18-2188

United States Court of Appeals for the Second Circuit

CITY OF NEW YORK,

Plaintiff-Appellant,

v.

CHEVRON CORPORATION, CONOCOPHILLIPS, EXXONMOBIL CORPORATION, ROYAL DUTCH SHELL PLC, AND BP P.L.C.,

Defendants-Appellees.

On Appeal from the U.S. District Court
For the Southern District of New York, No. 18-cv-00182

BRIEF OF DEFENDANTS-APPELLEES CHEVRON CORPORATION, EXXON MOBIL CORPORATION, AND CONOCOPHILLIPS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Defendants submit the following statement:

Chevron Corporation has no parent corporation, and there is no publicly held corporation that owns 10% or more of Chevron Corporation's stock. Chevron U.S.A. Inc. is a wholly owned subsidiary of Chevron Corporation.

ConocoPhillips has no parent corporation, and there is no publicly held corporation that owns 10% or more of ConocoPhillips's stock.

Exxon Mobil Corporation is a publicly traded corporation and it has no corporate parent. No publicly held corporation owns 10% or more of Exxon Mobil Corporation's stock.

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PRELIMINARY STATEMENT

The City of New York seeks to hold five publicly traded energy companies liable for the alleged impacts of global warming. Purporting to assert causes of action under state tort law, Plaintiff seeks relief for alleged injuries resulting from Defendants' worldwide fossil-fuel production and the global greenhouse gas emissions of countless actors, including New York City and its residents. Defendants' lawful commercial activity plays a key role in virtually every sector of the global economy—supplying the fuels that power most forms of transportation, heat countless homes, literally keep the lights on, and enable production and innovation across all industries. Yet Plaintiff seeks a ruling deeming Defendants' conduct a public nuisance, and asks for an injunction to "abate the nuisance" if Defendants do not pay billions of dollars in damages. In short, Plaintiff seeks to use *state* tort law to regulate Defendants' *worldwide* fossil-fuel production because of *worldwide* greenhouse gas emissions.

The district court properly dismissed this action for failure to state a viable legal claim. As the district court recognized, "the City's claims are governed by federal common law" because this is "exactly the type of 'transboundary pollution suit[]' to which federal common law should apply." SPA11-12. And under Supreme Court precedent, Plaintiff cannot state a claim for relief under federal common law because "Congress has expressly delegated to the EPA the

determination as to what constitutes a reasonable amount of greenhouse gas emission under the Clean Air Act." SPA17-18 (citing *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 428-29 (2011) ("*AEP*")). Moreover, to the extent that Plaintiff's claims are based on foreign emissions, they are "barred by the presumption against extraterritoriality" and the "'serious foreign policy consequences'" that would result from declaring worldwide fossil-fuel production and greenhouse gas emissions a public nuisance. SPA21-22 (quoting *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1407 (2018)). At bottom, the district court recognized that "[c]limate change is … not for the judiciary to ameliorate. Global warming and solutions thereto must be addressed by the other two branches of government." SPA20-21.

The district court was exactly right in locating the power to address global warming in the political branches. As the Supreme Court held just last year, federal courts must exercise "great caution" before creating new common law remedies, particularly where an action may "imping[e] on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Jesner*, 138 S. Ct. at 1399, 1403. Allowing Plaintiff's novel and sweeping global-warming tort claims to proceed would directly contravene this command. Moreover, even if Plaintiff's claims could be pled under state law, New York courts, like their federal counterparts, are "cautious in imposing novel theories of tort liability," especially

where, as here, the defendant's alleged duties remain "the focus of a national policy debate." *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 240 (2001); *see also Spitzer v. Sturm, Ruger & Co., Inc.*, 761 N.Y.S.2d 192, 196-97, 202-03 (1st Dep't 2003). Plaintiff's expansive theory of liability would trample on longstanding principles of proximate cause and usurp the proper role of the legislative and executive branches, in violation of New York tort law principles.

Numerous other federal doctrines also bar any state-law tort claims here. Specifically, any such state claims would be subject to dismissal because they would infringe on the federal government's foreign-affairs powers and be preempted by the Clean Air Act ("CAA") and the many federal statutes that encourage the production of fossil fuels. Further, any state claims would be barred by the Commerce, Due Process, and Takings Clauses.

For these reasons, this Court should affirm the dismissal of this case.

JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1332, and this Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

Did the district court correctly dismiss the Complaint for failure to state a viable claim?

STATEMENT OF THE CASE

I. Global warming is an important international issue that affects every nation. Plaintiff does not contend that global warming is a localized concern, unique to the City of New York. Rather, Plaintiff alleges that worldwide greenhouse gas emissions, which "cannot be traced to their source," have caused global temperatures to rise, which is generating effects all around the world. A71-72¶¶54-55, A85¶75. Indeed, Plaintiff admits that this case is about preventing global warming impacts "both locally and globally." A72¶56.

Global warming has for decades been the subject of federal laws and regulations, extensive scientific research, political negotiations, and diplomatic engagement with the international community. International discussions, which began over 30 years ago, led to the adoption of the United Nations Framework Convention on Climate Change ("UNFCCC"), which the U.S. signed and the Senate ratified in 1992. *See* UNFCCC, *Status of Ratification of the Convention*, http://bit.ly/1ujgxQ3. Noting that global warming was "a common concern of humankind," the UNFCCC "[a]cknowledg[ed] that the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response." UNFCCC, 2 (1992), http://bit.ly/1BQK8Wg. Plaintiff itself recently recognized that it cannot address global warming "on its own," and that "[c]ities, states, the federal

government, and international partners must work together" on the issue. City of New York, *1.5° C, Aligning New York City with the Paris Climate Agreement*, at 31 (Sept. 2017) (cited at A72¶56 n.16).

As early as 1978, Congress established a "national climate program" to improve the country's understanding of global warming through enhanced research, information collection and dissemination, and international cooperation. *See* Nat'l Climate Program Act of 1978, 15 U.S.C. § 2901 *et seq*. A decade later, in the Global Climate Protection Act of 1987, Congress recognized the uniquely international character of global warming and directed the Secretary of State to coordinate U.S. negotiations on the issue. *See* 15 U.S.C. § 2901; 15 U.S.C. § 2952(a).

In the CAA, Congress established a comprehensive scheme to "protect and enhance the quality of the Nation's air resources[.]" 42 U.S.C. § 7401(b)(1). Congress authorized the Environmental Protection Agency ("EPA") to regulate air pollutants like greenhouse gas emissions, and the EPA has exercised this authority on its own and with other agencies. *See id.* § 7601; *see also* U.S. EPA, Regulations for Greenhouse Gas Emissions from Passenger Cars and Trucks, http://bit.ly/2EWvcKK. Other laws, like the Energy Policy Act of 2005 and the Energy Independence and Security Act of 2007, sought further reductions of greenhouse gas emissions at the national level. *See* 42 U.S.C. § 13389(c)(1); 42 U.S.C. § 17001 *et seq*.

Reflecting the complex tradeoffs inherent in national energy and security policy, the political branches of the U.S. Government have always balanced environmental considerations with economic and social interests. For example, the U.S. Senate unanimously adopted a resolution urging the President not to sign the Kyoto Protocol if it would cause serious harm to the U.S. economy or fail to sufficiently reduce other countries' emissions. *See* S. Res. 98, 105th Cong. (1997). More recently, the President cited similar concerns with respect to multilateral climate initiatives and reaffirmed the importance of fossil fuels to the American economy. President Trump, Remarks at the Unleashing American Energy Event (June 29, 2017), http://bit.ly/2El7yWU. State governments—including New York's—have also recognized the importance of fossil fuels to their citizens and economies, and have authorized and encouraged the production of those fuels within their jurisdictions. *See, e.g.*, N.Y. Envtl. Conserv. Law § 23-0301 ("declar[ing]" it "to be in the public interest … to authorize and to provide for the operation and development of oil and gas properties in such a manner that a greater ultimate recovery of oil and gas may be had"); 6 NYCRR 552.2.

II. According to Plaintiff, global greenhouse gas emissions over the past few centuries have contributed to global warming in the form of increased global average temperature. A46¶3, A68-70¶52. Plaintiff seeks to remedy this worldwide problem by asserting state-law tort claims against a select group of fossil fuel companies. *Id*.

Plaintiff alleges that Defendants "are collectively responsible, through their production, marketing, and sale of fossil fuels, for over 11% of all the carbon and methane pollution from industrial sources that has accumulated in the atmosphere since the dawn of the Industrial Revolution." A46¶3. Plaintiff further alleges that Defendants' "marketing" and "promotion" activities prevented effective regulation of emissions and contributed to third-party emissions, and that Defendants "misled the public"—including, apparently, the worldwide scientific community—by "downplaying the harms and risks of climate change" with the goal of "continu[ing] to produce fossil fuels and sell their products on a massive scale." A85-86¶¶77, A95¶93-94.

Plaintiff seeks to hold Defendants liable for their lawful worldwide conduct, including lobbying and other First Amendment-protected activities. A51¶13, A64-65¶41. Purporting to rely solely on state-law nuisance and trespass claims, Plaintiff seeks "compensatory damages for past and future costs incurred by the City," as well as an "equitable order ascertaining damages and granting an injunction to abate the public nuisance and trespass that would not be effective unless Defendants fail to pay the court-determined damages for the past and permanent injuries inflicted." SPA8-9 (citing A117-18).

III. Defendants moved to dismiss the claims on several grounds, arguing that the claims arose under federal common law in the first instance, but that the CAA

displaced those claims. Defendants also argued that no federal common law remedy is available for claims based on overseas emissions. Further, Defendants maintained that numerous federal doctrines barred Plaintiff's claims; that Plaintiff failed to plead any viable state law claims; and that Plaintiff's claims were not justiciable.[1]

The court "agree[d] that the City's claims are governed by federal common law." SPA11. The court explained that "regardless of the manner in which the City frames its claims[,]" Plaintiff "is seeking damages for global-warming related injuries resulting from greenhouse gas emissions, and not only the production of Defendants' fossil fuels." SPA13; *see also* SPA19. The court thus held that "the City's claims are ultimately based on the 'transboundary' emission of greenhouse gases, indicating that these claims arise under federal common law and require a uniform standard of decision." SPA14.

