No. 18-16663

United States Court of Appeals for the Ninth Circuit

CITY OF OAKLAND, et al.,

Plaintiffs-Appellants,

v.

BP P.L.C., et al.,

Defendants-Appellees.

Appeal from the District Court for the Northern District of California
Nos. 3:17-cv-06011, 3:17-cv-06012 (Hon. William H. Alsup)

BRIEF OF AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLEES' PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America certifies that it is a non-profit business federation. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

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AMICUS CURIAE'S IDENTITY, INTEREST, AND AUTHORITY TO FILE[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country.

An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber often files amicus curiae briefs in cases that raise issues of concern to the nation's business community, including at the panel stage in this case, as well as in pending cases raising similar issues, see *County of San Mateo* v. *Chevron Corp.*, 960 F.3d 586 (9th Cir. 2020), pet. for reh'g pending (filed July 9, 2020); *City of New York* v. *Chevron Corp.*, No. 18-2188 (2d Cir. docketed July 26, 2018), and other cases addressing related questions about the respective roles of state and federal

[1] All parties have consented to the filing of this brief. No party's counsel authored the brief in whole or in part, no party or party's counsel contributed money intended to fund preparing or submitting the brief, and no person other than the Chamber, its members, or its counsel contributed money intended to fund preparing or submitting the brief.

law in this arena, *e.g.*, *Am. Elec. Power Co.* v. *Connecticut*, 564 U.S. 410 (2011) (*AEP*); *North Dakota* v. *Heydinger*, 825 F.3d 912 (8th Cir. 2016); *Native Vill. of Kivalina* v. *ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012).

The Chamber believes that the global climate is changing, and that human activities contribute to those changes. The Chamber believes that global climate change poses a serious long-term challenge that deserves serious solutions. And it believes that businesses, through technology, innovation, and ingenuity, will offer the best options for reducing greenhouse gas emissions and mitigating the impacts of climate change. An effective climate policy should leverage the power of business, maintain U.S. leadership in climate science, embrace technology and innovation, aggressively pursue greater energy efficiency, promote climate resilient infrastructure, support trade in U.S. technologies and products, and encourage international cooperation. See U.S. Chamber of Commerce, *Addressing Climate Change*, https://tinyurl.com/y38v5gms. The Chamber believes that governmental policies aimed at achieving these goals should come from the federal government, and in particular Congress and the Executive Branch, not a patchwork of actions under state common law.

The Chamber is concerned that allowing state common law actions such as these to proliferate would fashion a new tort that marries the broadest elements of public-nuisance and product-liability claims, but with none of the historical limits on those doctrines. See U.S. Chamber Institute for Legal Reform, *Waking the Litigation Monster: The Misuse of Public Nuisance* 28-30, 31-34 (Mar. 2019), https://tinyurl.com/y46jrhy7 (*Public Nuisance*). The doctrine of "public nuisance arose to address discrete, localized problems, not far-reaching policy matters." *Id.* at 31. "In contrast, large-scale societal challenges implicate needs and interests that can be fully addressed and balanced only by the political branches of government." *Id.* Allowing public nuisance claims like those asserted here would impose liability on businesses for decades-old conduct worldwide, that was lawful when and where it occurred, based solely on its undifferentiated global effects, even though—by the Plaintiffs' own account—countless other actors worldwide contributed to the same alleged harms. If accepted, that tort theory would sprawl into other industries, with potentially drastic consequences. See U.S. Chamber Institute for Legal Reform, *Mitigating Municipality Litigation: Scope and Solutions* 9-13, 14-18 (Mar. 2019), https://tinyurl.com/y58gygdm. Those concerns underscore why uniform legislative

and Executive action, not countless state-law nuisance suits, are the best solution to the challenges of global climate change. See *id.* at 16; *Public Nuisance* at 32-34.

INTRODUCTION

This case presents two important questions of federal civil procedure involving the relationship between the federal and state courts on matters that are important to the business community. First, this Court should grant rehearing to decide whether a district court judgment may be vacated on the ground that a removal from state court was erroneous, when the plaintiff subsequently cured any possible jurisdictional defect by voluntarily amending the complaint to add a claim that expressly arises under federal law. As the Defendants' petition explains (Pet. 17-22), there is a circuit conflict on that question and the panel's decision is wrong.

