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

BRIEF OF NATURAL RESOURCES DEFENSE COUNCIL AS AMICUS CURIAE IN SUPPORT OF APPELLEES AND AFFIRMANCE

Ian Fein
Natural Resources Defense Council
111 Sutter Street, 21st Floor
San Francisco, CA 94104

Peter Huffman
Natural Resources Defense Council
1152 15th Street NW, Suite 300
Washington, D.C. 20005

(202) 289-2428

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1, Amicus Curiae Natural Resources Defense Council, Inc., certifies that it is a non-profit environmental and public health membership organization that has no publicly held corporate parents, affiliates, and/or subsidiaries.

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INTEREST OF AMICUS CURIAE

Amicus Curiae Natural Resources Defense Council (NRDC) is a non-profit environmental and public health organization with hundreds of thousands of members. NRDC engages in research, advocacy, public education, and litigation to protect public health and the environment. NRDC was founded in 1970, the year Congress established the Environmental Protection Agency and amended the Clean Air Act. NRDC has worked for decades ensuring enforcement of the Act and other laws to address major environmental challenges.

Plaintiffs here are California counties and municipalities that have been harmed by the effects of climate change. They seek to avail themselves of state tort and common law remedies, important tools that states have traditionally provided to address harms to the welfare of their residents. Defendants contend that enforcing state law will impermissibly undermine federal authority, because climate change is an interest "unique" to the federal government. NRDC strongly disagrees that states lack a legitimate interest in addressing climate change or that state common law regulation is impermissible.

Climate change is the major environmental challenge of our time. In November 2018, the National Climate Assessment—the collective work product of 13 expert federal agencies—laid out in stark terms the toll that unmitigated climate change exacts on our health and welfare:

> In the absence of more significant global mitigation efforts, climate change is projected to impose substantial damages on the U.S. economy, human health, and the environment. Under scenarios with high emissions and limited or no adaptation, annual losses in some sectors are estimated to grow to hundreds of billions of dollars by the end of the century. It is very likely that some physical and ecological impacts will be irreversible for thousands of years, while others will be permanent.[1]

These impacts vary significantly across geographies. In California, coastal counties "are home to 68 percent of its people, 80 percent of its wages, and 80 percent of its GDP," and unmitigated climate change "will have drastic impacts along the coastline as well as for inland flooding" and "impacts to the economy are expected to be severe."[2]

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[1] Fourth National Climate Assessment (2018), vol. II, ch. 29, *The Risks of Inaction,* https://nca2018.globalchange.gov/chapter/29/.

[2] California's Fourth Climate Change Assessment: Statewide Summary Report (2018), ch. 2, *Climate Change Impacts in California*, at 65, *available at* http://www.climateassessment.ca.gov/state/docs/20190116-StatewideSummary.pdf.

Action is urgently needed on many fronts. As the federal government is currently proposing to roll back climate-protecting standards, NRDC is opposing those proposals while supporting bold state and private action. NRDC works extensively at the state and local level to help deploy a broad range of effective legal, policy, and technology tools to combat all forms of climate change pollution. From the nine-state (and counting) Regional Greenhouse Gas Initiative that caps and reduces power sector carbon dioxide emissions; to renewable portfolio standards that require utilities to supply electricity from renewable sources; to limits on methane pollution, mandates for electric vehicles, and building codes that require energy efficiency, enforcing state law is an effective means to help society transition from a dependence on polluting fossil fuels to the adoption of clean energy.

NRDC—in and out of court—has defended the enforceability of state law against the challenge that it interferes with federal authority. *See, e.g.*, *Am. Fuel & Petrochemical Mfrs. v. O'Keeffe*, 903 F.3d 903 (9th Cir. 2018) (upholding Oregon clean fuels program from Clean Air Act preemption and dormant commerce clause challenges). NRDC submits this brief to highlight why state law—both statutory and

common law—remains available to address harms produced by climate change.[3]

SUMMARY OF ARGUMENT

States have the right and the responsibility to protect the health, safety, and welfare of their residents. To that end, states can provide a range of legal remedies—both statutory and common law—that they deem appropriate. These state law remedies are enforceable unless preempted by federal law.

Plaintiffs here allege injuries arising from Defendants' production and marketing of fossil fuels. Plaintiffs seek relief only under California state law. The federal courts thus lack jurisdiction over these claims and the district court correctly remanded these actions to California state court.

