



ESSAY

Forum Versus Substance: Should Climate Damages Cases Be Heard in State or Federal Court?

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Introduction

Climate change affects communities in calamitous ways: rising seas; increased storm severity, frequency and duration; disruption of the hydrologic cycle (such as extreme heat, extreme precipitation, extreme drought, wildfire, or flooding); public health effects; and other dire impacts on people, property, and public infrastructure. The costs of adapting to and mitigating these climate-related impacts are immense. Since 2017, public agencies including cities, counties, and one state have filed thirteen lawsuits against fossil fuel companies seeking climate change-related damages.¹ Plaintiffs allege that defendants have long known that profligate use of their products would cause catastrophic injuries to communities, including the plaintiffs. Yet they embarked on a decades-long campaign to hide the connection between fossil fuels and the climate crisis, attack science (and scientists), and influence the public and decisionmakers to avoid limits on their products' sales.

Plaintiffs filed 12 of the 13 cases in state courts; all 13 assert solely state law claims. Defendants removed the cases to federal court. Two federal district courts found that the cases are inherently federal but that federal law provides

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1. Climate change lawsuits assert many legal theories across many forums around the world. The Columbia University Sabin Center for Climate Change Law and Arnold & Porter maintain a comprehensive database of both U.S. domestic and international litigation involving climate change-related issues. *Climate Change Litigation Databases*, SABIN CTR. FOR CLIMATE CHANGE LAW, <https://perma.cc/JA9L-P7H7> (last visited Jan. 15, 2020).

no remedy and granted defendants' motions to dismiss.² Four other courts held that the cases contain no inherent federal issues, were improperly removed, and should proceed under state law in state courts.³ The Fourth Circuit recently affirmed an order of remand,⁴ while the First, Second, Ninth, and Tenth Circuits have appeals before them of all the remaining decisions, with rulings expected later this year. Meanwhile, following denials of requests for stays pending appeal in the First, Fourth, and Tenth Circuits and the U.S. Supreme Court, state courts in Rhode Island, Maryland, and Colorado are managing preliminary motion and discovery practice in the remanded cases.

This Essay examines the relationship between the questions of federal court removal jurisdiction and the substance of plaintiffs' claims.

I. Plaintiffs' Claims

Although the lawsuits present a variety of state-specific legal claims, they all rest on the same thematic foundations. The court summarized these in *Rhode Island v. Chevron Corp.*:

Climate change is expensive, and the State wants help paying for it. Specifically from Defendants in this case, who together have extracted, advertised, and sold a substantial percentage of the fossil fuels burned globally since the 1960s. This activity has released an immense amount of greenhouse gas into the Earth's atmosphere, changing its climate and leading to all kinds of displacement, death (extinctions, even), and destruction. What is more, Defendants understood the consequences of their activity decades ago, when transitioning from fossil fuels to renewable sources of energy would have saved a world of trouble. But instead of sounding the alarm, Defendants went out of their way to becloud the emerging scientific consensus and further delay changes—however existentially necessary—that would in any way interfere with their multibillion-dollar profits. All while quietly readying their capital for the coming fallout.

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2. See *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 471-76 (S.D.N.Y. 2018) (granting motions to dismiss), *appeal docketed*, No. 18-2188 (2d Cir. 2018); *City of Oakland v. BP P.L.C. (SF/OAK II)*, 325 F. Supp. 3d 1017, 1028-29 (N.D. Cal. 2018) (granting motions to dismiss under FRCP 12(b)(6)), *appeal docketed*, No. 18-16663 (9th Cir. 2018); *California v. BP P.L.C. (SF/OAK I)*, Nos. C 17-06011 WHA & C 17-06012 WHA, 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018) (addressing cases brought by San Francisco and Oakland, California and denying motions to remand), *appeal docketed sub. nom. City of Oakland v. BP P.L.C.*, No. 18-16663 (9th Cir. 2018).
 3. *Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, 405 F. Supp. 3d 947, 981 (D. Colo. 2019); *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142, 152 (D.R.I. 2019); *Mayor and City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538, 574 (D. Md. 2019); *County of Santa Cruz v. Chevron Corp.*, No. 18-cv-00450-VC (N.D. Cal. July 10, 2018) (granting motions to remand in individual actions by the County of Santa Cruz, City of Santa Cruz, and City of Richmond, California); *County of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 939 (N.D. Cal. 2018) (addressing separate lawsuits by the California counties of San Mateo and Marin, and the City of Imperial Beach).
 4. *Mayor & City Council of Baltimore v. BP P.L.C. (Baltimore II)*, 952 F.3d 452, 457 (4th Cir. 2020), *petition for cert. filed*, No. 19-1189 (U.S. Mar. 31, 2020).

