Appeal No. 18-16663

IN THE

United States Court of Appeals for the Ninth Circuit

CITY OF OAKLAND and CITY AND COUNTY OF SAN FRANCISCO,

Plaintiffs-Appellants,

v.

B.P. PLC, CHEVRON CORPORATION, CONOCOPHILLIPS,
EXXON MOBIL CORPORATION,
ROYAL DUTCH SHELL PLC, and DOES 1 through 10,

Defendants-Appellees.

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

BRIEF OF NATURAL RESOURCES DEFENSE COUNCIL AS AMICUS CURIAE IN SUPPORT OF APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1, Amicus Curiae Natural Resources Defense Council, Inc., certifies that it is a non-profit environmental and public health membership organization that has no publicly held corporate parents, affiliates, and/or subsidiaries.

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INTEREST OF AMICUS CURIAE

Amicus Curiae Natural Resources Defense Council (NRDC) is a non-profit environmental and public health organization with hundreds of thousands of members. NRDC engages in research, advocacy, public education, and litigation to protect public health and the environment. Founded in 1970, NRDC has worked for decades ensuring enforcement of the Clean Air Act and other laws to address major environmental challenges.

The Clean Air Act sets a nationwide baseline for addressing air pollution and provides federal remedies to improve air quality. But the Act does not relieve states of the primary responsibility for protecting the health of their residents and the quality of their air. The Act also recognizes that each state faces its own challenges and encourages state and local efforts that reduce air pollution.

The California plaintiffs in this case have been harmed by the effects of climate change. Basic public infrastructure—roads, sewers, airports—must be repaired and hardened against the rising seas and unprecedented storms. Plaintiffs seek to avail themselves of tort law remedies, important tools that California has long provided to address

harms to the welfare of its residents. The court below concluded that enforcing state law would impermissibly undermine federal authority because climate change is a "uniquely" federal interest. NRDC strongly disagrees that states lack a legitimate interest in addressing climate change or that state law regulation is impermissible.

Climate change is the major environmental challenge of our time. In November 2018, the National Climate Assessment—the collective work product of 13 expert federal agencies—laid out in stark terms the toll that unmitigated climate change exacts on our health and welfare:

> In the absence of more significant global mitigation efforts, climate change is projected to impose substantial damages on the U.S. economy, human health, and the environment. Under scenarios with high emissions and limited or no adaptation, annual losses in some sectors are estimated to grow to hundreds of billions of dollars by the end of the century. It is very likely that some physical and ecological impacts will be irreversible for thousands of years, while others will be permanent.[1]

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[1] Fourth National Climate Assessment (2018), vol. II, ch. 29, *The Risks of Inaction,* https://nca2018.globalchange.gov/chapter/29/.

These impacts vary significantly across geographies. In California, coastal counties "are home to 68 percent of its people, 80 percent of its wages, and 80 percent of its GDP," and unmitigated climate change "will have drastic impacts along the coastline as well as for inland flooding" and "impacts to the economy are expected to be severe."[2]

Action is urgently needed on many fronts. The current effort of the federal government to roll back climate-protecting standards increases the need for remedies to the ever-growing climate threat. NRDC works extensively at the state and local level to help deploy a broad range of effective legal, policy, and technology tools to combat all forms of climate change pollution. From the nine-state (and counting) Regional Greenhouse Gas Initiative that caps and reduces power sector carbon dioxide emissions; to renewable portfolio standards that require utilities to supply electricity from renewable sources; to limits on methane pollution, mandates for electric vehicles, and building codes that reduce energy waste (and carbon pollution), enforcing state law is an effective

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[2] California's Fourth Climate Change Assessment: Statewide Summary Report (2018), ch. 2, *Climate Change Impacts in California*, at 65, *available at* http://www.climateassessment.ca.gov/state/docs/20190116-StatewideSummary.pdf.

means to help society transition to an energy system that will not harm the climate that sustains us.

NRDC—in and out of court—has defended the enforceability of state law against the challenge that it interferes with federal authority. *See, e.g.*, *Am. Fuel & Petrochemical Mfrs. v. O'Keeffe*, 903 F.3d 903 (9th Cir. 2018) (upholding Oregon clean fuels program from Clean Air Act preemption and commerce clause challenges). NRDC submits this brief to highlight why state law—both statutory and common law—remains available to address harms produced by climate change.[3]

[3] All parties have consented to the filing of this brief. No party or party's counsel has authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief. No person or entity, other than amicus, has contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

States have the right and the responsibility to protect the health, safety, and welfare of their residents. To that end, states can provide a range of legal remedies—both statutory and common law—that they deem appropriate. California has authorized local officials to bring abatement actions against defendants who create public nuisances. This state law remedy is enforceable unless preempted by federal law. *Close v. Sotheby's, Inc.*, 909 F.3d 1204, 1209 (9th Cir. 2018).

