CLIMATE LITIGATION — FEDERAL PREEMPTION OF STATE LAW — NINTH CIRCUIT FINDS THAT STATE PUBLIC NUISANCE CLAIMS AGAINST FOSSIL FUEL PRODUCERS ARE NOT COMPLETELY PREEMPTED BY FEDERAL LAW. — City of Oakland v. BP PLC, 969 F.3d 895 (9th Cir. 2020).

The world has reached a tipping point. According to the United Nations Intergovernmental Panel on Climate Change, we have nine years to drastically cut back greenhouse gas (GHG) emissions, after which we will face massive incidents of floods, drought, and poverty.1 Despite mounting public pressure,2 the federal government has failed to take meaningful action.3 To fill this regulatory void, states and localities have stepped up, filing suit against major energy companies4 — arguably the most significant contributors to climate change. In these actions, the defendants invariably argue that the Clean Air Act5 (CAA) or federal common law nuisance claims brought by Oakland and San Francisco against the world’s largest energy companies.6 While the court reached the right conclusion, it did not discuss a key factor that also could have justified its

6 969 F.3d 895 (9th Cir. 2020).
7 Id. at 908. Complete preemption is a jurisdictional doctrine, not a type of preemption. See Meyer v. Conlon, 162 F.3d 1264, 1268 n.2 (10th Cir. 1998). While a federal preemption defense normally does not provide a basis for removal, state law claims may be treated as arising under federal law when federal law preempts state law and provides “the exclusive cause of action for the claim asserted.” Beneficial Nat’l Bank v. Anderson, 539 U.S. 1, 8 (2003); see also Gil Seinfeld, The Puzzle of Complete Preemption, 155 U. PA. L. REV. 537, 552 (2007). Nevertheless, discussions of complete preemption inevitably involve analysis of the preemptive effect of the federal law at issue, and this comment focuses on the merits of that underlying dispute.
decision. Because the assumption underlying federal preemption — that state involvement will disrupt the federal government’s ability to more effectively address a problem — does not apply in climate change cases, the Ninth Circuit was correct to allow the state claims to proceed.

In 2017, the cities of Oakland and San Francisco (the Cities) each sued five oil and gas companies⁸ (the Companies) in California state court. The allegations in both cases were identical: these companies, whose fossil fuel–based products are responsible for over eleven percent of global carbon dioxide emissions, continued to produce and actively promote their products despite knowing that the use of these products contributed to climate change.⁹ According to the plaintiffs, their cities would now need to spend billions of dollars to “build sea walls and other infrastructure to protect human safety and public and private property . . . from global warming-induced sea level rise.”¹⁰ The plaintiffs further contended that this “egregious state of affairs” was a public nuisance under California law,¹¹ and they requested that the court order the Companies to create an abatement fund to pay for the Cities’ climate change adaptation programs.¹² One month later, the Companies removed the cases to the Northern District of California, and the plaintiffs moved to remand to state court.¹³

Judge Alsup denied the Cities’ motions, finding that federal common law preempted the Cities’ state law nuisance claims and made removal appropriate. He explained that federal common law, which is created when “a federal rule of decision is ‘necessary to protect uniquely federal interests,’”¹⁴ governed the Cities’ nuisance claims because the claims involved the “uniquely federal interests [that] exist in ‘interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations.’”¹⁵ This federal common law completely preempted the Cities’ state law–based nuisance claims, thereby transforming the claims into those “arising under” the laws of the United States and making them appropriate for resolution in federal court.¹⁶