Defendants contend that removal is proper because Plaintiffs' claims are purportedly "governed" by federal law—in other words, that

[3] All parties have consented to the filing of this brief. No party or party's counsel has authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief. No person or entity, other than amicus, has contributed money that was intended to fund preparing or submitting the brief.

federal law preempts all state law climate claims. But it is well established that state law actions cannot be removed to federal court on the basis of a preemption defense. *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 14 (1983).

More fundamentally, Defendants' premise is wrong: federal law does not preempt—much less *completely* preempt—all state law claims related to the effects of climate change. The district court correctly held that under *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011) ("*AEP*") and *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012) ("*Kivalina*"), no federal common law exists that could preempt the state law claims here. Plaintiffs' state law claims are thus presumptively available unless preempted by an Act of Congress. *AEP*, 564 U.S. at 429.

Defendants do not identify any Act of Congress that preempts all state law climate claims. Defendants point to the federal Clean Air Act, but that Act does not address the subject of Plaintiffs' claims: the tortious production and marketing of fossil fuels. Even if Plaintiffs' claims were construed as claims over damages caused by air pollution, they are not inherently preempted. The Clean Air Act expressly

preserves states' broad traditional authority to address air pollution under state law. *Oxygenated Fuels Ass'n v. Davis*, 331 F.3d 665, 670-671 (9th Cir. 2003) ("*OFA*").

To be sure, federal action is needed on climate change. And some remedies can be provided exclusively by federal law. But that reality does not work to preempt all state remedies. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 393-95 (1987). Climate change is not a concern unique to the federal government and federal remedies are not the exclusive means to address it. State remedies are both necessary and effective. California provides remedies and Plaintiffs are entitled to the opportunity to prove a claim for relief in California state court.

ARGUMENT

"States are independent sovereigns in our federal system," *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), and possess the "traditional authority to provide tort remedies" as they deem appropriate, *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). California provides tort remedies for nuisances and dangerous products. *See, e.g.*, *People v. ConAgra Grocery Products Co.*, 227 Cal. Rptr. 3d 499, 514 (Cal. Ct. App. 2017), *cert. denied sub nom. ConAgra Grocery*

Products Co. v. California, 139 S. Ct. 377 (2018) (nuisance action against lead paint manufacturers); *Carlin v. Superior Court*, 920 P.2d 1347, 1348 (Cal. 1996) (products liability action against pharmaceutical manufacturer). Such California state law remedies are presumptively available unless preempted by federal law. *See Hansen v. Grp. Health Coop.*, 902 F.3d 1051, 1056 (9th Cir. 2018) ("In our federal system, the States possess sovereignty concurrent with that of the Federal Government, limited only by the Supremacy Clause.").

As explained below, federal law does not preempt all state law claims solely because the claims are brought to address harms related to climate change. *First*, federal common law does not preempt all state law climate claims. The federal common law that Defendants invoke no longer exists: Congress displaced it with the Clean Air Act, and this Act—not the extinct federal common law—determines the preemptive scope of federal law. *AEP*, 564 U.S. at 423-424, 429. *Second*, the Clean Air Act does not preempt all state law climate claims. To the contrary, "[t]he text of the Clean Air Act, in a number of different sections, explicitly protects the authority of the states to regulate air pollution." *Exxon Mobil Corp. v. U.S. E.P.A.*, 217 F.3d 1246, 1254 (9th Cir. 2000).

Finally, there is no "unique" federal interest in climate change that somehow preempts all state law climate claims. "It is well settled that the states have a legitimate interest in combating the adverse effects of climate change on their residents." *O'Keeffe*, 903 F.3d at 913.

I. Federal common law does not preempt all state law climate claims.

Plaintiffs' state law claims are not preempted—or, in Defendants' parlance, "governed"—by federal common law, because no relevant federal common law exists to preempt them. Although there is no general federal common law, it exists in certain narrow areas. *See Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). Historically, the federal courts recognized a federal common law of interstate air pollution. *See, e.g.*, *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237-239 (1907). However, the Supreme Court has since held that this federal common law has been displaced by Congress via the federal Clean Air Act. *See AEP*, 564 U.S. at 424. Because "it is primarily the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest," once Congress legislates in an area, any preexisting federal common law "disappears." *Id*. at 423-424. The preemptive—or "governing"—scope of federal law

thus turns on the displacing federal statute, not the displaced federal common law. *See id.* at 429.

a. Congressional legislation defines the substance of federal law to the exclusion of federal common law.

