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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

BP P.L.C., *et al.*,

Defendants.

Case No. C 17-06011 WHA
Case No. C 17-06012 WHA

AMICUS BRIEF OF INDIANA AND FOURTEEN OTHER STATES IN SUPPORT OF DISMISSAL

Date: April 19, 2018
Time: 11:00 a.m. PT

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INTEREST OF THE AMICI STATES

The justiciability of climate change lawsuits under federal common law is an issue of extraordinary importance to the Amici States. To permit federal adjudication of claims for abatement fund remedies would disrupt carefully calibrated state regulatory schemes devised by politically accountable officials. Federal courts should not use public nuisance theories to confound state and federal political branches' legislative and administrative processes by establishing emissions policy (or, as is more likely, multiple conflicting emissions policies) on a piecemeal, ad hoc, case-by-case basis under the aegis of federal common law.

States have an especially strong interest in this case because the list of potential defendants is limitless. Plaintiffs' theory of liability involves nothing more specific than promoting the use of fossil fuels. As utility owners, power plant operators, and generally significant users of fossil fuels (through facilities, vehicle fleets and highway construction, among other functions), States and their political subdivisions themselves may be future defendants in similar actions.

SUMMARY OF THE ARGUMENT

In the name of the State of California, the cities of San Francisco and Oakland seek to harness the power and prestige of federal courts to remedy global climate change. They assert that five fossil fuel corporations, by producing such fuels and promoting their use, have broken the law—but not law enacted by a legislature, promulgated by a government agency, or negotiated by a President. Rather, the law Plaintiffs invoke is common law. They say that Defendants' production of fossil fuels and the subsequent use of those fuels by third parties sufficiently contributes to global warming as to constitute a "public nuisance" that the federal judiciary should enjoin.

But the questions of global climate change and its effects—and the proper balance of regulatory and commercial activity—are political questions not suited for resolution by any court. Indeed, such judicial resolution would trample Congress's carefully-calibrated process of cooperative federalism where States work in tandem with EPA to administer the federal Clean Air Act.

And even were that not so, the Supreme Court has already said that the Clean Air Act and related EPA regulations have displaced the federal common law on which Plaintiffs base their claim in this case: "We hold 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." *American Electric Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011) (*AEP*). Plaintiffs seek to evade *AEP*'s mandate by framing the "nuisance" as "producing" and "promoting" the use of fossil fuels rather than "emitting carbon dioxide," but this tactic serves only to show that their claim is too attenuated. ECF No. 168, First Amended Compl. at ¶¶ 10, 33, 117. Similarly, they request relief in the form of an "abatement fund remedy" rather than outright abatement, but the Ninth Circuit has already said that the remedy requested is irrelevant to the displacement issue. Ultimately, neither stratagem changes the essential nature of Plaintiffs' claim or of the liability that they are asking the court to impose—liability that could serve as the predicate for myriad remedies in future cases or even in this one.

Finally, Plaintiffs' claims, if successful, would have impermissible extraterritorial impact. Consider: Plaintiffs are asking the court to order Defendants to pay to build sea walls, raise the elevation of low-lying property and buildings, and construct other infrastructure projects necessary to combat the effects of global climate change for the major cities of Oakland and San Francisco. Such a remedy could cost several billion dollars and seriously impact Defendants' ability to provide energy to the rest of the country. In effect, Plaintiffs would be imposing limitations on commerce that takes place wholly outside California's borders. Such limitations violate the dormant Commerce Clause just as surely as any statutory enactment, and the court should not permit them.

ARGUMENT

I. Plaintiffs' Claims Are Non-Justiciable

A. Plaintiffs' claims raise political questions and must fail

Plaintiffs' objections to fossil fuel use are based in public policy, not law, and are thus not appropriate for judicial resolution.

1. Longstanding Supreme Court precedent has established that a claim presents non-justiciable political questions if its adjudication would not be governed by "judicially discoverable and manageable standards" or would require "an initial policy determination of a kind clearly for non-judicial discretion." *Baker v. Carr*, 369 U.S. 186, 217 (1962). The political question doctrine arises from the Constitution's core structural values of judicial modesty and restraint. As early as

Marbury v. Madison, Chief Justice Marshall stated that "[q]uestions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." 5 U.S. (1 Cranch) 137, 170 (1803). These questions, Marshall wrote, "respect the nation, not individual rights . . . ." *Id.* at 166. There, in the very case that establishes the power of judicial review, the political question doctrine received its judicial imprimatur.

