No. 18-16663

IN THE

# United States Court of Appeals for the Ninth Circuit

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CITY OF OAKLAND, a Municipal Corporation, and THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Oakland City Attorney Barbara J. Parker; 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.

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

*Defendants-Appellees*.

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On Appeal from The United States District Court, Northern District of California
Case Nos. 3:17-cv-06011-WHA, 3:17-cv-06012-WHA (Hon. William H. Alsup)

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## DEFENDANTS-APPELLEES' PETITION FOR PANEL REHEARING AND/OR REHEARING EN BANC

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## RULE 35(B)(1) STATEMENT AND INTRODUCTION

This case raises two questions of exceptional importance regarding federal jurisdiction. Because the panel overlooked or misapprehended several key issues relevant to these questions, and decided them in a manner that conflicts with this Court's precedent and decisions of the Supreme Court and other courts of appeals, this Court should grant panel rehearing or rehearing en banc. Fed. R. App. P. 35(b)(1)(A)–(B), 40(b)(2).

First, although the district court held that it had jurisdiction because Plaintiffs' nominally state-law claims "are necessarily governed by federal common law," ER29, the panel reversed on the ground that there are only "two exceptions to the well-pleaded-complaint rule"—*Grable* and complete preemption—and that neither applied. Op. 18. But authority from inside and outside this Circuit clearly recognizes federal common law as a third, independent ground for federal jurisdiction. *See, e.g.*, *Wayne v. DHL Worldwide Express*, 294 F.3d 1179 (9th Cir. 2002); *New SD, Inc. v. Rockwell Int'l Corp.*, 79 F.3d 953 (9th Cir. 1996); *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922 (5th Cir. 1997).

Second, the panel conceded that Plaintiffs had "cured any subject-matter jurisdiction defect" that existed at the time of removal by "amending their complaints to assert a claim under federal common law." Op. 23. It also acknowledged that, "when a jurisdictional defect has been cured after removal and the case has been tried in a 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.'" Op. 25. But it held that this rule "generally will not apply when a district court dismisses a complaint for failure to state a claim under Rule 12(b)(6)." Op. 27. That holding conflicts with this Court's decision in *Retail Property Trust v. United Brotherhood of Carpenters & Joiners of America*, 768 F.3d 938 (9th Cir. 2014), and the decisions of five other courts of appeals, *see Barbara v. N.Y. Stock Exch., Inc.*, 99 F.3d 49 (2d Cir. 1996); *In re Lipitor Antitrust Litig.*, 855 F.3d 126 (3d Cir. 2017); *Moffitt v. Residential Funding Co., LLC*, 604 F.3d 156 (4th Cir. 2010); *Bernstein v. Lind-Waldock & Co.*, 738 F.2d 179 (7th Cir. 1984); *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922 (8th Cir. 2005).

For these reasons, this case should be reheard by the panel or en banc and the district court's judgment affirmed.

## BACKGROUND

In September 2017, the Cities of Oakland and San Francisco sued Defendant energy companies in California Superior Court seeking to hold them liable for the alleged consequences of global climate change. Op. 9–10.[1] Plaintiffs alleged that Defendants' production and sale of fossil fuels have caused "global warming-induced sea level rise," "coastal flooding," and "shoreline erosion," and therefore constitute a public nuisance under California law. Op. 10. Defendants removed to federal court on numer-

[1] Eleven similar actions are pending in this Circuit. In addition to the two here, six others were heard by Judge Chhabria, who found no federal jurisdiction and remanded to state court. The same panel that decided this appeal affirmed in a decision that is the subject of a separate petition for rehearing. *See County of San Mateo v. Chevron Corp.*, 960 F.3d 586 (9th Cir. 2020). Three other actions are stayed pending these appeals. *See Pacific Coast Federation of Fishermen's Associations, Inc. v. Chevron Corp.*, No. 18-cv-7477 (N.D. Cal.); *King County v. BP PLC*, No. 18-cv-758 (W.D. Wash.); *City and County of Honolulu v. Sunoco LP*, No. 20-cv-163 (D. Haw.).

ous grounds, including that Plaintiffs' nominally state-law public-nuisance claims for interstate and international pollution necessarily arise under federal common law. *Id.*

The district court denied Plaintiffs' motion to remand, holding that "Plaintiffs' nuisance claims—which address the national and international geophysical phenomenon of global warming—are necessarily governed by federal common law." ER29. The district court explained that "[a] patchwork of fifty different answers to the same fundamental global issue would be unworkable," and that "the scope of the worldwide predicament demands the most comprehensive view available, which in our American court system means our federal courts and our federal common law." ER31.

