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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CITY OF OAKLAND, a Municipal Corporation, and THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Oakland City Attorney,

Plaintiffs,

v.

BP P.L.C., 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, and DOES 1 through 10,

Defendants.

Case No.: 3:17-cv-06011-WHA

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR LEAVE TO RESPOND TO UNITED STATES' AMICUS BRIEF; MEMORANDUM OF POINTS AND AUTHORITIES

Hearing Date: May 24, 2018
Hearing Time: 8:00 a.m.
Courtroom 12 (19th floor)
Judge: Hon. William Alsup

CHEVRON CORP.,

Third Party Plaintiff,

v.

STATOIL ASA,

Third Party Defendant.

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,

v.

BP P.L.C., 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, and DOES 1 through 10,

Defendants.

CHEVRON CORP.,

Third Party Plaintiff,

v.

STATOIL ASA,

Third Party Defendant.

Case No.: 3:17-cv-06012-WHA

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR LEAVE TO RESPOND TO UNITED STATES' AMICUS BRIEF; MEMORANDUM OF POINTS AND AUTHORITIES

Hearing Date: May 24, 2018
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NOTICE OF MOTION AND MOTION FOR LEAVE TO RESPOND TO UNITED STATES' AMICUS BRIEF

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that plaintiffs, the City of Oakland and the People of the State of California, acting by and through Oakland City Attorney Barbara J. Parker in Case No. 3:17-cv-06011-WHA, and the City and County of San Francisco and the People of the State of California, acting by and through San Francisco City Attorney Dennis J. Herrera in Case No. 3:17-cv-06012-WHA, hereby move the Court for an Order allowing them to respond to the amicus brief filed by the United States on May 10, 2018. A copy of the proposed response is attached as Exhibit A. This motion is based on this notice of motion and motion, the accompanying memorandum of points and authorities, the evidence and records on file in this action, and any other written or oral evidence or argument that may be presented at or before the time this motion is decided.

MEMORANDUM OF POINTS AND AUTHORITIES

The Court previously issued an order in connection with the briefing of defendants' motions to dismiss which invited the United States to submit an amicus brief "on the question of whether (and the extent to which) federal common law should afford relief of the type requested by the complaints."[1] The Order stated the Court would appreciate receiving the amicus brief by April 20 and that "[i]f the United States can meet the April 20 deadline then the parties will be given an opportunity to respond to the amicus brief via supplemental briefing."[2] Subsequently, plaintiffs filed amended complaints and the Court issued a revised briefing schedule for the motions to dismiss.[3] The Court then granted the United States an extension until May 10 to submit an amicus brief.[4] On May 10, the United States submitted a 24-page amicus brief.[5] The hearing on defendants' motions to dismiss is scheduled for May 24.

It appears that the Court contemplated allowing the parties to respond to any amicus brief by the United States should time permit. The United States has raised several new arguments in its amicus brief concerning the cognizability of the Cities' federal common law public nuisance claim, displacement of federal common law, foreign policy preemption, the Act of State doctrine and foreign commerce preemption. Plaintiffs request leave to file the attached response to the United States' amicus brief. Plaintiffs will file their response promptly upon receiving permission from the Court.

CONCLUSION

Plaintiffs request that the Court grant them leave to file a short response to the United States amicus brief.

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[1] Order Setting Deadline for Motions to Dismiss and Inviting United States to File Amicus Brief, Mar. 1, 2018, ECF No. 136 in Case No. 3:17-cv-06011-WHA.

[2] *Id.*

[3] Order Setting Briefing Schedule for Motions to Dismiss Amended Complaint, Apr. 4, 2018, ECF No. 207 in Case No. 3:17-cv-06011-WHA.

[4] Order Granting United States' Motion for Extension of Time to Consider Whether to Participate as *Amicus Curiae*, Apr. 18, 2018, ECF No. 218 in Case No. 3:17-cv-06011-WHA.

[5] Amicus Curiae Brief of United States of America in Support of Dismissal, May 10, 2018, ECF No. 245 in Case No. 3:17-cv-06011-WHA.

