No. 18-16663

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF OAKLAND, et al.,
Plaintiffs/Appellants,

v.

B.P. p.l.c., et al.,
Defendants/Appellees.

Appeal from the United States District Court
for the Northern District of California
Nos. 3:17-cv-06011 and 3:17-cv-06012 (Hon. William H. Alsup)

BRIEF OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLEES AND AFFIRMANCE

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INTEREST OF THE UNITED STATES

This case presents questions of federal law as to which the United States has a substantial interest. Domestically, the United States Environmental Protection Agency (EPA) has primary responsibility, pursuant to a delegation from Congress, for administering certain programs under the Clean Air Act (CAA), 42 U.S.C. §§ 7401 et seq., including decisions involving the regulation of greenhouse gas emissions. Internationally, the United States government engages in important and complex questions of diplomacy and foreign affairs relating to climate change.

STATEMENT OF THE CASE

A. The Clean Air Act and related regulations

The CAA establishes a comprehensive program for controlling air pollutants and improving the nation's air quality through both state and federal regulation. After the Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007), EPA determined that greenhouse gas emissions from motor vehicles "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare" under 42 U.S.C. § 7521(a). *See* 74 Fed. Reg. 66,496 (Dec. 15, 2009). In so determining, EPA considered several effects of climate change, including "coastal inundation and erosion caused by melting icecaps and rising sea levels." *American Electric Power Co. v. Connecticut*, 564 U.S. 410, 416 (2011) (*AEP*) (citing 74 Fed. Reg. at 66,533).

Consistent with this finding, EPA issued greenhouse gas emissions standards for new motor vehicles. *See, e.g.*, 77 Fed. Reg. 62,624 (Oct. 15, 2012); 81 Fed. Reg. 73,478 (Oct. 25, 2016). EPA and the Department of Transportation also regulate greenhouse gas emissions from mobile sources through fuel economy standards. *See, e.g.,* Proposed Rule, 83 Fed. Reg. 42,986 (Aug. 24, 2018). EPA has also promulgated regulations aimed at reducing such emissions from stationary sources. These include technology-based standards for certain facilities regulated by the CAA's New Source Performance Standards, 40 C.F.R. Part 60. *See, e.g.*, Proposed Rule, 83 Fed. Reg. 65,424 (Dec. 20, 2018). EPA has promulgated emissions guidelines for States to develop plans to address greenhouse gas emissions from existing sources in specific source categories, such as electric utility generating units. *See, e.g.*, Proposed Rule, 83 Fed. Reg. 44,746 (Aug. 31, 2018). Finally, under the Prevention of Significant Deterioration (PSD) program, EPA and States have issued permits containing greenhouse gas emissions limitations based on the best available control technology for new major sources or major modifications to stationary sources.

Consistent with the Act's cooperative federalism approach, *see* 42 U.S.C. § 7401(a)(3), States likewise can play a meaningful role in regulating greenhouse gas emissions from sources within their borders. In particular, States have the initial responsibility to adopt plans (subject to EPA approval) to implement emissions

guidelines for greenhouse gas emissions from existing sources (including electric utility generating units). *See id*. § 7411(d). In addition, many States implement the PSD permitting program through a state-run permitting process that is approved by EPA and incorporated into State Implementation Plans (SIPs). *Id*. § 7410(a)(2)(C).

For in-state stationary sources, the Act generally preserves the ability of States to adopt and enforce air pollution control requirements and limitations, so long as those are at least as stringent as the corresponding federal requirements. *See* 42 U.S.C. § 7416. For out-of-state sources, however, the Act provides a more limited role for States, even if the pollution causes harm within their borders. Affected States can comment on proposed EPA rules, *see id*. § 7607(d)(5), PSD permits, *see id*. § 7475(a)(2), and other States' SIP submissions to EPA (including any provisions that may address PSD requirements for greenhouse gases), *see id*. § 7410(a)(2)(C); 40 C.F.R. § 51.102(a); seek judicial review if their concerns are not addressed, *see* 42 U.S.C. § 7607(b); and petition EPA to recall another State's previously approved but allegedly deficient SIP, *see id*. § 7410(k)(5).

B. International climate change-related efforts

The United States has engaged in international efforts to address global climate change for decades. The United States is a party to the United Nations Framework Convention on Climate Change (UNFCCC), which establishes a cooperative multilateral framework for addressing climate change. *See* S. Treaty

Doc. No. 102-38, 1771 U.N.T.S. 107 (entered into force Mar. 21, 1994). More recently, the United States has indicated its intent to withdraw from the Paris Agreement, an agreement negotiated under the auspices of the UNFCCC. Among other things, the Paris Agreement requires its Parties to communicate nationally determined contributions related to the reduction of greenhouse gas emissions.

SUMMARY OF ARGUMENT

The Cities of Oakland and San Francisco have presented the federal courts with nuisance claims that putatively arise under both state law and federal common law. Because the Cities amended their complaints to add claims based expressly on federal common law, the exercise of federal jurisdiction is appropriate. In this circumstance, this Court need not decide what law governs because all of the Cities' claims must be dismissed as preempted or displaced by the Clean Air Act and by the foreign commerce and foreign affairs authorities in the Constitution.

1. The district court appropriately exercised subject matter jurisdiction because the Cities amended their complaints to add claims based expressly on federal common law, thereby mooting their motions to remand. Should this Court disagree and conclude that the question of remand is not moot, it should not affirm the exercise of removal jurisdiction based on the alternative ground (raised sua sponte by the district court) that sea-level rise attributed to federal jurisdictional waters creates federal question jurisdiction.

