Nos. 18-15499, 18-15502, 18-15503, 18-16376

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COUNTY OF SAN MATEO, Plaintiff-Appellee, v. CHEVRON CORPORATION, et al., Defendants-Appellants.	Appeal No. 18-15499 No. 17-cv-4929-VC N.D. Cal., San Francisco Hon. Vince Chhabria presiding
CITY OF IMPERIAL BEACH, Plaintiff-Appellee, v. CHEVRON CORPORATION, et al., Defendants-Appellants.	Appeal No. 18-15502 No. 17-cv-4934-VC N.D. Cal., San Francisco Hon. Vince Chhabria presiding
COUNTY OF MARIN, Plaintiff-Appellee, v. CHEVRON CORPORATION, et al., Defendants-Appellants.	Appeal No. 18-15503 No. 17-cv-4935-VC N.D. Cal., San Francisco Hon. Vince Chhabria presiding
COUNTY OF SANTA CRUZ, et al., Plaintiffs-Appellees, v. CHEVRON CORPORATION, et al. Defendants-Appellants.	Appeal No. 18-16376 Nos. 18-cv-00450-VC; 18-cv-00458-VC; 18-cv-00732-VC N.D. Cal., San Francisco Hon. Vince Chhabria presiding

BRIEF FOR AMICI CURIAE STATES OF CALIFORNIA, NEW YORK, MARYLAND, NEW JERSEY, OREGON, RHODE ISLAND, VERMONT, AND WASHINGTON IN SUPPORT OF PLAINTIFF-APPELLEES

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IDENTITY AND INTEREST OF AMICI

The States of California, Maryland, New Jersey, New York, Oregon, Rhode Island, Vermont, and Washington ("Amici States") have an interest in maintaining states' substantial police power authority to protect the health and welfare of the citizenry, and in our state courts' ability to adopt and enforce requirements of state common law—including damages awards—in cases involving fossil fuel producers and sellers. Here, Defendant-Appellant petroleum and coal companies ("Defendants") seek a ruling that would divest state courts of authority to handle a broad class of state common-law actions—those related to climate change. As explained below, Defendants' arguments fundamentally misconstrue the applicable law of removal jurisdiction and ignore the states' broad authority and important role in addressing climate change.

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

under which a complaint that pleads only state-law causes of action may be successfully removed from state court.[1]

INTRODUCTION

Defendants' appeal of the district court's remand order raises eight distinct arguments for removal, as well as the preliminary issue of the proper scope of the issues before the Court on appeal. As a threshold matter, Amici States agree with Plaintiffs that this Court has jurisdiction only to review Defendants' arguments for removal on federal-officer grounds under 28 U.S.C. § 1442. *See* Plaintiff-Appellees' Br. ("P. Br.") at 30-45, *San Mateo v. Chevron et al.*, No. 18-15499, (9th Cir.), ECF No. 88; *see also* 28 U.S.C. § 1447; *Patel v. Del Taco, Inc.*, 446 F.3d 996, 998 (9th Cir. 2006). Because Defendants' other theories for removal lack merit, the ultimate outcome of this appeal is not altered if the Court does look to other grounds for removal.

Amici write to explain why, if this Court looks to those other grounds, Defendants' overly-expansive construction of the artful pleading doctrine should

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[1] Plaintiff-Appellees Counties of Marin, San Mateo, and Santa Cruz, and Cities of Santa Cruz, Imperial Beach, and Richmond ("Plaintiffs") filed separate complaints in individual state-court actions. However, the complaints in each of the cases make similar factual allegations and set forth the same causes of action; they also seek the same forms of relief. Moreover, the appeals in these cases have been consolidated before this Court. Thus, we refer to the Plaintiffs' complaints collectively as "the complaint" and will cite specifically to the complaint in *San Mateo v. Chevron et al.*, No. 17-cv-03222 (Cal. Super. Ct. filed July 17, 2017) when specific citation is warranted.