Dated: May 18, 2018

Respectfully submitted,

** */s/ Erin Bernstein*
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** Pursuant to Civ. L.R. 5-1(i)(3), the electronic filer has obtained approval from this signatory.

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EXHIBIT A

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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CHEVRON CORP.,

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I. INTRODUCTION

The United States' amicus brief makes three arguments, all largely based on misconceptions about the scope and complexity of the Cities' claims.

First, the United States incorrectly contends that federal common law affords no relief in these cases, relying heavily on out-of-context snippets from *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011) ("*AEP*"). *AEP* did not decide whether federal common law would afford a remedy even in that case, where the plaintiffs sought judicial emissions caps that would have engaged the courts in a direct regulation of pollution sources already regulated by the U.S. Environmental Protection Agency. The Court in *AEP* acknowledged that "public nuisance law, like common law generally, adapts to changing scientific and factual circumstances," and that "federal courts are free to apply the traditional common-law technique of decision when fashioning federal common law." *AEP*, 564 U.S. at 423 (quotation marks omitted). These principles plainly counsel this Court to let the Cities try to prove their claims, particularly since these claims do not challenge any activity regulated under the Clean Air Act, and do not seek to enjoin any defendant's conduct -- and therefore raise none of the policy concerns at issue in *AEP*. The United States' assertion that these cases will engage the Court in "critical policy judgments," USA Br. 5:8,[1] is mistaken: the main "judgments" at issue are who has contributed most to the massive flooding threat to the Cities, and whether those parties should be required to pay to avert the harm. Both questions are traditional tort issues and the second has already been resolved by basic nuisance principles – including under decisions that evaluated factual scenarios (*e.g.*, pollution of Lake Michigan by multiple sources) that parallel this case in their salient features. And no matter who prevails in this lawsuit, this Court will effectively be making a judgment on these issues: dismissing the case simply would be making a pre-judgment in defendants' favor, by eliminating a potential liability that could otherwise attach under existing legal principles.

[1] All ECF references herein are to No. 3:17-cv-06011-WHA. "USA Br." refers to the Amicus Curiae Brief of the United States of America in Support of Dismissal, May 10, 2018, ECF 245. "Def. Br." refers to Defendants' Motion to Dismiss First Amended Complaint, Apr. 18, 2018, ECF 225. "FAC" refers to the Amended Complaints, Apr. 3, 2018, ECF Nos. 199 (17-cv-6011-WHA) and 168 (17-cv-6012-WHA).

Second, the United States' argument based upon displacement of federal common law essentially regurgitates the argument from the defendants' briefs. The argument should be rejected for the reasons described in the Cities' papers responding to those briefs. ECF 235 at 9-13.

Third, the Court should reject the United States' separation of powers arguments. Once again, these arguments misunderstand the Cities' claims – *i.e.*, the United States assumes that these claims require a complex balancing of the costs and benefits of fossil fuels. Not so. Where a plaintiff's injury is severe, and where the remedy seeks to afford relief without enjoining the defendant's conduct, the utility of that conduct is irrelevant. Put differently, the fact that the defendants may provide an economically valuable product in no way justifies their attempt to walk away from the harm these products are causing in Oakland and San Francisco. Forcing the defendants to pay to deal with this harm, rather than simply letting it fall on the parties who happen to suffer most, merely internalizes the hidden costs of Defendants' products; it does not enmesh the Court in cost-benefit analysis.

At bottom, the common law of nuisance, and the federal common law of nuisance in particular, were designed to protect against emerging environmental harms caused by conduct that has not yet been regulated by statute. The abatement fund the Cities seek here against producers, sellers and promoters of fossil fuels is entirely consistent with these traditional principles; the United States' arguments to the contrary should be rejected.