Importantly, whether federal law preempts California nuisance law is not a question that must be answered in a federal court. Here, in fact, it is question that *cannot* be answered in federal court. Plaintiffs pled only a California state law nuisance claim and filed their complaint in state court. Even if federal preemption could ultimately provide a defense to that claim, it does not provide federal jurisdiction to remove the case from state court. *Franchise Tax Bd. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 14 (1983).

The district court erred in accepting removal. Absent an express congressional grant of removal jurisdiction, removal is available only in the "extraordinary" event of "complete preemption." *Caterpillar Inc. v.*

Williams, 482 U.S. 386, 393 (1987). "Complete preemption refers to the situation in which federal law not only preempts a state-law cause of action, but also substitutes an exclusive federal cause of action in its place." *Hansen v. Grp. Health Coop.*, 902 F.3d 1051, 1057 (9th Cir. 2018). The district court here accepted removal jurisdiction on the basis that federal common law "necessarily governs" Plaintiffs' nuisance claims. But the court then subsequently held that no federal common law cause of action exists. This latter holding confirms the error in the former: Without a federal cause of action to substitute for the state-law nuisance claims, complete preemption does not exist; and without complete preemption, the state law actions are not removable.

More fundamentally, federal law does not preempt—much less *completely* preempt—any and all state law claims solely because the claims are brought to address harms related to climate change. The district court characterized Plaintiffs' claims as seeking to solve climate change by regulating greenhouse gas emissions through state nuisance law. Plaintiffs fairly dispute that characterization, as they seek only an order for Defendants to bear costs of abating localized impacts. But even so construed, under this Court's decision in *Native Village of*

Kivalina v. ExxonMobil Corp., 696 F.3d 849 (9th Cir. 2012) ("*Kivalina*"), no relevant federal common law exists to preempt Plaintiffs' claims because federal common law has been displaced by the Clean Air Act. Plaintiffs' state law claims are thus presumptively available unless preempted by that Act. *See Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 429 (2011) ("*AEP*"). And the Clean Air Act does *not* preempt all state law climate claims. No court has ever so held, and the Act expressly preserves states' broad traditional authority to address air pollution under state law. *Oxygenated Fuels Ass'n v. Davis*, 331 F.3d 665, 670-71 (9th Cir. 2003) ("*OFA*").

To be sure, federal action is needed on climate change. And some remedies can be provided exclusively by federal law. But that does not preempt all state remedies. *See Caterpillar*, 482 U.S. at 393-95. Climate change is not a concern unique to the federal government and federal remedies are not the exclusive means to address it. State remedies are both necessary and effective. California provides a nuisance remedy and Plaintiffs are entitled to the opportunity to prove a claim for relief in state court.

ARGUMENT

"States are independent sovereigns in our federal system," *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), and possess the "traditional authority to provide tort remedies" as they deem appropriate, *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). California provides a tort remedy for nuisances. *See People v. ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d 499, 514 (Cal. Ct. App. 2017), *cert. denied*, 139 S. Ct. 377 (2018) (nuisance action against lead paint manufacturers).

Plaintiffs here allege that Defendants have long known that the continued burning of fossil fuels would cause significant climate-related harms. Plaintiffs contend that Defendants deliberately concealed that knowledge while continuing to wrongfully promote the unrestrained use of their fossil fuel products. Plaintiffs claim this wrongful promotion gives rise to liability under California nuisance law.

Plaintiffs are entitled the opportunity to prove that claim in California state court. Under the "well-pleaded complaint rule," Plaintiffs are masters of their claim and "may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar*, 482 U.S. at 392.

Plaintiffs filed this action in state court and exclusively pled a California law nuisance claim. This action thus can only be removed to federal court in the "extraordinary" event of "complete preemption"—where existing federal law both preempts California nuisance law and provides a substitute federal cause of action. *Id*. at 393; *see also Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003); *Hansen*, 902 F.3d at 1057. Such extraordinary preemption is not present here.

As explained below, California nuisance law is not completely preempted by federal law simply because the state claims are brought to address harms related to climate change:

First, federal common law does not completely preempt state law climate claims. Federal common law does not govern the wrongful promotion of fossil fuels, and under *Kivalina*, any federal common law addressing harms from interstate air pollution no longer exists: Congress displaced it with the Clean Air Act, and this Act—not any extinct federal common law—determines the preemptive scope of federal law. 696 F.3d at 856-58; *see AEP*, 564 U.S. at 423-24, 429.