[1] ExxonMobil and ConocoPhillips also moved to dismiss for lack of personal jurisdiction, and continue to reserve that defense. A144, A150. Because Chevron was not contesting personal jurisdiction, the district court agreed, at Plaintiff's and Chevron's request, to defer further briefing and decision on those Rule 12(b)(2) motions. A140-43; SPA9 n.1. The court also deferred the responses of the two foreign-based Defendants until after a ruling on the U.S.-based Defendants' motions to dismiss. A141. The court concluded that Plaintiff failed to state a viable claim and thus dismissed the entire case, including as to the foreign-based Defendants, without addressing personal jurisdiction defenses. *See Chevron Corp. v. Naranjo*, 667 F.3d 232, 256 n.17 (2d Cir. 2012) (where court has jurisdiction over one defendant and dismisses "the claim in its entirety," court has discretion to "decline to address the personal jurisdictional claims made by some defendants").

The court held that the CAA displaced Plaintiff's federal common law claims to the extent they are based on domestic emissions, SPA14-21, and that "to the extent that the City seeks to hold Defendants liable for damages stemming from foreign greenhouse gas emissions, the City's claims are barred by the presumption against extraterritoriality and the need for judicial caution in the face of 'serious foreign policy consequences.'" SPA21-22.

STANDARD OF REVIEW

This Court reviews the district court's dismissal of the complaint *de novo* and thus is "'entitled to affirm the judgment on any basis that is supported by the record.'" *See Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 94-95 (2d Cir. 2017). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* at 94.

SUMMARY OF ARGUMENT

I. Federal common law has generally governed transboundary pollution suits brought by entities in one state to address pollution emanating from another state. Because global-warming based claims necessarily involve interstate pollution, the Supreme Court, the Ninth Circuit, and another district court addressing claims nearly identical to those asserted here have all held that federal common law governs global warming-based claims. Judge Keenan followed these authorities and concluded that Plaintiff's claims must likewise be governed by federal common law.

Plaintiff admits that its alleged injuries are based on out-of-state—indeed, worldwide—greenhouse gas emissions. Plaintiff nevertheless contends that state law applies because it has sued Defendants for *producing and promoting* fossil fuels that result in third-party emissions, not for Defendants' own emissions. The focus on production instead of emissions is a distinction without a difference as to whether federal common law governs these claims. Plaintiff cannot transform necessarily federal claims into state law claims merely by moving further back in the causal chain and suing entities that produce and market fossil fuels rather than suing those that emit greenhouse gases when they use them. The federal nature of the claims is inherent in Plaintiff's underlying allegations, which maintain that the greenhouse gas emissions resulting from the use of Defendants' products constitute an "unreasonable" interference with public rights. The reasonableness of worldwide greenhouse gas emissions from worldwide fossil fuel sources cannot be resolved under various conflicting state law standards. Instead, that reasonableness determination requires a uniform federal rule of decision.

II. The district court correctly held that Plaintiff failed to state a claim for relief under federal common law. First, to the extent that Plaintiff's alleged injuries are based on domestic greenhouse gas emissions, the claims are displaced by the CAA. In *AEP,* the Supreme Court held that because the CAA empowers the EPA to determine the reasonableness of nationwide greenhouse gas emissions, federal

common law claims seeking to deem such emissions a public nuisance are displaced. Plaintiff contends that the CAA does not regulate the *production* of fossil fuels, but the CAA displaces any claims (such as those here) predicated on alleged injuries from domestic greenhouse gas emissions.

Second, Plaintiff has failed to plead a viable claim under federal common law. Federal common law has never been used to hold manufacturers of lawful products liable merely because the *users* of those products create interstate pollution. Nor has federal common law ever supplied a remedy where the causal chain connecting the defendant's conduct to the alleged harms extends back several decades, includes billions of intervening actors, and depends on complex phenomena that scientists continue to study.

This Court should not create a novel federal common law remedy here because the Supreme Court has admonished courts to exercise great caution before fashioning federal common law in areas touching on foreign affairs, and Plaintiff's requested relief threatens to shut down Defendants' worldwide fossil-fuel production, much of which occurs under the direction of foreign governments.

III. Plaintiff's claims would fare no better under state law. This case does not, as Plaintiff contends, present traditional nuisance and trespass claims. New York courts have never recognized a global warming tort—or any tort based on the worldwide production of a lawful product on the theory that the global *use* of that

product allegedly causes widespread environmental changes. And New York courts are wary of expanding nuisance liability to address wider societal problems better addressed by the political branches.

Plaintiff's claims cannot satisfy traditional concepts of proximate cause under New York law because Defendants' alleged misconduct is spatially and temporally remote from the alleged harm, which is allegedly caused by greenhouse gas emissions from billions of intervening third-party consumers of fossil fuels worldwide. Plaintiff asks the Court to substitute a vague foreseeability standard for proximate cause, but foreseeability and remoteness are distinct concepts in tort law, and New York courts have made clear that foreseeability does not overcome the remoteness bar. Plaintiff's allegations do not even satisfy New York's but-for causation requirement because Defendants' worldwide fossil-fuel production allegedly accounts for less than 12% of total industrial greenhouse gas emissions, and Plaintiff's alleged injuries likely would have occurred even had Defendants produced no fossil fuels.

The doctrine of *in pari delicto* also bars Plaintiff's claims because the City of New York and its residents have long consumed Defendants' products and have thus willingly contributed to the greenhouse gas emissions that have allegedly caused Plaintiff's injuries.

IV. Even if Plaintiff had pleaded viable state-law claims (which it has not), the judgment should be affirmed because Plaintiff's claims are barred by various federal doctrines and constitutional provisions. Plaintiff's claims are preempted by the foreign affairs doctrine because they would interfere with the clear federal policy of addressing global warming through multilateral negotiation. Plaintiff's claims are also preempted because the CAA, and the EPA actions it authorizes, occupy the field of national emissions regulations, and Plaintiff's attempt to label fossil-fuel production a public nuisance conflicts with numerous statutes that authorize and encourage fossil-fuel production. The Commerce Clause also bars Plaintiff's claims because the remedy that Plaintiff seeks would have the impermissible effect of controlling out-of-state conduct. Finally, imposing a massive, retroactive damages award based on the lawful conduct of Defendants over the past several decades would violate the Due Process and Takings Clauses.

ARGUMENT

I. Plaintiff's Global Warming Claims Are Governed by Federal Common Law.

Plaintiff's Amended Complaint is premised on the theory that New York law should govern tort claims based on injuries allegedly caused by the worldwide accumulation of greenhouse gases from billions of emitters over the last several hundred years. But tort claims aimed at the interstate and international effects of greenhouse gas emissions "are governed by federal common law," SPA11, because

such claims implicate the "rights and obligations of the United States," "the conflicting rights of States[,]" and "our relations with foreign nations." *Tex. Indus. v. Radcliff Materials*, 451 U.S. 630, 641 (1981). The Supreme Court, this Court, the Ninth Circuit, and a federal district court in California that adjudicated nearly identical claims against the same five Defendants, have all concluded that global warming-based tort claims require a uniform federal rule of decision. Plaintiff contends that state law should apply because it has sued Defendants for their *production and promotion* of fossil fuels—not their emissions—but as the Amended Complaint makes clear, Plaintiff's alleged injuries arise from greenhouse gas emissions, not the mere production of fossil fuels. Accordingly, Plaintiff's claims must be governed by federal common law.

A. Federal Common Law Governs Claims Involving Greenhouse Gas Emissions

Although "[t]here is no federal general common law," *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), there remain "some limited areas" in which the governing legal rules will be supplied, not by state law, but by "what has come to be known as 'federal common law.'" *Tex. Indus.*, 451 U.S. at 640 (quoting *United States v. Standard Oil Co.*, 332 U.S. 301, 308 (1947)). One such area is where the subject matter implicates "uniquely federal interests," such as where "the interstate or international nature of the controversy makes it inappropriate for state law to control." *Id.* at 640-41; *see also AEP*, 564 U.S. at 421 (federal common law applies

to those subjects "where the basic scheme of the Constitution so demands"). The paradigmatic example of such a controversy is a "transboundary pollution suit[]" brought by one state to address pollution emanating from another state. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 855 (9th Cir. 2012); *see also Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972) ("*Milwaukee I*") ("When we deal with air and water in their ambient or interstate aspects, there is a federal common law[.]"). "[S]uch claims have been adjudicated in federal courts" under federal common law "for over a century." *Connecticut v. Am. Elec. Power Co., Inc.*, 582 F.3d 309, 331 (2d Cir. 2009), *rev'd on other grounds in AEP*, 564 U.S. 410. Accordingly, contrary to Plaintiff's assertion (at AOB40), federal common law governs interstate pollution not merely to "fill in statutory interstices," but also because claims based on interstate pollution, by their very nature, require a federal rule of decision.

Before the Supreme Court's seminal decision in *Erie*, there was no question that "federal common law governed" interstate pollution. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 487 (1987); *see*, *e.g.*, *Missouri v. Illinois*, 200 U.S. 496 (1906) (applying federal common law to interstate pollution dispute); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907) (same). After *Erie*, the Court "affirmed the view" that the regulation of interstate pollution "is a matter of federal, not state, law[.]" *Ouellette*, 479 U.S. at 488 (citing *Milwaukee I*, 406 U.S. at 102 n.3). In

short, the Court has consistently held that "control of interstate pollution is primarily a matter of federal law." *Id.* at 492 (citing *Milwaukee I*, 406 U.S. at 107).