Pleading eight state-law causes of action, the State prays in law and equity to relieve the damage Defendants have and will inflict upon all the non-federal property and natural resources in Rhode Island. Casualties are expected to include the State's manmade infrastructure, its roads, bridges, railroads, dams, homes, businesses, and electric grid; the location and integrity of the State's expansive coastline, along with the wildlife who call it home; the mild summers and the winters that are already barely tolerable; the State fisc, as vast sums are expended to fortify before and rebuild after the increasing and increasingly severe weather events; and Rhode Islanders themselves, who will be injured or worse by these events. The State says it will have more to bear than most: Sea levels in New England are increasing three to four times faster than the global average, and many of the State's municipalities lie below the floodplain.⁵

The complaints do not challenge any regulation or law (federal or state), or international treaty or contract, nor do they challenge any permit held by anyone, nor seek a remedy that would regulate or impose liability on defendants for their own greenhouse-gas emissions or anyone else's. Rather, plaintiffs contend that defendants' campaign of deception and denial supports liability for contributing to a public nuisance, failing to warn, product liability, and other theories under well-settled state law around the nation.⁶

II. Removal, Remand, and Dismissal Rulings

Defendants' removal notices assert a lengthy list of purported grounds for removal jurisdiction, including: (1) the plaintiffs' claims are governed by federal common law, not state law, and are foreclosed by earlier decisions from the U.S. Supreme Court in *American Electric Power Co. v. Connecticut (AEP)*,⁷ and the Ninth Circuit in *Native Village of Kivalina v. ExxonMobil Corp.*,⁸ respectively, in which the courts rejected federal common law claims of nuisance against emitters of greenhouse gases; (2) the action raises disputed and substantial issues of federal law that must be adjudicated in a federal forum under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*;⁹ (3) the plaintiffs' claims are completely preempted by the Clean Air Act (CAA)¹⁰ and/or other

5. 393 F. Supp. 3d at 146-47 (citations omitted).

6. See, e.g., *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 725 F.3d 65, 79 (2d Cir. 2013) (holding Exxon liable as a manufacturer under New York law for contamination of drinking water); *People v. ConAgra Grocery Prods Co.*, 17 Cal. App. 5th 51, 65-66 (2017), *cert. denied*, 139 S. Ct. 377 (2018) (holding a lead paint manufacturer liable for participating in creating public nuisance by wrongfully marketing and promoting a product with known dangers); *Soto v. Bushmaster Firearms Int'l LLC*, 202 A.3d 262, 272-73 (Conn. 2019) (upholding claims against gun manufacturers and observing that "regulation of advertising that threatens the public's health, safety, and morals has long been considered a core exercise of the states' police powers"), *cert. denied sub nom. Remington Arms Co., LLC v. Soto*, 140 S. Ct. 513 (2019).

7. 564 U.S. 410 (2011).

8. 696 F.3d 849 (9th Cir. 2012).

9. 545 U.S. 308 (2005).

10. Clean Air Act, 42 U.S.C. § 7401 (2018).

federal statutes and the Constitution; (4) federal courts have original jurisdiction under the Outer Continental Shelf Lands Act (OCSLA);¹¹ (5) federal officer removal;¹² (6) the plaintiffs' claims are based on alleged injuries to and/or conduct on federal enclaves; and (7) the plaintiffs' claims are related to federal bankruptcy cases.¹³ Later removal notices further asserted that the plaintiffs' claims fell within the federal courts' original admiralty jurisdiction because sea level rise inherently involves federal waters.¹⁴

Plaintiffs moved to remand. Five district court judges—Judge William Alsup (N.D. Cal.), Judge Vince Chhabria (N.D. Cal.), Judge Ellen Lipton Hollander (D. Md.), Judge William Smith (D.R.I.), and Judge William Martinez (D. Colo.)—ruled on the motions to remand. Judge Alsup denied such motions. In addition, Judge Alsup and Judge John F. Keenan (S.D.N.Y.) (ruling in New York City's case, which was filed in federal court based on diversity jurisdiction) granted defendants' motions to dismiss under Federal Rule of Civil Procedure 12(b)(6). Judges Chhabria, Hollander, Martinez, and Smith granted motions to remand. The Fourth Circuit affirmed Judge Hollander in *Baltimore II*.