The business community has a significant interest in the proper resolution of that question. Businesses frequently seek to remove cases from state court to federal court, and it is particularly important for businesses that "jurisdictional rules should be clear," *Direct Mktg. Ass'n* v. *Brohl*, 575 U.S. 1, 14 (2015). The panel's rule, however, is unclear, inefficient, and unfair. The panel applied a vague, sliding-scale approach that is inherently

indeterminate. Cf. *Bristol-Myers Squibb Co.* v. *Superior Ct.*, 137 S.Ct. 1773, 1781 (2017) (rejecting a "sliding scale approach" to personal jurisdiction). It would unwind a federal proceeding after it was litigated to final judgment, without identifying any error in the judgment itself, causing a wasteful do-over in state court. The do-over would be particularly pointless where, as here, the district court certified its order for interlocutory review but the plaintiffs declined to pursue an appeal. And the rule creates a heads-I-win, tails-you-lose situation: If the Plaintiffs won their case "on the merits in federal court [they] could claim to have raised the federal question in [their] amended complaint voluntarily," but having lost, they could claim that it never should have been in federal court so they are "entitled to start over in state court." *Bernstein* v. *Lind-Waldock & Co.*, 738 F.2d 179, 185-86 (7th Cir. 1984). The rehearing petition fully addresses these issues, and this brief does not further discuss them.

Second, this Court should grant rehearing to determine whether a defendant can remove an ostensibly state common law tort claim to federal court on the ground that, whatever its label, that tort necessarily arises under federal common law. In thoughtful and measured decisions, the district court held that the Plaintiffs' "nuisance claims—which address the

national and international geophysical phenomenon of global warming—are necessarily governed by federal common law" and therefore belong in federal court. Order Denying Mot. to Remand 3, Dkt. 134 ("Remand Op."); see Order Granting Mot. to Dismiss 11, Dkt. 284 ("Dismissal Op.") (the "relief would effectively allow plaintiffs to govern conduct and control energy policy on foreign soil"). The court then held that Plaintiffs (the "Cities") failed to state a claim because Congress and the Executive, not the courts, must decide how best to respond to the many challenges of global climate change. Dismissal Op. 12.

On appeal, the parties forcefully disputed whether the Cities' asserted nuisance tort necessarily arises under federal common law. The Chamber filed an amicus brief in support of the Defendants arguing that it does, whereas the Cities argued that it does not. That underlying question is itself important and warrants close review.

The panel, however, made a more fundamental error by not even answering it. Without discussion, the panel asserted that the only situations in which a court will look beyond a plaintiff's invocation of state law are when (1) there is "complete preemption" by a "federal statute"; or (2) the case fits within the "special and small category" under *Grable & Sons*

Metal Products, Inc. v. *Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), of state-law claims that nonetheless arise under federal law because federal law is an element. See Op. 15, 17. The panel thus denied the existence of federal jurisdiction in an additional category that this Court's own cases recognize and upon which the district court relied, namely, for tort claims that "necessarily arise under federal common law." Remand Op. 7-8 (relying on *Wayne* v. *DHL Worldwide Express*, 294 F.3d 1179, 1184 (9th Cir. 2002)). The panel merely noted that it was "not clear" whether consideration of the nuisance claim would require application of federal common law. Op. 19.

The panel's cramped understanding of federal-question jurisdiction warrants rehearing. As the petition for rehearing shows (Pet. 8-12), there are intra- and inter-circuit conflicts as to whether this additional category exists. Indeed, the panel decision conflicts with the very circuit precedent on which the district court relied. See *Wayne*, 294 F.3d at 1184-1185.

The Chamber submits this brief to emphasize three points: First, the rule the district court applied—that federal jurisdiction exists over a tort claim that, notwithstanding a state-law label, necessarily arises under federal common law—is consistent with the well-pleaded complaint rule and

its corollary, the "artful pleading" doctrine. Second, exercising jurisdiction over such a claim advances the purposes of federal-question jurisdiction without undermining the general purposes of the well-pleaded complaint rule. Third, the question is important to the business community. Businesses are often defendants in tort suits, and the upshot of the panel's ruling is that state courts (not federal courts) will decide whether to fashion novel torts governing economic activity nationwide or worldwide. Doing so requires considering the broader national interest and the international repercussions of extraterritorial regulation by tort. The panel's approach, by contrast, favors local concerns without adequately considering the national interest, raising the threat of a panoply of overlapping legal obligations imposed on conduct in different states and countries. Indeed, individuals and businesses could be held liable in California for activities that were perfectly lawful in the other states or countries where they occurred. The Chamber respectfully submits that the federal courts (not a state court) should decide whether to create such a global-effects nuisance claim, and that the panel's approach to federal-question removal systematically discounts the strong national interests at play.