Second, the Clean Air Act does not completely preempt state law climate claims. To the contrary, the Act, "in a number of different

sections, explicitly protects the authority of the states to regulate air pollution," *Exxon Mobil Corp. v. U.S. E.P.A.*, 217 F.3d 1246, 1254 (9th Cir. 2000), and does not regulate the promotion of fossil fuels at all.

I. Federal common law does not completely preempt Plaintiffs' claims.

Plaintiffs' state law nuisance claims are not completely preempted—or, as framed by the district court, "necessarily governed"—by federal common law, because no relevant federal common law exists to preempt them.[4] Although there is no general federal common law, it exists in certain narrow areas. *See Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). Historically, the federal courts fashioned a federal common law of interstate air pollution. *See, e.g.*, *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237-39 (1907). However, the Supreme Court has since held that this federal common law has been displaced by Congress via the federal Clean Air Act. *See AEP*, 564

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[4] The district court held that Plaintiffs' California law nuisance claims were "necessarily governed by federal common law." Excerpts of Record ("ER") 29. Although not labeled as such, this is a preemption holding. State law can only be "governed" by federal law, via the Supremacy Clause, in cases of conflict between federal and state law—*i.e.*, when federal law has preempted state law. *See Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1479-80 (2018).

U.S. at 424. Congress, not the federal courts, has primary responsibility for setting federal policy and once Congress legislates in an area, any preexisting federal common law "disappears." *Id.* at 423 (quotation omitted). The preemptive—or "governing"—scope of federal law thus turns on the displacing federal statute, not the displaced federal common law. *See id.* at 429.

a. Congressional legislation defines the substance of federal law to the exclusion of federal common law.

Before enactment of the major federal environmental statutes, federal courts adjudicated some environmental nuisance cases by resort to a federal common law. *See, e.g.*, *Missouri v. Illinois*, 180 U.S. 208, 241 (1901); *Tennessee Copper Co.*, 206 U.S. at 237; *Illinois v. City of Milwaukee, Wis.*, 406 U.S. 91, 103 (1972) ("*Milwaukee I*"). The courts foresaw, however, that the federal common law recognized in these cases would be replaced by federal statutes. As the Supreme Court observed in *Milwaukee I*, a water pollution nuisance case, "[i]t may happen that new federal laws and new federal regulations may in time preempt the field of federal common law of nuisance." 406 U.S. at 107.

Those new federal laws arrived in the early 1970s in the form of major updates to the Clean Water Act[5] and the Clean Air Act.[6] The Supreme Court subsequently revisited the availability of federal common law nuisance claims for water pollution in light of the Clean Water Act. In *City of Milwaukee v. Illinois* ("*Milwaukee II*"), the Court explained that federal common law is only "a necessary expedient," "subject to the paramount authority of Congress," "and when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears." 451 U.S. 304, 313-14 (1981) (quotations omitted). In updating the Clean Water Act, Congress "ha[d] not left the formulation of appropriate federal standards to the courts," but rather had adequately "occupied the field" so as to "supplant federal common law." *Id.* at 317. Under *Milwaukee II*, then, new congressional legislation does not add a layer of federal statutory law on top of any

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[5] Pub. L. 92-500 (Oct. 18, 1972), 86 Stat. 816, *codified as amended at* 33 U.S.C. §§ 1251 *et seq*.

[6] Pub. L. 91-604 (Dec. 31, 1970), 84 Stat. 1676, *codified as amended at* 42 U.S.C. §§ 7401 *et seq*.

existing federal common law. Instead, the new federal statute defines the substance of federal law and the federal common law on that subject ceases to exist.

Milwaukee II presaged the extinction of most federal common law regarding interstate pollution. New federal statutes would replace judicially-created federal standards with congressionally-enacted federal standards. Importantly, however, federal statutes' displacement of federal common law does not simultaneously extinguish all *state* common law. To the contrary, in *International Paper Co. v. Ouellette*, the Supreme Court explained that while the relevant federal common law was displaced by the Clean Water Act, state common law nuisance claims for interstate water pollution could be available. 479 U.S. 481, 489 (1987). At that point, with federal common law no longer at issue, the only question was whether Congress intended the federal *statute* to preempt state law claims. *See id.* at 491.

b. The Clean Air Act defines the substance of federal law concerning air pollution.