While Plaintiffs purported to "reserve all rights with respect to whether jurisdiction is proper in federal court," ER63; ER134, they refused to seek immediate review when the district court certified its order for interlocutory appeal, ER34–35. Instead, they each amended their complaint to add a new plaintiff asserting a new, federal public-nuisance claim. SER3.

The district court then held two hearings on Defendants' motions to dismiss, each spanning several hours, as well as a 4.5-hour tutorial at which the parties "trace[d] the history of scientific study of climate change" and "set forth the best science now available on global warming, glacier melt, sea rise, and coastal flooding." SER16. Thereafter, the district court dismissed Plaintiffs' claims under Rule 12(b)(6). The court reasoned that "the scope of plaintiffs' claims [must] be decided under federal law, given the international reach of the alleged wrong." ER25. It then concluded that there was no basis for imposing a judicial remedy under federal common law, and that courts were obligated to "defer to the other co-equal branches of government [because] the problem at hand clearly deserves a solution best addressed by those branches." ER26.

The panel reversed the district court's denial of Plaintiffs' motion to remand. It first held that "the district court lacked federal-question jurisdiction unless one of the two exceptions to the well-pleaded-complaint rule applies": (1) federal law is a necessary element of Plaintiffs' state-law claim under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005); or (2) complete preemption.

Op. 18. The panel concluded that "neither exception to the well-pleaded-complaint rule applies to the Cities' original complaints." Op. 23.

The panel next considered whether Plaintiffs' addition of a federal claim changed the outcome. It acknowledged that Plaintiffs "cured any subject-matter jurisdiction defect by amending their complaints to assert a claim under federal common law." Op. 23. But it nevertheless declined to exercise jurisdiction. The panel conceded that remand is not appropriate when jurisdictional defects existing at the time of removal have been subsequently cured and "the case has been tried in federal court." Op. 25–26. It also recognized that this Court has "extended this reasoning to cases where the district court resolves 'state law issues on the merits' at summary judgment." Op. 26. But the panel fashioned a general rule requiring remand where the district court has dismissed "under Rule 12(b)(6)." Op. 27.

The district court subsequently filed a letter "under General Order 12.10, to correct a mistake in the Court of Appeals' May 26 opinion." Dkt. 173 at 1. Pointing to the Supreme Court's repeated holdings that claims relating to interstate air and water are governed by federal common law and therefore arise under federal law within the meaning of 28 U.S.C.

§ 1331, the district court observed that the panel's opinion did not fully address "the merits of the ground on which removal jurisdiction was actually sustained below." *Id.* at 3.

## REASONS FOR GRANTING THE PETITION

### A. The Panel's Decision Creates Intra- and Inter-Circuit Conflicts Regarding Whether Plaintiffs' Claims Support Federal-Question Jurisdiction.

Although there is "'no federal general common law,'" the Supreme Court "has recognized the need and authority in some limited areas to formulate what has come to be known as 'federal common law'"—particularly where "a federal rule of decision is 'necessary to protect uniquely federal interests.'" *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (citations omitted). Interstate and international pollution is a prime example of a field where uniquely federal interests require a uniform, federal law. *See Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972) ("*Milwaukee I*") ("When we deal with air and water in their ambient or interstate aspects, there is a federal common law[.]"). And where "federal common law exists, . . . state law cannot be used." *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 n.7 (1981) ("*Milwaukee II*").

Even though the central jurisdictional issue before the district court and this Court was whether Plaintiffs' nominally state-law claims necessarily arise under federal common law, the panel addressed federal common law in the context of *Grable* jurisdiction, rather than as an independent ground for removal of a claim nominally pleaded under state law. In rejecting federal common law as an independent basis for federal jurisdiction, the panel created several conflicts with decisions of this and other Circuits. These conflicts merit rehearing.

