County of San Mateo v. Chevron & *City of Oakland v. BP*: Are State Nuisance Claims for Climate-Change Damage Removable?

INTRODUCTION

In the last few years, coastal municipalities and communities throughout the United States have filed several near-identical state common law nuisance claims against major oil companies for contributing to climate change through greenhouse gas (GHG) emissions. While the claims raise numerous interesting and difficult questions, one major issue is whether such state common law claims belong in federal or state court.

Two concurrent cases on this issue are *County of San Mateo v. Chevron Corp.* and *City of Oakland v. BP*.[1] After the plaintiffs in both cases filed complaints in California Superior Court against GHG emitters for climate-change damage, the defendants removed to the United States District Court for the Northern District of California. In justifying removal, the defendants in both cases cited identical federal statutes.[2] Yet, in determining the plaintiffs' motions to remand, the two courts reached inconsistent conclusions: Judge Chhabria,

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1. *See generally* City of Oakland v. BP P.L.C., 325 F. Supp. 3d 1017 (N.D. Cal. 2018) (exemplifying contemporary municipal climate-change litigation); Cty. of San Mateo v. Chevron Corp., 294 F. Supp. 3d 934 (N.D. Cal. 2018) (providing an example of a municipality suing an oil and gas company because of alleged contributions to global warming). Marin County, the City of Imperial Beach, Santa Cruz County, the City of Santa Cruz, the City of Richmond, and the Pacific Coast Federation of Fishermen's Associations filed near-identical claims as the County of San Mateo, seeking abatement, disgorgement of profits, compensatory damages, and punitive damages against BP, Chevron, ConocoPhillips, Exxon Mobil, Royal Dutch Shell, and additional companies engaged in oil, natural gas, and coal production. *See* Complaint at 1, Cty. of San Mateo v. Chevron Corp., No. 18-15499 (9th Cir. filed Aug. 20, 2018) (No. 17CV03242) [hereinafter San Mateo 9th Cir. Complaint]. San Francisco also filed a near-identical consolidated lawsuit against identical parties as the City of Oakland lawsuit, seeking abatement in response to sea-level rise from defendants BP, Chevron, ConocoPhillips, Exxon Mobil, and Royal Dutch Shell. *See* Complaint at 1, City of Oakland v. BP P.L.C., 325 F. Supp. 3d 1017 (N.D. Cal. 2018) (No. CGC-17-561370) [hereinafter Oakland Complaint].

2. Notice of Removal at 1, Cty. of San Mateo v. Chevron Corp., 294 F. Supp. 3d 934 (N.D. Cal. 2018) (No. 3:17-cv-04929-MEJ) [hereinafter San Mateo Notice of Removal]; Notice of Removal at 1, City of Oakland v. BP P.L.C., 325 F. Supp. 3d 1017 (N.D. Cal. 2018) (No. 3:17-cv-06011-JCS) [hereinafter Oakland Notice of Removal].

presiding over *San Mateo,* granted the plaintiffs' motion to remand, while Judge Alsup, presiding over *Oakland*, denied the plaintiffs' motion to remand.[3]

This In Brief examines whether federal jurisdiction is proper. Because neither federal question jurisdiction nor any other applicable federal statute provides adequate justification for removal, this In Brief concludes that these claims are best adjudicated under state law and in state courts.[4] Although state law is inconclusive as to the final merits of these specific state common law nuisance and trespass claims addressing GHG emissions, the claims are not properly governed by federal common law or the Clean Air Act (CAA).[5]

Part I of this In Brief provides the legal and factual context for both lawsuits by surveying the doctrinal framework surrounding the question of removal and preemption and analyzing case history. Part II presents the legal arguments that led Judges Chhabria and Alsup to different conclusions. Finally, Part III scrutinizes the conflicting justifications for federal and state litigation and concludes that these claims are best litigated in state court.

I. LEGAL AND FACTUAL BACKGROUND

A. The Doctrine of Non-Diversity Removal in a Nutshell

The right to remove is a statutory right. Title 28, § 1441 of the U.S. Code provides defendants with the ability to litigate in a federal, rather than state, forum for civil cases that are within the federal court's original jurisdiction. Section 1441(a) requires a court to consider whether the removed claims could have originally been filed in federal court. Some cases fall within federal diversity jurisdiction, such as when all parties reside in different states.[6] The most important basis of federal jurisdiction, however, is federal question jurisdiction.[7] Courts determine federal question jurisdiction according to the well-pleaded complaint rule: federal question jurisdiction exists only if an issue of federal law appears on the face of a well-pleaded complaint.[8] A defense based on federal law, however, does not create federal question jurisdiction.[9] Consequently, in the absence of complete diversity, removal is generally unwarranted, unless the complaint affirmatively alleges a federal claim.[10] In

3. *San Mateo*, 294 F. Supp. 3d at 937; *Oakland*, 2018 U.S. Dist. LEXIS 32990, at *1. At the time of this writing, the *San Mateo* remand order and the *Oakland* remand order and dismissal were on separate appeal before the Ninth Circuit.