Just as the Clean Water Act supplanted the federal common law of nuisance for water pollution, so too did the Clean Air Act supplant the federal common law of nuisance for air pollution. As this Court held

in *Kivalina*, that "federal common law cause of action has been extinguished by Congressional displacement." 696 F.3d at 857. Thus, as further explained below, to the extent the district court relied on any pre-Clean Air Act federal cause of action for interstate air pollution to support removal, that was error.

In 2004, eight States, the City of New York, and three private land trusts sued five major power companies in New York federal court, alleging that defendants' emissions contributed to global warming and thereby unreasonably interfered with public rights. *See AEP*, 564 U.S. at 418. Plaintiffs sought an injunction setting carbon dioxide emission caps for each defendant under the federal common law of nuisance and, in the alternative, state tort law. *See id.* at 418-19.

The case eventually reached the Supreme Court. The Second Circuit had ruled that federal common law "governed" these claims, *AEP*, 564 U.S. at 419, 429, and the Supreme Court granted certiorari to address whether plaintiffs "can maintain federal common law public nuisance claims against carbon-dioxide emitters," *id.* at 415.

The parties disputed the historic availability of federal common law rights, but the Court found that passage of the Clean Air Act had

rendered that dispute "academic." *AEP*, 564 U.S. at 423. Relying heavily on *Milwaukee II*, the Court held that "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants." *Id*. at 424.

Importantly, the Court held that displacement turned on the congressional decision to legislate in this area, and not on the content of federal rights Congress decided to provide. *AEP*, 564 U.S. at 426. The Court noted that Congress had not directly established a federal right to seek abatement—it had delegated authority to EPA to set a federal standard that would trigger federal rights and remedies. *Id*. But, the Court concluded, even if EPA declined to set a standard, "courts would have no warrant to employ the federal common law." *Id*.

In other words, even if federal common law historically recognized a federal right to abatement, Congress is not bound to preserve it. The Supreme Court has "always recognized that federal common law is subject to the paramount authority of Congress." *Milwaukee II*, 451 U.S. at 313. That paramount authority would be hollow unless Congress could reject prior judicially-created federal common law. Congress

instead has the power to "strike a different accommodation" than recognized under federal common law, *AEP*, 564 U.S. at 422, including *contracting* the scope of federal law. Under *AEP*, then, as under *Milwaukee II*, new congressional legislation does not coexist with prior federal common law—the new statute displaces any federal common law and that federal common law disappears. Thus, the Clean Air Act defines the substance of federal law to the exclusion of federal common law.[7]

This Court reaffirmed these principles in *Kivalina*. An Alaskan village, Kivalina, sued a large group of energy companies in California federal district court for defendants' contribution to climate change. Like the *AEP* plaintiffs, Kivalina sued under both federal and state common law. Unlike the *AEP* plaintiffs, Kivalina did not seek an injunction limiting emissions, but rather sought compensatory damages. *Kivalina*, 696 F.3d at 853-55.

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[7] Federal common law may occasionally fill in "statutory interstices" if required. *AEP*, 564 U.S. at 421. But *AEP* makes clear that the Clean Air Act does not leave a nuisance-sized interstice in federal law for federal common law to fill. *Id.* at 423.

This Court applied *AEP* to dispose of Kivalina's federal common law claim for damages. Under *AEP*, the "federal common law addressing domestic greenhouse gas emissions has been displaced by Congressional action." *Kivalina*, 696 F.3d at 858. Displacement, this Court held, means that any "federal common law *cause of action* has been extinguished," and, once the "cause of action is displaced, displacement is extended to all remedies." *Id*. at 857 (emphasis added).

In short, congressional action had extinguished the substance of federal common law, and displacement of the federal cause of action, as well as all federal common law remedies, necessarily followed. *Id*. at 857-58. Like the Supreme Court in *AEP*, this Court confirmed that new congressional legislation does not coexist with federal common law—it completely replaces it.

The district court here relied on *Milwaukee I*, *AEP*, and *Kivalina* to conclude that federal common law provides a basis to remove a state law complaint to federal court. *See* ER 30-31. None of those cases supports the existence of a federal common law cause of action for interstate air pollution—much less one that completely preempts all state law claims for removal purposes. All three cases were filed in

federal court by plaintiffs asserting a federal cause of action. *Milwaukee I*, 406 U.S. at 93; *AEP*, 564 U.S. at 418; *Kivalina*, 696 F.3d at 853. Neither *AEP* or *Kivalina* held that climate tort claims *must* be governed by federal common law, and neither case ruled on whether such claims *may* be authorized by state law. Both Courts held only that the Clean Air Act had extinguished preexisting *federal* common law. *AEP*, 564 U.S. at 415; *Kivalina*, 696 F.3d at 853; *cf. Milwaukee II*, 451 U.S. at 317 (holding Clean Water Act displaced federal common law recognized in *Milwaukee I*).