II. ARGUMENT

A. Federal common law affords relief.

The United States correctly observes that in *AEP*, the Supreme Court "left open" the issues of "whether federal common law claims are available to redress climate-related claims" and whether political subdivisions of a state may bring federal nuisance claims. USA Br. 7:13-16. But the United States' answers to these questions are based upon out-of-context snippets from *AEP*, inapposite cases, and misinterpretation of federal common law.[2]

[2] The United States proceeds on the premise that federal law can simultaneously apply in these cases while providing no remedy. USA Br. 6:20. However, in a case where jurisdiction is premised on removal, this is incorrect. *See Sullivan v. First Affiliated Secur., Inc.*, 813 F.2d 1368, 1372 (9th Cir. 1987) ("If . . . state law is preempted by federal law and federal law provides no remedy, the

First, the United States is incorrect in arguing that there should be no cognizable federal claim here absent action by Congress to create a claim. The United States relies on the Court's statement in *AEP* that "'the Court remains mindful that it does not have creative power akin to that vested in Congress.'" USA Br. 7:3-4 (quoting *AEP*, 564 U.S. at 422). But the Court ultimately declined to decide whether federal common law afforded a remedy, even in a more complicated case like *AEP*, which sought judicially imposed emissions caps. In so doing, the Court pointed out that: (1) "we have recognized that public nuisance law, like common law generally, adapts to changing scientific and factual circumstances," (2) the Court had previously adjudicated claims even though they did "not concern nuisance of the simple kind that was known to the older common law," and (3) "federal courts are free to apply the traditional common-law technique of decision when fashioning federal common law." *Id.* at 423 (quotation marks omitted).

Nor does the United States advance its argument by invoking cases concerning the creation of new private rights of action based upon federal statutory rights. USA Br. 7:1-13. Those cases deal with an entirely different problem, *i.e.*, the need to "interpret [a] statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). "Statutory intent on this latter point is determinative." *Id*. Thus, for example, in *Bush v. Lucas*, 462 U.S. 367, 368 (1983), the Court declined to recognize a First Amendment damages remedy for a demoted federal employee "[b]ecause such claims arise out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States." Here, there is no federal remedial scheme, statutory or otherwise, for claims against fossil fuel producers for their contributions to global warming.

The United States' characterization of prior federal common law cases is also inaccurate. *Milwaukee I* did not involve "a single defendant's activities" or "discrete" pollution. USA Br. 7:20-21. There were six defendants in that case as originally filed in the Supreme Court. *See Illinois v.*

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state claim cannot be recharacterized as federal, as no federal claim exists, preemption is interposed solely as a defense, and removal is improper.").

City of Milwaukee, 406 U.S. 91, 93 (1972). And when Illinois re-filed the case in federal district court under federal question jurisdiction, it was joined by Michigan as a co-plaintiff, which complained of a notably non-discrete harm, *i.e.*, eutrophication of Lake Michigan, a process of algal overgrowth caused by nutrient pollution not just from the major source defendants but from non-point sources of runoff all over a watershed spread across multiple states and two nations:

> Eutrophication is a gradual process in which the changes from year to year are imperceptible. One must measure in terms of decades if not longer intervals to see the difference . . . . Nutrients are discharged into the lake by "point sources," such as paper mills and sewage treatment plants, and by "non-point sources," such as tributary creeks and rivers carrying the runoff from farm lands, and even the air, which conveys significant quantities of phosphorous and other chemicals into the lake. There is no means of identifying any particular molecule of phosphorous or nitrogen or any other chemical as having come from a particular source, either point or non-point.[3]

Notwithstanding the diffuse, diverse and numerous sources of pollution (ranging from the *de minimis* contributions of individual farms to the very large sewage plants), the district court applied the federal common law of public nuisance and found liability against "the largest point source on the lake." *Id*. at *15. Here, as in *Illinois v. Milwaukee*, the Cities have identified defendants that are among the largest contributors to a widespread environmental problem.

To be sure, as the United States points out, the Cities' claim here encompasses activity that is global in scope and products that are widely used. USA Br. 7:23-9:3. But that is simply a consequence of the fact that defendants engage in global conduct to produce, sell and promote products that cause global changes with discrete, localized impacts in many places. Here again the Supreme Court's observation in *AEP* is on point: "we have recognized that public nuisance law, like common law generally, adapts to changing scientific and factual circumstances." 564 U.S. at 423. And it has held, in the context of standing law, that injury "widely shared" by a great many people is