4. *See, e.g.*, Grable & Sons Metal Prods. v. Darue Eng'g & Mfg., 545 U.S. 308, 312 (2005).

5. Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 419–24 (2011); Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 865 (9th Cir. 2012); 42 U.S.C. §§ 7411, 7416, 7604 (2012).

6. 28 U.S.C. § 1332 (2012).

7. *See Grable & Sons*, 545 U.S. at 310.

8. *Id.*; 28 U.S.C. § 1331 (2012); Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908); CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 226 (6th ed. 2002).

9. *Louisville*, 211 U.S. at 152.

10. *See, e.g.*, San Mateo Notice of Removal, *supra* note 1, at 1; Oakland Notice of Removal, *supra* note 1, at 1.

other words, if a plaintiff, as "the master of the complaint," chooses to plead only a state law claim in state court, the defendant usually cannot remove the case.[11]

Yet complications arise when defendants contend that federal law preempts state law, meaning that federal law takes precedence over state law due to the Supremacy Clause of the U.S. Constitution.[12] While federal law often preempts state law claims, federal preemption is mainly a defense; the well-pleaded complaint rule thus works to keep the action in state court.[13] But, in circumstances where Congress has "completely pre[]empt[ed] a particular area" of the law, state law claims falling within the preempted category are deemed inherently federal and thus fall under federal question jurisdiction.[14] That is, federal law so thoroughly occupies a legislative field as to leave "no room" for corresponding state law.[15] Therefore, a state law claim is completely preempted and thus removable to federal court only when a federal statute "pre-empts the state-law cause of action" and the federal statute "provides the exclusive cause of action for the claim asserted."[16] Because courts must rely on congressional intent, the express language of the pertinent statute is essential.[17] Moreover, Supreme Court doctrine has developed a presumption against preemption on the basis that "the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[18]

If the degree of preemption is insufficient to warrant removal from state court to federal court, federal courts may nonetheless exercise jurisdiction over the claims through federal question jurisdiction if the claims implicate "significant federal issues."[19] In *Grable & Sons Metal Products v. Darue Engineering & Manufacturing,* the Supreme Court devised a three-pronged test to determine whether state law claims "implicate significant federal issue[s],"

11. Caterpillar, Inc. v. Williams, 482 U.S. 386, 392–93 (1987) (overturned, *infra* note 14).

12. U.S. CONST. art. VI, cl. 2.

13. Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987).

14. *Id.* at 63–64; *see also Caterpillar,* 482 U.S. at 393 (1987) ("Thus, it is now settled law that 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.") (emphasis in original); Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 8 (2003) (Subsequently, the Supreme Court reasoned that, in order for a defendant to remove a state law claim based on complete preemption, the defendant must show both that the federal law preempted the plaintiff's claim and that Congress intended for "the federal statutes at issue [to] provide[] the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action.").

15. United States v. Locke, 529 U.S. 89, 111 (2000); *see also* Scott Gallisdorfer, *Clean Air Act Preemption of State Common Law: Greenhouse Gas Nuisance Claims after* AEP v. Connecticut, 99 VA. L. REV. 131, 140 (2013).

16. *See Beneficial Nat'l Bank*, 539 U.S. at 8; s*ee also, e.g.*, Miles v. Okun (*In re* Miles), 430 F.3d 1083, 1090 (9th Cir. 2005); City of Rome v. Verizon Commc'ns, Inc., 362 F.3d 168, 176–77 (2d Cir. 2004); Hoskins v. Bekins Van Lines, 343 F.3d 769, 773 (5th Cir. 2003).

17. *See Beneficial Nat'l Bank*, 539 U.S. at 9 n.5.

18. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); *see, e.g.*, Franchise Tax Bd. v. Constr. Laborers Vacation Tr., 463 U.S. 1, 25 (1983).

