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## THE UNLIKELY RENAISSANCE OF FEDERAL COMMON LAW IN THE SECOND WAVE OF CLIMATE CHANGE LITIGATION

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*Since 2017, states and municipalities have sued fossil fuel producers under state law, alleging that they continued producing, selling, and marketing fossil fuels despite knowledge of the harms that fossil fuels caused. The defendants—the world’s largest fossil fuels producers—have held up the litigation around the country by arguing plaintiffs’ claims are not what they purport to be. They argued states and municipalities are attempting to regulate global climate change, an area of a “unique federal interest,” requiring exclusive application of federal common law. Through these arguments, fossil fuel companies attempt to resurrect federal common law, which runs headlong into Supreme Court precedent and the text of the Clean Air Act. Nonetheless, the defendants have found success in some federal courts. For example, the Second Circuit in *The New York City v. Chevron* first reframed defendants’ state-law claims as claims concerning global greenhouse gas emissions and then erroneously applied federal common law to justify dismissal of New York City’s state-law claims. Such legal analysis erroneously interprets the Supreme Court’s precedent and intrudes on historic powers of state courts. This Article concludes that instead, courts should apply an ordinary preemption analysis under the Clean Air Act*

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*when assessing whether federal law preempts state-law causes of action arising from production, sale, and marketing of fossil fuels.*

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## I. Introduction

In the United States alone, states are facing increasing threats to human health and the environment accompanied by rising sea levels and extreme weather, including storms, flooding, droughts, and wildfires.<sup>1</sup> The recent Intergovernmental Panel on Climate Change (IPCC) reports that the “rise in weather and climate extremes has led to some irreversible impacts as natural and human systems are pushed beyond their ability to adapt,” including “[w]idespread, pervasive impacts to ecosystems, people, settlements, and infrastructure.”<sup>2</sup> The report unambiguously shows that the harms and costs associated with climate change will not abate. They will only grow—possibly

<sup>1</sup> See Env't Def. Fund, *How climate change plunders the planet*, <https://www.edf.org/climate/how-climate-change-plunders-planet> (last visited Oct. 23, 2021).

<sup>2</sup> INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, IMPACTS, ADAPTATION AND VULNERABILITY, SUMMARY FOR DECISIONMAKERS, at 9 (2022), [https://report.ipcc.ch/ar6wg2/pdf/IPCC\\_AR6\\_WGII\\_SummaryForPolicymakers.pdf](https://report.ipcc.ch/ar6wg2/pdf/IPCC_AR6_WGII_SummaryForPolicymakers.pdf) [hereinafter IPCC 2022 Report].

exponentially<sup>3</sup> and faster than we expected. A federal judge in Rhode Island recently summarized the situation as follows: “Climate change is expensive, and the State wants help paying for it.”<sup>4</sup> But the stakes are now higher than that. The report shows that the amount of damages and suffering incurred by states and their populations will depend both on mitigation and adaptation measures.<sup>5</sup> The ability of states to sue those who contribute to climate change—and thus secure funding for mitigation and adaptation measures—is therefore a matter of survival.

Indeed, states and cities are unlikely to receive significant help elsewhere. The federal and even global response to climate change threats has been paltry. For four years, the Trump administration has been hindering efforts to mitigate climate-change impacts, setting the United States’ environmental policy backwards by decades. Among many such examples was the Trump administration’s reversal of environmental rules and policies mitigating impacts of global warming,<sup>6</sup> and distancing the United States from international efforts and agreements combatting the same.<sup>7</sup> The Biden administration embarked on the lengthy and painstaking process of reversing hundreds of these rules and regulations with a vision to transform the American power grid and set the United States on the path to meet its obligations under the Paris climate agreement.<sup>8</sup> At the same time, the new administration successfully fought a long and protracted battle to push the new climate change legislation through the Senate—an effort that was marked with long negotiations and countless compromises.<sup>9</sup> But even with the new legislation on the table and many regulations reversed, it is far from certain whether the new laws and policies will do enough to prevent or even mitigate catastrophic climate change impacts that are already unfolding in the United States and around the world.<sup>10</sup>

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<sup>3</sup> See U.S. Env’t Prot. Agency, *Climate Change and Social Vulnerability in the United States* 6–8 (2021), [https://www.epa.gov/system/files/documents/2021-09/climate-vulnerability\\_september-2021\\_508.pdf](https://www.epa.gov/system/files/documents/2021-09/climate-vulnerability_september-2021_508.pdf).

<sup>4</sup> *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142, 146 (D. R.I. 2019).

<sup>5</sup> See IPCC 2022 Report, *supra* note 2, at 14.

<sup>6</sup> See Michael Greshko et al., *A running list of how President Trump is changing environmental policy*, NAT’L GEOGRAPHIC (May 3, 2019), <https://www.nationalgeographic.com/news/2017/03/how-trump-is-changing-science-environment>.

<sup>7</sup> See Rebecca Hersher, *U.S. Officially Leaving Paris Climate Agreement*, NAT’L PUB. RADIO (Nov. 3, 2020), <https://www.npr.org/2020/11/03/930312701/u-s-officially-leaving-paris-climate-agreement>.

<sup>8</sup> See Coral Davenport, *Restoring Environmental Rules Rolled Back by Trump Could Take Years*, N.Y. TIMES (Jan. 22, 2021), <https://www.nytimes.com/2021/01/22/climate/biden-environment.html>; Jeff Brady, *Congress Is Debating Its Biggest Climate Change Bill Ever. Here’s What’s At Stake*, NAT’L PUB. RADIO (Sept. 15, 2021), <https://www.npr.org/2021/09/15/1036954961/congress-is-debating-its-biggest-climate-change-bill-ever-heres-whats-at-stake>.

<sup>9</sup> See, e.g., Brady Dennis & Maxine Joselow, *U.S. climate promises hang in the balance as Manchin upends talks*, WASH. POST (July 15, 2022), <https://www.washingtonpost.com/climate-environment/2022/07/15/manchin-climate-biden-paris-agreement/>.

<sup>10</sup> See Chris Mooney & Harry Stevens, *The U.S. plan to avoid extreme climate change is running out of time*, WASH. POST (July 18, 2022), <https://www.washingtonpost.com/climate-environment/2022/07/18/climate-change-manchin-math/>. See also Fiona Harvey, *Major climate*

In this environment, litigation against fossil fuel producers may be one of the few—if not the only—avenues for states and municipalities to protect themselves, if only partially, against the growing costs of climate change and vindicate “the[ir] responsibility of protecting the health [and] safety” of their citizens.<sup>11</sup>

Since at least 2017, states and municipalities filed over 30 lawsuits against fossil fuel producers in state courts alleging a variety of state-law claims that can be broadly divided into four types: (1) public and private nuisance and trespass causes of action arising from the production, sale, and deceptive marketing of fossil fuels that caused rising sea levels, floods, and other climate change harms;<sup>12</sup> (2) product liability claims alleging that defendants produced and marketed fossil fuels with the knowledge that fossil fuels caused global warming and failed to act on this knowledge;<sup>13</sup> (3) consumer protection claims alleging that defendants engaged in misleading and deceptive marketing and promotion of fossil fuels;<sup>14</sup> and (4) investor fraud claims arising from the same conduct.<sup>15</sup> In these actions, states and cities demanded compensatory and punitive damages, civil penalties, and other relief for damages to land, property, infrastructure, and natural resources as well as for harms to consumers and investors who relied on false or misleading information.<sup>16</sup>

These recent lawsuits have been dubbed the “second wave” of climate change litigation.<sup>17</sup> The new wave of climate change litigation benefits from scientific improvements in data collection and analysis that has allowed plaintiffs to quantify and attribute—with increasing precision—carbon emissions to individual fossil fuel companies,<sup>18</sup> and from evidence assembled by investigative journalists that fossil fuel companies had knowledge of climate harms.<sup>19</sup> Unlike earlier

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*changes inevitable and irreversible – IPCC’s starkest warning yet*, GUARDIAN (Aug. 9, 2021), <https://www.theguardian.com/science/2021/aug/09/humans-have-caused-unprecedented-and-irreversible-change-to-climate-scientists-warn>.

<sup>11</sup> *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342 (2007).

<sup>12</sup> *See, e.g., City of New York v. BP P.L.C.* (New York I), 325 F. Supp. 3d 466, 468 (S.D.N.Y. 2018).

<sup>13</sup> *See, e.g., Mayor & City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538, 548 (D. Md. 2019).

<sup>14</sup> *See, e.g., Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142, 152 (D.R.I. 2019).

<sup>15</sup> *See, e.g., Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31, 51 (D. Mass. 2020).

<sup>16</sup> *See, e.g., Delaware v. BP Am. Inc.*, 578 F. Supp. 3d 618, 626 (D. Del. 2022) (alleging compensatory and punitive damages arising from climate impacts including sea level rise, extreme weather events, and ocean acidification); *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31, 38 (D. Mass. 2020) (plaintiffs seeking declaratory and injunctive relief and penalties arising from defendants false statements and misrepresentations connected to effects of climate change and targeting consumers and investors); *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142, 146 (D.R.I. 2019) (plaintiffs alleging compensatory damages arising from climate-change related damage to infrastructure and natural resources).

<sup>17</sup> *See* Karen C. Sokol, *Seeking (Some) Climate Justice in State Tort Law*, 95 WASH. L. REV. 1383, 1388, 1406–09 (2020); Geentanjali Ganguly et al., *If at First You Don’t Succeed: Suing Corporations for Climate Change*, 38 OXFORD J. LEGAL STUD. 841, 849 (2018).

<sup>18</sup> *See* Ganguly et al., *supra* note 17, at 851–55.

<sup>19</sup> *See* Sokol, *supra* note 18, at 1388, 1409–14.

litigation that centered around federal common law causes of action, which lower courts held to be preempted by the Clean Air Act in the light of the Supreme Court's decision in *Connecticut v. American Electric Power Co.* (“AEP”),<sup>20</sup> this new litigation effort is based on state statutory and common law causes of action.

Plaintiffs allege, for example, that the defendants' conduct produced, marketed, and sold fossil fuels for decades “while knowing of the harm that was substantially certain to result”<sup>21</sup> and “pushed a false narrative that climate science was plagued with doubts.”<sup>22</sup> They thus argue that these actions constituted “an unlawful public and private nuisance and an illegal trespass” on state and municipal properties,<sup>23</sup> defrauding investors and consumers.<sup>24</sup>

Although the types of claims and the fora in which plaintiffs bring their claims changed over the past decade, the defendants' arguments and legal strategies remained largely the same.<sup>25</sup> Across the United States, fossil fuel companies attempted to “federalize” the lawsuits by arguing that plaintiffs' state-law claims are based in federal law in order to remove the actions to federal courts. Federalization of state-law claims is an oft-used legal strategy employed by various industries facing state-law liability.<sup>26</sup> In response to defendants' arguments that state-law products liability and consumer fraud claims are “artfully pleaded” federal causes of action, a Hawaii state court recently remarked that “[state courts] often see artful pleading in the trial courts, where new conduct and new harms first arise.”<sup>27</sup> The court recognized that although the causes of action here may seem new, their facts, predicated on holding a tortfeasor liable for harms, are common. It noted that “[c]ommon law historically tried to adapt to such new circumstances,” and that “[t]he argument that recognizing the tort will result in a vast amount of litigation has accompanied virtually every innovation in the law.”<sup>28</sup>

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<sup>20</sup> 564 U.S. 410 (2011). *See, e.g.*, *Native Vill. of Kivalina v. Exxon Mobil Corp.*, 696 F.3d 849, 858 (9th Cir. 2012).

<sup>21</sup> Complaint at 13, *New York I*, 325 F. Supp. 3d 466 (S.D.N.Y. 2018) [hereinafter *New York City Complaint*].

<sup>22</sup> *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31, 36 (D. Mass. 2020).

<sup>23</sup> *New York City Complaint* at 13.

<sup>24</sup> *See Massachusetts*, 462 F. Supp. 3d at 36.

<sup>25</sup> *See* DAVID R. WOOLEY & ELIZABETH M. MORSS, *CLEAN AIR ACT HANDBOOK* § 10:38 (2021) (characterizing climate change litigation after *American Electric Power* and the Ninth Circuit's decision in *Kivalina* as ones where plaintiffs “asserted a variety of state common law claims based on public nuisance, private nuisance, trespass, and unjust enrichment, as well as claims under state consumer protection laws” and where “defendants generally have sought to remove these cases to federal court on various grounds, including the contention that federal-question jurisdiction exists under 28 U.S.C.A. § 1331”).

<sup>26</sup> *See Sokol, supra* note 18, at 1388, 1406–09.

<sup>27</sup> *City & Cnty. of Honolulu v. Sunoco LP*, Civ. No. 1CCV-20-0000380, at \*7 (Haw. Cir. Ct. Feb. 22, 2022).

<sup>28</sup> *Id.*

In the past, federal courts rejected attempts to remove litigation from state courts based in state law arising from the Volkswagen diesel emissions scandal,<sup>29</sup> opioid sales and manufacturing,<sup>30</sup> and toxic waste.<sup>31</sup> The overwhelming majority of federal district courts that considered fossil fuel producers' removal actions from state courts likewise found that the state-law claims did not provide a basis for federal jurisdiction, and denied removal.<sup>32</sup>

Federal courts are often deemed more favorable to defendants because of justiciability doctrines that could lead to an earlier or a more likely dismissal of the case.<sup>33</sup> Accordingly, the defendants' arguments in the second wave of climate change litigation focused primarily on two arguments. First, the defendants tried to paint these tort actions as arising from global greenhouse gas emissions, and not from the deceptive sale, marketing, and production of fossil fuels. They then argued these actions are global in nature and intertwined with the federal national policymaking, to obtain dismissal under the political question doctrine or presumption against extraterritoriality.<sup>34</sup> Second, and relatedly, the defendants consistently alleged that the state-law causes of actions are just "masquerading" federal claims, akin to federal common law claims asserted in the first wave of climate change litigation, and argued that they were thus preempted by the Clean Air Act under the Supreme Court's decision in *AEP*.<sup>35</sup>

United States-based plaintiffs have filed the most lawsuits seeking relief from the effects of climate change in the world.<sup>36</sup> Yet the key cases filed by states and municipalities that could have provided plaintiffs with significant funds to abate climate change costs never proceeded to the merits. Instead, these lawsuits have been held up in federal courts on the jurisdictional question, following fossil fuel companies' attempts to remove the cases to federal courts premised on, among

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<sup>29</sup> In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig., No. MDL 2672 CRB, 2017 WL 2258757 (N.D. Cal. May 23, 2017); Arnold W. Reitze Jr., *The Volkswagen Air Pollution Emissions Litigation*, 46 ENVTL. L. REP. NEWS & ANALYSIS 10564, 10566–68 (2016).

<sup>30</sup> See, e.g., In re Nat'l Prescription Opiate Litig., No. 1:17-MD-2804, 2019 WL 180246 (N.D. Ohio Jan. 14, 2019); Delaware ex rel. Denn v. Purdue Pharma L.P., 2018 WL 1942363 (D. Del. Apr. 25, 2018).

<sup>31</sup> See, e.g., New Mexico ex rel. Balderas v. Monsanto Co., 454 F. Supp. 3d 1132 (D.N.M. 2020).

<sup>32</sup> See *infra* Part III.

<sup>33</sup> Professor Gil Seinfeld notes that there is not a consensus on whether federal courts are more likely to favor plaintiffs. He points out that some commentators argued that the federal courts "have generally been inhospitable to climate change actions" while others pointed out that climate change litigation in federal courts will grow into the tobacco litigation scale. Gil Seinfeld, *Climate Change Litigation in the Federal Courts: Jurisdictional Lessons from California v. BP*, 117 MICH. L. REV. ONLINE 25, 26–27 (2018) [hereinafter Seinfeld, *Jurisdictional Lessons*]. But given that industry defendants have been employing the "federalization" strategy to state-law tort actions for decades and that they are generally sophisticated litigants, it seems highly plausible that federal forum is indeed more favorable to them, despite the lack of academic consensus.

<sup>34</sup> See *infra* Parts II & III.

<sup>35</sup> See Sokol, *supra* note 17, at 1402–06.

<sup>36</sup> Sebastien Malo, *Factbox: Eyes on U.S. climate lawsuits after landmark Dutch ruling*, REUTERS (May 26, 2021), <https://www.reuters.com/business/sustainable-business/eyes-us-climate-lawsuits-after-landmark-dutch-ruling-2021-05-26/>.

others,<sup>37</sup> the two theories outlined above. As noted, all but one district court found that federal courts did not have jurisdiction over the state-law claims and remanded the state-law climate change actions to state courts. Four circuits affirmed the respective decisions.<sup>38</sup>

However, a recent Supreme Court decision, *BP P.L.C. v. Mayor & City Council of Baltimore*, will make circuit courts around the country reconsider the district courts' remand orders and all of the defendants' (many) arguments in support of federal jurisdiction.<sup>39</sup> Before *BP v. Mayor & City Council of Baltimore*, federal appellate courts did not review district courts' orders to remand except for where the federal officer statute was a ground for removal.<sup>40</sup> The Supreme Court's holding changed this and vacated the First, Fourth, Ninth, and Tenth Circuits' decisions affirming remand to state courts in which the courts considered solely whether federal jurisdiction was proper based on the federal

<sup>37</sup> For a full overview of the defendants' grounds for removal *see infra* Part III(A)(1).

<sup>38</sup> The following district courts granted the plaintiffs' motions to remand cases to state courts: Delaware v. BP Am. Inc., 2022 WL 58484, at \*3 (D. Del. Jan. 5, 2022); City of Hoboken v. Exxon Mobil Corp., 2021 WL 4077541, at \*12 (D.N.J. Sept. 8, 2021); City & Cnty. of Honolulu v. Sunoco LP, WL 531237, at \*9 (D. Haw. Feb. 12, 2021); (2021); Minnesota v. Am. Petroleum Inst., 2021 WL 1215656 (D. Minn. Mar. 31, 2021); Massachusetts v. Exxon Mobil Corp., 462 F. Supp. 3d 31, 51 (D. Mass. May 28, 2020); Bd. of Cnty. Commissioners of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 405 F. Supp. 3d 947, 981 (D. Colo. Sept. 5, 2019), *aff'd in part, appeal dismissed in part*, 965 F.3d 792 (10th Cir. 2020), *cert. granted, judgment vacated*, 141 S. Ct. 2667 (2021); Rhode Island v. Chevron Corp., 393 F. Supp. 3d 142, 152 (D.R.I. July 22, 2019), *aff'd sub nom. Rhode Island v. Shell Oil Prod. Co.*, 979 F.3d 50 (1st Cir. 2020), *cert. granted, judgment vacated*, 141 S. Ct. 2666, (2021); Bd. of Cnty. Commissioners of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 405 F. Supp. 3d 947, 981 (D. Colo. Sept. 5, 2019), *aff'd in part, appeal dismissed in part*, 965 F.3d 792 (10th Cir. 2020), *cert. granted, judgment vacated*, 141 S. Ct. 2667 (2021); Mayor & City Council of Baltimore v. BP P.L.C., 388 F. Supp. 3d 538, 574 (D. Md. June 10, 2019), as amended (June 20, 2019), *aff'd*, 952 F.3d 452 (4th Cir. 2020), *cert. granted*, 141 S. Ct. 222 (2020), *and vacated and remanded*, 141 S. Ct. 1532; Cnty. of San Mateo v. Chevron Corp., 294 F. Supp. 3d 934, 937 (N.D. Cal. March 16, 2018), *aff'd in part, appeal dismissed in part*, 960 F.3d 586 (9th Cir. 2020), *cert. granted, judgment vacated sub nom. Chevron Corp. v. San Mateo Cnty., California*, 141 S. Ct. 2666 (2021). Only Judge Alsup in the Northern District of California found that the petitioners' claims arose under the federal common law and denied the order to remand to the California state court. California v. BP p.l.c., 2018 WL 1064293, at \*5 (N.D. Cal. Feb. 27, 2018), *vacated and remanded sub nom. City of Oakland v. BP PLC*, 960 F.3d 570 (9th Cir. 2020), *opinion amended and superseded on denial of reh'g*, 969 F.3d 895 (9th Cir. 2020), and *vacated and remanded sub nom. City of Oakland v. BP PLC*, 969 F.3d 895 (9th Cir. 2020).

<sup>39</sup> *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532 (2021). *See infra* Part III for an overview of the types of claims defendants allege in support of removal to federal courts.

<sup>40</sup> 28 U.S.C. § 1447(d). Under this statute, a federal appellate court cannot review a remand order unless “(1) the remand was for a reason other than lack of subject matter jurisdiction or a defect in the removal procedure or (2) the ‘except’ clause of §1447(d) gives [the court] jurisdiction.” Board of Cnty Comm’n of Boulder Cnty v. Suncor Energy (U.S.A.), No. 19-1330, 2020 WL 3777996 at \*3 (10th Cir. July 7, 2020). Section 1442 and 1443 are in the “except” clause. Section 1442 allows “[a] civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending[.]” §1447(d). Section 1443 in turn provides for removal to federal court for certain civil rights cases.

officer statute.<sup>41</sup> These circuits and any other circuits where appeals from lower courts' orders to remand are pending will review the remand orders not only on the narrow question concerning federal officers, but on all other bases for federal jurisdiction.

The recent decision of the Second Circuit in *New York City v. Chevron (New York II)* is procedurally distinguishable from the other climate change lawsuits that were filed in state courts in the first instance.<sup>42</sup> Unlike plaintiffs in the state court cases, the City of New York lodged an action based in state tort law in a federal district court in the first instance. Still, *New York II* is the only circuit court decision that considered the full range of defendants' arguments alleging federal jurisdiction and is therefore a harbinger for the debate that will play out in the circuits on the reconsideration of the lower courts' remand orders. The outcome of this debate will determine whether state and municipal litigation must be brought in the federal forum, and whether states will be able to use state-law remedies to obtain recourse for climate change-related harms.<sup>43</sup>

To this end, Part II provides an overview of federal regulation of interstate pollution while emphasizing the historic importance of state-law remedies in addressing air pollution. It discusses the Supreme Court's application of federal common law to claims arising from interstate pollution and the Court's retreat from fashioning federal common law remedies broadly, specifically in light of the congressional enactment of the Clean Water Act and the Clean Air Act.

Part III summarizes actions filed by cities and municipalities in state courts against fossil fuel producers and outlines the types of claims advanced by defendants. It notes that across fora, defendants employed a litigation strategy that focused on: (1) recharacterizing plaintiffs' claims arising from production, sale, and marketing of fossil fuels to claims from global greenhouse gas emissions; and (2) federalization of the same through alleging, through a variety of procedural devices, that the state-law claims "necessarily arise" under federal common law. All but one district court dismissed defendants' arguments and remanded the actions to state courts, and this section summarizes and explains the courts' orders.

Part IV then introduces the facts and holding of the Second Circuit's decision in *New York II* in detail. It shows that the court was persuaded by the

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<sup>41</sup> The following decisions were vacated by the Supreme Court: Board of City Comm'r of Boulder City v. Suncor Energy (U.S.A.) Inc., 405 F. Supp. 3d 947, 981 (D. Colo. 2019), *aff'd in part, appeal dismissed in part*, 965 F.3d 792 (10th Cir. 2020); City of San Mateo v. Chevron Corp., 294 F. Supp. 3d 934, 937 (N.D. Cal. 2018), *aff'd in part, appeal dismissed in part*, 960 F.3d 586 (9th Cir. 2020); Mayor & City Council of Baltimore v. BP P.L.C., 388 F. Supp. 3d 538, 574 (D. Md. 2019), *as amended* (June 20, 2019), *aff'd*, 952 F.3d 452 (4th Cir. 2020); Rhode Island v. Chevron Corp., 393 F. Supp. 3d 142, 152 (D.R.I. 2019), *aff'd sub nom.* Rhode Island v. Shell Oil Prod. Co., 979 F.3d 50 (1st Cir. 2020).

<sup>42</sup> 993 F.3d 81 (2d Cir. 2021).