Applying these precedents, the Supreme Court has squarely held that federal common law governs claims asserting global-warming-based injuries from greenhouse gas emissions. *See AEP*, 564 U.S. at 421-22. In *AEP*, New York City and other plaintiffs sued five electric utilities, contending that "defendants' carbon-dioxide emissions" substantially contributed to global warming in violation of the federal common law of interstate nuisance, or, in the alternative, of state tort law." 564 U.S. at 418. Like Plaintiff here, the *AEP* plaintiffs "alleged that public lands, infrastructure, and health were at risk from climate change." *Id.* This Court held that the case would be "governed by recognized judicial standards under the federal common law of nuisance" and allowed the claims to proceed. *Am. Elec. Power Co.*, 582 F.3d at 329. In reviewing this Court's decision, the Supreme Court, as a threshold matter, agreed that federal common law governs public nuisance claims involving "'air and water in their ambient or interstate aspects.'" *AEP*, 564 U.S. at 421. The Court rejected the notion that state law could govern global warming nuisance claims, holding that "borrowing the law of a particular State would be inappropriate." *Id.* at 421-22.

The Ninth Circuit reached the same conclusion in *Kivalina*. There, an Alaskan city asserted a public nuisance claim for damages to city property and infrastructure

as a result of "sea levels ris[ing]" and other alleged effects of the defendant energy companies' "emissions of large quantities of greenhouse gases." 696 F.3d at 853-54. The city asserted this claim under federal common law and, in the alternative, under state law, but the district court dismissed the federal claims and declined to exercise supplemental jurisdiction over the state-law claims. *Id.* at 854-55. On appeal, the Ninth Circuit noted that federal common law "includes the general subject of environmental law and specifically includes ambient or interstate air and water pollution." *Id*. at 855 (citing *AEP* and *Milwaukee I*). Given the global character of claims asserting damage from the worldwide accumulation of carbon dioxide emissions in the atmosphere, the court concluded that the case was precisely the sort of "transboundary pollution suit[]" to which "federal common law" applied. *Id*.

Even more recently, in *California v. BP p.l.c.*, 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018) ("*BP*"), San Francisco and Oakland brought nearly identical global warming claims against the same defendants here based on their worldwide fossil-fuel production. The district court, applying *AEP* and *Kivalina*, held that the plaintiffs' claims, "which address the national and international geophysical phenomenon of global warming" were "necessarily governed by federal common law." *Id.* at *2. "Taking the complaints at face value," the court held that "the scope of the worldwide predicament demands the most comprehensive view available,

which in our American court system means our federal courts and our federal common law." *Id.* at *3.

B. Plaintiff's Claims Are Based on Worldwide Greenhouse Gas Emissions and Thus Are Governed by Federal Common Law.

Plaintiff's claims—like those in *AEP*, *Kivalina*, and *BP*—are quintessential "transboundary pollution suits" because they are based on Defendants' alleged worldwide fossil fuel production and promotion and the worldwide emissions of countless third parties. As the district court recognized, "regardless of the manner in which the City frames its claims[,] … the City is seeking damages for global-warming related injuries resulting from greenhouse gas emissions, not only the production of Defendants' fossil fuels." SPA13. Because claims based on worldwide greenhouse gas emissions implicate interstate and international concerns, there is an "overriding federal interest in the need for a uniform rule of decision." *Milwaukee I*, 406 U.S. at 105 n.6; *see also Kivalina*, 696 F.3d at 855-56; *BP*, 2018 WL 1064293 at *3; AOB40-41 (conceding that "a federal standard of decision may be necessary to avoid interstate conflict" when a plaintiff challenges "a defendant's direct emissions").

Plaintiff contends that state law should govern because there "is no uniquely federal interest in the adjudication" of claims seeking compensation for global-warming-related injuries. AOB32. But the assertion that Defendants' fossil fuel extraction constitutes an "unreasonable" interference with public rights—*i.e.*, that

the harm allegedly caused by Defendants' conduct outweighs its utility—implicates the federal government's unique interests in setting national and international policy on matters related to energy, the environment, the economy, and national security. *See AEP*, 564 U.S. at 427. Claims seeking to deem worldwide fossil-fuel production and promotion a public nuisance also threaten to undermine the federal government's exclusive authority to negotiate with foreign nations to address the issue of global warming. *Cf. Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003).

Global warming claims also implicate significant federalism interests and thus require a uniform rule of decision. Allowing state law to govern these types of claims would permit plaintiffs alleging injury due to global warming to seek relief under the laws of all 50 states, which would subject out-of-state producers and emitters "to a variety of" "'vague' and 'indeterminate'" state common law nuisance standards and allow states to "do indirectly what they could not do directly—regulate the conduct of out-of-state sources." *Ouellette*, 479 U.S. at 495-96. As the Solicitor General explained in *AEP*, "resolving such claims would require each court to consider numerous and far-reaching technological, economic, scientific, and policy issues" to decide "whether and to what extent each defendant should be deemed liable under general principles of nuisance law for some share of the injuries associated with global climate change." Br. for the TVA as Resp't Supporting Pet'rs at 37, *AEP*, 564 U.S. 410 (2011) (No. 10-174), 2011 WL 317143. Such

consideration could lead to "widely divergent results" based on "different assessments of what is 'reasonable.'" *Id.*

As the Fourth Circuit recognized in reversing an injunction capping emissions from out-of-state sources, "[i]f courts across the nation were to use the vagaries of public nuisance doctrine to overturn the carefully enacted rules governing airborne emissions, it would be increasingly difficult for anyone to determine what standards govern." *N.C., ex. rel. Cooper v. TVA*, 615 F.3d 291, 298 (4th Cir. 2010) ("*Cooper*"). And as the United States recently highlighted in the *BP* litigation, the problems of applying state-law to out-of-state sources "are magnified … where the sources of emissions alleged to have contributed to climate change span the globe." *Amicus Curiae* Br. for the United States at 11, *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017 (N.D. Cal. 2018) (No. 17-cv-06011), 2018 WL 2192113, ECF No. 245 at 11; *see id.* at 10 (noting that adjudicating a global warming nuisance "claim under California law flies directly into the headwinds of *Ouellette*"). Fundamentally, a "patchwork of fifty different answers to the same fundamental global issue would be unworkable." *BP*, 2018 WL 1064293, at *3.

Plaintiff and its amici argue that the "possibility of different tort standards" does not justify resort to federal common law in cases against product manufacturers because manufacturers can simply "internalize[]" the costs of complying with the various state laws. AOB36 (citing *In re "Agent Orange" Prod. Liab. Litig.*, 635

F.2d 987, 994-95 (2d Cir. 1980); *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1324 (5th Cir. 1985) (en banc)); *see also* Sharkey Br. at 4. But this argument fundamentally mischaracterizes Plaintiff's claims, which are not based on alleged harm resulting solely from Defendants' products, but on alleged harm resulting from worldwide *greenhouse gas pollution*. As Plaintiff concedes, its alleged harm arises only because "the combined effects of Defendants' products when used domestically and abroad" affect "the global atmosphere," which in turn produces the alleged "local environmental harms." AOB63; *see also* AOB38 (admitting that "emissions constitute a component of the causal chain for the harm alleged in the complaint"). The claims here are thus unlike the products liability claims asserted in *Agent Orange* and *Johns-Manville*, which were based on alleged injuries resulting from the plaintiffs' exposure to the defendants' hazardous products.[2]

Moreover, even if this select group of fossil-fuel producers could "internalize" the costs of remedying global-warming based harms under varying state standards—which is doubtful—state law may not be used to control out-of-state conduct. *See*

[2] It is irrelevant that state law has been applied to public nuisance claims against manufacturers of asbestos, tobacco, guns, MTBE, lead paint, and opioids (*see* NLC Br. at 4-6), because each of those suits involved local harms allegedly caused by the specific products sold or distributed to that locality. None of those cases involved transboundary *pollution claims*, which have generally been governed by federal common law.

Ouellette, 479 U.S. at 496-97.[3] Although Plaintiff disclaims any attempt to control out-of-state conduct, AOB32, 37, the Amended Complaint explicitly seeks an order "granting an injunction to abate the public nuisance and trespass" in the event that Defendants "fail to pay" any court-ordered damages remedy. A118. And even if Plaintiff sought only damages, the Supreme Court has recognized that "regulation can be … effectively exerted through an award of damages," *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 637 (2012), and that "[s]tate power" can be wielded as much by "application of a state rule of law in a civil lawsuit as by a statute," *BMW of N. Am. v. Gore*, 517 U.S. 559, 572 n.17 (1996). The Court has noted that environmental tort claims in particular have the tendency to force the defendant to "change its methods of doing business and controlling pollution to avoid the threat of ongoing liability[.]" *Ouellette*, 479 U.S. at 495; *see also Boomer*, 26 N.Y.2d at 226 ("the risk of being required to pay permanent damages … would itself be a reasonable effective spur" to change the defendant's conduct); Sharkey Br. at 4 (admitting that one goal of tort liability is to induce the tortfeasor to alter its conduct).

[3] Professor Sharkey argues that state tort law can be used "for economic deterrence and to allocate the cost of damage." Sharkey Br. at 5 (citing *Boomer v. Atl. Cement Co.*, 26 N.Y.2d 219, 226 (1970); *532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc.*, 750 N.E.2d 1097 (N.Y. 2001)). But *Boomer* involved pollution from a factory that was interfering with adjacent property, and *532 Madison Ave.* involved "the unlawful obstruction of a public street." *Id.* Neither case involved the type of extraterritorial regulation that would result from the requested damages award here.

Plaintiff contends that the "need for uniformity" cannot justify the application of federal common law here because tort actions "employed solely to allocate harms from a product or activity" are "'within the state's historic powers to protect'" its citizens. AOB35 (citing *In re Methyl Tertiary Butyl Ether (MTBE) Prod. Liab. Litig.*, 725 F.3d 65, 96 (2d Cir. 2013)); *see also* States Br. at 11. But the regulation of interstate pollution—unlike the regulation of defective products, local chemical spills, or "corporate law"—is not an area "traditionally occupied by the states." *Marsh v. Rosenbloom*, 499 F.3d 165, 177 (2d Cir. 2007) (cited at AOB35). *MTBE* is not to the contrary because there the plaintiff alleged tortious conduct occurring *within the state*, namely the sale of gasoline containing MTBE to local gas stations, that created a localized nuisance by contaminating drinking water. 725 F.3d at 78. Tellingly, Plaintiff cannot identify a *single case* in which a court applying state law has declared multi-state and transnational pollution—including "pollution from the burning of fossil fuels," A68-69¶52—to be a public nuisance.