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⁸ These companies are BP, Chevron, ConocoPhillips, ExxonMobil, and Royal Dutch Shell.
¹¹ Oakland Complaint, supra note 10, ¶ 2; San Francisco Complaint, supra note 10, ¶ 2.
¹² Oakland Complaint, supra note 10, ¶ 11; San Francisco Complaint, supra note 10, ¶ 11.
¹³ City of Oakland, 969 F.3d at 902.
¹⁵ Id. (quoting Tex. Indus., 451 U.S. at 641).
¹⁶ Id. at *5; see also 28 U.S.C. § 1331; Massachusetts v. Exxon Mobil Corp., 462 F. Supp. 3d 34, 40 (D. Mass. 2020) (“Though he did not use the term, Judge Alsup’s holding is intelligible only as an application of the complete preemption doctrine.”).
arriving at this decision, Judge Alsup emphasized the scope of the problem described in the Cities’ pleadings: “If ever a problem cried out for a uniform and comprehensive solution, it is the geophysical problem described by the complaints.”

The Cities subsequently filed amended complaints in which they added the then-required federal nuisance claims, and the Companies filed a motion to dismiss for failure to state a claim. In a second opinion, Judge Alsup granted the motion, again highlighting the “breathtaking” scope of the Cities’ theory of liability and concluding that to hold particular companies responsible for global warming would be to “balance . . . policy concerns” that Congress, through the CAA, entrusted to the Environmental Protection Agency (EPA). And because the Cities targeted global GHG emissions, such a decision would also implicate foreign policy concerns, which should generally be handled by the Executive and Congress.

The Ninth Circuit vacated and remanded. Writing for the panel, Judge Ikuta held that the court lacked jurisdiction over the Cities’ claims. She explained that the Cities’ state law public nuisance allegations did not satisfy the “well-pleaded complaint rule” because a federal question did not “appear[] on the face of the complaint.” Generally, a well-pleaded complaint is premised on a federal cause of action. Still, certain exceptions to this rule open federal courts to cases premised on state law causes of action. The first of these, known as the Grable test, extends federal jurisdiction to a “special and small category” of cases in which federal law is “a necessary element of the . . . claim for relief.”

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18 In their amended complaints, the Cities stated that they added a federal public nuisance claim “to conform to the [district court’s] ruling” and that they “reserve[d] all rights with respect to whether jurisdiction is proper in federal court.” City of Oakland, 969 F.3d at 909 (alterations in original) (quoting the Cities’ Amended Complaints). The Ninth Circuit subsequently held that because of this provision, the Cities did not waive their ability to argue that their cases should be remanded upon appeal. Id.
19 Id. at 902.
21 Id. at 1025.
23 City of Oakland, 969 F.3d at 911–12.
24 Id. at 903; see id. at 908. The well-pleaded complaint rule stems from 28 U.S.C. § 1331, which grants federal jurisdiction over all cases “arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331.
25 This test comes from Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing, 545 U.S. 308 (2005), in which the Supreme Court held that a state law claim posed a federal question deserving of federal court jurisdiction because its resolution required the interpretation of a federal tax statute. See id. at 310.
26 City of Oakland, 969 F.3d at 904 (omission in original) (quoting Empire Healthchoice Assurance, Inc. v. McVeigh, 547 U.S. 677, 699 (2006)).
This exception did not apply in this case because the Cities’ claims did not “require resolution of a substantial question of federal law.”

Rather, as the Companies contended, the claims merely implicated numerous federal interests, including “energy policy, national security, and foreign policy.” Though important, such “policy question[s]” do not confer federal jurisdiction over state law claims.

The panel also addressed a second exception, known as the “artful-pleading doctrine,” to the well-pleaded complaint rule. This doctrine permits removal to federal court when “the pre-emptive force of the [federal] statute is so ‘extraordinary’ that it ‘converts an ordinary state common-law complaint into one stating a federal claim’” for jurisdictional purposes. Courts recognize such complete preemption when a federal statute “provide[s] the exclusive cause of action” for a claim and “set[s] forth procedures and remedies governing that cause of action,” neither of which the CAA does. The Cities’ nuisance claims were also not completely preempted by federal common law. Indeed, the court expressed doubt that the claims implicated federal common law at all, since the Ninth Circuit has held that federal public nuisance claims related to global warming are displaced by the CAA, and the existence of any remaining common law of interstate pollution was unclear. As a result, federal jurisdiction did not lie under the well-pleaded complaint rule or its exceptions. The court remanded the cases to the district court to determine whether there was another basis for federal jurisdiction. If there was not, the cases would have to return to state court.