[3] *Illinois ex. rel. Scott v. City of Milwaukee*, 1973 U.S. Dist. LEXIS 15607 (N.D. Ill. 1973), at *13-15, *aff'd in rel. part, rev'd in part*, 599 F.2d 151 (7th Cir. 1979), *vacated on other grounds, Milwaukee v. Illinois*, 451 U.S. 304 (1981). The other case the United States cites, *Georgia v. Tennessee Copper Co*., 206 U.S. 230, 238 (1907), also involved more than one defendant. *See Georgia v. Tennessee Copper Co.*, 237 U.S. 474 (1915) (granting relief against additional defendant).

cognizable as long as it is concrete, a ruling it has applied to global warming.[4] The same logic applies here when considering the merits of a claim: causing widespread injury through the combined effects of widespread conduct on a vast scale is not a reason counseling *against* recognition of a claim.[5]

Second, the United States' contention that federal common law applies only in cases brought by itself and states as sovereigns misconstrues both the nature of the City Attorneys' legal authority and federal common law. USA Br. 9:4-5. Here, the City Attorneys have sued in the name of the People in both cases and as such are acting on behalf of the State within their respective jurisdictions.[6] Moreover, the United States overlooks cases holding that municipalities are proper plaintiffs under federal nuisance law.[7] And while it is true that, "[h]istorically," the federal common law of nuisance was grounded in the Supreme Court's original jurisdiction in actions by States, USA Br. 9:11-10:6, under *Milwaukee I* interstate nuisances now arise under federal law because of the nature of their subject matter. *Milwaukee I*, 407 U.S. at 105 n.6. This is the very reason why the United States, which is not entitled to bring a claim in the Supreme Court's original jurisdiction,

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[4] *FEC v. Akins*, 524 U.S. 11, 24 (1998) ("where a harm is concrete, though widely shared, the Court has found injury in fact . . . . This conclusion seems particularly obvious where (to use a hypothetical example) large numbers of individuals suffer the same common-law injury (say, a widespread mass tort)"); *Massachusetts v. EPA*, 549 U.S. 497, 522 (2007) ("That these climate-change risks are 'widely shared' does not minimize Massachusetts' interest in the outcome of this litigation.") (quoting *Akins*); *see also NW. Envtl. Def. Ctr. v. Owens Corning Corp.*, 434 F. Supp. 2d 957, 966 (D. Or. 2006) ("The greater the threatened harm, the less power the courts would have to intercede. That is an illogical proposition.").

[5] The United States invokes the Supreme Court's concern in *AEP* about varying and potentially conflicting pronouncements from federal district courts, USA Br. 8:18-23, but this, again, is an instance of out-of-context quotation. In context, the Supreme Court was addressing a claim for injunctive relief seeking to "set limits on greenhouse gases in the face of a law empowering EPA to set the same limits." 564 U.S. at 429. The same was true in *North Carolina v. TVA*, 615 F.3d 291 (4th Cir. 2010), also cited by the United States. *See* USA Br. 8:12-15. The Cities here do not seek to impose emissions limits and have not even brought suit against emitters.

[6] *See California v. Purdue Pharma L.P.*, 2014 WL 6065907, at *3-4 (C.D. Cal. Nov. 12, 2014) (holding that in public nuisance actions brought by a city on the People's behalf, the real party in interest is the state).

[7] *See Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 361 (2d Cir. 2009), *rev'd on other grounds*, 564 U.S. 410 (2011); *City of Evansville v. Kentucky Liquid Recycling*, 604 F.2d 1008, 1018 (7th Cir. 1979); *Township of Long Beach v. City of New York*, 445 F. Supp. 1203, 1214 (D.N.J. 1978).

itself may bring federal nuisance claims in federal district court and thus has long been, itself, a beneficiary of the federal nuisance doctrine set forth in *Milwaukee I*.[8]

The United States fails to demonstrate that the Cities' federal common law public nuisance claim affords no relief.

B. Congress has not displaced the Cities' claim.

The United States, in all of its displacement arguments, fundamentally misconstrues the displacement test. In *County of Oneida v. Oneida Indian Nation of New York State*, 470 U.S. 226, 238-39 (1985), the Supreme Court rejected displacement of a federal common law claim. In doing so, it emphasized that the legislation at issue contained "no remedial provision" for the conduct at issue, "in contrast to the specific remedial provisions" of the statute that displaced the claim in *Milwaukee II*.