be rejected. The artful pleading doctrine is, and should remain, a narrow exception to the general rule that a plaintiff is the master of her complaint. Defendants' first and most troubling argument would break new ground, attempting to expand the artful pleading doctrine to allow removal on the basis of federal common law that itself has been displaced by Congress and therefore no longer exists. The argument has no precedent[2] and is inconsistent with on-point decisions from both this Court and the Supreme Court. Defendants' second argument, that Plaintiffs' state common-law claims are "completely preempted" by the Clean Air Act ("Act"), is inconsistent with the Act's cooperative federalism approach and its express preservation of states' substantial police-power authority to protect human welfare. State common law has long been a backstop against environmental harms, and the text of the Act makes clear Congress did not intend to remove that backstop. And, Defendants' third argument, that Plaintiffs' claims necessarily

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[2] In another set of consolidated climate-change cases in which plaintiffs initially pled state common-law claims, a different district court in the Northern District of California denied the plaintiffs' motion to remand. *See City and Cnty. of San Francisco v. BP, P.L.C., et al.* (Case No. 17-cv-06012-WHA) (N. Dist. Cal.); *City of Oakland v. BP, P.L.C., et al.* (Case No. No. 17-cv-06011-WHA) (N. Dist. Cal.). The district court's denial of remand was based in part on its initial determination that San Francisco and Oakland might be able to plead federal common law claims (which it later concluded, in dismissing the action, they could not). The court's order denying remand and the subsequent order dismissing San Francisco's and Oakland's complaints are the subject of a separate pending appeal in this Court (Appeal No. 18-16663).

raise federal issues because they relate to climate change, erroneously posits climate-change mitigation and adaptation as an exclusively federal domain. This argument ignores: (1) the substantial role that states and local jurisdictions have played and will continue to play in addressing climate change; and (2) Congress' intent under the Act that local harms can continue to be addressed by local common law.

State courts are the branch of government most often tasked with enforcing state-law requirements, including through the creation, application, and enforcement of state common law. And state courts are entitled to the same substantial latitude as state executive and legislative branches to enforce the states' police powers to protect the public health and welfare. Defendants' arguments for removal, if accepted, would curtail that latitude with respect to the signal environmental issue of our time, climate change.

For these reasons, Amici States respectfully submit that the district court's order remanding Plaintiffs' complaint should be affirmed.

ARGUMENT

In arguing for removal, Defendants in this case face a significant burden. The removal statute is "strictly construed against removal jurisdiction." *Provincial Gov't of Marinduque v. Placer Dome, Inc.*, 582 F.3d 1083, 1087 (9th Cir. 2009); *see also Hunter v. Philip Morris USA*, 582 F.3d 1039, 1042 (9th Cir. 2009)

(defendant has the burden of establishing that removal is proper and ambiguities are construed against removal). Further, under the well-pleaded complaint rule, the plaintiff is "master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). This rule is a "powerful doctrine" that "severely limits the number of cases in which state law 'creates the cause of action' that may be initiated in or removed to federal district court[.]" *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 9–10 (1983).

It is against this backdrop that federal courts have adopted a narrow set of exceptions under the "artful pleading" doctrine, where a defendant may remove a case that on its face pleads only state-law claims. *See Redwood Theatres, Inc. v. Festival Enter., Inc.*, 908 F.2d 477, 479 (9th Cir. 1990), *see also Hunter v. United Van Lines*, 746 F.2d 635, 640 (9th Cir. 1984); 14C Charles Alan Wright, Arthur R. Miller, Federal Practice and Procedure § 3722.1 (Rev. 4th ed. 2018).

Defendants' first three arguments seek to inappropriately apply—or in the first case invent—a branch of the artful pleading doctrine. For the reasons set forth below, those arguments should be rejected.

I. THIS COURT SHOULD DECLINE TO EXPAND THE ARTFUL PLEADING DOCTRINE INTO NEW TERRITORY.

Defendants' first argument references neither of the recognized applications of the artful pleading doctrine—complete preemption or *Grable* jurisdiction (each

of which Defendants argue separately)—but rather seeks to expand the doctrine into new territory. In short, Defendants insist that the Court must reclassify Plaintiffs' claims as federal common-law claims, even as they further argue that such federal claims have been displaced by the Act, leaving Plaintiffs with no remedy. Appellant-Defendants' Opening Br. ("D. Br.") at 30-45, *San Mateo v. Chevron et al.*, No. 18-15499, (9th Cir.), ECF No. 77.