In eschewing complete preemption of state climate nuisance claims, the Ninth Circuit reached the right conclusion but failed to address an important consideration that could have also justified its decision: climate change’s unique properties make it exceedingly difficult, if not impossible, for the federal government to adequately address. As such,

\[\text{Id. at 906.}\]
\[\text{Id. at 906–07.}\]
\[\text{Id. at 907.}\]
\[\text{Id. at 905.}\]
\[\text{Id. (quoting Caterpillar Inc. v. Williams, 482 U.S. 386, 393 (1987)).}\]
\[\text{Id. (quoting Beneficial Nat’l Bank v. Anderson, 539 U.S. 1, 8 (2003)).}\]
\[\text{Id. at 905–06.}\]
\[\text{Id. at 907–08.}\]
\[\text{The panel did not explicitly say this, but in reversing the district court’s ruling, it implicitly endorsed such a theory.}\]
\[\text{City of Oakland, 969 F.3d at 906 (citing Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 858 (9th Cir. 2012)). Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849, was itself applying a similar holding by the Supreme Court in American Electric Power Co. v. Connecticut, 564 U.S. 410, 423 (2011).}\]
\[\text{City of Oakland, 969 F.3d at 906.}\]
\[\text{Id. at 911. The panel did not review the district court’s ruling on personal jurisdiction, noting that the Cities could move the district court to vacate its opinion if the cases were remanded to state court. Id. at 911 n.13.}\]
one rationale that underlies federal preemption — that the federal government can better address certain problems without state involvement — is missing from the climate change context. In recognition of this fact and the surprising reality that some states and localities have taken up the federal government’s abandoned mantle to fight climate change, courts should adopt a stronger presumption against preempting state law climate suits than they would in other policy contexts.38

As scholars have noted, climate change poses unusually difficult policy challenges.39 First, it is the ultimate collective action problem;40 addressing it “will involve the combined activities of every major economy in the world.”41 Second, the incentives and costs to mitigate climate change are misaligned. The countries that emit the most GHGs and can more effectively stem climate change — notably, the United States — will be the last to experience climate change’s most severe effects.42 And third, when it comes to climate change, time is costly. Failing to curb GHG emissions now means that the world will need to reduce emissions even more in the future.43

The combination of these elements would make climate change difficult for any institution to address, but the particular circumstances and structure of the federal government make it especially ill-suited to do so. For one thing, the United States is one of the most powerful nations in the world. It is also the largest historical emitter of GHGs.44 Together, these facts make it unlikely that the United States will voluntarily commit itself to significantly scaling back its emissions or that

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38 Courts typically apply a presumption against preempting state law, but “its scope and force are not entirely clear.” Robert L. Glicksman & Richard E. Levy, A Collective Action Perspective on Ceiling Preemption by Federal Environmental Regulation: The Case of Global Climate Change, 102 NW. U. L. REV. 579, 589 (2008). This comment merely argues that this presumption should be even stronger in the case of climate change suits.


42 See Richard J. Lazarus, Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future, 94 CORNELL L. REV. 1153, 1160, 1170–73 (2009) (describing the “pervasive combination of the laws of physics and chemistry with patterns of economic industrialization around the globe” that causes such a “geographic mismatch” between climate change’s “cause and effect,” id. at 1172).

43 See id. at 1168.

another group of nations will succeed at compelling it to do so. This problem is worsened by the fact that Congress and executive agencies face a high risk of legislative and regulatory capture, a risk that is particularly acute in the realm of climate and energy policy, where huge international companies wield more power than do many nations. Finally, the federal government was designed to facilitate deliberate, countermajoritarian decisionmaking that does not respond well to problems that need immediate, sweeping action.

