington, D.C., for Amicus Curiae Washington Legal Foundation.

Philip S. Goldberg and Christopher E. Appel, Shook Hardy & Bacon LLP, Washington, D.C.; Linda E. Kelly and Peter C. Tolsdorf, Manufacturers' Center for Legal Action, Washington, D.C.; for Amicus Curiae National Association of Manufacturers.

Curtis T. Hill, Jr., Attorney General; Thomas M. Fisher, Solicitor General; Kian J. Hudson, Deputy Solicitor General; Julia C. Payne and Robert Rowlett, Deputy Attorneys General; Office of the Attorney General, Indianapolis, Indiana; Steve Marshall, Kevin G. Clarkson, Leslie Rutledge, Christopher M. Carr, Derek Schmidt, Jeff Landry, Eric Schmitt, Tim Fox, Doug Peterson, Wayne Stenehjem, Dave

Yost, Mike Hunter, Alan Wilson, Ken Paxton, Sean Reyes, Patrick Morrissey, and Bridget Hill, Attorneys General; for Amici Curiae States of Indiana, Alabama, Alaska, Arkansas, Georgia, Kansas, Louisiana, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, Texas, Utah, West Virginia, and Wyoming.

Raymond A. Cardozo and David J. de Jesus, Reed Smith LLP, San Francisco, California; Richard A. Epstein, Chicago, Illinois; for Amici Curiae Professors Richard A. Epstein, Jason Scott Johnston, and Henry N. Butler.

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

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

***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 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.

[1] **[2]** **[3]** 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-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

[4] **[5]** **[6]** **[7]** **[8]** 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-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.

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

1

[9] 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 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.*

[10] **[11]** 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

***5** **[12]** 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 pre-emptive 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

[13] 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 necessarily 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.

***6** **[14]** 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 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

[15] 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] lawsuit 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 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.

***7** 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

[16] 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.

[17] 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 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.

[18] 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).

***8** 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 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 § 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).

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

***9** **[20]** 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]

[21] 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, 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.

***10 VACATED AND REMANDED**. [14]

All Citations

--- F.3d ----, 2020 WL 2702680, 20 Cal. Daily Op. Serv. 4802, 2020 Daily Journal D.A.R. 4811

Footnotes

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 California, 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. 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.*, —— F.3d ——, 2020 WL 2703701 (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-nuisance action in federal court in the name of the people of the State of California.

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 under' 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)).

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.

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.

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.

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).

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 Aircraft 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).

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 (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.

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.

End of Document