Defendants' argument has no precedent in removal jurisprudence. To the contrary, in cases where plaintiffs have alleged *both* federal and state common-law claims against greenhouse gas emitters, the Supreme Court and this Court have both stated that it is preemption by the federal Act—not displacement by the federal common law—that would determine the viability of state-law claims. The courts thus assumed that the traditional remand standards would apply. First, in *American Electric Power Co. v. Connecticut* ("*AEP*"), states and other plaintiffs sued five major electric power companies in federal court, alleging that the companies' greenhouse-gas emissions violated the federal common law or, in the alternative, state tort law. 564 U.S. 410, 418 (2011). Although the Court concluded that the plaintiffs' federal nuisance claims were displaced by the Act, the Court expressly declined to invalidate the plaintiffs' *state-law* nuisance claims. *Id.* at 429. The Court identified "preemption" as the standard that would determine the availability of state nuisance law, not displacement or—as Defendants argue—

a reclassification of state-law claims as federal.[3] *Id.*; *see also Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 497 (1987).

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

[3] As the Sixth Circuit discussed in a subsequent case, "there are fundamental differences ... between displacement of federal common law by the [Clean Air] Act and preemption of state common law by the Act. ... [T]he 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 [but] does not grant federal courts any similar authority." *Merrick v. Diageo Americans Supply, Inc.*, 805 F.3d 685, 693 (6th Cir. 2015) (citation omitted).

leave those injured by air pollution without a remedy," because "[o]nce federal common law is displaced, state nuisance law becomes an available option to the extent it is not preempted by federal law." *Id.* at 866 (Pro, J., concurring).

Anathema to both these decisions, Defendants' argument conflates the relationship between federal statutes and federal common law, on the one hand, with the relationship between federal law and state law, on the other. As *AEP* and *Kivalina* hold, the Act has displaced whatever federal common law might otherwise apply to claims against emitters of greenhouse gases. But once displaced, there is no federal common law for such claims to "arise under," and federal common law therefore cannot form the basis of federal jurisdiction. As the holdings of *AEP* and *Kivalina* make clear, federal common law is irrelevant to the jurisdictional issue before this court.[4]

II. THE CLEAN AIR ACT IS A MODEL OF COOPERATIVE FEDERALISM THAT CANNOT SUPPORT REMOVAL ON COMPLETE PREEMPTION GROUNDS.

Defendants also argue for removal on "complete preemption" grounds. But here, too, Defendants' construction (D. Br. 56-58) is incorrect, and stretches

[4] Defendants appear to be making a "complete preemption" argument for removal premised on federal common law supplanting state common law, but as discussed below, the complete preemption doctrine only provides a basis for removal when *Congress* has expressed the intent in federal statute to entirely replace state law. Thus, the proper focus of a "complete preemption" argument is the Act, not federal common law.

complete preemption in a way that would severely constrain state courts in a field that states have traditionally occupied—protecting the health and welfare of their citizens. *See Rocky Mountain Farmers Union v. Corey*, -- F.3d --, Case No. 17-16881, 2019 WL 254686 at * 2 (9th Cir., Jan. 18, 2019) ("*Rocky Mountain II*") ("[W]hatever else may be said of the revolutionary colonists who framed our Constitution, it cannot be doubted that they respected the rights of individual states to pass laws that protected human welfare, ... and recognized their broad police power to accomplish this goal.") (citations omitted).

This Court has observed that "[c]omplete preemption is really a jurisdictional rather than a preemption doctrine, as it confers exclusive federal jurisdiction in certain instances where Congress intended the scope of federal law to be so broad as to entirely replace any state-law claim." *Dennis v. Hart*, 724 F.3d 1249, 1254 (9th Cir. 2013) (internal quotation and citation removed). As a result, complete preemption "is a limited doctrine that applies only where a federal statutory scheme is so comprehensive that it entirely supplants state-law causes of action." *Id.* This high bar is not met in this case.

The mere existence of an ordinary preemption defense to a state-law claim is not enough for removal—because state courts are perfectly capable of adjudicating such defenses. *See Retail Prop. Trust v. United Broth. of Carpenters & Joiners*, 768 F.3d 938, 946-947 (9th Cir. 2014). For example, Defendants' argument—that

Plaintiffs' claims, as pleaded, cannot reach Defendants' out-of-state conduct because they are purportedly based on "transboundary" pollution (D. Br. 31-35)—is a preemption defense that Defendants can raise before the state court on remand. Even if that preemption argument were a viable defense on the merits, it would not establish complete preemption that would justify removal.

