DISPLACING AN INCOMPLETE COMPLETE PREEMPTION AND DISPLACEMENT ANALYSIS: DOCTRINAL ERRORS AND MISCONCEPTIONS IN THE SECOND WAVE OF STATE CLIMATE TORT LITIGATION

STEVEN KAHN*

I. INTRODUCTION

In an ideal world, legal liability for greenhouse gas (GHG) emissions would be available from a variety of sources. As many litigants, courts, and commentators have noted, the environmental harms directly and indirectly caused by GHG emissions could potentially be framed as a run of the mill tort claim.[1] In an archetypical GHG emissions case, a party that unreasonably causes GHG to be emitted to the detriment of another party is externalizing those GHG emissions and, as a consequence, should be theoretically liable for those externalities. This

* J.D. graduate, Spring 2020, Florida State University College of Law.

1. *See e.g.*, Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153 (2009).

treatment of the externalities attributable to GHG emissions would be consistent with the "polluter pays principle" underlying much of environmental law.

One would also expect that these externalities would be monitored by Congress or by the Environmental Protection Agency (EPA). Regulation of tortious conduct that is imperfectly deterred at common law is, after all, prevalent in many other contexts. In such a system, a democratically accountable body that is empowered by the public to make value judgments concerning the trade-offs associated with certain socially beneficial conduct can prospectively establish standards governing that conduct. Prospective regulations have the advantage of preventing externalities before they happen by deterring or preventing the conditions needed for their occurrence. If compliance with those regulations is not met and the regulated externality continues to occur, then an entity with enforcement authority or a citizen's group can bring an enforcement action to rectify the situation – either by forcing the polluter to internalize their externalities or by coercing them into developing a solution. If the current regulatory landscape does not provide a solution to an externality harming the public, one would also expect the public to either lobby their elected representatives to create a solution or to fall back certain on common law causes of action that co-exist with these legislative solutions a "gap-filler."

However, the realities of GHG emissions as applied to this idealized model are not so simple. GHG emissions as an environmental tort represent one of the most factually complicated lawsuits imaginable[2] as, to establish prima facie liability, prospective GHG emissions plaintiffs must face a burden of linking their chosen defendants to a variety of attenuated harms and causal circumstances.[3] Even the judicial logistics of managing a GHG emissions case of this magnitude could threaten to be unworkable.[4] Presumably, this complexity would indicate GHG emissions cases are a prime candidate for a regulatory scheme that enables injured parties to mitigate this collective action problem and allow them to be made whole again.

Recent legislative and regulatory solutions to the problems caused by GHG emissions range from having been disappointing at best and actively detrimental at worst. Although existing

2. *See* Albert C. Lin & Michael Burger, *State Public Nuisance Claims and Climate Change Litigation*, 36 PACE L. REV. 49, 55–57 (2018).

3. *Id.*

4. David L. Markell & Emily Hammond Meazell, *A Primer on Common Law & Related Causes of Action in Climate Change Litigation*, GLOBAL CLIMATE CHANGE AND U.S. LAW (2d ed.) at 18 (publication forthcoming) (last accessed Oct. 22, 2019, 10:08 A.M.).

legislation such as the Clean Air Act[5] gives the EPA ample authority to regulate GHG emissions as an air pollutant,[6] the EPA's recent attempts to regulate pursuant to that grant of authority have been viewed as inadequately addressing the problem and have been difficult to rely on. Referencing the model presented above, it would appear that it is time for the public to lobby their elected representatives for more comprehensive regulatory schema for GHG emissions and, in the interim, rely on common law "gap-filler" causes of action as best as they are able.

Unfortunately, the Supreme Court and various circuit courts of appeal have held that the suboptimal solutions implemented by the political branches have also had the net effect of preventing most common law causes of action from being used for this task.[7] The status quo has left the state common law of public nuisance as one of the few remaining vehicles for bringing GHG emissions to the attention of the courts.[8] GHG emitting industries are aware of this and have attempted to federalize as many state law public nuisance claims as possible[9]—which, due to the Supreme Court's precedent, will require them to be dismissed.[10]

In this article, I will argue that state law public nuisance claims should not be federalized. In Part II, I briefly provide background to the relevant aspects of nuisance, preemption, and displacement law. In Part III, I explain the reasoning of the 2018 state public nuisance GHG emissions cases, argue that said reasoning is incorrect, and then articulate why the 2019 state law public nuisance GHG emissions cases reached the correct result. In Part IV, I provide additional policy reasons for why the latter cohort of state law public nuisance GHG emissions cases should be followed by other courts in the future, should the need arise.

II. LEGAL BACKGROUND

In order to explain why state law public nuisance GHG emissions claims are receiving so much attention it is necessary to elaborate on the reasons why other, more suitable claims are *not* being brought. That is to say, which types of common law GHG

5. 42 U.S.C. § 7401.

6. *See generally* Massachusetts v. EPA, 549 U.S. 497 (2007).

7. *See infra* Part II.

8. The Public Trust Doctrine is another highly litigated source of potential common law liability—state or federal—that may serve to create liability for greenhouse gas emissions. However, arguments addressing the proper domain of the Public Trust Doctrine are outside the scope of this article. For a brief explanation of the issue, *see* Markell & Meazell, *supra* note 4, at 9.

9. *See infra* Part III.

10. *See infra* Part II, III.

emissions claims have already been ruled out, and which are left? Of the various common law claims that remain, why have courts, commentators, and litigants placed so much emphasis on state law public nuisance in particular?

A. Public and Private Nuisance

Nuisance law is one of the classic ways to utilize the common law to require the internalization of unreasonable externalities.[11] Within the overarching category of nuisance law there are two distinct causes of action—private nuisance and public nuisance. A private nuisance generally is an action that causes an unreasonable and substantial disturbance with another's private use and enjoyment of their land.[12] If a private nuisance claim succeeds, courts will typically enjoin the tortious action until the tortfeasor reaches an agreement with the plaintiff to compensate them for their injuries in exchange for lifting the injunction.