Plaintiff asserts that there is "no uniquely federal interest in every case involving environmental matters" because states also have an interest in "applying their own law to local environmental harms caused by fossil-fuel products." AOB34. That may be true, but this case does not involve a localized nuisance causing environmental harm within New York. On the contrary, Plaintiff seeks to hold Defendants liable under New York law for changes in the *Earth's* climate

allegedly resulting from Defendants' *worldwide* extraction and production of fossil fuels and the emissions produced by billions of third parties who use those products all over the world. There is a uniquely federal interest in addressing such an inherently global phenomenon: "If ever a problem cried out for a uniform and comprehensive solution, it is the geophysical problem described by the complaints, a problem centuries in the making (and studying) with causes ranging from volcanoes, to wildfires, to deforestation to stimulation of other greenhouse gases—and, most pertinent here, to the combustion of fossil fuels."[4] *BP*, 2018 WL 1064293, at *3.

Finally, Plaintiff contends there are no federalism concerns in a suit between New York City and private manufacturers who are "untethered to a specific jurisdiction." AOB39 (citing *Milwaukee I*). But that reasoning is exactly

[4] Plaintiff also relies on *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985), and *Nat'l Audubon Soc'y v. Dep't of Water*, 869 F.2d 1196 (9th Cir. 1988), but both cases involved localized nuisances. In *Shore Realty* the court invoked state nuisance law to order a landowner to clean up hazardous waste stored on its property. 759 F.2d at 1037. And *National Audubon* involved "essentially a domestic dispute and therefore [was] not the sort of interstate controversy which makes application of state law inappropriate." 869 F.2d at 1205. The States, citing *American Fuel & Petrochemical Manufacturers v. O'Keefe*, 903 F.3d 903 (9th Cir. 2018), assert that they have "longstanding authority to protect their residents from environmental harms." States Br. at 5. But the Oregon statute at issue in *American Fuel* was enacted to "reduce *Oregon's contribution* to the global levels of greenhouse gas emissions and the impacts of those emissions in Oregon," 903 F.3d at 912 (emphasis added). The claims here, by contrast, are not focused on in-state production or emissions.

backwards. Whereas *Milwaukee I* involved the sovereign interests of only two states—Wisconsin and Illinois—Defendants are "tethered" to every jurisdiction in which they operate, and every greenhouse gas emitter is likewise tethered to its respective jurisdiction. Plaintiff's claims, which threaten to shut down the fossil fuel industry, thus implicate the sovereign interests of all 50 states and foreign nations. Indeed, *nineteen states* filed amicus briefs in the proceedings below, *see* ECF Nos. 123-1, 141-1, belying Plaintiff's contention that this case does not implicate federalism concerns.

Accordingly, federal common law, not state law, governs Plaintiff's claims.

II. Federal Common Law Does Not Provide a Remedy for Plaintiff's Global Warming Claims.

Having concluded that federal common law governs Plaintiff's transboundary pollution claims, the district court dismissed the action for failure to state a claim. As the court recognized, the CAA displaces global warming claims to the extent they are based on domestic greenhouse gas emissions, and the presumption against extraterritoriality bars the claims to the extent they are based on foreign emissions. Plaintiff's arguments to the contrary are irreconcilable with Supreme Court precedent, well-established principles of federal common law, and the allegations in the Amended Complaint.

A. The Clean Air Act Displaces Federal Common Law Claims Based on Domestic Greenhouse Gas Emissions.

1. Although *AEP* concluded that federal common law governs global warming-based tort claims, the Court held that such claims were not viable because Congress displaced them when it enacted the CAA. *AEP*, 564 U.S. at 423-29. As the Court explained, because "it is primarily the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest," federal common law is displaced when a federal "statute 'speak[s] directly to [the] question' at issue." *Id.* at 423-24 (citation omitted).

The Court held that the CAA displaced global warming-based nuisance claims against greenhouse gas emitters because the Act directs the EPA to "establish standards of performance for emission of pollutants." *Id.* at 424. The CAA gives the EPA "multiple avenues for enforcement," including "impos[ing] administrative penalties for noncompliance" and "commenc[ing] civil actions against polluters in federal court." *Id.* at 425. The Court thus 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. In *Kivalina*, the Ninth Circuit extended *AEP* and held that the CAA displaced the plaintiff's global warming-based nuisance claims, which sought damages rather than abatement, because "the type of remedy asserted is not relevant to the applicability

of the doctrine of displacement." 696 F.3d at 857 (citing *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008)).

Here, the district court followed *AEP* and *Kivalina* and held that "[t]o the extent that the City brings nuisance and trespass claims against Defendants for domestic greenhouse gas emissions, the Clean Air Act displaces such federal common law claims[.]" SPA14.

Plaintiff concedes, as it must, that emissions from domestic sources are regulated by the CAA, but nevertheless contends that its claims are not displaced because the Act "is silent as to the remedy for environmental harms to the City's property resulting from the production, promotion, and sale of fossil fuels." AOB48. But as explained above, Plaintiff's alleged injuries are not caused by the production and promotion of Defendants' products *simpliciter*, but by the *emissions* that result when third-party users combust those products. "If an oil producer cannot be sued under the federal common law for their own emissions, *a fortiori* they cannot be sued for someone else's." *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1024 (N.D. Cal. 2018).[5] This is because a "factfinder[] would have to consider whether

[5] Plaintiff cites Judge Alsup's previous decision indicating that the CAA does not displace federal common law claims against fossil-fuel producers. AOB49 (quoting *California v. BP P.L.C.*, 2018 U.S. Dist. LEXIS 32990, at *12 (N.D. Cal. Feb. 27, 2018)). But when that issue was then squarely presented on defendants' motion to dismiss, Judge Alsup held—like the district court subsequently did here—that the

emissions resulting from the combustion of Defendants' fossil fuels created an 'unreasonable interference' and an 'unlawful invasion' on City property." SPA17 (citing *Milwaukee I*, 451 U.S. at 348); *see California v. Gen. Motors Corp.*, 2007 WL 2726871, at *8 (N.D. Cal. Sept. 17, 2007) (court could not resolve global warming-based claims against automobile manufacturers without "mak[ing] an initial decision as to what is unreasonable in the context of carbon dioxide emissions"). In other words, the court would have to determine whether the "social utility" of Defendants' conduct is "outweighed by the gravity of the harm inflicted." *In re MTBE Prod. Liab. Litig.*, 824 F. Supp. 2d 524, 537 (S.D.N.Y. 2011). As the Supreme Court explained in *AEP*, adjudicating a global warming-based nuisance claim—"as with other questions of national or international policy"—would require "complex balancing" of "competing interests." 564 U.S. at 427. "Along with the environmental benefit potentially achievable, our Nation's energy needs and the possibility of economic disruption must weigh in the balance." *Id.*

But federal courts lack authority to undertake such "complex balancing" because Congress has "delegated to the EPA the determination as to what constitutes a reasonable amount of greenhouse gas emission under the Clean Air Act." SPA18 (citing *AEP*, 564 U.S. at 428-29). Although Plaintiff contends that the CAA does

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CAA displaces claims against fossil-fuel producers. *City of Oakland*, 325 F. Supp. 3d at 1024.

not speak "directly to every issue related to global warming and its effects," AOB52, the Act speaks directly to the relevant issue here—namely, the reasonableness of the greenhouse gas emissions that allegedly caused Plaintiff's injuries. SPA19.[6]

Suggesting that *Kivalina* was "wrongly decided," Plaintiff contends that it is unnecessary to decide whether Defendants' conduct was "unreasonable"—*i.e.*, whether the gravity of harms outweigh the utility of the conduct—because it seeks only damages, not injunctive relief. AOB52-53 (citing Restatement (Second) of Torts § 821B cmt. i) (hereafter, "Restatement"); *see also* AOB21-22 (arguing that certain harm can be a public nuisance regardless of the utility of the conduct). But Plaintiff explicitly requested an "injunction to abate the public nuisance and trespass[.]" A118. And even if Plaintiff had requested only damages, the court would still be required to conduct a reasonableness inquiry. As the Restatement explains, there is no difference between an injunction and damages where (as here) an award of damages would "make the continuation of the conduct not feasible."

[6] The Supreme Court's decision in *Exxon Shipping*, cited at AOB52, has no bearing on the displacement analysis here. There, although the defendant "admitt[ed] that the [Clean Water Act] does not displace compensatory remedies for consequences of water pollution," it argued that the statute "somehow preempt[ed] punitive damages[.]" 554 U.S. at 489. The Court disagreed because "nothing in the statutory text points to fragmenting the recovery scheme this way." *Id.* Here, by contrast, "Congress has acted to occupy the entire field" of greenhouse gas regulation and thus has "displace[d] any previously available federal common law action," which "means displacement of remedies"—*all* remedies. *Kivalina*, 696 F.3d at 857.

Restatement § 826(b). In conducting this feasibility analysis, courts must take account of "the financial burden of compensating for this and *similar harm to others*." *Id.* (emphasis added); *see id.* cmt. f. ("[C]onsideration is given not only to the cost of compensating for the harm in the suit before the court but also to the potential liability for compensating the other persons who may also have been injured by the activity.").