Importantly, neither *AEP* or *Kivalina* addressed whether the Clean Air Act preempts state law climate claims.[8] Plaintiffs in both

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[8] Displacement and preemption are materially different. *AEP*, 564 U.S. at 423-24. Displacement is readily found, because "it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law." *Milwaukee II*, 451 U.S. at 316-17. In contrast, when considering preemption, courts "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* at 316; *see AEP*, 564 U.S. at 423. The Court in the past sometimes used the terms "preemption" and "displacement" interchangeably, *cf. Milwaukee I*, 406 U.S. at 107; *AEP*, 564 U.S. at 423, but regardless of the terminology, the Court has always employed a more stringent standard when considering claims that federal law preempts state law. *E.g.*, *Milwaukee II*, 451 U.S. at 316, 317 n.9.

cases asserted state common law claims in the alternative to federal common law, *AEP*, 564 U.S. at 418; *Kivalina*, 696 F.3d at 858 (Pro, J., concurring), but neither Court reached those claims at all, *AEP*, 564 U.S. at 429; *Kivalina*, 696 F.3d at 858. In short, because the "Clean Air Act displaces federal common law," the "availability *vel non*" of Plaintiffs' state law claims here depends on the "preemptive effect of the federal Act." *AEP*, 564 U.S. at 429. As explained below, *infra* Section II, the Clean Air Act does not preempt—much less completely preempt—all state law climate claims.

c. There is no unique federal interest in climate change that completely preempts state law.

The district court recognized that federal common law is only "appropriately fashioned" when necessary to protect "uniquely federal interests." ER 29. The court then opined that the need for a "uniform" response to climate change supported fashioning federal common law: "the transboundary problem of global warming raises exactly the sort of federal interests that necessitate a uniform solution." ER 30-31. To the extent the district court held that addressing climate change—or addressing it uniformly—is a uniquely federal interest, such that a

federal court can fashion common law that completely preempts state law, that holding was error.

Only a "narrow" category of transboundary disputes truly raises uniquely federal interests: those interstate or international disputes "implicating the conflicting rights of States or our relations with foreign nations." *Texas Industries*, 451 U.S. at 641. Plaintiffs' claims here are brought against five private parties for the tortious promotion of fossil fuels. These claims do not implicate the conflicting rights of States or relations with foreign nations.

The actual interstate or international aspects of Plaintiffs' claims are mundane. Suits involving parties in different jurisdictions, or conduct that crosses national or state boundaries, or global branding or marketing, all have "interstate" or "international" characteristics, but do not implicate uniquely federal concerns. *Cf. O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 88 (1994) ("uniformity of law" governing "primary conduct on the part of private actors" not a significant federal interest). For example, a coalition of forty different state attorneys general recently reached a settlement with a Swiss bank concerning the fraudulent manipulation of LIBOR, "a benchmark interest rate that

affects financial instruments worth trillions of dollars and has a far-reaching impact on global markets and consumers."[9]

To be sure, there is a federal interest in addressing climate change. But it is not a *unique* interest: "It is well settled that the states have a legitimate interest in combating the adverse effects of climate change on their residents." *O'Keeffe*, 903 F.3d at 913; *accord Rocky Mountain Farmers Union v. Corey*, 913 F.3d 940, 957 (9th Cir. 2019). And there are federal remedies that should be brought to bear. But federal remedies are not the exclusive means to address climate change.

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[9] Press Release, N.Y. Att'y Gen., *A.G. Underwood Announces $68 Million Multistate Settlement With UBS AG ("UBS") For Artificially Manipulating Interest Rates* (Dec. 21, 2018), https://ag.ny.gov/press-release/ag-underwood-announces-68-million-multistate-settlement-ubs-ag-ubs-artificially; *see also*, *e.g.*, *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, 895 F.3d 597, 603 (9th Cir. 2018) (affirming approval of $10 billion settlement between consumers and German company to resolve "a bevy of claims under state and federal law"); *Felix v. Volkswagen Grp. of Am., Inc.*, No. A-0585-16T3, 2017 WL 3013080, at *1, *6-7 (N.J. Super. Ct. App. Div. July 17, 2017), *appeal denied*, 177 A.3d 109 (N.J. 2017) (state law claims against non-resident car manufacturer for fraudulent marketing not preempted by Clean Air Act); *W. Virginia ex rel. Morrisey v. McKesson Corp.*, No. 16-1772, 2017 WL 357307, at *1, *9 (S.D. W. Va. Jan. 24, 2017) (state law tort claims against non-resident, national drug distributor, arising out of tortious interstate shipments, remanded to state court).