### 1. The Panel's Conclusion That There Are Only Two Exceptions To The Well-Pleaded-Complaint Rule Conflicts With This Circuit's Precedent And Decisions Of Other Federal Appellate Courts.

Though putatively pleaded under state law, Plaintiffs' claims necessarily have their source in federal common law and therefore "aris[e] under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. This is apparent from the complaint, which pleads a public nuisance based on interstate and international conduct that can be addressed only by federal law. *See Milwaukee I*, 406 U.S. at 103; *Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 439 (2011) ("*AEP*"). This

was Defendants' primary argument in support of jurisdiction in the district court, and it was the sole ground on which the district court exercised jurisdiction, ER29—a point the district court emphasized in its letter to this Court, Dkt. 173 at 1 ("[T]he district court expressly relied on federal-question (and only federal-question) jurisdiction."). The panel, however, rejected the notion that federal jurisdiction exists over claims necessarily governed by federal common law. Instead, it held that there are only "two exceptions to the well-pleaded complaint rule"—*Grable* and complete preemption. Op. 18.

This holding conflicts with binding Ninth Circuit precedent. For example, in *Wayne v. DHL Worldwide Express*, 294 F.3d 1179 (9th Cir. 2002), the defendant removed a "complaint, filed in California state court, alleg[ing] violations of California, not federal law." *Id.* at 1183. Although the complaint did not assert a federal claim, this Court acknowledged "*three* theories that might support federal question jurisdiction over this action: 1) complete preemption; 2) *federal common law*; or 3) the complaint raises an express or implied cause of action that arises under the Constitution, federal statute, or international treaty." *Id.* (emphases added); *see also ARCO Envt'l Remediation, L.L.C. v. Dep't of Health &*

*Envt'l Quality of the State of Montana*, 213 F.3d 1108, 1114 (9th Cir. 2000) ("A state-created cause of action can be deemed to arise under federal law (1) where federal law completely preempts state law; (2) *where the claim is necessarily federal in character*; or (3) where the right to relief depends on the resolution of a substantial, disputed federal question." (emphasis added) (internal citations omitted)).

In fact, this Court has exercised removal jurisdiction where claims pleaded under state law were necessarily governed by, or had their source in, federal common law. In *New SD, Inc. v. Rockwell Int'l Corp.*, 79 F.3d 953 (9th Cir. 1996), a military subcontractor sued the prime contractor "in state court for breach of contract, services rendered, quantum meruit, declaratory relief and an accounting." *Id.* at 954. This Court held that federal removal jurisdiction was proper, reasoning that, "[w]here the federal interest requires that 'the rule must be uniform throughout the country,' . . . then the entire body of state law applicable to the area conflicts and is replaced by federal rules." *Id.* at 955. And "[w]hen federal law applies . . . , it follows that the question arises under federal law, and federal question jurisdiction exists." *Id.*

The panel's holding also conflicts with decisions of other courts of appeals. In *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922 (5th Cir. 1997), for instance, the Fifth Circuit considered whether it had jurisdiction over a case removed from state court "alleging breach of contract, negligence, and violations of the Texas deceptive trade practice law." *Id.* at 924. Consistent with this Court's decisions in *Wayne* and *ARCO*, the court acknowledged that "[t]here are three theories that might support federal jurisdiction," including where "the cause of action arises under federal common law principles." *Id.* The Fifth Circuit concluded that, "[b]ecause [the plaintiff's] negligence action against Airborne arises under federal common law, we have jurisdiction over this action." *Id.* at 929.

Because the panel expressly concluded that there are only "two exceptions to the well-pleaded complaint rule," Op. 18, and held that federal common law can *never* provide an independent ground for federal jurisdiction, the panel simply ignored the overwhelming federal interests implicated by Plaintiffs' claims. It also avoided grappling with binding precedent making clear that state law and federal common law govern mutu-

ally exclusive domains. *See Milwaukee II*, 451 U.S. at 313 n.7 ("[I]f federal common law exists, it is because state law cannot be used."); *Texas Indus.*, 451 U.S. at 641 ("[W]here federal common law exists . . . , our federal system does not permit the controversy to be resolved under state law."). That is why such claims, even when ostensibly pleaded under state law, are actually governed by (and can "arise under") *only* federal law—and are therefore removable to federal court. The panel's decision conflicts with the foregoing precedents.