ARGUMENT

I. A Tort That Nominally Arises Under State Law May Be Removed To Federal Court On The Ground That It Could Only Arise Under Federal Common Law

A. A Plaintiff Cannot Defeat Federal Jurisdiction Merely By Asserting That A Tort Arises Under State Common Law, When Only Federal Common Law Could Create It

Regardless of the plaintiff's choice of label, a tort claim arises under federal common law if that is the only body of law that could create it. Such a case arises under federal law because "the dispositive issues stated in the complaint" necessarily "require the application of federal common law." *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 100 (1972) (*Milwaukee I*); see *Wayne*, 294 F.3d at 1184-1185. And it is well-settled that, "[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law." *AEP*, 564 U.S. at 421 (quoting *Milwaukee I*, 406 U.S. at 103).

This is not a question of preemption as a defense to a well-pleaded complaint; it is the federal common law variant of the "artful pleading" doctrine. "Allied as an 'independent corollary' to the well-pleaded complaint rule is the further principle that 'a plaintiff may not defeat removal by omitting to plead necessary federal questions.'" *Rivet* v. *Regions Bank of Louisiana*, 522 U.S. 470, 475 (1998) (citation omitted). And although the Supreme Court has only had occasion to apply the artful-pleading doctrine

in the context of complete preemption via statute, the underlying principle is broader: "A plaintiff may not avoid federal jurisdiction … by casting in state law terms a claim that can be made only under federal law." *Easton* v. *Crossland Mortg. Corp.*, 114 F.3d 979, 982 (9th Cir. 1997); see 14C Charles Alan Wright & Arthur Miller, *Federal Practice & Procedure* § 3722.1 (rev. 4th ed. 2018) ("[A] plaintiff cannot frustrate a defendant's right to remove by pleading a case without reference to any federal law when the plaintiff's claim is necessarily federal.").

Although complete preemption is the "most common way that federal questions are disguised as matters of state law," *Hansen* v. *Grp. Health Coop.*, 902 F.3d 1051, 1057 (9th Cir. 2018) it is not the only way. Other courts have recognized that the "artful pleading" doctrine is not limited to situations involving complete preemption by statute. *E.g.*, *Mikulski* v. *Centerior Energy Corp.*, 501 F.3d 555, 560-565 (6th Cir. 2007) (describing them as "related exception[s]" but analyzing them independently); *Sullivan* v. *Am. Airlines, Inc.,* 424 F.3d 267, 272 (2d Cir. 2005) ("The artful-pleading doctrine *includes within* it the doctrine of complete preemption." (emphasis added)); see also 14C Wright & Miller § 3722.1 (noting that, although

"some courts have suggested" otherwise, "most federal courts" have not embraced the view that "the artful-pleading exception to the well-pleaded complaint rule is coextensive with the complete preemption doctrine"). Otherwise, simply by asserting that a tort arises under "state common law," a plaintiff could unilaterally prevent federal court involvement, no matter how strong the national or international implications. The whole point of the "artful pleading" doctrine, however, is to prevent that kind of superficial circumvention of federal authority.

There is also no sound basis for distinguishing between artful pleading of claims that necessarily arise under federal statutory law, on one hand, from artful pleading of claims that necessarily arise under federal common law, on the other. Either way, the cause of action raises a "necessary federal question," *Rivet*, 522 U.S. at 475, and thus arises under federal law. See also *Lippitt* v. *Raymond James Fin. Servs., Inc.*, 340 F.3d 1033, 1041-1042 (9th Cir. 2003) (noting that "courts have used the artful pleading doctrine" where "the claim is necessarily federal in character"); cf. Richard H. Fallon, Jr., et al., *Hart & Weschler's The Federal Courts and the Federal System* 818 (7th ed. 2015) ("No plausible reason was ever advanced why—once a claim was determined to rest on federal rather than state

law—the appropriateness of and need for a federal forum should turn on whether the claim arose under a federal statute or under federal common law.").

The Supreme Court has also stated that its precedents "squarely contradict[]" the view that complete preemption cannot occur unless federal law provides a remedy. *Caterpillar* v. *Williams*, 482 U.S. 386, 391 n.4 (1987). "The breadth or narrowness of the relief which may be granted under federal law … is a distinct question from whether the court has jurisdiction over the parties and the subject matter." *Id.*; see Pet. 14-17; see also *Lippitt*, 340 F.3d at 1046 ("We have found no case holding that the want of a federal remedy creates an automatic right to a remand of a removed claim to state court."). Moreover, this is not a situation in which federal common law would be substituting for an otherwise preexisting state-law remedy. The Cities here seek to establish a novel boundary-less tort that a state lacks constitutional authority to create in the first place. A single state cannot "impos[e] its regulatory policies on the entire Nation," *BMW of N. Am.* v. *Gore*, 517 U.S. 559, 571, 585 (1996), much less the entire planet. Only federal common law could create or govern such a tort, and the question of whether to create it thus arises under federal law.