<sup>43</sup> See, e.g., City of Annapolis, Maryland v. BP P.L.C., No. CV ELH-21-772, 2021 WL 2000469, at \*4 (D. Md. May 19, 2021) ("The Fourth Circuit's ruling on remand in the Baltimore Case is not a foregone conclusion. At least some of the defendants' alternative jurisdictional arguments in the Baltimore Case, like those advanced by defendants here, raise novel questions of law on which the Fourth Circuit has yet to opine.").



“recharacterization-and-federalization” arguments advanced by the defendants, finding that plaintiffs’ claims aim to regulate global greenhouse gas emissions. It also introduces the analysis that enabled the Second Circuit to reach its decision that the City’s claims were preempted. Specifically, the court applied a tripartite framework to the recharacterized plaintiffs’ claims, holding that: (1) federal common law applied to the City’s state-law claims; (2) the so-transformed federal common law claims were preempted under the Clean Air Act; and (3) any claims arising from foreign emissions were displaced by the presumption against extraterritoriality.

Part V argues that the Second Circuit committed an analytical error by fashioning and applying federal common law to the City’s claims, which was contrary to the Supreme Court’s precedent and led to an enlargement of the court’s power at the expense of state courts. This section also advances that the court improperly recharacterized the City’s claims as arising from global greenhouse gas emissions. This is because the court used the recharacterization as a stepping-stone to an unwarranted creation of federal common law. It is also because the recharacterization misidentified the but-for cause of alleged harm, which could have negative repercussions on future mass tort litigation in state courts. Finally, the section concludes with a brief outline of an ordinary preemption analysis that future courts should apply instead of the Second Circuit’s tripartite framework.

## II. Overview of Federal Regulation of Interstate Pollution

The Second Circuit in *New York II*, as well as 12 other district courts considering defendants’ removal actions from state courts, discusses plaintiffs’ state-law claims in the context of federal regulations and federal common law to arrive at conclusions about whether the state law claims are governed by federal law. The Second Circuit in *New York II* and the district court in California in *Oakland v. BP (BP I)* held that the cities’ claims arise under federal common law,<sup>44</sup> while 11 district courts found in the removal context that they do not.<sup>45</sup> These 11 courts also held that the applicable federal common law has either been displaced or constituted an ordinary preemption defense insufficient to support removal, while the Second Circuit held that the New York City’s claims were preempted under the Clean Air Act.<sup>46</sup> The question of whether federal legislation or federal common law governs these claims is essential to understanding courts’ decisions in the second wave of climate change litigation. The following section provides such an overview before analyzing the parties’ arguments. It argues that, unlike federal common law remedies, state law remedies have been preserved under the Clean Air Act, and that federal courts have been cognizant of the states’ role in regulating climate change harms.

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<sup>44</sup>*New York II*, 993 F.3d 81, 91–93 (2d Cir. 2021); *California v. BP p.l.c.*, No. C 17-06011 WHA, 2018 WL 1064293, at \*2 (N.D. Cal. Feb. 27, 2018).

<sup>45</sup> See *infra* Part III(A)(1)(1).

<sup>46</sup> See *infra* Part IV.

Historically, state law, and especially state common law of public nuisance, was used to address various environmental issues from air and water to hazardous pollution.<sup>47</sup> Every law student is familiar with a seminal first-year law school case—*Boomer v. Atlantic Cement Co.*<sup>48</sup>—in which property owners brought a nuisance action under New York law against owners of a cement company, seeking injunctive and monetary relief for the plant's noxious emissions and vibrations.<sup>49</sup> *Boomer* was an example of state courts embracing “the principle that tort law can be used for economic deterrence and to allocate the cost of damages to [] the ‘cheapest cost avoider’ . . . [the party] in the best position to avoid harms at the lowest cost.”<sup>50</sup> Apportioning liability to producers who would otherwise profit from their economic activity while externalizing the harms of production, such as environmental pollution, makes producers account for the harms they cause, and helps to better calibrate their incentives.<sup>51</sup> These principles still hold true, which is why scholars such as Catherine Sharkey argue that state tort law remains “well-suited to handling claims by plaintiffs who incur expenses in order to avoid future harms such as the . . . climate change adaptation expenses” incurred by states and cities.<sup>52</sup>

Federal common law, however, temporarily staked out a competing claim to resolve questions of environmental pollution in the interstate context. As the societal costs of pollution increased exponentially during the rapid industrialization in the second half of the 19th century, industry, states, legislatures and society more broadly began to focus their attention away from the benefits of industrialization, to its collective costs.<sup>53</sup> The councils of the most polluted municipalities were the first entities that, at the break of the century, took affirmative action against air pollution.<sup>54</sup> Pollution also became a source of tension between the states, which filed transboundary pollution cases directly to the Supreme Court under the Court's original and exclusive jurisdiction.<sup>55</sup> The Supreme Court recognized in *Missouri v. Illinois* that it was uniquely suited for resolving interstate disputes that, if they “arose between independent

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<sup>47</sup> See P. Leigh Bausinger, Note, *Welcome to the (Impenetrable) Jungle: Massachusetts v. EPA, The Clean Air Act and the Common Law of Public Nuisance*, 53 VILL. L. REV. 527, 534–35 (2008).

<sup>48</sup> 257 N.E. 2d 870 (1970).

<sup>49</sup> *Id.*

<sup>50</sup> Brief for Catherine M. Sharkey as Amicus Curiae Supporting Petitioner, at 5, 9, New York II, 993 F.3d 81 (2d Cir. 2021).

<sup>51</sup> *Id.* at 8.

<sup>52</sup> *Id.* at 20.

<sup>53</sup> Jan G. Laitos, *Legal Institutions and Pollution: Some Intersections Between Law and History*, 15 NAT. RESOURCES J. 423, 428 (1975). For most of the nineteenth century, legislation and regulation encouraged industry, though soon came the realization that depletion and pollution of natural resources was not sustainable and all levels of government began to act on this realization. *d.* at 433.

<sup>54</sup> *Id.* at 434. For an overview of the first types of air ordinances, see *id.* at 434–35.

<sup>55</sup> Robert V. Percival, *The Frictions of Federalism: The Rise and Fall of the Federal Common Law of Interstate Nuisance*, WORKING PAPER SERIES NO. 2003-02, Oct. 9, 2003, at 2-3.

sovereignties, might lead to war.”<sup>56</sup> As scholars noted, the necessity of impartial adjudication and balance between federal and state rights embodied in the Constitution’s grant of exclusive original jurisdiction of interstate disputes to the Supreme Court<sup>57</sup> therefore mandated that the Supreme Court create and apply federal common law to such interstate disputes.<sup>58</sup>

For example, in *Missouri v. Illinois*, the City of Chicago built a massive public works project to prevent further outbreaks of cholera caused by the City’s dumping of raw sewage into Lake Michigan.<sup>59</sup> The new project required reverse-engineering the flow of the Chicago River so that the dumped sewage would flow to the Illinois River, and ultimately to the Mississippi.<sup>60</sup> But downstream on the Mississippi was another city—St. Louis—where the local government and inhabitants feared that the Chicago sewage could threaten their health and pollute drinking water, and so they promptly sued Illinois.<sup>61</sup> *Missouri v. Illinois* and similar cases from this period that usually involve a dispute between two sovereigns are heavily relied on by the defendants in the second wave of climate change litigation, as well as by the Second Circuit in *New York II*.<sup>62</sup> Defendants use this precedent to argue there is a long tradition in which federal courts applied federal common law to transboundary pollution cases.<sup>63</sup> But the interstate conflicts cases brought within the Supreme Court’s original and exclusive jurisdiction offer only a blinkered view of the use and application of federal common law to interstate pollution.<sup>64</sup> These cases also ignore the traditional role of states in addressing pollution through state tort law. Lastly, these cases do not address how congressional action curtailed the courts’ ability to fashion common law, nor do they speak to congressional treatment of state-law remedies.

With further industrial growth, the contamination of waters and air pollution only grew and so did the public awareness about the fragility of our ecosystem.<sup>65</sup> Gradually, lawmakers and the public became aware that litigation and local regulation were insufficient to address pollution. Federal lawmakers instead

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<sup>56</sup>200 U.S. 496, 518 (1906).

<sup>57</sup> U.S. CONST. art. III, § 2 (“The judicial Power shall extend . . . to Controversies between two or more States”).

<sup>58</sup> See Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENV’T L. 293, 310 (2005).

<sup>59</sup> See Percival, *supra* note 56, at 4.

<sup>60</sup> *Id.* at 5.

<sup>61</sup> *Id.* at 6.

<sup>62</sup> See, e.g., *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907); *New York v. New Jersey*, 256 U.S. 296 (1921); *New Jersey v. City of New York*, 284 U.S. 585 (1931).

<sup>63</sup> See *New York II*, 993 F.3d 81, 91 (2d Cir. 2021); Defendants’ Opposition to Mayor & City Council of Baltimore’s Motion to Remand at 9, *Mayor of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538 (D. Md. 2019) (No. 1:18-cv-2357 ELH).

<sup>64</sup> See *infra* note 313 for the list of the cases cited by the Second Circuit and relied on by the industry defendants.

<sup>65</sup> See PETER S. MENELL & RICHARD B. STEWART, ENVIRONMENTAL LAW AND POLICY 241–44 (1994).

attempted to address pollution nationally by passing the Air Pollution Control Act of 1955, which established a foundation for the Clean Air Act, and its subsequent comprehensive amendments in 1970, 1977, and 1990.<sup>66</sup> Congress also adopted the Federal Water Pollution Control Act Amendments of 1972 (“the Clean Water Act” or CWA), which created a national permit program to control discharges of water pollutants from point sources.<sup>67</sup> The Supreme Court case *Illinois v. City of Milwaukee*<sup>68</sup> (*Milwaukee I*) and its sequel *City of Milwaukee v. Illinois*<sup>69</sup> (*Milwaukee II*) unfolded in the background of congressional remaking of American environmental law, and they best explain the impact of the congressional actions on the availability of federal and state remedies.

In *Milwaukee I*, Illinois filed an original action with the Supreme Court against Wisconsin’s cities before the Clean Water Act amendments of 1972 were enacted.<sup>70</sup> In this action, Illinois alleged that Milwaukee and three other Wisconsin cities were discharging a large amount of raw or inadequately treated sewage into Lake Michigan and polluting Illinois’s drinking water.<sup>71</sup> Justice Douglas, writing for the court, explained that court must create and apply “interstate common law” to the dispute because, even though there was already some legislation on the books that addressed environmental problems, “[t]he remedy sought by Illinois [was]not within the precise scope of remedies prescribed by Congress.”<sup>72</sup>

Citing in its decision an interstate water apportionment dispute, *Kansas v. Colorado*, where the Court likewise applied federal common law, Justice Douglas held that federal common law applied in this context as well, because of an “overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interest of federalism.”<sup>73</sup> *Missouri I* therefore gave federal courts broad discretion to fashion federal common law remedies beyond the interstate context of the early cases such as *Missouri v. Illinois* or *Kansas v. Colorado*. But the impacts of this decision were short-lived. Justice Douglas in *Milwaukee I* wrote that, “it may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance.”<sup>74</sup> This statement turned out to be prescient because just a few months after the Court announced its decision in *Milwaukee I*, Congress enacted the 1972 amendments to the Federal Water Pollution Act, known as the Clean Water Act.<sup>75</sup>

<sup>66</sup> See Laitos, *supra* note 54, at 437; RICHARD K. LATTANZIO, CONG. RSCH SERV., CLEAN AIR ACT: A SUMMARY OF THE ACT AND ITS MAJOR REQUIREMENTS 1–2 (2022).

<sup>67</sup> See Percival, *supra* note 56, at 64.

<sup>68</sup> 406 U.S. 91 (1972).

<sup>69</sup> 451 U.S. 304 (1981).

<sup>70</sup> *Id.* at 307. Unlike in the preceding cases which involved two states, the Supreme Court’s original jurisdiction here is concurrent, not exclusive.

<sup>71</sup> See Percival, *supra* note 56, at 62.

<sup>72</sup> *Milwaukee I*, 406 U.S. at 103, 105–06.

<sup>73</sup> *Id.* at 108 n.6. The Court then remanded the suit to a federal district court to be tried under the federal law of common nuisance. *Id.* at 108.

<sup>74</sup> *Id.* at 107.

<sup>75</sup> See *infra* note 382 and accompanying text.

Shortly after *Milwaukee I*, Illinois filed a new complaint against Milwaukee in the district court, alleging that Milwaukee's discharges constituted a public nuisance under federal common law.<sup>76</sup> Milwaukee argued that the Clean Water Act preempted Illinois's federal common law nuisance action but the district court rejected Milwaukee's defenses, and held that the cities' discharges arose under federal common law of nuisance.<sup>77</sup> The district court ordered the defendants to eliminate sewer overflows within 12 years, and required them to meet more stringent effluent permits than those in their existing permits under the Clean Water Act.<sup>78</sup>

The Seventh Circuit affirmed the district court's decision that the 1972 amendments did not pre-empt the applicable federal common law of nuisance, but it reversed the district court's imposition of more stringent effluent limits.<sup>79</sup> Milwaukee then appealed to the Supreme Court. The Supreme Court reconsidered its earlier decision in *Milwaukee I* in light of significant legislative developments. The *Milwaukee II* Court held that the CWA preempted federal common law of nuisance in interstate water pollution cases.<sup>80</sup> But the legislative developments were not the only changes. The attitude of the Court towards federal common law remedies shifted as well. While *Milwaukee I* encouraged courts to fashion federal common law remedies, Justice Rehnquist, writing for the majority, cited *Erie* to stress that federal courts had a limited role in creating federal common law in the absence of a congressional say-so.<sup>81</sup> Rehnquist highlighted that federal courts are not general common law courts with the power to fashion their own rules of decision, and that federal common law should only be used where a federal question cannot be answered by federal statute alone.<sup>82</sup>

To determine whether common law was preempted, Rehnquist emphasized that a court must assess "the scope of . . . legislation and whether the scheme established by Congress addresses the problem formerly governed by federal common law."<sup>83</sup> The Clean Water Amendments of 1972 created a comprehensive national permit scheme that addressed Illinois's concerns.<sup>84</sup> The Court thus stressed that the complexity of transboundary water pollution would make cases involving it "peculiarly inappropriate" for the application of federal common law in light of federal legislation that had supplanted it.<sup>85</sup>

The defendants in climate change cases also rely on *Milwaukee I* to argue that nuisance claims encompassing pollution from several states "call 'for applying

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<sup>76</sup> See Percival, *supra* note 56, at 63–64.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 65.

<sup>81</sup> *City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304, 312–13 (1981).

<sup>82</sup> *Id.* at 313–14.

<sup>83</sup> *Id.* at 315 n.8.

<sup>84</sup> *Id.* at 310–11.

<sup>85</sup> *Id.* at 325.

federal law”<sup>86</sup> or to argue that interstate pollution is one of the specialized areas “where there is an overriding federal interest in the need for a uniform rule of decision” that displaces state law actions.<sup>87</sup> Even if we agree with the defendants’ recharacterization of the plaintiffs’ claims, which is questionable because the plaintiffs sue for damages for in-state sale of fossil fuels and a misinformation campaign surrounding it and not for combustion of fossil fuels or emissions,<sup>88</sup> these arguments appear to ignore the central holding of *Milwaukee II*. The Court in *Milwaukee II* held the 1972 Clean Water Act amendments preempted federal common law, not state law.<sup>89</sup> If comprehensive federal regulation displaced federal common law, then it must be true *a fortiori* that an assertion of state law claims should not resuscitate that federal common law. More importantly, the Supreme Court explicitly said as much in the next case that addressed the availability of state law remedies and interpreted the Clean Water Act—*International Paper Co. v. Ouellette*.<sup>90</sup>

In *Ouellette*, decided six years after *Milwaukee II*, Vermont property owners sued the owners of a paper mill in New York for pollution of Lake Champlain, which borders both states.<sup>91</sup> The Court in *Ouellette* answered a question left open by *Milwaukee II*—whether federal statutory law controlling interstate water pollution preempted state nuisance causes of action.<sup>92</sup> The Court reasoned that if a state could impose its discharge standards on a polluter in another state, it would interfere with the goals and policies of the Clean Water Act.<sup>93</sup> The Court held that the Clean Water Act preempted state common law nuisance actions based on the law of the pollution-affected state, but “nothing in the Act bar[ed] aggrieved individuals from bringing a nuisance claim pursuant to the law of the *source* State.”<sup>94</sup> In arriving at this conclusion, the Court considered the Clean Water Act’s savings clause, which expressly preserved the right of states to impose more

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<sup>86</sup> See, e.g., Defendants’ Opposition to Mayor and City Council of Baltimore’s Motion to Remand, *supra* note 65, at 10; Petition for a Writ of Certiorari at 9, *Chevron Corp. v. City of Oakland*, 141 S. Ct. 2776 (2021) (No. 20-1089).

<sup>87</sup> Petition for a Writ of Certiorari, *supra* note 92, at 26 (citing *Illinois v. City of Milwaukee (Milwaukee I)*, 406 U.S. 91, 105 n.6 (1972)).

<sup>88</sup> See, e.g., First Amended Complaint for Public Nuisance at 3, *City of San Francisco v. BP P.L.C.*, 325 F. Supp. 3d 1017 (N.D. Cal. 2018) (No. 3:17-cv06012-WHA). Unlike *Illinois v. City of Milwaukee II*, *Missouri v. Illinois*, or *New Jersey v. City of New York*, the second-generation climate lawsuits are not lawsuits against specific out-of-state sources polluting water or air that arrives in the recipient state. Instead, the harm alleged occurs through the defendants’ conduct of sale of fossil fuels and misinformation campaign targeted to consumers within one state.

<sup>89</sup> *Milwaukee II*, 451 U.S. at 332.

<sup>90</sup> 479 U.S. 481 (1987).

<sup>91</sup> *Id.* at 484.

<sup>92</sup> Stacey Goodwin, *Preemption of Private Remedies in Interstate Water Pollution Disputes: International Paper Company v. Ouellette*, 28 NAT. RESOURCES J. 863 (1988).

<sup>93</sup> *Ouellette*, 479 U.S. at 493–94. Under this logic, if the polluted state could impose more stringent requirements of public nuisance on the source, the source would be effectively coerced to adopt different standards than those approved by the EPA and the source state. *Id.* at 495.

<sup>94</sup> *Id.* at 497–99.

stringent standards on point sources under state law.<sup>95</sup> The Court explained that even though the savings clause does not preclude ordinary preemption, its presence “negates the inference that Congress ‘left no room’ for state causes of action” even if “Congress intended to dominate the field of pollution regulation.”<sup>96</sup> The Clean Water Act’s savings clause is identical to the one found in the Clean Air Act:<sup>97</sup>

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or State agency).<sup>98</sup>

The legislative history of the section clarifies that the provision “specifically preserve[s] any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. Compliance requirements under this Act would not be a defense to a common law action for pollution damages.”<sup>99</sup> Considering *Milwaukee II* and *Ouellette* together shows that, although federal common law of nuisance has been preempted in interstate pollution disputes, state law remains a viable cause of action as long as the law of the source is applied—if the Court finds that the source of the pollution exists outside the state.

On the other hand, if a court finds that the source of the harm is in-state, *Ouellette* would not be applicable. Plaintiffs in the second generation of climate change lawsuits dispute this conclusion and argue that the relevant conduct and source of pollution arise, unlike in *Ouellette*, *within* the state through production, sale, marketing, and often accompanying deceptive or fraudulent conduct.<sup>100</sup> Still, despite the open question of what law applies and how to characterize the source of pollution, it is plainly not true that state remedies are unavailable to litigants under the Clean Air Act and the precedent.

The structure of the Clean Air Act further supports the inference that the legislature was very mindful of preserving state powers and remedies in combating air pollution. The state and local governments are the primary actors responsible for air pollution control and prevention under the Clean Air Act, while the federal government coordinates these efforts, sets standards that the

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<sup>95</sup> *Id.* at 498–99.

<sup>96</sup> *Id.* at 492.

<sup>97</sup> Caroline Wick, Note, *Bell v. Cheswick Generating Station: Preserving the Cooperative Federalism Structure of the Clean Air Act*, 27 TUL. ENV'T L. J. 107, 111 (2013).

<sup>98</sup> 33 U.S.C. § 1365(e).

<sup>99</sup> S. REP. NO. 92–414 (1972), at 81 (1971), as reprinted in 1972 U.S.C.C.A.N. 3668, 3746–47.

<sup>100</sup> See, e.g., *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142, 152 (D.R.I. 2019) (alleging that the state-law causes of action arose from defendants’ misleading marketing and promotion of fossil fuels), *aff’d sub nom.* *Rhode Island v. Shell Oil Prods. Co.*, 979 F.3d 50 (1st Cir. 2020), *cert. granted, vacated*, 141 S. Ct. 2666 (2021); *New York I*, 325 F. Supp. 3d 466, 468 (S.D.N.Y. 2018) (alleging that the state-law causes of action arose from defendants’ production, sale, and deceptive marketing of fossil fuels), *aff’d sub nom.* *New York II*, 993 F.3d 81 (2nd Cir. 2021).

states implement, and provides funds.<sup>101</sup> The Clean Air Act has been widely recognized as an “experiment in cooperative federalism.”<sup>102</sup> Its reliance on state authority to control air pollution and the presumption against preemption<sup>103</sup> make it further unlikely that Congress intended to displace state remedies.

The most recent Supreme Court case on the availability of federal common law, *American Power Co. v. Connecticut (AEP)*,<sup>104</sup> extended *Milwaukee II*'s holding about displacement of federal common law of interstate water pollution to interstate air pollution. In *AEP*, eight states sued electric companies and the Tennessee Valley Authority, collectively responsible for one-tenth of the United States' carbon dioxide emissions, and asserted public nuisance claims under federal common law.<sup>105</sup> The Court first summarized the recent holding of *Massachusetts v. EPA*, in which it interpreted the Clean Air Act to require that the EPA regulate emissions of carbon dioxide.<sup>106</sup> It explained that unlike state law, federal common law is easily displaced by congressional action.<sup>107</sup> Federal common law is displaced when Congress “speak[s] directly to [the] question” at issue.<sup>108</sup> Therefore, like in *Milwaukee II*, Congress displaced federal common law by enacting the Clean Air Act's provisions that delegate regulation of carbon dioxide to the EPA.<sup>109</sup> It did not matter whether the EPA exercised its delegated power to regulate, the Court held, because the “critical point” that dispelled availability of a federal common law cause of action was when “Congress delegated to EPA the decision” to regulate carbon dioxide emissions from power plants.<sup>110</sup> The parties never briefed the question of whether state law was still a viable avenue for plaintiffs. But the Court nevertheless remarked, citing *Ouellette*, that “the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act.”<sup>111</sup>

In summary, the precedent shows that congressional intent is paramount in determining whether state-law remedies remain available to plaintiffs.<sup>112</sup> The Supreme Court, since the 1970s, has recognized the diminishing need for and availability of federal common law remedies in light of growing federal

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<sup>101</sup> 42 U.S.C. § 7401(a)(3)-(4).

<sup>102</sup> *Michigan v. EPA*, 268 F.3d 1075, 1083 (D.C. Cir. 2001).

<sup>103</sup> See generally Jack L. Goldsmith, *Statutory Foreign Affairs Preemption*, JOHN M. OLIN PROGRAM L. & ECON. WORKING PAPER NO. 116, 2001, at 1, 6–10.

<sup>104</sup> *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011).

<sup>105</sup> *Id.* at 418.

<sup>106</sup> *Id.* at 416.

<sup>107</sup> *Id.* at 423 (“[W]hen Congress addresses a question previously governed by a decision rested on federal common law,” the Court has explained, “the need for such an unusual exercise of law-making by federal courts disappears.”) (alteration in original) (citing *City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304, 314 (1981)).

<sup>108</sup> *Id.* at 424 (alteration in original) (citations omitted).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 426.

<sup>111</sup> *Id.* at 429 (citing *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 489, 491, 497 (1987)).