Before the enactment of the major federal environmental statutes, the federal courts adjudicated some environmental nuisance cases by resort to a federal common law. *See, e.g.*, *Missouri v. Illinois*, 180 U.S. 208, 241 (1901); *Tennessee Copper Co.*, 206 U.S. at 237; *Illinois v. City of Milwaukee, Wis.*, 406 U.S. 91, 103 (1972) ("*Milwaukee I*"). The courts foresaw, however, that the federal common law recognized in these cases would be replaced by federal statutes. As the Supreme Court observed in *Milwaukee I*, a water pollution nuisance case, "[i]t may happen that new federal laws and new federal regulations may in time preempt the field of federal common law of nuisance." 406 U.S. at 107.

Those new federal laws arrived in the early 1970s in the form of major updates to the Clean Water Act[4] and the Clean Air Act.[5]

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[4] Pub. L. 92-500 (October 18, 1972), 86 Stat. 816, *codified as amended at* 33 U.S.C. § 1251 *et seq.*

[5] Pub. L. 91-604 (December 31, 1970), 84 Stat. 1676, *codified as amended at* 42 U.S.C. § 7401 *et seq.*

The Supreme Court subsequently revisited the availability of federal common law nuisance claims for water pollution in light of the Clean Water Act. In *City of Milwaukee v. Illinois & Michigan* ("*Milwaukee II*"), the Court explained that federal common law is only "a necessary expedient," "subject to the paramount authority of Congress," "and when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears." 451 U.S. 304, 313-314 (1981). In updating the Clean Water Act, Congress "ha[d] not left the formulation of appropriate federal standards to the courts," but rather had adequately "occupied the field" so as to "supplant federal common law." *Id.* at 317. Under *Milwaukee II*, then, new congressional legislation does not add a layer of federal statutory law on top of any existing federal common law. Instead, the new federal statute defines the substance of federal law and the federal common law on that subject ceases to exist.

Milwaukee II presaged the extinction of most federal common law regarding interstate pollution. New federal statutes would replace judicially-created federal standards with congressionally-enacted

federal standards. Importantly, however, federal statutes' displacement of federal common law does not simultaneously extinguish all *state* common law. To the contrary, in *International Paper Co. v. Ouellette*, the Supreme Court explained that while the relevant federal common law was displaced by the Clean Water Act, state common law nuisance claims for interstate water pollution could be available. 479 U.S. 481, 489 (1987). At that point, with federal common law no longer at issue, the only question was whether Congress intended the federal *statute* to preempt state common law claims. *Id.* at 491.

b. The Clean Air Act defines the substance of federal law concerning air pollution.

Just as the Clean Water Act supplanted the federal common law of nuisance for water pollution, so too did the Clean Air Act supplant the federal common law of nuisance for air pollution.

In 2004, eight States, the City of New York, and three private land trusts sued a group of power companies in New York federal district court. *See AEP*, 564 U.S. at 418. At the time, the defendants were the five largest emitters of carbon dioxide in the nation. The suit alleged that defendants' emissions contributed to global warming and thereby unreasonably interfered with public rights. Plaintiffs brought

claims under the federal common law of nuisance and, in the alternative, state common law. Plaintiffs sought an injunction setting carbon dioxide emission caps for each defendant. *See id*. at 418-419.

The case eventually reached the Supreme Court. The Second Circuit had ruled that federal common law "governed" these claims, *AEP*, 564 U.S. at 419, 429, and the Supreme Court granted certiorari to address whether plaintiffs "can maintain federal common law public nuisance claims against carbon-dioxide emitters." *Id.* at 415.

The parties disputed the historic availability of federal common law remedies, but the Court found that passage of the Clean Air Act had rendered that dispute "academic." *AEP*, 564 U.S. at 423. Relying heavily on *Milwaukee II*, the Court held that "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants." *Id*. at 424.

Importantly, the Court held that displacement turned on the congressional decision to legislate in this area, and not on the content of federal rights Congress decided to provide. *AEP*, 564 U.S. at 426. The Court noted that Congress had not directly established a federal right

to seek abatement—it had delegated authority to EPA to set a federal standard that would trigger federal rights and remedies. *Id*. But, the Court concluded, even if EPA declined to set a standard, "courts would have no warrant to employ the federal common law." *Id*.