Rehearing is therefore appropriate (1) because the panel "overlooked or misapprehended" relevant points of law, Fed. R. App. P. 40(a)(2); (2) "to secure or maintain uniformity of the court's decisions," Fed. R. App. P. 35(a)(1); and (3) because the conflicts engendered with other Circuits present a "question[] of exceptional importance," Fed. R. App. P. 35(b)(1)(B).

### 2. The Panel's Analysis Of Federal Common Law Conflicts With Supreme Court Precedent And Decisions Of Other Courts Of Appeals.

Although the panel erroneously failed to recognize that Plaintiffs' claims arise under federal common law, it did consider the question whether Plaintiffs' state-law claims "require resolution of a substantial

question of federal law" for purposes of the *Grable* analysis. Op. 19. In doing so, the panel asserted that "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," Op. 19—an assertion that is directly contradicted by Supreme Court precedent, *see Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987) ("[I]nterstate water pollution is a matter of federal, not state, law[.]"); *Milwaukee I*, 406 U.S. at 103 ("When we deal with air and water in their ambient or interstate aspects, there is a federal common law."); *see also AEP*, 564 U.S. at 421 ("Environmental protection is undoubtedly an area 'within national legislative power,' one in which federal courts may fill in 'statutory interstices,' and, if necessary, even 'fashion federal law.'" (internal citations omitted)).

The panel also relied on this Court's previous conclusion "that federal public-nuisance claims aimed at imposing liability on energy producers" related to climate change "are displaced by the Clean Air Act." Op. 20. That reliance, however, creates a further conflict with Supreme Court precedent, as well as an additional circuit conflict.

The Supreme Court held in *AEP* that certain federal common law claims related to climate change are displaced by the Clean Air Act. 564 U.S. at 424. But whether and how that displacement analysis applies to Plaintiffs' claims goes only to whether federal common law provides a *remedy*, which is a *merits* question. And under longstanding Supreme Court precedent, that merits question is separate from, and arises *after*, resolution of the threshold question whether a claim is necessarily governed by federal common law for jurisdictional purposes.

In *United States v. Standard Oil of California*, 332 U.S. 301 (1947), the Supreme Court established a two-step approach for analyzing questions like the one presented here. First, courts must determine whether the *source* of law is federal or state based on the nature of the issues at stake, and second, if federal common law is the source, courts must determine the *substance* (if any) of that law.

*Standard Oil* involved a claim brought by the Government alleging interference with the government-soldier relationship. *Id.* at 302. The Court answered the first, "source" question in favor of federal law because "the scope, nature, legal incidents and consequences of the relationship

between persons in service and the Government are fundamentally derived from federal sources[.]" *Id.* at 305–06. Nevertheless, it resolved the second, "substance" question by concluding that federal common law did not provide a *remedy*, declining the Government's invitation to "exercise [the] judicial power to establish the new liability" because doing so would "intrud[e] within a field properly within Congress' control." *Id.* at 316.

Significantly, moreover, the Supreme Court cited *Standard Oil* favorably in *AEP*, describing the decision as "holding that federal law determine[d]" the question at issue (*i.e.*, the "source") even though the Court "declin[ed] to impose" any federal common law remedy "absent action by Congress" (*i.e.*, the "substance"). 564 U.S. at 422. As the *AEP* Court noted, "[r]ecognition that a subject is meet for federal law governance" for purposes of the source question "does not necessarily mean that federal courts should create the controlling law" for purposes of the substance question. *Id.*

In *United States v. Swiss American Bank, Ltd.*, 191 F.3d 30 (1st Cir. 1999), the First Circuit likewise recognized the difference between the "source question and the substance question," adhering to the "two-part

approach" articulated in *Standard Oil* when considering whether civil asset forfeiture claims against foreign banks arose under federal law for jurisdictional purposes because "federal interest[s] necessitate[d] a federal source for the rule of decision." *Id.* at 43, 45. The court explained that the "source question" asks whether "the source of the controlling law [should] be federal or state," while the substance question, "which comes into play only if the source question is answered in favor of a federal solution," asks whether the governing rule should be borrowed from state law or instead be a "uniform federal rule." *Id.* at 42–43. Whether a claim "arises under" federal law for jurisdictional purposes "turns on the resolution of the source question." *Id*. at 44.