Here, there is no "remedial provision" for global warming injuries caused by fossil fuel production, sales and promotion in any federal statute. The United States' assertion that the Clean Air Act displaces the claim here because "the Cities seek to hold the Defendants liable for exactly the same conduct (greenhouse gas emissions)" at issue in *AEP* and *Kivalina*, USA Br. 14:13-15, directly contradicts the focus of the Cities' complaints, this Court's prior decision on the remand motions,[9] and even defendants' argument that "this Court should *extend AEP* and *Kivalina* to find displacement here as well." Def. Br. 9:11-12 (emphasis added). The United States also misconstrues the complaints in contending that the allegations somehow encompass the use of fossil

[8] *See Stream Pollution Control Bd. v. United States Steel Corp.*, 512 F.2d 1036, 1040 n.9 (7th Cir. 1975) (Stevens, J.) (argument that federal nuisance "depends on the existence of a conflict between sovereigns" is at odds with cases permitting United States to sue in federal nuisance); *United States v. Ira S. Bushey & Sons*, 363 F. Supp. 110, 120 (D. Vt. 1973) (granting injunction to United States under federal common law), *aff'd without opinion*, 487 F.2d 1393 (2d Cir. 1973); *United States v. Stoeco Homes, Inc.*, 359 F. Supp. 672, 679 (D.N.J. 1973) ("defendant's activities amount to a public nuisance in violation of federal common law and, as such, are subject to abatement at the instance of the Government."), *modified*, *United States v. Stoeco Homes, Inc.*, 498 F.2d 597, 611 (3d Cir. 1974) ("The United States can, of course, sue to abate a public nuisance under federal common law.").

[9] *See* Order Denying Motions to Remand, ECF No. 134, at 6:18-21 ("plaintiffs here have fixated on an earlier moment in the train of industry, the earlier moment of production and sale of fossil fuels, not their combustion.").

fuels for chemical and plastics production, USA Br. 15:1-11, when the complaints in fact exclude such uses from defendants' contributions to global warming.[10]

The other domestic statutes that the United States relies upon, relating to the production of fossil fuels on federal lands, speak only in broad generalities and contain no remedial provision for the conduct at issue here, nor even any provision relating to climate change. USA Br. 20-22. These statutes thus do not "speak directly" to the issue presented here.

Nor is there any international relations action by Congress or the Executive Branch that speaks directly to the issue of compensation for global warming injuries caused by fossil fuel production, sales and promotion. The United States invokes the Global Climate Protection Act of 1987.[11] But as the Second Circuit observed, that statute "consists almost entirely of mere platitudes" and thus does not displace a federal common public nuisance claim. *AEP,* 582 F.3d at 383; *see also id*. at 331-32. The United States also relies upon cases preempting state law that have conflicted with federal foreign policies but neglects two cases that have addressed, and rejected, alleged foreign policy preemption of state laws in the specific context of climate change.[12] According to its brief, the United States is "involved in discussions as to whether and how to address climate change, most recently in the Paris Agreement," which it says it "is in the process of withdrawing from." USA Br. 18:12-13, 2:9-10. But "a commitment to negotiate falls short of" the Supreme Court's foreign policy preemption standard. *Cent. Valley*, 529 F. Supp. 2d at 1186. The district courts in *Central Valley* and *Green Mountain* thus rejected foreign policy preemption challenges to state laws that directly regulate greenhouse gas emissions.

Finally, the Cities' federal nuisance claim does not run afoul of the Act of State doctrine or the federal government's exclusive role in regulating commerce with foreign nations. *See* USA Br.

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[10] "These non-combustion uses effectively store carbon, and thus must be subtracted from the emission calculations." R. Heede, *Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854–2010*, Climatic Change, Jan. 2014, at 237, at https://link.springer.com/content/pdf/10.1007%2Fs10584-013-0986-y.pdf), cited in FAC ¶ 94 n.71.

