Nos. 18-15499, 18-15502, 18-15503, 18-16376

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

COUNTY OF SAN MATEO, Plaintiff-Appellee, v. *CHEVRON CORPORATION*, *et al.*, Defendants-Appellants.	No. 18-15499 No. 17-cv-4929-VC N.D. Cal., San Francisco Hon. Vince Chhabria presiding
CITY OF IMPERIAL BEACH, Plaintiff-Appellee, v. *CHEVRON CORPORATION, et al.*, Defendants-Appellants.	No. 18-15502 No. 17-cv-4934-VC N.D. Cal., San Francisco Hon. Vince Chhabria presiding
COUNTY OF MARIN, Plaintiff-Appellee, v. *CHEVRON CORPORATION, et al.*, Defendants-Appellants.	No. 18-15503 No. 17-cv-4935-VC N.D. Cal., San Francisco Hon. Vince Chhabria presiding
COUNTY OF SANTA CRUZ; et al., Plaintiffs-Appellees v. *CHEVRON CORPORATION; et al.* Defendants-Appellants.	No. 18-16376 Nos. 18-cv-00450-VC; 18-cv-00458-VC; 18-cv-00732-VC N.D. Cal., San Francisco Hon. Vince Chhabria presiding

AMICUS CURIAE BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF AFFIRMANCE

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* the California State Association of Counties represents that it is a non-profit mutual benefit corporation, which does not offer stock and which is not a subsidiary or affiliate of any publicly owned corporation.

INTERESTS OF AMICUS CURIAE[1]

The California State Association of Counties (CSAC) is a non-profit corporation whose membership is comprised of all fifty-eight California counties. All of CSAC's member counties bear responsibility for preserving the public health, safety, and welfare within their borders. Each of these counties has a unique geography—some are mountainous, some forested, some coastal, and some all three. Each county is home to a diverse set of industries—from energy production to technology to farming—and has a different approach to local policy. But all of the counties share an interest in preserving California's public nuisance law as a mechanism for responding to the hazards that threaten their communities and redressing the resulting harms. And the counties are further united in their position that California public nuisance claims, as state law causes of action, when filed in state court should remain there, absent extraordinary circumstances not present in this case. CSAC thus submits this brief in support of affirming the district court's ruling,

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[1] Filing of this brief was authorized by CSAC's Litigation Overview Committee, which is comprised of County Counsels throughout the state. All parties have consented by stipulation to the filing of this amicus brief. No counsel for a party authorized this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici or their counsel made a monetary contribution to this brief's preparation or submission.

which properly returned to state court state law claims targeted at addressing the harm a set of California communities face within their borders.

INTRODUCTION

The California Legislature codified the State's public nuisance law, in an exercise of its police powers, to enable local governments to redress widespread harms within their communities. Public nuisance causes of action thus allow local governments to carry out their obligation to preserve community wellbeing, and local governments have brought such actions to address diverse and grave threats. Although only state law is at issue in this case, Defendants ask the Court to invent a federal issue with the overarching aim of using preemption to destroy any public nuisance claim.

The federal government's involvement in regulating the oil industry is not a sufficient basis for removal jurisdiction and cannot justify tying the hands of local governments and severely limiting the use of a critical tool for protecting local communities. Instead, State public nuisance law fits comfortably alongside federal regulation as a complement to the federal regime. California courts have frequently applied public nuisance law to remedy harmful conduct even when a defendant's conduct was federally regulated, and this Court has endorsed that practice. Indeed, this parallel scheme of federal regulation and state law torts is a hallmark of cooperative federalism.

The Clean Air Act exemplifies this system of federal, State, and local cooperation—and illustrates its necessity. Although the Clean Air Act imposes federal regulation, it does not provide any federal mechanism for local governments to remedy local harms, and it *explicitly preserves* state law actions, like public nuisance, to avoid creating a gap. Were this Court to accept Defendants' contention that the Clean Air Act completely preempts state law causes of action in matters implicating air pollution, States and local governments would be virtually helpless to require air polluters to shoulder the costs of remediating harms stemming from their polluting activities.

A ruling in Defendants' favor here would disrupt the system of cooperative federalism that lies at the foundation of our nation's regulatory system and would seriously undermine the ability of California counties to protect the health, safety, and welfare of their residents. CSAC thus asks the Court to reject the Defendants' invitation to improperly insert the federal courts into this issue of state law and affirm the district court's ruling.