The Supreme Court applied this two-step approach in concluding that there is a federal common law of nuisance regarding interstate pollution in *AEP* and *Milwaukee I*. Both cases first determined that a federal rule of decision was necessary, *AEP*, 564 U.S. at 421; *Milwaukee I*, 406 U.S. at 98–101, and then proceeded to consider whether a federal statute displaced any federal common law claim, *AEP*, 564 U.S. at 422–30; *Milwaukee I*, 406 U.S. at 101–09.

The panel here analyzed federal common law only under *Grable* because it incorrectly held that federal common law does not provide an independent ground for federal jurisdiction. The panel's assumption that the displacement of federal common law remedies is relevant to the jurisdictional analysis impermissibly collapses the distinct "source" and "substance" questions recognized by the Supreme Court in *Standard Oil* and *AEP* and by the First Circuit in *Swiss American*. Rehearing is appropriate to address this "conflict[] with a decision of the United States Supreme Court" and resolve the "question[] of exceptional importance" presented by the conflict with First Circuit precedent. Fed. R. App. P. 35(b)(1)(A)–(B).

### B. The Panel's Decision Also Creates Intra- and Inter-Circuit Conflicts Regarding The Standards Governing Retention Of Jurisdiction When Removal Defects Are Cured Before Judgment.

After concluding that Plaintiffs' complaint did not support federal jurisdiction at the time of removal, the panel went on to hold that remand was required even though Plaintiffs' amended complaint had "cur[ed] any subject-matter jurisdiction defect" before entry of final judgment. Op. 23,

25–27. This holding creates a further conflict with decisions of this Court and other courts of appeals.

In *Caterpillar v. Lewis*, 519 U.S. 61 (1994), the Supreme Court held that "a district court's error in failing to remand a case improperly removed is not fatal to the ensuing adjudication if federal jurisdictional requirements are met at the time judgment is entered." *Id.* at 64. Despite that unqualified language, the panel limited *Caterpillar* to cases where final judgment comes after a "jury trial" or "summary judgment," holding that it "generally will not apply when a district court dismisses a complaint for failure to state a claim under Rule 12(b)(6)." Op. 26.

In reaching this conclusion, the panel "agree[d] 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.'" *Id.* (quoting *Camsoft Data Sys., Inc. v. S. Elecs. Supply, Inc.*, 756 F.3d 327, 338 (5th Cir. 2014)).[2] But that rule conflicts with precedents of this Court and several other courts of appeals.

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[2] *Accord Gentek Bldg. Prods., Inc. v. Sherwin-Williams Co.*, 491 F.3d 320, 327 (6th Cir. 2007); *see also Thermoset Corp. v. Bldg. Materials*

This Court has rejected the panel's rule, applying *Caterpillar* to retain jurisdiction over a case dismissed under Rule 12(b)(6). In *Retail Property Trust v. United Brotherhood of Carpenters & Joiners of America*, 768 F.3d 938 (9th Cir. 2014), the district court denied a motion to remand and dismissed under Rule 12(b)(6) for failure to state a claim. *Id.* at 944–45. On appeal, this Court held that "the district court acquired federal question jurisdiction under § 1331—not because the [defendant] *removed* the case under [that] theory, but because the [plaintiff later] *pled* federal question jurisdiction in its [second amended complaint]." *Id.* at 949. As a result, the Court held that "[t]he question whether the district court erred in denying the [plaintiff's] motions to remand is thus moot, as the [plaintiff's] assertion of federal jurisdiction in the SAC conferred jurisdiction upon the district court and hence upon us." *Id.* at 949 n.6.

