SHER EDLING LLP
PROTECTING PEOPLE AND THE PLANET

July 7, 2020

Via ECF

Molly C. Dwyer
Clerk of Court
U.S. Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: *City of Oakland v. BP P.L.C.,* No. 18-16663
Plaintiffs-Appellants' Response to Judge Alsup's June 25, 2020 Letter

Dear Ms. Dwyer,

We write on behalf of plaintiffs-appellants City of Oakland et al. (the "People") to respond to District Court Judge Alsup's letter to the Panel, dated June 25, 2020, asking it "to correct a mistake" in its unanimous decision in *City of Oakland v. BP PLC*, 960 F.3d 570 (9th Cir. 2020). Respectfully, there is no mistake. The Panel considered and rejected all grounds for federal-question jurisdiction relied upon by the district court. In so doing, it disposed of all arguments properly preserved and advanced by defendant-appellee Energy Companies on appeal that pertained to that issue. Nonetheless, to eliminate any doubt, the People propose below a modification to Footnote 12 to clarify that the Panel's analysis necessarily rejected the district court's assertion of subject-matter jurisdiction based on "the navigable waters of the United States" — a jurisdictional theory, we note, that the Energy Companies did *not* pursue on appeal to this Court.

A. The Panel's Analysis Necessarily Precludes the District Court's "Navigable Waters" Theory of Jurisdiction.

The Panel made clear, in holding that the People's "state-law claim for public nuisance does not arise under federal law for purposes of 28 U.S.C. § 1331," that the standards for "arising-under" jurisdiction were not satisfied in this case "[*e*]*ven assuming that the Cities' allegations could give rise to a cognizable claim for public nuisance under federal common law*, . . . because the state-law claim for public nuisance fails to raise a substantial federal question." *City of Oakland*, 960 F.3d at 575, 580 (emphasis added) (internal citation omitted). Nothing about the character of the instrumentalities giving rise to the public nuisance (i.e., the global-warming-induced expansion of ocean waters) has any bearing on that inquiry, which turns on whether, under the well-pleaded complaint rule, the People's state law complaint arises under Section 1331, either pursuant to *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005), or the

doctrine of complete preemption. *See* 960 F.3d at 580-582.[1] As the Panel correctly held, the People's well-pleaded complaint does not support either basis for jurisdiction in this case.

B. This Court Was Not "Led Astray" and it Correctly Rejected the District Court's Legal Analysis

The district court states that "it appears counsel led the Panel astray in recharacterizing the reasoning of the district court as admiralty jurisdiction." Dkt. No. 173 at 1. The People's briefs do not support that characterization. To the contrary, the People directly addressed the district court's navigable-waters theory, and *separately* pointed to the Energy Companies' waiver of their admiralty jurisdiction argument. *See* AOB at 14 n.4, 27-28.

The first time the navigable-waters theory of removal jurisdiction arose in the district court was when the district court issued a Request for Supplemental Briefing, inviting the parties to address whether the purported relationship between the People's claims and the navigable waters of the United States supported removal. ER34. The parties responded as directed, and their briefs addressed the navigable-waters theory from the perspective of both admiralty jurisdiction (which the Energy Companies had waived) and federal-question jurisdiction. ER193-201.

The district court subsequently held, in the order reversed by this Court, that the People's public nuisance claim was properly removed because it was "necessarily governed by federal common law," "noting" in part that because flooding involves navigable waters, the People's claims "necessarily implicate an area quintessentially within the province of the federal courts." *State of California v. BP P.L.C.*, Case No. C. 17-06011 WHA, 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018) (citing *Michigan v. U.S. Army Corps of Engineers*, 667 F.3d 765 (7th Cir. 2011)).[2]

---

[1] At least two district courts have rejected navigable waters as a basis for federal removal jurisdiction in climate injury cases similar to this. *See Mayor and City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538, 560 (D. Md. 2019), as amended (June 20, 2019), *aff'd on other grounds*, 952 F.3d 452 (4th Cir. 2020) ("That the City's hypothetical remedy might include some construction of infrastructure on navigable waters, and thus require the approval of the Army Corps, does not mean that an issue of federal law is necessarily raised by the City's claims."); *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142, 151 (D.R.I. 2019) ("By mentioning . . . navigable waters of the United States, Appellees seek to raise issues that they may press in the course of this litigation, but that are not perforce presented by the State's claims."); *cf*. United States Amicus Br. (Dkt. No. 97) at 9 (urging "the Court *not* to affirm the district court's conclusion that jurisdiction may be sustained because the Cities' alleged flooding-related injuries would be most immediately caused by the 'navigable waters of the United States'") (emphasis in original). Indeed, the district court's navigable-waters theory would not support even ordinary preemption. United States Amicus Br. (Dkt. No. 97) at 9 (the Clean Water Act "regulates *discharges of pollutants to* – not flooding from – 'navigable waters'") (citing 33 U.S.C. §§ 1311, 1362(12)) (emphasis in original).

