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.	No. 18-15499 No. 17-cv-4929-VC N.D. Cal. Hon. Vince Chhabria
CITY OF IMPERIAL BEACH, Plaintiff-Appellee, v. CHEVRON CORPORATION, *et al.*, Defendants-Appellants.	No. 18-15502 No. 17-cv-4934-VC N.D. Cal. Hon. Vince Chhabria
COUNTY OF MARIN, Plaintiff-Appellee, v. CHEVRON CORPORATION, *et al.*, Defendants-Appellants.	No. 18-15503 No. 17-cv-4935-VC N.D. Cal. Hon. Vince Chhabria
COUNTY OF SAN MATEO, Plaintiff-Appellee, v. CHEVRON CORPORATION, *et al.*, Defendants-Appellants.	No. 18-16376 Nos. 18-cv-450-VC, 18-cv-458-VC, 18-cv-732-VC N.D. Cal. Hon. Vince Chhabria

BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF REHEARING EN BANC

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INTEREST OF THE AMICUS CURIAE[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 three 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, like this one, that raise issues of concern to the nation's business community.

The Chamber has a strong interest in legal and policy issues relating to climate change. The global climate is changing, and human activities contribute to these changes. There is much common ground on which all sides could come together to address climate change with policies that are practical, flexible, predictable, and durable. The Chamber believes that durable climate policy must be made by Congress, which should both encourage innovation and investment to ensure significant emissions reductions and avoid economic harm for businesses, consumers, and disadvantaged communities. *See, e.g.*, Press Release, Sen. Sheldon

[1] All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no entity or person, aside from amicus curiae, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

Whitehouse, *New Bipartisan, Bicameral Proposal Targets Industrial Emissions for Reduction* (July 25, 2019), https://tinyurl.com/y49xfg3a (reporting the Chamber's support for the bipartisan Clean Industrial Technology Act). U.S. climate policy should recognize the urgent need for action, while maintaining the national and international competitiveness of U.S. industry and ensuring consistency with free enterprise and free trade principles. *See* U.S. Chamber of Commerce, Our Approach to Climate Change, https://www.uschamber.com/climate-change-position. Governmental policies aimed at achieving these goals should not be made by the courts, much less by a patchwork of actions under state common law.

INTRODUCTION AND SUMMARY OF ARGUMENT

Relying on *City of Oakland v. BP PLC*, 969 F.3d 895, 905 (9th Cir. 2020), the panel decision here allows artful pleading to keep an inherently federal case out of federal court. Contravening prior Ninth Circuit precedent and splitting with other circuits, *Oakland* and the panel decision here have artificially constricted the artful pleading doctrine, so that it can be triggered *only* where a federal statute provides an exclusively federal cause of action ("complete preemption"). But the artful pleading doctrine is not limited to complete preemption cases. What matters for artful-pleading purposes is whether the nature of a claim is inherently federal—here, for reasons going directly to the structure of our federal union—even if Congress has not given the plaintiff a different, statutory right of action. In such a case, the

plaintiffs' artful refusal to attach the label "federal common law" to their claims does not matter.

That conclusion, which is required by the artful pleading doctrine, is entirely consistent with the well-pleaded complaint rule. That rule respects a plaintiff's deliberate choice to present a state-law claim in state court. But there is no such choice available where there can *be* no state-law claim. In the narrow, discrete, and easily identifiable subset of cases where federal common law governs, a state common law cause of action cannot exist.

This dispute falls in this narrow category of cases. Plaintiffs' claims regarding the harm arising from the effects of global climate change are exactly the sort of interstate and international claims that require the application of federal common law. The plaintiffs may purport to assert a localized harm, but the alleged cause of that harm is anything but local—an inherently global phenomenon that is caused by parties and activities not only in every city, county, and state in the United States, but in every country on the planet.

The gap in federal jurisdiction that the panel decisions in *Oakland* and this case have created is particularly pernicious, because the few domains where federal common law controls are those where federal jurisdiction is the *most* important—and where state-court jurisdiction would be most problematic. Sending this case, and the many others pending throughout the circuit, back to the various state courts

would greatly increase the likelihood of inconsistent judgments on inherently federal, and highly complex, questions of law of great importance, resulting in a patchwork of inconsistent judge-made law. The Court should reconsider this erroneous precedent.

ARGUMENT

I. The panel relied on circuit precedent that misconstrues federal jurisdiction and must be reconsidered.

A. *Oakland* construes the well-pleaded complaint rule too narrowly, and conflicts with this Court's prior decisions on artful pleading and federal common law.