A. Orders Denying Remand and Granting Motions to Dismiss

The district court in *SF/OAK I* denied plaintiffs' motions to remand, and subsequently granted defendants' motions to dismiss in *SF/OAK II*.¹⁵ First, Judge Alsup denied the cities' motions to remand.¹⁶ The court portrayed the cases as attacking a "worldwide predicament" that "crie[s] out for a uniform and comprehensive solution."¹⁷ The court explained: "A patchwork of fifty different [state court] answers to the same fundamental global issue would be unworkable."¹⁸ Further, the court observed that "the transboundary problem of global warming raises exactly the sort of federal interests that necessitate a uniform solution."¹⁹ Accordingly, Judge Alsup concluded that federal courts have removal jurisdiction:

11. Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(b) (2018).

12. 28 U.S.C. § 1442(a)(1) (2018).

13. 28 U.S.C. § 1452.

14. 28 U.S.C. § 1331 (federal question jurisdiction).

15. Judge Alsup also granted four of the five defendants' motions to dismiss under FRCP 12(b)(2) for lack of personal jurisdiction. *City of Oakland v. BP P.L.C.*, Nos. C 17-06011 WHA & C 17-06012 WHA, 2018 WL 3609055, at *4 (N.D. Cal. July 27, 2018) (granting motions to dismiss under FRCP 12(b)(2)), *appeal docketed*, No. 18-16663 (9th Cir. 2018). Chevron's world headquarters is in California and the company did not contest personal jurisdiction.

16. *California v. BP P.L.C. (SF/OAK I)*, Nos. C 17-06011 WHA & C 17-06012 WHA, 2018 WL 1064293, at *5 (N.D. Cal. Feb. 27, 2018).

17. *Id.* at *3.

18. *Id.*

19. *Id.*

Plaintiffs' claims . . . depend on a global complex of geophysical cause and effect involving all nations of the planet (and the oceans and atmosphere). It necessarily involves the relationships between the United States and all other nations. It demands to be governed by as universal a rule of apportioning responsibility as is available [P]laintiffs' claims, if any, are governed by federal common law. Federal jurisdiction is therefore proper.²⁰

Second, the courts in *SF/OAK II* and *City of New York* (a case originally filed in federal court under diversity jurisdiction) granted defendants' motions to dismiss for failure to state a claim under FRCP 12(b)(6).²¹ Both courts held that federal law exclusively controls the plaintiffs' claims, including those pled under state law, but simultaneously held that no cause of action currently exists under federal law.²² Both courts further held that allowing state law claims to proceed would impermissibly interfere with separation of powers and foreign policy.²³

B. Orders Granting Remand

The courts in *San Mateo*, *Baltimore*, *Rhode Island*, and *Boulder* granted plaintiffs' motions to remand. These courts all rejected each of what Judge Hollander called defendants' "proverbial 'laundry list' of grounds for removal,"²⁴ and all expressly disagreed with Judge Alsup's view in *SF/OAK I* that federal common law exclusively governs plaintiffs' claims and supports removal jurisdiction.²⁵

No Federal Common Law Jurisdiction. First, the courts flatly rebuffed defendants' assertion that federal common law "governs" the claims in these cases as an improper effort to interpose a preemption defense that cannot

20. *Id.* at *5.

21. *See City of Oakland v. BP P.L.C. (SF/OAK II)*, 325 F. Supp. 3d 1017, 1028 (N.D. Cal. 2018); *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 476 (S.D.N.Y. 2018).

22. *SF/OAK II*, 325 F. Supp. 3d at 1028; *City of New York*, 325 F. Supp. 3d at 471-72.