In contrast, a public nuisance refers to actions that cause a substantial and unreasonable interference with a public right.[13] In this context, an action is unreasonable if it causes social harms that outweigh the associated social utility of the action's benefits.[14] Public nuisance litigation on occasion may also require the identification of a public right.[15] Public nuisance claims can be further subcategorized into two groups based on the identity of their plaintiff. Public nuisance claims are generally brought by government bodies on behalf of their constituents, but private parties may also have standing to bring a public nuisance claim if they have suffered a "special injury" that is different in kind from those suffered by the general public.

Public nuisance has three advantages over private nuisance in the GHG emissions context. First, public nuisance claims are inherently larger in scope than private nuisance claims are, which enables them to aggregate a variety of different injuries suffered by a diffuse public against the conduct of a single actor.[16] This aggregation of harms makes it easier for plaintiffs to frame a defendant's conduct as being unreasonable and, as a result, makes it more likely that they prevail on the merits during the weighing of the harms phase of the claim.[17] Second, some commentators have noted that by framing the reasonableness of the underlying

11. *See e.g.*, Boomer v. Atlantic Cement Co., 257 N.E.2d 870 (N.Y. 1970).
12. RESTATEMENT (SECOND) TORTS § 822 (Am. Law. Inst. 1979).
13. RESTATEMENT (SECOND) TORTS §§ 821(B)(1), (B)(1)(a) (Am. Law. Inst. 1979).
14. RESTATEMENT (SECOND) TORTS § 821(B) cmt. E (Am. Law. Inst. 1979).
15. Lin & Berger, *supra* note 2, at 88.
16. *Id.*
17. *Id.*

unreasonable conduct as a balancing act between the comparative social values of the allegedly tortious activity and the public injuries that it allegedly causes, public nuisance claims allow courts to focus on the magnitude of harm suffered by the public instead of engaging in an overt cost benefit analysis like they would in a private nuisance case.[18] This, again, makes it easier for the public to win. Third, the use of public nuisance claims to bring GHG emissions claims is supported by the historical justifications for the public nuisance doctrine,[19] which in turn lends credence to their underlying claims and encourages judges and, perhaps more importantly the media, to characterize the lawsuit as a state protecting its interests rather than engaging in the occasionally disfavored practice of regulating via lawsuit.

B. Displacement and Preemption

Prior to the enactment of the Clean Air Act it would have been possible for GHG litigants to have chosen between bringing either a federal or state law public nuisance claim. These litigants would also have had many equitable remedies to choose from, as well as the possibility of recovering money damages. However, after the Clean Air Act was enacted, many federal common law causes of action have been displaced, and state common law causes of action may be preempted, at least according to the defendants in the state law public nuisance GHG emissions case. A discussion of the leading case law in this area will be convenient to outline the differences between displacement and preemption before proceeding to the substance of an argument why state law public nuisance GHG emissions cases should not be federalized.

Perhaps the most important case in a GHG emissions public nuisance context is *American Electric Power v. Connecticut* (*AEP*).[20] In *AEP*, a group of environmental plaintiffs brought a federal public nuisance claim and sought injunctive relief against various electrical utilities for their contributions to global GHG emissions.[21] However, the Supreme Court unanimously held that because Congress had enacted the Clean Air Act, such relief was "displaced" and was no longer available under federal common

18. Douglas A. Kysar, *What Climate Change Can Do About Tort Law*, 41 ENVT'L L. 1, 25 (2011).

19. At common law, the public nuisance doctrine was frequently used by the state to address criminal and quasi-criminal actions that yet to be statutorily prohibited. *See* RESTATEMENT (SECOND) OF TORTS § 821(B) cmts. a & b (Am. Law. Inst. 1979).

20. American Electric Power Co. v. Connecticut (*AEP*) 564 U.S. 410 (2011).

21. *Id.* at 418.

law.[22] Displacement is a Congressionally imposed horizontal limitation on the federal judiciary's power to make law, in this case by judicially imposing GHG emissions standards though the federal common law. The *AEP* court explained that, for the purposes of a displacement inquiry, it is legally irrelevant if the EPA would ever actually decide to regulate GHG emissions, as "the delegation is what displaces federal common law."[23] To find displacement, the *AEP* court stated that the legal test is simply whether the statute speaks directly to the question at issue.[24] In contrast, the *AEP* court observed that because it does not implicate the same federalism concerns, the standard for displacement was necessarily far easier to satisfy than the standard for preemption.[25] Finally, the *AEP* court explicitly withheld judgment on the question of whether the Clean Air Act imposed vertical limitations, i.e., preemption, on the existence of a state law public nuisance cause of action concerning GHG emissions.[26] The potential safe harbor for a state law public nuisance GHG emissions claim that was created here has not been adequately addressed by subsequent jurisprudence and is essentially the focus of the second wave of climate change litigation moving through the courts today.

The second major datapoint in the ongoing saga of GHG emissions litigation, *Native Village of Kivalina v. Exxon Mobil Corporation*,[27] is important to public nuisance law in the dual contexts of their displacement and justiciability under the political question doctrine. In *Kivalina*, a coalition of environmental plaintiffs took note that in *AEP*, the Supreme Court had, technically speaking, had only held that federal equitable remedies had been displaced by the Clean Air Act.[28] This argument proved to be unavailing at the Ninth Circuit, which applied other

22. *Id.* at 424 ("the Clean Air Act and the EPA actions it authorizes displace any federal common-law right to seek abatement" [of GHG emissions].).

23. *Id.* at 426. This line of reasoning also forecloses future arguments that, either by flip-flopping on climate policies or GHG emissions regulations, executive or administrative actors might, either deliberately or inadvertently, reenable a federal public nuisance cause of action for GHG emissions. Only a Congressional revocation of the EPA's delegated authority to regulate GHG emissions would suffice. *See* Markell & Meazell, *supra* note 4, at 5.

24. *AEP*, 564 U.S. at 411.

25. *Id.* at 423. ("Legislative displacement of federal common law does not require the 'same sort of evidence of a clear and manifest purpose' demanded for preemption of state law.").