In other words, even if federal common law historically recognized a federal right to abatement, Congress is not bound to preserve it. The Supreme Court has "always recognized that federal common law is subject to the paramount authority of Congress." *Milwaukee II*, 451 U.S. at 313. That paramount authority would be hollow unless Congress could reject prior judicially-created federal common law. Congress instead has the power to "strike a different accommodation" than recognized under federal common law, *AEP*, 564 U.S. at 422, including *contracting* the scope of federal law. Under *AEP*, then, as under *Milwaukee II*, new congressional legislation does not coexist with prior federal common law—the new statute displaces any federal common law and that federal common law disappears. Thus, in areas of federal

concern addressed by the Clean Air Act, the Act defines the substance of federal law to the exclusion of federal common law.[6]

This Court reaffirmed these principles in *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012) ("*Kivalina*"). A native Alaskan village, Kivalina, sued a large group of energy companies in California federal district court. Kivalina alleged that defendants emitted massive quantities of greenhouse gases that contributed to climate change. Because Kivalina lies atop a barrier reef, climate change was an immediate threat to its survival. Like the *AEP* plaintiffs, Kivalina sued under both federal and state common law. Unlike the *AEP* plaintiffs, Kivalina did not seek an injunction limiting emissions, but rather sought compensatory damages. *Kivalina*, 696 F.3d at 853-855.

This Court applied *AEP* to dispose of Kivalina's federal common law claim for damages. Under *AEP*, the "federal common law addressing domestic greenhouse gas emissions has been displaced by

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[6] Federal common law may occasionally fill in "statutory interstices" if required. *AEP*, 564 U.S. at 421. But *AEP* makes clear that the Clean Air Act does not leave a nuisance-sized interstice in federal law for federal common law to fill. *Id*. at 423.

Congressional action." *Kivalina*, 696 F.3d at 858. The *Kivalina* Court concluded that this holding applied whether plaintiffs sought an injunction or sought damages. *Id*. Displacement was not remedy-specific. Congressional action had extinguished the substance of federal common law, and displacement of all federal common law remedies necessarily followed. *Id*. at 857-858. Thus, like the Supreme Court in *AEP*, this Court confirmed that new congressional legislation does not coexist with federal common law—it completely replaces it.[7]

c. Congressional displacement of federal common law does not preempt state common law.

Defendants here assert that under *AEP* and *Kivalina*, "global-warming based tort claims are governed by federal common law—not state law." Defendants-Appellants' Brief ("Opening Br.") 1. As an initial matter, although not styled as such, this is a preemption argument. State law can only be "governed" by federal law, via the Supremacy Clause, in cases of conflict between federal and state law—*i.e.*, when

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[7] Defendants are thus wrong in suggesting that displacement is limited only to federal common law *remedies*. *See* Defendants-Appellants' Brief 38-41. As this Court has explained, displacement means that any "federal common law *cause of action* has been extinguished." *Kivalina*, 696 F.3d at 857 (emphasis added).

federal law has preempted state law. *See Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1479-80 (2018). But regardless, Defendants' assertion is wrong for at least two key reasons:

First, neither *AEP* or *Kivalina* held that climate tort claims *must* be governed by federal common law, and neither case ruled on whether such claims *may* be authorized by state common law. Plaintiffs in both cases asserted federal common law claims in the first instance. 564 U.S. at 418; 696 F.3d at 853. Thus, neither Court had occasion to consider whether state common law could apply in the first instance. Both Courts held only that the Clean Air Act had extinguished preexisting federal common law. 564 U.S. at 415; 696 F.3d at 853.

Second, neither *AEP* or *Kivalina* addressed whether the Clean Air Act preempts state common law climate claims. Plaintiffs in both cases asserted state common law claims in the alternative to federal common law. 564 U.S. at 418; 696 F.3d at 858 (Pro, J., concurring), but neither Court reached those claims at all. 564 U.S. at 429; 696 F.3d at 858. In *AEP*, the Supreme Court observed that once federal common law was displaced, the availability of state law claims would turn on the preemptive effect of the Clean Air Act. 564 U.S. at 429. But the Court

explicitly left that ordinary preemption question open. *Id.* And this Court did essentially the same thing in *Kivalina*. *See* 696 F.3d at 866 (Pro, J., concurring) ("Once federal common law is displaced, state nuisance law becomes an available option to the extent it is not preempted by federal law. . . . Kivalina may pursue whatever remedies it may have under state law to the extent their claims are not preempted." (citation omitted)).