Earlier attempts to litigate climate change public nuisance lawsuits have run headlong into the political question doctrine. Indeed, *this* Court previously dismissed two cases seeking relief from industry for harms allegedly caused by global climate change. In one case, it dismissed an Alaskan village's claims seeking damages from dozens of energy companies for coastal erosion allegedly caused by global warming, observing that "the allocation of fault—and cost—of global warming is a matter appropriately left for determination by the executive or legislative branch." *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp 2d 863, 877 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012). In another, it dismissed public nuisance claims against automakers, recognizing "the complexity of the initial global warming policy determinations that must be made by the elected branches prior to the proper adjudication of Plaintiff's federal common law nuisance claim[,]" and the "lack of judicially discoverable or manageable standards by which to properly adjudicate Plaintiff's federal common law global warning nuisance claim." *See California v. Gen. Motors Corp.*, No. C06-05755, 2007 WL 2726871 at *6, *16 (N.D. Cal. Sept. 17, 2007).

Similarly, a district court in Mississippi dismissed on political question grounds a lawsuit by Gulf of Mexico residents against oil and gas companies for damages from Hurricane Katrina, which plaintiffs alleged was strengthened by climate change. *Comer v. Murphy Oil I,* No. 05-436, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007) (unpublished ruling), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010), *mandamus denied*, No. 10-294 (U.S. Jan. 10, 2011).

More broadly, several Circuits in addition to the Ninth Circuit and other federal courts have recognized that political questions may arise in cases that are nominally tort claims. *See, e.g.*, *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petrol.*, 577 F.2d 1196, 1203 (5th Cir. 1978) (concluding tortious conversion claims were barred by the political question doctrine); *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271 (11th Cir. 2009) (finding tort claims

arising from automobile accident were barred by the political question doctrine); *Antolok v. United States*, 873 F.2d 369, 383 (D.C. Cir. 1989) (noting that "[i]t is the political nature of the [issue], not the tort nature of the individual claims, that bars our review and in which the Judiciary has no expertise."); *Chaser Shipping Corp. v. United States*, 649 F. Supp. 736, 738 (S.D.N.Y. 1986) ("Even though awarding tort damages is a traditional function for the judiciary, it is apparent that there is a clear lack of judicially discoverable and manageable standards for arriving at such an award.").

As the weight of authority demonstrates, Plaintiffs claims in this case may be styled as torts, but they are in substance political, and thus nonjusticiable.

2. Plaintiffs' claims plainly are not governed by "judicially discoverable and manageable standards[.]" *Baker*, 369 U.S. at 217. They are instead governed by "policy determination[s] of a kind clearly for non-judicial discretion." *Id.*; *see also Kivalina*, 663 F. Supp. 2d at 874–77. There are no judicially enforceable common law "nuisance" standards to apply, or any practical limitation on the judicial policymaking role as the court decides whether the prospect of global climate change makes it "unreasonable" for energy companies to extract and produce fossil fuels.

To determine liability, the court would need to determine that plaintiffs have a "right" to the climate—in all of its infinite variations—as it stood at some unspecified time in the past, then find not only that this idealized climate has changed, but that Defendants caused that change through "unreasonable" action that deprived Plaintiffs of their right to the idealized climate. And, as a remedy, it would need to impose a regulatory scheme on fossil fuel emissions already subjected to a comprehensive state-federal regulatory scheme by way of balancing the gravity of harm alleged by the Plaintiffs against the utility of each Defendant's conduct. Such decisions have no principled or reasoned standards. Federal judges are not in a position to discern, as a matter of common law, the proper regulatory balance.