26. *Id.* at 429. ("In light of our holding that the Clean Air Act displaces federal common law, the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal act. None of the parties have briefed preemption or otherwise addressed the availability of a claim under state nuisance law. we therefore leave the matter open for consideration on remand") (citations omitted).

27. Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849 (9th Cir. 2012).

28. *Id.* at 856–58.

binding precedent to hold that "if a cause of action is displaced, displacement is extended to all remedies" to that cause of action.[29]

Equally important for our purposes, Judge Pro observed in a concurrence that state nuisance law was still potentially available to the Native Village a remedy for the harms they had suffered because of GHG emissions.[30]

The third leading case in this line of common law GHG emissions cases, *Comer v. Murphy Oil USA*,[31] stands for the proposition that state law public nuisance claims for damages concerning GHG emissions that are brought to federal court under diversity jurisdiction are distinguishable from federal public nuisance claims for equitable relief.[32] In *Comer*, a group of environmental plaintiffs sued in federal court under a variety of state common law claims, including state public and private nuisance.[33] While *Comer* was decided on remand on (numerous) procedural grounds without having reached the merits,[34] the fact that the case was not dismissed outright for having been preempted should be promising for the prospects of future state common law GHG emissions litigants.

To recap, federal courts have yet to directly address the viability of litigating a state law public nuisance claim for damages concerning GHG emissions in state court. As it stands, the available precedent states that federal law public nuisance claims for equitable or monetary relief are preempted by the Clean Air Act and that, regardless of fora, federal law public nuisance claims are at least theoretically distinguishable from state law public nuisance claims, which has left the door open for the modern cohort of GHG emissions cases to potentially reach the merits of a state law public nuisance claim.

III. THE SECOND WAVE OF STATE CLIMATE TORT LITIGATION

Climate change plaintiffs are mindful of the precedents discussed above and have in recent years renewed their efforts to hold GHG emitting industries accountable for their actions. In this second wave of climate litigation,[35] the current main area of

29. *Id.* at 857.
30. *Id.* at 866–67 (J. Pro, concurring).
31. Comer v. Murphy Oil USA, 585 F.3d 855 (5th Cir. 2010).
32. *Id.*at 878–79.
33. Lin & Burger, *supra* note 2, at 11.
34. Comer v. Murphy Oil USA, 839 F.Supp.2d 849, 855–57, 862, 865–68 (S.D. Miss. 2012).
35. This is not a formal designation for these cases, but it is useful as a reference to distinguish the 2019 and 2018 climate change lawsuits at issue here from *AEP*, *Kivalina*,

contention is the applicability of a host of narrowly construed methods for a federal court to exercise removal jurisdiction over a complaint pleading an exclusively state law cause of action. However, as will be demonstrated below. these removal arguments fail to persuasively demonstrate that the second wave of climate emissions lawsuits should be federalized.

A. An Overview of the Cases

As of late November 2019, there are seven prominent state law public nuisance lawsuits seeking a remedy for injuries caused by GHG emissions. The earlier of these challenges would appear to indicate that the removal question is a simple and easily resolved matter of applying preemption law and referencing the holdings of *AEP* and *Kivalina*, but several of the more recent district court opinions on the matter have managed to distinguish these precedents and have held that removal would be inappropriate. I will briefly discuss the results of each line of cases below, before then turning to a more detailed analysis of the removal arguments that they present, and finally resolving any remaining uncertainty in their outcome in favor of resisting federalization and allowing their litigants to eventually reach their merits in state court.

1. Cases in which Federalization was Successful

The first case of the second wave of state law public nuisance GHG emissions litigation, *California v. BP P.L.C.* (*CA I*)[36], was brought in February 2018 by the cities of Oakland and San Francisco in the California Superior Court against BP, Chevron, ConocoPhillips, Exxon Mobil, and Royal Dutch Shell over the flooding of city property allegedly caused by sea level rise attributable to climate change.[37] Mindful of precedent, the plaintiffs deliberately framed their complaint in a manner that made no mention of liability predicated directly on the burning or actual GHG emissions.[38] Instead, the Cities "fixated on an earlier moment in the train of industry" and alleged that the various GHG emitting energy industry defendants knowingly continued to produce, market, and sell fossil fuels despite their knowledge of

---

Comer, etc. All credit goes to Albert C. Lin for the name. *See* Albert C. Lin, *The second wave of climate change public nuisance litigation*, AMERICAN BAR ASSOCIATION SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES (Sept. 01, 2019), https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2019-2020/september-october-2019/the-second-wave/.

36. California v. BP P.L.C. (CA 1), 2018 U.S. Dist. LEXIS 32990 (N.D. Cal. 2018).

37. *Id.* at 3–4

38. *Id.* at 11–12.

the severe risks of harm that these products posed to the global atmospheric climate system.[39] As a remedy, the cities requested the creation of an abatement fund to finance the seawalls and other infrastructure that will eventually be required to address flooding caused by rising sea levels.[40] The defendants timely filed a notice of removal, asserting that federal jurisdiction existed because the city's claims were controlled by the federal common law of interstate nuisance[41] and, as a consequence of *AEP* and *Kivalina*, were displaced.

