UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CITY OF NEW YORK, Plaintiff, v. BP P.L.C.; CHEVRON CORPORATION; CONOCOPHILLIPS; EXXON MOBIL CORPORATION; and ROYAL DUTCH SHELL PLC, Defendants.	Case No. 18 Civ. 182 (JFK)

BRIEF AMICUS CURIAE OF NISKANEN CENTER IN SUPPORT OF PLAINTIFF CITY OF NEW YORK

David Bookbinder
Niskanen Center
820 First Street, NE
Suite 675
Washington, DC 20002
301-751-0611

STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus Niskanen Center ("Niskanen") is a 501(c)(3) think tank with a strong interest in protecting Americans' property rights. Niskanen shares conservatives' belief in the wealth-creating power of free markets, progressives' desire to robustly address economic and social inequality, libertarians' skepticism about the ability of technocratic elites to solve those economic and social problems, liberals' commitment to toleration and civil liberties, and moderates' embrace of empiricism rather than dogma.

Climate change imposes significant damage on both public and private property without the consent of the property owners. Niskanen believes that the common law – specifically state common law — provides a remedy for such injuries by requiring wrongdoers to internalize costs they impose on others. Common law nuisance and trespass claims are ultimately grounded in property rights, so much so that they are entitled to constitutional protection under the Takings Clause. *See Richards v. Wash. Terminal Co.*, 233 U.S. 546, 553 (1914) ("while the legislature may legalize what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such a character as to amount in effect to a taking of private property for public use.")[1]

[1] This principle of common law nuisance enjoying protection under the Takings Clause retains its vitality, *e.g.*, *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 171 (Iowa 2004) (holding state statute unconstitutional as a taking of private property "to the extent it deprives property owners of a remedy for the taking of their property resulting from a nuisance created by an animal feeding operation.")

No matter how useful fossil fuels may be, it is unfair to impose their hidden costs on property owners. As law and economics scholars have pointed out for decades, where an activity causes property damage, "the cost of that injury should be made a part of the price of the goods that activity produced." Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 Yale L.J. 499, 537 (1961) (analyzing nuisance law). Foisting these costs onto property owners not only forces them to subsidize the Defendants, it further distorts markets by eliminating the competitive advantage of forms of energy that do *not* impose such costs.

Niskanen, which also serves as co-counsel in a similar case pending in Colorado,[2] submits this brief to clarify an important issue raised in the briefing of the pending motions to dismiss: imposing tort damages on a fossil fuel *producer* would not upset or interfere with any federal interest in providing a "uniform" system of regulating the *emissions* that come from burning those fuels.

ARGUMENT

Relying primarily on a claimed need for "uniformity" in dealing with climate change, Defendants argue that federal, and not state, common law should govern the claims in this case (and then, in turn, Defendants argue that federal common law has been displaced by the Clean Air Act).[3] In doing so, Defendants elide both

[2] *Board of County Commissioners of Boulder County, et al. v. Suncor Energy U.S.A., et al.,* No. 2018CV030349, Boulder County District Court (filed April 17, 2018).

[3] Memorandum of Law of Chevron Corporation, ConocoPhillips, and Exxon Mobil Corporation Addressing Common Grounds in Support of Their Motions to Dismiss Plaintiff's Amended Complaint ("MTD") pp. 9-12.

the relief sought – money damages[4] – and the conduct – producing fossil fuels – that gave rise to these claims. But both the conduct at issue and the relief requested distinguish this case from the cases on which Defendants rely.

Defendants' precedents in support of their "uniformity" argument are inapposite because they dealt exclusively with liability based upon the defendants' *emissions* of pollution. For emitters, applying more than one state's laws could, in fact, result in multiple and potentially conflicting emissions standards governing which pollutants, and in what quantities and concentrations, may be emitted.

In contrast, Defendants here are *producers*, and it does not matter how many states' laws apply to them: they face only the simple choice of whether, when producing their products, to internalize their costs or to foist them onto the public. There is no matrix of emission standards applicable to selling a gallon of gasoline that could possibly result from subjecting Defendants to common law damages from multiple states. As a result, there is no basis for Defendants' argument that federal law must apply in order to avoid being forced to comply with a multiplicity of state standards.