There should be no doubt that adjudicating these claims would require a complex "initial policy determination" that is more appropriately addressed by other branches of government. *Baker*, 369 U.S. at 217. EPA reaffirmed this point long ago when it observed that "[t]he issue of

global climate change . . . has been discussed extensively during the last three Presidential campaigns; it is the subject of debate and negotiation in several international bodies; and numerous bills have been introduced in Congress over the last 15 years to address the issue." *Control of Emissions from New Highway Vehicles and Engines,* Notice of Denial of Pet. for Rulemaking, 68 Fed. Reg. 52922, 52928 (Sept. 8, 2003). Furthermore, EPA observed, "[u]navoidably, climate change raises important foreign policy issues, and it is the President's prerogative to address them." *Id.* at 52931. For these reasons, "[v]irtually every sector of the U.S. economy is either directly or indirectly a source of [greenhouse gas] emissions, and the countries of the world are involved in scientific, technical, and political-level discussions about climate change." *Id.* at 52928.

Federal courts should not set nationwide energy and environmental policy—or, more likely, competing policies—on an *ad hoc*, case-by-case basis under the aegis of federal common law. They face immutable practical limits in terms of gathering information about complex public policy issues and predicting long-term consequences that might flow from judicial decisions. And critically, federal courts lack political accountability for decisions based on something other than neutral principles.

B. Plaintiffs' claims jeopardize our national system of cooperative federalism

Plaintiffs' desired remedies are nothing more than a form of regulatory enforcement and creation of policy through the use of judicial remedies. Plaintiffs seek to inject their political and policy opinions into the national regulatory scheme of energy production, promotion, and use. Yet *all* States play a critical regulatory role within their borders, and Congress has leveraged and augmented that authority by way of the Clean Air Act, a cooperative federalist program designed to permit each State to achieve its optimal balance of regulation and commercial activity. Cooperative federalism in the environmental and energy production policy arena underscores the political nature of this case.

1. Cooperative federalism—where the federal government creates federal standards and leaves the implementation to the States—allows states significant discretion and power and, as a consequence, encourages multiple levels of political debate and negotiation. *See* Phillip

Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. Rev. 663, 668–70, 671–73 (2001). It proves to be especially beneficial in areas of regulation where economic trade-offs and regional variation are important, such as the balance between energy production and environmental law. *See generally, e.g.*, Holly Doremus & W. Michael Hanemann, *Of Babies and Bathwater: Why the Clean Air Act's Cooperative Federalism Framework is Useful for Addressing Global Warming*, 50 Ariz. L. Rev. 799 (2008).

As underscored by the Supreme Court's decision in *AEP*, the Clean Air Act, 42 U.S.C. § 7401 *et seq*., serves as the most significant political instrument to address the consequences of air emissions and is a prime example of cooperative federalism in action. While the Clean Air Act requires the EPA to establish national health-based air quality standards to protect against common environmental pollutants, it also assigns States a significant role in enforcing these standards. It thereby illustrates the inherently political undertaking regulation of environmental standards weighed against energy production and emission-producing activities.

For example, States adopt their own State Implementation Plans (SIPs) for compliance with National Ambient Air Quality Standards within three years of EPA promulgation. *See* 42 U.S.C. § 7410(a). While such plans must meet basic requirements and are subject to EPA approval or disapproval, they must be adopted through a process involving public input, ensuring that the plans are adapted to the particular circumstances of each state. *Id.* States are free to choose how best to meet federal requirements within their borders and are expressly allowed to have more stringent requirements than the basic federal mandate. *See id.* § 7416. As a consequence, no two SIPs are identical. And even the EPA SIP approval process is subject to public notice and comment, which permits a wide range of participation by the public and helps ensure that EPA and the States make reasonable trade-offs in the course of implementing the Clean Air Act.

2. The political negotiations and compromises necessary for accountable regulatory action extend beyond the Clean Air Act to regional compacts, where groups of states, with the blessing of Congress, can add yet more greenhouse gas limits. These compacts differ greatly as they address a wide spectrum of issues related to global climate change. Some target emissions, and in so doing vary in reduction targets. Whereas the Regional Greenhouse Gas Initiative aims

to reduce CO2 emissions from 2009 levels by 10% by the year 2018, the Midwestern Greenhouse Gas Reduction Accord seeks to reduce emissions by 20% from 2005 levels by the year 2020. *Compare Regional Greenhouse Gas Initiative auction prices are the lowest since 2014*, TODAY IN ENERGY, U.S. Energy Info. Admin. (May 31, 2017), https://www.eia.gov/todayinenergy/detail.php?id=31432 *with* Org. for Econ. Co-Operation & Dev., 2010/15 *OECD Economic Surveys: United States* 129 (Sept. 2010). Another compact, the Western Climate Initiative, has targeted a 15% reduction from 2005 levels by the year 2020. David G. Tuerck *et al.*, *The Economic Analysis of the Western Climate Initiative's Regional Cap-and-Trade Program* 1 (Mar. 2009), https://www.washingtonpolicy.org/library/docLib/westernclimateinitiative.pdf.