Defendants here are conflating congressional displacement of federal common law with federal preemption of state law. Displacement and preemption are materially different. "[T]he appropriate analysis in determining if federal statutory law governs a question previously the subject of federal common law is not the same as that employed in deciding if federal law preempts state law." *Milwaukee II*, 451 U.S. at 316; *see also AEP*, 564 U.S. at 423-424. Displacement is readily found, because in considering "whether federal statutory or federal common law governs," courts "start with the assumption that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law." *Milwaukee II*, 451 U.S. at 316-317 (quotation omitted). In contrast, when considering preemption, courts

"start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* at 316 (quotations omitted); *see* *AEP*, 564 U.S. at 423.[8]

In short, because the "Clean Air Act displaces federal common law," the "availability *vel non*" of state law claims here depends on the "preemptive effect of the federal Act." *AEP*, 564 U.S. at 429. As explained below, the Clean Air Act does not preempt—much less completely preempt—all state law climate claims.

II. The Clean Air Act does not preempt all state law climate claims.

As an initial matter, preemption under the Clean Air Act is relevant for removability only to the extent that the Act *completely* preempts Plaintiffs' state law claims. *Caterpillar*, 482 U.S. at 393. Defendants (briefly) contend that the Clean Air Act "completely

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[8] Some confusion has resulted from the Court's historical use of the term "preemption" to describe congressional replacement of federal common law. *E.g.*, *Milwaukee I*, 406 U.S. at 107. Courts now use "displacement." *E.g.*, *AEP*, 564 U.S. at 423. Regardless of the terminology, the Court has consistently employed a more stringent standard when considering claims that federal law preempts state law. *E.g.*, *Milwaukee II*, 451 U.S. at 316, 317 n.9.

preempts" all of Plaintiffs' state law claims, Opening Br. 56-58, but they are wrong. The "complete preemption doctrine" only applies in "extraordinary" cases where a federal statute both preempts state law claims and provides a replacement federal cause of action. *See Caterpillar*, 482 U.S. at 393. No court has ever held that the Clean Air Act completely preempts any state law claims, and Plaintiffs thoroughly explain why the doctrine does not apply here. *See* Plaintiffs-Appellees' Brief ("Answering Br.") 33-38.

The conclusion that the Clean Air Act does not "completely" preempt all state law climate claims is confirmed by the fact that that Act does not even "ordinarily" preempt all state law climate claims. Ordinary preemption, as distinct from complete preemption, comes in three forms: "express," "field," and "conflict." *Murphy*, 138 S. Ct. at 1480. As explained below, under any of these formal tests, the Clean Air Act does not broadly preempt all state law climate claims either.

This should not be surprising. *First*, all preemption is ultimately based on the Supremacy Clause, which simply provides "that federal law is supreme in case of a conflict with state law." *Murphy*, 138 S. Ct.

at 1479. At bottom, state law climate claims are not generally preempted because there is no inherent conflict between those claims and the Clean Air Act. "The central goal of the Clean Air Act is to reduce air pollution." *OFA*, 331 F.3d at 673. State law climate claims do not conflict with that goal—they complement it. *Second*, "[t]he text of the Clean Air Act, in a number of different sections, explicitly protects the authority of the states to regulate air pollution." *Exxon Mobil Corp.*, 217 F.3d at 1254. Among other things:

> The Clean Air Act also includes a sweeping and explicit provision entitled the "Retention of State Authority." This section provides that, with the exception of aircraft emissions, standards for new motor vehicles and . . . [certain] fuel additives, "nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution.

Id. at 1255 (quoting 42 U.S.C. § 7416). The Act also contemplates the existence of both statutory and common law rights to seek relief from harmful emissions *outside* the Act's framework, and explicitly preserves those rights. *See* 42 U.S.C. § 7604(e) (provision of "citizen suit" right to enforce Clean Air Act standards shall not restrict "any right" "under

any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief").

a. The Clean Air Act does not expressly preempt all state law climate claims.

Congress knows how to broadly preempt state law if it wants to. The Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, for example, preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). The Clean Air Act contains no comparable provision broadly preempting state laws that relate to climate change. As noted above, the Act expressly preserves state law in broad areas.