<sup>112</sup> See Goldsmith, *supra* note 106, at 6–10.



regulation of water and air pollution.<sup>113</sup> Many indicia, including the Clean Air Act's savings clause, the Act's reliance on the states to regulate interstate air pollution, and the states' traditional role in regulating the same suggest that Congress took care that state-law causes of actions are preserved.

### III. Overview of the Second Wave of State Climate Litigation

Since 2017, cities and municipalities have sued fossil fuel producers in 12 state courts, seeking to reimburse state taxpayers for the costs of adapting to climate change. Plaintiffs' claims in these actions were based in state law and arising from the production, marketing, and sale of fossil fuels that contributed to the increase of carbon-dioxide emissions. The sole action brought in the first instance in federal court was New York City's lawsuit against BP and other largest fossil fuel producers in *City of New York v. BP (New York I)*.<sup>114</sup> In *New York I*, the district court dismissed New York City's complaint,<sup>115</sup> and the Second Circuit affirmed the order in *New York II*.<sup>116</sup> In all actions, petitioners asserted only state-law causes of action, though the types of causes of action evolved over time. From 2017 through 2019, plaintiffs' claims centered on public and private nuisance claims, trespass, and some plaintiffs also included product liability claims arising from violations of state consumer fraud statutes.<sup>117</sup> Three more recent lawsuits in Connecticut, Minnesota, and Massachusetts, in contrast, relied on statutory state-law claims focused on misrepresentation and defrauding consumers and investors.<sup>118</sup>

The potential shift away from public nuisance claims may be a part of plaintiffs' experimentation to determine whether claims focused on deception

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<sup>113</sup> See *infra* Part III.

<sup>114</sup> 325 F. Supp. 3d 466, 468 (S.D.N.Y. 2018), *aff'd sub nom. New York II*, 993 F.3d 81 (2d Cir. 2021).

<sup>115</sup> *New York I*, 325 F. Supp. 3d at 476.

<sup>116</sup> *New York II*, 993 F.3d at 103.

<sup>117</sup> See, e.g., Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 405 F. Supp. 3d 947, 954–55 (D. Colo. 2019) (plaintiffs asserting six causes of actions based on public nuisance, private nuisance, trespass, unjust enrichment, violation of the Colorado Consumer Protection Act, and civil conspiracy), *aff'd in part, appeal dismissed in part*, 965 F.3d 792 (10th Cir. 2020), *cert. granted, vacated*, 141 S. Ct. 2667 (2021); California v. BP P.L.C. (*BP I*), No. C 17-06011 WHA, 2018 WL 1064293, at \*2 (N.D. Cal. Feb. 27, 2018), *vacated sub nom. City of Oakland v. BP P.L.C.*, 960 F.3d 570 (9th Cir. 2020), *vacated and amended by* 969 F.3d 895 (9th Cir. 2020) (plaintiffs asserting public nuisance claims); *New York I*, 325 F. Supp. 3d at 470 (plaintiffs asserting claims based on public and private nuisance and trespass).

<sup>118</sup> Connecticut v. Exxon Mobil Corp., No. 3:20-CV-1555 (JCH), 2021 WL 2389739, at \*1 (D. Conn. June 2, 2021) (plaintiffs alleging “eight claims under the Connecticut Unfair Trade Practices Act”); Minnesota v. Am. Petroleum Inst., No. 20-1636 (JRT/HB), 2021 WL 1215656, at \*2 (D. Minn. Mar. 31, 2021) (alleging causes of actions arising from violations of the Minnesota Consumer Fraud Act, Minnesota Deceptive Trade Practices Act, Minnesota False Statement in Advertising Act, as well as common law theories of strict liability and negligence and fraud and misrepresentation; Massachusetts v. Exxon Mobil Corp., 462 F. Supp. 3d 31, 38 (D. Mass. 2020) (plaintiffs alleging defendants violated various provisions of Massachusetts investor and consumer protection statutes).

rather than nuisance could avoid preemption arguments under *AEP*.<sup>119</sup> Commentators point out that state tort law concerning wrongful manufacturing and marketing of products is very developed and “well-suited” to litigation arising out of production, marketing, and sale of fossil fuels because they “allege a product manufacturer’s systemic use of a ‘disinformation plus path-dependence’ strategy to continue profiting from the sale of their products notwithstanding clear evidence of their catastrophic nature.”<sup>120</sup> The state courts, however, have not had the opportunity to evaluate the plaintiffs’ claims as a matter of tort law.

This is because the defendants assert a “laundry list” of bases for federal jurisdiction with an aim to remove the actions to federal courts.<sup>121</sup> The lawsuits have been held up in jurisdictional battles since. The defendants argued that federal courts have jurisdiction over these actions because plaintiffs’ state-law claims: (1) necessarily arise under federal common law, not state law; (2) are completely preempted by the Clean Air Act; (3) involve a substantial federal issue under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*;<sup>122</sup> (4) give rise to original federal courts’ jurisdiction under the Outer Continental Shelf Lands Act;<sup>123</sup> (5) give rise to federal jurisdiction under the federal officer removal statute;<sup>124</sup> (6) give rise to federal jurisdiction because the alleged injuries or conduct occurred on federal enclaves;<sup>125</sup> (7) give rise to federal jurisdiction because the claims are related to bankruptcy proceedings;<sup>126</sup> or (8) give rise to original admiralty jurisdiction.<sup>127</sup>

The district courts did not find the defenses sufficient to support federal jurisdiction and remanded the cases to state courts in 11 out of 12 removal actions.<sup>128</sup> Only Judge Alsup in *California v. BP P.L.C.*<sup>129</sup> (*BP I*) held that the federal court has jurisdiction and denied the motion to remand because state nuisance claims alleged by the cities of Oakland and San Francisco were

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<sup>119</sup> See *infra* Part V(B)(1).

<sup>120</sup> Sokol, *supra* note 17, at 1417.

<sup>121</sup> *Mayor of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538, 550 (D. Md. 2019) (“This matter presents a primer on removal jurisdiction; defendants rely on the proverbial ‘laundry list’ of grounds for removal.”), *aff’d*, 952 F.3d 452 (4th Cir. 2020), *vacated*, 141 S. Ct. 1532 (2021).

<sup>122</sup> 545 U.S. 308 (2005).

<sup>123</sup> 43 U.S.C. § 1349(b).

<sup>124</sup> 28 U.S.C. § 1442(a)(1).

<sup>125</sup> The Constitution authorizes Congress “[t]o exercise exclusive Legislation in all Cases whatsoever . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-yards, and other needful Buildings.” U.S. CONST. art. I, § 8, cl. 17. Some courts construed this provision as “establish[ing] federal subject matter jurisdiction over tort claims occurring on federal enclaves, and have allowed such claims to proceed even when applying state law.” *Jograj v. Enter. Servs., LLC*, 270 F. Supp. 3d 10, 16 (D.D.C. 2017) (citations omitted).

<sup>126</sup> 28 U.S.C. § 1452.

<sup>127</sup> *Id.* § 1333; Admiralty Extension Act, 46 U.S.C. § 30101(a).

<sup>128</sup> See Subsection III(A) *infra*.

<sup>129</sup> *California v. BP P.L.C. (BP I)*, No. C 17-06011 WHA, 2018 WL 1064293, at \*2 (N.D. Cal. Feb. 27, 2018), *vacated sub nom. City of Oakland v. BP P.L.C.*, 960 F.3d 570 (9th Cir. 2020), *vacated and amended by* 969 F.3d 895 (9th Cir. 2020).

“necessarily governed by federal common law.”<sup>130</sup> Subsequently, Judge Alsup dismissed the claims against fossil fuel producers in *City of Oakland v. BP P.L.C. (BP II)*, finding that although the Clean Air Act did not preempt the cities’ claims, they were nevertheless dismissed because the “presumption against extraterritoriality” and concerns about separation-of-powers limited the court’s ability to fashion a federal common law remedy for claims arising from “sales of fossil fuels worldwide, beyond the reach of the EPA and the Clean Air Act.”<sup>131</sup> Later, the Ninth Circuit vacated and remanded Judge Alsup’s decision.<sup>132</sup> The Circuit held that the Clean Air Act does not have the “extraordinarily preemptive force” necessary to displace state-law claims and support removal to federal court.<sup>133</sup>

Only one other district court followed a similar logic to Judge Alsup’s just one month later. In *New York I*, the district court Judge Keenan held that the City’s state law claims based on harms related to production and manufacturing of fossil fuels claims are “ultimately based on transboundary emission of greenhouse gases, indicating that these claims arise under federal law and require a uniform standard of decision.”<sup>134</sup> But unlike Judge Alsup, Judge Keenan held that the City’s claims were preempted under the Clean Air Act.<sup>135</sup> The Second Circuit affirmed the district court’s decision, framing the question before the court as “whether municipalities may utilize state tort law to hold multinational oil companies liable for the damages caused by greenhouse gas emissions.”<sup>136</sup> The answer according to the Second Circuit was “no,” given “the existence of a complex web of federal and international environmental law regulating such emissions.”<sup>137</sup> The posture of the *New York II* case was different from the remaining 11 lawsuits because the City filed it in the first instance in the federal court, which, according to the court, allowed it to “consider the Producers’ preemption defense on its own terms, not under the heightened standard unique to the removability inquiry.”<sup>138</sup>

The Second Circuit was the only circuit court that held that state law claims were preempted by the Clean Air Act and the court’s reasoning in support of this holding will likely be closely examined by the First, Fourth, Ninth, and Tenth

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<sup>130</sup> *BP I*, 2018 WL 1064293, at \*2.

<sup>131</sup> *City of Oakland v. BP P.L.C. (BP II)*, 325 F. Supp. 3d 1017, 1024-299 (N.D. Cal. 2018), vacated, 960 F.3d 570 (9th Cir. 2020), vacated and amended by 969 F.3d 895 (9th Cir. 2020)

<sup>132</sup> *City of Oakland v. BP P.L.C.*, 960 F.3d 570 (9th Cir. 2020), *vacated, remanded, and amended* by 969 F.3d 895 (9th Cir. 2020).

<sup>133</sup> *Id.* at 581.

<sup>134</sup> *New York I*, 325 F. Supp. 3d 466, 472 (S.D.N.Y. 2018) (internal quotation marks omitted). The court further held that “to the extent that the City seeks to hold Defendants liable for damages stemming from foreign greenhouse gas emissions, the City’s claims are barred by the presumption against extraterritoriality and the need for judicial caution in the face of ‘serious foreign policy consequences.’” *Id.* at 475.

<sup>135</sup> *Id.* at 472.

<sup>136</sup> *New York II*, 993 F.3d 81, 85 (2d Cir. 2021).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 94.

Circuits that will be reconsidering the appeals from the respective district courts' orders to remand, and all grounds for federal jurisdiction alleged by defendants therein, in light of the Supreme Court's decision *BP P.L.C. v. Mayor & City Council of Baltimore*.<sup>139</sup>

### A. District Courts' Decisions Granting Plaintiffs' Motions to Remand to State Courts

At the heart of the second wave of climate change litigation lies the balance between federal and state courts as courts grapple with the question of whether federal courts can properly assume jurisdiction over state-law claims. Statutes and doctrines defining federal jurisdiction are therefore front and center in climate change litigation. Federal courts are courts of limited subject matter jurisdiction; the Constitution defines the outer bounds of federal courts' jurisdiction while Congress decides whether lower federal courts exist at all and "prescribe[s]" or "withhold[s]" courts' jurisdiction within constitutional boundaries.<sup>140</sup> Federal courts are tasked with interpreting jurisdictional statutes. Faithful interpretation of jurisdictional statutes is necessary to preserve the constitutional balance between state and federal governments but also to maintain a system of checks and balances.<sup>141</sup> Congressional control of federal courts' jurisdiction is a constitutional check on the courts' power, even though at the end of the day, the strength of this check depends on the courts' faithful interpretation of jurisdictional grants.<sup>142</sup>

Since 1875, Congress granted federal courts the power to hear cases "arising under the Constitution, laws or treaties of the United States,"<sup>143</sup> now codified at

<sup>139</sup> *BP P.L.C. v. Mayor of Baltimore*, 141 S. Ct. 1532, 1533 (2021).

<sup>140</sup> Article III of the Constitution vests the federal judicial power in the Supreme Court "and in such inferior Courts as the Congress may from time to time ordain and establish" and extends the judicial power to nine different categories of cases and controversies that form the outer limit on the jurisdiction of federal courts. U.S. CONST. art. III, §§ 1, 2. *See* *Bowles v. Russell*, 127 S. Ct. 2360, 2365 (2007) ("Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider."); *Sheldon v. Sill*, 49 U.S. 441, 449 (1850) ("[H]aving a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers."). *See generally* Julian Velasco, *Congressional Control Over Federal Court Jurisdiction: A Defense of the Traditional View*, 46 CATH. U. L. REV. 671 (1997). Despite the text of Article III and a history without a large presence of federal courts, there is academic discussion about whether Congress is free to abolish lower courts in all categories of cases, especially where the courts would be necessary to enforce federal rights. *See, e.g.*, F. Andrew Hessick III, *The Common Law of Federal Question Jurisdiction*, 60 ALA. L. REV. 895, 900 n.7 (2009). Similarly, even though most academics agree that Congress has the power to regulate jurisdiction, there is a debate on whether this power is unfettered or whether the Constitution requires Congress to confer jurisdiction in certain categories of cases. *See id.* at 900 n.11. Neither of these debates touches on the arguments raised here, and will not be addressed.

<sup>141</sup> Hessick, *supra* note 144, at 905.

<sup>142</sup> *Id.*

<sup>143</sup> Judiciary Act of 1875, ch. 137, 18 Stat. 470; *see also* Rachel M. Janutis, *The Road Forward from Grable: Separation of Powers and the Limits of "Arising Under" Jurisdiction*, 69 LA. L. REV. 99, 100 (2008).

28 U.S.C. § 1331 and known as the federal question jurisdiction.<sup>144</sup> Even though in the federal jurisdictional statute Congress adopted the verbatim operative language from the Constitution, the Supreme Court has interpreted the statutory language more narrowly than the constitutional grant, after some initial experimentation with interpreting it more broadly.<sup>145</sup> Professor Freer summarized the motivations behind the invention of the jurisdiction-narrowing rule as follows:

[T]he federal courts are too busy and the state interests too important to countenance the broad placement of state-law centered litigation into federal fora absent some need—a need rooted in the reasons for federal question jurisdiction: the vindication of federal right or the necessity of consistent and sympathetic interpretation of federal provisions.<sup>146</sup>

To this end, the courts created the chief limit on the federal courts' jurisdiction—the well-pleaded complaint rule—in a series of cases in the decades following the enactment of the Judiciary Act of 1875,<sup>147</sup> which bestowed federal question jurisdiction on federal courts for the first time.<sup>148</sup> The well-pleaded complaint rule and corresponding judicially created exceptions were central to district courts' decisions to remand in climate change litigation.

### 1. District Courts' Focus on the Well-Pleaded Complaint Rule

The district courts that remanded climate change lawsuits to state courts focused on the well-pleaded complaint rule—a jurisdiction restricting rule. Defendants argued that the plaintiffs' claims “necessarily [arose] under federal law ‘because they [sought] to regulate transboundary and international emission and pollution,’” which is one of the specialized areas that required that federal

<sup>144</sup> See Rory Ryan, *No Welcome Mat, No Problem?: Federal-Question Jurisdiction After Grable*, 80 ST. JOHN'S L. REV. 621, 623–26 (2006).

<sup>145</sup> See Richard D. Freer, *Of Rules and Standards: Reconciling Statutory Limitations on "Arising Under" Jurisdiction*, 82 IND. L. J. 309, 312–17 (2007). Professor Freer explains that even though the Supreme Court interpreted the Article III “arising under” language “with stunning breadth” in *Osborn v. Bank of the United States*, it turned to a narrow interpretation of the statutory grant after some period of experimentation. *Id.* at 313–14.

<sup>146</sup> *Id.* at 315–16. See also Gil Seinfeld, *The Puzzle of Complete Preemption*, 155 U. PA. L. REV. 537, 545–47 (2007) [*hereinafter* Seinfeld, *Complete Preemption Puzzle*].

<sup>147</sup> ch. 137, 18 Stat. 470.

<sup>148</sup> See Seinfeld, *Complete Preemption Puzzle*, *supra* note 150, at 541. Other oft-discussed judge-made limits on federal jurisdiction are: (1) centrality, or that the federal issue must be central or substantial to the plaintiff's claim; and (2) substantiality requirement that the federal issue be asserted in good faith and is not completely frivolously asserted. See Paul J. Mishkin, *The Federal "Question" in the District Court*, 53 COLUM. L. REV. 157, 165 (1954) (explaining that plaintiff's claim must “directly” invoke federal law); 13 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* 174 (3d ed. 2008) (“[T]he federal law injected by the plaintiff's well-pleaded complaint [must] be sufficiently central to the dispute to support federal question jurisdiction.”); see *id.* at 244–45 (“The test for dismissal is a rigorous one and if there is any foundation or plausibility to the claim, federal jurisdiction exists.”). The centrality and substantiality requirements can be understood as folded into the *Grable* jurisdiction and conceived as an exception to the well-pleaded complaint rule rather than separate requirements. See *infra* Part IV(A)(1)(i).

common law applies due to “an overriding interest in having a federal rule.”<sup>149</sup> The district courts analyzed defendants’ arguments in two ways. Some district courts found that plaintiffs plead only state law causes of actions,<sup>150</sup> noting also that defendants misinterpreted the Supreme Court’s holding in *AEP*: “Far from holding . . . that state law claims relating to global warming are superseded by federal common law,” district court Judge Chhabria explained, “the Supreme Court noted that the question of whether . . . state law claims survived would depend on whether they are preempted by the federal statute that had displaced federal common law.”<sup>151</sup> Other district courts characterized the defendants’ claims that state law claims must arise under federal common law as “a cleverly veiled [ordinary] preemption argument.”<sup>152</sup> The well-pleaded rule barred removal in both instances.

The well-pleaded complaint rule, known from the famous case of *Louisville & Nashville Railroad v. Mottley*,<sup>153</sup> requires that there be a federal issue on the face

<sup>149</sup> *City of Hoboken v. Exxon Mobil Corp.*, 558 F. Supp. 3d 191, 201 (D.N.J. 2021), *aff’d sub nom.* *City of Hoboken v. Chevron Corp.*, 45 F.4th 699 (3rd Cir. 2022). *See also* *Connecticut v. Exxon Mobil Corp.*, No. 3:20-cv-1555 (JCH), 2021 WL 2389739, at \*2 (D. Conn. June 2, 2021) (“ExxonMobil argues that removal of this case is proper, because ‘federal common law necessarily and exclusively governs claims for interstate and international pollution.’”); *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142, 148 (D.R.I. 2019) (“Defendants first argue — and two district courts have recently held — that a state’s public-nuisance claim premised on the effects of climate change is ‘necessarily governed by federal common law.’”), *aff’d sub nom.* *Rhode Island v. Shell Oil Prods. Co.*, 979 F.3d 50 (1st Cir. 2020), *cert. granted, vacated*, 141 S. Ct. 2666 (2021).

<sup>150</sup> *City of Hoboken v. Exxon Mobil Corp.*, 558 F. Supp. 3d at 200 (“Plaintiff does not assert any federal claims here; Hoboken only asserts state law claims. Thus, on its face, the well-pleaded complaint rule is not satisfied”). *See also* *Bd. of Cnty. Comm’rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 405 F. Supp. 3d 947, 962 (D. Colo. 2019), *aff’d in part, dismissing appeal in part*, 965 F.3d 792 (10th Cir. 2020), *cert. granted, vacated*, 141 S. Ct. 2667 (2021); *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d at 147.

<sup>151</sup> *Cnty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 937 (N.D. Cal. 2018), *aff’d in part, appeal dismissed in part*, 960 F.3d 586 (9th Cir. 2020), *cert. granted, vacated*, 141 S. Ct. 2666 (2021).

<sup>152</sup> *Mayor of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538, 555 (D. Md. 2019), *aff’d*, 952 F.3d 452 (4th Cir. 2020), *vacated*, 141 S. Ct. 1532 (2021). *See also* *Connecticut v. Exxon Mobil Corp.*, 2021 WL 2389739, at \*4 (“ExxonMobil’s argument ‘that federal common law necessarily and exclusively governs claims for interstate and international pollution’, . . . parallels the complete preemption doctrine.”); *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d at 148; *Suncor Energy*, 405 F. Supp. 3d at 964.

<sup>153</sup> 211 U.S. 149 (1908). *Mottley* was injured on a railroad and as a part of the settlement for these injuries with the railroad, he obtained lifetime free passes on the railroad. *Id.* at 150. But when Congress enacted a statute prohibiting certain free-transportation contracts, the railroad stopped honoring the passes and *Mottley* sued, seeking specific performance of the contract. *Id.* at 150–51. *Mottley* argued that the federal statute did not apply to the contract, or, in the alternative, was unconstitutional as applied to them. *Id.* at 151. The court held that although it was “very likely . . . a question under the Constitution would arise,” the plaintiff’s cause of action did not arise under the Constitution or the federal statute. *Id.* at 152. Plaintiff’s complaint did not support federal jurisdiction because even though the Court would have to have construed a federal statute and its constitutionality at some point in the litigation, these considerations would only arise as defenses or responses to anticipated defenses. *Id.* at 153–54. Another seminal case explaining well-pleaded complaint rule is *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987) where the court held that

of the complaint for federal jurisdiction to exist.<sup>154</sup> In other words, a defendant cannot inject a federal issue into a response pleading to remove action to federal court, thereby gaining control over the forum.<sup>155</sup> Courts have explained that the well-pleaded complaint rule “operationalizes the maxim that a plaintiff is the master of her complaint: She may assert certain causes of action and omit others . . . and thereby appeal to the jurisdiction of her choice.”<sup>156</sup> Because the well-pleaded complaint rule keeps lawsuits that could contain or turn on issues of federal law away from federal courts, scholars argue that it does not advance historical core purposes of federal question jurisdiction, such as interest in federal law uniformity and combating state court bias.<sup>157</sup> Yet other commentators argue that the well-pleaded complaint rule is a fair and objective rule where both federal and state law causes of actions exist.<sup>158</sup>

The rule plays an important role in the removal context, which is controlled by the removal statute—28 U.S.C. § 1441. Under the statute, a defendant can only remove an action originally commenced in state court upon a finding that the federal court has original jurisdiction over the action.<sup>159</sup> The Supreme Court held that an action can only be removed where a federal cause of action is pleaded, and not merely on the basis “of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff’s complaint, and even if both parties concede that the federal defense is the only question truly at issue.”<sup>160</sup> Climate change lawsuit defendants attempting to remove under Section 1441 must therefore meet the demands of the “arising under” statute 28 U.S.C. § 1331 and the well-pleaded complaint rule.<sup>161</sup>

Federal courts also created two narrow and somewhat arcane exceptions to the well-pleaded complaint rule to accommodate certain types of claims where federal interests are very strong.<sup>162</sup> These two judge-made exceptions are: (1) a “special and small category” of state-law actions under the Supreme Court’s

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whether federal jurisdiction exists under 28 U.S.C. § 1331 “is governed by the ‘well-pleaded complaint rule,’ which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff’s properly pleaded complaint.” *Id.* at 392.

<sup>154</sup> Freer, *supra* note 149, at 317.

<sup>155</sup> See *Caterpillar Inc.*, 482 U.S. at 386 (“Ordinarily, a case may not be removed on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the complaint, and even if both parties concede that the federal defense is the only question truly at issue.”). The “master of [the] complaint” principle is a vestige of old common law, derived from the notion that a lawsuit is the plaintiff’s property, and the plaintiff thus can dispose with it as she pleases. Antony L. Ryan, *Principles of Forum Selection*, 103 W. VA. L. REV. 167, 203 (2000).

<sup>156</sup> *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d at 147.

<sup>157</sup> See Seinfeld, *Complete Preemption Puzzle*, *supra* note 150, at 545, 545 n.22.