These programs share a "cap and trade" methodology, combined with technology investments and offsets, in order to allow regional economic growth while pursuing environmental goals. Despite this similarity, each differs in its particular implementation based on the aggregate conditions—both economic and ecologic—of the region. What is more, while some place mandatory requirements on their member states, others urge voluntary compliance. *Compare Regional Greenhouse Gas Initiative auction prices are the lowest since 2014*, TODAY IN ENERGY, U.S. Energy Info. Admin. (May 31, 2017), https://www.eia.gov/todayinenergy/detail.php?id=31432 (describing RGGI as "the nation's first mandatory cap-and-trade program for greenhouse gas emissions"), *with* David R. Wooley & Elizabeth M. Morss, *§ 10:30. Regional greenhouse gas reduction initiatives*, Clean Air Act Handbook (2017) (noting that "an advisory panel [of the Midwestern Regional Greenhouse Gas Reduction Accord] released its final recommendations for a regional GHG cap-and-trade program" but "the governors of the states who signed the Accord never adopted the recommendations of the advisory panel[.]"). These compacts—each the result of yet more politics—further demonstrate the unsuitability of a one-size-fits-all environmental and energy production regulatory regime as a matter of judicial review.

This is not to say that such policies are implemented solely on federal and regional levels. At least 21 States have designed individual regulations addressing those sources of greenhouse gases of greatest local concern, in a way consistent with their local priorities. *See* Pew Center on Global Climate Change, https://www.c2es.org/content/state-climate-policy/ (providing a dynamic

maps of state and regional activities in the United States). California has its own cap and trade program, requires power companies to source 33% of their electricity from renewable sources, and requires greenhouse gas emission reporting, among other regulations. *See Climate Change Programs*, California Air Res. Bd., http://www.arb.ca.gov/cc/cc.htm. In contrast, Nebraska invests in research on the effectiveness of using agricultural land for carbon sequestration. *See, e.g.,* University of Nebraska Carbon Sequestration Program, http://csp.unl.edu/public/. Virginia has committed to a 30% reduction in greenhouse gas emissions from 2007 levels by 2025, driven by energy conservation and renewable energy usage. Mike Porter, *Governor Unveils New Virginia Energy Plan during VCU Visit*, VCU NEWS, Sept. 13, 2007, https://news.vcu.edu/article/Governor_unveils_new_Virginia_Energy_Plan_during_VCU_visit. Each State's decision implicitly reflects a balancing of the costs of climate change regulation weighed against the benefits likely to accrue from the regulation.

Thus, through the cooperative federalism model, States use their political bodies to secure environmental benefits for their citizens without sacrificing their livelihoods, and each does so in a different fashion—a natural result of the social, political, environmental, and economic diversity that exists among States. A plan to modify greenhouse gas emissions that is acceptable to California or Vermont may be unacceptable to Indiana, Georgia, or Texas, for example.

3. If these multi-level approaches are not enough to demonstrate the political nature of the claim Plaintiffs have brought to federal court, the very description of the problem this case seeks to address surely resolves any remaining doubt. Plaintiffs are worried not about *national* climate change, but about *global* climate change. And, indeed, the global nature of concerns over anthropogenic climate change has spawned a variety of treaties and other international initiatives aimed at addressing air emissions. This activity has been multifaceted, balancing a variety of economic, social, geographic, and political factors and emphasizing multiparty action rather than arbitrarily focusing on a single entity or small group of entities.

The United Nations has responded to concerns about the possibility of climate change by creating the United Nations Framework Convention on Climate Change (UNFCCC). This treaty has been joined by 196 nations and 1 regional development group. *See Status of Ratification of*

the Convention, U.N. Climate Change, https://unfccc.int/process/the-convention/what-is-the-convention/status-of-ratification-of-the-convention (providing link to listing of 197 signatories to the UNFCCC). The UNFCCC is mostly aspirational, with provisions suggesting that parties "should" attempt to "anticipate, prevent, or mitigate" climate change. *See generally* U.N. Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107; S. Treaty Doc No. 102-38 (entered into force March 21, 1994). A number of provisions also focus on technology transfers from developed to developing nations and economic sustainability of environmental policies. *See id.* Countries retain discretion to set their individual policies in pursuit of these goals on the basis of the specific conditions of each party. *See id.* art. 3, ¶3.