Nor is the risk of federal government failure on the issue of climate change merely theoretical; we already experience it. Scientists began sounding the alarm about catastrophic climate change over forty years ago. Every year since, the scientific consensus regarding the seriousness of the problem and the need for immediate governmental action has both broadened and deepened. Yet no President or Congress has passed the kind of comprehensive federal legislation that is plainly required to address climate change before it is literally too late.

The federal government’s conceptual and proven inability to adequately address the climate crisis bears on whether courts find state laws preempted by federal law because such devastating inaction calls into question an important theoretical premise implicitly underlying

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45 See Elaine Kamarck, The Challenging Politics of Climate Change, BROOKINGS (Sept. 23, 2019), https://www.brookings.edu/research/the-challenging-politics-of-climate-change (noting that there is no “legal architecture that allows us to reward and/or punish those who decrease or increase their greenhouse gas emissions”).


47 See, e.g., NAOI ORESKES & ERIK M. CONWAY, MERCHANTS OF DOUBT: HOW A HANDFUL OF SCIENTISTS OBSCURED THE TRUTH ON ISSUES FROM TOBACCO SMOKE TO GLOBAL WARMING 246–47 (reprt. ed. 2011) (discussing how energy companies have prevented government action on global warming).


50 ORESKES & CONWAY, supra note 47, at 170–74; see also NATHANIEL RICH, LOSING EARTH: A RECENT HISTORY 5 (2019) (describing how the world’s most powerful nations almost addressed climate change in the decade from 1979 to 1989).

51 See, e.g., John Cook et al., Quantifying the Consensus on Anthropogenic Global Warming in the Scientific Literature, 8 ENV’T RSCH. LETTERS 1, 2 (2013) (“Repeated surveys of scientists found that scientific agreement about [anthropogenic global warming] steadily increased from 1996 to 2009.”).

52 See Thomas Frank, Federal Government Is Failing on Climate Readiness, Watchdog Says, E&E NEWS (Nov. 27, 2019), https://www.scientificamerican.com/article/federal-government-is-failing-on-climate-readiness-watchdog-says [https://perma.cc/683B-G7MD]. While the CAA is a powerful tool to address air pollution, it does not specifically address GHGs or climate change, and it vests discretion in the EPA to determine when and how pollution should be regulated. A deregulatory administration, see Lisa Friedman & Brad Plumer, E.P.A. Announces Repeal of Major Obama-Era Carbon Emissions Rule, N.Y. TIMES (Oct. 9, 2017), https://nyti.ms/2s5Irps [https://perma.cc/JE2Z-LS5F], or a conservative Supreme Court, see West Virginia v. EPA, 136 S. Ct. 1000 (2016) (mem.), could neuter the Act’s potential to regulate GHGs.
decisions to preempt state law: the federal government more effectively addresses certain policy problems without state interference. Of course, judges rarely discuss this assumption explicitly, as doing so could be seen as admitting that they are influenced in part by their desired substantive policy outcomes. Instead, courts couch their decisions to preempt in theories about Congress’s intent in passing a federal law.\(^53\) However, beneath this “objective” legal surface, preemption decisions are typically accompanied by “a decision to displace state law in some area in order to advance perceived federal policy goals.”\(^54\) After all, “[t]he whole point of preemption is generally to force national uniformity on a particular issue, stifling state-by-state diversity and experimentation.”\(^55\) Nowhere is this preference for uniform federal policy more apparent, or more misplaced, than in decisions finding that federal law preempts state climate change suits. Without congressional intent to fall back on, Judge Alsup relied explicitly on the need for a “uniform and comprehensive solution” to justify preemption.\(^56\) But the inevitable result of these decisions — dismissing claims because federal common law provides no cause of action\(^57\) — highlights the mismatch between the desirability of a federal response and the federal government’s capacity to offer one.\(^58\) Judge Alsup drew the wrong message from “the scope of the worldwide predicament”\(^59\): what matters is the scale of our response, not its source. Perhaps surprisingly, in the absence of a federal strategy to fight climate change, states and localities have emerged as leaders in the field.\(^60\) They have used a wide array of strategies, including legislative limits on GHG emissions\(^61\) and executive actions that promote clean