<sup>158</sup> Cf. Eric James Moss, Note, *The Breadth of Complete Preemption: Limiting the Doctrine to Its Roots*, 76 VA. L. REV. 1601, 1632 n. 168 (1990) (citing C. WRIGHT, LAW OF FEDERAL COURTS 99–102 (4th ed. 1983)).

<sup>159</sup> 28 U.S.C. § 1441.

<sup>160</sup> *Caterpillar Inc.*, 482 U.S. at 393.

<sup>161</sup> Moss, *supra* note 165, at 1608.

<sup>162</sup> Arthur R. Miller, *Artful Pleading: A Doctrine in Search of Definition*, 76 TEX. L. REV. 1781, 1802–21 (1998).

decision in *Grable & Sons Metal Products v. Darue Engineering & Manufacturing*, which “necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities;”<sup>163</sup> and (2) cases completely preempted by federal legislation that creates a cause of action that “Congress intended . . . to be exclusive.”<sup>164</sup> Defendants argued that state-law claims fall into these narrow categories, and even argued for the creation of a new, third category. As noted earlier, many courts analyzed petitioners’ arguments that federal law exclusively governs interstate pollution as arguments for ordinary preemption,<sup>165</sup> and held that as such, they could not constitute basis for a removal to federal court because the defendants only pleaded preemption as a defense.<sup>166</sup> Other courts simply stated the plaintiffs’ claims were premised on state law and did not fall into these two narrow exceptions.<sup>167</sup>

The defendants, however, attempted to argue that because federal law *exclusively* governs interstate pollution, there is another, third path for removal and exception to the well-pleaded complaint rule.<sup>168</sup> Citing case law governing interstate water disputes within the Supreme Court’s original jurisdiction<sup>169</sup> and cases concerning foreign affairs federal common law,<sup>170</sup> defendants argued that federal law “must apply here” so that the states do not “impose [their] own legislation on . . . the others” and out of concern for “uniformity in this country’s dealings with foreign nations.”<sup>171</sup> Defendants therefore argued that federal common law applied to plaintiffs’ state-law claims, and that it has such extraordinary preemptive power as to completely preempt state-law claims and sustain removal. This third exception to the well-pleaded complaint rule has not been adopted by the district courts in the removal context. But the defendants’ arguments were eventually embraced by the Second Circuit in *New York II*, which

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<sup>163</sup> 545 U.S. 308, 314 (2005).

<sup>164</sup> *Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1, 9 n.5 (2003). *See also* *City of Oakland v. BP P.L.C.*, 960 F.3d 570, 579 (9th Cir.), *vacated and amended by* 969 F.3d 895 (9th Cir. 2020).

<sup>165</sup> *See supra* note 156 and accompanying text.

<sup>166</sup> *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142, 148 (D.R.I. 2019), *aff’d sub nom.* *Rhode Island v. Shell Oil Prods. Co.*, 979 F.3d 50 (1st Cir. 2020), *cert. granted, vacated*, 141 S. Ct. 2666 (2021); *Bd. of Cnty. Comm’rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 405 F. Supp. 3d 947, 964 (D. Colo. 2019), *aff’d in part, appeal dismissed in part*, 965 F.3d 792 (10th Cir.), *cert. granted, vacated*, 141 S. Ct. 2667 (2021).

<sup>167</sup> *See supra* note 154 and accompanying text.

<sup>168</sup> *Petition for a Writ of Certiorari*, *supra* note 929, at 14 (“But this Court’s decisions establish another path for removal: Because federal law *exclusively* governs interstate-pollution claims, such a claim necessarily arises under federal law and is removable to federal court—even if the claim is framed under state law, and even if federal law does not ultimately provide a cause of action that would allow the claim to proceed.”) (emphasis added).

<sup>169</sup> *Id.* at \*16 (citing *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938); *Kansas v. Colorado*, 206 U.S. 46, 97 (1907)).

<sup>170</sup> *Id.* at \*17 (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 424 (1964)).

<sup>171</sup> *Id.* at \*16–17.



adopted much of the language and the case law advanced by the defendants in arguing for such a third exception.<sup>172</sup>

i. First Exception to the Well-Pleaded Complaint Rule:  
*Grable* Jurisdiction

The first exception to the well-pleaded complaint rule arises under the Supreme Court precedent in *Grable*. Broadly speaking, federal jurisdiction exists under § 1331 in two instances. The first type of jurisdiction is easy. Jurisdiction there arises when federal law creates a cause of action and is covered by the so-called “Holmes Test.”<sup>173</sup> The second type of federal jurisdiction has much less certain boundaries. Jurisdiction of this type arises where important federal issues and interests exist, on which the plaintiff’s right to relief depends. One type of such jurisdiction exists under the Supreme Court’s precedent in *Grable*.<sup>174</sup> For some time until the mid-2000s and following the Supreme Court’s decision in *Merrell Dow Pharmaceuticals Inc. v. Thompson*,<sup>175</sup> there was a lower court split on whether federal courts can exercise jurisdiction over state-law claims that incorporated federal law if the federal law did not grant a private right of action.<sup>176</sup> In *Merrell*, the Court relied heavily on the lack of a congressionally created private right of action to find that there was not a substantial federal issue under the Federal Food, Drug, and Cosmetic Act to support federal jurisdiction.<sup>177</sup> In *Grable*, a unanimous court rejected *Merrell*’s proposition that federal jurisdiction necessitates a finding of a federally created private right of action.<sup>178</sup>

<sup>172</sup> See *infra* notes 293–97 and accompanying text.

<sup>173</sup> *Smith v. Kansas City Title & Tr. Co.*, 255 U.S. 180, 215 (1921) (Holmes, J., dissenting).

<sup>174</sup> See *Ryan*, *supra* note 151, at 630–31 (summarizing that the answer to the question what types of federal issues embedded in state-law claims “became a pragmatic one based on certain amount of judicial intuition—the presence of a federal issue in a state-law claim made the case arise under federal law when it seemed the federal court should be empowered to hear it.”). The Court in *Franchise Tax Board v. Construction Laborers Vacation Trust* summarized these types of claims as such where “plaintiff’s right to relief necessarily depends on resolution of a substantial question of federal law.” 463 U.S. 1, 28 (1983).

<sup>175</sup> 478 U.S. 804 (1986). The *Merrell Dow* plaintiffs were mothers who took the drug Benedectin during pregnancy and whose children developed birth defects. *Id.* at 805. Plaintiffs alleged six causes of actions: five turned on state law and the sixth one encompassed an embedded federal issue. *Id.* In the sixth claim, plaintiff alleged that the defendant had violated the Federal Food, Drug and Cosmetic Act (“FDCA”) and that this violation gave rise to a rebuttable presumption of negligence. *Id.* at 805–06. Ultimately, the Court concluded that even though federal question jurisdiction existed where the vindication of the state law right “necessarily turned on some construction of federal law,” the federal issue in this case under the FDCA was not substantial enough to give rise to federal jurisdiction. *Id.* at 808, 814.

<sup>176</sup> See, e.g., *Ryan*, *supra* note 151, at 631; *Janutis*, *supra* note 147, at 103–04.

<sup>177</sup> 478 U.S. at 812, 814.

<sup>178</sup> *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 312 (2005). In *Grable*, the Internal Revenue Services (IRS) seized *Grable*’s real property to satisfy tax debt owed to IRS. *Id.* at 310. The IRS sold the property to *Darue* and gave him a quitclaim deed, but *Grable* later brought a quiet title action against *Darue* in state court for the property. *Id.* at 310–11. *Grable* argued that *Darue*’s title was invalid because the IRS had not complied with the applicable notice provisions that—according to *Grable*—required personal service. *Id.* at 311. *Darue* removed to

The *Grable* court instead held that whether federal jurisdiction exists depends on the “nature of the federal interest at stake,” and whether a private right of action exists is “relevant . . . but not dispositive.”<sup>179</sup>

The courts in the second wave of climate change litigation applied the *Grable* test to determine whether federal jurisdiction exists. Under *Grable*, courts considered whether federal claims were: “(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.”<sup>180</sup> Defendants argued that state law claims raised a host of federal issues because they “intrude[d] upon both foreign policy and carefully balanced regulatory considerations at the national level, including the foreign affairs doctrine,” “ha[d] a significant impact on foreign affairs,” “require[d] federal-law-based cost-benefit analyses,”<sup>181</sup> impacted federal environmental and energy policymaking and national security,<sup>182</sup> impacted their free speech,<sup>183</sup> or simply were “inherently federal in character.”<sup>184</sup>

Every court rejected defendants’ *Grable* arguments.<sup>185</sup> The district courts held that defendants did not point out to any “necessarily raised” or “actually disputed” issue of federal law,<sup>186</sup> and noted that the “general concern that federal

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federal court, arguing that *Grable*’s state quiet-title claim contained a federal issue—an interpretation of federal tax provision. *Id.* The court synthesized preceding case law into the four-part test, and concluded that *Grable*’s prong fulfilled the necessary and actually disputed prongs. *See id.* at 314–15. *Grable*’s claim necessarily raised a federal issue based on federal tax law because the state law required *Grable* to specify how he established a superior title, and the only basis for establishing a superior title was the IRS’s failure to give *Grable* personal notice of property’s seizure. *Id.* at 315. The federal issue was actually disputed because the legal meaning of the statute appeared to be the only contested issue in the case. *Id.*

<sup>179</sup> *Id.* at 317–18.

<sup>180</sup> *Gunn v. Minton*, 568 U.S. 251, 258 (2013).

<sup>181</sup> *Mayor of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538, 558 (D. Md. 2019), *aff’d*, 952 F.3d 452 (4th Cir. 2020), *vacated*, 141 S. Ct. 1532 (2021).

<sup>182</sup> *Connecticut v. Exxon Mobil Corp.*, No. 3:20-cv-1555 (JCH), 2021 WL 2389739, at \*8 (D. Conn. June 2, 2021).

<sup>183</sup> *Id.* at \*10.

<sup>184</sup> *City of Hoboken v. Exxon Mobil Corp.*, 558 F. Supp. 3d 191, 204 (D.N.J. 2021), *aff’d sub nom.* *City of Hoboken v. Chevron Corp.*, 45 F.4th 699 (3d Cir. 2022).

<sup>185</sup> *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31, 45 (D. Mass. 2020) (citing a collection of cases).

<sup>186</sup> *City of Hoboken v. Exxon Mobil Corp.*, 558 F. Supp. 3d at 203–05. While defendants claimed that the state claims are inherently federal in character because they required plaintiff to prove that defendants’ conduct was unreasonable, which is akin to “the analysis Congress already performed when enacting a variety of federal environmental statutes,” they did not show that the court’s analysis is “dependent on the interpretation of federal law.” See also *Connecticut v. Exxon Mobil Corp.*, 2021 WL 2389739, at \*8–\*9 (finding, *inter alia*, that while state claims relating to issues of national concern may demonstrate that an that there is a “substantial” issue under *Grable*, defendants did not show that state law claims “necessarily” raised an issue of federal law and that state consumer fraud claims do not necessarily raise issues of federal law simply because they are guided by federal interpretations); *Cnty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 989 (N.D. Cal. 2018) (pointing out that “even if deciding that nuisance claims were to involve a weighing of costs and benefits, and even if the weighing were to implicate the defendants’ dual

law might be implicated or may guide the Court's analysis is materially different than a claim, like that in *Grable*, that is dependent on the interpretation of federal law."<sup>187</sup> Similarly, the district courts explained that the defendants made "only vague references to a 'comprehensive regulatory scheme.'"<sup>188</sup> The Ninth Circuit held that the state law nuisance claims "fail[ed] to raise a substantial federal question"<sup>189</sup> because the adjudication of the claim "neither require[d] an interpretation of a federal statute, . . . , nor challenge[d] a federal statute's constitutionality,"<sup>190</sup> nor any "interpretation or application of federal law at all, because the Supreme Court ha[d] not yet determined that there [was] a federal common law of public nuisance relating to interstate pollution."<sup>191</sup>

ii. Second Exception to the Well-Pleaded Complaint Rule: Complete Preemption

The courts next turned to analyzing the defendants' motions to remand under the second exception to the well-pleaded complaint rule, which authorizes removal where federal law completely preempts plaintiffs' state-law claim. This exception is also known as the artful pleading doctrine, "an independent corollary of the well-pleaded complaint rule that a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint."<sup>192</sup> The artful

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obligations under federal and state law, that would not be enough to invoke *Grable* jurisdiction. On the defendants' theory, many (if not all) state tort claims that involve the balancing of interests and are brought against federally regulated entities would be removable. *Grable* does not sweep so broadly."), *aff'd in part, appeal dismissed in part*, 960 F.3d 586 (9th Cir. 2020), *cert. granted, vacated*, 141 S. Ct. 2666 (2021).

<sup>187</sup> *City of Hoboken v. Exxon Mobil Corp.*, 558 F. Supp. 3d at 204.

<sup>188</sup> *Mayor of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538, 560 (D. Md. 2019) (citation omitted), *aff'd*, 952 F.3d 452 (4th Cir. 2020), *vacated*, 141 S. Ct. 1532 (2021).

<sup>189</sup> *City of Oakland v. BP P.L.C.*, 969 F.3d 895, 906–07 (9th Cir. 2020).

<sup>190</sup> *Id.* at 906.

<sup>191</sup> *Id.* (citing *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 423 (2011)).

<sup>192</sup> *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 22 (1983). In the past, there has been a minor disagreement over the exact relationship between the "artful pleading doctrine" and complete preemption. Some courts suggested that complete preemption is an extension of the artful pleading doctrine, while others said artful pleading is a different doctrine. *See Moss, supra* note 162, at 1611, 1611 n.54 (collecting cases). The Supreme Court itself equivocated on the exact meaning of the artful pleading doctrine. *Compare Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 475 (1998) ("The artful pleading doctrine allows removal where federal law completely preempts a plaintiff's state-law claim.") with *Franchise Tax Bd.* 463 U.S. at 21 (describing artful pleading as a principle that "a plaintiff may not defeat removal by omitting to plead necessary federal questions."). The district courts examined in this paper understood the artful pleading doctrine as synonymous with complete preemption, *see Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142, 148 (D.R.I. 2019), *aff'd sub nom. Rhode Island v. Shell Oil Prods. Co.*, 979 F.3d 50 (1st Cir. 2020), *cert. granted, vacated*, 141 S. Ct. 2666 (2021), or as coextensive with and operating like *Grable* jurisdiction, *see Connecticut v. Exxon Mobil Corp.*, No. 3:20-cv-1555 (JCH), 2021 WL 2389739, at \*10 n.10 (D. Conn. June 2, 2021). Both characterizations lead to the same outcome—removal—and will not be distinguished for the purposes of this paper. Many academics and the Supreme Court view the doctrines as related. The "artful pleading" doctrine only arises when a plaintiff files a state law claim that is completely preempted, as if trying to hide

pleading doctrine allows courts to look below the surface of the pleaded causes of actions and probe for substantive federal issues that should be adjudicated in the federal forum—whether out of concern for uniformity and interference with the federal interests or out of distrust of state courts generally or their expertise particularly.<sup>193</sup>

Professor Young noted that complete preemption and protective jurisdiction share important similarities—they allow federal courts to exercise jurisdiction over state law claims to protect strong federal interests.<sup>194</sup> Professor Seinfeld, on the other hand, argued that complete preemption is best limited where there is a particularly strong interest in “regulatory uniformity.”<sup>195</sup> Yet other academics advanced that complete preemption is not connected to federal question interests such as uniformity of federal law because “the importance of uniformity in any single case is unrelated to whether federal law provides an exclusive federal remedy.”<sup>196</sup> Instead, these academics suggested that uniformity is related to other, historically contingent factors.<sup>197</sup> The underpinning of the doctrine are the subject of much academic discussion, and the Supreme Court’s limited precedent has done very little to demystify it.

The Supreme Court’s application of the doctrine suggests, however, that it is less comfortable with finding preemption based on its own determination of an important federal interest. Instead, the Court in recent years has strived to apply complete preemption upon a finding of an extraordinary manifestation of congressional intent to preempt state law by creating an exclusive cause of action. This approach makes sense if one views the doctrine against the backdrop of the growing administrative state where Congress has considered and legislated in nearly all areas of federal interest. According to this logic, the need for judicial application of the complete preemption doctrine therefore decreased, just as the need for courts to exercise protective jurisdiction decreased. This development can be discerned in the (sparse) Supreme Court precedent, in which the Court progresses from finding complete preemption without any justification to demanding an extraordinary showing of congressional intent within the statute to do so.

The very first case in which the Supreme Court applied the doctrine of complete preemption was *Avco Corp. v. Aero Lodge No. 735*.<sup>198</sup> In *Avco*, the Court permitted removal of a case where plaintiffs asserted state-law claims only because “[a]n action arising under [Section] 301 [of the Labor Management

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its “true” federal notion. *See, e.g., Rivet*, 522 U.S. at 475; *King v. Marriott Int’l, Inc.*, 337 F.3d 421, 425 (4th Cir. 2003) (“[T]he plaintiff simply has brought a mislabeled federal claim.”).

<sup>193</sup> Miller, *supra* note 166, at 1785; Karen A. Jordan, *The Complete Preemption Dilemma: A Legal Process Perspective*, 31 WAKE FOREST L. REV. 927, 949–50 (1996)

<sup>194</sup> *See* Ernest A. Young, *Stalking the Yeti: Protective Jurisdiction, Foreign Affairs Removal, and Complete Preemption*, 95 CAL. L. REV. 1775, 1806 (2007).

<sup>195</sup> Seinfeld, *Complete Preemption Puzzle*, *supra* note 150, at 540, 566.

<sup>196</sup> Paul E. McGreal, *In Defense of Complete Preemption*, 156 U. PA. L. REV. ONLINE 147, 152 (2007).

<sup>197</sup> *Id.*

<sup>198</sup> 390 U.S. 557 (1968).

Relations Act (LMRA)] is controlled by federal substantive law even though it is brought in a state court.”<sup>199</sup> Justice Scalia later remarked that “the opinion in *Avco* failed to . . . explain why state-law claims that are preempted by Section 301 of the LMRA are exempt from the strictures of the well-pleaded-complaint rule, nor did it explain how such a state-law claim can plausibly be said to ‘arise under’ federal law.”<sup>200</sup> The Court in *Franchise Tax Board v. Construction Laborers Vacation Trust* provided rationale for *Avco* grounded in the complete preemption doctrine:

The necessary ground of decision [in *Avco*] was that the preemptive force of § 301 is so powerful as to displace entirely any state cause of action “for violation of contracts between an employer and a labor organization.” Any such suit is purely a creation of federal law . . . . *Avco* stands for the proposition that if a federal cause of action completely preempts a state cause of action[,] any complaint that comes within the scope of the federal cause of action necessarily “arises under” federal law.<sup>201</sup>

Nevertheless, the Court held in *Franchise Tax Board*, that federal jurisdiction in the context of Section 502 of the Employment Income Security Act (ERISA) was not proper because unlike the federal statute in *Avco*, ERISA did not provide an alternative cause of action that would replace the preempted state law claim.<sup>202</sup> As commentators and the late Justice Scalia argued, *Franchise Tax Board*, though being the best account of complete preemption we have from the Supreme Court, is “entirely conclusory” and merely provides “an account of what *Avco* accomplishes, rather than a justification . . . for [its] radical departure from the well-pleaded-complaint rule.”<sup>203</sup> The rationale provided by *Franchise Tax Board* and repeated by courts since then is that the state law claims are just federal claims, masquerading as state claims—the reason why the doctrine is also referred to as artful pleading doctrine.<sup>204</sup> Commentators referred to the judicial process unmasking or discovering of the true essence of a claim “a sheer fiction”<sup>205</sup> that in either case does not authorize the “federalize-and-remove dance” but properly

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<sup>199</sup> *Id.* at 560.

<sup>200</sup> *Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 14 (2003) (Scalia, J., dissenting) (emphasis omitted).

<sup>201</sup> 463 U.S. 1, 23-24 (1983)..

<sup>202</sup> The Court found that there was no parallel federal remedy that would replace the state action or the enforcement of a tax levy or declaratory judgment under state law under ERISA. *Id.* at 25–26.

<sup>203</sup> Seinfeld, *Complete Preemption Puzzle*, *supra* note 150, at 553 (quoting *Beneficial Nat'l Bank*, 539 U.S. at 15) (internal quotation marks omitted).

<sup>204</sup> See Young, *supra* note 199, at 1813–14; Seinfeld, *Complete Preemption Puzzle*, *supra* note 150, at 567–68.

<sup>205</sup> Young, *supra* note 199, at 1814 (quoting Trevor W. Morrison, *Complete Preemption and the Separation of Powers*, 155 U. PA. L. REV. ONLINE 186, 187–88 (2006)).

requires a dismissal upon the “presentation of a nonexistent claim to a state court.”<sup>206</sup>

The Supreme Court has found complete preemption only in two other cases since *Avco*, each representing a slight change in the method of judicial determination of complete preemption, though both emphasizing congressional intent. In *Metropolitan Life Insurance Co. v. Taylor*, Taylor sued his employer and insurance company for failure to pay disability benefits on his employee benefit plan.<sup>207</sup> The defendants wanted to remove to a federal court, claiming that federal jurisdiction existed “over the disability benefits claim by virtue of [Employee Retirement Income Security Act] ERISA.”<sup>208</sup> The Court upheld removal, and held that unlike the relevant provision in *Franchise Board*, Section 502(a)(1)(B) of ERISA, which “lies at the heart of a statute,” had the extraordinary preemptive power necessary to “convert a state claim into an action arising under federal law.”<sup>209</sup> Even so, the Court stated it would have been reluctant to find such “extraordinary pre-emptive power . . . that converts an ordinary state common law complaint into one stating a federal claim . . . [i]n the absence of explicit direction from Congress.”<sup>210</sup> This is because the jurisdictional provision of ERISA closely paralleled the language of Section 301 of the LMRA that the Court held to completely preempt state claims in *Avco*.<sup>211</sup> The Court further relied on legislative history to confirm that just in *Avco*, Congress intended to grant the defendant the ability to remove the action to federal court by replicating the LMRA language.<sup>212</sup>

In the third and last case, *Beneficial National Bank v. Anderson*, the Supreme Court held that state-law usury claims were completely preempted by the National Bank Act (NBA) and removable to federal court.<sup>213</sup> The Court determined congressional intent with reliance on precedent and by considering scope of the statute, not by looking at the text of the provision itself and comparing it with

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<sup>206</sup> *Id.* (quoting *Beneficial Nat. Bank*, 539 U.S. at 18).

<sup>207</sup> 481 U.S. 58, 60-61 (1987).

<sup>208</sup> *Id.* at 61.

<sup>209</sup> *Id.* at 64-65.

<sup>210</sup> *Id.* Justice Brennan and some commentators suggested that because of the reliance on congressional intent to find removal, *Taylor* could be read “as a straightforward finding of *clear* congressional intent to create removal jurisdiction” though they admit that “ERISA does not specifically provide that state law actions will be removable as do the statutes in other cases where removal of state law claims is upheld on the basis of congressional authorization.” Garrick B. Pursley, *Rationalizing Complete Preemption after Beneficial National Bank v. Anderson: A New Rule, a New Justification*, 54 DRAKE L. REV. 371, 407 (2006).

<sup>211</sup> *Taylor*, 481 U.S. at 64.

<sup>212</sup> Miller, *supra* note 166, at 1796-97. To determine congressional intent, the Court examined legislative history and determined that the House and Senate agreed to nearly identical language in drafting the remedial provision of ERISA as was contained in section 301 of the LMRA that the *Amco* court found completely preempted state claims. *Taylor*, 481 U.S. at 65-66. The Court found this identical language as evidence that Congress recognized the *Avco* rule and incorporated it by reference to the remedial section of ERISA *Id.*

<sup>213</sup> 539 U.S. 1, 10-11 (2003).

other statutes or by looking at legislative history as the Court did in *Taylor*.<sup>214</sup> The Court explained that complete preemption applied where federal statute not only preempted the cause of action but “provided the exclusive cause of action.”<sup>215</sup> Critics argue that the *Anderson* majority “did not engage in a substantive inquiry into the ‘degree’ of preemptive force unleashed by [the relevant sections] of the NBA,” compare the provisions to the sections of ERISA and the LMRA where complete preemption was found earlier, or “consult the relevant legislative history to discern the degree to which Congress intended state law to be preempted by the NBA.”<sup>216</sup>

In the most recent articulation of the complete preemption doctrine, the Supreme Court focused on finding an extraordinary expression of congressional intent to preempt state law, with differences on how to determine congressional intent in relationship to a specific congressional statute.<sup>217</sup> Accordingly, the inquiry of the district courts evaluating defendants’ arguments that the Clean Air Act completely preempted state-law claims and applying this precedent also reflected some uncertainty about the relevant method and the necessary showing thereunder that would determine that Congress intended to completely preempt state law. Most of the district courts appeared to agree that whatever the outer bounds of complete preemption, climate change litigation did not rise to the threshold necessary for complete preemption because there was no statutory evidence that Congress intended such preemption.