23. *SF/OAK II*, 325 F. Supp. 3d at 1024 (noting that claims about global warming "are foreclosed by the need for federal courts to defer to the legislative and executive branches when it comes to such international problems"); *City of New York*, 325 F. Supp. 3d at 476 ("To litigate such an action for injuries from foreign greenhouse gas emissions in federal court would severely infringe upon the foreign-policy decisions that are squarely within the purview of the political branches of the U.S. Government.").

24. *Mayor & City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538, 550 (D. Md. 2019).

25. *Id.* at 556; *County of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 937-38 (N.D. Cal. 2018); *see also* Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc., 405 F. Supp. 3d 947, 960-62 (D. Colo. 2019) (disagreeing with *City of New York*); *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142, 148-49 (D.R.I. 2019) (same). At least one commentator has also strongly criticized Judge Alsup's decision. *See* Gil Seinfeld, *Climate Change Litigation in the Federal Courts: Jurisdictional Lessons from California v. BP*, 117 MICH. L. REV. ONLINE 25, 32-35 (2018) (arguing that Judge Alsup's "decision is out of step with prevailing doctrine").

support removal jurisdiction.²⁶ The “well-pleaded complaint” rule makes the plaintiff the master of her complaint (and allows her to choose state law remedies even if federal law also could apply), and these complaints on their faces sound entirely in state law; defendants’ efforts to recharacterize the complaint simply attempt to assert preemption defenses and therefore fail.²⁷ Moreover, the Supreme Court in *AEP* and a concurrence in the Ninth Circuit in *Kivalina*, far from holding that only federal law can address climate change, expressly left the issue open.²⁸

No Complete Preemption. Second, all the courts pointed to the savings clauses in the Clean Air Act that, like similar provisions of the Clean Water Act, “preserve state causes of action and suggest that Congress did not intend the federal causes of action under those statutes ‘to be exclusive.’”²⁹ In addition, all the courts held that nothing in the “judicially-crafted foreign affairs doctrine” completely preempts plaintiffs’ state law claims.³⁰

No Grable Jurisdiction. Third, the courts rejected *Grable* jurisdiction, finding that the complaints contained no federal issues (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 as required by *Grable*.³¹ The courts found that none of the defendants’ proposed “host of federal issues” qualify.³² These include defendants’ multiple assertions

26. *Boulder*, 405 F. Supp. 3d at 957-64, 968-73; *Rhode Island*, 393 F. Supp. 3d at 148-50; *Baltimore*, 388 F. Supp. 3d at 554-58, 563; *San Mateo*, 294 F. Supp. 3d at 937-38.

27. *Boulder*, 405 F. Supp. 3d at 963-64 (“Ultimately, Defendants’ argument that Plaintiffs’ state law claims are governed by federal common law appears to be a matter of ordinary preemption which . . . would not provide a basis for federal jurisdiction”); *Rhode Island*, 393 F. Supp. 3d at 148 (“[N]othing in the artful-pleading doctrine . . . sanctions this particular transformation” of a state law pleading into a federal claim for removal purposes); *Baltimore*, 388 F. Supp. 3d at 555, 558 (rejecting defendants’ “cleverly veiled [ordinary] preemption argument”).

28. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 429 (2011) (noting that “the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act,” and leaving the matter open for consideration on remand); *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 866 (9th Cir. 2012) (“Once federal common law is displaced, state nuisance law becomes an available option to the extent it is not preempted by federal law.”) (Pro, J., concurring).

29. *Boulder*, 405 F. Supp. 3d at 968-73 (no complete preemption based on emissions standards or foreign affairs); *Rhode Island*, 393 F. Supp. 3d at 150 (“A statute that goes so far out of its way to preserve state prerogatives cannot be said to be an expression of Congress’s ‘extraordinary pre-emptive power’ to convert state-law into federal-law claims. No court has so held, and neither will this one.” (citation omitted)); *Baltimore*, 388 F. Supp. 3d at 562-66; *San Mateo*, 294 F. Supp. 3d at 938 (citation omitted).

30. *Boulder*, 405 F. Supp. 3d at 966 (addressing foreign affairs as part of *Grable* analysis); *Rhode Island*, 393 F. Supp. 3d at 151 (same); *San Mateo*, 294 F. Supp. 3d at 938 (same); *see also Baltimore*, 388 F. Supp. 3d at 562 (“[T]here 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.”).