These commitments implicate delicate matters of national and international policy, including the relationships between "developing nations" and "developed nations;" the transfer of technology and skills between nations; education; methods of containing climate change; and the timetables involved in doing so. *See id.* art. 4. Because of the complex nature of these commitments, the member countries of the UNFCCC and its different committees have met regularly since 1996 to discuss implementation. *See What are United Nations Climate Change Conferences?*, United Nations Climate Change, https://unfccc.int/process/conferences/what-are-united-nations-climate-change-conferences. At these meetings, the nations involved discuss implementation of the aspirational commitments contained within the UNFCCC and recent scientific developments. *See generally id.*

These meetings have spawned numerous ancillary agreements, including the Kyoto Protocol to the UNFCCC, 37 I.L.M. 22 (1998), Dec. 10, 1997; the Marrakesh Accords of 2005, UNFCCC, October 29–November 10, Decision 11/CP.7, 7th sess. (2001); the Copenhagen Accord, UNFCCC, December 7–19, Decision 2/CP.15, 15th sess. (2010), and the Paris Agreement, UNFCCC, November 30–December 13, Decision 1/CP.21, 21st sess. (2016). These agreements, unlike the UNFCCC, typically require binding commitments from members. *See, e.g.*, *What is the Kyoto Protocol*, U.N. Climate Change, https://unfccc.int/process/the-kyoto-protocol/what-is-the-kyoto-protocol (stating the Kyoto Protocol "commits its Parties by setting internationally binding emission reduction targets").

Notably, President Clinton signed the Kyoto Protocol, which required reductions of "developed nations" but not "developing nations," but the United States did not ratify the treaty. *See Status of Ratification of the Kyoto Protocol*, U.N. Climate Change, https://unfccc.int/process/the-kyoto-protocol/status-of-ratification. Explaining the United States' decision not to ratify the Protocol, President Bush noted that it exempted from its limitations 80% of the world, including India and China, and that he believed it would harm the United States' economy. *See, e.g.,* Michael Weisslitz, *Rethinking the Equitable Principle of Common but Differentiated Responsibility: Differential Versus Absolute Norms of Compliance and Contribution in the Global Climate Change Context*, 13 Colo. J. Int'l Envtl. L. & Pol'y 473, 507–08 (2002).

In contrast, President Obama placed the United States at the forefront of the negotiation of the Copenhagen Accord in 2009, with the hope that this new agreement would ameliorate the flaws of the Kyoto Protocol. *See, e.g.,* Elisabeth Rosenthal, *Obama's Backing Raises Hopes for Climate Pact*, N.Y. Times (Mar. 1, 2009), https://www.nytimes.com/2009/03/01/science/earth/01treaty.html. The United States has since agreed to be bound by it. *See Information Provided by Parties to the Convention Relating to the Copenhagen Accord*, U.N. Climate Change, https://unfccc.int/process/conferences/pastconferences/copenhagen-climate-change-conference-december-2009/statements-and-resources/information-provided-by-parties-to-the-convention-relating-to-the-copenhagen-accord.

More recently, the United States entered into the Paris Agreement, which went in to force on November 4, 2016. *See Paris Agreement – Status of Ratification*, U. N. Climate Change, https://unfccc.int/process/the-paris-agreement/status-of-ratification. The Paris Agreement's central aim is address climate change by limiting global temperature increase to well below 2 degrees Celsius, and also pursuing efforts to further limit the increase to 1.5 degrees. Paris Agreement, art. 2, (Dec. 12, 2015), https://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf. Parties to the Paris Agreement are also required to work to reduce its emissions by adopting a Nationally Determined Contributions (NDCs) including requirements that all Parties report their emissions and efforts to reduce such emissions. *Id*. at art. 3. On March 31, 2015, the United States filed its Intended Nationally Determined Contribution (INDC), which

serves as a formal statement of the United States that it would work to reduce emissions by 26–28% below 2005 levels by 2025, and to make best efforts to reduce by 28%. *See* FACT SHEET: *U.S. Reports its 2025 Emissions Target to the UNFCCC* (Mar. 31, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/03/31/fact-sheet-us-reports-its-2025-emissions-target-unfccc. Yet, with the change in administrations, President Trump announced he would withdraw the United States from the Paris Climate Change Agreement on June 1, 2017. *See President Trump Announces U.S. Withdrawal from the Paris Climate Accord* (June 1, 2017), https://www.whitehouse.gov/articles/president-trump-announces-u-s-withdrawal-paris-climate-accord/.