The panel's decision also conflicts with decisions of other courts of appeals. The Second and Third Circuits, for example, have categorically stated that so long as jurisdiction existed at the time of judgment, the

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*Corp. of Am.*, 849 F.3d 1313, 1321 (11th Cir. 2017) (holding that *Caterpillar* does not apply even when the case has been resolved on summary judgment).

impropriety of removal does not justify remand after the case has been dismissed under Rule 12(b). *Barbara v. N.Y. Stock Exch., Inc.*, 99 F.3d 49, 56 (2d Cir. 1996) ("[I]f a . . . plaintiff voluntarily amends the complaint to allege federal claims, we will not remand for want of jurisdiction."), *abrogated on other grounds by Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562 (2016); *In re Lipitor Antitrust Litig.*, 855 F.3d 126, 150 (3d Cir. 2017). The Fourth Circuit has gone even further, holding that remand is not required even *before* entry of final judgment if the initial jurisdictional defect has been cured, reasoning that while "concerns of judicial economy are often implicated after a case reaches final judgment, they are not confined to that situation." *Moffitt v. Residential Funding Co., LLC*, 604 F.3d 156, 160 (4th Cir. 2010).

Other courts have articulated the governing principle in an unqualified manner that does not depend on when judgment is entered. *See, e.g.*, *Paros Props. LLC v. Colo. Cas. Ins. Co.*, 835 F.3d 1264, 1273 (10th Cir. 2016) (holding that "*Caterpillar* applies not only after a trial but also when 'judgment is based on a district court's ruling on a *dispositive motion*'" (citation omitted) (emphasis added)); *Huffman v. Saul Holdings Ltd. P'ship*, 194 F.3d 1072, 1080 (10th Cir. 1999) (citing approvingly to

decision finding remand unnecessary where removal defect was cured before dismissal under Rule 12(b)(6)); *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 928–29 (8th Cir. 2005) (holding, in an appeal from a class-action settlement, that "where a plaintiff has filed an amended complaint, federal courts must resolve questions of subject matter jurisdiction by examining the face of the amended complaint" (citation omitted)); *Bernstein v. Lind-Waldock & Co.*, 738 F.2d 179, 185 (7th Cir. 1984) ("[O]nce [the plaintiff] decided to take advantage of his involuntary presence in federal court to add a federal claim to his complaint he was bound to remain there.").

The panel's decision thus creates a fissure in this Circuit's precedents and raises a "question[] of exceptional importance" because it exacerbates a circuit conflict. Fed. R. App. P. 35(b)(1)(A)–(B). This alone warrants panel rehearing or rehearing en banc. The exceptional importance of this question is compounded, however, by the Supreme Court's teaching that "jurisdictional rules should be clear." *Direct Mktg. Ass'n v. Brohl*, 575 U.S. 1, 14 (2015) (internal quotation marks and brackets omitted). "Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate," and "encourage gamesmanship." *Hertz*

*Corp. v. Friend*, 559 U.S. 77, 94 (2010). By contrast, "courts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case," and "[s]imple jurisdictional rules also promote greater predictability." *Id.*

Clarity and uniformity in this context are essential. This Court should rehear this case to reconcile its own decisions and join the majority of circuits that have declined to narrow the *Caterpillar* rule.

## CONCLUSION

This case should be reheard by the panel or en banc, and the district court's judgment should be affirmed.

Dated: July 8, 2020

Respectfully submitted,

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** Pursuant to Ninth Circuit L.R. 25-5(e), counsel attests that all other parties on whose behalf the filing is submitted concur in the filing's contents

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## CERTIFICATE OF COMPLIANCE

This petition complies with the type-volume limitation of Court Rule 35-4 and 40-1(a) because it contains 4,199 words, excluding the parts of the petition exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This petition complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced font using Microsoft Word 2016 in 14-point New Century Schoolbook type.

Dated: July 8, 2020 /s/ Theodore J. Boutrous, Jr.

# EXHIBIT A

**FOR PUBLICATION**

# UNITED STATES COURT OF APPEALS
# FOR THE 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

D.C. Nos.
3:17-cv-06011-WHA
3:17-cv-06012-WHA

OPINION

Appeal from the United States District Court
for the Northern District of California
William Alsup, District Judge, Presiding

Argued and Submitted February 5, 2020
Pasadena, California

Filed May 26, 2020

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

Opinion by Judge Ikuta

## SUMMARY*

### Removal/Subject-Matter Jurisdiction

The panel vacated the district court's judgment and order denying defendants' motion to remand cases to the state court from which they had been removed on the ground that plaintiffs' claim arose under federal law, and remanded for the district court to consider whether there was an alternative basis for subject-matter jurisdiction.