To determine congressional intent to completely preempt state law, most courts examined the Clean Air Act and the available causes of action for

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<sup>214</sup>*Taylor*, 481 U.S. at 65–66. Scalia and Thomas dissented, arguing that *Anderson*’s exclusive federal cause of action test “implicitly contradict[ed]” *Taylor* where the court examined jurisdictional provisions and legislative history to determine whether removal was proper. Scalia was concerned by the potential reach of *Anderson*, concluding that “as between an inexplicable narrow holding and an inexplicable broad one, the former is the lesser evil.” *Anderson*, 539 U.S. at 21 (Scalia J., dissenting); see also Margaret Tarkington, *Rejecting the Touchstone: Complete Preemption and Congressional Intent after Beneficial National Bank v. Anderson*, 59 S. C. L. REV. 225, 245 (2008).

<sup>215</sup>*Anderson*, 539 U.S. at 8. The Court reasoned that the finding that NBA provided an exclusive cause of action for usury against national banks was supported by the “same federal interest that protected national banks from the state taxation that Chief Justice Marshall characterized as the ‘power to destroy.’” *Id.* at 11 (citation omitted). Providing a rationale for the decision, the *Anderson* court explained that “[u]niform rules limiting the liability of national banks and prescribing exclusive remedies for their overcharges are an integral part of a banking system that needed protection from ‘possible unfriendly State legislation.’” *Id.* at 10 (citation omitted); see also Seinfeld, *Complete Preemption Puzzle*, *supra* note 150, at 552.

<sup>216</sup> Pursley, *supra* note 217, at 442.

<sup>217</sup>*Connecticut v. Exxon Mobil Corp.*, No. 3:20-cv-1555 (JCH), 2021 WL 2389739, at \*5 (D. Conn. June 2, 2021) (“Although the Supreme Court has not expressly addressed whether a defendant may remove a case on the ground that purported state claims actually arise under federal common law, the Supreme Court’s articulation of the complete preemption standard suggests that the Court views congressional intent, in relation to the text of a specific federal statute, as an essential prerequisite for overcoming the principle that a plaintiff is the master of a complaint.”). See Trevor W. Morrison, *Complete Preemption and the Separation of Powers*, 155 U. PA. L. REV. ONLINE 186, 190 (2006) (“[T]he clarity that *Beneficial National Bank* brought to complete preemption also exposed its theoretical impoverishment.”).

plaintiffs. Several courts found that defendants did not identify any provision of the Clean Air Act or other evidence of congressional intent to completely preempt state causes of action, and some courts even found the contrary—that Congress wanted to preserve state law claims through the Clean Air Act’s savings clause.<sup>218</sup> Two district courts analyzed congressional intent by looking at whether there is an “exclusive” federal cause of action, and found none.<sup>219</sup> Other district courts took a different analytical route. These courts held that because plaintiffs state-law claims simply do not arise under federal common law<sup>220</sup> or, relatedly, because they are veiled arguments of ordinary preemption defense,<sup>221</sup> they did not completely preempt state law claims. Finally, two district courts conceded that federal common law could support removal, which seems to be contrary to the

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<sup>218</sup> See *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142, 150 (D.R.I. 2019) (citation omitted) (“As far as the Court can tell, the CAA authorizes nothing like the State’s claims, much less to the exclusion of those sounding in state law. In fact, the CAA itself says that controlling air pollution ‘is the primary responsibility of States and local governments.’”), *aff’d sub nom.* *Rhode Island v. Shell Oil Prods. Co.*, 979 F.3d 50 (1st Cir. 2020), *vacated*, 141 S. Ct. 2666 (2021); *Cnty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 938 (N.D. Cal. 2018) (citations omitted) (“The defendants do not point to any applicable statutory provision that involves complete preemption. To the contrary, the Clean Air Act and the Clean Water Act both contain savings clauses that preserve state causes of action and suggest that Congress did not intend the federal causes of action under those statutes ‘to be exclusive.’”), *aff’d in part, appeal dismissed in part*, 960 F.3d 586 (9th Cir. 2020), *vacated*, 141 S. Ct. 2666 (2021).

<sup>219</sup> See *City of Hoboken v. Exxon Mobil Corp.*, 558 F. Supp. 3d 191, 200–01 (D.N.J. 2021) (pointing out that “[d]efendants also fail to identify any means for a litigant to assert a federal cause of action under the Act” and that they “do not identify any provision of the Clean Air Act or other related document that evidences a congressional intent to displace state law remedies that fall within the ambit of the Clean Air Act.”), *aff’d sub nom.* *City of Hoboken v. Chevron Corp.*, 45 F.4th 699 (3d Cir. 2022); *Mayor of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538, 557 (D. Md. 2019) (“Defendants have not shown that any federal common law claim for public nuisance is available to the City here, and case law suggests that any such federal common law claim has been displaced by the Clean Air Act.”).

<sup>220</sup> It is likely that courts that simply proceeded to analyze defendants’ arguments that state public nuisance and consumer fraud claims necessarily arise under federal law and completely preempt state law simply assumed, but have not stated, that the Supreme Court’s complete preemption doctrine does not allow for preemption by federal common law, see, e.g., *Connecticut v. Exxon Mobil Corp.*, 2021 WL 2389739, at \*7, and they instead analyzed defendants’ arguments as complete preemption arguments.

<sup>221</sup> *Minnesota v. Am. Petroleum Inst.*, No. 20-1636 (JRT/HB), 2021 WL 1215656, at \*6 (D. Minn. Mar. 31, 2021) (“Because the Court finds that the claims alleged by the State do not arise under federal common law and Defendants do not plausibly allege that the claims are completely preempted, federal common law is not a sufficient independent basis for removal in this manner.”); *Connecticut v. Exxon Mobil Corp.*, 2021 WL 2389739, at \*7 (citation omitted) (“Federal common law provides no criteria by which a court can discern whether a federal cause of action carries the ‘extraordinary’ . . . )degree of preemption needed for removal.”); *Bd. of Cnty. Cmm’rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 405 F. Supp. 3d 947, 964 (D. Colo. 2019) (finding that defendants’ arguments are an ordinary preemption defense and as such cannot support removal); *Mayor of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d at 557 (finding that defendants’ arguments are ordinary preemption arguments, which cannot support removal); *Id.* at 555 (“[U]nlike ordinary preemption, complete preemption *does* ‘convert[] an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.”) (emphasis and alteration in original).



existing Supreme Court's focus on congressional intent as evidenced by the statute, without finding sufficient support for removal. Specifically, one district court held that federal common law does not govern the claims at hand and cannot support removal,<sup>222</sup> and another district court held that plaintiffs' claims are not completely preempted by federal common law.<sup>223</sup>

## 2. Defendants' Other Grounds for Removal

Similar to the types of arguments defendants made under *Grable*, defendants also contended that because climate change is a matter of international concern and international agreements, the foreign affairs doctrine preempts the state law claims and supports removal.<sup>224</sup> The courts that considered these arguments rejected removal based on the foreign affairs doctrine.<sup>225</sup>

Defendants further invoked a host of specific statutory bases for removal, including the Outer Continental Shelf Lands Act,<sup>226</sup> ; the federal officer removal statute,<sup>227</sup>; federal bankruptcy law,<sup>228</sup>; the Class Action Fairness Act,<sup>229</sup> ; admiralty jurisdiction,<sup>230</sup> and Admiralty Extension Act,<sup>231</sup> ; federal enclave

<sup>222</sup>Massachusetts v. Exxon Mobil Corp., 462 F. Supp. 3d 31, 44 (D. Mass. 2020) (finding that Massachusetts claims protecting consumers and investors do not implicate "uniquely" federal interests).

<sup>223</sup>Delaware v. BP Am. Inc., 578 F. Supp. 3d 618, 628–29 (D. Del. 2022) (citations omitted) (holding that "federal common law cannot create federal jurisdiction to support removal here, irrespective of whether Plaintiff's claims are 'federal in nature'" and that "[n]either the Supreme Court nor the Third Circuit has held that a complaint expressly asserting state-law claims that happen to implicate federal common law can create an additional exception to the well-pleaded complaint rule and confer removal jurisdiction on federal courts"), *aff'd sub nom.* City of Hoboken v. Chevron Corp., 45 F.4th 699 (3d Cir. 2022).

<sup>224</sup>See, e.g., Mayor of Baltimore v. BP P.L.C., 388 F. Supp. at 559 (the district court held that even though climate change is a serious international concern, the defendants failed to "actually identify any foreign policy that is implicated by the City's claims, much less one that is necessarily raised"); see also Delaware v. BP Am. Inc., 578 F. Supp. 3d at 631; Am. Petroleum Inst., 2021 WL 1215656, at \*5 (D. Minn. Mar. 31, 2021); Rhode Island v. Chevron Corp., 393 F. Supp. 3d 142, 151 (D.R.I. 2019), *aff'd sub nom.* Rhode Island v. Shell Oil Prods. Co., 979 F.3d 50 (1st Cir. 2020), cert. granted, vacated, 141 S. Ct. 2666 (2021).

<sup>225</sup>See, e.g., Am. Petroleum Inst., 2021 WL 1215656, at \*9 ("[T]he State does not raise claims related to environmental regulation or foreign policy, therefore the Clean Air Act and foreign affairs doctrine do not pose colorable defenses" and therefore cannot support removal); *Suncor Energy*, 405 F. Supp. 3d at 973 (rejecting complete preemption after finding that "there is no congressional intent regarding the preemptive force of the judicially-crafted foreign affairs doctrine, and the doctrine obviously does not supply any substitute causes of action.") (quoting Beneficial Nat. Bank v. Anderson, 539 U.S. 1, 8 (2003)); *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d at 150 n. 3 (finding the argument that foreign-affairs doctrine completely preempts state law claims "without legal basis."); *Mayor & City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d at 562 (finding that "defendants' reliance on this principle, often referred to as the 'foreign affairs doctrine,' . . . is inapposite in the complete preemption context").

<sup>226</sup>43 U.S.C. § 1349(b).

<sup>227</sup>28 U.S.C. § 1332(a).

<sup>228</sup>38 U.S.C. § 1452.

<sup>229</sup>28 U.S.C. § 1332(d).

<sup>230</sup>codified at 28 U.S.C. § 1333.

jurisdiction based on climate change impacts to military bases and other “federal enclaves,” and diversity jurisdiction.<sup>232</sup> The federal courts rejected wholesale these bases for removal.<sup>233</sup>

### B. The Sole District Court Denying the Order to Remand

Judge Alsup, a federal district court judge in San Francisco, was the sole judge who denied the plaintiffs’ motion to remand a climate change lawsuit based on state law claims back to state court in a February 2018 case, *BP I.*<sup>234</sup> Plaintiffs City of Oakland and City of San Francisco (the “Cities”) filed a complaint in California Superior Court alleging a “single claim for public nuisance under California law” against the five largest “producers of fossil fuels in the world, as measured by the greenhouse gas emissions allegedly generated from the use of fossil fuels they have produced.”<sup>235</sup> The Cities argued that “combustion (by others) of fossil fuels produced by defendants has increased atmospheric levels of carbon dioxide and, as a result, raised global temperatures and melted glaciers to cause a rise in sea levels, and thus caused flooding in Oakland and San Francisco.”<sup>236</sup>

The Cities did not seek to impose liability on the producers for direct emissions of carbon dioxide but instead, their state nuisance claims were:

[p]remised on the theory that—despite long-knowing that their products posed severe risks to the global climate—defendants produced fossil fuels while simultaneously engaging in large scale advertising and public relations campaigns to discredit scientific research on global warming, to downplay the risks of global warming, and to portray fossil fuels as environmentally responsible and essential to human well-being.<sup>237</sup>

They demanded an “abatement fund to pay for seawalls and other infrastructure needed to address rising sea levels” to mitigate the costs of rising sea levels following the climate change misinformation campaign and subsequently increased combustion of carbon dioxide.<sup>238</sup> As in the other second wave climate

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<sup>231</sup> 46 U.S.C. § 30101(a).

<sup>232</sup> 28 U.S.C. § 1332(a)(1)

<sup>233</sup> See, e.g., *Am. Petroleum Inst.*, 2021 WL 1215656, at \*10–13; *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d at 44–51 (D. Mass. 2020); *Suncor Energy*, 405 F. Supp. 3d at 973–80 (D. Colo. 2019); *Mayor & City Council of Baltimore*, 388 F. Supp. 3d at 566–74 (D. Md. 2019).

<sup>234</sup> *California v. BP P.L.C.*, No. C 17-06011 WHA, 2018 WL 1064293, at \*1 (N.D. Cal. Feb. 27, 2018), *vacated sub nom.* *City of Oakland v. BP P.L.C.*, 960 F.3d 570 (9th Cir. 2020), *amended by* 969 F.3d 895 (9th Cir. 2020).

<sup>235</sup> *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1021 (N.D. Cal. 2018), *vacated*, 960 F.3d 570 (9th Cir. 2020), *amended by* 969 F.3d 895 (9th Cir. 2020).

<sup>236</sup> See *California v. BP*, 2018 WL 1064293, at \*4.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at \*5.

change lawsuits, defendants alleged a host of grounds for federal jurisdiction.<sup>239</sup> Broadly speaking, defendants argued that the state law public nuisance claims necessarily arise under federal common law because they implicate various broadly articulated important federal interests including national security and foreign affairs or environmental protection and energy regulation.<sup>240</sup>

Judge Alsup held for the defendants on their motion to remove the case to federal court, and agreed with defendants that the “nuisance claims—which address the national and international geophysical phenomenon of global warming—are necessarily governed by federal common law.”<sup>241</sup> As the other district courts considering state law climate change claims have pointed out in distinguishing this ruling, Judge Alsup’s decision does not show exactly what procedural device would enable a federal court to entertain purely state-law claims in the removal context if they do not fit into the two circumspect exemptions to the well-pleaded rule. Specifically, other district courts criticized Judge Alsup’s decision for failing “to discuss or note the significance of the difference between removal jurisdiction, which implicates the well-pleaded complaint rule, and federal jurisdiction that is invoked at the outset such as in *AEP* and *Kivalina*”<sup>242</sup>—the two precedents cited by Judge Alsup for the proposition that federal law applied to the case.

Judge Alsup concluded, while likening the case to the Supreme Court decisions in *AEP* and *City of Milwaukee v. Illinois* as well as the Ninth Circuit’s precedent *Native Village of Kivalina v. ExxonMobil Corp.*,<sup>243</sup> that federal common law properly applies to the plaintiffs’ public nuisance claims because “a uniform standard of decision is necessary to deal with the issues raised” in the suit.<sup>244</sup> Given the “scope of the predicament,” “[a] patchwork of fifty different answers to the same fundamental global issue would be unworkable.”<sup>245</sup> Judge Alsup omitted from his discussion that plaintiffs in those cases pleaded federal common law causes of action. Accordingly, there is an unexplained gap in this opinion concerning the procedural device that preempted the state-law causes of action pleaded by the defendants in this case. The Supreme Court has never addressed whether federal common law does constitute an exception to the well-pleaded complaint rule and can thus displace state-law claims with sufficient

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<sup>239</sup> See Notice of Removal at 3–5, *California v. BP P.L.C.*, No. C 17-06011 WHA, 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018) (No. 3:17-cv-06011-JCS)[hereinafter *BP I* Defendant’s Notice of Removal].

<sup>240</sup> *Id.*

<sup>241</sup> *BP I*, 2018 WL 1064293, at \*2.

<sup>242</sup> *Bd. of Cnty. Comm’rs v. Suncor Energy (U.S.A.) Inc.*, 405 F. Supp. 3d 947, 962 (D. Colo. 2019). See also *Mayor & City Council of Balt. v. BP P.L.C.*, 388 F. Supp. 3d 538, 556–57 (D. Md. 2019) (“[T]he ruling is at odds with the firmly established principle that ordinary preemption does not give rise to federal question jurisdiction.”).

<sup>243</sup> *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012).

<sup>244</sup> *BP I*, 2018 WL 1064293, at \*1.

<sup>245</sup> *Id.* at \*3.

force to support removal, but the current articulation of the doctrine does not seem to support this proposition.<sup>246</sup>

Academics, most prominently Professor Seinfeld, and federal judges proposed that although Judge Alsup in *BP I* did not say the procedural device that allowed the court to maintain jurisdiction was complete preemption, it was the only “intelligible” basis for the decision.<sup>247</sup> Complete preemption is an unusual and controversial doctrine,<sup>248</sup> and its expansion by Judge Alsup through the inclusion of preemption by federal force elicited criticism. For those reasons, some authors like Professor Seinfeld argued that complete preemption, in this case, offers an “unsatisfying framework.”<sup>249</sup> Professor Seinfeld noted that complete preemption does not do what Judge Alsup wants it to do because it turns on one factor—“the availability of a federal cause of action to replace the preempted state law claim.”<sup>250</sup> According to Professor Seinfeld, complete preemption as applied by Judge Alsup “enhance[d] federal judicial power at the expense of plaintiffs . . . and state courts,” and if it can “attach when state law is preempted by federal common law,” it introduces “judicial empowerment” at Congress’s expense into judicial action.<sup>251</sup>

However, at least one federal court disagreed with Professor Seinfeld’s conclusion—which was also embraced by several district courts—that federal common law does not and should not form a basis for complete preemption.<sup>252</sup> Judge Young of District Court of Massachusetts wrote that even though the case law generally refers to congressional intent as the touchstone of complete preemption, this merely means that all cases cited incidentally involved statutory interpretation and these cases did not speak to whether federal common law could completely preempt state-law claims.<sup>253</sup> To argue that preemption premised on federal law could exist, Judge Young cites *Oneida Indian Nation of N.Y. v. County of Oneida*, where the Supreme Court found preempted “possessory land

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<sup>246</sup> Connecticut v. Exxon Mobil Corp., No. 3:20-CV-1555 (JCH), 2021 WL 2389739, at \*5 (D. Conn. June 2, 2021). *But see* Massachusetts v. Exxon Mobil Corp., 462 F. Supp. 3d 31, 42 n.8 (D. Mass. 2020). *See supra* Part (II)(A)(1)

<sup>247</sup> Massachusetts v. Exxon Mobil Corp., 462 F. Supp. 3d 31, 40 (D. Mass. 2020) (“Though he did not use the term, Judge Alsup’s holding is intelligible only as an application of the complete preemption doctrine.”); Seinfeld, *Jurisdictional Lessons*, *supra* note 33, at 32 (“Despite Judge Alsup’s failure to say so . . . California v. BP is best understood as a complete preemption case.”)

<sup>248</sup> *See* Seinfeld, *Jurisdictional Lessons*, *supra* note 33, at 27.

<sup>249</sup> *Id.* at 35.

<sup>250</sup> *Id.* at 36.

<sup>251</sup> *Id.* at 37.

<sup>252</sup> Cases that embraced the theory that federal common law cannot form basis for complete preemption were: Connecticut v. Exxon Mobil Corp., No. 3:20-CV-1555 (JCH), 2021 WL 2389739, at \*\*5–6 (D. Conn. June 2, 2021), Rhode Island v. Chevron Corp., 393 F. Supp. 3d 142, 149 (D.R.I. 2019); BD. of Cty. Comm’rs v. Suncor Energy (U.S.A.) Inc., 405 F. Supp. 3d 947, 969 (D. Colo. 2019); Mayor & Ctiy Council of Baltimore v. BP P.L.C., 388 F. Supp. 3d 538, 557 (D. Md. 2019); Ctny. of San Mateo v. Chevron Corp., 294 F. Supp. 3d 934, 938 (N.D. Cal. 2018), *aff’d in part*, appeal dismissed in part, 960 F.3d 586 (9th Cir. 2020).

<sup>253</sup> Massachusetts v. Exxon Mobil Corp., 462 F. Supp. 3d 31, 42, n.8 (D. Mass. 2020).

claims under state law brought by Indian tribes because of the uniquely federal 'nature and source of the possessory rights of Indian tribes.'"<sup>254</sup>

But complete preemption in the federal Indian case law is a distinguishable manifestation of federal plenary power over Indian affairs, a power based on the special relationship between the federal government and Indian tribes. Moreover, even within Indian law, complete preemption predicated on federal Indian common law is limited to a set of narrow circumstances. The Supreme Court has acknowledged as much in *Beneficial National Bank v. Anderson*, where it noted that *Oneida* turned on "the special historical relationship between Indian tribes and the Federal Government," and it therefore did not impact the Court's analysis in those cases concerning complete preemption.<sup>255</sup>

Furthermore, later Supreme Court decisions suggest that, at the minimum, even as applied to Indian affairs, complete preemption based on federal Indian common law only applies to a narrow set of special circumstances.<sup>256</sup> For example, in *Oklahoma Tax Commission v. Graham*, the Chickasaw Nation and the manager of its wholly-owned motor inn sought to remove an action brought against the Tribe by the Oklahoma Tax Collection for unpaid excise taxes under Oklahoma law.<sup>257</sup> The Tribe argued that the action was barred by tribal sovereign immunity, and sought to remove it to federal court.<sup>258</sup> But the Supreme Court reversed the Tenth Circuit's decision that affirmed the lower court and upheld the removal of the claims to federal court.<sup>259</sup> The Court held that allegations of federal immunity from a state claim do not qualify for federal jurisdiction, stating under the well-pleaded complaint rule that "it has been long settled that the existence of a federal immunity to the claims asserted does not convert a suit otherwise arising under state law into one which, in the statutory sense, arises under federal law."<sup>260</sup>

The necessary procedural device that would have enabled Judge Alsup to arrive at the decision that federal common law provides basis for federal jurisdiction is therefore limited to a few very restricted instances concerning federal Indian law and compelled by a constitutional preference.<sup>261</sup> Unlike Indian

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<sup>254</sup> *Massachusetts*, 462 F. Supp. at 41 n.8 (citing *Oneida Indian Nation of N.Y. v. Cnty. of Oneida*, 414 U.S. 661 (1974)).

<sup>255</sup> 539 U.S. 1, 8 n.4 (quoting *Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 667 (1974)).

<sup>256</sup> Lower courts arrived at similar conclusions and rejected a broad rule that would apply complete preemption in the absence of anything of import to Indian tribes in disputes involving tribal trust lands. *See, e.g.*, *K2 Am. Corp. v. Roland Oil & Gas, LLC*, 653 F.3d 1024 (9th Cir. 2011); *Safari Park, Inc. v. Southridge Prop. Owners Ass'n of Palm Springs*, No. 18-cv-01233-CBM, 2018 WL 6843667 (C.D. Cal. Dec. 4, 2018).

<sup>257</sup> 489 U.S. 838, 839 (1989) (per curiam).

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at 839-41.

<sup>260</sup> *Id.* at 841.

<sup>261</sup> One such area is likely state law claims that impact Indian possessory claims. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 n.8 (1987) (A "state-law complaint that alleges a present right to possession of Indian tribal lands necessarily asserts a present right to possession under federal law

affairs, pollution is a state concern and constitutional preference enshrined in the principles of federalism advises the contrary treatment—that states' interests must be protected and cannot be easily displaced.