State law remedies are an important component of mitigation efforts.[10] In short, the federal interest in climate change is not "unique" and does not preclude enforcement of state law remedies. *Cf. Nat'l Audubon Soc. v. Dep't of Water*, 869 F.2d 1196, 1203 (9th Cir. 1988) ("[T]here is not 'a uniquely federal interest' in protecting the quality of the nation's air. Rather, the primary responsibility for maintaining the air quality rests on the states.").

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[10] *See, e.g.*, Fourth National Climate Assessment, vol. II, ch. 29, fig. 29.1 *Mitigation-Related Activities at State and Local Levels,* https://nca2018.globalchange.gov/chapter/29/. "For example, states in the Northeast take part in the Regional Greenhouse Gas Initiative, a mandatory market-based effort to reduce power sector emissions." *Id.* at *State of Emissions Mitigation Efforts*. This state law initiative has led to substantial reductions in emissions and corresponding public health benefits. *See, e.g.*, Abt Associates, *Analysis of the Public Health Impacts of the Regional Greenhouse Gas Initiative*, 2009-2014 (Jan. 2017), https://www.abtassociates.com/insights/publications/report/analysis-of-the-public-health-impacts-of-the-regional-greenhouse-gas-0.

II. The Clean Air Act does not completely preempt Plaintiffs' claims.

Although not reached by the district court, Defendants also contend that Plaintiffs' California law nuisance claims are removable because they are completely preempted by the Clean Air Act. *See, e.g.*, ER 207. Defendants are wrong. Complete preemption only applies in extraordinary cases where a federal statute both preempts state law claims and provides a replacement federal cause of action. *See Caterpillar*, 482 U.S. at 393. No court has ever held that the Clean Air Act completely preempts state law climate claims. With good reason. The Act expressly preserves states' broad traditional authority to address air pollution under state law. *OFA*, 331 F.3d at 670-71.

The conclusion that the Clean Air Act does not completely preempt all state law claims related to climate change is confirmed by the fact that that Act does not even "ordinarily" preempt all state law climate claims. Ordinary preemption, as distinct from complete preemption, comes in three forms: "express," "field," and "conflict." *Murphy*, 138 S. Ct. at 1480. As explained below, under any of these formal tests, the Clean Air Act does not broadly preempt all state law climate claims either.

This should not be surprising. *First*, all preemption is ultimately based on the Supremacy Clause, which simply provides "that federal law is supreme in case of a conflict with state law." *Murphy*, 138 S. Ct. at 1479. At bottom, state law climate claims are not generally preempted because there is no inherent conflict between those claims and the Clean Air Act. "The central goal of the Clean Air Act is to reduce air pollution." *OFA*, 331 F.3d at 673. State law climate claims do not conflict with that goal—they complement it.

Second, "[t]he text of the Clean Air Act, in a number of different sections, explicitly protects the authority of the states to regulate air pollution." *Exxon Mobil Corp.*, 217 F.3d at 1254. Among other things:

> The Clean Air Act also includes a sweeping and explicit provision entitled the "Retention of State Authority." This section provides that, with the exception of aircraft emissions, standards for new motor vehicles and . . . [certain] fuel additives, "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."

Id. at 1255 (quoting 42 U.S.C. § 7416). The Act also contemplates the existence of both statutory and common law rights to seek relief from harmful emissions *outside* the Act's framework, and explicitly preserves

those rights. *See* 42 U.S.C. § 7604(e) (provision of "citizen suit" right to enforce Clean Air Act standards shall not restrict "any right" "under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief").

a. The Clean Air Act does not expressly preempt all state law climate claims.

Congress can expressly preempt state law. The Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq*., for example, preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). The Clean Air Act contains no comparable provision preempting state laws that relate to climate change. As noted above, the Act expressly preserves state law in broad areas.

The Act does contain a few express preemption provisions. For example, Section 209(a) provides that states may not prescribe "any standard relating to the control of emissions from new motor vehicles."

42 U.S.C. § 7543(a).[11] Section 211(c) likewise provides that states may not impose controls on any "fuel or fuel additive" "for purposes of motor vehicle emission control." *Id.* § 7545(c)(4)(A)[12]; *see also id.* § 7573 (preempting direct state regulation of aircraft emissions).