The district court in *CA I* agreed with the energy industry defendants and held that removal was appropriate because a "uniform standard of decision [was] necessary to deal with the issues raised in plaintiffs' complaints," meaning that the state law public nuisance claims that the cities had pled could only be resolved by a federal court.[42] The *CA I* court observed that the Supreme Court and the Ninth Circuit had recognized the potential availability of state law claims in the GHG emissions context but nonetheless reasoned that:

> If ever a problem cried out for a uniform and comprehensive solution, it is the geophysical problem described by the complaints …. Taking the complaints at face value, the scope of the worldwide predicament demands the most comprehensive view available, which in our American court system means our federal courts and our federal common law. A patchwork of fifty different solutions to the same fundamental global issue would be unworkable. That is not to say that the ultimate answer under our federal common law will favor judicial relief. But it is to say that the extent of any judicial relief should be uniform across our nation.[43]

Consequentially, the district court applied the reasoning of *Illinois v. City of Milwaukee,*[44] *AEP*, and *Kivalina* to dismiss the cities' petition for remand and ultimately allow for the case to proceed in federal court.[45]

The *CA I* court then went on to explain why the cities' grounds for resisting removal were lacking. First, the district court refused to allow the cities' attempt at distinguishing the act of selling and marketing fossil fuels from the act of burning those fossil fuels to contribute to interstate pollution as, despite the fact that "[the]

39. *Id.* at 4.
40. *Id.* at 5.
41. *Id.* at 9–10, 15.
42. *CA 1,* 2018 U.S. Dist. LEXIS at 9–10.
43. *Id.*
44. Illinois v. City of Milwaukee, 406 U.S. 91, 107 n.9 (1972).
45. *CA I*, 2018 U.S. Dist. LEXIS 32990, at 15.

plaintiffs assert[ed] a novel theory of liability" the case still implicated the same federal interests that the court had already determined required a federal solution.[46] The *CA I* court then noted that because the cities had pled a different theory of liability than those that had been previously addressed by *AEP* or *Kivalina*, it was free to find that the Clean Air Act did not speak directly to the issue of liability stemming from the production and sale of fossil fuels, and that the applicable federal common law had not been displaced.[47] If the applicable federal common law is not displaced, then the potential safe harbor for state common law described by *AEP* and *Kivalina* would not apply, so the federal common law would in turn preempt the state common law.[48] Finally, the *CA I* court reasoned that the well-pleaded complaint rule[49] would not suffice to keep the cities' state law public nuisance claims in state court because they "necessarily arise under federal common law" because they "necessarily involve[] the relationships between the United States and all other nations."[50] As a result, federal jurisdiction under *Grable*[51] was also available as a basis for removal.[52]

The District Court for the Northern District of California returned to this dispute in late June 2018, holding that because the harm suffered by the cities was ultimately caused by GHG emissions, their state common law claims were displaced by the Clean Air Act, which required the case to be dismissed.[53] After *CA I*, the cities had substituted a defendant and amended their complaints to, in addition to their previous claims, assert a new federal law public nuisance claim.[54] The *CA II* court observed that the amended complaint potentially implicated assigning the energy industry defendants' liability for the actions of foreign entities that purchased fossil fuels from them and subsequently contributed to domestic climate change related harms by burning those fossil fuels overseas.[55] As a result, the district court found that the federal law public nuisance claim had to be displaced in deference to the Executive and Legislative branches' authority to conduct foreign affairs and to manage the nation's foreign policy.[56]

---

46. *Id.* at 10–11.
47. *Id.* at 11–14.
48. *Id.*
49. *See infra* Part III.b.
50. *CA I*, 2018 U.S. Dist. LEXIS 32990, at 14–15.
51. *See infra* Part III.b.3
52. *CA I*, 2018 U.S. Dist. LEXIS 32990, at 14–15.
53. City of Oakland v. BP P.L.C. (*CA II*), 325 F. Supp. 3d 1017, 1024 (N.D. Cal. 2018).
54. *CA II*, 325 F. Supp. 3d at 1021–22.
55. *Id.* at 1024.
56. *Id.* at 1024–28.

Notably, the court based its decision solely on displacement, without first addressing the complete preemption argument necessary to keep the case in federal court in the first place.[57]

The next case in the second wave of climate litigation, *City of New York v. BP P.L.C.*,[58] was decided in mid-July 2018, hot on the heels of *CA II*. *City of New York* is the outlier of this cohort of cases insofar as that while it involves similar state common law claims to *CA II* that were quickly federalized by the court before being displaced,[59] the case did not address preemption, federal jurisdiction or removal because it was brought to federal court pursuant to diversity jurisdiction.[60] Instead, the court in *City of New York* followed the same reasoning as the court in *CA I* and *CA II*, holding that despite the fact that the City framed its complaint in terms of the production and sale of fossil fuels, it was still ultimately seeking damages from climate change related injuries caused by GHG emissions.[61] As a result, the City had actually pled an interstate pollution claim that "arises under federal common law and require[s] a uniform standard of decision."[62] The district court then held that because the Clean Air Act spoke directly to the issue regarding the ultimate harm the City had (apparently) alleged, their claims had been displaced under the reasoning of *AEP* and *Kivalina*.[63]

2. Cases in which Federalization was not Successful

CA I and *City of New York* were quickly and successfully distinguished by environmental plaintiffs in other jurisdictions. The foundational data point in the line of cases that have resisted federalization, *County of San Mateo v. Chevron Corp*,[64] was also filed in the California state court system and was decided in the

57. This defect in the reasoning of *CA I* has been seized on by the litigants of subsequent second wave climate change suits to successfully distinguish their cases from *CA I* and overcome removal arguments to earn a remand back to the state courts that they originated in. *See infra* Part III.b.

58. City of New York v. BP P.L.C., 325 F. Supp. 3d 466 (S.D.N.Y. 2018).

59. *Id.* at 741–74.

60. Bd. Of Cty. Comm'rs v. Suncor Energy Inc., 405 F. Supp. 3d 947 (D. Colo. 2019) ("The court in *City of New York* did not address federal jurisdiction or removal jurisdiction. … [the] *City of New York* case[] did not address preemption at all, and certainly not complete preemption as providing a basis for removal jurisdiction"); Mayor of Baltimore v. BP P.L.C., 2019 U.S. Dist. LEXIS 97438 1, 26 (D. Md. 2019) ("Significantly, however, the [*City of New York*] court did not consider whether this finding conferred federal question jurisdiction because the plaintiffs originally filed their complaint in federal court based on diversity jurisdiction.").

61. *City of New York*, 325 F. Supp. 3d. at 472.

62. *Id.* (citing *CA I*).