The Ninth Circuit case cited by Judge Alsup in support of the proposition that the well-pleaded complaint rule does not bar the court's jurisdiction over the Cities' federal common law claims, *Wayne v. DLH Worldwide Express*,<sup>262</sup> does not withstand closer scrutiny either. In *Wayne*, the Ninth Circuit held that federal common law could support the removal of purely state law claims against air carriers for offering shipment insurance in violation of California's laws.<sup>263</sup> Even though *Wayne* and like Circuit precedents are cited by defendants in support of a "third exception" to the well-pleaded complaint rule,<sup>264</sup> those decisions are distinguishable.

First, the Supreme Court's decision in *Anderson*, in which the court articulated the complete preemption standard emphasizing a clear expression of congressional intent, was announced just a year after *Wayne*.<sup>265</sup> Although the Supreme Court never ruled on whether federal common law can constitute an exception to the well-pleaded complaint rule, other Circuits that had previously held that it could in precedents resembling *Wayne* found that these precedents were overruled by *Anderson* and its focus on congressional intent.<sup>266</sup> Second, and relatedly, *Wayne* was unlike *BP I* because the relevant statute in *Wayne*—the Airline Deregulation Act of 1978—contained an express savings clause that preserved *federal* common law causes of action,<sup>267</sup> while the CAA contains a savings clause preserving *state*, and not federal, causes of actions. And third, unlike federal common law of air carrier cases, the Supreme Court held that the federal common law of air pollution was displaced by the CAA.<sup>268</sup>

Judge Alsup's decision therefore lacked a key ingredient that, according to the Supreme Court, enables a court to find an "extraordinary" preemptive force that

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and is thus completely preempted and arises under federal law.") (internal quotation marks omitted).

<sup>262</sup> 294 F. 3d 1179 (9th Cir. 2002).

<sup>263</sup> *Id.* at 1182.

<sup>264</sup> *See, e.g.*, Defendants-Appellees' Petition for Panel Rehearing and/or Rehearing En Banc, *City of Oakland v. BP P.L.C.*, 3:17-cv-06011-WHA 9 (July 8, 2020) ("[A]uthority from inside and outside this Circuit clearly recognizes federal common law as a third, independent ground for federal jurisdiction.") (citing *Wayne* 294 F.3d at 1179).

<sup>265</sup> *Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 8, 10–11 (2003).

<sup>266</sup> A Connecticut district court explained in *Connecticut v. Exxon Mobil Corporation* that while "[t]he Second Circuit, . . ., recognized federal common law as a basis for removal under the complete preemption doctrine," because such claims "necessarily ar[o]se under federal common law," the Second Circuit reconsidered its decision in *Marcus v. AT&T Corp.*, 138 F.3d 46 (2d Cir. 1998), noting that Metropolitan Life Insurance Co. "sharply circumscribed the availability of removal based on complete preemption." *Connecticut v. Exxon Mobil Corp.*, No. 3:20-CV-1555 (JCH), 2021 WL 2389739, at \*6 (D. Conn. June 2, 2021) (citation omitted) (internal quotation marks omitted).

<sup>267</sup> *Wayne*, 294 F.3d at 1185, n.4 (quoting ADA saving's clause which in relevant part 49 U.S.C. § 40120(c) stated that "[a] remedy under this part [49 U.S.C. § 40101 et. seq.] is in addition to any other remedies provided by law.")

<sup>268</sup> *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424–26 (2011).

displaces state-law cause—congressional intent expressed in a federal statute.<sup>269</sup> Without congressional input, a federal court's decision to retain jurisdiction over state law claims becomes an exercise in taking away both state power to adjudicate tort claims and congressional power to invade this state province in violation of the doctrines of separation of powers and federalism.<sup>270</sup>

#### IV. *City of New York v. Chevron*: Counting the Differences

New York City's lawsuit against Chevron and the other four largest fossil fuel producers was different from the climate change lawsuits introduced in Part III. It was the only lawsuit filed in federal court in the first instance. It was also the only other case in which a court held, as Judge Alsup did in *BP I*, that the plaintiffs' claims necessarily arose under federal law.

In 2018, New York City (the "City") filed a lawsuit against the five largest producers of fossil fuels, alleging that even though they had "early knowledge of climate change risks, [they] extensively promoted fossil fuels for pervasive use while denying or downplaying these threats."<sup>271</sup> New York City pleaded three causes of action under New York law: public nuisance, private nuisance, and trespass arising from the production, promotion, and sale of fossil fuels.<sup>272</sup> Based on these claims, the City requested past and future compensatory damages for costs incurred to its "infrastructure and property, and to protect the public health, safety, and property of its residents from the impacts of climate change."<sup>273</sup> The defendants moved to dismiss the City's lawsuits, arguing that: "(1) the City's claims [arose] under federal common law and should be dismissed, (2) the City's

<sup>269</sup> *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987) (quoting *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987)). *But see* Seinfeld, *Complete Preemption Puzzle*, *supra* note 150, at 555–77 (2007). Professor Seinfeld argues that *Avco*, *Franchise Tax*, and *Caterpillar* do not discuss congressional intent at all and that the court should therefore focus on the question of whether a field has been occupied by congressional action. This paper does not embrace this theory in light of the two other cases that found complete preemption—*Taylor* and *Anderson*—that do focus on congressional intent. Professor Seinfeld's theory has moreover not been accepted by lower federal courts, and it would increase the number of cases that could be found to be completely preempted and subsequently removed to federal courts without a clear congressional directive to do so. Such result would have concerning repercussions on the doctrines of federalism and separation of powers. Professor Young also points out another problem. First, that "it is hardly obvious . . . that Congress may not have an overriding interest in the uniform application of a single rule in an otherwise unpreempted field. Second, "little can be derived" from the formula that Congress "has occupied the field" because every act of Congress occupies some field, but the boundaries of when does the occupation preempt state law claims are hard to ascertain. *See* Young, *supra* note 199., at 1817–18.

<sup>270</sup> Even in the most expansive federal legislation, the Clean Water Act and the Clean Air Act, Congress did not exercise its power to grant federal court's jurisdiction over all matters related to the acts. The acts are instead built on principles of federal and state cooperation—the savings clause is one of the expressions of the federal-state cooperative balance on which the Clean Air Act was premised. *See generally* Part II.

<sup>271</sup> *New York I.*, 325 F. Supp. 3d 466, 469 (S.D.N.Y. 2018).

<sup>272</sup> *Id.* at 470.

<sup>273</sup> *Id.*

claims [were]independently barred by numerous federal doctrines, (3) the amended complaint [did]not allege viable state-law claims, (4) the City's claims [were]not justiciable, and (5) the City []failed to allege proximate cause.”<sup>274</sup>

The district court dismissed the City’s claims, finding that they were “displaced by federal common law” because “transboundary greenhouse gas emissions are, by nature, a national (indeed, international) problem, and therefore must be governed by a unified federal standard.”<sup>275</sup> It then held that these so “transformed” federal common law claims were preempted and displaced by the Clean Air Act under *AEP*.<sup>276</sup> Finally, the court also held that even though the CAA only regulates domestic emissions, the City’s claims based on foreign emissions [were]nevertheless “barred by the presumption against extraterritoriality and the need for judicial caution in the face of ‘serious foreign policy consequences.’”<sup>277</sup> The City then appealed the district court’s decision.

The Second Circuit framed the question as “whether municipalities may utilize state tort law to hold multinational oil companies liable for the damages caused by global greenhouse gas emissions.”<sup>278</sup> The court found, considering the “harm and the existence of a complex web of federal and international environmental law regulating such emissions,” the City cannot so use New York tort law against fossil fuel producers, and affirmed the district court’s dismissal.<sup>279</sup> The Circuit’s reasoning was buttressed by the initial determination that the City’s state-law claims arising from the production, promotion, and sale of fossil fuels were masquerading claims for harms caused by greenhouse gas emissions. Next, the court held in three steps that: (1) the City’s state law claims were governed by federal common law; (2) the so-transformed federal common law claims arising from domestic emissions were subsequently preempted under the CAA; and (3) any claims concerning foreign emissions do not create a cause of action under federal common law.

Before proceeding to the analysis, the court laid out the facts of the case that betrayed the court’s skepticism towards the City’s case. Unpersuaded by the City’s allegations that defendants had “known for decades that their fossil fuel products pose a severe risk to the planet’s climate,” yet still “downplayed [its] the risks and continued to sell massive quantities of fossil fuels,” the court remarked that in essence, the City claimed “ its taxpayers should not have to shoulder the burden of financing the City’s preparations to mitigate the effects of global warming . . . [e]ven though every single person who uses gas and electricity . . . contributes to global warming.”<sup>280</sup> The court also pointedly added that even though the City admitted the “Producers’ conduct [was]lawful . . . commercial

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<sup>274</sup> *Id.* .

<sup>275</sup> *New York II*, 993 F.3d 81, 88–89 (2d Cir. 2021) (quoting *New York I*, 325 F. Supp. 3d 466, 471–476 (S.D.N.Y. 2018)).

<sup>276</sup> *New York I*, 325 F. Supp. 3d at 472.

<sup>277</sup> *Id.* at 475 (citing *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1407 (2018)).

<sup>278</sup> *New York II*, 993 F.3d at 85.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* at 86–87 (internal quotations marks omitted).



activit[y],” plaintiffs “[n]onetheless . . . believe[d] that it is appropriate to shift the costs of protecting the City from climate change impacts back on the companies . . .”<sup>281</sup> The court’s extreme skepticism toward the plaintiff’s claims is unusual. Hidden away in the facts section, the court stopped short of saying that the defendant’s conduct was lawful, and that the plaintiff merely attempted to regulate climate change writ large—without ever discussing the merits of the case.

The court then presented a brief overview of the CAA of 1963 and the 1970 Amendments that focused on statutory limitations on the states’ “role in regulating pollution sources beyond their borders.”<sup>282</sup> It explained that these legislative enactments created “an intricate regulatory regime intended to ‘protect and enhance the quality of the [n]ation’s air resources to promote the public health and welfare and the productive capacity of its population.’” Under the Act, the states adopt plans to “implement emission standards applicable to any existing source of air pollution” but when it comes to regulating pollution beyond their borders, the CAA, according to the Court, “often limits states to commenting on proposed EPA rules or another state’s emission plan.”<sup>283</sup> The limitations of the state power are particularly obvious, according to the court, when considering climate change—“a problem that the United States cannot confront alone,” which requires the engagement of the federal government in multilateral international efforts that transcend state boundaries.<sup>284</sup>

The court then turned to its first and most critical argument that the City’s state-law nuisance and trespass claims were governed by federal common law. Citing *Milwaukee II*, the Second Circuit starts its analysis by noting that “*Erie* was not a death knell to all federal common law” because federal common law still exists in restricted instances “where a federal court is compelled to consider federal questions [that] cannot be answered from federal statute alone.”<sup>285</sup> The court explained that unlike a preemption by a federal statute that requires a “clear and manifest purpose of Congress,” “where federal common law exists, it is because state law cannot be used” in fields that states traditionally have not occupied.<sup>286</sup> According to the court, federal common law applies to a cause of action where “a federal rule of decision is necessary to protect uniquely federal interests, [t]hose in which Congress has given the courts the power to develop substantive law,”<sup>287</sup> and where there is a “conflict between that federal interest

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<sup>281</sup> *Id.* at 87 (alterations added) (internal quotations marks omitted).

<sup>282</sup> *Id.* at 88.

<sup>283</sup> *Id.* (citing as examples 42 U.S.C. §§ 7607(d)(5), 7475(a)(2), 7410(a)(1)).

<sup>284</sup> *Id.* (citing as an example of such multilateral efforts the United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc. No. 102–38, 1771 U.N.T.S. 107 and rejoining of the Paris Agreement).

<sup>285</sup> *Id.* at 89 (citations and quotations omitted) (alterations in text).

<sup>286</sup> *Id.* at 90, 98 (quoting *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988); *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 316 (1981)) (internal quotation marks omitted).

<sup>287</sup> *Id.* at 90 (citing *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981)).

and the operation of state law.”<sup>288</sup> The applicable precedent and language that the court relied on mirrored the arguments presented by the fossil fuel producers in the removal context, where defendants argued that the harms alleged by states and cities werenot limited to harms caused by fossil fuels in the states but they were caused by defendants’ global activities and greenhouse gas emissions.<sup>289</sup> Claims arising out of global emissions, according to fossil fuel producers, therefore implicated a “uniquely federal interest” that preempted state-law claims.<sup>290</sup>

The court agreed with the defendants, and found that federal common law indeed applies to defendants’ claims because these did not arise from the production, promotion, or sale of fossil fuels, but instead from greenhouse gases.<sup>291</sup> It rejected the City’s contention that emissions are “only a link in the causal chain” and that the wrongful conduct was the production, promotion, and sale of fossil fuels all the while defendants knew and actively covered up the harms they caused.<sup>292</sup> Instead, the court found that this action was a “suit over global greenhouse gas emissions” because the City sought damages exactly “because fossil fuels emit greenhouse gases.”<sup>293</sup> The court labeled the City’s claims “artful pleading” that did not “change the substance of [the City’s] claims.”<sup>294</sup> Once the court recharacterized the nature of conduct from which the claims arose, it found that the case in front of it was “sprawling” and “simply beyond the limits of state law.”<sup>295</sup> Accordingly, adjudication of such a case would “effectively impose strict liability for damages caused by fossil fuel emissions no matter where they were released” and upset “the careful balance that has been struck between the prevention of global warming . . . energy production, economic growth, foreign policy, and national security.”<sup>296</sup>

The court held that federal common law applied to that action based on an almost century-long and “mostly unbroken string of cases [that have] applied federal law to disputes involving interstate air or water pollution.”<sup>297</sup> The court emphasized that “such [interstate] quarrels” implicated two interests that are “incompatible with the application of state law: (i) the ‘overriding . . . need for a

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<sup>288</sup> *Id.* (citing *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 692 (2006); *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994); *Boyle v. United Technologies Corp.*, 487 U.S. 500, 507 (1988)).

<sup>289</sup> *See, e.g.*, Defendants’ Opposition to Mayor & City Council of Baltimore’s Motion to Remand, at 11, *Mayor & City Council of Baltimore v. BP*, 388 F. Supp. 3d 538 (2019) (No. 1:18-cv-2357 ELH), 2018 WL 5019802; Notice of Removal by Defendant Shell Oil Products Company LLC, at 3, *State of Rhode Island v. Chevron*, (R.I. Sup. Ct. 2018).

<sup>290</sup> *See, e.g.*, Notice of Removal by Defendant Shell Oil Products Company LLC, *supra* note 304, at 3.

<sup>291</sup> *New York II*, 993 F.3d. at 91.

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> *Id.* at 97.

<sup>295</sup> *Id.* at 92–93 (citations omitted).

<sup>296</sup> *Id.* at 93.

<sup>297</sup> *Id.* at 91.

uniform rule of decision' on matters influencing national energy and environmental policy, and (ii) 'basic interests of federalism.'"<sup>298</sup> The majority of the cited cases were decided before the enactment of the CAA or the CWA, and are either interstate disputes or disputes between states and cities and out-of-state polluters.<sup>299</sup> Curiously, the court also cited *Milwaukee II* and *AEP* in which the courts held that federal common law was displaced by federal legislation,<sup>300</sup> and *Ouellette*, where the court held that a state law action based on the law of the source state was permitted.<sup>301</sup> The relevant citation that the Court selected from *Ouellette*,<sup>302</sup> for example, states that the principle that "federal common law governed the use and misuse of interstate water" was upset by the CWA and as a consequence, the "federal legislation now occupie[s] the field."<sup>303</sup>

According to the court, the City's claims interfered with unique federal interests because they effectively amounted to "strict liability for the damages caused by fossil fuel emissions no matter where in the world those emissions were released (or who released them)" and "risk[ed] upsetting the careful balance that has been struck between the prevention of global warming . . . and energy production, economic growth, foreign policy, and national security . . . ."<sup>304</sup> As an example of such balance, the court cited the Energy Policy and Conservation Act,<sup>305</sup> the goal of which is to avoid "another severe energy crisis through the creation of programs focused on energy regulation, energy conservation, and . . . improved energy efficiency of various products."<sup>306</sup>

The court finally distinguished the City's case from the "parade of recent opinions" holding that "state-law claim[s] for public nuisance [brought against fossil fuel producers] do[ ] not arise under federal law."<sup>307</sup> In those cases,

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<sup>298</sup> *Id.* The cited unbroken string of cases was the following: *Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 421 (2011); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 487–89 (1987); *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 327–28, 327 n. 19 (1981); *Illinois v. City of Milwaukee, Wis.*, 406 U.S. 91, 102–03, 102 n.3 (1972); *New Jersey v. City of New York*, 283 U.S. 473, 477, 481–83 (1931); *North Dakota v. Minnesota*, 263 U.S. 365, 374 (1923); *New York v. New Jersey*, 256 U.S. 296 (1921); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907); *Missouri v. Illinois*, 200 U.S. 496 (1906); see also *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 855 (9th Cir. 2012); *People of State of Ill. v. City of Milwaukee*, 731 F.2d 403, 406–411 (7th Cir. 1984); *Texas v. Pankey*, 441 F.2d 236, 240 (10th Cir. 1971).

<sup>299</sup> See e.g., : *North Dakota v. Minnesota*, 263 U.S. 365, 374 (1923); *New Jersey v. City of New York*, 283 U.S. 473, 477 (1931); *New York v. New Jersey*, 256 U.S. 29 (1921); *Missouri v. Illinois*, 200 U.S. 496 (1906). The other cases brought by states against polluters outside were: *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 327–28, 327 n. 19 (1981); *Illinois v. City of Milwaukee*, 406 U.S. 91, 102–03, 102 n.3 (1972); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907).

<sup>300</sup> See *supra* Part I.

<sup>301</sup> *New York II*, 993 F.3d at 91.

<sup>302</sup> *Id.* (citing *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 487–89 (1987)).

<sup>303</sup> *Ouellette*, 479 U.S. at, 487, 489 .

<sup>304</sup> *New York II*, 993 F.3d at 93.

<sup>305</sup> 42 U.S.C. § 6201.

<sup>306</sup> *New York II*, 993 F.3d at 93 (alterations in original) (quoting 42 U.S.C. § 6201(5)) (internal quotation marks omitted).

<sup>307</sup> *Id.* (alterations in original) (citations omitted).

discussed in Part III, “the single issue” before the courts was whether the defendants’ removal based on anticipated federal preemption defenses “could singlehandedly create federal-question jurisdiction under 28 U.S.C. § 1331 in light of the well-pleaded complaint rule.”<sup>308</sup> But in this litigation, the court explained, they were “free to consider the Producers’ preemption defense on its own terms, not under the heightened standard unique to the removability inquiry.”<sup>309</sup>

Under the second step of its analysis, the court held that the CAA displaced the federal common law cause of action that governed plaintiffs’ claims concerning domestic emissions, citing the Supreme Court’s decision in *AEP* and the Ninth Circuit’s decision in *Native Village of Kivalina v. ExxonMobil Corp. (Kivalina)*.<sup>310</sup> In *Kivalina*, the Ninth Circuit held that even though the plaintiffs sought damages for past emissions and not an injunctive action, the Supreme Court’s decision in *AEP* controlled and displaced the plaintiffs’ federal common law cause of action.<sup>311</sup> The court concluded that because the City’s causes of action were based in federal common law, they were likewise preempted under *AEP*.<sup>312</sup>

The court added that the CAA’s displacement of the common law did not “resuscitate the City’s State-Law Claims.”<sup>313</sup> It expounded, citing *Milwaukee II* and *Boyle v. United Technologies*,<sup>314</sup> that where federal common law exists, “it is because state law cannot be used” and that where “a federal statute displaces federal common law, it does so not in a field in which the [s]tates have traditionally occupied.”<sup>315</sup> The CAA savings clause, according to the court, did not preserve the City’s claims because it only protected states’ rights to “create and enforce their own emissions standards applicable to in-state polluters.”<sup>316</sup> The City’s claims were not applicable to in-state polluters because they “wishe[d] to impose New York nuisance standards on emissions emanating simultaneously from all 50 states and the nations of the world.”<sup>317</sup>

As the final step of its analysis, the court considered what it identified as “the City’s claims concerning foreign emissions.”<sup>318</sup> The court held that the CAA could not displace federal common law claims seeking recovery for harms caused by foreign emissions because the Act only regulates domestic emissions.<sup>319</sup> The

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<sup>308</sup> *Id.* at 94 (citing *Caterpillar Inc. v. Williams*, 482 U.S. 386, 398 (1987)).

<sup>309</sup> *Id.*

<sup>310</sup> *Native Village of Kivalina*, 696 F. 3d 849, 855 (9th Cir. 2012).

<sup>311</sup> *Id.* at 858.

<sup>312</sup> *New York II*, 993 F.3d at 96.

<sup>313</sup> *Id.* at 98.

<sup>314</sup> 487 U.S. 500, 507 (1988).

<sup>315</sup> *New York II*, 993 F.3d at 98. (citations omitted) (alterations in original) (internal quotation marks omitted).

<sup>316</sup> *Id.* at 99 (citations omitted).

<sup>317</sup> *Id.* at 100 (citing *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987) (alterations added)).

<sup>318</sup> *Id.*

<sup>319</sup> *Id.* at 100–101.

court's reasoning under the last step of its analysis changed. Unlike in the first part where the court applied federal common law to the state-law nuisance claims, here, the court refused to recognize the federal common law of nuisance of international pollution. Instead, citing the Supreme Court's precedent in *Kiobel v. Royal Dutch Petroleum*<sup>320</sup> and *Jesner v. Arab Bank*,<sup>321</sup> the court reasoned that they must proceed with "caution with respect to creating (or extending) federal common law causes of action."<sup>322</sup> According to the court, applying federal common law to these claims would interfere with United States foreign policy.<sup>323</sup> Such judicial interference was particularly inappropriate in light of the creation of a "comprehensive scheme designed to address greenhouse gas emissions" that Congress declined to extend beyond U.S. borders.<sup>324</sup>

### V. Analysis of *City of New York v. Chevron*

The Second Circuit's analysis of the City's nuisance and trespass claims consisted of a preliminary finding that the City's claims arising from the production, promotion, and sale of fossil fuels were dressed-up claims arising from greenhouse gas emissions. This claim-transformative finding was at once confusing and extraordinary. First, the court referred to the City's causes of action as "artful pleading," a doctrine applicable in the removal context, which created confusion about the analytical and procedural devices employed by the court. Second, the court's transformation of the plaintiffs' claims was insulated from its analysis of the merits even though it was necessary to the court's conclusions, and therefore an exercise of judicial power at the expense of litigants. This section explains that the court's unmasking of the state claims was an unwarranted expansion of judicial power and ultimately amplified the Second Circuit's analytical error at the first step of the three-part analysis that the court applied.

In this tripartite framework, the court held that the City's "transformed" claims arising from global greenhouse gas emissions were governed by federal common law because they implicated unique federal interests and subsequently preempted under the CAA. It also held that any claims concerning foreign emissions do not create a cause of action under federal common law. This section argues that at the first step, the court created federal common law, which was unwarranted under the Supreme Court's precedent and in light of a comprehensive statutory enactment regulating air pollution. It will then briefly outline the ordinary preemption analysis under the CAA that the court should have applied instead.

#### a. The Second Circuit's Recharacterization of Plaintiffs' State-Law Claims

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<sup>320</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).

<sup>321</sup> *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018).

<sup>322</sup> *New York II*, 993 F.3d at 102.

<sup>323</sup> *Id.* at 103.

<sup>324</sup> *Id.*

As a preliminary matter and before evaluating the Second Circuit's tripartite framework, this section addresses the circuit's unusual recharacterization of the City's claims as arising from emissions of greenhouse gases.<sup>325</sup> Even though the City alleged harms arising from in-state conduct of the defendants'—the production, promotion, and sale of fossil fuels<sup>326</sup>—the court rejected these as “artfully pleaded” claims actually premised on global greenhouse gas emissions. The court's use of the term “artful pleading” and reframing of the substance of plaintiffs' claims is distinguishable from the “artful pleading” doctrine as applied by courts in the removal context. But it raises the same concerns about separation of powers and infringement of states' rights because it served as a stepping stone for the creation of federal common law, and ultimately for displacement of state law. Second, the court's transformation of the claims would also be an unworkable principle for mass tort litigation because it misidentifies the wrongful conduct.

