

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CITY OF OAKLAND, a Municipal Corporation, and The People of the State of California, acting by and through the Oakland City Attorney; CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, and The People of the State of California, acting by and through the San Francisco City Attorney Dennis J. Herrera,
Plaintiffs-Appellants,

v.

BP PLC, a public limited company of England and Wales; CHEVRON CORPORATION, a Delaware corporation; CONOCOPHILLIPS, a Delaware corporation; EXXON MOBIL CORPORATION, a New Jersey corporation; ROYAL DUTCH SHELL PLC, a public limited company of England and Wales; DOES, 1 through 10,
Defendants-Appellees.

No. 18-16663

D.C. Nos.
3:17-cv-06011-WHA
3:17-cv-06012-WHA

ORDER AND
AMENDED
OPINION

Appeal from the United States District Court
for the Northern District of California
William Alsup, District Judge, Presiding

Argued and Submitted February 5, 2020
Pasadena, California

Filed May 26, 2020
Amended August 12, 2020

Before: Sandra S. Ikuta, Morgan Christen, and
Kenneth K. Lee, Circuit Judges.

Order;
Opinion by Judge Ikuta

SUMMARY*

Removal/Subject-Matter Jurisdiction

The panel vacated the district court's judgment and order denying defendants' motion to remand cases to the state court from which they had been removed on the ground that plaintiffs' claim arose under federal law, and remanded for the district court to consider whether there was an alternative basis for subject-matter jurisdiction.

The City of Oakland and the City and County of San Francisco filed complaints in California state court asserting

* This summary constitutes no part of the opinion of the court. It has

a California public-nuisance claim against five energy companies arising from the role of fossil fuel products in global warming. The complaints sought an order of abatement requiring the energy companies to fund a climate change adaptation program for the cities. The energy companies removed the complaints to federal court, identifying seven grounds for subject-matter jurisdiction, including that the cities' public-nuisance claim was governed by federal common law. The district court denied the cities' motion to remand the cases to state court, holding that it had federal-question jurisdiction under 28 U.S.C. § 1331 because the cities' claim was "necessarily governed by federal common law." The cities amended their complaints to include a federal nuisance claim. The district court dismissed for failure to state a claim, and it dismissed four defendants for lack of personal jurisdiction.

Considering the pleadings filed at the time of removal, the panel held that the state-law public-nuisance claim did not arise under federal law for purposes of § 1331. The panel explained that there is an exception to the well-pleaded complaint rule for a claim that arises under federal law because federal law is a necessary element of the claim. This exception applies when a federal issue is necessarily raised, actually disputed, substantial, and capable of resolution in federal court without disrupting the federal-state balance approved by Congress. The panel concluded that this exception did not apply because the state-law claim for public nuisance failed to raise a substantial federal question. A second exception, referred to as the "artful-pleading doctrine," allows removal where federal law completely preempts a state-law claim. The panel concluded that this exception did not apply because the state-law claim was not completely preempted by the Clean Air Act.

The panel further held that the cities cured any subject-matter jurisdiction defect by amending their complaints to assert a claim under federal common law. Thus, at the time the district court dismissed the cities' complaints, there was subject-matter jurisdiction. Nonetheless, the panel held that it could not affirm the district court's dismissals if there was not subject-matter jurisdiction at the time of removal. The panel concluded that the cities did not waive their argument in favor of remand by amending their complaints. The panel also rejected the energy companies' argument that any impropriety with respect to removal could be excused by considerations of finality, efficiency, and economy. The panel agreed with the Fifth Circuit that a dismissal for failure to state a claim, unlike a grant of summary judgment or judgment after trial, is generally insufficient to forestall an otherwise proper remand.

The panel remanded the cases to the district court to determine if there was an alternative basis for jurisdiction.

COUNSEL

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