19. Grable & Sons Metal Prods. v. Darue Eng'g & Mfg., 545 U.S. 308, 312 (2005).

and thus fall within federal question jurisdiction.[20] The federal issue raised by the state law claim must be contested, must be substantial, and must not "disturb[] any congressionally approved balance of federal and state judicial responsibilities."[21]

Congress also grants federal courts jurisdiction in special, enumerated cases not covered by federal question jurisdiction.[22] For instance, pursuant to 28 U.S.C. § 1442, federal courts have the authority to hear actions against federal officers or agencies, which may remove actions originally brought in state court.[23] Additionally, federal courts have jurisdiction over bankruptcy cases and have discretional jurisdiction over state law claims joined with federal law claims under the doctrine of supplemental jurisdiction.[24] Thus, defendants can properly remove a state law claim filed in state court in only a finite number of ways.

B. Displacement, Preemption, the Clean Air Act, and GHG Emissions

In the past, courts recognized public nuisance claims related to interstate pollution under federal, not state, common law.[25] Until *Massachusetts v. EPA*, the EPA had declined to exercise regulatory authority over GHG emissions through the CAA. The plaintiffs in *Massachusetts* convinced the Supreme Court to require the EPA to regulate GHGs under the CAA.[26] And, as discussed in Section II, once the Court held that extant laws mandated the regulation of GHGs, the need for judge-made, federal common law disappeared.[27]

Subsequently, a unanimous Court in *American Electric Power Co. v. Connecticut* (*AEP*) further ruled that the CAA's displacement of federal common law public nuisance claims extended to claims related to GHG emissions.[28] In *AEP*, the Court held that Congress spoke directly to the issue of regulating interstate GHG emissions through the CAA.[29] The Court ruled that "[the CAA] and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions."[30] This holding, in conjunction with the Court's 2007 decision in *Massachusetts v. EPA*, established the EPA as the

20. *Id.*
21. *Id.* at 314.
22. *See, e.g.*, 28 U.S.C. § 1442 (2012).
23. *Id.*
24. 28 U.S.C. §§ 1334(a), 1367 (2012). More statutory avenues for federal jurisdiction are available. Although the defendants in *San Mateo* and *Oakland* cite to additional doctrines and statutes to justify removal, this article focuses only on the issue of removal under federal question jurisdiction.
25. Illinois v. City of Milwaukee, 406 U.S. 91, 107 n.9 (1972). More recently, and since the CAA displaced federal common law, the court in *North Carolina ex rel Cooper v. Tennessee Valley Authority*, held that the law of the states where the emissions sources come from will apply in a nuisance claim, but another state's laws should not apply extraterritorially. 615 F.3d 291 (4th Cir. 2010).
26. Massachusetts v. EPA, 549 U.S. 497, 528–29 (2007).
27. City of Milwaukee v. Illinois, 451 U.S. 304, 314 (1981); *see Massachusetts*, 549 U.S. at 532.
28. Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 428 (2011).
29. *Id.* at 424.
30. *Id.* at 423.

primary regulator of GHG emissions.[31] Congress, by delegating authority to the EPA to regulate GHG emissions, had eliminated the role of federal common law in the field.[32]

Although the Supreme Court has read the CAA to displace federal common law in such cases, the CAA also expressly preserved available state law causes of action through its two savings clauses.[33] The *AEP* Court, however, did not directly address the plaintiffs' state law nuisance claims, considering only the plaintiffs' potential federal common law claims.[34] As the lower court found that federal common law governed, there was no need to directly address the potential state common law claims.[35] Justice Ginsburg nevertheless left open the possibility of state common law claims, stating: "In light of our holding that the CAA displaces federal common law, the availability *vel non* of a state lawsuit depends, *inter alia,* on the preemptive effect of the federal Act."[36]

One year later, the Ninth Circuit Court of Appeals addressed a similar issue in *Native Village of Kivalina v. ExxonMobil Corp*.[37] The plaintiff, a native Alaskan community, brought alternative federal and state common law public nuisance claims against GHG emitters for damages from climate change-caused sea-level rise.[38] Unlike the plaintiffs in *AEP*, the village sought damages rather than injunctive relief.[39] The court of appeals confirmed and expanded upon the Supreme Court's ruling in *AEP*, determining that the CAA displaced the village's federal public nuisance claim for damages against GHG emitters.[40] Thus, the CAA displaced the federal common law claim, regardless of the common law remedy sought.[41] Although *Kivalina* closed another door on federal common law relief for GHG emissions through CAA displacement, the court declined to exercise supplemental jurisdiction over the village's remaining state common

31. *Am. Elec. Power Co*., 564 U.S. at 423; *see also Massachusetts*, 549 U.S. at 528–29, 532 (*Massachusetts* made plain that emissions of carbon dioxide qualify as air pollution subject to regulation under the CAA.).