The Act does contain a few express preemption provisions. For example, Section 209(a) provides that states may not prescribe "any standard relating to the control of emissions from new motor vehicles." 42 U.S.C. § 7543(a).[9] Section 211(c) likewise provides that states may

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[9] California, however, is expressly exempted from this provision and allowed to set higher standards in most instances. *See* 42 U.S.C. § 7543(e)(2)(A). And, in general, any other state may choose to adopt California's higher standards. *See id.* (2)(B).

not impose controls on any "fuel or fuel additive" "for purposes of motor vehicle emission control." *Id.* § 7545(c)(4)(A)[10]; *see also id.* § 7573 (preempting direct state regulation of aircraft emissions).

But these express provisions are limited to their terms and do not preempt even all state law actions relating to fuels or to new motor vehicle emissions. *See, e.g.*, *OFA*, 331 F.3d at 670 (California ban on fuel additive not preempted under Section 211(c) because ban was enacted to protect state waters and not to regulate emissions); *O'Keeffe*, 903 F.3d at 917 (Oregon program regulating production and sale of fuels based on greenhouse gas emissions not preempted under Section 211(c)); *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Products Liab. Litig.*, 2018 WL 4777134, at *20 (N.D. Cal. Oct. 3, 2018) (state law claims for deceptive marketing of "clean" emission vehicles not preempted by Section 209(a)). The presence of these specific preemption provisions simply highlights that the Clean Air Act does not contain any provision that broadly preempts state law claims that relate to climate change.

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[10] California, again, is generally exempt. *See* 42 U.S.C. § 7545(c)(4)(B).

b. The Clean Air Act does not preempt the field of climate regulation.

State law can also be preempted "where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." *OFA*, 331 F.3d at 667 (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990)). No court has ever held that the Clean Air Act occupies the entire regulatory field relating to air pollution or climate change. With good reason. "It is well settled that the states have a legitimate interest in combating the adverse effects of climate change on their residents. Air pollution prevention falls under the broad police powers of the states, which include the power to protect the health of citizens in the state." *O'Keeffe*, 903 F.3d at 913 (citations omitted). In these areas, there is a strong presumption that state law is not preempted "unless it was the clear and manifest purpose of Congress to do so." *Exxon Mobil Corp.*, 217 F.3d at 1256; *OFA*, 331 F.3d at 673; *see also Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (presumption against preemption of state police powers is a "cornerstone[] of our

preemption jurisprudence"); *Silkwood*, 464 U.S. at 248 (states possess "traditional authority to provide tort remedies").[11]

The Clean Air Act does not provide evidence—clear or otherwise—that Congress intended to preempt all state authority to address climate change. To the contrary, as discussed above, the Act evidences clear congressional intent to broadly protect the authority of states to regulate air pollution. *Exxon Mobil Corp*., 217 F.3d at 1254-56. "The first section of the Clean Air Act, entitled 'Congressional Findings,' makes clear that the states retain the leading role in regulating matters of health and air quality." *Id*. at 1254 (citing 42 U.S.C. § 7401(a)(3)). In other sections of the Act, "the primary responsibility of the states is again reaffirmed." *Id*. (citing 42 U.S.C. § 7407, covering state implementation plans for air quality). The Act further expressly preserves state authority in "sweeping and explicit" language, *id.* at

[11] *Accord In re Methyl Tertiary Butyl Ether (MTBE) Products Liab. Litig.,* 725 F.3d 65, 96 (2d Cir. 2013) ("Imposing state tort law liability for negligence, trespass, public nuisance, and failure-to-warn—as the jury did here—falls well within the state's historic powers to protect the health, safety, and property rights of its citizens. In this case, therefore, the presumption that Congress did not intend to preempt state law tort verdicts is particularly strong.").

1255 (citing 42 U.S.C. § 7416), and then expressly preserves the right of "any person" to enforce those rights outside of the Clean Air Act, *see* 42 U.S.C. § 7604(e). The text and structure of the Act foreclose any inference that Congress intended federal authority to be exclusive. *Exxon Mobil Corp.*, 217 F.3d at 1254 ("The Supreme Court has given substantial weight in preemption analysis to evidence that Congress intended to preserve the states regulatory authority.").[12] *Cf. Wyeth*, 555 U.S. at 575 (the case for preemption is "particularly weak" where Congress indicates awareness of the operation of state law).

In short, nothing in the Clean Air Act demonstrates a congressional intent to exclusively occupy the field of climate regulation—or, for that matter, fields of production and marketing of fossil fuels, which are not addressed by the Act at all.