63. *Id.*

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

roughly half year interim between *CA I* and *CA II*.[65] Here, the *County of San Mateo* court correctly applied the displacement analysis, observing that because claims seeking relief for GHG emissions related injuries from either the production and sale of fossil fuels or directly from emissions resultant from those products themselves are fundamentally the same, they are both displaced by the Clean Air Act.[66] The *County of San Mateo* court also objected to the reasoning of *CA I*, claiming that the *CA I* court had misapplied *AEP* and *Kivalina* by improperly distinguishing between liability allegedly incurred by contributing to emissions and liability allegedly incurred by the actual emissions themselves.[67] As the district court then succinctly summarized, "because federal common law does not govern the plaintiffs' claims, it also does not preclude them from asserting the state law claims in these lawsuits. Simply put, these cases should not have been removed to federal court on the basis of federal common law that no longer exists."[68] The *County of San Mateo* court then turned to the energy industry defendants' other removal arguments, found them insufficient, and remanded the case back to state court .[69]

The analysis of the *County of San Mateo* court has since been followed by district courts in three other circuits – the Fourth[70], First[71], and the Tenth.[72] The district court judges in these circuits have also elaborated on the fundamental error made by the *CA I* and *City of New York* courts in conflating displacement, ordinary preemption, and complete preemption. In addition, these same judges have further expanded upon the many reasons why the numerous sources of removal jurisdiction are unavailable in the face of a properly-pled state law public nuisance common law claim. A brief summary of removal jurisdiction and an explanation of these arguments follows.

---

65. *Id.*; *see generally CA I*, 2018 U.S. Dist. LEXIS 32290; *see also generally CA II*, 325 F. Supp. 3d.

66. *County of San Mateo*, 294 F. Supp. 3d at 937.

67. *Id.* ("*Kivalina* stands for the proposition that federal common law is not just displaced when it comes to claims against energy producers' contributions to global warming and rising sea levels. Put another way, *American Electric Power* did not confine its holding about the displacement of federal common law to particular sources of emissions, and *Kivalina* did not apply *American Electric Power* in such a limited way.").

68. *Id.*

69. *Id.* at 938–39.

70. *Mayor of Baltimore*, 2019 U.S. Dist. LEXIS 97438, at 41–142.

71. Rhode Island v. Chevron Corp., 393 F. Supp. 3d 142, 151 (D. RI 2019).

72. *Boulder County*, 405 F. Supp. 3d at 961.

B. Removal Jurisdiction and Related Arguments – Fixing What CA I and City of NY broke.

Removal is a procedural mechanism intended to balance the federalism concerns created by having two sets of courts with occasionally-overlapping jurisdiction with the policy of providing safeguards to protect nonresident litigants from "state-court tribalism."[73] For the most part, the removal statute, 28 U.S.C. § 1441, allows for claims that were initially pled in state court to be removed to a federal court if the federal court would have had federal jurisdiction over the state law claim in the first instance.[74] Thus, in many cases some analysis is needed to determine if federal jurisdiction is appropriate, as federal courts are courts of limited jurisdiction that is affirmatively granted to them by the Constitution or by Congress.[75] A removing party—for our purposes, the many energy industry defendants—must carry its burden of proof by demonstrating the presence of federal jurisdiction and that removal is appropriate.[76] When federal jurisdiction is at issue, courts are required to resolve their doubts in favor of declining to exercise jurisdiction or allowing removal, and if a case is not successfully removed, the federal court is required to remand the case back to the state court in which it originated.[77]

In the 2019 trio of GHG emissions state public nuisance removal cases, the energy industry defendants filed unsuccessful notices of removal predicated on no less than eight separate grounds.[78] Of these justifications, four rely on federal question jurisdiction[79] and four on other grants of original jurisdiction to the

---

73. *See* Barbour v. Int'l Union, 640 F.3d 599, 605 (4th Cir. 2011) (en banc), *abrogated in part on other grounds by* the Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, 125 Stat. 758 (2011); *Rhode Island*, 393 F. Supp. 3d at 147 (citing 14C Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 3721 (rev. 4th ed. 2018)).

74. 28 U.S.C. § 1441(a) ("any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed …, to the district court of the United States for the district and division embracing the place where such action is pending.").

75. Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 552 (2005).

76. *See* Strawn v. AT&T Mobility LLC, 530 F. 3d 293, 296 (4th Cir. 2008).

77. Shamrock Oil & Gas Corp v. Sheets, 313 U.S. 100, 108–09 (1941); Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 8 (1983) (citing 28 U.S.C. § 1447(c)).

78. *Compare* cases cited *supra* note 70–72 with *County of San Mateo*, 294 F. Supp. 3d 394 (removing energy industry defendants pleading seven of the eight possible justifications for federal jurisdiction but omitting arguments concerning admiralty jurisdiction that have been included in the 2019 trio of recent cases.).

79. 28 U.S.C. § 1331; *Mayor of Baltimore*, 2019 U.S. Dist. LEXIS 97438 at 12 ("These grounds are as follows: (1) the City's public nuisance claim is necessarily governed by federal common law; (2) the City's claims raise disputed and substantial issues of federal law; (3) the City's claims are completely preempted by the Clean Air Act, and the foreign

federal court system.[80] Of the eight, only an improperly conflated version of ordinary and complete preemption was discussed in *CA I* or *City of New York*, and once corrected, it follows that federal jurisdiction is unavailable and consequently that removal is improper. This and the justifications will now be addressed in turn.

1. "Ordinary" Preemption

Federal question jurisdiction is governed by 28 U.S.C. § 1331,[81] which states that federal question jurisdiction is appropriate in cases "'aris[ing] under federal law."[82] This may either occur when "federal law creates the cause of action asserted"[83] or through what is commonly called *Grable*[84] jurisdiction, which occurs when a claim originates in state law but nevertheless "the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law."[85] In the vast majority of cases,[86] the well-pleaded complaint rule is used to determine if federal jurisdiction is available on the face of the complaint.[87] The well-pleaded complaint rule is intended to guarantee that "the plaintiff [is] the master of [its] claim" and enables a plaintiff, if they so desire, to "avoid federal jurisdiction by exclusive reliance on state law."[88]

Federal "arising under" jurisdiction in the removal context must be predicated exclusively on the plaintiff's complaint and may not look to potential federal defenses as the basis for federal jurisdiction, no matter how likely it is that they will eventually be raised.[89] As a result, if "ordinary" preemption is alleged defense—

---

affairs doctrine; and (4) the City's claims are based on conduct or injuries that occurred on federal enclaves.") (citations omitted). I do not address the fourth of these justifications as it is beyond the scope of this paper.