Although generally "the party who brings suit is master to decide what law he will rely upon," "a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint." *Franchise Tax Bd. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 22 (1983). This principle, known as the "artful pleading" doctrine, makes crystal clear that where the cause of action is "inherently federal," plaintiffs cannot avoid federal jurisdiction just by refusing to acknowledge that federal character in their complaint. 14C Wright & Miller, *Federal Practice & Procedure* § 3722.1 (4th ed.).

The panel, following *Oakland*, concluded that the artful pleading doctrine applies *only* where a federal statute completely displaces state-law causes of action in favor of a federal one—that is, that the doctrine applies only in "complete preemption" cases. Op. 25-26. But as this Court and others have recognized, artful

pleading is not so narrowly defined: "[C]oextensiveness of the complete preemption and artful pleading doctrines has not been expressly embraced by most federal courts . . . ." 14C Wright & Miller, *supra*, § 3722.1; 15A *Moore's Fed. Practice—Civil* § 103.43 (2022) ("[T]he view that the artful pleading exception is the same as the complete preemption doctrine . . . . would not appear to be necessarily accurate . . . . Perhaps a better expression is that the complete preemption doctrine is a specific application of the artful pleading doctrine."). Complete preemption has been a "traditional example" of the artful-pleading doctrine, *Brennan v. Sw. Airlines Co.*, 134 F.3d 1405, 1409, *amended*, 140 F.3d 849 (9th Cir. 1998), but it is not the only one.

Before *Oakland* and this case, this Court had never before held that jurisdictional scrutiny for artful pleading applies *only* when there is a federal statutory cause of action that the plaintiff has chosen not to invoke. To the contrary, this Court has recognized that "complete preemption" and "federal common law" are *different* "theories that might support federal question jurisdiction." *Wayne v. DHL Worldwide Express*, 294 F.3d 1179, 1183 (9th Cir. 2002).

The "complete preemption or bust" version of the artful-pleading doctrine, employed in this case and in *Oakland*, conflicts most starkly with this Court's decisions concerning other exclusively federal areas, such as government contracting, where "the federal interest requires that the rule must be uniform

throughout the country." *New SD, Inc. v. Rockwell Int'l Corp.*, 79 F.3d 953, 955 (9th Cir. 1996) (citation omitted). No federal statute creates an express right of action for suits between government contractors and their subcontractors, so that type of claim does not involve "complete preemption" as the panels in *Oakland* and this case understood it. Op. 26. Yet this Court has correctly held that because "on government contract matters having to do with national security, state law is totally displaced by federal common law[,] . . . it follows that the question arises under federal law, and federal question jurisdiction exists." *New SD*, 79 F.3d at 955.

That is so even if the plaintiff insists that it brings "purely state law claims." *Id.* at 954; *accord, e.g.*, *Wayne*, 294 F.3d at 1184-85 (discussing federal common law claims for loss or damage to goods by air carriers). There is no principled reason for excluding the governance of federal common law as a basis for removal jurisdiction as the panel did here, given that federal common law applies when it is the *only* law that may be applied, making the underlying claim "inherently federal" in nature. In short: "[I]f the cause of action arises under federal common law principles, jurisdiction may be asserted," even where there is no complete preemption. *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 924, 926, 929, 931 (5th Cir. 1997); *see also In re Otter Tail Power Co.*, 116 F.3d 1207, 1214-15 (8th Cir. 1997) (holding that case necessarily presented a federal question because it "raise[d] important questions of federal law," including "the federal common law of

inherent tribal sovereignty"; a federal common law question as to such sovereignty "is manifestly a federal question").

1. Federal common law claims are inherently federal in nature and give rise to federal jurisdiction.

"There is no federal *general* common law," *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (emphasis added), but federal courts may "fashion federal law" in limited areas "where federal rights are concerned," *Illinois v. City of Milwaukee (Milwaukee I)*, 406 U.S. 91, 103 (1972) (citation omitted), such as "the rights and obligations of the United States," or "the conflicting rights of States or our relations with foreign nations." *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 & n.13 (1981); *see also Sam Majors*, 117 F.3d at 927 n.8 (noting that on "the same day *Erie* was decided, the Supreme Court released an opinion in which Justice Brandeis, the author of *Erie*, relied upon federal common law to resolve a case." (citing *Hinderlider v. La Plata River Co.*, 304 U.S. 92 (1938))). In those areas where "especial federal concerns" are implicated, the only claim that can be pleaded is a federal one, as federal common law governs where the nature of the claim "makes it inappropriate for state law to control." *Tex. Indus.*, 451 U.S. at 641 & n.13. And a claim governed by federal common law provides district courts with federal-question jurisdiction. *Milwaukee I*, 406 U.S. at 100 ("[Section] 1331 jurisdiction will support claims founded upon federal common law as well as those of a statutory origin.").