32. *Am. Elec. Power Co.,* 564 U.S. at 423.

33. *See* 42 U.S.C. § 7416 (authorizing states to regulate air pollution so long as the standard is no less stringent than the CAA); *id.* § 7604(e) ("Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)").

34. *Am. Elec. Power Co*., 564 U.S. at 429.

35. *Id.; see also* Int'l Paper Co. v. Ouellette, 479 U.S. 481, 488–97 (1987) (holding that the Clean Water Act (CWA) precluded courts from applying the law of an affected state against an out-of-state pollution source. The Court, however, noted that, while affected state law was inapplicable, the plaintiffs were not without remedy. Because the CWA's savings clause "specifically preserves" some state action, the CWA did not bar the plaintiffs from bringing a claim in accordance with the law of the source state.).

36. *Am. Elec. Power Co*., 564 U.S. at 429.

37. 696 F.3d 849, 856 (9th Cir. 2012).

38. *Id.* at 853–55.

39. *Id.* at 857.

40. *Id.* at 858.

41. *Id. See* Exxon Shipping Co. v. Baker, 554 U.S. 471, 489 (2008).

law nuisance claim, so it did not address whether the CAA preempts state common law claims.[42]

II. COMPETING OPINIONS

On July 17, 2017, the local governments of San Mateo County, Marin County, and the City of Imperial Beach filed identical lawsuits in California Superior Court alleging that fossil fuel companies' "production, promotion, marketing, and use of fossil fuel products, simultaneous concealment of the known hazards of those products, and their championing of anti-regulation and anti-science campaigns, actually and proximately caused" injuries to the plaintiffs.[43] Their complaints included claims for public nuisance, strict liability for failure to warn, strict liability for design defect, private nuisance, negligence, negligent failure to warn, and trespass.[44] The plaintiffs sought compensatory and punitive damages, equitable relief to abate the alleged nuisance, and disgorgement of profits.[45]

Similarly, on September 19, 2017, the Cities of Oakland and San Francisco filed lawsuits in California Superior Court against oil and gas companies alleging that the GHG emissions from their fossil fuel production created an unlawful public nuisance.[46] The cities asked the court to require that the companies abate the public nuisance by funding climate adaptation infrastructure programs and find the companies jointly and severally liable for "causing, creating, assisting in the creation, of, contributing to, and/or maintaining a public nuisance."[47]

Soon after the cities filed the lawsuits, the defendants removed the cases to the federal district court for the Northern District of California.[48]

A. County of San Mateo v. Chevron Corp.

Almost seven months after the defendants removed the cases to federal court, Judge Chhabria, who presided over these consolidated cases, granted the plaintiffs' motions to remand the cases to state court.[49] Chevron had sought to justify removal on the basis of federal common law, citing the Supreme Court's *AEP* holding on the displacement of federal common law claims related to GHG

42. *Kivalina*, 696 F.3d at 854–55.

43. *See* Complaint at 4, Cty. of San Mateo v. Chevron Corp., 294 F. Supp. 3d 934 (N.D. Cal. 2018) (No. 17CIV03222) [hereinafter San Mateo N.D. Cal. Complaint]. Santa Cruz County, the City of Santa Cruz, the City of Richmond, and the Pacific Coast Federation of Fishermen's Associations later filed near-identical complaints in state court seeking identical climate-change damages. *See* San Mateo 9th Cir. Complaint, *supra* note 1, at 1; Complaint at 1, Pacific Coast Fed. of Fisherman's Associations v. Chevron Corp., No. 3:18-cv-07477 (N.D. Cal. filed Nov. 14, 2018) (No. CGC-18-571285).

44. *See supra* note 43.

45. *See id.*

46. *See generally* Oakland Complaint, *supra* note 1.

47. *Id.* at 39.

48. The defendants invoked federal jurisdiction under 28 U.S.C. §§ 1331, 1334, 1441, 1442, 1452, and 1446, as well as 43 U.S.C. § 1349(b). San Mateo Notice of Removal, *supra* note 1, at 1.