B. Allowing Removal Advances The Purposes Of Federal-Question Jurisdiction Without Undermining The Purposes Of The Well-Pleaded Complaint Rule

"[F]ederal question jurisdiction is granted to provide a federal trial forum for the vindication of federally-created rights" and "'to resort to the experience, solicitude, and hope of uniformity' of the federal trial court for the interpretation of federal law." 13D Wright & Miller § 3562 (3d ed. 2008) (quoting *Grable*, 545 U.S. at 312); see *Savoie* v. *Huntington Ingalls, Inc.*, 817 F.3d 457 (5th Cir. 2016), *overruled on other grounds by Latiolais* v. *Huntington Ingalls, Inc.*, 951 F.3d 286 (5th Cir. 2020) (en banc) (describing federal jurisdiction as based on "a desire to have the federal courts decide … federal issues").

Here, the key question is who decides the fate of this novel boundaryless tort: A state court with an inherently local focus, or a federal court with an inherently national perspective? To ask the question is to answer it. For example, the Supreme Court has emphasized that "only a federal common law" can supply the needed "uniform standard" when dealing with "the environmental rights of a State against improper impairment by sources outside its domain." Remand Op. 3 (quoting *Milwaukee I*, 406 U.S. at 107 n.9).

And as the district court recognized, the "nature of the controversy" in "interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations" here makes it "inappropriate for state law to control." *Id.* (quoting *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981)). A federal court with its inherently national perspective—not a state court in the very state that is being asked to regulate activity outside its jurisdiction—should make the weighty decision whether this is necessarily such a case, taking into account the broader national interest (and potential foreign-relations impacts) such a decision would implicate.

Conversely, the panel's approach would not meaningfully advance the purposes of the well-pleaded complaint rule. The "longstanding policies" underlying that rule are (1) to make the plaintiff the "master of the complaint," enabling him "to have the cause heard in state court" by "eschewing claims based on federal law"; (2) to avoid "radically expand[ing] the class of removable cases, contrary to the '[d]ue regard for the rightful independence of state governments'"; and (3) to provide a "quick rule of thumb." *Holmes Grp., Inc.* v. *Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831-832 (2002) (citations omitted).

First, the panel's approach does not advance the interest in making the plaintiff the "master of the complaint." If a plaintiff chooses to advance a tort that only federal common law could create, then that plaintiff has not actually "eschew[ed]" a federal claim. *Id.* at 832. She has instead chosen to plead a federal common law claim the defendant has a right to remove, notwithstanding a disclaimer to the contrary.

Second, the panel's approach will not meaningfully protect the size of the federal docket or the rightful independence of the states. This exception only comes into play when, by definition, a state lacks the independence in the first place to create the tort; only federal law could. Furthermore, federal common law jurisdiction exists only for the few, narrow "'subjects within national legislative power where Congress has so directed' or where the basic scheme of the Constitution so demands." *AEP*, 564 U.S. at 421 (citation omitted). It will accordingly be a rare case that is pleaded as if it arises under state common law but necessarily arises under federal common law.

Third, although the well-pleaded complaint rule creates a "quick rule of thumb," the panel's approach will do little to make the overall question of federal jurisdiction less thorny. In a situation in which a tort necessarily

arises under federal common law, the defendants will typically have reasonable arguments that the claim also falls within federal jurisdiction for other reasons, including under *Grable*. See Op. 14-17. But the Supreme Court in *Grable* declined to adopt a "single, precise, all-embracing" rule, 545 U.S. at 314, and instead adopted a nuanced, context-sensitive test. Given the overlap in the analyses, which focus on many of the same issues, determining whether the cause of action necessarily arises under federal common law is thus unlikely to add appreciably more complexity.[2]

C. The Business Community Has A Significant Interest In Having A Federal Court Decide Whether These Kinds Of Cases Necessarily Arise Under Federal Common Law

The business community has a strong interest in ensuring that a federal court, not a single state court, makes the key decision of whether to create a tort that is so national in character that only federal common law could create it. Businesses are often defendants, and they remove cases to federal courts for many reasons, including to avoid local favoritism, to benefit from the expertise of the federal bench, or to mitigate anti-federal bias. Moreover, businesses often operate in multiple states or countries, and