One area ripe for the "fashioning" of federal common law is the protection of the air and water that cross state lines: "When we deal with air and water in their ambient or interstate aspects, there is a federal common law . . . ." *Id.* at 103 (citing *Texas v. Pankey*, 441 F.2d 236 (10th Cir. 1971)); *see, e.g.*, *Hinderlider*, 304 U.S. at 110 ("[W]hether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive." (citations omitted)). "Environmental protection" is "undoubtedly an area 'within national legislative power'" in which it is appropriate for federal courts to "fill in 'statutory interstices,' and, if necessary, even 'fashion federal law.'" *Am. Elec. Power Co. v. Connecticut (AEP)*, 564 U.S. 410, 421 (2011) (citation omitted).

The panel decisions in this case and in *Oakland* should be revisited to conform with this precedent. If federal common law governs, that necessarily means that state law *cannot* apply. *Accord New SD*, 79 F.3d at 955 ("state law is totally displaced by federal common law" where "the federal interest requires" a nationally uniform rule).

2. Statutory displacement of a federal common law claim does not make the claim any less "federal" in character.

The panel decision in this case focuses on whether resolving the state-law claims *as state-law claims* would necessarily raise a disputed issue of federal common law under *Grable & Sons Metal Products, Inc. v. Darue Engineering &*

Manufacturing, 545 U.S. 308 (2005). Op. 25. But *Grable* represents a different theory of federal jurisdiction than artful pleading, and does not substitute for it. And however pleaded, a claim governed by federal common law *can only be* "inherently federal."

The panel reasoned that Plaintiffs' state-law tort claims "do not 'require resolution of a substantial question of federal law,'" as any federal common law claim is "displaced by the Clean Air Act." Op. 25 (citing *Oakland*, 969 F.3d at 906). Because federal common law is displaced, the panel reasoned, Plaintiffs' tort claims could proceed under state law.

With respect, that reasoning cannot be squared with the Supreme Court's explanation that where federal common law arises, state law cannot govern. *Tex. Indus.*, 451 U.S. at 641 & n.13 (federal common law governs where the nature of the claim "makes it inappropriate for state law to control"); *Milwaukee I*, 406 U.S. at 107 n.9 ("Until the field has been made the subject of comprehensive legislation or authorized administrative standards, only a federal common law basis can provide an adequate means for dealing with such claims as alleged federal rights."); *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 313 n.7 (1981) (*Milwaukee II*) ("[I]f federal common law exists, it is because state law cannot be used."). Displacement of federal common law does not make state law capable of resolving interstate disputes.

Thus, as the Second Circuit explained in rejecting a similar municipal climate-nuisance action, the notion that a state law claim may "snap back into action" once federal law is displaced is "difficult to square with the fact that federal common law governed [the] issue in the first place." *City of N.Y. v. Chevron Corp.*, 993 F.3d 81, 98 (2d Cir. 2021); *cf. Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987) ("implicit corollary" of *Milwaukee I* is that state common law is replaced by federal common law). When a federal statute displaces federal common law, it eliminates the causes of action or remedies that might have been available under the common law—it does not allow state-law claims into an area that is exclusively federal in character. Thus, for example, States may surrender their federal common-law cause of action over water rights in an interstate compact. *See Hinderlider*, 304 U.S. at 104-05. But that does not invite state-law causes of action that otherwise are plainly displaced by federal common law. *See id.* at 110.

Until these cases, this Court's case law has correctly conceptualized statutory displacement as the displacement of causes of action or remedies, not of federal jurisdiction. *See Native Vill. of Kivalina v. ExxonMobil Corp.,* 696 F.3d 849, 856 (9th Cir. 2012) (displacement means that federal common law "does not provide a remedy"); *id.* at 857 ("displacement of a federal common law right of action means displacement of remedies"). Likewise, in *AEP*, the Supreme Court explained that the scope of the displacement was determined by the "reach of remedial provisions"

available in the displacing statute. 564 U.S. at 425 (citing *Cty. of Oneida v. Oneida Indian Nation*, 470 U.S. 236, 237-39 (1985)); *see also Milwaukee II*, 451 U.S. at 332 (observing that Congress's changes to the Clean Water Act meant that "no federal common-law remedy was available").