49. Cty. of San Mateo v. Chevron Corp., 294 F. Supp. 3d 934, 937 (N.D. Cal. 2018).

pollution.[50] Judge Chhabria, however, looked to Justice Ginsburg's language in *AEP* regarding whether such claims are preempted by the CAA, which had displaced federal common law that previously would have preempted certain state law claims.[51]

Judge Chhabria found San Mateo's claims "nearly identical" to those of the plaintiffs in *Kivalina*: Both plaintiffs claimed that the defendants' contribution to GHG emissions created "a substantial and unreasonable interference with public rights."[52] In *Kivalina*, the Ninth Circuit relied on *AEP* in holding that the CAA displaced federal common law, regardless of the relief sought.[53] As such, according to Judge Chhabria, the relevant federal common law could not justify removal because of its displacement by the CAA.[54]

Additionally, Judge Chhabria considered removal improper under the doctrine of complete preemption, noting that federal preemption of a plaintiff's state law claims does not guarantee removal.[55] Judge Chhabria reasoned that a defendant can remove a case to federal court only if the state law claim is "completely preempted" by a specific federal statute.[56] However, because the CAA contains savings provisions that clarify the congressional intent to preserve certain state law claims, the court concluded that the plaintiffs' claims were not "completely preempted."[57] Therefore, without complete preemption, the claims belong in state court in accordance with the well-pleaded complaint rule.[58]

The court next considered whether federal question jurisdiction justified removal of the plaintiffs' claims.[59] The court applied the test from *Grable & Sons*, which holds that, if the plaintiffs' complaint, on its face, includes a specific federal issue "that must be decided" in resolving the state law claims, defendants have the right to remove.[60] The court found that the potential foreign policy implications from a successful action did not raise the "kind of actually disputed, substantial federal issue" warranting removal under *Grable & Sons*.[61]

50. San Mateo Notice of Removal, *supra* note 1, at 3–4.

51. *San Mateo*, 294 F. Supp. 3d at 937.

52. *Id.*; *see* Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 854 (9th Cir. 2012).

53. *Kivalina*, 696 F.3d at 857.

54. *San Mateo*, 294 F. Supp. 3d at 937.

55. *Id.* at 937–38.

56. *Id.* at 938.

57. *Id.*. *See* 42 U.S.C. §§ 7604(e), 7416 (2012).

58. *See San Mateo*, 294 F. Supp. 3d at 938; Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 9 n.5 (2003) ("[T]he proper inquiry [to determine if preemption warrants removal] focuses on whether Congress intended the federal cause of action to be exclusive rather than on whether Congress intended that the cause of action be removable.").

59. *San Mateo*, 294 F. Supp. 3d at 938.

60. Grable & Sons Metal Prods. v. Darue Eng'g & Mfg., 545 U.S. 308, 314 (2005).

61. *See San Mateo*, 294 F. Supp. 3d at 938. Moreover, the court reasoned that the necessary weighing of cost and benefits that may implicate federal law does not invoke *Grable*; if so, almost all state tort claims against federally regulated bodies could be removed. *Id.* The court also rejected the defendants' removal justifications under specialized statutory removal. *Id.* The defendants cited federal officer removal, bankruptcy removal, and removal through the Outer Continental Shelf Lands Act, but Judge Chhabria rejected these as clearly inapplicable. *Id.* at 939.

Thus, because none of the defendants' justifications for removal survived the court's scrutiny, the court remanded the suit to state court for further proceedings.[62] The court, however, left for the state court the question of preemption, admitting that the claims raise "national and perhaps global questions."[63] The court concluded its opinion by noting the difficulty of reaching federal court: "[T]o justify removal . . . a defendant must be able to show that the case being removed fits within one of a small handful of small boxes."[64]

B. City of Oakland v. BP

In *City of Oakland v. BP*,[65] the plaintiffs alleged that fossil fuels, produced and distributed by the defendants, have increased atmospheric carbon dioxide levels, contributing to climate change.[66] The plaintiffs also made several additional claims. First, the plaintiffs alleged that the defendants' actions contributed to sea-level rise and thus flood damage on coastal land in Oakland and San Francisco.[67] Second, the cities asserted that the defendants, despite knowing the threat that their products posed to the global climate, had created massive public relations and advertising campaigns to undermine scientific research and findings to downplay fossil fuel impacts on the climate.[68] Finally, plaintiffs claimed that the sea-level rise caused by the defendants' actions would continue to threaten public and private property in Oakland and San Francisco.[69] The complaint ends with warnings that, as storms continue to increase in severity, loss of life and further extensive property damage could result.[70]

Within a month of the defendants' initial motion to remove to federal court, two plaintiffs—the Cities of Oakland and San Francisco—filed a motion to remand.[71] Judge Alsup denied the motion before ultimately dismissing the case, holding that federal common law "necessarily" governed the plaintiffs' nuisance claims because the claims addressed "national and international geophysical phenomenon of global warming."[72] The court explained that federal common law applies when necessary to protect federal interests, particularly when the claims implicate interstate and international concerns.[73] And, as federal district