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[12] Congressional intent to exclusively occupy a field of regulation can sometimes be inferred from the scope of a statute. *Altria Grp. v. Good*, 555 U.S. 70, 76 (2008). But simply labeling a statute's scope "comprehensive" does not suffice. *See, e.g., Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 613 (1991). The Clean Air Act is a prime example: it "establishes a comprehensive program for controlling and improving the United States' air quality," but it does so through both "state and federal regulation." *Natural Res. Def. Council, Inc. v. U.S. E.P.A.*, 638 F.3d 1183, 1185 (9th Cir. 2011).

c. State law climate claims do not inherently conflict with the Clean Air Act.

Conflict preemption exists "where 'compliance with both state and federal law is impossible,' or where 'the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *ONEOK, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1595 (2015) (quoting *California v. ARC America Corp.*, 490 U.S. 93, 100-101 (1989)).

"Impossibility preemption is a demanding defense." *Wyeth*, 555 U.S. at 573. It is not impossible, for example, to comply with both "minimum federal standards" and "more demanding state regulations." *See Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141-142 (1963); *see also Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002); *Patriotic Veterans, Inc. v. Indiana*, 736 F.3d 1041, 1049 (7th Cir. 2013) ("The fact that a state has more stringent regulations than a federal law does not constitute conflict preemption."). The Clean Air Act generally imposes minimum federal standards and expressly contemplates that states can adopt more demanding standards in many areas. *See, e.g.*, 42 U.S.C. §§ 7416, 7604(e); *Exxon Mobil Corp.*, 217 F.3d at 1255; *Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685, 693 (6th Cir. 2015) ("For one thing, the Clean Air Act expressly reserves for the

states—including state courts—the right to prescribe requirements more stringent than those set under the Clean Air Act.”). In other words, even if state law imposes additional or higher standards—such as through tort duties—it is generally possible to meet those standards and also comply with the Act.

Nor are additional state law duties likely to stand as an obstacle to achieving the purposes of the Clean Air Act. “The central goal of the Clean Air Act is to reduce air pollution.” *OFA*, 331 F.3d at 673; *see also Exxon Mobil Corp.*, 217 F.3d at 1255 (the Act “force[s] the states to do their job in regulating air pollution effectively”). Only if state law has the effect of increasing air pollution is it likely to conflict with the Act.

Defendants here contend that Plaintiffs’ state law claims must be preempted because they “would contravene the [Act’s] carefully crafted regulatory scheme by curbing *nationwide and global* emissions.” Opening Br. 57. This bizarre contention finds no support in the Act. The Clean Air Act was not crafted to ensure a minimum level of nationwide emissions—nothing in the Act evinces a congressional concern with

reducing pollution too much.[13] Further, courts should be slow to imply ancillary purposes not clearly expressed in federal legislation or "to entertain hypothetical conflicts" with state law. *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 486, 488, 499 (9th Cir. 1984) (federal allowance for some low-oil ballast discharges from maritime tankers did not preempt state complete ban on discharges); *cf., e.g.*, *Stengel v. Medtronic Inc.*, 704 F.3d 1224, 1231-32 (9th Cir. 2013) (where state-law duty parallels federal-law duty, state imposition of additional damages remedy does not conflict); *OFA*, 331 F.3d at 673 (state law that had the effect of increasing gasoline prices did not conflict with Clean Air Act).

Broadly speaking, the Clean Air Act directs EPA to establish minimum federal standards for certain air pollutants and certain sources of air pollution. *See, e.g.*, *AEP*, 564 U.S. at 424-25 (describing regulation of stationary sources under Clean Air Act Section 111). A state law that *required* a source to emit pollution in violation of federal

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[13] In any event, on their face the instant suits do not seek to enjoin emissions. *See* ER312 (prayer for relief in complaint); Answering Br. 6. Plaintiffs seek redress for Defendants' tortious production and marketing of fossil fuels. The Clean Air Act does not address these subjects.

standards would likely be preempted. But a federal pollution standard does not necessarily imply a federal right to pollute up to that standard. *Accord, e.g.*, *Chinatown Neighborhood Ass'n v. Harris*, 794 F.3d 1136, 1142 (9th Cir. 2015) (federal shark fishing allowance did not imply mandate to harvest; accordingly, state law restricting shark fin possession did not conflict); *Wyeth*, 555 U.S. at 583 (Thomas, J., concurring) (FDA approval of drug label "does not give drug manufacturers an unconditional right to market their federally approved drug at all times"). In other words, state law that has the effect of reducing pollution is unlikely to conflict with the Clean Air Act.