ARGUMENT

A. California's Public Nuisance Cause of Action Represents an Important Exercise of State Police Powers to Address Harms to Local Communities.

"The States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all

persons." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342-43 (2007) (quoting *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985)). The Supreme Court has long acknowledged the important role of the States, and by extension localities as subdivisions of the States, in exercising police powers to deal with "all the great public needs." *Noble State Bank v. Haskell*, 219 U.S. 104, 111 (1911). In California, the Legislature recognized the important role public nuisance doctrine plays in addressing those great public needs and codified public nuisance law as a powerful tool to safeguard the public's interests. *See* Cal. Civ. Code §§ 3479-80; *see also People ex rel. Gallo v. Acuna*, 929 P.2d 596, 603 (Cal. 1997) ("[A] principal office of the centuries-old doctrine of the 'public nuisance' has been the maintenance of public order—tranquility, security and protection.").

The California public nuisance statutes represent a legislative judgment that a cause of action protecting against an array of communal harms is necessary to safeguard the wellbeing of the people of California. While California courts have defined some of the contours of public nuisance, "the ultimate legal authority to declare a given act or condition a public nuisance rests with the Legislature." *Acuna*, 929 P.2d at 606; *see also People v. Lim*, 118 P.2d 472, 476 (Cal. 1941) ("The courts have thus refused to grant injunctions on behalf of the state except where the objectionable activity can be brought within the terms of the statutory definition of public nuisance."). By statute, the California Legislature has defined nuisance to include

"[a]nything which is injurious to health, . . . obstruct[s] the free use of property, . . . or unlawfully obstructs the free passage or use" of certain areas. Cal. Civ. Code § 3479.[2] Further, the Legislature has empowered localities to sue to remedy these conditions when the conditions impact "an entire community or neighborhood, or any considerable number of persons." *Id.* at §§ 3480, 3494.

The California Supreme Court has explained that public nuisance law reflects an understanding that local governments have "not only a right to maintain a decent society, but an obligation to do so." *Acuna*, 929 P.2d at 603 (internal citations and quotation marks omitted). The harms local governments have addressed through public nuisance causes of action, though always tied to the legislative definition, are extensive and varied: the presence of toxic lead paint in the interior of homes in local communities, *ConAgra Grocery Prod. Co.*, 17 Cal.App.5th 51, 66-77 (2017); illegal gambling activities, *Lim*, 118 P.2d at 474; abandoned housing units that "presented a fire hazard of the most extreme character," *San Diego Cty. v. Carlstrom*, 196 Cal.App.2d 485, 488, 489-91 (1961); gang activity that made it dangerous for people to leave their houses, *Acuna*, 929 P.2d at 618; and improperly disposed of dry-cleaning chemicals

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[2] To be actionable, the injury, offense, or obstruction must also be "unreasonable." *San Diego Gas & Elec. Co. v. Superior Court*, 920 P.2d 669, 697 (Cal. 1996). And "[t]he primary test for determining whether the invasion is unreasonable is whether the gravity of the harm outweighs the social utility of the defendant's conduct." *Id.*

that were leaching into ground water, *City of Modesto v. Dow Chem. Co.*, 19 Cal.App.5th 130, 135 (2018), to name just a few. *See also Ileto v. Glock Inc.*, 349 F.3d 1191, 1211-14 (9th Cir. 2003) (*Ileto I*) (determining that plaintiffs had sufficiently alleged a California public nuisance cause of action based on allegations concerning a gun manufacturers' marketing and distribution of firearms).[3]

In these cases, without a public nuisance cause of action, parties whose conduct had harmed the community might have dodged responsibility for redressing the harmful conditions they had created. Where harm is spread broadly across the community, local governments are often best situated to remedy the harm, both because they have an obligation to preserve local order and because they are well-positioned to understand the threats their communities face. And the California Legislature codified the public nuisance cause of action because, without it, local governments would often be powerless to remedy—or prevent—widespread harm. *See Cty. of Santa Clara v. Atl. Richfield Co.*, 137 Cal.App.4th 292, 309-10 (2006) (explaining that, unlike tort law claims, public nuisance actions allow a public entity itself to act on behalf of a community that has been subjected to a widespread hazard.). Using California public nuisance law, localities can prevent future harm

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[3] *Ileto* was removed from state court on the basis that a defendant was an instrumentality of a foreign state. *See Ileto v. Glock, Inc.*, 194 F.Supp.2d 1040, 1044 (C.D. Cal. 2002); *see also* 28 U.S.C. §§ 1330(a), 1603(a) (providing for original jurisdiction in district courts in suits against instrumentalities of foreign states).

from a present perilous condition, rather than being unable to act until a harm is complete or reduced to pursuing inadequate remedies under a limited federal regime. *See id.* Holding this cause of action preempted by defunct federal common law, which can no longer provide a remedy, would deny localities the ability to adequately redress harms to their communities.