The Court's reference to artful pleading is distinct from the doctrine of artful pleading that is ordinarily applied in the removal context, though they share some common characteristics.<sup>327</sup> In the removal context, the artful pleading doctrine allows federal courts to find jurisdiction even where plaintiffs plead state-law causes of actions in instances where Congress enacted statutes that “so completely pre-empt a particular area” that any claim “raising [a] select group of claims is *necessarily federal in character*.”<sup>328</sup> The artful pleading doctrine, also understood as complete preemption, was raised by defendants in each of the climate change actions removed to federal courts and discussed extensively by the district courts.<sup>329</sup>

The doctrine allows a court to find that state-law claims are something other than what they purport to be and that, as such, the claims are completely displaced by federal law.

Here, however, the Second Circuit likely refers to artful pleading first to show that the City's claims arising from the production and sale of fossil fuels are veiled greenhouse gas emissions claims. Only in the later steps one and two, the court finds that such transformed claims were governed by federal common law and subsequently preempted by the CAA.<sup>330</sup> Considered together, the Court's

<sup>325</sup> See *supra* notes 298–301 and accompanying text.

<sup>326</sup> See *New York I*, 325 F.Supp.3d 466, 468 (2018).

<sup>327</sup> See Robert A. Ragazzo, *Reconsidering the Artful Pleading Doctrine*, 44 HASTINGS L. J. 273, 273 (1993) (“The artful pleading doctrine is utilized by federal courts to transform claims pled under state law into federal claims in order to confer removal jurisdiction.”);. See also *supra* Part I(A)(1)(ii).

<sup>328</sup> Seinfeld, *Jurisdictional Lessons*, *supra* note 33, at 31 (quoting *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63–64 (1987)) (emphasis in the original) (internal quotation marks omitted).

<sup>329</sup> See *supra* Part II(A)(1)(ii).

<sup>330</sup> *New York II*, 993 F.3d 81, 93–94 (2d Cir. 2021). The Second Circuit noted that unlike a “parade of recent opinions holding that ‘state-law claim[s] for public nuisance [brought against fossil fuel producers] do[ ] not arise under federal law,’” the Court in this case was “free to consider the Producers’ preemption defense on its own terms, not under the heightened standard unique to the removability inquiry.” (quoting *City of Oakland v. BP PLC*, 960 F.3d 570, 575 (9th Cir.)).

recharacterization of the claims only to find that these claims were preempted had an extraordinary effect on state law comparable to complete preemption, which some academics named an “exercise in thwarting a ruse.”<sup>331</sup> It is no accident that the court’s reasoning and conclusion about the substance of the City’s claims matched exactly the types of arguments put forward by defendants in the removal context in support of their arguments for complete preemption. This is because the defendants’ arguments are part and parcel of a concerted action to federalize state-law claims through federal common law preemption.

A Hawaii state court also noted the similarity between the Second Circuit’s reframing of plaintiffs’ claims and the arguments presented by the industry defendants in *City of Honolulu v. Sunoco*.<sup>332</sup> In *Sunoco*, the defendants argued that the plaintiffs, alleging state-law tort claims arising from failures to disclose and deceptive promotion, “actually [sought] to regulate global fossil fuel emissions.”<sup>333</sup> The Second Circuit’s framing of plaintiffs’ claims was similar, the state court found, in that the Second Circuit described New York City’s claims as targeting a “lawful commercial activity” that would require defendants to “cease global production” to avoid liability.<sup>334</sup>

In the removal context, just as in this case, the defendants across the country employed the same arguments with an aim to recharacterize, federalize, and dismiss plaintiffs’ claims under *AEP*.<sup>335</sup> But unlike in the removal context, defendants’ arguments finally found a receptive audience with the Second Circuit. Defendants in the earlier-discussed suits filed in state courts argued that the state and municipal actions were really about greenhouse emissions, and not about the sale, production, or marketing of fossil fuels—an argument that was employed by the Second Circuit in its preliminary unmasking of the City’s claims.<sup>336</sup> Next, defendants argued that the claims arising from greenhouse gases are “necessarily governed by federal common law,”<sup>337</sup> appealing to concerns for uniformity of federal law in an area they painted as concerning special federal interests.<sup>338</sup> The Second Circuit arrived at the same conclusion in step one of its analysis. And the

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<sup>331</sup> See Seinfeld, *Jurisdictional Lessons*, *supra* note 33, at 31.

<sup>332</sup> *City & Cnty. of Honolulu v. Sunoco LP*, No. 1CCV-20-0000380, at \*3 (Haw. Cir. Ct. 2022).

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

<sup>335</sup> See *supra* notes 25–26 and accompanying text for a description of the federalization strategy.

<sup>336</sup> See, e.g., Notice of Removal by Defendant Shell Oil Products Company LLC at 3, 8, *State v. Chevron*, No. PC2018-4716 (R.I. Sup. Ct. 2018) (stating that “[t]his case is about *global* emissions” and that this action is “removable because Plaintiff’s claims . . . necessarily are governed by federal common law”).

<sup>337</sup> *Id.*

<sup>338</sup> *New York II*, 993 F.3d 81, 91–92(2d Cir. 2021). The Second Circuit articulated these interests in uniformity of federal law. See also *California v. BP P.L.C.*, No. C. 17-06011 WHA, 2018 WL 1064293, at \*9–10 (N.D. Cal. 2018). Judge Alsup, the only judge who found for defendants in the removal context, likewise stated that the decision was premised on concerns about uniformity of federal law in an area of special federal interest.

defendants even cited the same case law in support of these arguments as adopted by the Second Circuit.<sup>339</sup>

But is the distinction between the success of the defendants' arguments in front of the Second Circuit and their failure in the removal context merely attributable to the posture of the cases? In other words, as the court noted, was it "free to consider the Producers' preemption defense on its own terms, not under the heightened standard unique to the removability inquiry"?<sup>340</sup> The answer is no, because the court did not just consider defendants' preemption arguments. Before the court ever considered preemption at step two, it had already recharacterized and reframed plaintiffs' arguments and created a federal common law rule of decision. The court's analysis therefore is not just a simple ordinary preemption. Likely due to these arguments having been tailored for employment in the removal context, the mechanics of the Second Circuit's decision almost reads as a complete preemption analysis.

In the removal context, the defendants' arguments that consisted of unmasking the true substance of the state-law claims and subsequent finding of preemption would have been folded into one analytical step. Here, the court spread out its findings over several steps and without a single procedural device uniting them. As a preliminary matter, the court used its equitable power to identify the "true" substance of the City's claims, then it fashioned federal common law, and only then did it hold the claims preempted. Both instances lead to displacement of state law by an extraordinary federal interest identified by the court.

Of course, the Second Circuit's legal analysis and the complete preemption doctrine are not the same. The complete preemption doctrine operates in the special context of removal that was discussed at length in Part III. But the Second Circuit's unmasking and recharacterizing of the City's claim as a necessary precondition of its preemption analysis was motivated by the same judicial protection of federal interests and accompanied by the same divestment of state authority as complete preemption.<sup>341</sup> Thus, the Court should have approached this analysis with extreme caution because its transformation of the City's claims and creation of federal common law were outcome-determinative, and solely guided by its own judgment. While ordinarily we may not consider a court's decision to reframe plaintiffs' claims with suspicion, where such action serves as a necessary steppingstone to an unguided exercise of judicial power, such transformation becomes inseparable from our analysis of whether a court's creation of federal common law was proper. The Supreme Court's precedent and constitutional interests in preserving a proper balance between federal and state powers suggest that it was not.

Second, the Court's transformation of the City's claims arising from greenhouse gases would also have unforeseeable and potentially grave

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<sup>339</sup> Compare Defendants' Opposition to Mayor and City Council of Baltimore's Motion to Remand at \*15, *Mayor & City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538 (D. Md. 2019) (1:18-cv-2357 ELH) with *New York II*, 993 F.3d 81, 91 (2d Cir. 2021).

<sup>340</sup> *New York II*, 993 F.3d at 94.

<sup>341</sup> See Young, *supra* note 199, at 1798.



repercussions on mass tort litigation in state courts. The City alleged that the fossil fuel producers engaged in a decades-long “campaign of deception and denial regarding climate change” that further drove their sales of fossil fuels.<sup>342</sup> But the court held that the state-law claims were really federal because the City was seeking damages “precisely *because* fossil fuels emit greenhouse gases,” which in turn “exacerbate global warming.”<sup>343</sup>

This argument could make much of mass tort litigation unworkable by shifting the focus from the but-for cause of the harm to the intermediate substance that caused harm to plaintiffs. Holding that plaintiffs’ claims must be based on greenhouse gas emissions because the City’s damages would not have arisen without emissions is akin to arguing that suing tobacco manufacturers for deceptive marketing practices and downplaying the harms to human health boils down to a suit about tar and nicotine, given that these harms would have not occurred without those substances. In a more recent example, it would be like saying that lawsuits against opioid manufacturers for negligence and willful ignorance of the opioids’ harms is about the opioids themselves or even about the federal regulation of drugs. Such arguments ignore the harmful conduct that set the events in motion.

Indeed, the Hawaii state court in *Sunoco* found the Second Circuit’s “framing” of plaintiffs’ state law claims unpersuasive for the same reasons, and instead applied a more “accurate” tort law framework including “duty, breach of duty, causation, and limits on actual damages caused by the alleged wrongs.”<sup>344</sup> It recognized that the City and County of Honolulu did not “ask for damages for all effects of climate change,” nor did they ask the court “to limit, cap, or enjoin the production and sale of fossil fuels.”<sup>345</sup> Plaintiffs sought damages for harms “*caused* by Defendants’ breach of long-recognized duties”<sup>346</sup>—an issue that fits squarely into the traditional ambit of tort law.

Acknowledging the substance of the City’s claims does not mean that they will succeed as a matter of tort law. Before many of the tobacco companies settled public nuisance suits against them, some courts held that the smokers’ injuries were insufficiently connected to the harm to establish proximate causation.<sup>347</sup> Some academics suggest that proximate cause—which reflects to some extent the societal judgment of whether the actor should be held responsible

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<sup>342</sup> See Complaint at \*6, *New York I*, 325 F. Supp. 3d 466 (S.D.N.Y. 2018) (No. 18-cv-182).

<sup>343</sup> *New York II*, 993 F.3d at 91.

<sup>344</sup> *City & Cnty. of Honolulu v. Sunoco LP*, No. 1CCV-20-0000380 \*3 (Haw. Cir. Ct. 2022).

<sup>345</sup> *Id.*

<sup>346</sup> *Id.*

<sup>347</sup> See Albert C. Lin, *Dodging Public Nuisance*, 11 U.C. IRVINE L. REV. 489, 498 & n.57 (2020) (collecting cases). According to the Third Restatement, proximate cause corresponds to the “scope of liability.” Benjamin C. Zipursky, *Foreseeability in Breach, Duty, and Proximate Cause*, 44 WAKE FOREST L. REV. 1247, 1253 (2009). Professor Zipursky explains that scope of liability asks a question about “which of the harms that would not have occurred but for defendant’s breach are among those for which liability in negligence may be imposed?” (although he then inevitably criticizes it) *Id.*

for harm—could likewise pose problems for state tort climate change actions.<sup>348</sup> However, that alone is not a reason to prevent the application and development of the state law in the area.

### **b. The Second Circuit's Erroneous Application of Federal Common Law**

Even if we accept the Second Circuit's recharacterization of the City's claims, their three-pronged approach still does not withstand a closer scrutiny. This is because the court committed an error at step one, the predicate step that carried the rest of the court's analysis, in which it fashioned and applied federal common law to the City's claims. The court's analytical error becomes obvious when juxtaposing the first step of its analysis, where it found that federal common law governed the City's claims, with its third step, where it held that creating a federal cause of action for the portion of plaintiffs' claims that concerned foreign emissions required caution "as to avoid unintentionally stepping on the toes of the political branches."<sup>349</sup> At the third step and with respect to claims concerning foreign emissions, the court cited the Supreme Court's precedent concerning the creation of federal causes of action under the Alien Torts Statute in *Jesner* and *Kiobel* to note that these cases raised issues applicable here. The creation of a federal common law cause of action in *Jesner* and *Kiobel*, according to the court, raised concerns over "separation of powers, intrusion on the political branches' monopoly over foreign policy, and judicial caution with respect to creating (or extending) federal common law causes of action."<sup>350</sup> But the same concerns should have encouraged judicial caution at the first step of the court's analysis, where it fashioned federal common law, especially in light of a congressional comprehensive enactment such as the CAA. Instead, at the first step of its analysis, the Second Circuit should have conducted an ordinary preemption analysis under the CAA.

The precedent the court cited did not support the court's conclusion that federal common law applied to plaintiffs' claims either. The court started off the analysis by presenting a "mostly unbroken string of cases" involving interstate pollution where courts applied federal common law.<sup>351</sup> But the court's reference to the early twentieth century cases, brought primarily by states against other

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<sup>348</sup> See Lin, *supra* note 354, at 514 (citing Douglas A. Kysar, *What Climate Change Can Do About Tort Law*, 41 ENV'T L. 1, 29–41 (2011)).

<sup>349</sup> *New York II*, 993 F.3d 81, 10 (2d Cir. 2021) (citations omitted).

<sup>350</sup> *Id.*

<sup>351</sup> *Id.* at 91. The string of cases the court cites as an example is the following: *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 421 (2011); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 487–89 (1987); *City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304, 327–28 (1981); *Illinois v. City of Milwaukee (Milwaukee I)*, 406 U.S. 91, 102–03 (1972); *North Dakota v. Minnesota*, 263 U.S. 365, 374 (1923); *New York v. New Jersey*, 256 U.S. 296 (1921); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907); *Missouri v. Illinois*, 200 U.S. 496 (1906). The court also noted *Native Vill. of Kivalina v. ExxonMobil Corp. (Kivalina)*, 696 F.3d 849, 855 (9th Cir. 2012); *Illinois v. City of Milwaukee (Milwaukee III)*, 731 F.2d 403, 406–411 (7th Cir. 1984); *Texas v. Pankey*, 441 F.2d 236, 240 (10th Cir. 1971).

states within the Supreme Court's original jurisdiction, offers only a blinkered view of the development of federal common law and it neglects how Congress's enactments of the CAA and CWA impacted federal common law. Far from an "unbroken string," the cases cited by the court offer a complex and fractured view of the development and eventual demise of federal common law.

Amongst the cases cited by the Second Circuit are the so-called "interstate conflicts" cases brought by states under the Supreme Court's original and exclusive jurisdiction. The very first state conflict of this type was *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*<sup>352</sup> In *Hinderlider*, the Supreme Court held that certain interstate issues, such as the apportioning of interstate streams, were beyond the judicial competence of any individual state, and had to be governed by federal common law.<sup>353</sup> Later interstate conflicts were motivated and adjudicated under similar rationales as *Hinderlider*. In *Missouri v. Illinois*, for example, St. Louis sued Chicago for reverse-engineering the flow of the Chicago River, carrying Chicago sewage, into the Mississippi River, which eventually carried it to St. Louis where the sewage would pollute drinking water.<sup>354</sup> In *New York v. New Jersey*, similarly, New York sued New Jersey, asking the court to permanently enjoin New Jersey from dumping large volumes of sewage into the New York harbor.<sup>355</sup>

Just as in *Hinderlider*, federal common law applied in these disputes because of necessity—the need for neutral law when the Supreme Court adjudicates cases between two sovereigns in its exclusive original jurisdiction. Interstate conflict cases are therefore distinguishable from *New York II* because *New York II* is not a dispute between two sovereigns, and the source of the pollution arguably exists within the suing state. In interstate pollution cases, and unlike in *New York II*, the Constitution grants the Supreme Court the power to create federal common law through Article III's grant of federal judicial power over interstate controversies.<sup>356</sup> When the Court created rules of decision in those cases, it was motivated by the potential for interstate conflict and division of governmental powers inherent in federalism that recognized the states' right to have an impartial adjudication of their disputes<sup>357</sup> and not necessarily by uniformity and protecting a court-identified federal interest, as the Second Circuit held.<sup>358</sup> In the cases

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<sup>352</sup> *Hinderlider v. La Plata River & Cherry Creek Ditch*, 304 U.S. 92 (1938). The Second Circuit cited *Hinderlider* in an earlier section for the proposition that "specialized federal common law" exists after *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). *New York II*, 993 F.3d at 89.

<sup>353</sup> *Hinderlider*, 304 U.S. at 110.

<sup>354</sup> See *supra* notes 57–63 and accompanying text.

<sup>355</sup> *New York v. New Jersey*, 256 U.S. 296, 298 (1921).

<sup>356</sup> U.S. CONST. art. III, § 2 ("The judicial Power shall extend . . . to Controversies between two or more States . . ."). Later the same section gives the Supreme Court original jurisdiction "[i]n all Cases . . . in which a State shall be Party." *Id.*

<sup>357</sup> See Suzanne Baker O'Connor, *The Expansion of Federal Common Law and Federal Question Jurisdiction to Interstate Pollution*, 10 HOUS. L. REV. 121 (1972).

<sup>358</sup> *New York II*, 993 F.3d 81, 91–92 (2d Cir. 2021) (identifying, as motivations behind the Court's decision to apply federal common law, "(i) the overriding . . . need for a uniform rule of decision on matters influencing national energy and environmental policy, and (ii) basic interests of

immediately following *Erie*, the Supreme Court had to justify extending the federal common law to the interstate nuisance context. The Second Circuit's justification for creating federal common law must therefore be found in later Supreme Court's jurisprudence.

It was only the Supreme Court's decision in *Milwaukee I* that extended the federal common law to cover "suits alleging creation of a public nuisance by water pollution,"<sup>359</sup> embracing a principle that was for the first time articulated in a Tenth Circuit decision *Texas v. Pankey*.<sup>360</sup> As in *Pankey*, the Court in *Milwaukee I* reasoned that federal common law was available to "abate a public nuisance in interstate or navigable waters" because of the interstate nature of the conflict and the need for uniformity in dealing with interstate waters.<sup>361</sup> Until *Milwaukee I*, there was much uncertainty concerning federal courts' jurisdiction over interstate pollution and the court's institutional competence to create and apply a uniform body of case law to interstate nuisance contexts. As the Second Circuit admits, the Supreme Court, in a footnote of *Ohio v. Wyandotte Chemicals Corp.*<sup>362</sup> decided before *Milwaukee I*, contradicted the court's holding in *Pankey*.<sup>363</sup> The *Wyandotte* Court suggested that Ohio's motion to file a claim in the original jurisdiction of the Supreme Court to abate dumping of toxic waste to Lake Erie should have been brought in state court, and state law should have been applied to the dispute instead.<sup>364</sup>

*Milwaukee I* was also an exceptional decision in terms of the Court's liberal approach to federal courts' lawmaking powers. In *Milwaukee I*, Justice Douglas—a known advocate of judicial activism when it comes to the environment<sup>365</sup>—also suggested that remedies fashioned by federal courts existed side-by-side with congressional remedies in the Water Pollution Control Act.<sup>366</sup> Relying on his own decision in *Textile Workers Union of America v. Lincoln Mills of Alabama*,<sup>367</sup> Douglas interpreted the CWA and found a general congressional policy in favor of abatement of interstate nuisance, which led him to conclude that federal courts can fashion remedies to achieve those goals.<sup>368</sup> In *Lincoln Mills*,

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federalism." (internal quotation marks omitted), (quoting *Milwaukee I*, 406 U.S. 91, 105 n.6 (1972)).

<sup>359</sup> *Milwaukee II*, 451 U.S. 304, 310 (1981).

<sup>360</sup> 441 F.2d 236 (1971).

<sup>361</sup> *Milwaukee I*, 406 U.S. 91 at 103–07 (1972).

<sup>362</sup> 401 U.S. 493 (1971).

<sup>363</sup> *New York II*, 993 F.3d at 91 n.4 (distinguishing *Wyandotte* as an exception in dicta from which the Court retreated in *Milwaukee I*).

<sup>364</sup> *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 498 n.3 (1971).

<sup>365</sup> See Kenneth M. Murchison, *Interstate Pollution: The Need for Federal Common Law*, 6 VA. J. NAT. RES. L. 1, 12 (1986) (collecting cases where Justice Douglas dissented, advocating for environmental principles).

<sup>366</sup> *Milwaukee I*, 406 U.S. at 104.

<sup>367</sup> 353 U.S. 448, 457 (1957).

<sup>368</sup> *Milwaukee I*, 406 U.S. at 102–03. Justice Douglas interpreted Section 10(a) of the Federal Water Pollution Act, 33 U.S.C. § 1160(a) (1970), that made interstate pollution subject to statutory abatement if it "endangers the health or welfare of any persons."

the Court likewise interpreted the gaps in the Labor Management Relations Act as granting it general federal common law-making power to fill those gaps, consistent with what the Court identified to be the purpose of the Act.<sup>369</sup> Douglas did, however acknowledge that “new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance.”<sup>370</sup> While Douglas justified the extension of federal common law into a new area based on the nature of the dispute, the character of the parties, and overriding federal interest in a uniform rule, he admitted that new federal legislation can in the future pre-empt the new federal common law.<sup>371</sup>

And that is exactly what happened just five months after *Milwaukee I* was announced by the Court when Congress enacted amendments to the FCPCA known as the Clean Water Act of 1972 (CWA).<sup>372</sup> At the time of enactment, “[t]he CWA was Congress's most comprehensive and encompassing statement of federal water pollution policy to that date.”<sup>373</sup> It required any source to obtain a permit before discharging any pollutant into any water in the United States and tasked the EPA with administering and enforcing the new permits system.<sup>374</sup>

By the time Illinois re-filed its complaint against *Milwaukee* in the district court in a decision that came to be known as *Milwaukee II*, the regulatory landscape and the attitude of the Court towards judicial creation of federal common law had changed. Chief Justice Rehnquist, who wrote for the majority in *Milwaukee II*, was deeply unsympathetic to the judicial creation of remedies. *Milwaukee II* itself is emblematic of the judicial shift away from, and discomfort with, such creation of federal common law remedies in light of growing congressional legislation and concerns about institutional capacity to adjudicate ever-more complex and technical claims without congressional guidance. *Milwaukee II* was therefore grounded in the Court's concern with the limited ability of federal courts to create common law doctrine, emphasizing that federal common law doctrines exist only “subject to the paramount authority of Congress.”<sup>375</sup> The decision was marked with dissatisfaction with the broadening of federal common law post-*Erie*, one example of which was *Milwaukee I*.<sup>376</sup>

The issue in *Milwaukee II* was whether the 1972 Amendments “spoke directly to [the water pollution] question,” for which the *Milwaukee I* Court found it necessary to devise a common law solution.<sup>377</sup> The Court considered the comprehensive nature of the act and how the CWA addressed effluent

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<sup>369</sup> *Textile Workers Union of America v. Lincoln Mills of Ala.*, 353 U.S. 448, 456–57 (1957).

<sup>370</sup> *Milwaukee I*, 406 U.S. at 107.

<sup>371</sup> *Id.* at 103 n.5, 105 nn.6–7, 107.

<sup>372</sup> William A. Chittenden II, *City of Milwaukee v. Illinois: The Demise of Federal Common Law Nuisance Actions in Interstate Water Pollution Disputes*, 35 SW. L. J. 1097, 1101 (1982).

<sup>373</sup> *Id.*

<sup>374</sup> *Milwaukee II*, 451 U.S. 304, 310–11 (1981).

<sup>375</sup> *Id.* at 313–14.

<sup>376</sup> *Id.* at 312–14.