The past two decades have thus seen four Presidencies with widely divergent views of what the United States' foreign policy on climate change and greenhouse gas emissions should be. These shifts in direction further demonstrate the political nature of environmental and fossil fuel regulation and reaffirm the need for such decisions to be the subject of political debate and accountability.

4. Focusing on energy production rather than emissions does not make this case any less inherently political. If anything, it underscores the political nature of the global climate change problem by casting a spotlight on yet more political choices that bear on the issue.

In some instances States themselves promote the very energy production and marketing targeted in this case. For example, the California State Oil and Gas Supervisor is charged with "encourag[ing] the wise development of oil and gas resources" and "permit[ing] the owners or operators of the wells to utilize all methods and practices known to the oil industry for the purpose of increasing the ultimate recovery of underground hydrocarbons[.]" Cal. Pub. Res. Code §§ 3004, 3106(b), (d). Similarly, Texas permits the "land subject to its control surveyed or subdivided into tracts, lots, or blocks which will, in its judgment, be most conducive and convenient to facilitate the advantageous sale of oil, gas, or mineral leases[,]" Tex. Nat. Res. Code § 34.052, and allows the issuance of "a permit for geological, geophysical, and other surveys and investigations on land . . . that will encourage the development of the land for oil, gas, or other minerals." *Id.* § 34.055. More specifically addressing the extraction of such fossil fuels, the Texas legislature found that

"the extraction of minerals by surface mining operations is a basic and essential activity making an important contribution to the economic well-being of the state and nation[.]" *Id.* § 131.002(1). And the federal government is no different; numerous federal statutes expressly state the government's intention "to promote the efficient exploration, production, storage, supply, marketing, pricing, and regulation of energy resources, including fossil fuels . . . ." Consolidated Appropriations Act, 2016, *codified at* 42 U.S.C. § 6212a(b); *see also* Energy Policy Act of 2005, *codified at* 42 U.S.C. § 15910(2)(B) ("The purpose of this section is . . . to promote oil and natural gas production . . . .").

Such promotion not only demonstrates the inherently political nature of this issue, but also suggests that States and the federal government themselves could be subject to liability if Plaintiffs' claims are permitted to proceed. Indeed, in view not only of Plaintiffs' expansive theories of liability, but also their presumption of suing as relators on behalf of the State, this case might as well be styled *California v. California.*

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To weigh environmental policy against promotion of energy production in the context of a public nuisance lawsuit would render pointless the process of interpreting and applying the political resolution of such policy disputes. A judicial determination inserting the common law of public nuisance into the state, regional, national, and international debates on energy production and environmental policy would be governmentally untenable. It would render the results of political debate up to this point moot and irrevocably define the terms of future debate.

II. Federal Statutes Have Displaced the Federal Common Law on Which Plaintiffs Have Based Their Claims

In the alternative, should the Court believe Plaintiffs' claims are justiciable, Plaintiffs still cannot prevail, because federal statutes have displaced the common law upon which they rely in this case. The Supreme Court held more than seven years ago in *AEP* that Congress, by "delegat[ing] to EPA the decision whether and how to regulate carbon-dioxide emissions," had "displace[d] federal common law." 564 U.S. at 426. There is no relief available for Plaintiffs' common law tort claims because—like those in *AEP*—their theory relies on an alleged harm based on global

climate change. It does not matter that Plaintiffs here focus on production and promotion rather than emissions; ultimately the alleged harm still arises from emissions, which is exactly what Court deemed off limits to public nuisance claims in *AEP*.