But these express provisions are limited to their terms and do not preempt even all state law actions relating to fuels or to new motor vehicle emissions. *See, e.g.*, *OFA*, 331 F.3d at 670 (California ban on fuel additive not preempted under Section 211(c) because ban was enacted to protect state waters and not to regulate emissions); *O'Keeffe*, 903 F.3d at 917 (Oregon program regulating production and sale of fuels based on greenhouse gas emissions not preempted under Section 211(c)); *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Products Liab. Litig.*, 349 F.Supp.3d 881, 911 (N.D. Cal. 2018) (state law claims for deceptive marketing of "clean" emission vehicles not preempted by Section 209(a)). The presence of these specific preemption

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[11] California, however, is expressly exempted from this provision and allowed to set higher standards in most instances. *See* 42 U.S.C. § 7543(b)(1), (e)(2)(A). And, in general, any other state may choose to adopt California's higher standards. *Id.* § 7507, 7543(e)(2)(B).

[12] California, again, is generally exempt. *See* 42 U.S.C. § 7545(c)(4)(B).

provisions simply highlights that the Clean Air Act does not contain any provision that broadly preempts state law claims that relate to climate change.

b. The Clean Air Act does not preempt the field of climate regulation.

State law can also be preempted "where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." *OFA*, 331 F.3d at 667 (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990)). No court has ever held that the Clean Air Act occupies the entire regulatory field relating to air pollution or climate change. "It is well settled that the states have a legitimate interest in combating the adverse effects of climate change on their residents. Air pollution prevention falls under the broad police powers of the states, which include the power to protect the health of citizens in the state." *O'Keeffe*, 903 F.3d at 913 (citations omitted). In these areas, there is a strong presumption that state law is not preempted "unless it was the clear and manifest purpose of Congress to do so." *Exxon Mobil Corp.*, 217 F.3d at 1256; *OFA*, 331 F.3d at 673; *see also Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (presumption against preemption of state police powers is a "cornerstone[] of our preemption jurisprudence");

Silkwood, 464 U.S. at 248 (states possess "traditional authority to provide tort remedies").[13]

The Clean Air Act does not provide evidence—clear or otherwise—that Congress intended to preempt all state authority to address climate change. To the contrary, as discussed above, the Act evidences clear congressional intent to broadly protect the authority of states to regulate air pollution. *Exxon Mobil Corp.*, 217 F.3d at 1254-56. "The first section of the Clean Air Act, entitled 'Congressional Findings,' makes clear that the states retain the leading role in regulating matters of health and air quality." *Id.* at 1254 (citing 42 U.S.C. § 7401(a)(3)). In other sections of the Act, "the primary responsibility of the states is again reaffirmed." *Id.* (citing 42 U.S.C. § 7407, covering state implementation plans for air quality). The Act further expressly preserves state authority in "sweeping and explicit" language, *id.* at

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[13] *Accord In re Methyl Tertiary Butyl Ether (MTBE) Products Liab. Litig.*, 725 F.3d 65, 96 (2d Cir. 2013) ("Imposing state tort law liability for negligence, trespass, public nuisance, and failure-to-warn—as the jury did here—falls well within the state's historic powers to protect the health, safety, and property rights of its citizens. In this case, therefore, the presumption that Congress did not intend to preempt state law tort verdicts is particularly strong.").

1255 (citing 42 U.S.C. § 7416), and then expressly preserves the right of "any person" to enforce those rights outside of the Clean Air Act, *see* 42 U.S.C. § 7604(e). The text and structure of the Act forecloses any inference that Congress intended federal authority to be exclusive. *Exxon Mobil Corp.*, 217 F.3d at 1254 ("The Supreme Court has given substantial weight in preemption analysis to evidence that Congress intended to preserve the states regulatory authority.").[14] *Cf. Wyeth*, 555 U.S. at 575 (the case for preemption is "particularly weak" where Congress indicates awareness of the operation of state law).

In short, nothing in the Clean Air Act demonstrates a congressional intent to exclusively occupy the field of climate regulation—or, for that matter, the field of promotion of fossil fuels, which is not addressed by the Act at all.

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[14] Congressional intent to exclusively occupy a field of regulation can sometimes be inferred from the scope of a statute. *Altria Grp. v. Good*, 555 U.S. 70, 76 (2008). But simply labeling a statute's scope "comprehensive" does not suffice. *See, e.g., Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 613 (1991). The Clean Air Act is a prime example: it "establishes a comprehensive program for controlling and improving the United States' air quality," but it does so through both "state and federal regulation." *Natural Res. Def. Council, Inc. v. U.S. E.P.A.*, 638 F.3d 1183, 1185 (9th Cir. 2011).

c. State law climate claims do not inherently conflict with the Clean Air Act.