[11] USA Br. 18:3-10 (citing Pub. L. No. 100-204, tit. XI, 101 Stat. 1331).

[12] *See Cent. Valley Chrysler-Jeep v. Goldstene*, 529 F. Supp. 2d 1151, 1183-88 (E.D. Cal. 2007); *Green Mt. Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 396 (D. Vt. 2007).

18-20. These are not displacement doctrines at all and, in any event, the cases cited are readily distinguished. *In re Philippine Nat'l. Bank*, 397 F.3d 768, 772 (9th Cir. 2005), held that, under the Act of State doctrine, a lower court erred by issuing an order that "held invalid" a foreign judgment of the Philippine Supreme Court. Here, the United States points to no foreign judgment that would be invalidated by the Cities' federal nuisance claim but merely suggests hypothetical situations in which foreign governments "could respond" to private party nuisance liability with some kind of retaliation. USA Br. 19:8. The foreign commerce cases cited by the United States merely hold that nondiscriminatory state taxes are valid.[13] A federal court judgment in favor of the Cities on their federal nuisance claim would not be a state law, a tax, or a discriminatory action against foreign commerce.

C. The Cities' federal nuisance claim does not violate the separation of powers.

Resolution of this case will not violate the separation of powers. The United States' contention that there is a "lack of judicially discoverable and manageable standards" is a *sub silentio* invocation of the second factor of the political question doctrine. *See Baker v. Carr*, 369 U.S. 186, 217 (1962). For the reasons set forth by the Second Circuit in *AEP*, 582 F.3d at 326-30, this argument should be rejected. The Ninth Circuit's decision in *Kivalina* also implicitly rejected this argument, as set forth in the Cities' main brief. ECF 235 at 24:7-9. The United States invokes the political question decision in *Gilligan v. Morgan*, 413 U.S. 1 (1973), but the Cities' tort claim seeking an equitable abatement fund (*i.e.*, monetary relief) is fundamentally unlike *Gilligan*, where

[13] *Barclays Bank Plc v. Franchise Tax Bd.*, 512 U.S. 298, 320-330 (1994) (holding that California's worldwide combined reporting requirement for calculating corporate franchise tax does not frustrate federal government's ability so speak with one voice when regulating commercial relations with foreign governments); *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 286 (1976) ("It is obvious that such nondiscriminatory property taxation can have no impact whatsoever on the Federal Government's exclusive regulation of foreign commerce, probably the most important purpose of the Clause's prohibition."); *Japan Line, Ltd. v. Cty. of Los Angeles*, 441 U.S. 434, 452 (1979) (invalidating state tax that "creates more than the *risk* of multiple taxation; it produces multiple taxation in fact"); *cf.* USA Br. 20:11 (contending Cities' claim "creates an unacceptable risk of double taxation"). The United States also relies upon *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), USA Br. 18:22-26, which held that a federal statute does not apply extra-territorially. But *Morrison* dealt with legislative intent and thus, even if this issue were relevant to a claim by domestic plaintiffs bringing claims for domestic property injuries, which it is not, *Morrison* "cannot sensibly be applied" to "common law claims." *Doe I v. Nestle USA*, 766 F.3d 1013, 1028 (9th Cir. 2014).

the plaintiffs sought "continuing regulatory jurisdiction over the activities of the Ohio National Guard" as a result of the Kent State killings, which ran afoul of a specific textual constitutional provision granting Congress and the states "responsibility for organizing, arming, and disciplining the Militia (now the National Guard)." *Id*. at 5-6.

The United States also misapprehends public nuisance law by contending that the requirement of an "unreasonable" interference with public rights will require the Court to weigh the social utility of defendants' conduct against the environmental benefits. USA Br. 23:16-25. Such weighing is required only in a case seeking to enjoin the defendant's conduct. Where the plaintiff is not seeking to enjoin the defendant's conduct, then the court is not required to evaluate the social utility of this conduct:

> In determining whether to award damages, the court's task is to decide whether it is unreasonable to engage in the conduct without paying for the harm done. Although a general activity may have great utility it may still be unreasonable to inflict the harm without compensating for it. In an action for injunction the question is whether the activity itself is so unreasonable that it must be stopped.