The displacement question "is whether the field has been occupied, not whether it has been occupied in a particular manner." *Milwaukee II*, 451 U.S. at 324. When a state law claim is impermissible because of the federal nature of the interests at stake, and federal common law is displaced by a federal statute, the case continues to arise under federal law and establish federal jurisdiction. The fact that federal common law provides no *remedy* does not make the interests at stake any less federal; it means only that Congress has exercised its right to make rules for an exclusively federal area.

Here, the claims concerning interstate pollution do not become any less "interstate" because the Clean Air Act displaces federal common law. The panel's reasoning looks nothing like displacement by Congress; it is replacement of Congress—by state courts.

B. Removal of federal common law claims, however they are labeled, is wholly consistent with the policies underlying the well-pleaded complaint rule.

Three "longstanding policies" justify the ordinary application of the well-pleaded complaint rule: (1) respect for the plaintiff's deliberate choice to "eschew[]

claims based on federal law, . . . to have the cause heard in state court"; (2) avoiding the radical expansion of "the class of removable cases, contrary to the '[d]ue regard for the rightful independence of state governments'"; and (3) preventing the "undermin[ing] [of] the clarity and ease of administration of the well-pleaded complaint doctrine, which serves as a 'quick rule of thumb' for resolving jurisdictional conflicts." *Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831-32 (2002) (citation omitted). Each of those policies is completely consistent with upholding the removal of federal common law claims, including federal common law claims set forth in an artfully pleaded complaint that attempts to recast such claims as state-law claims.

First, a plaintiff cannot choose the law and forum when the plaintiff alleges a common-law claim that is inherently federal; where federal common law applies, there is no state-law option to choose. One of the main purposes of the well-pleaded complaint rule is to honor the plaintiff's choice of bringing a claim "in state court under state law." *Id.* at 832. But, as explained above, where federal common law governs, the "implicit corollary" is that there is no state law to apply. *Ouellette*, 479 U.S. at 488; *see also Milwaukee II*, 451 U.S. at 313 n.7 ("If state law can be applied, there is no need for federal common law; if federal common law exists, it is because state law cannot be used."). That corollary is best demonstrated in cases where federal common law necessarily governs because the claim is interstate and

international in nature; transboundary issues cannot be resolved by a patchwork of state courts applying local law in an uncoordinated manner. *E.g.*, *New York*, 993 F.3d at 85-86 ("Global warming presents a uniquely international problem of national concern. It is therefore not well-suited to the application of state law."); *Grynberg Prod. Corp. v. British Gas, p.l.c.*, 817 F. Supp. 1338, 1356 (E.D. Tex. 1993) ("International relations are not such that both the states and the federal government can be said to have an interest; the states have little interest because the problems involved [in international relations] are uniquely federal." (citation and internal quotation marks omitted)).

Second, there is no risk of flooding federal courts with a new wave of removal cases premised on federal common law. *Holmes*, 535 U.S. at 832 (2002); *Nevada v. Bank of Am. Corp.,* 672 F.3d 661, 675 (9th Cir. 2012) (federal-question jurisdiction must be "consistent with congressional judgment about the sound division of labor between state and federal courts" (citation and internal quotation marks omitted)). Federal common law plays "a necessarily modest role," *Rodriguez v. FDIC*, 140 S. Ct. 713, 717 (2020), and thus the "instances where [federal courts] have created federal common law are few and restricted," *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963). *See Tex. Indus.*, 451 U.S. at 641 (federal common law exists only in "narrow areas"). In those few areas where federal common law applies, there is little

risk of intruding upon the "independence of state governments," as those areas necessarily fall outside state authority. *Holmes*, 535 U.S. at 832 (citation omitted).