The indispensable role that public nuisance plays in California law militates against removal here. As the Ninth Circuit has explained, "the federal character of our judicial system recognizes that matters of state law should first be decided by state courts when possible, not federal courts." *Liberty Surplus Ins. Corp. v. Ledesma & Meyer Constr. Co., Inc.*, 834 F.3d 998, 1003 (9th Cir. 2016) (citations and quotation marks omitted). The district court's decision to remand this case demonstrated proper comity to the state courts regarding this state law matter.

B. As Part of the Scheme of Cooperative Federalism, State Public Nuisance Actions Have an Important Role to Play in Addressing Harms Originating in Federally Regulated Areas.

As this court has ruled, plaintiffs may bring state law public nuisance suits against legal, regulated industries. *Ileto I*, 349 F.3d at 1214; *see also ConAgra Grocery Prod. Co.*, 17 Cal.App.5th at 73 (although lead paint could lawfully be sold at the time the defendant companies marketed it to homeowners, their conduct nonetheless caused a nuisance). And numerous federal courts have allowed state law causes of action to go forward even when the conduct that gave rise to the state law cause of

action was subject to federal regulation. *See, e.g.*, *Ileto I*, 349 F.3d at 1214 (ruling that federal regulation of firearms did not prevent plaintiffs from pursuing state law public nuisance claim);[4] *Cipollone v. Liggett Grp., Inc.,* 505 U.S. 504, 529 (1992) (ruling that state law claims for fraudulent misrepresentation, conspiracy to misrepresent or conceal material facts, and breach of express warranty in connection with the sale of cigarettes were not preempted by federal regulations that dictated a specific warning be placed on cigarettes); *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 725 F.3d 65, 95–96 (2d Cir. 2013) (upholding a jury verdict finding Exxon Mobil liable under state law for the contamination of ground water with MTBE, even though the Clean Air Act had required that some oxygenating additive, such as MTBE, be included in gasoline).

In re Volkswagen is particularly instructive here. In that case, the State of New Mexico brought a state law public nuisance claim against Volkswagen in connection with its installation of software in its cars designed to cheat federal and state emissions

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[4] The plaintiffs' claims in *Ileto* against a federally licensed manufacturer and a federally licensed seller of firearms were dismissed in an ensuing appeal following congressional enactment of a law that explicitly prohibited most civil actions against federally licensed gun manufacturers and sellers. *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1131 (9th Cir. 2009) (*Ileto II*); *see also* 15 U.S.C. § 7901. But it was only this enactment that destroyed the plaintiffs' claims, not the preexisting regulatory scheme around firearms. *See Ileto I*, 349 F.3d at 1214. Because Congress had created protections for only federally licensed manufacturers and sellers, the plaintiffs' claims against an unlicensed foreign manufacturer were allowed to go forward. *Ileto II*, 565 F.3d at 1145.

tests. *In re Volkswagen*, MDL No. 2672, 2017 WL 2258757, at *4 (N.D. Cal. May 23, 2017). In its order remanding the case, the district court reasoned that while there is an extensive federal regulatory scheme under the Clean Air Act that applies to automobile emissions, New Mexico did not need to touch on that scheme to prove its nuisance claim; instead "New Mexico [had] to prove only that Volkswagen's emissions . . . interfered with the public's common right to clean air, and clean water." *Id.* at *11 (quotation marks and alteration omitted); *see also Lougy v. Volkswagen Grp. of Am., Inc.*, No. CV 16-1670 (JLL), 2016 WL 3067686, at *3 (D. N.J. May 19, 2016) (also rejecting Volkswagen's argument that federal regulations prohibiting Volkswagen's alleged conduct justified removal of state law claims). Thus, that court determined that federal regulations and state nuisance law could play parallel roles, without either collapsing into the other.