[2] For the reasons stated in the petition for rehearing, the Chamber agrees that the panel's *Grable* analysis was flawed.

thrive under predictable legal rules. The prospect of a single state court fashioning a novel nuisance tort to set national or international regulatory policy in any arena would sharply undermine that predictability and potentially subject businesses to a welter of overlapping and inconsistent legal obligations. See, *e.g.*, *Int'l Paper Co.* v. *Ouellette*, 479 U.S. 481, 497 (1987) (allowing a non-source state to regulate out-of-state discharges via tort would make it "virtually impossible to predict the standard for a lawful discharge into an interstate body of water" (citation omitted)). As the district court observed, when the challenged conduct and its effects are "universal," "[a] patchwork of fifty different answers to the same fundamental global issue would be unworkable." Remand Op. 4.

The facts of this case vividly illustrate the point. Everybody in this case "accepts the science behind global warming" and that "[t]he dangers raised in the complaints are very real." Dismissal Op. 15. But "those dangers are worldwide. Their causes are worldwide. The benefits of fossil fuels are worldwide. The problem deserves a solution on a more vast scale than can be supplied by a district judge or jury in a public nuisance case." *Id.*; see *North Carolina ex rel. Cooper* v. *Tenn. Valley Auth.*, 615 F.3d 291, 302, 306 (4th Cir. 2010) (describing a "patchwork" of nuisance tort-remedies as

"likely inferior to system-wide analysis of where changes will do the most good," noting that "[a] company, no matter how well-meaning," could not "determine its obligations ex ante under such a system").

The Cities press a theory the district court described as "breathtaking," reaching "the sale of fossil fuels anywhere in the world, including all past and otherwise lawful sales, where the seller knew that the combustion of fossil fuels contributed to the phenomenon of global warming." Dismissal Op. 6. That theory would be indifferent to state and national borders. It would ignore the legality of the conduct when and where it occurred. It would disregard the undifferentiated and global nature of the resulting emissions. And it would lack any other limiting factor or nexus to the state.

Any such tort would have no stopping point. The Cities have sued a handful of large energy companies, but "anyone who supplied fossil fuels with knowledge of the problem would be liable." *Id.* The operator of a local gas station in Corpus Christie, Texas, would be liable. Because the Cities have offered no basis to limit their "universal" theory to domestic sales, see Remand Op. 4-6, the operator of a local gas station in Kathmandu, Nepal, would be liable as well. And the Cities have disclaimed any effort to cabin

the theory, describing their allegations of promotion of faulty science as a mere "plus factor" rather than an essential element of their claim. *Id.*

The Cities have sought to invoke the state's traditional police power, comparing (Br. 12) their novel theory to public nuisance claims against manufacturers of lead paint used in residential housing in California, see *People* v. *ConAgra Grocery Prods. Co.*, 17 Cal. App. 5th 51 (2017), or producers of dry-cleaning chemicals that were used in California and then leached into the groundwater, see *City of Modesto* v. *Dow Chem. Co.*, 19 Cal. App. 5th 130 (2018). But whatever the merits of those actions, the global-effects tort the Cities seek to create would be different in kind. The alleged nuisance in those cases "was caused by a product's use *in California*." Remand Op. 5 n.2. The Cities, by contrast, disclaim any such limit, avowedly seeking compensation for the local manifestations of a global problem caused by undifferentiated global conduct. See *id.*

As the district court aptly noted, "Plaintiffs' claims, though pled as state-law claims, depend on a global complex of geophysical cause and effect involving all nations of the planet (and the oceans and atmosphere). It necessarily involves the relationships between the United States and all

other nations. It demands to be governed by as universal a rule of apportioning responsibility as is available." *Id.* at 8. Only federal common law could supply such a universal tort. State law cannot. In particular, the decision to create such a universal tort—with such national and international ramifications—inherently impacts the national interest. The panel's approach to the well-pleaded complaint rule, however, systematically discounts the strong national interests here by leaving that inherently federal question in the hands of a single local judge. The Chamber respectfully submits that rehearing is warranted.

CONCLUSION

The Court should grant the petition for rehearing.

Respectfully submitted,

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July 20, 2020

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 20, 2020. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Zachary D. Tripp
Zachary D. Tripp

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Ninth Circuit Rule 29-2(c)(2) because, excluding parts of the document exempted by Federal Rule of Appellate Procedure 32(f), it contains 4,079 words.

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