31. *See Grable & Sons Metal Prod., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 313-14 (2005).

32. *See, e.g., Baltimore*, 388 F. Supp. 3d at 558, 561.

that the lawsuits necessarily constitute collateral attacks on federal regulatory schemes,³³ or interference with foreign affairs,³⁴ or any other federal issues.³⁵

No Other Grounds for Removal Jurisdiction. The courts further found that none of the other grounds asserted by defendants supported jurisdiction, rejecting OCSLA jurisdiction,³⁶ federal officer jurisdiction (an asserted basis

33. *Boulder*, 405 F. Supp. 3d at 966 (“Plaintiffs’ state law claims do not have as an element any aspect of federal law or regulations. Plaintiffs do not allege that any federal regulation or decision is unlawful, or a factor in their claims, nor are they asking the Court to consider whether the government’s decisions to permit fossil fuel use and sale are appropriate.”); *Rhode Island*, 393 F. Supp. 3d at 150 (“The State’s are thoroughly state-law claims. The rights, duties, and rules of decision implicated by the complaint are all supplied by state law, without reference to anything federal.”) (citations omitted); *Baltimore*, 388 F. Supp. 3d at 560 (“[D]efendants do not identify any regulation or statute that is actually attacked by the City’s claims. Rather, defendants make only vague references to a ‘comprehensive regulatory scheme.’ The mere existence of a federal regulatory regime, however, does not confer federal question jurisdiction over a state cause of action.”) (citations omitted); *San Mateo*, 294 F. Supp. 3d at 938 (“[D]efendants have not pointed to a specific issue of federal law that must necessarily be resolved to adjudicate the state law claims. Instead, the defendants mostly gesture to federal law and federal concerns in a generalized way Nor does the mere existence of a federal regulatory regime mean that these cases fall under *Grable*.”).

34. *Boulder*, 405 F. Supp. 3d at 966 (Defendants “point to no specific foreign policy that is essential to resolving the Plaintiffs’ claims. Instead, they cite only generally to non-binding, international agreements that do not apply to private parties, and do not explain how this case could supplant the structure of such foreign policy arrangements. Certainly Defendants have not shown that any interpretation of foreign policy is an essential element of Plaintiffs’ claims.”); *Rhode Island*, 393 F. Supp. 3d at 151 (“By mentioning foreign affairs, federal regulations, and the navigable waters of the United States, Defendants seek to raise issues that they may press in the course of this litigation, but that are not perforce presented by the State’s claims.”); *Baltimore*, 388 F. Supp. 3d at 559 (“Climate change is certainly a matter of serious national and international concern. But, defendants do not actually identify any foreign policy that is implicated by the City’s claims, much less one that is necessarily raised Putting aside the fact that President Trump has announced his intention to withdraw the United States from the Paris Agreement, defendants’ generalized references to foreign policy wholly fail to demonstrate that a federal question is ‘essential to resolving’ the City’s state law claims.” (quoting *Burrell v. Bayer Corp.*, 918 F.3d 372, 383 (4th Cir. 2019))); *San Mateo*, 294 F. Supp. 3d at 938 (“[D]efendants mostly gesture to federal law and federal concerns in a generalized way. The mere potential for foreign policy implications (resulting from the plaintiffs succeeding on their claims at an unknown future date) does not raise the kind of actually disputed, substantial federal issue necessary for *Grable* jurisdiction.”).

35. *See, e.g., Boulder*, 405 F. Supp. 3d at 966-67 (rejecting the same arguments, and also defendants’ contention that lawsuits “attack the decision of the federal government to enter into contracts with [defendants] to develop and sell fossil fuels”); *Baltimore*, 388 F. Supp. 3d at 559-60 (rejecting defendants’ arguments that plaintiffs’ claims “seek a different balancing of social harms and benefits than that struck by Congress” and issues “related to the navigable waters of the United States”).

36. *Boulder*, 405 F. Supp. 3d at 978-79; *Rhode Island*, 393 F. Supp. 3d at 151-52; *Baltimore*, 388 F. Supp. 3d at 566-67; *San Mateo*, 294 F. Supp. 3d at 938-39.