Here, that would mean taking into consideration not only this lawsuit, but also the cost of compensating *every other plaintiff* that has brought or could bring similar claims, including the plaintiffs in the 13 other global warming-based nuisance cases pending in courts around the country against Defendants (and in some cases, other fossil fuel companies).[7] In *City of Oakland*, the court rejected a similar argument that it could "ignore the public benefits derived from defendants' conduct in adjudicating plaintiffs' claims." 325 F. Supp. 3d at 1027. As the court recognized,

[7] *See Cty. of San Mateo v. Chevron Corp*, No. 17-cv-4929 (N.D. Cal.); *City of Imperial Beach v. Chevron Corp.*, No. 17-cv-4934 (N.D. Cal.); *Cty. of Marin v. Chevron Corp.*, No. 17-cv-4935 (N.D. Cal.); *City of Oakland v. BP p.l.c.*, No. 17-6011 (N.D. Cal.); *City & Cty. of S.F. v. BP p.lc.*, No. 17-cv-6012 (N.D. Cal.); *Cty. of Santa Cruz v. Chevron Corp.*, No. 18-cv-450 (N.D. Cal.); *City of Santa Cruz v. Chevron Corp.*, No. 18-cv-458 (N.D. Cal.); *City of Richmond v. Chevron Corp.*, No. 18-cv-732 (N.D. Cal.); *Pac. Coast Fed'n of Fishermen's Ass'ns, Inc. v. Chevron Corp.*, No. 18-cv-7477 (N.D. Cal.); *King County v. BP P.L.C.*, No. 18-cv-00758 (W.D. Wash.); *Rhode Island v. Chevron Corp.*, No. 18-cv-00395 (D.R.I.); *Mayor & City Council of Baltimore v. BP p.l.c.*, No. 18-cv-02357 (D. Md.); *Bd. of Cty. Comm'rs of Boulder v. Suncor Energy (U.S.A.) Inc.*, No. 18-cv-1672 (D. Colo.).

"judgments in favor of the plaintiffs who have brought similar nuisance claims based on identical conduct (let alone those plaintiffs who have yet to file suit) would make the continuation of defendants' fossil fuel production 'not feasible.'" *Id.*; *cf.* NLC Br. at 1, 3 (representing *19,000* cities and towns that purportedly "have an interest in the Court's proper recognition of the existence and availability of state common law claims for climate change impacts"); *see also* AOB50 (conceding that Defendants would be forced to "adjust their production, promotion, or sales activities in some way in response to a liability finding").[8]

Because the "financial burden" resulting from an award of damages here and in other similar cases "would make continuation of [Defendants'] activity not feasible," Restatement § 826, cmt. f., the court could not award damages without first weighing the costs and benefits and determining whether the amount of greenhouse gases emitted as a result of Defendants' conduct is "unreasonable." Because Congress has empowered the EPA, not federal courts, to determine the reasonable level of greenhouse gas emissions, Plaintiff's claims "cannot be reconciled with the decisionmaking scheme Congress enacted." *AEP*, 564 U.S. at 429.

[8] The potential for manifold claims based on the same conduct further distinguishes this case from *Boomer*, because there the award of damages to the "neighboring land owners" did not presage massive liability to countless *other* potential plaintiffs. 26 N.Y.2d at 222.

2. Plaintiff contends that "when a federal statute displaces federal common law, a state-law claim may still be asserted unless it has been preempted by statute." AOB54 (citing *AEP*, 564 U.S. at 429); *see also* States Br. at 17-19; NLC Br. at 12. That argument is based on a misreading of *AEP* and *Ouellette*.[9]

In *AEP*, the Court held that "borrowing the law of a particular State" to adjudicate an interstate and transnational global-warming-related public nuisance claim "would be *inappropriate*," and that such a claim could *only* be governed by a uniform "*federal* rule of decision." 564 U.S. at 422 (emphases added). In other words, "if federal common law exists, it is because state law cannot be used." *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 n.7 (1981); *see also Nat'l Audubon*, 869 F.2d at 1204-05 ("true interstate disputes [concerning pollution] *require* application of federal common law" to "the exclusion of state law") (emphasis added). *AEP*'s holding that federal common law applies to global warming-based claims necessarily entails that state law *cannot* apply to such claims, regardless of whether federal common law remedies remain available.

The question *AEP* left "open on remand" (AOB55) was whether state-law claims based on "*the law of each State where the defendants operate power plants*" were preempted by the CAA. 564 U.S. at 429 (emphasis added). That theory,

[9] Even if state law could, somehow, spring back to life following displacement, Plaintiff's claims would be preempted by federal law. *See infra* IV.B.

derived from *Ouellette*, has no relevance here. The question in *Ouellette* was whether the Clean Water Act ("CWA") preempted a public nuisance claim brought by Vermont plaintiffs in Vermont federal court under Vermont law to abate a nuisance caused by activity in New York. The Court held that "[i]n light of [the CWA's] pervasive regulation and the fact that the control of interstate pollution is primarily a matter of federal law, it is clear that the only state suits that remain available are those specifically preserved by the Act." 479 U.S. at 492. Because "[n]othing in the Act gives each affected State th[e] power to regulate discharges" in other states through nuisance actions, the Court concluded that "the CWA precludes a court from applying the law of an affected State against an out-of-state source." *Id.* at 494, 497. The Court recognized, however, that the CWA did not preclude "aggrieved individuals from bringing a nuisance claim pursuant to the law of the *source* State[,]" because the "CWA allows States such as New York to impose higher standards on their own point sources[.]" *Id.* at 497.

That narrow carve-out for state-law claims is inapplicable here because "the City has not sued under New York law for claims related to the production of fossil fuels in New York." SPA20; *see Cooper*, 615 F.3d at 306 (*Ouellette's* "holding is equally applicable to the Clean Air Act"). Nor has it sued for injuries allegedly caused by New York-based emissions. Rather, Plaintiff has pleaded omnibus public nuisance and trespass claims *under New York law* addressing production and

emissions in *all jurisdictions*. Those are precisely the types of claims that *AEP* and *Kivalina* held must be governed by federal common law. The district court was thus correct: it would be "illogical to allow the City to bring state law claims" addressing "areas of federal concern" that "require a uniform, national solution." SPA20.

Accordingly, the district court correctly dismissed Plaintiff's claims on displacement grounds to the extent they involve injuries allegedly resulting from domestic greenhouse gas emissions.

B. Plaintiff Failed to Plead Viable Federal Common Law Claims.

Even if Congress had not displaced the relevant federal common law, Plaintiff would still fail to state a claim under federal common law. Federal common law has never been extended to hold manufacturers liable for producing legal products merely because third-party *users* of those products emit transboundary pollution. Indeed, "[n]o plaintiff has ever succeeded in bringing a nuisance claim based on global warming." *City of Oakland*, 325 F. Supp. 3d at 1023.

Nor do federal proximate causation principles support the imposition of liability where, as here, the causal chain between lawful production and the alleged harm involves billions of intervening causes and complex ecological phenomena dating back hundreds of years. *See infra* III.A (discussing Plaintiff's failure to adequately plead causation). There is no justification for extending federal common

law remedies beyond the "bounded pollution giving rise to past federal nuisance suits." *AEP*, 564 U.S. at 422.

Moreover, as the district court recognized, because Plaintiff's claims are based in part on extraterritorial conduct—*i.e.*, overseas fossil-fuel extraction and foreign emissions by third parties—extending federal common law to provide a remedy here would disregard "the need for judicial caution in the face of 'serious foreign policy consequences.'" SPA21-22 (quoting *Jesner*, 138 S. Ct. at 1407). In *Jesner*, the Court held that federal courts should exercise "great caution" before recognizing new forms of liability that bear on foreign policy, because "[t]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns." *Id.* at 1403.[10] Such caution is especially appropriate here given that Plaintiff seeks a ruling that Defendants' worldwide fossil-fuel production—much of which occurs at the direction of foreign

[10] *Jesner* also reaffirmed that federal "courts must refrain from creating" federal common law remedies "if there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy." 138 S.Ct. at 1402 (quoting *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1858 (2017)). Such restraint is warranted here because Congress has repeatedly *encouraged* fossil fuel production, confirming that fossil fuels are not a public nuisance but an essential national resource. *See*, *e.g.*, Energy Policy Act of 1992, 42 U.S.C. §§ 13401, 13411(a), 13412, 13415(b)–(c); Energy Policy Act of 2005, 42 U.S.C. §§ 15903, 15904, 15909(a), 15910(a)(2)(B), 15927; Mining and Minerals Policy Act of 1970, 30 U.S.C. § 21a; Coastal Zone Management Act of 1972, 16 U.S.C. § 1451(j); Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701(a)(12).

governments—is a public nuisance. Moreover, global warming is "the subject of international agreements," and "many other governmental entities around the United States and in other nations, will be forced to grapple with the harmful impacts of climate change in the coming decades." SPA23; *see also City of Oakland* 325 F. Supp. 3d at 1026 ("The United States is … engaged in active discussions with other countries as to whether and how climate change should be addressed through a coordinated framework."). The district court thus correctly held that litigating an action based on "foreign greenhouse gas emissions in federal court would severely infringe upon the foreign-policy decisions that are squarely within the purview of the political branches of the U.S. Government." SPA23.

The district court also invoked the "presumption against extraterritoriality" as a bar to Plaintiff's claims. SPA21. Plaintiff and its amici contend that the presumption does not apply to federal common law claims. AOB60; Scholars Br. at 2. Yet the Supreme Court has expressly "cautioned that where recognizing a new claim for relief under federal common law could affect foreign relations, courts should be 'particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.'" *City of Oakland*, 325 F. Supp. 3d at 1025 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004)). Indeed, the Court applied the presumption in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), and declined to recognize a new federal common law cause of action

under the "strictly jurisdictional" Alien Tort Statute. *Id.* at 116. As the Court explained, although the canon typically applies to statutes, "the principles underlying the canon of interpretation similarly constrain courts." *Id.* This is because "the danger of unwarranted judicial interference in the conduct of foreign policy is magnified" where "the question is not what Congress has done but instead what courts may do." *Id.* Because Plaintiff's claims target extraterritorial conduct—and would interfere with the political branches' ability to manage foreign policy—the district court correctly declined to create a federal common law remedy for their claims.[11]

Plaintiff faults the district court for failing to describe exactly *how* its claims might infringe on the political branches' authority to conduct foreign policy. AOB58. But the foreign-policy implications of declaring the "worldwide production, marketing, and sale of fossil fuels" (SPA22) a public nuisance are self-evident. As discussed above, the relief that Plaintiff seeks "would effectively allow plaintiffs to govern conduct and control energy policy on foreign soil," and "many foreign governments actively support the very activities targeted by plaintiffs' claims." *City of Oakland*, 325 F. Supp. 3d at 1026. To the extent that the United

[11] That Plaintiff has alleged "local harms" (AOB61; Scholars Br. at 4, 11-12) is of no moment, because the "focus" of a nuisance claim is on the conduct that created the alleged nuisance. *See Kiobel*, 569 U.S. at 124 (federal common law claim is extraterritorial if the "relevant conduct took place outside the United States").