Conversely, failing to recognize federal common law claims for what they are, just because the plaintiff refuses to acknowledge it, risks allowing state courts and state law to intrude upon federal priorities. As the Second Circuit has warned, attempting to apply state law in a domain governed by federal common law risks "upsetting the careful balance" of federal prerogatives. *New York*, 993 F.3d at 93. In a case very similar to this one that presented claims for relief based on climate change, the Supreme Court made clear that "[e]nvironmental protection" is one such area that is "undoubtedly . . . within *national* legislative power, one in which federal courts may fill in statutory interstices and, if necessary, even fashion federal law." *AEP*, 564 U.S. at 421 (emphasis added, citation and internal quotation marks omitted); *see id.* (quoting *Milwaukee I*, 406 U.S. at 103); *id.* at 422 (noting not only that the subject of tort law claims based on climate change "is meet for federal law governance," but that "borrowing the law of a particular State would be inappropriate" for federal common law claims based on climate change).

Finally, using the artful pleading doctrine to recognize federal jurisdiction in cases presenting federal common law claims does not make the well-pleaded complaint rule any more complicated to apply. It is not difficult to identify the few narrow areas of the law that raise the sorts of "especial federal concerns to which

federal common law applies." *Tex. Indus.*, 451 U.S. at 641 n.13; *e.g.*, *id.* at 641 (identifying several "narrow areas" in which federal common law applies). The subject of "air and water in their ambient or interstate aspects," *AEP*, 564 U.S. at 421 (quoting *Milwaukee I*, 406 U.S. at 103), is one such narrow category, and a claim of harm resulting from global climate change fits squarely into it.

II. The importance of national uniformity on climate-change claims warrants en banc review.

Climate change is an international and interstate phenomenon. And it is "the interstate or international nature of [a] controversy" like this one that makes it *necessary for* federal law, not state law, to govern. *Tex. Indus.*, 451 U.S. at 641. Yet the panel decisions in this case and *Oakland* would have these literally global controversies addressed in precisely the opposite fashion—by local trial judges in county courthouses.

This issue will replicate itself more broadly if these two panel decisions remain the law of the circuit. In the handful of areas governed by federal common law, Congress may or may not choose to provide a particular federal cause of action. But limiting artful pleading to cases of complete preemption, as the panel decisions do, means that wherever Congress has not provided an express right of action, plaintiffs are exempt from scrutiny for artful pleading—and exclusively federal areas of law become the purview of state courts.

These climate-related cases are a stark example. The panel decisions in *Oakland* and this case leave claims of global and interstate emissions to be decided by disparate state common law on public nuisance. The resulting fragmentation will hamper an effective federal response to climate change. Public nuisance is an amorphous cause of action, "often vague and indeterminate," *Milwaukee II*, 451 U.S. at 317, and state nuisance law is poorly suited for "regulat[ing] the conduct of out-of-state sources." *Ouellette* 479 U.S. at 495; *id.* at 495-96 (noting that the "[a]pplication of an affected State's law to an out-of-state source also would undermine the important goals of efficiency and predictability in the [Clean Water Act's] permit system"); *see also* Jonathan H. Adler, *A Tale of Two Climate Cases*, 121 Yale L.J. Online 109, 112 (2011) ("[T]he application of variable state standards to matters of a global, interjurisdictional concern could further frustrate the development of a coherent climate change policy.").

Even if every state were to follow a uniform standard of public nuisance—which they will not—they would still disagree over what the articulated standard requires, and how to account for their own particular sovereign interests. As a result, if state courts were to rely on "the vagaries of public nuisance doctrine" to decide cases involving interstate emissions, "it would be increasingly difficult for anyone to determine what standards govern." *North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 298 (4th Cir. 2010).

And those courts would be charged with implementing remedies that would have national and international consequences, with only the limited tools available to state courts applying state law; that would, in turn, leave state courts in the unenviable position of serving as global environmental regulators. "Energy policy cannot be set, and the environment cannot prosper, in this way." *Cooper*, 615 F.3d at 298. State-court lawsuits are simply not fit for the task.

There are already multiple lawsuits within this Circuit affected by the decision in this case and the underlying *Oakland* precedent. *Oakland* was only recently remanded to the district court, and lawsuits from Honolulu and Maui are pending before this Court, *City & Cnty. of Honolulu v. Sunoco LP*, No. 21-15313; *County of Maui v. Chevron USA Inc.*, No. 21-15318. This Court should reaffirm the *federal* nature of claims based on global climate change before the many different state courts take hold of such claims and begin working on their own distinct local patches of judge-made regulation.

CONCLUSION

The Court should rehear this case en banc.

Dated: May 27, 2022

Respectfully submitted,

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This brief complies with the type-volume limitation of Circuit Rule 29-2(c)(2) because it contains 4105 words, excluding the parts exempted by Rule 32(f).

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