Judge Chhabria called “dubious”),³⁷ federal enclave jurisdiction,³⁸ and bankruptcy jurisdiction.³⁹ The courts in *San Mateo*, *Baltimore*, and *Rhode Island* also rejected defendants’ assertion of admiralty jurisdiction.⁴⁰

C. Appellate Proceedings

As of this writing, appeals of the rulings by Judges Smith, Keenan, Alsup, Chhabria, and Martinez are pending in the First, Second, Ninth, and Tenth Circuits, respectively.

Judge Chhabria granted defendants’ motion for a stay pending appeal of his remand order.⁴¹ Judges Hollander, Smith, and Martinez, however, denied such

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37. *San Mateo*, 294 F. Supp. 3d at 939; *see also Boulder*, 405 F. Supp. 3d at 976-77 (“Defendants have not shown that a federal officer instructed them how much fossil fuel to sell or to conceal or misrepresent the dangers of its use They also have not shown that federal officer directed them to market fossil fuels at levels they knew would allegedly cause harm to the environment.”); *Rhode Island*, 393 F. Supp. 3d at 152 (“Defendants cannot show the alleged promotion and sale of fossil fuels abetted by a sophisticated misinformation campaign were ‘justified by their federal duty.’” (quoting *Mesa v. California*, 489 U.S. 121, 131-32 (1989))); *Baltimore*, 388 F. Supp. 3d at 569 (“[D]efendants have failed to plausibly assert that the acts for which they have been sued were carried out ‘for or relating to’ the alleged federal authority.” (quoting 28 U.S.C. § 1442(a)(1))).
38. *Boulder*, 405 F. Supp. 3d at 974 (“That the alleged climate alteration by Defendants may have caused similar injuries to federal property does not speak to the nature of Plaintiffs’ alleged injuries for which they seek compensation, and does not provide a basis for removal.”); *Rhode Island*, 393 F. Supp. 3d at 152 (“Although federal land . . . exists in Rhode Island . . . the State’s claims did not arise there, especially since its complaint avoids seeking relief for damages to any federal lands.”); *Baltimore*, 388 F. Supp. 3d at 565-66 (“[U]nder Maryland law . . . generally ‘the place of the tort is considered to be the place of injury.’ Here, the claims appear to arise in Baltimore, where the City allegedly suffered and will suffer harm.” (quoting *Phillip Morris Inc. v. Angeletti*, 752 A.2d 200, 231 (2000))); *San Mateo*, 294 F. Supp. 3d at 939 (“[F]ederal land was not the ‘locus in which the claim arose.’” (quoting *Alvares v. Erickson*, 514 F.2d 156, 160 (9th Cir. 1975))).
39. *See Boulder*, 405 F. Supp. 3d at 980-81; *Rhode Island*, 393 F. Supp. 3d at 152 (“[T]his is an action ‘designed primarily to protect the public safety and welfare.’” (quoting *McMullen v. Sevigny*, 386 F.3d 320, 325 (1st Cir. 2004))); *Baltimore*, 388 F. Supp. 3d at 569-72; *San Mateo*, 294 F. Supp. 3d at 939.
40. *Rhode Island*, 393 F. Supp. 3d at 152; *Baltimore*, 388 F. Supp. 3d at 572-74; *see also County of Santa Cruz v. Chevron Corp.*, No. 18-cv-00450-VC (N.D. Cal. July 10, 2018) (Order Granting Motions to Remand) (citing *Coronel v. AK Victory*, 1 F. Supp. 3d 1175, 1178-89 (W.D. Wash. 2014)), *appeal docketed*, No. 18-16376 (9th Cir. July 24, 2018). Admiralty jurisdiction was not an issue in *Boulder*.
41. *County of San Mateo v. Chevron Corp.*, No. 17-cv-04929-VC (N.D. Cal. Apr. 9, 2018).

motions.⁴² The Fourth, First, and Tenth Circuits also denied motions for stay pending appeals.⁴³ So did the U.S. Supreme Court.⁴⁴