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 energy companies arising from the role of fossil fuel products in

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

global warming. The complaints sought an order of abatement requiring the energy companies to fund a climate change adaptation program for the cities. The energy companies removed the complaints to federal court, identifying seven grounds for subject-matter jurisdiction, including that the cities' public-nuisance claim was governed by federal common law. The district court denied the cities' motion to remand the cases to state court, holding that it had federal-question jurisdiction under 28 U.S.C. § 1331 because the cities' claim was "necessarily governed by federal common law." The cities amended their complaints to include a federal nuisance claim. The district court dismissed for failure to state a claim, and it dismissed four defendants for lack of personal jurisdiction.

Considering the pleadings filed at the time of removal, the panel held that the state-law public-nuisance claim did not arise under federal law for purposes of § 1331. The panel explained that there is an exception to the well-pleaded complaint rule for a claim that arises under federal law because federal law is a necessary element of the claim. This exception applies when a federal issue is necessarily raised, actually disputed, substantial, and capable of resolution in federal court without disrupting the federal-state balance approved by Congress. The panel concluded that this exception did not apply because the state-law claim for public nuisance failed to raise a substantial federal question. A second exception, referred to as the "artful-pleading doctrine," allows removal where federal law completely preempts a state-law claim. The panel concluded that this exception did not apply because the state-law claim was not completely preempted by the Clean Air Act.

The panel further held that the cities cured any subject-matter jurisdiction defect by amending their complaints to assert a claim under federal common law. Thus, at the time the district court dismissed the cities' complaints, there was subject-matter jurisdiction. Nonetheless, the panel held that it could not affirm the district court's dismissals if there was not subject-matter jurisdiction at the time of removal. The panel concluded that the cities did not waive their argument in favor of remand by amending their complaints. The panel also rejected the energy companies' argument that any impropriety with respect to removal could be excused by considerations of finality, efficiency, and economy. The panel agreed with the Fifth Circuit that a dismissal for failure to state a claim, unlike a grant of summary judgment or judgment after trial, is generally insufficient to forestall an otherwise proper remand.

The panel remanded the cases to the district court to determine if there was an alternative basis for jurisdiction.

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## 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."

[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.

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]

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

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[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 (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 — (9th Cir. 2020).

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.

[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.

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

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 (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 (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 pre-emption, 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. Therefore, as the "master of the claim," the plaintiff can generally "avoid federal jurisdiction by exclusive reliance on state law." *Id.* at 392.

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

1

First, in a line of cases, beginning with *Northern Pacific Railway Co. v. Soderberg*, 188 U.S. 526 (1903), and extending most recently to *Grable & Sons Metal Products,*

[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 (quoting *Osborn v. Bank of U.S.*, 22 U.S. (9 Wheat.) 738, 823 (1824)).

*Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (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 (2006) (citation omitted). Only a few cases have fallen into this "slim category," *id.* at 701, 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 (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 (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 (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 (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. 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; *Moore v. Chesapeake & Ohio Ry. Co.*, 291 U.S. 205, 210 (1934),

required remedies "contemplated by a federal statute," *Empire Healthchoice*, 547 U.S. at 690, 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 (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 (citing *Grable*, 545 U.S. at 314). All four requirements must be met for federal jurisdiction to be proper. *Id.*

The Court has often focused on the third requirement, the question whether a case "turn[s] on substantial questions of federal law." *Grable*, 545 U.S. at 312. This inquiry focuses on the importance of a federal issue "to the federal system as a whole." *Gunn*, 568 U.S. at 260. 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; *Hopkins*, 244 U.S. at 489–90, or when it challenges the functioning of a federal agency or program, *see Grable*, 545 U.S. at 315 (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 (citation omitted), that directly draws into question "the constitutional validity of an act of Congress," *Smith*, 255 U.S. at 201, or challenges the actions of a federal agency, *see Grable*, 545 U.S. at 310, 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 (citing *Grable*, 545 U.S. at 313). By contrast, a federal issue is not substantial if it is "fact-bound and situation-specific," *see id.* at 701, or raises only a hypothetical question unlikely to affect interpretations of federal law in the future, *see Gunn*, 568 U.S. at 261. A federal issue is not substantial merely because of its novelty, *see id.* at 262, or because it will further a uniform interpretation of a federal statute, *see Merrell Dow Pharm.*, 478 U.S. at 815–16.