Restatement (Second) of Torts § 821B cmt. i (1979). As set forth in the Cities' remand briefing, in cases of "severe" harm such as this, and where no injunction is sought, the Restatement and case law expressly dispense with any balancing. ECF 108 at 11:22 -13:1 & n.13.

It should also be clear that this logic applies equally whether the relief requested is damages or (as here) an abatement fund. The purpose of the balancing test is to ensure that courts do not issue orders prohibiting economically valuable conduct, even in cases of severe harm. But where the plaintiff does not seek to prohibit the defendant's conduct, the fact that the conduct is economically valuable does not prevent a court from taking reasonable steps to ensure that victims of "severe" harm are afforded relief – and this is true regardless of whether the plaintiff is afforded relief by a damages award or by the sort of abatement fund requested by the Cities. In either case, the defendant is free to continue its conduct, and the relief to the plaintiff is regarded (in the words of a leading treatise) as "a cost of doing the kind of business in which the defendant is engaged":

> Confusion has resulted from the fact that the intentional interference with the plaintiff's use of his property can be unreasonable even when the defendant's conduct is reasonable. This is simply because a reasonable person could conclude that the plaintiff's loss resulting from the intentional interference ought to be allocated to the defendant. . . . Courts have often

> found the existence of a nuisance on the basis of unreasonable use when what was meant is that the interference was unreasonable, *i.e.*, it was unreasonable for the defendant to act as he did without paying for the harm that was knowingly inflicted on the plaintiff. Thus, an industrial enterpriser who properly locates a cement plant or a coal-burning electric generator, who exercises utmost care in the utilization of known scientific techniques for minimizing the harm from the emission of noxious smoke, dust and gas and who is serving society well by engaging in the activity may yet be required to pay for the inevitable harm caused to neighbors. This is simply a decision that the harm thus intentionally inflicted should be regarded as a cost of doing the kind of business in which the defendant is engaged.

W. Page Keeton, Dan B. Dobbs, Robert E. Keeton, David G. Owen, *Prosser and Keeton on the Law of Torts* § 52 (5th ed. 1984). Thus, the United States' reliance on cases such as *AEP* and *North Carolina* seeking to enjoin defendants discharging pollution, USA Br. 22-23, is misplaced. This case does not seek to enjoin defendants' conduct.

An illustration of these principles comes from an important public nuisance case by the New York Court of Appeals. *Boomer v. Atl. Cement Co.*, 26 N.Y.2d 219 (1970). The defendant operated a cement plant that employed hundreds of people; the neighboring plaintiffs were few and their injury (though severe to them) was small when compared to defendant's investment in the plant and the number of workers employed there. *Id*. at 225. Reluctant to close down the plant, the court declined to engage in the exercise of balancing the utility of defendant's operation against the scope of plaintiffs' harms. Instead, the court issued an injunction that would be dissolved on the payment of money equal to the permanent damage suffered by the neighbors. By facilitating an outcome that resulted solely in monetary relief, the court obviated the need to conduct any balancing test.

The Court in *Boomer* held that a "court performs its essential function when it decides the rights of parties before it," even though the ultimate solution to reducing pollution from cement plants "is likely to require massive public expenditure and to demand more than any local community can accomplish." *Id*. at 222-23. In that case, as here, the ultimate solution to the pollution problem was beyond the scope of the case and "depend[s] on the total resources of the . . . industry Nationwide and throughout the world." *Id*. at 226. The Court nonetheless focused on the core cost-shifting function of tort law and afforded relief by way of an equitable judgment. As the Court observed, "[t]he nuisance complained of by these plaintiffs may have other public or

private consequences, but these particular parties are the only ones who have sought remedies and the judgment proposed will fully redress them. The limitation of relief granted is a limitation only within the four corners of these actions and does not foreclose public health or other public agencies from seeking proper relief in a proper court." *Id*. at 226. The same basic functions of tort law applied in *Boomer* – allocation and cost-shifting – apply here and militate against the arguments made in support of dismissal.

III. CONCLUSION

Defendants' motion to dismiss should be denied.

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Respectfully submitted,

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