Plaintiffs claim that they are "not seek[ing] to impose liability on Defendants for their direct emissions of greenhouse gases and do not seek to restrain Defendants from engaging in their business operations." ECF No. 168, First Amended Compl. at ¶ 11. Yet in the very same breath, they request "an order requiring Defendants to abate the global warming-induced sea level rise" which Plaintiffs attribute directly to carbon dioxide emissions: "[p]ervasive fossil fuel combustion and greenhouse gas emissions to date will cause ongoing and future harms regardless of future fossil fuel combustion or future greenhouse gas emissions." ECF No. 168, First Amended Compl. at ¶ 57. They also allege that "[e]ach Defendant . . . continues to be aware, that the inevitable emissions of greenhouse gases from the fossil fuels it produces combines with the greenhouse gas emissions from fossil fuels . . . to result in dangerous levels of global warming with grave harms for coastal cities like San Francisco." ECF No. 168, First Amended Compl. at ¶ 58. In short, Plaintiffs allege the harm is global climate change, which in their view is caused by carbon dioxide *emissions*.

The *AEP* Court rejected the same theory of liability on grounds of displacement, and to conclude otherwise here would suggest that the transaction of a legally permissible commodity can be a public nuisance without any causal connection to any supposed harm to the Plaintiffs or public. The Ninth Circuit rejected similar arguments in *Kivalina* when it concluded that allegations that energy companies "conspir[ed] to mislead the public about the science of global warming" could only be successful if the underlying theory of injury based on emissions was successful. 696 F.3d at 854, 858.

Moreover, as the Defendants thoroughly address, *see* Defendants' Motion to Dismiss, even if this Court considers the case exclusively about fossil fuel production and promotion rather than emissions, then *other* federal statutes still displace Plaintiffs' federal common law claims. Congressional enactments such as the Energy Policy and Conservation Act of 1992 ("EPCA"), *codified at* 42 U.S.C. § 13401; the Energy Policy Act of 2005 *codified at* 42 U.S.C. § 15910(2)(B), the

Mining and Minerals Policy Act, *codified at* 30 U.S.C. § 21a; the Coastal Zone Management Act, *codified at* 16 U.S.C. § 1451(j), and the Federal Lands Policy Management Act, *codified at* 43 U.S.C. 1701(a)(12), all speak "directly" to the reasonableness of the Defendants' conduct in producing and promoting such materials. EPCA, for example, provides that "[i]t is the goal of the United States in carrying out energy supply and energy conservation research and development . . . to strengthen national energy security by reducing dependence on imported oil." 42 U.S.C. § 13401.

As a result, there is no relief available for Plaintiffs' common law tort claims here because—whether Plaintiffs' claims fall directly under *AEP* and *Kivalina* or not—such claims are displaced by federal statutes.

III. This Case Threatens Extraterritorial Regulation by Imposing Plaintiffs' Policy Choices on Other States and on Commercial Transactions Occurring Outside California

A. Plaintiffs' desired remedies are a form of regulatory enforcement

Plaintiffs seek "an order of abatement requiring Defendants to fund a climate change adaptation program for San Francisco consisting of the building of sea walls, raising the elevation of low-lying property and buildings and building such other infrastructure as is necessary for San Francisco to adapt to climate change." ECF No. 168, First Amended Compl. at ¶ 148. Imposing such financial consequences on business activity contravenes Congress's exclusive power to regulate interstate and foreign commerce. *La. Pub. Serv. Comm'n v. Tex. & N.O.R. Co.*, 284 U.S. 125, 130 (1931). One state should not (even through relators) have the power to seek a judicial remedy as means of implementing a national regulatory regime for environmental and energy production policy. Such a scheme is contrary to fundamental notions of horizontal federalism.

California cannot evade the application of the Commerce Clause by using common law rather than state statutory law to regulate commerce occurring outside its borders. The constitutional restrictions on California's ability to regulate out-of-state commerce "reflect the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within

their respective spheres." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 335–36 (1989). California's attempt to restrict and punish out-of-state production of fossil fuels by suing producers with a *common law* cause of action implicates these constitutional concerns the same way a suit based on a state *statutory* cause of action would: as explained above, California is asking this Court to interpret its common law of public nuisance to impose limitations on out-of-state commerce that would interfere with other States' regulatory choices—as well as the federal government's own regulatory choices.