62. *Id.* at 938.
63. *Id*. at 939.
64. *Id.*
65. This case is also widely referenced under *California v. BP* as state law grants the city attorney independent authority to bring public nuisance cases in the name of the people of the State of California. Cal. Code Civ. Proc. § 731 (2011).
66. Oakland Complaint, *supra* note 1, at 1–2.
67. *Id.* at 2–3.
68. *See id.* at 3.
69. *See id.* at 3–4.
70. *See id.* at 50.
71. Motion to Remand at 1, City of Oakland v. BP P.L.C., 325 F. Supp. 3d 1017 (N.D. Cal. 2018) (No. 3:17-cv-06011-WHA).
72. California v. BP P.L.C., No. C 17-06011 WHA, 2018 U.S. Dist. LEXIS 32990, at *3, *5–6 (N.D. Cal. Feb. 27, 2018).
73. *Id.*

courts have original jurisdiction over federal questions, removal was proper.[74] Therefore, the disputed claims were of the "nature of the controversy [that] ma[de] it inappropriate for state law to control."[75]

After examining the Court's *AEP holding*, the court focused on *Kivalina*.[76] *Kivalina* reaffirmed that, without the CAA, federal common law would be the appropriate avenue for GHG pollution public nuisance claims.[77] Additionally, like in *AEP*, the *Kivalina* court did not rule on the alternative state public nuisance claims and left open the possibility of successful state law claims.[78] Judge Alsup, however, distinguished the claim in *California v. BP* from the facts asserted in *AEP* and *Kivalina*: California's claims were not against GHG emitters, but, instead, were against the companies as producers engaging in international commerce.[79] Therefore, Judge Alsup reasoned that, unlike the precedents that dealt with "domestic emissions" regulated by the CAA, which displaced relevant federal common law, the cause of action here dealt in significant part with foreign-emanating GHG emissions that were *outside* the scope of the EPA regulatory mandate and, thus, beyond the control of the CAA.[80] Judge Alsup determined that the CAA did not displace the federal common law because it did not speak directly to the "geophysical problem" at hand: "[T]he transboundary problem of global warming raises exactly the sort of federal interests that necessitate a uniform solution."[81] Thus, federal common law governed; and it was federal common law, not the CAA, that preempted the plaintiffs' state law claims.[82]

III. ANALYSIS AND POTENTIAL AVENUE FORWARD

San Mateo and *Oakland* arrived at opposite conclusions from near-identical claims. The two judges' differing rationales stem from one point of departure: Whether the CAA displaces federal common law.[83] Judge Alsup, concluding that the CAA *did not* entirely displace federal common law, had no need to further evaluate whether state law claims survive under the CAA because the applicable federal common law preempted any state common law claim.[84] On the other hand, Judge Chhabria reasoned that the CAA *did* displace federal common law and thus potentially preempted the state law claims.[85] Accordingly, Chhabria

74. *Id.* at *14–15.
75. *Id.*
76. *Id.* at *5–6, *14–15.
77. Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 858 (9th Cir. 2012).
78. *Id*. at 854–55; *see* Am. Elec. Power. Co. v. Connecticut, 564 U.S. 410, 429 (2011).
79. *Oakland*, 2018 U.S. Dist. LEXIS 32990, at *13.
80. *Id.*
81. *Id.* at *10.
82. *Id.* at *9, *12.
83. Both *AEP* and *Kivalina* hold that CAA *at least* partially displaces federal common law. *See Am. Elec. Power. Co.*, 564 U.S. at 429; *Kivalina*, 696 F.3d at 858.
84. *Oakland*, 2018 U.S. Dist. LEXIS 32990, at *13.
85. *See* Cty. of San Mateo v. Chevron Corp., 294 F. Supp. 3d 934, 937–38 (N.D. Cal. 2018).

then considered whether the CAA, through its savings clauses, left room for the state law claims to survive.