Defendants' "uniformity" argument rests on two cases involving the applicability of state common law to the discharge of pollution, *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) ("*Milwaukee I*"), and *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987). In both, the Supreme Court expressed concerns that

[4] Niskanen uses "money damages" to refer to both damages and abatement costs.

remedies under state nuisance law could lead to multiple, inconsistent discharge standards being applied to Defendants' conduct.[5]

Because the discharges in both cases were subject to federal statutory schemes, the Supreme Court recognized that allowing a plaintiff to obtain injunctive relief governing out-of-state conduct could subject a defendant to a multiplicity of different standards governing the same discharges. The defendant in *Ouellette* discharged wastewater from a pulp and paper mill pursuant to a permit issued under the federal Clean Water Act, which regulates dozens of pollutants from such mills via both mass and concentration limits for daily maximum, daily average, and monthly average discharges.[6] It is thus easy to see how granting injunctions based on multiple state laws regarding these discharges could result in any number of conflicting standards. A similar risk was present in *Milwaukee I*,

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[5] "After examining the [Clean Water Act] as a whole, its purposes and its history, we are convinced that if affected States were allowed *to impose separate discharge standards* on a single point source, the inevitable result would be a serious interference with the achievement of the full purposes and objectives of Congress." *Ouellette*, 479 U.S. at 493 (emphasis added; internal quotation marks omitted); "[I]t is not only the character of the parties that requires us to apply federal law. . . . [W]here there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism, we have fashioned federal common law. . . . Certainly these same demands for applying federal law are present in the pollution of a body of water such as Lake Michigan bounded, as it is, by four states." *Milwaukee I*, 406 U.S. at 105 & n.6.

[6] 40 CFR 430.22, 430.26; EPA classifies this facility as a "Bleached Papergrade Kraft" facility subject to 40 CFR 430, Subpart B. *Preliminary Report: Pulp, Paper, and Paperboard Detailed Study,* EPA-821-B-05-007, August 2005, Appendix B, p. 4.

which involved discharges from a municipal sewage treatment plant into Lake Michigan, "bounded, as it is, by four states". *Id.* at 105 & n.6.[7]

But while the specter of potentially conflicting relief was present in *Milwaukee I* and *Ouellette*, merely parroting concerns about "uniformity" is no substitute for explaining – as Defendants carefully avoid doing – how damage awards against fossil fuel *producers* here could subject them to similarly inconsistent standards.

To be sure, money damages can compel a defendant to alter its conduct, as *Ouellette* explicitly recognized.[8] But unlike common law standards based upon the amounts and concentrations of various pollutants in *Ouellette and Milwaukee I*, liability for damages will not – *and cannot* – present Defendants with similar matrices of potentially conflicting standards. And, tellingly, Defendants have not suggested that there are any such measures that they might be coerced into adopting.

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[7] "For a number of different states to have independent and plenary regulatory authority over a single discharge would lead to chaotic confrontation between sovereign states. *Dischargers* would be forced to meet not only the statutory limitations of all states potentially affected by their discharges but also the common law standards developed through case law of those states. It would be virtually impossible to predict *the standard for a lawful discharge* into an interstate body of water." *Illinois v. Milwaukee*, 731 F.2d 403, 414 (1984) (*Milwaukee III*) (emphases added), quoted in *Ouellette*, 479 U.S. at 496-97.

[8] "We also think it would be unwise to treat compensatory damages differently under the facts of this case. If the Vermont court determined that respondents were entitled only to the requested compensatory relief, [the defendant] might be compelled to adopt different or additional means of pollution control from those required by the Act, regardless of whether the purpose of the relief was compensatory or regulatory." *Ouellette*, 479 U.S. at 498 & n.19.

In the end, imposing damages liability on Defendants simply requires them to pay for the injuries caused by their products. Defendants claim that those products "play a key role in virtually every sector of the global economy, supplying the fuels that enable production and innovation, literally keep the lights and heat on, power nearly every form of transportation, and form the basic materials from which innumerable consumer, technological, and medical devices are fashioned." MTD, p. 1. As then-Professor Calabresi pointed out in his discussion of nuisance externalities, "if the product were sufficiently useful socially, it would be able to make a go of it even though it had to bear the injury costs." Calabresi, *supra*.

Bearing the costs of those injuries is, of course, what any efficient market requires. Otherwise, Defendants will continue to reap the benefits of producing fossil fuels, while requiring New York City and its taxpayers to subsidize the costs.

CONCLUSION

For the reasons given above, the Court should reject Defendants' argument that applying state common law to Defendants' actions violates any federal interest in uniform regulation of their conduct.

Respectfully submitted,

s/David Bookbinder
David Bookbinder
Chief Counsel
Niskanen Center
820 First Street, NE
Suite 675
Washington, DC 20002

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