80. *Mayor of Baltimore*, 2019 U.S. Dist. LEXIS 97438 at 12–13 ("As alternative grounds, defendants assert that this Court has original jurisdiction under the OSCLA; removal is authorized under the federal officer removal statute; removal is authorized … because the City's claims are related to bankruptcy cases; and the City's claims fall within the Court's original admiralty jurisdiction.") (citations omitted). However, these justifications for removal, like that of federal enclave jurisdiction, are beyond the scope of this paper.

81. The statute grants federal district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." *See* 28 U.S.C. § 1331.

82. Pinney v. Nokia Inc., 402 F.3d 430, 441 (4th Cir. 2005) (citations omitted).

83. Gunn v. Minton, 568 U.S. 251, 257 (2013).

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

85. Empire Healthchoice Assurance Inc. v. McVeigh, 547 U.S. 677 (2006); *see infra* Part III.b.3..

86. The two exceptions to this rule are *Grable* jurisdiction and complete preemption, which are discussed in Parts III.b.2 and III.b.3, *see infra* Part III.b.2, III.b.3.

87. Rivet v. Regions Bank of LA., 522 U.S. 470, 475 (1988).

88. Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987).

89. *Caterpillar Inc.*, 482 U.S. at 393 ("… a case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is

as it consistently has been in the second wave of climate change cases to preempt state common law—"it does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to federal court."[90] The key error in the reasoning of the *CA I* and *City of New York* courts that the *Mayor of Baltimore*, *Rhode Island*, and *Boulder County* courts have picked up on is that the former inadvertently "conflate[d] complete preemption with the defense of ordinary preemption."[91]

"Ordinary preemption"[92] is a familiar concept to most environmental practitioners as the mechanism through which the Supremacy Clause[93] is used to ensure that federal law will, if necessary, supersede state law. Mechanically, ordinary preemption acts as a defense to state law claims that is successful when Congress intends a federal law to preempt state law.[94] Ordinary preemption is commonly articulated to occur in three forms: (1) express preemption, (2) conflict preemption, and (3) field preemption.[95] In contrast, "complete preemption" is a narrow[96] exception to the well-pleaded complaint rule that "converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule."[97] Like ordinary preemption, complete preemption is a question of Congressional intent, but the two are distinct as, in order for a state law to be "completely preempted," the defense must demonstrate "that Congress intended for federal law to provide 'the exclusive cause of action' for the claim asserted."[98]

After resolving this point of confusion and subsequently applying the correct law, the ordinary preemption arguments that were made in *CA I* and *City of New York* do not allow for a

---

anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue.").

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

91. *Mayor of Baltimore*, 2019 U.S. Dist. LEXIS 97438 at 17. As one scholar has correctly noted, the *CA I* court does not frame its argument in terms of complete preemption. However, no other legal theory would allow the court to reason as it did to reach its decision. *See* Gil Seinfeld, *Climate Change Litigation in the Federal Courts: Jurisdictional Lessons from California v. BP*, 117 MICH. L. REV. ONLINE 25, 31 (Oct. 2018).

92. The doctrine is typically referred to simply as "preemption," but as courts and commentators have noted, the nomenclature in this area of the law becomes confusing when it is necessary to distinguish between preemption as a defense and complete preemption as an exception to the well-pleaded complaint rule. Thus, the contextual change in the name of the doctrine from "preemption" to "ordinary preemption."

93. US CONST. art. VI, cl 2.

94. *See* Cox v. Duke Energy, Inc., 876 F.3d 625 (4th Cir. 2017).

95. English v. Gen. Elec. Co., 496 U.S. 72, 78–79 (1990).

96. As the *Mayor of Baltimore* court recently noted, federal statutes have rarely been found to complete preemption their state common law equivalent causes of action. *Mayor of Baltimore*, 2019 U.S. Dist. LEXIS 97438 at 36–37.

97. Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 65 (1987).

98. Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 9 (2003).

properly pled state common law public nuisance complaint to be removed to federal court. This is because the well-pleaded complaint rule ensures that state law claims are treated as state law claims for jurisdictional purposes unless an exception to that rule, such as the complete preemption doctrine, federalizes the claim. However, the "uniquely federal interests" argument advanced by the removing defendants in *CA I* and *City of New York* serves only to argue that state common law is ordinarily preempted, not that it is completely preempted.[99] Regardless of how likely it is that said claims are ordinarily preempted by federal common law, such ordinary preemption simply does not overcome the well-pleaded complaint rule to create federal jurisdiction over a state law claim.[100] Seeing as it is settled that state courts are competent to rule on the ordinary preemption of state law, these claims are more properly resolved in the state courts that they were initially filed in.[101]

2. Complete Preemption

Even if the *CA I* or *City of New York* courts had correctly applied the doctrine of complete preemption instead of conflating it with ordinary preemption, they still should have ruled against the federalization of their respective plaintiffs' well-pled complaints. As the court in *County of San Mateo* and its followers have noted, the test for complete preemption is that Congress must intend for a federal statute to be the exclusive cause of action in that area.[102] However, Congress has already demonstrably expressed its intent to the contrary by including savings clauses in the Clean Air Act and in the Clean Water Act.[103] After all, if Congress had really intended for the Clean Air or Clean Water Acts to provide the exclusive statutory cause of action for interstate air or water pollution related issues, why would it enact a law specifically to the contrary? As further observed by the *Mayor of Baltimore* and *Rhode Island* courts, the Clean Air Act states that regulating air pollution "is the primary responsibility of States and local governments" and that the Act includes a provision reserving state

99. *Mayor of Baltimore*, 2019 U.S. Dist. LEXIS 97438 at 20–22; *Rhode Island*, 393 F. Supp. 3d at 149-150; *Suncor Energy,* 405 F. Supp. At 961–62.