States has an interest in encouraging other countries to reduce fossil fuel production or greenhouse gas emissions, the President, not the judiciary, has the constitutional authority to conduct those negotiations.

Holding foreign corporations—such as Shell and BP—liable for alleged global warming-based injuries would also invite foreign entities to sue American corporations for similar injuries. *See Jesner*, 138 S.Ct. at 1405-06 (opinion of Kennedy, J.) (discussing possibility of retaliation in the context of private cause of action under the Alien Tort Statute); Scholars Br. at 16 (conceding that *Jesner* cautions against allowing suits "against 'foreign corporate defendants'" to go forward where the actions would "cause[] significant diplomatic tensions"). In the absence of clear statutory authorization, this Court should thus refrain from creating a new global warming tort because it is Congress that has "the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain." *Kiobel*, 569 U.S. at 116.

In short, "[a]lthough the scope of [P]laintiff['s] claims is determined by federal law, there are sound reasons why regulation of the worldwide problem of global warming should be determined by our political branches, not by our judiciary." *City of Oakland*, 325 F. Supp. 3d at 1029. The district court was thus justified in exercising "appropriate caution and declin[ing] to recognize" a novel "cause of action" under federal common law against fossil-fuel producers. SPA23.

III. Plaintiff Failed to Plead Viable Claims Under New York Law.

Even if New York law governed Plaintiff's claims (which it does not), this Court should still affirm because Plaintiff has failed to plead a viable state law claim. Although Plaintiff contends it has asserted "traditional state-law nuisance and trespass claims," AOB19, its sweeping global warming claims have no basis in New York tort law. New York courts, like their federal counterparts, are "cautious in imposing novel theories of tort liability" to address problems that are the "focus of a national policy debate," *Hamilton*, 96 N.Y.2d at 239-40, and they have rejected similar efforts to use tort law to address "societal problems" that are "better suited" for resolution by "the Legislative and Executive branches," *Sturm, Ruger*, 761 N.Y.S.2d at 203.

New York courts are particularly "wary of expanding the breadth of public nuisance" liability, *City of New York v. A.E. Sales LLC*, 2005 WL 3782442, at *3 (S.D.N.Y. Feb. 9, 2005), lest it "become a monster that would devour in one gulp the entire law of tort." *Sturm, Ruger*, 761 N.Y.S.2d at 196-97, 202-03. They have also declined to abandon traditional tort law principles where plaintiffs have sought to impose liability "regardless of the distance between the 'causes' of the 'problems' and their alleged consequences, and without any deference to proximate cause." *Id.* Accordingly, were New York law to apply, the result would be the same: dismissal.

A. Plaintiff Fails to Plead Proximate Causation.

New York courts impose tort liability only where a "direct and immediate" connection exists between the defendant's conduct and the alleged harm. *Sturm, Ruger*, 761 N.Y.S.2d at 197; *see also Smith v. 2328 Univ. Ave. Corp.*, 859 N.Y.S.2d 71, 73-74 (1st Dep't 2008) (rejecting product liability claim where product was not defective when sold, the alleged harm arose 50 years after sale, and there were numerous intervening actors) (citing *Sturm, Ruger*, 761 N.Y.S.2d at 201). New York courts have consistently refused to "lay aside traditional notions of remoteness, proximate cause, and duty" when addressing nuisance and trespass claims. *Janki Bai Sahu v. Union Carbide Corp.*, 528 F. App'x 96, 101 (2d Cir. 2013) (citing *Sturm, Ruger*, 761 N.Y.S.2d at 199, 200-02).

In assessing proximate cause, New York courts consider: "(1) the aggregate number of factors involved which contribute towards the harm and the effect which each has in producing it, (2) … whether the situation was acted upon by other forces for which the defendant is not responsible, and (3) the lapse of time." *Mack v. Altmans Stage Lighting Co.*, 470 N.Y.S.2d 664, 667 (2d Dep't 1984) (quoting Restatement § 433). The allegations in the Amended Complaint confirm that Defendants' conduct is not the proximate cause of Plaintiff's alleged injuries.

First, numerous factors—both human and natural—purportedly contribute to global warming. Thousands of companies and governments around the world

extract fossil fuels; other entities transport and refine those fuels; countless other entities design and manufacture products that may require fossil fuels for their use; refined fuels are then sold to billions of consumers—including the City of New York and its citizens—who use them to generate electricity, drive automobiles, heat homes and buildings, fly airplanes, operate industrial equipment, grow crops, and otherwise engage in productive enterprises. The combusted fuels emit greenhouse gases that accumulate in the atmosphere and combine with emissions from all other industrial and non-industrial sources—such as livestock and volcanic activity—and cause the planet to warm through complex processes. A68¶52-A80¶68. It is this warming that Plaintiff alleges will cause sea levels to rise, which will in turn cause Plaintiff's alleged injuries. It is difficult to imagine a nuisance involving a greater "number of factors" than the global warming claims asserted here. *Mack*, 470 N.Y.S.2d at 667.

By contrast, the cases that Plaintiff cites involved traditional nuisance actions addressing local pollution from a small number of alleged tortfeasors. For example, in *State v. Schenectady Chemicals, Inc.*, three companies deposited chemical waste at a single site in New York, and the waste seeped into the local water supply. 459 N.Y.S.2d 971, 974 (Sup. Ct. 1983), *modified*, 479 N.Y.S.2d 1010 (3d Dep't 1984). In *State v. Fermenta ASC Corp.*, 238 A.D.2d 400 (2d Dep't 1997), a single chemical company was held liable for trespass (but not for public nuisance) because it

"direct[ed] consumers to apply [its chemical] to the soil," and the chemical contaminated the local water supply in Suffolk County. *Id.* at 404. Similarly, in *Abbatiello v. Monsanto Co.*, 522 F. Supp. 2d 524 (S.D.N.Y. 2007) (cited at AOB24), a single company (Monsanto) sold a harmful chemical to another company (GE), and the chemical later contaminated a particular GE plant in New York and the surrounding land. *Id.* at 528. Although these cases confirm that a defendant "need not be the sole party responsible for creating a nuisance to be held liable," AOB24, they in no way support the imposition of liability where, as here, the "aggregate number of factors" responsible for the alleged nuisance is in the billions. *Mack*, 470 N.Y.S.2d at 667.

Second, Defendants' alleged wrongful conduct—the production of fossil fuels—"created a situation harmless unless acted upon by other forces." *In re Methyl Tertiary Butyl Ether (MTBE) Prod. Liab. Litig.*, 739 F. Supp. 2d 576, 596 (S.D.N.Y. 2010) (quoting Restatement § 433(b)). It is not until third parties combust Defendants' fuels that greenhouse gases are emitted. And it is the accumulation of *all* worldwide greenhouse gas emissions—not merely the 11% of industrial emissions purportedly resulting from the combustion of Defendants' products, A46¶3—that allegedly causes global warming. This case is thus unlike *Schenectady*, *Fermenta*, *Abbatiello*, *MTBE*, *Agent Orange*, and *Johns-Manville*—which all involved injuries directly linked to the defendants' inherently hazardous chemicals.

Third, Plaintiff admits that it seeks to hold Defendants liable for conduct occurring since the "Industrial Revolution." A182¶88. The "lapse of time" between Defendants' conduct and alleged injury is thus exponentially greater than any case in which a New York court has found proximate cause satisfied. *Mack*, 470 N.Y.S.2d at 667. Moreover, Defendants' conduct is geographically removed from the alleged injury, as nearly all of Defendants' fossil-fuel extraction and promotion has occurred outside New York, and much of it has occurred outside the United States.

In short, Plaintiffs' claims suffer from the same defects that led the New York Appellate Division to dismiss New York's public nuisance lawsuit against gun manufacturers in *Sturm, Ruger*. The New York Attorney General alleged that the defendant handgun manufacturers "knowingly place[d] a disproportionate number of handguns in the possession of people who use them unlawfully," 761 N.Y.S.2d at 194, but the court rejected the City's claims because the alleged harm was "*far too remote* from defendants' *otherwise lawful commercial activity* to fairly hold defendants accountable for common-law public nuisance." *Id.* at 201 (emphasis added). The court thus held that as a matter of law the defendants' conduct could "not be considered a proximate cause of such harm." *Id.*

The court specifically declined to abandon "longstanding" proximate cause principles because "giving a green light" to such attenuated nuisance claims would

"likely open the courthouse doors to a flood of limitless, similar theories of public nuisance, not only against these defendants, but also against a wide and varied array of other commercial and manufacturing enterprises and activities." *Id.* at 196. Anticipating the types of claims asserted here, the court warned:

> All a creative mind would need to do is construct a scenario describing a known or perceived harm of a sort that can somehow be said to relate back to the way a company or an industry makes, markets and/or sells its non-defective, lawful product or service, and a public nuisance claim would be conceived and a lawsuit born.

Id. But the judiciary is not well-suited to remedy every social problem, and the proximate cause requirement prevents courts from becoming enmeshed in "issues which the legislative and executive branches are vastly better designed, equipped and funded to address." *Id.* at 105. Global warming—an issue caused by and affecting everyone—presents "the classic scenario for a legislative or international solution." *City of Oakland*, 325 F. Supp. 3d at 1026.