Indeed, in enacting a scheme of federal regulation, Congress may choose to rely on state law to redress harms to individuals or particular communities when it "determine[s] that widely available state rights of action provide[] appropriate relief for injured" parties. *Wyeth v. Levine*, 555 U.S. 555, 574 (2009). Further, because the federal government's resources are finite and federal oversight of massive industries necessarily can only ever be partial, state tort and nuisance law can serve as important complements to federal regulation, operating as a means for uncovering wrongdoing or addressing unanticipated hazards. *See id.* at 578-79.

It would be untenable if the mere existence of federal regulation of an industry stripped localities of the ability to bring state law claim against actors within that industry. Such sweeping federal preemption would leave local governments hamstrung in their efforts to remedy harm to their communities, particularly where, as here, Congress has not provided the full suite of remedies that state law supplies. And it would run flatly contrary to principles of federalism the Supreme Court has articulated. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) ("[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action.").

Defendants seek to skirt this body of law by arguing that their conduct was authorized by federal regulatory agencies. Opening Brief for Appellants at 47-49. But Defendants' stated intent to hide behind federal regulatory bodies to defend against their liability here is also insufficient to justify removing this claim from state court, as a planned defense does not offer a basis for federal jurisdiction. *See Merrill Dow Pharm., Inc. v. Thompson,* 478 U.S. 804, 808 (1986) ("A defense that raises a federal question is inadequate to confer federal jurisdiction."). That a federal regulatory scheme touches on some of Defendants' activities does not generally preclude a public nuisance cause of action or create a basis for removal.

C. Far from Preempting State Law, the Clean Air Act Anticipates that States and Localities Will Continue to Play the Primary Role in Protecting Local Communities from Air Pollution-Related Harms.

As noted by the district court below and in Appellees' briefing, Appellees' Opening Brief at 36-37, the Clean Air Act contains a savings clause that clearly permits states, local governments, or other authorities to bring actions "to seek enforcement of any emission standard or limitation *or to seek any other relief*." 42 U.S.C. § 7604(e) (emphasis added). And for good reason: the Clean Air Act's limited remedies do not include damages for harms to individuals or communities stemming from pollution, and Clean Air Act penalties are generally deposited into a fund to be used by the EPA for enforcement. *Id.* § 7604(g)(1); *see also Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984) ("It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.").[5] Congress's decision to allow parallel state law claims also makes sense in light of its understanding, as evidenced in the Clean Air Act, that localities are best suited to dealing with the effects of air pollution. *See Oxygenated Fuels Ass'n Inc. v. Davis*, 331 F.3d 665, 670–71 (9th Cir. 2003); *see also Nat'l Audubon Soc. v. Dep't of Water*,

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[5] Courts have discretion to order the use of up to $100,000 in civil penalties for "beneficial mitigation projects" that "enhance the public health or the environment." 42 U.S.C. § 7604(g)(2). But where extensive harm stems from an actor's unreasonable conduct, this payment will be insufficient to remedy the harm to a community.

869 F.2d 1196, 1203 (9th Cir. 1988) ("[T]here is not 'a uniquely federal interest' in protecting the quality of the nation's air. Rather, the primary responsibility for maintaining the air quality rests on the states.").

Were courts to treat the Clean Air Act as completely preempting actions brought by localities to address the local harms of air pollution, the Clean Air Act, far from buttressing the efforts of states and localities to preserve the air, would make it impossible in many instances for communities harmed by air pollution to make themselves whole. Such a reading of the Clean Air Act would allow polluters to externalize costs to the communities harmed by pollution. As evidenced by the savings clause, 42 U.S.C. § 7604(e), this transfer of costs from polluters to states and local governments was not what Congress authorized or intended.

To the extent Defendants plan to assert that the Plaintiffs' claims are barred by express, conflict, or field preemption, such defenses cannot serve as a basis for removal, and state courts are fully competent to adjudicate such defenses. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987) ("[I]t is now settled law that 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 anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue.").

CONCLUSION

Parallel state law causes of action proceeding alongside Congressional regulatory schemes are a classic feature of federalism. This system allows the federal government to set standards that govern nationally while continuing to vest in states and local governments responsibility for addressing specific local harms and impacts. Indeed, this is precisely the type of cooperation for which the Clean Air Act provides. And California public nuisance law fits neatly into this scheme by giving localities a tool to redress those harms that threaten wide swaths of their communities. This Court should allow cooperative federalism to function as intended and affirm the district court's decision to remand this case to state court.

Dated: January 29, 2019

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 3,145 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2010 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Tony LoPresti
Tony LoPresti

CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Tony LoPresti
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