III. There is no unique federal interest in climate change that preempts all state law climate claims.

Throughout their appellate brief, Defendants suggest that the "interstate" aspects of climate change create a unique federal interest that broadly preempts state law in this area. Not so. Only a "narrow" category of interstate or international disputes truly raise uniquely federal interests: those "implicating the conflicting rights of States or our relations with foreign nations." *Texas Industries*, 451 U.S. at 641. Plaintiffs' claims here are brought against private parties for the

tortious production and marketing of fossil fuel products. Such claims do not implicate the conflicting rights of States.

The actual interstate aspects of Plaintiffs' claims are mundane. Suits involving parties in different states, or conduct that crosses state lines, or nationwide marketing, all have "interstate" characteristics, but do not implicate uniquely federal concerns. *Cf., e.g.*, *Felix v. Volkswagen Grp. of Am., Inc.*, 2017 WL 3013080, at *1, *6-*7 (N.J. Super. Ct. App. Div. July 17, 2017), *appeal denied*, 177 A.3d 109 (N.J. 2017) (state law claims against non-resident car manufacturer for fraudulent marketing not preempted by Clean Air Act); *W. Virginia ex rel. Morrisey v. McKesson Corp.*, 2017 WL 357307, at *1 (S.D. W. Va. Jan. 24, 2017) (state law tort claims against non-resident, national drug distributor, arising out of tortious interstate shipments, remanded to state court).

To be sure, there is a federal interest in addressing climate change. But it is not a unique interest. "It is well settled that the states have a legitimate interest in combating the adverse effects of climate change on their residents." *O'Keeffe*, 903 F.3d at 913; *accord Rocky Mountain Farmers Union v. Corey*, --- F.3d ---, 2019 WL 254686, at *12 (9th Cir. Jan. 18, 2019). There are also exclusively federal remedies that

should be brought to bear. But federal remedies are not the exclusive means to address climate change. State law remedies are an important component of mitigation efforts.[14]

In short, the federal interest in climate change is not "unique" and does not preclude enforcement of state law remedies. *Cf. Nat'l Audubon Soc. v. Dep't of Water*, 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.").

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[14] *See, e.g.*, Fourth National Climate Assessment, vol. II, ch. 29, fig. 29.1 *Mitigation-Related Activities at State and Local Levels,* https://nca2018.globalchange.gov/chapter/29/. "For example, states in the Northeast take part in the Regional Greenhouse Gas Initiative, a mandatory market-based effort to reduce power sector emissions." *Id.* ch. 29, at *State of Emissions Mitigation Efforts*. This state law initiative has led to substantial reductions in emissions. *See, e.g.*, Murray, B. C., and P. T. Maniloff, 2015: *Why have greenhouse emissions in RGGI states declined? An econometric attribution to economic, energy market, and policy factors.* Energy Economics, 51, 581–589, *available at* https://doi:10.1016/j.eneco.2015.07.013.

CONCLUSION

The Court should affirm the district court's orders remanding these cases to state court.

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Respectfully submitted,

/s/ Peter Huffman

Peter Huffman*
(NY Bar # 5144274)
Natural Resources Defense Council
1152 15th Street NW, Suite 300
Washington, D.C. 20005
phuffman@nrdc.org
(202) 289-2428

Ian Fein
Natural Resources Defense Council
111 Sutter Street, 21st Floor
San Francisco, CA 94104
ifein@nrdc.org

Counsel for Amicus Curiae
Natural Resources Defense Council

* Application for admission pending.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(g), I certify that:

This brief complies with Rule 29(a)(5)'s type-volume limitation because it contains 6257 words (as determined by the Microsoft Word 2016 word-processing system used to prepare the brief), excluding the parts of the brief exempted by Rule 32(f).

This brief complies with Rule 32(a)(5)'s typeface requirements and Rule 32(a)(6)'s type-style requirements because it has been prepared in a proportionately spaced typeface using the 2016 version of Microsoft Word in 14-point Century Schoolbook font.

/s/ Peter Huffman
Peter Huffman

CERTIFICATE OF SERVICE

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

/s/ Peter Huffman
Peter Huffman