2

A second exception to the well-pleaded-complaint rule is referred to as the "artful-pleading doctrine." This doctrine "allows removal where federal law completely preempts a plaintiff's state-law claim," *Rivet v. Regions Bank of La.*, 522 U.S. 470, 475 (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 (quoting *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (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 (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 (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; 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. 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); *accord Hunter v. United Van Lines*, 746 F.2d 635, 642–43 (9th Cir. 1984).

B

We now consider whether the district court erred in concluding it had jurisdiction over the Cities' complaints under § 1331. At the time of removal, each complaint asserted only a single cause of action for public nuisance under California law. Under the well-pleaded-complaint rule, the district court lacked federal-question jurisdiction unless one of the two exceptions to the well-pleaded-complaint rule applies.

1

We first consider whether the Cities' state-law claim for public nuisance falls within the "special and small category" of state-law claims that arise under federal law. *Empire Healthchoice*, 547 U.S. at 699. 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 (citing *Grable*, 545 U.S. at 314).

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 (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; *Hopkins*, 244 U.S. at 489, nor challenges a federal statute's constitutionality, *cf. Smith*, 255 U.S. at 199. 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 (citing *Grable*, 545 U.S. at 313). 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, and we have held that federal public-nuisance claims aimed at imposing liability on energy producers for "acting in concert to create, contribute to, and maintain global warming" and "conspiring to mislead the public about the science of global warming," *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 854 (9th Cir. 2012), are displaced by the Clean Air Act, *id.* at 858.

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

[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.

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, and we need not consider the remaining requirements articulated in *Grable*.

2

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

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

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*,

[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.

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.

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

III

Although the district court lacked jurisdiction under 28 U.S.C. § 1331 at the time of removal, that does not end our inquiry. This is because the Cities cured any subject-matter jurisdiction defect by amending their complaints to assert a claim under federal common law. *See Pegram v. Herdrich*, 530 U.S. 211, 215 n.2 (2000) (holding that there was "jurisdiction regardless of the correctness of the removal" because the "amended complaint alleged ERISA violations, over which the federal courts have jurisdiction"); *Singh v. Am. Honda Fin. Corp.*, 925 F.3d 1053, 1070 (9th Cir. 2019); *Retail Prop. Tr. v. United Bhd. of Carpenters &*

*Joiners of Am.*, 768 F.3d 938, 949 & n.6 (9th Cir. 2014).[8] Thus, at the time the district court dismissed the Cities' complaints, there was subject-matter jurisdiction because the operative pleadings asserted a claim "arising under" federal common law. 28 U.S.C. § 1331. Based on this cure, the Energy Companies raise two arguments as to why we can affirm the district court's dismissals, even if there was no subject-matter jurisdiction at the time of removal.

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

Section 1441(a) requires that a case be "fit for federal adjudication at the time [a] removal petition is filed." *Id.*

[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.

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

There is, however, a narrow exception to this rule that takes into account "considerations of finality, efficiency, and economy." *Singh*, 925 F.3d at 1065 (quoting *Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 574 (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).

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,

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[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).

efficiency, and economy become overwhelming," *Lewis*, 519 U.S. at 75, 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; *see also Grubbs v. Gen. Elec. Credit Corp.*, 405 U.S. 699, 702 (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. "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 (quoting *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 836 (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).

[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 (2001).

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).

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 (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]

In this case, "considerations of finality, efficiency, and economy" are far from "overwhelming." *Lewis*, 519 U.S. at 75. 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

[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.

resources as compared to, for example, three years of litigation, culminating in a six-day jury trial. *See id.* at 66–67. 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; *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 (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,

[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.

the cases should be remanded to state court.[13] This panel will retain jurisdiction for any subsequent appeals arising from these cases.

**VACATED AND REMANDED**.[14]

[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 (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.