100. *Mayor of Baltimore*, 2019 U.S. Dist. LEXIS 97438 at 20–22; *Rhode Island*, 393 F. Supp. 3d at 149–150; *Suncor Energy,* 405 F. Supp. At 961–62.

101. County of San Mateo v. Chevron, 294 F. Supp. 3d 934, 938.

102. *Id.*

103. *Id.*; *see also* 42 U.S.C. §§ 7604(e), 7416; 33 U.S.C. §§ 1365(e), 1370. The Clean Water Act is tangentially relevant to many climate issues because, as here, the instrumentality of the harm alleged by the plaintiffs is sea level rise, which then implicates the Waters of the United States.

governments' authority to regulate air pollution in a stricter manner than what is established by the federal baseline.[104] This reservation of state authority to regulate air pollution would presumably extend to state statutory causes of action to enforce state regulations on the subject as well.

The *Rhode Island* court also addressed the potential misconception that, to the extent that after *AEP* and *Kivalina* any federal common law relating to interstate air pollution has not been displaced by the Clean Air Act, that federal common law still cannot completely preempt state common law.[105] It apparently bears repeating that because complete preemption is a question of Congressional intent, only a federal statute can completely preempt state common law.[106] To the extent that federal common law may have any preemptive effect, it would only be that of ordinary preemption which, as established above, is a federal defense that must be pled in state court and not an exception to the well-pleaded complaint rule.[107] The energy industry defendants' related argument that the "foreign affairs doctrine" completely preempts state public nuisance common law fails for similar reasons.[108]

3. Grable Jurisdiction

As the *Mayor of Baltimore, Rhode Island, and Boulder County* courts have noted, the other exception to the well-pleaded complaint rule, commonly referred to as *Grable* jurisdiction, does not lead to a successful federalization of a well-plead state law claim either. *Grable* jurisdiction is appropriate when a state law complaint necessarily depends on the resolution of a substantial question of federal law.[109] In order to invoke *Grable* jurisdiction, a

104. *Rhode Island*, 393 F. Supp. 3d at 150 (citing 42 U.S.C. § 7401(a)(3)); *Mayor of Baltimore,* 2019 U.S. Dist. LEXIS 97438 at 41–42 (citing 42 U.S.C. § 7412(r)(11)).

105. *Rhode Island*, 393 F. Supp. 3d at 149–50.

106. *Id.* at 149 ("Congress, not the federal courts, initiates this 'extreme and unusual' mechanism.") (citations omitted).

107. *See* discussion *supra* Part III.b.1.

108. *Mayor of Baltimore*, 2019 U.S. Dist. LEXIS 97438 at 37–38. The foreign affairs doctrine states that "[t]here is, of course, no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the 'concern for uniformity in this country's dealings with foreign nations' that animated the Constitution's allocation of the foreign relations power to the National Government in the first place." Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 413 (2003) (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427 n.25 (1964)). As a common law doctrine, however, the foreign affairs doctrine is wholly incapable of completely preempting anything, as "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." *Mayor of Baltimore*, 2019 U.S. Dist. LEXIS 97438 at 38.

109. Bd. Of. Cty. Comm'rs v. Suncor Energy U.S.A., Inc., 405 F. Supp. 3d 947, 964–67 (D. Colo. 2019*).*

removing defendant must demonstrate that a federal issue raising in the process of a state law claim is: "(1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress."[110] The *Boulder County* court, which allocated far more its overall length on its *Grable* analysis relative to *County of San Mateo*, *Mayor of Baltimore*, or *Rhode Island* did, held that state common law public nuisance claims relating to climate change fail on the first and third prongs of this analysis.[111]

First, the *Boulder County* court determined that federal issues were not "necessarily raised" by a state common law public nuisance lawsuit addressing interstate air pollution.[112] In its reasoning, the court expanded on the analysis of *Rhode Island*, reasoning that a federal issue is only necessarily raised if it is "an element and an essential one, of the [plaintiffs'] cause[s] of action."[113] In fact, the federal element must be so essential to the state law claim that "*every* legal theory supporting the claim requires the resolution of a federal issue."[114] In contrast, if federal law is only relevant as a defense to state law, like ordinary preemption is, then the federal issue is not necessarily raised for *Grable* purposes.[115] In their notices of removal, however, the defendants in *Boulder County* merely referenced the possibility of the plaintiffs' state law claim raising issues of foreign policy or federal interstate air pollution law without "actually identify[ing] any foreign policy that was implicated by the City's claims" or doing much more than "mostly gestur[ing] to federal law and federal concerns in a generalized way."[116]

The *Boulder County* court then turned to the substantiality prong of the *Grable* analysis, which is satisfied when a court "look[s] to whether the federal law issue is central to the case" and determines that the federal legal issue "appear[s] to be the only legal or factual issue contested in the case."[117] The court then reasoned that because a state law public nuisance claim raises numerous factual and state law legal issues other than federal

110. Gunn v. Minton, 568 U.S. 251, 258 (2013).

111. *See Suncor Energy,* 405 F. Supp. 3d at 965–69.

112. *Id.* at 965–68.

113. *Id.* at 967.

114. Mayor of Baltimore v. BP P.L.C., , 2019 U.S. Dist. LEXIS 97438 at 30 (D. Md. 2019) (citations omitted) (emphasis in original).

115. Id. (citing Franchise Tax Bd. V. Constr. Laborers Vacation Tr.,, 463 U.S. 1, 13).

116. *Suncor Energy,* 405 F. Supp. 3d at 966–67 (first quoting Mayor of Balt. v. BP P.L.C., No. ELH-18-2357, 2019 U.S. Dist. LEXIS 97438, at 30 (D. Md. June 10, 2019); then quoting County of San Mateo v. Chevron Corp., 294 F. Supp. 3d 934, 938 (N.D. Cal. 2018)).