A. The CAA Likely Displaces Federal Common Law

In *California v. BP*, the court found that the plaintiffs' claims were distinct from those in *Kivalina*. According to Judge Alsup, pertinent, nondisplaced federal common law on public nuisance existed and would thus preempt any alleged state law public nuisance claims.[86] However, the *AEP* Court's holding that the CAA displaced federal common law is not as narrow as Judge Alsup's decision would suggest. Congress has already delegated authority to the EPA to decide if, when, and how to regulate GHG emissions.[87] In *Kivalina*, the Ninth Circuit interpreted *AEP*'s holding broadly, applying it not just to actions seeking abatement, but also to claims seeking damages. In his *San Mateo* decision, Judge Chhabria said as much with regard to the *Kivalina* plaintiff's similar claims, stating that "[*AEP*] did not confine its holding about the displacement of federal law to particular sources of emissions, and *Kivalina* did not apply [*AEP*] in such a limited way."[88]

On the other hand, Judge Alsup reasoned that the CAA does not preempt because it does not provide a "sufficient legislative solution" to the nuisance claims.[89] But the Supreme Court has ruled that the "type of remedy asserted is not relevant" in deciding the question of displacement.[90] Current Supreme Court jurisprudence calls for displacement of all remedies when a cause of action is displaced.[91] Although federal common law can "fill[] in the cracks" of a legislative scheme, *Kivalina* makes clear that there is no room for federal common law with nuisance claims for GHG emissions.[92]

B. The CAA Likely Does Not "Completely" Preempt State Common Law Nuisance

If an area of state law is completely preempted by federal law, the claim is inherently federal and, thus, removable.[93] The Court has recognized complete preemption where Congress clearly intends that a federal statute provide "the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action."[94] The CAA, however, contains

86. *Oakland*, 2018 U.S. Dist. LEXIS 32990, at *13.
87. *See* Massachusetts v. EPA, 549 U.S. 497, 528–29 (2007).
88. *San Mateo*, 294 F. Supp. 3d at 937.
89. *Oakland*, 2018 U.S. Dist. LEXIS 32990, at *14.
90. Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 857 (9th Cir. 2012); *see* Exxon Shipping Co. v. Baker, 554 U.S. 471, 489 (2008).
91. *Kivalina*, 696 F.3d at 857.
92. *Id.* at 858; *see Am. Elec. Power. Co.*, 564 U.S. at 421.
93. Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63–64 (1987).
94. Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 8 (2003).

multiple savings clauses that expressly preserve state causes of action.[95] These provisions suggest strongly that Congress did not intend the CAA to completely preempt all state law claims. As Judge Chhabria explained, although the CAA may preempt San Mateo's and Oakland's public nuisance claims, state courts have the authority to discern whether this is the case unless the claim "fits within one of a small handful of small boxes" that justify removal to federal court.[96]

The U.S. Supreme Court conducted a similar analysis regarding the preemptive scope of the Clean Water Act (CWA) in *International Paper Co. v. Ouellette*.[97] In *Ouellette*, a group of plaintiffs filed a lawsuit against a paper company, alleging that a New York plant's discharge flowed to the plaintiffs' property in Vermont.[98] The issue before the Court was whether two savings clauses within the CWA precluded state law causes of action from preemption.[99] The pertinent CWA savings clauses are remarkably similar to those in the CAA.[100] The Court held that, although the statute precluded those state law claims that interfered with the goal of the CWA, the savings clauses otherwise preserved other relevant state law nuisance claims.[101] The Court's interpretation of the savings clauses in CWA and its preservation of state law nuisance claims support interpreting similar savings clauses in the CAA to preserve state public nuisance claims.

Further, the *AEP* and *Kivalina* opinions both declined to rule out state causes of action and the ability of states to adjudicate state law claims.[102] Specifically, the court in *Kivalina* stated that "[the Village of] Kivalina may pursue whatever remedies it may have under state law to the extent their claims are not preempted."[103] Thus, because state common law nuisance claims against GHG emitters are not completely preempted by federal law, a faithful application of the doctrine of preemption should find that removal of such claims is improper.

95. 42 U.S.C. § 7604(e) (2012) (saving the "right[s] which any person . . . may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief"); *Id.* § 7416 (saving the "right[s] of any State . . . 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").

96. Cty. of San Mateo v. Chevron Corp., 294 F. Supp. 3d 934, 938 (N.D. Cal. 2018). *See generally* Her Majesty the Queen in Right of Province of Ontario v. City of Detroit, 874 F.2d 332, 342–43 (6th Cir. 1989) (state law cause of action survives the CAA); Gutierrez v. Mobil Oil Corp., 798 F. Supp. 1280, 1284 (W.D. Tex. 1992) (state law cause of action survives the CAA).

97. 479 U.S. 481, 488–97 (1987).

98. *Id.* at 484.

99. *Id.* at 492–93.

100. *See* 33 U.S.C. §§ 1365(e), 1370; 42 U.S.C. §§ 7416, 7604(e); *see also* Gallisdorfer, *supra* note 15, at 152.