<sup>377</sup> *Id.* at 315.

limitations.<sup>378</sup> Noting both the law's complexity and Congress's decision to leave the act's administration to an expert agency, Justice Rehnquist found the lower court's invocation of federal common law "peculiarly inappropriate."<sup>379</sup> In the paragraphs cited by the Second Circuit,<sup>380</sup> the *Milwaukee II* Court notes that under the CWA, states can, through state administrative law or common law, adopt more stringent limitations than those established by the Act because the savings clause "clearly contemplates state authority to establish more stringent pollution limitations."<sup>381</sup> The distinction exists because of different mechanisms that apply to the legislative preemption of federal common law and state common law. Federal preemption of state law implicates notions of federalism and requires a clear and manifest purpose.<sup>382</sup> Federal common law, which the Court deemed "often vague and indeterminate,"<sup>383</sup> was displaced more readily—through mere congressional occupation of the field.<sup>384</sup>

In summary, the period during which federal courts applied federal common law to disputes involving nuisance was short-lived and ended with *Milwaukee II*. *Milwaukee II* marked a judicial retreat from the creation of federal common law causes of action in the face of ever-more comprehensive and expert congressional enactments in areas ranging from transboundary pollution to financial regulation.<sup>385</sup>

In *New York II*, the Second Circuit committed the cardinal sin against which *Milwaukee II* warned—it supplemented congressional air pollution policy through the creation of federal nuisance law. It also ignored the Supreme Court's precedent that federal common law in this area has been displaced. In conclusion, then, it appears that it was not the states that improperly tried to resuscitate state common law causes of actions,<sup>386</sup> but the Second Circuit that improperly resuscitated federal common law cause of action.

Later Supreme Court pronouncements on the issue also do not support the Second Circuit's conclusion that federal common law applies to "disputes involving interstate air or water pollution."<sup>387</sup> Instead, in *International Paper Co. v. Ouellette*, decided six years after *Milwaukee II*, the Supreme Court held that state common law of the source state was available for transboundary nuisance actions.<sup>388</sup> The most recent Supreme Court's decision in *AEP* did not address

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<sup>378</sup> *Id.* at 318–20.

<sup>379</sup> *Id.* at 325.

<sup>380</sup> *New York II*, 993 F.3d 81, 91 (2d Cir. 2021) (citing *Milwaukee II*, 451 U.S. at 327–28).

<sup>381</sup> *Milwaukee II*, 451 U.S. at 327.

<sup>382</sup> *Id.* at 316–17.

<sup>383</sup> *Id.* at 317.

<sup>384</sup> *Id.*

<sup>385</sup> See generally, Thomas W. Merrill, *The Disposing Power of the Legislature*, 110 COLUM. L. REV. 452, 463 (2010).

<sup>386</sup> *New York II*, 993 F.3d 81, 98–100 (2d Cir. 2021).

<sup>387</sup> *Id.* at 91.

<sup>388</sup> *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 487 (1987). *Ouellette* concerned water pollution but as noted earlier, it has been interpreted to apply to air pollution as well because it analyzes an

state law causes of action, but the Court suggested in dicta that such actions continue to be available to plaintiffs.<sup>389</sup> The *AEP* Court relied on *Milwaukee II* to find that the CAA also displaced the availability of federal common law to abate interstate greenhouse gas emissions because, once Congress addressed “a question previously governed by a decision rested on federal common law, the need for such an unusual exercise of law-making by federal courts disappears.”<sup>390</sup> Accordingly, federal common law dissipated the moment the CAA delegated authority to regulate greenhouse gas emissions to the EPA, independently of whether the agency exercised this authority—highlighting the lower standard employed for the displacement of federal common law remedies than what exists for the displacement of state law remedies.<sup>391</sup> The Court noted in dicta that the availability of state remedies—which was not briefed by the parties—depends, “inter alia, on the preemptive effect of the federal Act.”<sup>392</sup> Commentators note that in the aftermath of these cases, lower federal courts permitted transboundary pollution cases to proceed on state common law claims.<sup>393</sup>

The Second Circuit’s citation of these cases in support of the proposition that federal common law must apply to interstate nuisance cases is confusing because the cases do not support the court’s conclusions, and even suggest the contrary. The circuit’s reasoning also runs headlong into separation of powers and federalism concerns that were emphasized by the Court in *Milwaukee II* and *AEP* as reasons to avoid creation and application of federal common law. And lastly, the court’s brief justification for the creation of any new federal common law does not seem persuasive either. The court argued that to fashion federal common law, there must be a “uniquely federal interest[]” and a “conflict between that federal interest and the operation of state law” but never showed that a truly unique federal interest existed and led to an inexorable conflict.<sup>394</sup>

First, pollution control, particularly in light of the traditional state role in regulation pollution that was preserved in the CAA, is far from an area of “uniquely federal interest.”<sup>395</sup> The Act is premised on the idea that states have an important role in regulating pollution, and Supreme Court precedent acknowledged the continued role for state common law in *Milwaukee II* and

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identical savings clause. *See, e.g.,* Bell v. Cheswick Generating Station, 734 F.3d 188, 194–197 (3d Cir. 2013)

<sup>389</sup> Am. Elec. Power Co. v. Connecticut (*AEP*), 564 U.S. 410, 429 (2011) (stating that the “availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act”). *See supra* Part II.

<sup>390</sup> *AEP*, 564 U.S. at 423 (quoting *City of Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981)).

<sup>391</sup> *Id.* at 425–26.

<sup>392</sup> *Id.* at 429.

<sup>393</sup> *See* Rachel Rothschild, *State Nuisance Law and the Climate Change Challenge to Federalism*, 27 N.Y.U. ENV'T L.J. 412, 427 (2019) (citing as examples *Gutierrez v. Mobil Oil Corp.*, 798 F. Supp. 1280 (W.D. Tex. 1992) and *N.C. ex rel. Cooper v. TVA*, 615 F.3d 291, 309 (4th Cir. 2010)).

<sup>394</sup> *New York II*, 993 F.3d 81, 90 (2d Cir. 2021) (quotations omitted)..

<sup>395</sup> *See supra* Part II.

*Ouellette*.<sup>396</sup> Second, the court failed to identify a specific national policy that would conflict with the tort liability imposed on fossil fuel producers. It broadly gestured towards a federal interest in balancing prevention of global warming and energy production and economic growth and cited the Energy Policy and Conservation Act that was designed to “achieve national economic and energy policy goals,” presumably as an example of such federal balancing.<sup>397</sup>

Such broadly phrased federal interests and unspecified conflicts would allow for the creation of federal common law in any area that would impose liability on fossil fuel producers, including, for example, in claims arising from misleading statements to consumers or investors.<sup>398</sup> Misleading statements to consumers and investors likewise implicate the production of greenhouse gases, because as a result, consumers consumed, and investors invested more. Yet we feel less comfortable with stating that such actions are preempted by national energy policy, especially in the absence of a clear congressional say-so.

Nor did the court explain why tort liability would upset the balance between national climate policy and economic growth in a different way than everyday tort liability to which fossil fuel companies are exposed as employers, sellers, or parties to business transactions. And even if federal policy were impacted, the circuit offered no arguments to show that Congress did not wish to preserve the ability of states to impose such liability on fossil fuel producers. The court readily assumed that the issue in front of it required a “uniform” application of federal law based on “unbroken string of cases” that the earlier section showed was neither “unbroken,” nor did it show that all claims that somehow touch on greenhouse gases always require uniform solutions. It presented no additional evidence that Congress in enacting the CAA desired such uniformity concerning defendants’ ordinary tort liability, which is questionable considering its cooperative structure of the Act and its focus on preserving state-law remedies.<sup>399</sup> The Supreme Court has repeatedly disapproved of such a “freewheeling judicial inquiry into whether a state statute is in tension with federal objectives,” because “such an endeavor would undercut the principle that it is Congress rather than the courts that pre-empts state law.”<sup>400</sup>

*Sunoco* further underscores these points. There, the court held that state-law claims brought by the City and County of Honolulu were not preempted by federal common law or the CAA.<sup>401</sup> It concluded without difficulty that “any

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<sup>396</sup> *Id.*

<sup>397</sup> *New York II*, 993 F.3d at 93 (quoting 43 U.S.C. § 1802(1)).

<sup>398</sup> *Cf. Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31, 43–44 (D. Mass. 2020) (finding that Massachusetts claims based on misleading statements directed at consumers and investors do not implicate “uniquely” federal interest).

<sup>399</sup> *New York II*, 993 F.3d 99.

<sup>400</sup> *Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 607 (2011) (alterations in text) (internal quotation marks omitted) (quoting *Gade v. Nat. Solid Wastes Mgmt. Assn.*, 505 U.S. 88, 111 (Kennedy, J., concurring)). *See also Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019) (“Invoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law.”).

<sup>401</sup> *City & Cnty. of Honolulu v. Sunoco LP*, No. 1CCV-20-0000380, at \*6 (Haw. Cir. Ct. 2022).



federal interest in the local impacts of climate change is an interest shared with the states—and is not unique to federal law.”<sup>402</sup> It noted that a doctrine that would reframe a tort action into regulation of global air pollution, inevitably compelling a conclusion of federal law preemption, would “intrude on the historic powers of state courts,” including litigation concerning products liability, consumer protection, or pharmaceuticals.<sup>403</sup> The court likewise found no “significant conflict” between the state and federal law compelled by a “concrete and specific” federal policy or interest.<sup>404</sup> That elements of the defendants’ conduct was also out-of-state or international “does not mean preemption is appropriate,” the court wrote.<sup>405</sup> It concluded that, “[w]ithout the power to hold tortfeasors liable for out-of-state conduct, municipalities such as Honolulu could be hard-pressed to seek redress.”<sup>406</sup>

### C. Ordinary Preemption Under the Clean Air Act: A Proper Framework for Analyzing State-Law Claims Arising from the Production, Sale, or Marketing of Fossil Fuels

In summary, then, the Second Circuit should have abstained from creating and applying federal common law. Instead, the court should have conducted an ordinary preemption analysis, as the Court in *Milwaukee II* did.<sup>407</sup> Under the ordinary preemption analysis, a court would consider whether the City’s public nuisance claims arising from the production, marketing, and sale of fossil fuels were preempted by the CAA. Several factors suggest that they would not be, although there remains a possibility that a court would find them preempted under the obstacle preemption doctrine. This possibility is greater where a court decides to recharacterize plaintiffs’ claims, as the Second Circuit did, as ones arising from global greenhouse gas emissions and not as from the production, sale, and marketing of fossil fuels.

The factors advising against finding ordinary preemption are the following. First, as the court admitted, the CAA did “not make environmental policy an exclusively federal matter” but instead it “envisions extensive cooperation between federal and state authorities.”<sup>408</sup> The states have a substantive responsibility to devise and implement applicable standards to existing sources of air pollution.<sup>409</sup> The overall structure of the Act suggests that Congress relied on states to enforce the Act and thus they were mindful of preempting state-law remedies. The Second Circuit, however, noted that the state’s role under the Act

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<sup>402</sup> *Id.* at \*6.

<sup>403</sup> *Id.*

<sup>404</sup> *Id.* at \*4–5.

<sup>405</sup> *Id.* at \*6.

<sup>406</sup> *Id.* (citations omitted).

<sup>407</sup> See *Milwaukee II*, 451 U.S. 304, 313 (1981) (explaining that the Court has “found it necessary . . . to develop federal common law” only “[w]hen Congress has not spoken to a particular issue”).

<sup>408</sup> *New York II*, 993 F.3d 87 (2d Cir. 2021) (citing 42 U.S.C. §§ 7401, 7411(c)(1), (d)(1)–(2)).

<sup>409</sup> *Id.* at 87–88.

is limited when it concerns pollution in other states. Within their borders, states can promulgate and implement standards as stringent or more stringent than the federal standards.<sup>410</sup> Outside of their borders, they are limited by the Supreme Court's decision in *Ouellette* and can only apply the law of the source state.<sup>411</sup> Yet it is unclear whether and how *Ouellette* applies to claims arising from the production, sale, and marketing of fossil fuels within a state.

The focus of a public nuisance claim is where the alleged illegal conduct interferes with a public right of property.<sup>412</sup> In this case, no point-source emission outside the state caused the harm as in *Ouellette*.<sup>413</sup> The nuisance—the sale of fossil fuels accompanied by deceptive marketing—occurred in the state in which the action was brought and interfered with property rights in that same state. That this effect was exacerbated by sales outside the forum, and included an intermediate step of combustion and release of greenhouse gases into the atmosphere, raises the question of attribution akin to those that the courts faced when calculating producer liability in mass torts, and of proximate cause.<sup>414</sup> But “the fact that Plaintiffs’ injuries are part of a worldwide problem . . . does not mean Defendants’ contribution to that problem cannot be addressed through principled adjudication.”<sup>415</sup>

Second, the CAA contains a savings clause identical to the one in the CWA, which “provides that “[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief.”<sup>416</sup> The Second Circuit held that the savings clause did not apply in *New York II* because New York did not bring the lawsuits under the laws of the source state under *Ouellette* but sought to impose “New York nuisance standards on emissions emanating simultaneously from all 50 states and the nations of the world.”<sup>417</sup> The court’s analysis of the savings clause runs into the same problem as its assessment of the cooperative structure of the CAA because it is not obvious that the public nuisance cause of action targeted conduct outside New York. And in any case, it is also questionable whether the court correctly reframed the causes of action as ones arising from greenhouse emissions rather than from the sale and production of fossil fuels.<sup>418</sup>

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<sup>410</sup> *Id.*

<sup>411</sup> *Id.* at 100.

<sup>412</sup> Lin, *supra* note 355, at 492.

<sup>413</sup> *See supra* Part II.

<sup>414</sup> Lin, *supra* note 355, at 508. Academics have pointed out that courts developed various tools, such as for example market share liability, substantial factor causation, and proximate causation, that address complex multi-causation tort situation. *Id.*

<sup>415</sup> *Id.* 8 (quoting *Connecticut v. Am. Elec. Power Co. (AEP III)*, 582 F.3d 309, 329 (2d Cir. 2009), *rev'd*, 564 U.S. 410 (2011)).

<sup>416</sup> 993 F.3d at 99 (quoting 42 U.S.C. § 7604(e)).

<sup>417</sup> *Id.* at 100.

<sup>418</sup> *See supra* Part V(A).

The existence of the savings clause therefore remains the clearest congressional statement that the CAA preserves state-law remedies.<sup>419</sup> As the Supreme Court noted in *Ouellette*, the existence of the savings clause does not preclude a finding of preemption, but the presence of one “negates the inference that Congress ‘left no room’ for state causes of action even if ‘Congress intended to dominate the field of pollution regulation.’”<sup>420</sup>

In a more recent case illustrating these arguments, in *Soto v. Bushmaster Firearms International* a Connecticut Superior Court allowed families of victims in the Sandy Hook Elementary School shooting to proceed with a lawsuit against a gun manufacturer on a theory of wrongful marketing that resulted in deaths and personal injuries, despite the existence of expansive and preemptive federal legislation.<sup>421</sup> The Protection of Lawful Commerce in Arms Act (PLCAA) generally shields gun manufacturers and dealers from “criminal or unlawful misuse” of their products through preempting state-law causes of action that impose liability for such conduct.<sup>422</sup> But the Connecticut Supreme Court found that plaintiffs’ actions based on Connecticut’s sale and marketing laws fell within the statute’s predicate exception rule.<sup>423</sup> The court considered the text of the predicate exception clause and the PLCAA’s legislative history, and concluded that Congress did not intend to preempt Connecticut’s power to regulate the “advertising that threatens the public’s health, safety, and morals [which have] long been considered a core exercise of the states’ police powers.”<sup>424</sup>

Some of the plaintiffs in the second wave of climate change litigation rely on the exact same type of claims arising from deceptive marketing. A climate change lawsuit brought in a Connecticut state court even alleged, amongst other claims, violations of the same Connecticut unfair trade practices statute as in *Soto*.<sup>425</sup> Like in *Soto*, the CAA explicitly preempts state law in some parts of the Act but does not contain a preemption clause for tort-law claims—whether based in unfair marketing practices or in public nuisance. For example, Section 209(a) explicitly preempts state common law claims premised on emission standards.<sup>426</sup> The existence of the savings clause side-by-side with the existence of clauses that explicitly preempt state law, like Section 209(a), and the lack of a clause that would expressly preempt state tort-law claims, further affirm that Congress preserved state tort-law actions by design.

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<sup>419</sup> See Rothschild, *supra* note 403, at 435.

<sup>420</sup> *Id.* at 436 (quoting *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987)).

<sup>421</sup> *Soto v. Bushmaster Firearms Int’l, LLC*, 202 A.3d 262, 324–25 (Conn. 2019).

<sup>422</sup> *Id.* at 309.

<sup>423</sup> *Id.* at 302.

<sup>424</sup> *Id.* at 273.

<sup>425</sup> *Connecticut v. Exxon Mobil Corp.*, No. 3:20-CV-1555 (JCH), 2021 WL 2389739, at \*2 (D. Conn. June 2, 2021) (“Count One alleges that ExxonMobil made false and/or misleading statements likely to deceive Connecticut consumers, in order to increase its profits, in violation of section 42-110b of the Connecticut General Statutes.”).

<sup>426</sup> 42 U.S.C. § 7543, *See also* *Jackson v. Gen. Motors Corp.*, 770 F. Supp. 2d 570, 572–73 (S.D.N.Y. 2011).

Future courts will have to apply these factors in their ordinary preemption analyses to determine whether the CAA impliedly preempts the state-law claims through field preemption or obstacle preemption. Where conflict between federal and state law exists, courts consider congressional intent key in determining preemption of state claims.<sup>427</sup> The interest in preserving “the historic police powers of the states” traditionally has cautioned courts from finding a conflict between federal and state law unless there is a “clear and manifest purpose of Congress” to preempt state law.<sup>428</sup>

Under the first type of preemption, Courts can imply that Congress intended to occupy when they find that Congress intended to preempt all law in a particular area because: (1) the federal scheme is sufficiently comprehensive; or (2) “the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.”<sup>429</sup> The courts will be unlikely to find that Congress occupied the field in light of the Act’s “cooperative federalism” structure and comprehensiveness. The existence of the savings clause preserving state law remedies, and another savings clause that allows states to adopt and enforce emission standards that are more stringent than the federal standards,<sup>430</sup> also suggests that state authority has been preserved, making unlikely the finding that a federal interest is so dominant that it would preclude state-law causes of action.

The next type of preemption is the so-called conflict preemption that comes in the forms of impossibility or obstacle preemption. It is also very unlikely that a court will find impossibility preemption because of the very high standard that requires defendants to show that it would be impossible for them to comply with federal and state law targeting the same conduct.<sup>431</sup> Some justices, for example Justices Thomas and Gorsuch, also have expressed skepticism over the scope of the conflict preemption doctrine, noting that it is “[i]t is doubtful whether a federal policy—let alone a policy of nonregulation—is sufficient to support conflict preemption.”<sup>432</sup> And in any case, it is intuitively unclear, and therefore likely unpersuasive, how tort liability for defendants’ sale of fossil fuels—propelled by a misinformation campaign—conflicts with the emissions standards imposed by the CAA.

Obstacle preemption, on the other hand, could create a hurdle for plaintiffs alleging public nuisance claims. Obstacle preemption was the basis on which the Supreme Court in *Ouellette* found that the state-law claims based on the pollution-

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<sup>427</sup> See *Retail Clerks Int'l Ass'n, Loc. 1625 v. Schermerhorn*, 375 U.S. 96, 103 (1963).

<sup>428</sup> *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

<sup>429</sup> Susan Raeker-Jordan, *The Pre-Emption Presumption that Never Was: Pre-Emption Doctrine Swallows the Rule*, 40 *Ariz. L. Rev.* 1379, 1383 (1998) ((quoting *Hillsborough Cnty. v. Automated Med. Lab'ys, Inc.*, 471 U.S. 707, 713 (1985)).

<sup>430</sup> 42 U.S.C. § 7416.

<sup>431</sup> See *Rothschild*, *supra* note 403, at 442–443 (noting that “[t]he burden for establishing ‘impossibility’ is extremely high.”).

<sup>432</sup> *Lipschultz v. Charter Advanced Servs. (MN), LLC*, 140 S. Ct. 6, 7 (2019) (Thomas, J., concurring).

receiving state, and not the source state, were preempted.<sup>433</sup> Defendants may argue that the state tort liability would pose obstacles to the general regulatory scheme of greenhouse gas emissions established by the CAA. The Supreme Court was receptive to these arguments in *Ouellette* and found that allowing a state to enforce its nuisance laws against a polluter would create a “chaotic regulatory structure” that would present an obstacle to achieving the purposes of the CWA.<sup>434</sup> The Second Circuit in *New York II* likewise noted with concern that imposing New York’s nuisance standards on polluters would “effectively impose strict liability for the damages caused by fossil fuel emissions no matter where in the world those emissions were released (or who released them)” and interfere with federal regulation.<sup>435</sup>

The key finding that could lead some courts to find obstacle preemption is the recharacterization of plaintiffs’ claims as arising from global emissions and not from the production, sale, or marketing of fossil fuels. But this recharacterization may enlarge a court’s power at the expense of litigants and has potentially vast repercussions on state tort law.<sup>436</sup> The Hawaii state court in *Sunoco* warns that the Second Circuit’s “damages = regulation = preemption” analysis would indeed intrude on historic powers of state courts and preempt much significant litigation, including products, pharmaceutical, and consumer protection litigation.<sup>437</sup> If courts in the future nevertheless do not heed this warning and instead transform and reframe plaintiffs’ claims, obstacle preemption may become a hurdle for plaintiffs alleging public nuisance claims in particular. Those Circuits that will be reconsidering other state-law claims, such as products liability claims and claims based on consumer protection law, are less likely to find obstacle preemption under the Clean Air Act because the courts will find more easily that these causes of actions are premised on in-state deceptive or dangerous conduct and not greenhouse gas emissions.

## VI. Conclusion

The most recent report from the IPCC marshaled an extraordinary amount of scientific evidence that unequivocally shows that “[c]limate change is a threat to human well-being and planetary health.”<sup>438</sup> The message is clearer than ever. If the temperature rises above 1.5 degrees Celsius, the damage to ecosystems, people, settlements, and infrastructure will become irreversible. And these changes will happen much sooner than we thought.<sup>439</sup> Already by 2030, the impact of resilience and development measures may be next to none.<sup>440</sup> The

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<sup>433</sup> *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987).

<sup>434</sup> *Id.* at 496–97.

<sup>435</sup> *New York II*, 993 F.3d 81, 93 (2d Cir. 2021).

<sup>436</sup> *See supra* Part V(B).

<sup>437</sup> *City & Cnty. of Honolulu v. Sunoco LP*, No. 1CCV-20-0000380, at \*6 (Haw. Cir. Ct. Feb. 22, 2022).

<sup>438</sup> IPCC 2022 Report, *supra* note 2, at 33.

<sup>439</sup> *Id.* at 13.

<sup>440</sup> *Id.* at 33.

report concludes that “[t]here is a narrowing window of opportunity to shift pathways towards more climate resilient development futures.”<sup>441</sup> It is therefore critical that states, which are already footing immense bills associated with climate change, can sue those who contribute to climate harms, and they must do so now. Litigation can help states with adaptation measures, but it can also impact the behavior of fossil-fuel producers by making them internalize the true costs of their business before it is too late.

These benefits would never be realized if the Second Circuit’s logic were widely adopted. Under their logic, a court could recharacterize almost any claim touching climate—even an ordinary tort—as a claim arising from climate change, find the state-law claims to be preempted by federal common law, and then under the CAA. In this way, a defendant could achieve displacement of state-law claims even though an ordinary preemption analysis would not allow it. Such a shortcut is neither grounded in sound legal analysis, nor is it permissible in our system of federalism.

Fortunately, the Second Circuit’s logic rests on a readily-remedied misconstruction of Supreme Court precedent. Future lower federal courts should recognize that the Supreme Court has disfavored the judicial creation of common-law remedies and the expansion of judicial authority at the expense of state law, especially in light of comprehensive legislative enactment on the issue—the CAA. Instead, courts should consider plaintiffs’ state-law claims arising from the production, sale, and marketing of fossil fuels under the ordinary preemption analysis. In that way, courts can give due consideration to the will of Congress as expressed in the Act and to plaintiff-identified sources of harm without making their decisions vulnerable to criticisms arising from overstepping boundaries of federal judicial power.

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<sup>441</sup> *Id.* at 31.