Referred to as "super preemption," complete preemption is rare and has been recognized only in three instances by the Supreme Court, none of which involve any claims related to environmental protection, let alone the Clean Air Act specifically.[5] *Retail Prop. Trust*, 768 F.3d at 947-948, fn. 5 (citations omitted). Indeed, this Court has previously rejected complete preemption in the context of other large-scale federal environmental programs. *See ARCO Envtl. Remediation, L.L.C. v. Dep't of Health & Envtl. Quality*, 213 F.3d 1108, 1114 (9th Cir. 2000) (Comprehensive Environmental Response, Compensation, and Liability Act does not completely preempt state-law action). Nor do Defendants point to any case that has held that the Act completely preempts state law. *See* D. Br. 57-58.

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

To find complete preemption, the defendant must provide proof that Congress both: (1) intended to displace the state-law cause of action; and (2) provided a substitute federal cause of action. *See Caterpillar*, 482 U.S. at 393 (complete preemption arises only when Congress has manifested its intent to "convert[] an ordinary state common-law complaint into one stating a federal claim"); *Moore-Thomas v. Alaska Airlines, Inc.*, 553 F.3d 1241, 1245–46 (9th Cir. 2009) (no complete preemption where the statute does not provide a federal cause of action). As to the second prong, Defendants fail entirely to identify any substitute federal cause of action that could provide a remedy for the injuries Plaintiffs assert. And as to the first, the Clean Air Act was plainly not intended to displace such state-law claims as the Plaintiffs bring here.

On its face, the Act shows that Congress did not intend to completely preempt state-law causes of action. In adopting the Act, Congress expressly stated that "air pollution prevention ... is the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3); *see also Connecticut. v. Envtl. Prot. Agency*, 696 F.2d 147, 151 (2d Cir. 1982) (describing Act's "cooperative federalism" approach). To those ends, Congress also included two broad savings

clauses in the Act, a citizen suit savings clause (42 U.S.C. § 7604(e)) and a states' rights savings clause (42 U.S.C. § 7416).[6]

The "states' rights" savings clause of the Act has been held to broadly protect states' authority to regulate harmful air emissions. *See*, e.g., *Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 854 (9th Cir. 2002) (as amended) (where a savings clause exists, state law is preempted only "to the extent that actual conflict persists between state and federal policies"); *Am. Fuel & Petrochemical Mfrs. v. O'Keeffe*, 134 F. Supp. 3d 1270, 1285-86 (D. Oregon 2015) (the Act's "sweeping and explicit" savings clause demonstrates that, absent an affirmative EPA finding otherwise, the states retain their "traditional authority" to regulate air pollutants), *aff'd* 903 F.3d 903 (9th Cir. 2018). And, as the Sixth Circuit has recognized, these provisions indicate Congress' intent that the states' authority to "adopt or enforce ... any requirement respecting the control or abatement of air pollution... *clearly encompasses common law standards*." *Merrick*, 805 F.3d at 690 (emphasis added); *see also In re Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation*, 488 F.3d 112, 135 (2nd Cir. 2007) (holding that state-law remedies were available to address MTBE in groundwater, and that the Act did not

[6] Defendants' brief inexplicably states that the Act has one savings clause, and mentions only the citizen suit savings clause, completely ignoring the savings clause that is most relevant here: the states' rights savings clause. *See* D. Br. 58.

completely preempt the claims). Moreover, "[i]t is also plain that state courts are parts of the 'state' for purposes of the states' rights savings clause." *Merrick*, 805 F.3d at 690. Thus, the Act's express terms foreclose any interpretation that would "leave[] no room for state law" in the field of air pollution regulation. *See New York SMSA Ltd. v. Town of Clarkston*, 612 F.3d 97, 104 (2nd Cir. 2010) (quotation marks omitted). This reservation of state authority is understandable given that Congress was legislating in an area where "[t]he States traditionally have had great latitude under the police powers...." *Rocky Mountain II*, 2019 WL 254686 at *2 (citations omitted).