For these reasons, the Supreme Court has repeatedly recognized that the constitutional principles sharply limiting States' ability to regulate extraterritorially apply to common law torts just as they apply to States' statutes.[1] It noted in *Healy* that "[t]he limits on a State's power to enact substantive legislation *are similar to the limits on the jurisdiction of state courts*. *In either case*, 'any attempt "directly" to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power.'" *Id.* at n.13 (emphasis added) (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982) (plurality opinion)). And in *BMW of North America, Inc. v. Gore*, it held that "a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States," observing that "[s]tate power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute." 517 U.S. 559, 572 & n.17 (1996). The rationale of the Supreme Court's Dormant Commerce Clause doctrine and the language of its cases thus rule out any special exemption for extraterritorial applications of common law.

B. Plaintiffs' desired remedies are unconstitutional because of the extraterritorial effect on wholly out-of-state commercial activity

Plaintiffs seek to impose financial consequences against oil companies to regulate production and promotion of fossil fuel that it deems a "public nuisance" to California. ECF No. 168,

[1] While this Court previously held that dormant Commerce Clause doctrine does not apply to state common law claims, *see Crowley v. CyberSource Corp.*, 166 F. Supp. 2d 1263, 1272 (N.D. Cal. 2001), that opinion is neither binding on this court nor does it prove particularly instructive here given that it did not analyze the foundational principles of extraterritoriality and the Supreme Courts precedent surrounding such principles.

First Amended Compl. at ¶ 10. At the most basic level, such remedies represent an effort by one state to occupy the field of environmental and energy production regulation across the nation, and to do so by superseding sound, reasonable, and longstanding standards adopted by other states in a system of cooperative federalism and by the federal government. Indeed, even if the Plaintiffs' desired remedies do not directly conflict with other states' existing laws and regulatory framework, it nonetheless would "arbitrarily . . . exalt the public policy of one state over that of another" in violation of the Commerce Clause. *Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660, 667–68 (7th Cir. 2010).

For an example, in *North Dakota v. Heydinger*, the court invalidated state regulations prohibiting the supply of electricity that had been generated by a "new large energy facility." 825 F.3d 912, 922 (8th Cir. 2016). Not only was the practical effect "to control activities taking place *wholly* outside Minnesota," *id.*, but those activities had no impact on the quality of electricity being supplied. In light of Minnesota's desire to phase out coal-fired power plants everywhere, what triggered the trade barrier were production conditions bearing on the world at large—*i.e.*, production in a *new* coal-fired power plant—not conditions bearing only on the safety of Minnesota citizens.

Accordingly, in determining whether a state regulation constitutes forbidden extraterritorial law is a function not merely of facial application, but of "practical effect[,]" including "the consequences of the statute itself . . . ." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989). Here, Plaintiffs' desired remedies exemplify "state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres." *Id.* at 335–36. There is no doubt that, by attacking fossil fuel production and commerce (rather than emissions), Plaintiffs' desired remedies would have an effect on commerce occurring wholly outside of California's border, similar to the Minnesota regulation invalidated in *Heydinger*. Indeed, Plaintiffs' own complaint alleges that "Defendants are the five largest investor-owned fossil fuel corporations *in the world* as measured by their historic production of fossil fuels." Amended Complaint at 2. And the Complaint goes on to assert that "Defendants continue to engage in massive fossil fuel production and execute long-term business plans to continue and even expand their fossil fuel production for

decades into the future." ECF No. 168, First Amended Compl. at ¶ 2. These allegations emphasize the impact such energy production has on our national and state economies. They also illustrate the extraterritorial significance and impact of regulating such an industry through judicial common law remedies.

By asking a single federal judge to impose energy production penalties on defendant companies, each of which is presumably compliant with the regulations of each state in which it operates, Plaintiffs are attempting to export their preferred environmental policies and their corresponding economic effects to other states. Allowing them to do so would be detrimental to state innovation and regional approaches that have prevailed through the political branches of government to date. California's attempt to regulate out-of-state production of fossil fuels and by suing producers with *common law* cause of action implicates the constitutional doctrine against extraterritorial regulation. This is yet another reason to reject Plaintiffs' novel theory of liability.

CONCLUSION

The amici States respectfully urge the Court to grant the Motion to Dismiss.

Respectfully Submitted,

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By: */s Thomas M. Fisher*

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