117. *Suncor Energy,* 405 F. Supp. 3d at 968 (first quoting Gilmore v. Weatherford, 694 F.3d 1160, 1175 (10th Cir. 2012); then quoting Grable & Sons Metal Prods. v. Darue Eng'g & Mfg., 545 U.S. 308, 315 (2005).

preemption, the substantiality prong had not been met.[118] On these and similar grounds, the *Boulder County, County of San Mateo, Rhode Island, and Mayor of Baltimore* courts have each declined to exercise *Grable* jurisdiction as an exception to the well-pleaded complaint rule to federalize an otherwise well-pled state common law public nuisance claim.

C. Current Dispositions of Mayor of Baltimore, Rhode Island, and Boulder County

As of mid-November 2019, *Mayor of Baltimore*, *Rhode Island*, and *Boulder County* are currently being appealed to the Fourth, First, and Second Circuits, respectively.[119] Notably, the Supreme Court recently issued three orders declining the energy industry defendants' applications for a stay of the district courts' remand orders pending appeal in each of the three cases.[120] Seeing as Chief Justice Roberts and Justices Breyer and Sotomayor were personally involved in denying these stays pending appeal, one might reasonably expect that it is relatively likely for the plaintiffs of the three cases to fair well in their respective ongoing appeals.[121]

IV. POLICY RATIONALE AND SOLUTIONS

There are numerous compelling arguments about the efficacy of litigants using the judicial system to regulate climate change and GHG emissions, but complete preemption simply cannot be included as one of them as it would cause too much collateral damage to the Supreme Court's existing civil procedure, preemption, and displacement jurisprudence.

The alternative, relying on state courts to correctly apply the principles of ordinary preemption and letting the chips fall where they may, is preferable because it better respects the role of Congressional intent in our constitutional system, correctly adheres to the Supreme Court's rulings in this area, and leads to a preferable policy outcome overall.

Perhaps most importantly, courts refraining from applying complete preemption principles in this area maintains Congress'

---

118. *Id.* at 968.

119. *See* Adam Liptak, *Supreme Court Lets Climate Change Lawsuit Proceed*, N.Y. TIMES (Oct. 22, 2019), https://www.nytimes.com/2019/10/22/us/supreme-court-climate-change.html?rref=collection%2Fsectioncollection%2Fclimate.

120. *See* Tiffany Challe, *State and Local Government Climate Cases to Proceed Against Fossil Fuel Companies in State Courts After Supreme Court Declined to Stay Remand Orders*, CLIMATE LAW BLOG (Nov. 6, 2019), http://blogs.law.columbia.edu/climatechange/.

121. *Id.*

role as the preeminent policy maker and removes the possibility of judicial activism. As noted previously, complete preemption turns on a question of Congressional intent that requires a federal statute to provide an exclusive cause of action in a particular substantive area.[122] Accordingly, if Congress had intended for the Clean Air Act to provide the exclusive remedy for all interstate air pollution issues it could have easily said so, but instead it chose to include both a savings clause and a state power reservations clause that ensure that states would continue to have room to regulate air pollution in the future.[123] Further, Congress is undoubtably aware of the holdings of *AEP* and *Kivalina* and the fact that these opinions intentionally left open the possibility of litigants bringing state law public nuisance claims in the future.[124] If Congress was dissatisfied with this safe harbor for state common law, it could have easily said so. However, in the face of continued Congressional inaction, courts should construe the existing regime as working as intended and should instead maintain the federal-state law balance that Congress has put into place.

Likewise, the application of complete preemption in this context misconstrues the scope of the Supreme Court's complete preemption doctrine and the well-pleaded complaint rule. First, as contended above,[125] conflating the principles of ordinary and complete preemption is, in this area, inappropriate in the first instance because it ignores the displacement analysis of *AEP* and *Kivalina* and overly emphasizes the intentionally limited post-*Erie* power of federal common law. This is because only a federal statute, not federal common law, can completely preempt state law. If the federal common law of interstate air pollution has been displaced by the Clean Air Act, how can that very same non-existent federal common law preempt state common law? Logic dictates that the two must be mutually exclusive. Further, as the court in *County of San Mateo* wisely observed, invoking *Grable* jurisdiction whenever a state law tort claim would indirectly involve a defendant with competing obligations under state and federal law would require all such cases to be removable.[126] Such a ruling would put a massive burden on the federal court system

122. *See supra* Part III.b.1 and III.b.2.

123. *See supra* Part III.b.2.

124. *See supra* Part II.b.

125. *See supra* Part III.

126. *County of San Mateo*, 294 F. Supp. 3d at 938 ("Moreover, even if deciding the nuisance claims were to involve a weighing of costs and benefits, and even if the weighing were to implicate the defendants' 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.")

and, along similar lines, would require federal courts to address all ordinary preemption cases in the future, which would even further burden an already overly-crowded federal docket. Instead, federal courts considering the removal of state common law public nuisance claims should adhere to the correct articulation of the well-pleaded complaint rule and continue to allow state litigants to "omit[] federal claims from a complaint [so that] a plaintiff can generally guarantee an action will be heard in state court."[127]

V. CONCLUSION

Nobody is saying that state courts utilizing state common law are the ideal, or even likely an effective, vehicle to hold the energy industry accountable for its contributions to climate change. Federal statutes or regulations would certainly be a far better fit for addressing this national existential problem. However, that does not mean that federal courts should jettison decades of well-reasoned precedent to address the viability of state court public nuisance common law claims as soon as they are presented with the issue. Instead, federal courts should continue to allow state courts to address particularized issues of the ordinary preemption of their own state laws as they arise, as they already do in essentially every other context. If a state court ever does determine that its laws are not preempted or displaced and allows GHG emissions lawsuit to continue, *that* is the time that federal courts should consider becoming involved, and no sooner.

127. *Suncor Energy,* 294 F. Supp. 3d at 956 (citing Devon Energy Prod. Co., L.P. v. Mosaic Potash Carlsbad, Inc., 693 F.3d 1195, 1202 (10th Cir. 2012)).