In addition to being in direct tension with the cooperative federalism approach and savings provisions of the Act, Defendants' argument must fail because it is premised on unspecified federal emission limitations that they do not assert apply to them. D. Br. 56-58. Defendants, who are being sued as producers and sellers of fossil fuels, not as emitters regulated by the Act, fail to explain how the Act could completely preempt state-law claims against parties who do not assert they are regulated under the Act.[7] Nor can they. As the Supreme Court has explained, "[t]here is no federal pre-emption in vacuo, without a constitutional text

[7] In addition, the merits of any standard preemption defense would remain for the state court to resolve on remand, but have no bearing on whether removal was proper.

or a federal statute to assert it," and Defendants are unable to point to any "enacted statutory text" that would support preemption. *See Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988).

III. REMOVAL IS NOT WARRANTED ON THE BASIS OF *GRABLE* JURISDICTION.

The other recognized ground for removal under the artful pleading doctrine that Defendants raise is referred to as *Grable* jurisdiction. D. Br. 45-55. To establish *Grable* jurisdiction, Defendants must demonstrate that Plaintiffs' cases fall into a "special and small category" of cases in which "a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn v. Minton*, 568 U.S. 251, 258 (2013) citing *Grable & Sons Metal Prods. v. Darue Engineering & Mfg.*, 545 U.S. 308, 313-14 (2005). Defendants, however, establish none of the *Grable* requirements for federal jurisdiction.

As to the federal issue "necessarily raised," Defendants argue that Plaintiffs' claims touch upon various "federal interests" implicated by climate change such as national security, foreign affairs, energy policy, navigable waters, and environmental regulation. D. Br. 46, 46-52. These federal *interests* are not federal *issues* for the court to resolve. Plaintiffs request damages and equitable relief to remedy local harms resulting from the conduct of the producers and marketers of fossil fuels, not to compel the federal government to alter its national security

strategy, foreign policy, energy permitting, infrastructure plans or environmental regulations. Compl. 98, *San Mateo v. Chevron et al.*, No. 17-cv-03222 (Cal. Super. Ct.). And their claims seeking such relief turn on state issues, not federal ones. As the district court determined, Defendants' arguments amount to mere "gestur[ing] to federal law and federal concerns in a generalized way," and as a result, the court correctly held Defendants failed to raise any substantial or actually disputed federal issue. ER6-8. While it is certainly true that climate change implicates issues in which the federal government has an interest, Defendants' arguments ignore the substantial climate change impacts on states, including Amici States.

Within our state borders, climate change is causing a loss of land due to rising seas, reducing our drinking water supply by decreasing snowpack, harming air and water quality, reducing the productivity of our agriculture and aquaculture, decimating biodiversity and ecosystem health, and increasing the intensity of severe storms and wildfires. *See, e.g.*, *Massachusetts v. Envtl. Prot. Agency*, 549 U.S. 497, 522-23 (2007). Accordingly, as this Court has stated, "[i]t is well settled that the states have a legitimate interest in combatting the adverse effects of climate change on their residents." *Am. Fuel & Petrochemical Mfrs. v. O'Keeffe*, 903 F.3d 903, 913 (9th Cir. 2018) (citing *Massachusetts*, 549 U.S. at 522-523). This Court has also expressly recognized California's interest in addressing this

existential problem. *See, e.g., Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1107 (9th Cir. 2013) ("California should be encouraged to continue and to expand its efforts to find a workable solution to lower carbon emissions."). Moreover, states' "great latitude" to exercise their general police powers to protect the health and welfare of all persons belies Defendants' argument that there is an "overriding federal interest in the need for a uniform rule of decision" in cases that raise issues related to climate change. *See Rocky Mountain II*, 2019 WL 254686 at *2.