101. *See* Gallisdorfer, *supra* note 15, at 149.

102. Am. Elec. Power. Co. v. Connecticut, 564 U.S. 410, 429 (2011); Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 854–55 (9th Cir. 2012).

103. *Kivalina*, 696 F.3d at 866.

C. Whether State Law Public Nuisance Claims Regarding Climate Change Damage Raise a Substantial and Disputed Federal Issue

Another potential justification for removal lies with the complaint itself. Although removal may be unwarranted through the doctrine of preemption, the question of federal question jurisdiction under *Grable & Sons* remains.

Grable & Sons jurisdiction may still justify removal of state law claims that implicate an issue of federal law. The federal issue implicated by the complaint, however, must be contested and substantial.[104] But even when the state action discloses a contested and substantial federal question . . . the federal issue will ultimately qualify for a federal forum only if federal jurisdiction is consistent with congressional judgment about the sound division of labor between state and federal courts governing the application of § 1331.[105]

Judge Alsup reasoned, in agreement with the defendants' position in both cases, that federal jurisdiction is proper because the claims "demand" international governance and therefore "necessarily involve" U.S. international relations.[106] Yet general global implications do not appear to be enough to warrant removal under *Grable & Sons*, which premises removal on a specific issue of federal law.[107] "The mere potential for foreign policy implications . . . does not raise the kind of actually disputed, substantial federal issue necessary for *Grable & Sons* jurisdiction."[108] While state common law nuisance claims against GHG emitters may raise foreign policy concerns, such concerns seem not to rise to the level of specificity to provide a basis for federal question jurisdiction.[109]

104. Grable & Sons Metal Prods. v. Darue Eng'g & Mfg., 545 U.S. 308, 313–14 (2005).

105. *Id.*

106. *BP*, 2018 U.S. Dist. LEXIS 32990 at *14–15.

107. *See Grable & Sons*, 545 U.S. at 313–14; *see also* Empire Healthchoice Assurance, Inc. v. McVeigh, 547 U.S. 677, 701 (2006) (holding that "overwhelming" United States interests do not alone warrant turning a state-court-initiated tort claim into a discrete and costly "federal case").

108. Cty. of San Mateo v. Chevron Corp., 294 F. Supp. 3d 934, 938 (N.D. Cal. 2018).

109. In addition to federal question jurisdiction, no pertinent federal statutes support removal. The defendants in *San Mateo* and *BP* raised additional specific statutes to justify removal. The defendants first pointed to the Outer Continental Shelf Lands Act. 43 U.S.C. § 1349(b). However, there is not enough of a direct connection for the state law claims to be considered "arising out of, or in connection with" Outer Continental Shelf activity. Next, removal was improper pursuant to 28 U.S.C. § 1452(a) and 28 U.S.C. § 1334(b) for claims relating to or arising under Title 11 Bankruptcy because there is not a "sufficiently close enough nexus" between the claims and the defendants' plans. Further, the defendants in both cases claimed removal to be proper under 28 U.S.C. § 1442(a)(1) because fossil fuel companies, through contract, produced fossil fuel on federal lands. The defendants, however, are neither federal officers nor persons acting under federal officers; thus, the statute is not applicable. Lastly, removal under U.S. Const., art. I, § 8, cl. 17 is not applicable because plaintiffs' claims did not arise within a federal enclave. *See* Cty. of San Mateo v. Chevron Corp, 294 F. Supp. 3d 934, 938–39 (N.D. Cal. 2018) (discussing why removal is improper under 28 U.S.C. §§ 1334(b), 1442(a)(1), 1452(a), and 43 U.S.C. § 1349(b)); San Mateo Notice of Removal, *supra* note 1, at 1; Oakland Notice of Removal, *supra* note 1, at 1.

CONCLUSION

Removal is a statutory right. Although many justifications may warrant removal, they cannot upset the balance between state and federal power. Within the CAA, Congress expressly saved certain rights of action for individuals, local governments, and state governments outside the federal regulatory scheme. Congress intended for state adjudication outside the scope of the Act. While the CAA may still preempt state common law claims against GHG emitters for climate-change damages, preemption alone is not enough to warrant removal. States have the right under the well-pleaded complaint rule to interpret state nuisance law in this area and determine whether such claims are preempted.

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We welcome responses to this In Brief. If you are interested in submitting a response for our online journal, *Ecology Law Currents*, please contact cse.elq@law.berkeley.edu. Responses to articles may be viewed at our website, http://www.ecologylawquarterly.org.