[2] *Michigan* did not address removal jurisdiction; the plaintiffs in that case had filed their lawsuit in federal court alleging federal causes of action only. *See* 667 F.3d 768-69.

On appeal, the People pointed out that the district court's navigable-waters theory could not support removal jurisdiction because "the court did not explain how a federal navigable-waters claim could completely preempt the People's state law public nuisance claim." AOB at 14 n.4. The People also made the *independent* argument that the Energy Companies' admiralty jurisdiction argument lacked merit, and was waived in any event, because the Energy Companies had failed to raise that jurisdictional ground in their notices of removal. *Id.* at 27-28. The People did not mislead the Panel concerning the district court's ruling, and the Panel's general analysis of "arising-under" jurisdiction makes clear that it was not "led astray" by the People's briefs.

The district court nonetheless takes issue with Footnote 12 of the Panel's opinion on the ground that it incorrectly suggests that the district court had relied on admiralty jurisdiction as one basis for denying the People's remand motion. Respectfully, that is not a fair reading of the footnote, which correctly observes that the district court requested supplemental briefing "on how the concept of "'navigable waters of the United States' . . . relates to the removal jurisdiction issue in th[e] case." *Id.* at 585 n.12 (alteration in the original). While it is true that the Energy Companies' supplemental briefing in the district court improperly raised a new admiralty jurisdiction argument as additional support for their position, ER194-198, the Panel in Footnote 12 simply stated that this new argument had been waived and would not be available to the Energy Companies on remand, which is why it advised the district court to "confine its analysis to the bases for jurisdiction asserted in the notices of removal."

C. Even if the Panel's Opinion Had Not Necessarily Rejected the District Court's Navigable Waters Theory, that Theory was Waived by the Energy Companies on Appeal

The district court's letter asks the Panel to "withdraw Footnote 12 and address the merits of the ground on which removal jurisdiction was actually sustained below." Dkt. No. 173 at 3. As explained above, the Panel's rejection of the district court's navigable waters theory is necessarily included in the Panel's analysis of what is required to establish arising-under jurisdiction under *Grable* and the complete-preemption doctrine. In addition, the Energy Companies waived this argument, by choosing not to include it as a substantive argument in their Response Brief.

The entirety of the Energy Companies' navigable-waters argument on appeal was contained in a single sentence that quoted a short excerpt from the district court's order: "Moreover, because 'the instrumentality of the alleged harm is the navigable waters of the United States,' ER25, Plaintiffs' claims necessarily arise under federal law." Response Brief at 37. The Energy Companies' failure to present any legal authority, factual support, or argument in support of "navigable waters" removal jurisdiction constitutes waiver. *See Nw. Acceptance Corp. v. Lynnwood Equip., Inc.*, 841 F.2d 918, 924 (9th Cir. 1988) (failure to present an "intelligible argument" in violation of Fed. R. App. P. 28(a)(4) waives issue on appeal); *In re Wilko Mach., Inc.*, 172 F.3d 61 (9th Cir. 1999) (declining to address insufficiently briefed issue).

* * *

For the foregoing reasons, the Court should decline the district court's invitation to withdraw Footnote 12 or to add a new discussion of the merits of the district court's navigable-waters theory of jurisdiction. In the alternative, the Court could amend Footnote 12 as follows, to clarify that the district court's navigable-waters theory fails on its merits and was, in any event, waived by the Energy Companies:

> The district court requested supplemental briefing on how the concept of the "'navigable waters of the United States' . . . relates to the removal jurisdiction issue in th[e] case." **Although the district court subsequently concluded that the navigable waters of the United States were an "instrumentality" of the alleged public nuisance and therefore required application of federal common law to the People's claims, this argument fails for the reasons we explained *supra*. In addition, the Energy Companies passing reference to that conclusion in their Response Brief at 37 is insufficient to preserve that argument for appeal (which would fail anyway for the reasons set forth above). Thus, like admiralty jurisdiction, which** the Energy Companies **failed to invoke** in their notices of removal, **the navigable-waters jurisdictional theory is also waived.** *See* 28 U.S.C. § 1446(a) (notice of removal must "contain[] a short and plain statement of the grounds for removal"); *ARCO*, 213 F.3d at 1117 (notice of removal "cannot be amended to add a separate basis for removal jurisdiction after the thirty day period" (citation omitted)); *O'Halloran*, 856 F.2d at 1381 (same); ***Nw. Acceptance Corp. v. Lynnwood Equip., Inc.*, 841 F.2d 918, 924 (9th Cir. 1988) (failure to present an "intelligible argument" constitutes waiver).** Thus, the district court should confine its analysis to the bases for jurisdiction **that were properly preserved**.

Respectfully submitted,

/s/ Victor M. Sher
Victor M. Sher
Sher Edling LLP

Counsel for Plaintiffs-Appellants

cc: All Counsel of Record (via ECF)