Plaintiff contends that *Sturm, Ruger* and *Hamilton* "are rooted in the law's traditional reluctance to hold a defendant responsible for another's intervening criminal acts," AOB28, but the holdings of those cases were not so limited. The claims at issue were dismissed not only because criminal acts were part of the causal chain, but also because "[s]uch broad liability … should not be imposed without a more tangible showing that defendants were a direct link in the causal chain that resulted in plaintiffs' injuries." *Hamilton*, 96 N.Y.2d at 234; *see also Sturm, Ruger*,

761 N.Y.S.2d at 201. Indeed, in *Sturm, Ruger* the court relied upon eight unanimous decisions by the federal Courts of Appeals dismissing public nuisance claims against tobacco companies on proximate cause grounds, even though there were no intervening criminal acts in those cases. 761 N.Y.S.2d at 201 n.3. The court made clear that its proximate cause ruling was necessary to avoid a "flood" of nuisance suits against a "wide and varied array" of "manufacturing enterprises"—not merely those whose products may be used in criminal activity. *Id.* at 196.

Plaintiff contends that manufacturers may be liable for nuisance "despite the intervening acts of other parties in using their products," AOB25, and it points to this Court's decision in *MTBE* as the roadmap for liability here. But *MTBE* did not recognize a "more generous legal standard" for public nuisance claims. *Sahu v. Union Carbide Corp*., 2014 WL 3765556, at *7 (S.D.N.Y. July 30, 2014), *aff'd*, 650 F. App'x 53 (2d Cir. 2016). On the contrary, *MTBE* applied the traditional causation standard under which a defendant is liable only if it "played a sufficiently direct role in causing the [harm alleged]." *Id.* (quoting *Sahu*, 528 F. App'x at 101-02); *see also In re Nassau Cty. Consol. MTBE Prods. Liab. Litig.*, 2010 WL 4400075, at *18 (N.Y. Sup. Ct., Nov. 4, 2010) (dismissing trespass claim against pipeline owner where defendants merely "participat[ed] in the chain of distribution of MTBE-containing gasoline").

MTBE is also inapposite because the defendant in that case was held liable for directly causing a local nuisance through its tortious conduct in New York. There, the plaintiffs asserted various tort claims against manufacturers, refiners, and distributors of MTBE—a gasoline additive that had leaked out of underground storage tanks in Queens and into the local water supply. 725 F.3d at 78. A jury found the defendant liable under New York law for, *inter alia*, public nuisance and trespass. *Id.* Although the defendant argued on appeal that it was "too remote" from the alleged injury to satisfy proximate cause, this Court rejected that argument because the plaintiffs had "adduced evidence showing that [the defendant] manufactured gasoline containing MTBE and *supplied that gasoline to service stations in Queens*." 725 F.3d at 121 (emphasis added). The plaintiffs had also "introduced evidence that [the defendant] knew specifically that tanks in the New York City area leaked," yet continued to supply them fuel. *Id.*

Moreover, the plaintiffs in *MTBE* "sought to hold [the defendant] liable as both a *direct spiller of MTBE gasoline* and as a manufacturer, refiner, supplier, and seller of MTBE gasoline, and … the jury's verdict on public nuisance did not distinguish between these theories of causation." *Id.* at 122 The verdict thus may well have turned on the defendant's own chemical releases in New York, not on its role as a manufacturer. And even if the jury had found the defendant liable "only as a manufacturer of MTBE," the "evidence showed that [the defendant] conducted

'operations near the relative geographic areas'" of the contaminated wells. *Id.* at 123. The Court thus concluded that the plaintiffs had established proximate cause based on the defendant's "extensive involvement *in the Queens gasoline market*." *Id.* at 123 (emphasis added). This evidence "belie[d] any claim that its conduct was too geographically remote to sustain liability for public nuisance." *Id.* Here, by contrast, Plaintiff has not alleged any New York-based conduct meaningfully connected to its alleged injuries.

At bottom, Plaintiff would have this Court substitute a vague foreseeability test for proximate cause, contending that manufacturers should be liable anywhere for injuries resulting from third-party conduct so long as the "effects" of that conduct are "normal and foreseen." AOB24. But "foreseeability" and "remoteness" are "distinct concepts" in tort law. *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 236, 240 (2d Cir. 1999), *as amended* (Aug. 18, 1999). One who causes an "accident in the Brooklyn Battery Tunnel during rush hour" will "foreseeabl[y]" harm "thousands"—but is liable only to "those physically injured in the crash." *Kinsman Transit v. City of Buffalo*, 388 F.2d 821, 825 n.8 (2d Cir. 1968); *see also Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 926 (3d Cir. 1999) ("foreseeability [is] insufficient to overcome the remoteness of the [plaintiff's] injury from the defendants' wrongdoing"); *SEIU Health & Welfare Fund v. Philip Morris Inc.*, 249 F.3d 1068, 1071-74 (D.C. Cir.

2001) (dismissing claims, including those brought by government entities, because the "tortured path" from defendants' conduct to alleged injuries failed proximate cause); *Sahu*, 2014 WL 3765556, at *11 (although it is foreseeable that "the process of manufacturing chemicals produces waste[,] … it does not necessarily follow that the production of chemicals itself constitutes legal causation of a tort."). Regardless whether some remote harm is foreseeable, proximate cause requires a "chain of causation leading to damages [that] is not complicated by the intervening agency of third parties." *Laborers Local 17*, 191 F.3d at 240. Accordingly, it would be "error" to "substitute[e] the foreseeability test" for a proximate cause analysis. *Id.*

Because the City's claims fail to satisfy proximate cause, dismissal is required.

B. Plaintiff Fails to Plead But-For Causation.

Plaintiff also fails to allege facts going to the "bedrock principle of tort law" that the "defendant's act was a cause-in-fact of [the alleged] injury." *Aegis Ins. Servs., Inc. v. 7 World Trade Co., L.P.*, 737 F.3d 166, 179 (2d Cir. 2013). Plaintiff does not (and cannot) allege that Defendants' conduct was sufficient to cause the alleged injuries. Indeed, Plaintiff alleges that nearly 90% of carbon and methane emissions from industrial sources are *not* attributable to Defendants, A46¶3, suggesting that Defendants are responsible for little, if any, of Plaintiff's alleged

global warming-related injuries, even under Plaintiff's own theory of liability.[12] Nor can any specific portion of Plaintiff's alleged injuries plausibly be attributed to Defendants' conduct because "there is no realistic possibility of tracing any particular alleged effect of global warming to any particular [action] by any specific person, entity, [or] group at any particular point in time." *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 880 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012); *see also Amigos Bravos v. U.S. Bureau of Land Mgmt.*, 816 F. Supp. 2d 1118, 1135 (D.N.M. 2011) ("[C]limate change is dependent on an unknowable multitude of [greenhouse gas] sources and sinks, and it is impossible to say with any certainty that Plaintiffs' alleged injuries were the result of any particular action or actions by Defendants.").

Plaintiff is also unable to plausibly allege that Defendants' conduct was a "substantial factor" in bringing about its alleged harms because any such harms would likely have occurred even if Defendants had not produced *any* fossil fuels. *See* Restatement § 432 ("conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained" absent the defendant's behavior);

[12] The allegations here are thus unlike those in *Sindell v. Abbott Labs.*, 607 P.2d 924 (Cal. 1980) (quoted in Sharkey Br. at 18), where *any* of the defendants' drugs could have caused the plaintiff's injury, but it was impossible to trace the harm "to any specific producer." *Id.* at 936; *see also Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1078 (N.Y. 1989). Here, by contrast, even Defendants' *cumulative* conduct was not sufficient to cause Plaintiff's alleged injuries.

see also Rodriguez v. Budget Rent-A-Car Sys., Inc., 841 N.Y.S.2d 486, 490 (1st Dep't 2007). If Defendants had curtailed their production, foreign oil producers—including those in OPEC nations which have voluntarily limited production for decades—would have quickly increased output to fill unmet demand. *See Sierra Club v. U.S. Def. Energy Support Ctr.*, 2011 WL 3321296, at *5 (E.D. Va. July 29, 2011) (rejecting global-warming claims because Plaintiff could not show that "if there had been a reduction in the amount of greenhouse gases emitted by [Defendants], those reductions would not have been offset by increased emissions elsewhere on the planet.").

C. Plaintiff's Claims Are Barred by the *In Pari Delicto* Doctrine.

The doctrine of *in pari delicto* "prohibits one party from suing another where the plaintiff was 'an active, voluntary participant in the unlawful activity that is the subject of the suit.'" *In re MF Global Holdings Ltd. Inv. Litig.*, 998 F. Supp. 2d 157, 189 (S.D.N.Y. 2014). "[T]he principle that a wrongdoer should not profit from his own misconduct is so strong in New York" that courts "have said the defense applies even in difficult cases and should not be 'weakened by exceptions.'" *Kirschner v. KPMG LLP*, 15 N.Y.3d 446, 464 (2010). Where warranted, "in pari delicto may be resolved on the pleadings in a state court action in an appropriate case." *Kirschner*, 15 N.Y.3d at 459 n.3; *see also In re Bernard L. Madoff Inv. Secs. LLC*, 721 F.3d 54, 65 (2d Cir. 2013).

Plaintiff admits that "[t]he basic facts of the greenhouse effect have been known for a long time." A82¶72. Yet despite this professed knowledge, Plaintiff has for decades authorized activities it now claims created the nuisance. Plaintiff has encouraged its residents to use fossil fuels, while reaping economic benefits from this reliance, including as an investor in fossil fuel companies. Indeed, fossil fuels provide "more than 98 percent of in-city electricity production by power plants," and residents of the City that never sleeps use millions of gallons of fossil fuels every day. *See* City of New York, *Building a Stronger, More Resilient New York* (2013), at 109, 133-34 (cited at A77¶66 n.25), *available at* https://www.nycedc.com/resource/stronger-more-resilient-new-york. In short, as the district court recognized, and Plaintiff does not dispute, "the City benefits from and participates in the use of fossil fuels as a source of power, and has done so for many decades." SPA17. Its claims are thus also barred by the doctrine of *in pari delicto*. *See Iroquois Gas Corp. v. Int'l Ry. Co.*, 270 N.Y.S. 197, 198 (4th Dep't 1934) (*in pari delicto* applies "without regard to the quantity of fault.").

IV. Numerous Federal Doctrines Also Bar Plaintiff's Claims.

Even if Plaintiff could plead viable claims under New York law (which it cannot), the claims were properly dismissed because adjudicating them would interfere with the foreign affairs powers of the political branches; the claims are

preempted by federal law; and they are barred by the Commerce, Due Process, and Takings Clauses.