\(^{53}\) See Thomas W. Merrill, Preemption and Institutional Choice, 102 NW. U. L. REV. 727, 740 (2008) (“We find this bromide” that “[t]he purpose of Congress is the ultimate touchstone” . . . endlessly repeated . . . .” (alteration in original) (quoting Retail Clerks Int’l Ass’n Loc. 1625 v. Schermerhorn, 375 U.S. 96, 103 (1963))).

\(^{54}\) Id. at 729; see also id. at 741 (noting that the preemption doctrine “systematically exaggerates the role of congressional intent, attributing to Congress judgments that are in fact grounded in judicial perceptions about the desirability of displacing state law in any given area”).

\(^{55}\) Ernest A. Young, The Rehnquist Court’s Two Federalisms, 83 TEX. L. REV. 1, 130 (2004).


\(^{58}\) Cf. Massachusetts v. Exxon Mobil Corp., 462 F. Supp. 3d 31, 40 n.7 (D. Mass. 2020) (questioning whether it would be proper to find complete preemption “when the federal scheme is not simply ‘more limited’ but has not been created at all”).

\(^{59}\) California v. BP P.L.C., 2018 WL 1064293, at *3.

\(^{60}\) Glicksman & Levy, supra note 38, at 582. One scholar calls this phenomenon “compensatory federalism.” Martha Derthick, Compensatory Federalism, in GREENHOUSE GOVERNANCE: ADDRESSING CLIMATE CHANGE IN AMERICA 58, 59 (Barry Rabe ed., 2010).

energy.\textsuperscript{62} And of course, they are bringing public nuisance and consumer fraud actions against the major energy producers that have done so much to exacerbate the climate crisis.\textsuperscript{63} This trend could not have been predicted; states and localities are arguably even less equipped to address climate change than the federal government, as they face greater collective action barriers than does a larger, national entity.\textsuperscript{64} It remains for future researchers to further examine why states may succeed in this policy arena where the federal government has so spectacularly failed.

Despite not knowing whether states and localities will ultimately put a dent in the climate crisis, courts should adopt a presumption against preempting them from trying. Without the usual assumption underlying preemption — that a uniform federal response will be more effective without independent state action — it would be imprudent for courts to close off any potential avenue to avoid disaster. Allowing states and localities to hold energy companies responsible serves as a “federalism hedge”: the “regulatory choice to retain overlapping, interacting, and often intertwined federal and state roles”\textsuperscript{65} is desirable because it “provides an array of second-best benefits that are likely the optimal possible answer even where, as with climate change, the likely ideal arrangement would utilize a single, well-crafted, preemptive and stable federal regulatory regime.”\textsuperscript{66} Permitting subnational governments to file climate suits also fosters innovation and allows “leader” jurisdictions to adopt more ambitious measures than a nation as a whole is willing to adopt.\textsuperscript{67} With a problem as intractable as climate change, allowing states to experiment and fill gaps left by the federal government is particularly wise.

Whether \textit{City of Oakland} or any other state law actions will succeed in holding energy companies responsible is yet to be determined. Their plaintiffs certainly face an uphill battle.\textsuperscript{68} Still, these challenges should not be preempted; they may provide a “safety net” in a policy area where the federal government has failed to do something it is ill-equipped to accomplish on its own.\textsuperscript{69}

\textsuperscript{63} See, e.g., cases cited supra note 4.
\textsuperscript{64} See Katherine A. Trisolini, \textit{All Hands on Deck: Local Governments and the Potential for Bidirectional Climate Change Regulation}, 62 STAN. L. REV. 669, 681 (2010).
\textsuperscript{66} \textit{Id.} at 1049.