Exercising their longstanding police powers to mitigate environmental harms, States have taken substantial steps in the past years to reduce climate-altering emissions and to prepare the adaptation measures required to survive in a warming world. For example, in 2006, California passed Assembly Bill 32, the Global Warming Solutions Act, which directed the California Air Resources Board to implement measures to reduce statewide greenhouse gas emissions to 1990 levels by 2020. Cal. Health & Safety Code, § 38500 et seq. (West through Ch. 1016 of 2018 Reg. Sess.). Subsequently, California passed Senate Bill 32, which codified the State's objective to reduce emissions to forty (40) percent below 1990 levels by 2030. *Id.* Washington law requires the largest electric utilities to meet a series of benchmarks on the amount of renewables in their energy mix, and to achieve 15% reliance on renewables by 2020. Wash. Rev. Code §§ 19.285.010-19.285.903

(West through 2018 Reg. Sess.). Oregon requires its largest utilities to achieve 20% reliance on renewables by 2020 and 50% by 2040 (Or. Rev. Stat. § 469A.052 (1)(c) and (h) (West through 2018 Reg. Sess.)) and to cease reliance on coal-generated electricity by 2030 (Or. Rev. Stat. § 757.518(2) (West through 2018 Reg. Sess.)). Oregon has also adopted a Clean Fuels Program to reduce the carbon intensity of fuel. Or. Rev. Stat. §§ 468A.265 to 468A.277 (West through 2018 Reg. Sess.); Or. Admin. R. 340-253-0000 through 340.253.8100 (West through 2018 Reg. Sess.). New Jersey's Global Warming Response Act requires set levels of carbon reductions—culminating in a 2050 level that is 80% lower than the State's 2006 level—and also establishes funding for climate-related projects and initiatives. N.J. Stat. Ann. §§ 26:2C-37 to -58 (West through Ch. 169 of 2018 Reg. Sess.). And Maryland recently amended its laws to require that utilities derive twenty-five percent of their sales from renewable sources by 2020, and to encourage, through tax credits and study methods, installation of energy storage measures that will facilitate the integration of renewable energy into its energy grid. Md. Laws Ch. 1 (2017) (Pub. Utils. § 7-703(b)(15)) (West through 2018 Reg. Sess.)); Md. Laws Ch. 389 (2017) (Tax Law § 10-719 (West through 2018 Reg. Sess.)); Md. Laws. Ch. 382 (2017) (West through 2018 Reg. Sess.).

The states also have collaborated on successful regional solutions. Nine northeastern states (including several amici) are part of the Regional Greenhouse

Gas Initiative, a cap-and-trade system codified and implemented through each participating state's laws and regulations, which places increasingly stringent limits on carbon pollution from power plants. Since this initiative's implementation, the participating states have reduced power-sector carbon-dioxide emissions by forty percent. Given the critical state and local interests that are implicated by climate change—and the numerous solutions that states have been spearheading—it is simply incorrect to characterize climate change as necessarily raising uniquely federal issues that may only be adjudicated in federal court.

In any event, "the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." *Merrell Dow Pharms., Inc., v. Thompson*, 478 U.S. 804, 813 (1986); *see also Bennett v. Southwest Airlines Co.*, 484 F.3d 907, 909-910 (7th Cir. 2007) (remanding tort claims regarding airline crash despite "national regulation of many aspects of air travel"). Indeed, the compatibility of state actions with federal interests in climate change is borne out by the breadth of cases state courts already hear related to climate change. A current database of United States Climate Change litigation maintained by the Sabin Center for Climate Change Law at Columbia Law School and Arnold & Porter Kaye Scholer LLP lists 284 past and ongoing lawsuits throughout the country that raise state-law claims related to climate change, over

90% of which are being or were adjudicated in state court.[8] The claims in these cases derive from a wide range of state laws. For example, state courts routinely address climate change in the context of challenges to land-use decisions under state equivalents to the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370m-12. *See, e.g., Cleveland Nat'l Forest Found. v. San Diego Assn. of Gov'ts*, 3 Cal. 5th 497, 397 P.3d 989 (2017); *Cascade Bicycle Club v. Puget Sound Reg'l Council*, 175 Wash. App. 494, 306 P.3d 1031 (Wash. Ct. App. 2013). State courts also adjudicate the operation and validity of states' substantial regulatory efforts to reduce greenhouse gas emissions. *See, e.g. Cal. Chamber of Commerce v. State Air Res. Bd.*, 10 Cal. App. 5th 604, 614, 216 Cal. Rptr. 3d 694, 700 (Ct. App. 2017), *review denied* (June 28, 2017) (upholding California's economy-wide cap-and-trade program); *New England Power Generators Ass'n, Inc. v. Dep't of Envtl. Prot.*, 480 Mass. 398, 400, 105 N.E.3d 1156, 1158 (2018) (upholding Massachusetts' greenhouse gas emissions limits for power plants).