A. Plaintiff's Claims Infringe on the Federal Government's Foreign Affairs Power.

"[S]tate laws 'must give way if they impair the effective exercise of the Nation's foreign policy.'" *Garamendi*, 539 U.S. at 419. This prohibition applies to state-law causes of action and to state law more broadly. *See In re Assicurazioni Generali, S.P.A.*, 592 F.3d 113, 115, 119-20 (2d Cir. 2010).

Here, the district court correctly concluded that adjudicating this action "would severely infringe upon the foreign-policy decisions that are squarely within the purview of the political branches of the U.S. Government." SPA23. With respect to global warming, the United States has pursued a policy of seeking multilateral reductions in worldwide carbon emissions and using domestic emissions reductions as a bargaining chip to extract similar commitments from other nations in negotiations. *See supra* at 5-6, 13 ; *see also* Emre Peker, *Trump Administration Seeks to Avoid Withdrawal from Paris Climate Accord*, The Wall Street Journal (Sept. 17, 2017), https://on.wsj.com/2frk9h4 (focus is on negotiating "a better deal for the U.S."). The United States has also opposed climate initiatives that would undermine the American economy. *See id.*

Plaintiff, apparently dissatisfied by these developments, is attempting to reduce emissions by "employ[ing] a different, state system of economic pressure"

on the fossil fuel industry. *Garamendi*, 539 U.S. at 423. But as the Supreme Court held in *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), state laws (and by extension, state causes of action) may not "undermine[] the President's capacity … for effective diplomacy" by "compromis[ing] the very capacity of the President to speak for the Nation." *Id.* at 381. "[T]he President's effective voice" on matters of foreign affairs must not "be obscured by state or local action." *Id.* Plaintiff's claims, if successful, would undercut the President's ability to negotiate for global emissions reductions by effectively requiring drastic and immediate reductions in production and emissions. These claims are thus akin to global-warming claims that the State of California brought against automobile manufacturers more than a decade ago in *General Motors*. In dismissing those claims, the court explained that "by seeking to impose damages for the Defendant automakers' lawful worldwide sale of automobiles, Plaintiff's nuisance claims sufficiently implicate the political branches' powers over interstate commerce *and foreign policy*." *Gen. Motors*, 2007 WL 2726871, at *14 (emphasis added).

Plaintiff contends that there is no "clear conflict" between this lawsuit and U.S. foreign policy. AOB57-60. But state laws that "undermine" foreign policy "objective[s]" are preempted even if they are "not directly in conflict with [the] government's policy." *Assicurazioni*, 592 F.3d at 118. Indeed, state law is preempted if there is even a "*likelihood* that state legislation will produce something

more than *incidental effect* in conflict with express foreign policy of the National Government." *Garamendi*, 539 U.S. at 420 (emphasis added); *see also Saleh v. Titan Corp.*, 580 F.3d 1, 13 (D.C. Cir. 2009) (application of state common law to conduct in Iraq "created a conflict with federal foreign policy interests").[13] The remedy that Plaintiff seeks here—massive damages backed up by an injunction—would undermine the policy of negotiating an acceptable international agreement before committing to substantial reductions in domestic emissions. Indeed, the United States made exactly this point in an amicus brief it filed in *City of Oakland*, which Defendants submitted here. *See* Dkt. 119-1 (16-20).

B. Federal Law Preempts Plaintiff's Claims.

State-law tort claims are preempted when they conflict with federal law or when Congress has occupied the field through legislation. *See Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 348 (2001); *N.Y. SMSA Ltd. P'ship v. Town of Clarkstown*, 612 F.3d 97, 104 (2d Cir. 2010). Plaintiff's claims here are preempted for both reasons.

[13] Plaintiff's amici contend that the claims here "address an area of 'traditional state responsibility,'" Scholars Br. at 19, but regulation of worldwide fossil-fuel production and greenhouse gas emissions is well outside the traditional authority of the states. *Supra* I.A-B. *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007), and *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007) (cited in AOB59-60) are not to the contrary, because both cases involved state regulation of *in-state emissions*.

By enacting the CAA, "Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions." *AEP*, 564 U.S. at 426. The CAA also provides specific procedures for any person, including private parties and state and local governments, to challenge or change those nationwide emissions standards or permitting requirements. 42 U.S.C. § 7607(b), (d). Plaintiff argues that the CAA is insufficiently comprehensive to "crowd[] out state action," AOB44, but the CAA plainly occupies the field with respect to national emissions standards. Here, Plaintiff seeks to use New York tort law to establish de facto national emissions limits by curbing Defendants' fossil-fuel production through the imposition of damages and the threat of endless liability. Plaintiff's claims are thus preempted because they would require a court to second-guess "Congress' decision and the Agency's ability to rely on the expertise that it develops." *Lead Indus. Ass'n, Inc. v. EPA*, 647 F.2d 1130, 1146 (D.C. Cir. 1980).[14]

Second, Plaintiff's claims conflict with the numerous federal laws and regulations that authorize and affirmatively promote fossil fuel production. *See, e.g.*,

[14] Plaintiff's claims also stand as an obstacle to the objectives of the CAA. *See Cooper*, 615 F.3d at 296. The States contend that the CAA makes "addressing air pollution" "'the primary responsibility of States and local governments.'" States Br. at 21 (quoting 42 U.S.C. § 7401(a)(3)). But the CAA authorizes states to take action to reduce *in-state* air pollution—it does not authorize states to regulate nationwide or worldwide air pollution based on in-state effects of that pollution, which is what Plaintiff attempts to do here under the guise of state law. *See Cooper*, at 302-04.

43 U.S.C. § 1802(1) (promoting "expedited exploration and development of the Outer Continental Shelf in order to achieve national economic and energy policy goals [and] assure national security"); 43 C.F.R. § 3162.1(a) (requiring federal lessees to drill "in a manner which … results in maximum ultimate economic recovery of oil and gas"); 30 C.F.R. § 550.120 (similar for offshore oil and gas leases); *see also* 10 U.S.C. § 7422(c)(1)(B); 30 U.S.C. § 201(a)(3)(C). Plaintiff cannot use state law to declare fossil-fuel production a nuisance when Congress has expressly declared fossil fuel a vital national resource and encouraged its production.

C. Plaintiff's Claims Violate the Commerce Clause.

To the extent that state law governs Plaintiff's claims, the claims would violate the Commerce Clause because they seek to impose New York's legal standards on out-of-state commercial activities.

State regulation that has "the practical effect" of "control[ling] conduct beyond the boundaries of the State" is invalid under the Commerce Clause *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989). Extraterritorial regulation violates the Commerce Clause "whether or not the commerce has effects within the State." *Id.*; *see Am. Booksellers Found. v. Dean*, 342 F.3d 96, 102 (2d Cir. 2003) (extraterritorial regulation of commerce is *per se* unconstitutional).

Here, Plaintiff's requested injunction would necessarily regulate Defendants' "worldwide production, marketing, and sale of fossil fuels." SPA22 Moreover, a

multi-billion dollar damages award would effectively control out-of-state conduct by requiring Defendants to curtail their worldwide fossil-fuel extraction to avoid additional crippling awards in the future. *See Kurns*, 565 U.S. at 637; *BMW*, 517 U.S. at 572 n.17; *Ouellette*, 479 U.S. at 495; *Boomer*, 26 N.Y.2d at 226; *Town of Oyster Bay v. Lizza Indus., Inc.*, 22 N.Y.3d 1024, 1031 (2013) (explaining continuing nuisance liability). But New York City may not "impose its own policy choice on neighboring states," let alone on every state in the country. *BMW*, 517 U.S. at 571. In short, Plaintiff's requested "relief would effectively allow plaintiff[] to govern conduct and control energy policy" in other states in violation of the Commerce Clause. *City of Oakland*, 325 F. Supp. 3d at 1026; *see Healy*, 491 U.S. at 336.

Plaintiff's claims are doubly barred because much of Defendants' fossil-fuel production occurs overseas. *See, e.g.*, *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 311 (1994) ("In the unique context of foreign commerce, a State's power is further constrained because of the special need for federal uniformity."); *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984).

D. The Due Process and Takings Clauses Also Bar Plaintiff's Claims.

The Due Process Clause prohibits Plaintiff from wielding state tort law to "punish a defendant for conduct that may have been lawful where it occurred." *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 421 (2003). This is especially true

when the requested economic sanctions aim to "chang[e] the tortfeasors' lawful conduct in other States." *BMW*, 517 U.S. at 572-73 & n.19.

Similarly, both the Due Process and Takings Clauses forbid states from imposing massive retroactive liability for lawful conduct. *See E. Enters. v. Apfel*, 524 U.S. 498, 534, 538 (1998) (plurality opinion) (concluding that the Coal Act violated the Takings Clause because it "improperly place[d] a severe, disproportionate, and extremely retroactive burden on Eastern"); *id.* at 539, 549 (Kennedy, J., concurring in the judgment and dissenting in part) (statute "must be invalidated as contrary to essential due process principles" because it created "liability for events which occurred 35 years ago" and had "a retroactive effect of unprecedented scope"). Plaintiff's claims, which seek to impose massive extraterritorial and retroactive liability based on Defendants' lawful conduct going back several decades, violate the "clear principle" announced in *Eastern Enterprises* that "a liability that is severely retroactive, disruptive of settled expectations and wholly divorced from a party's experience may not constitutionally be imposed." *Me. Yankee Atomic Power Co. v. United States*, 44 Fed. Cl. 372, 378 (1999); *see Peterson v. Islamic Republic of Iran*, 758 F.3d 185, 192 (2d Cir. 2014). Plaintiff's claims are thus barred whether federal or state law governs.

CONCLUSION

For the foregoing reasons, this Court should affirm.

Dated: February 7, 2019

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of February, 2019, a true and correct copy of the foregoing Opposition Brief for Defendants-Appellees was served on all counsel of record in this appeal via CM/ECF pursuant to Local Rule 25.1(h)(1) & (2).

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