On March 6, 2020, the Fourth Circuit in *Baltimore II* affirmed Judge Hollander’s order granting remand. The court first held that 28 U.S.C. § 1447(d) limits appellate review of such orders to defendants’ claimed federal officer removal.⁴⁵ And the court then held that none of the federal leases and contracts proffered by defendants supported federal officer status. The court emphasized that because the “source of tort liability” is “the promotion and sale of fossil fuel products without warning and abetted by a sophisticated disinformation campaign,” the “connection between such activity and Baltimore’s claims is too attenuated” to support federal officer status.⁴⁶

III. Forum Versus Substance

The differences between Judge Alsup on the one hand and Judges Chhabria, Hollander, Martinez, Smith, and the Fourth Circuit on the other go well beyond the question of federal court removal jurisdiction. Judge Alsup’s and Judge Keenan’s rulings on the merits rest on an interpretation of the plaintiffs’ state law public nuisance claims as claims “that must stand or fall under federal common law.”⁴⁷ To reach this conclusion, both judges ignored the actual allegations of the complaints and recharacterized plaintiffs’ claims, finding them to be disguised efforts to regulate interstate and international emissions and to set climate change policy, and holding that federal law—not state law—must exclusively apply to such claims.⁴⁸

42. *Bd. of Cty. Comm’rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, 2019 WL 4926764 (D. Colo. Oct. 7, 2019); *Rhode Island v. Shell Oil Prods. Co., LLC*, No. 1:18-cv-00395 (D.R.I. Sept. 10, 2019); *Mayor & City Council of Baltimore v. BP P.L.C.*, 2019 WL 3464667 (D. Md. Jul. 31, 2019).

43. *Bd. of Cty. Comm’rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, No. 19-1330 (10th Cir. Oct. 17, 2019); *Rhode Island v. Shell Oil Prods Co., LLC*, No. 19-1818 (1st Cir. Oct. 7, 2019); *Mayor & City Council of Baltimore v. BP P.L.C.*, No. 19-1644 (4th Cir. Oct. 1, 2019).

44. *BP P.L.C. v. Mayor & City Council of Baltimore*, 140 S. Ct. 449 (Oct. 22, 2019).

45. *Mayor & City Council of Baltimore v. BP P.L.C. (Baltimore II)*, 952 F.3d 452, 459-61 (4th Cir. 2020), *petition for cert. filed*, No. 19-1189 (U.S. Mar. 31, 2020).

46. *Id.* at 467-68, 471.

47. *City of Oakland v. BP P.L.C. (SF/OAK II)*, 325 F. Supp. 3d 1017, 1024, 1028 (N.D. Cal. 2018) (“[Claims about global warming] are foreclosed by the need for federal courts to defer to the legislative and executive branches when it comes to such international problems”); *see also City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 471 (S.D.N.Y. 2018) (“[T]he City’s claims are governed by federal common law.”).

48. *See City of New York*, 325 F. Supp. 3d at 473-74 (“[T]he City is seeking damages for global-warming related injuries resulting from greenhouse gas emissions . . . these matters are areas of federal concern that have been delegated to the Executive Branch.”); *SF/OAK II*, 325 F. Supp. 3d at 1024 (“The harm alleged by our plaintiffs remains a harm caused by fossil fuel emissions, not the mere extraction or even sale of fossil fuels . . .

District Judges Chhabria, Hollander, Martinez, and Smith, as well as the Fourth Circuit, rejected any such alchemical transformation of the plaintiffs' complaints. As all these courts recognized, the cases allege exclusively state law causes of action and disclaim any effort to regulate prospective emissions, and they do not ask the court to set climate or emissions policy. Rather, the cases seek remedies under well-established principles of state tort law for past wrongful corporate conduct that has caused plaintiffs' climate change-related injuries. The pertinent misconduct is not greenhouse emissions *per se*, but rather defendants' wrongful marketing and promotion of a product they knew would devastate the environment, their campaigns of deception and denial, and their efforts to avoid regulation—all of which led to excessive use of their products, to the world's (and plaintiffs') detriment. State courts have recognized this kind of corporate malfeasance as “distinct from and far more egregious than simply producing a defective product or failing to warn.”⁴⁹ As the Fourth Circuit explained:

Baltimore does not merely allege that Defendants contributed to climate change and its attendant harms by producing and selling fossil fuel products; it is the concealment and misrepresentation of the products' known dangers—and simultaneous promotion of their unrestrained use—that allegedly drove consumption, and thus greenhouse gas pollution, and thus climate change.⁵⁰

Moreover, neither Judge Alsup nor Judge Keenan found that federal law *preempts* plaintiffs' state law claims; indeed, neither addressed the issue. Rather, they both simply concluded that the subject of the complaints—global warming—arises necessarily under federal common law, which the Clean Air Act has displaced, and thereby held that any potential remedy that may have once existed had been eliminated. As the other district courts pointed out, however, “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.’”⁵¹

these claims are foreclosed by the need for federal courts to defer to the legislative and executive branches”).

49. *County of Santa Clara v. Atlantic Richfield Co.*, 137 Cal. App. 4th 292, 309 (2006) (manufacturer liability for lead paint in public buildings); *cf.*, *e.g.*, *Soto v. Bushmaster Firearms Int'l, LLC*, 202 A.3d 262, 272-73, 295 (Conn. Mar. 19, 2019) (finding no preemption of claims against gun manufacturers and noting: “The regulation of advertising that threatens the public's health, safety, and morals has long been considered a core exercise of the states' police powers.”), *cert. denied sub nom.* *Remington Arms Co., LLC v. Soto*, 140 S. Ct. 513 (2019).
50. *Baltimore II*, 952 F.3d at 467. The court noted that Baltimore “has limited its ... theory to one that turns on the promotion allegations, which have nothing to do with the action purportedly taken under federal authority.” *Id.* at 467 n.10 (discussing design defect claim).
51. *County of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 938 (N.D. Cal. 2018) (quoting *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 9 n.5 (2003)). Judges Martinez, Smith, and Hollander agreed. *See Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, 405 F. Supp. 3d 947, 971 (D. Colo. 2019); *Rhode Island v. Chevron Corp.*,

Both Judge Alsup and Judge Keenan further held that any federal common law claim related to “foreign emissions” is prohibited based on the courts’ need to defer to the executive and legislative branches, and to avoid meddling in foreign relations.⁵² As noted above, Judges Chhabria, Hollander, Martinez, and Smith all rejected this argument. As Judge Chhabria explained:

[T]he defendants mostly gesture to federal law and federal concerns in a generalized way. The mere potential for foreign policy implications (resulting from the plaintiffs succeeding on their claims at an unknown future date) does not raise the kind of actually disputed, substantial federal issue necessary for [federal] jurisdiction.⁵³

Although Judges Chhabria, Hollander, Martinez, Smith, and the Fourth Circuit only addressed removal jurisdiction, the logic underlying their decisions on jurisdiction differs fundamentally from the analyses on which Judges Alsup and Keenan relied in dismissing the claims under Rule 12(b)(6). Indeed, only by doing fundamental violence to the complaints—wrongly characterizing them as seeking “solutions” to climate change, regulating interstate (and international) emissions, and addressing foreign relations, among other mischaracterizations—were the latter courts able to retain jurisdiction and, not coincidentally, dismiss the plaintiffs’ actions. In contrast, the courts that remanded the cases to state forums correctly interpreted the actions as asserting only state causes of action, laying the foundation for future prosecutions of those matters on the merits following remand. These differences will likely lead to diverging decisions on the merits of future motions to dismiss—whether decided in federal or state court.

393 F. Supp. 3d 142, 148-50 (D.R.I. 2019); *Mayor & City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538, 562-63 (D. Md. 2019).

52. *SF/OAK II*, 325 F. Supp. 3d at 1024 (“[claims about global warming] are foreclosed by the need for federal courts to defer to the legislative and executive branches when it comes to such international problems”); see *City of New York*, 325 F. Supp. 3d at 476 (“To litigate such an action for injuries from foreign greenhouse gas emissions in federal court would severely infringe upon the foreign-policy decisions that are squarely within the purview of the political branches of the U.S. Government.”).

53. *San Mateo*, 294 F. Supp. 3d at 938; see also *Boulder*, 405 F. Supp. 3d at 967; *Rhode Island*, 393 F. Supp. 3d at 151; *Baltimore*, 388 F. Supp. 3d at 559.