Defendants also argue for the presence of a "necessary" federal issue on the grounds that only a federal court may balance the gravity of the harm Plaintiffs allege versus the utility of Defendants' conduct, given that the federal government

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[8] Sabin Center for Climate Change and the Environment and Arnold & Porter Kaye Scholer LLP, *U.S. Climate Change Litigation: State Law Claims*, Climate Change Litigation Database (last visited Jan. 12, 2019), http://climatecasechart.com/case-category/state-law-claims/.

often conducts cost-benefit analyses regarding climate change. D. Br. 48-49. In support, Defendants cite to federal laws requiring the evaluation of the costs and benefits of greenhouse-gas caps and emissions trading programs and of greenhouse-gas intensity reducing strategies and practices. 42 U.S.C. §§ 13384, 13389(c)(1). But these laws have never been held to require the federal government to weigh in on climate mitigation efforts by states, including the state statutes and the multi-state trading programs noted above, and they likewise have no bearing on the common-law claims at issue here. And as the district court noted, Defendants' theory would inappropriately remove "many (if not all) state tort claims that involve the balancing of interests and are brought against federally regulated entities... ." ER6. Such an expansive view of federal jurisdiction is unsupportable.

Moreover, state courts across the country have evaluated the balancing element of nuisance claims in cases of complex and widespread environmental contamination, even when there is related federal regulation on the same topic. For example, a California appellate court held several multinational lead paint companies responsible for the abatement of lead-paint contamination in ten local jurisdictions pursuant to a public nuisance theory. *People v. ConAgra Grocery Prod. Co.*, 17 Cal. App. 5th 51, 169, 227 Cal. Rptr. 3d 499, 598 (Ct. App. 2017), *reh'g denied* (Dec. 6, 2017), *review denied* (Feb. 14, 2018), *cert. denied sub nom.*

ConAgra Grocery Prod. Co. v. California, 139 S. Ct. 377 (2018), and *cert. denied sub nom. Sherwin-Williams Co. v. California*, 139 S. Ct. 378 (2018). In *ConAgra*, the state court had to evaluate the local threat of the nationwide marketing conduct of large multinational corporations. And, as in this case, *ConAgra* involved matters subject to significant federal regulation. Among other measures, Congress banned lead paint in 1978 and the federal Centers for Disease Control set a level of concern for blood lead levels. *Id.* at 73. So too here, the state court can evaluate the impact of Defendants' marketing, consider the relevance of any federal regulation, make a determination as to the unreasonableness of Defendants' conduct under state law without resolving a federal issue, and craft an equitable remedy pursuant to state common law.

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

served in Vietnam against producers of Agent Orange, despite federal interest in the health of veterans).

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

Federal courts have also recognized that state courts should decide complex environmental tort cases. The Second Circuit remanded claims brought by the New Hampshire Attorney General and the Sacramento District Attorney against corporations that used methyl tertiary butyl ether ("MTBE") as a gasoline additive. *In re MTBE Prod. Liab. Litig.*, 488 F.3d at 136. The Second Circuit held that the mere fact that defendants "refer to federal legislation by way a defense" was insufficient to establish federal jurisdiction. While "a question of federal law [was] lurking in the background... '[a] dispute so doubtful and conjectural, so far removed from plain necessity [was] unavailing to extinguish the jurisdiction of the

states.'" *Ibid.*, citing *Gully v. First Nat'l Bank*, 299 U.S. 109, 117 (1936). The Supreme Court of New Hampshire ultimately held Exxon Mobil Corporation liable under negligence and strict liability law. *State v. Exxon Mobil Corp.*, 168 N.H. 211, 218, 220 126 A.3d 266, 273, 274 (2015). Thus, state courts have been and continue to be the proper venue for environmental tort cases such as this. To hold otherwise would upset the balance of power between state and federal courts.

A state-law claim related to climate change, without more, does not necessarily raise a federal issue warranting federal jurisdiction. *Grable* jurisdiction is therefore unwarranted in this case.

CONCLUSION

For the reasons above, amici urge this Court to affirm the decision below to remand these actions to state court.

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CERTIFICATE OF SERVICE

I certify that on January 29, 2019, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all other participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: January 29, 2019 */s/ Erin Ganahl*

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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