Conflict preemption exists "where 'compliance with both state and federal law is impossible,' or where 'the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *ONEOK, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1595 (2015) (quoting *California v. ARC America Corp.*, 490 U.S. 93, 100-01 (1989)).

"Impossibility preemption is a demanding defense." *Wyeth*, 555 U.S. at 573. It is not impossible, for example, to comply with both "minimum federal standards" and "more demanding state regulations." *See Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141-42 (1963); *see also Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002); *Patriotic Veterans, Inc. v. Indiana*, 736 F.3d 1041, 1049 (7th Cir. 2013) ("The fact that a state has more stringent regulations than a federal law does not constitute conflict preemption."). The Clean Air Act generally imposes minimum federal standards and expressly contemplates that states can adopt more demanding standards in many areas. *See, e.g.*, 42 U.S.C. §§ 7416, 7604(e); *Exxon Mobil Corp.*, 217 F.3d at 1255; *Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685, 693 (6th Cir. 2015) ("For one thing, the Clean Air Act expressly reserves for the

states—including state courts—the right to prescribe requirements more stringent than those set under the Clean Air Act."). In other words, even if state law imposes additional or higher standards—such as through tort duties—it is generally possible to meet those standards and also comply with the Act.

Nor are additional state law duties likely to stand as an obstacle to achieving the purposes of the Clean Air Act. "The central goal of the Clean Air Act is to reduce air pollution." *OFA*, 331 F.3d at 673; *see also Exxon Mobil Corp.*, 217 F.3d at 1255 (the Act "force[s] the states to do their job in regulating air pollution effectively"). Only if state law has the effect of increasing air pollution is it likely to conflict with the Act.

Nothing in the Clean Air Act evinces a congressional concern with reducing pollution too much.[15] Further, courts should be slow to imply ancillary purposes not clearly expressed in federal legislation or "to entertain hypothetical conflicts" with state law. *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 486, 488, 499 (9th Cir. 1984) (federal

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[15] In any event, on their face the instant suits do not seek to enjoin emissions. *E.g.* ER 62 ¶ 11; ER 118-19 ("Relief Requested"). Plaintiffs seek redress for Defendants' tortious promotion of fossil fuels. The Clean Air Act does not address this subject.

allowance for some low-oil ballast discharges from maritime tankers did not preempt state complete ban on discharges); *cf., e.g.*, *Stengel v. Medtronic Inc.*, 704 F.3d 1224, 1231-32 (9th Cir. 2013) (where state-law duty parallels federal-law duty, state imposition of additional damages remedy does not conflict); *OFA*, 331 F.3d at 673 (state law that had the effect of increasing gasoline prices did not conflict with Clean Air Act).

Broadly speaking, the Clean Air Act directs EPA to establish minimum federal standards for certain air pollutants and certain sources of air pollution. *See, e.g.*, *AEP*, 564 U.S. at 424-25 (describing regulation of stationary sources under Clean Air Act Section 111). A state law that *required* a source to emit pollution in violation of federal standards would likely be preempted. But a federal pollution standard does not necessarily imply a federally guaranteed right to pollute up to that standard. *Accord, e.g.*, *Chinatown Neighborhood Ass'n v. Harris*, 794 F.3d 1136, 1142 (9th Cir. 2015) (federal shark fishing allowance did not imply mandate to harvest; accordingly, state law restricting shark fin possession did not conflict); *Wyeth*, 555 U.S. at 583 (Thomas, J., concurring) (FDA approval of drug label "does not give drug manufacturers an unconditional right to market their federally

approved drug at all times"). In other words, state law that has the effect of reducing pollution is unlikely to conflict with the Clean Air Act.

CONCLUSION

The Court should reverse the district court's order on removal and direct that it order these cases remanded to state court.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(g), I certify that:

This brief complies with Rule 29(a)(5)'s type-volume limitation because it contains 6,496 words (as determined by the Microsoft Word word-processing system used to prepare the brief), excluding the parts of the brief exempted by Rule 32(f).

This brief complies with Rule 32(a)(5)'s typeface requirements and Rule 32(a)(6)'s type-style requirements because it has been prepared in a proportionately spaced typeface using the Office 365 version of Microsoft Word in 14-point Century Schoolbook font.

/s/ Peter Huffman
Peter Huffman

CERTIFICATE OF SERVICE

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

/s/ Peter Huffman
Peter Huffman