2. The Cities assert claims under the common law of California based on alleged harms from out-of-state greenhouse gas emissions. Those claims are preempted by the CAA. The Supreme Court has held that the Clean Water Act (CWA) — which has a structure parallel to the CAA — preempts state common law nuisance claims that regulate out-of-state pollution sources. *International Paper Co. v. Ouellette*, 479 U.S. 481 (1986). By analogy, that holding applies here because the Cities' nuisance claims would regulate conduct taking place almost entirely outside of the State of California. The Cities' claims also are preempted because they challenge production and consumption of fossil fuels abroad, which interferes with the conduct of foreign commerce and foreign affairs and exceeds the State's authority under the Due Process Clause.

3. The district court correctly ruled that the Cities' claims asserted under federal common law fail. First, nuisance claims under federal common law are not available to municipalities (as opposed to States), and the judgment can be affirmed on that basis alone. Second, to recognize such broad and novel claims here is inconsistent with the Supreme Court's narrow view of federal common law and with principles of judicial restraint.

4. Finally, this Court may affirm on the ground that the claims asserted by the Cities should be dismissed because they would entangle the judiciary in matters assigned to the representative branches of government.

ARGUMENT

I. The district court had subject matter jurisdiction based on the Cities' pleading of federal common-law claims.

The parties devote considerable portions of their briefs to addressing whether the district court properly denied the Cities' motion to remand their claims to state court. In the United States' view, the district court had jurisdiction to dismiss all of the Cities' claims regardless of whether its order denying remand was correct. As the Supreme Court held in *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 76-77 (1996), even an erroneous denial of a motion to remand does not require reversal on appeal if the district court had jurisdiction at the time that it entered judgment. *See also Retail Property Trust v. United Brotherhood of Carpenters & Joiners of America*, 768 F.3d 938, 949 (9th Cir. 2014). Here, the district court had such jurisdiction because the Cities amended their complaint to add claims based expressly on federal common law, *see* 2 E.R. 115-16, 180-81, which created federal question jurisdiction under 28 U.S.C. § 1331. *See Retail Property*, 768 F.3d at 949 (explaining that the district court had jurisdiction "not because the [defendant] *removed* the case . . . , but because the [plaintiff] *pled* federal question jurisdiction in its" amended complaint); Answering Brief 14 n.3 (citing similar cases from other circuits).

Once the district court had federal question jurisdiction over the Cities' federal common law claims, it had (at a minimum) supplemental jurisdiction over the closely related state-law claims under 28 U.S.C. § 1367. *See, e.g.*, *City of Chicago*

v. International College of Surgeons, 522 U.S. 156, 165-66 (1997). The "question whether the district court erred in denying the [Cities'] motions to remand is thus moot, as the [Cities'] assertion of federal jurisdiction in [their amended complaints] conferred jurisdiction upon the district court and hence upon [this Court]." *Retail Property*, 768 F.3d at 949 n.6.

This Court has concluded that a challenge to the denial of a remand motion might not be mooted if a party amends its complaint to add federal claims under "coercion" by the district court or, perhaps, "solely in order to comply with the district court's order." *Id.*; *see also O'Halloran v. University of Washington*, 856 F.2d 1375, 1378 (9th Cir. 1988). But here, the district court did not "coerce" or "order" the Cities to amend their complaints. To the contrary, the district court allowed the Cities to immediately challenge its remand decision by sua sponte certifying its order for interlocutory appeal under 28 U.S.C. § 1292(b). *See* 1 E.R. 34-35. The Cities chose not to pursue that appeal and instead voluntarily amended their complaints to add federal claims. In those circumstances, the Cities' decision to amend cannot be considered involuntary or a response to "coercion" from the district court, Indeed, this Court in *Retail Property* explained that "no such coercion occurred" in part because the plaintiff did not bring "an interlocutory appeal under 28 U.S.C. § 1292(b)." 768 F.3d at 949 n.6.

In addition, although the Cities stated that they added new and distinct claims "pursuant to federal common law to conform to the Court's ruling" (i.e., its order denying remand), 2 E.R. 115, ¶ 138; 2 E.R. 180, ¶ 138, the Cities did not add the claims "solely" for that purpose, *Retail Property*, 768 F.3d at 949 n.6. Rather, as the Cities informed the district court, they also "amend[ed] their respective complaints *to address purported defects identified by the defendants* in their motions to dismiss under Rules 12(b)(2) and 12(b)(6)." S.E.R. 3 (emphasis added). Moreover, the Cities amended their complaints in at least one significant way not contemplated by the district court: they added themselves as parties, in addition to the "People of the State of California" on whose behalf they filed the original complaints.

Thus, despite the Cities' assertion that they "reserve[d] all rights with respect to whether jurisdiction is proper in federal court," 2 E.R. 63, ¶ 12; 2 E.R. 134, ¶ 12, the Cities' voluntary amendment of their complaints created jurisdiction in federal court regardless of whether the district court properly denied their motion to remand. The Cities seek an outcome "where if [they] won [their] case on the merits in federal court [they] could claim to have raised the federal question in [their] amended complaint voluntarily, and if [they] lost [they] could claim to have raised it involuntarily and to be entitled to start over in state court" — an outcome that courts have refused to accept. *Bernstein v. Lind-Waldock & Co.*, 738 F.2d 179, 185-86 (7th Cir. 1984); *accord Kidd v. Southwest Airlines Co.*, 891 F.2d 540, 547 (5th Cir. 1990).

Because the United States believes that jurisdiction was proper in federal court regardless of whether the district court properly denied the motions to remand, it takes no position at this time on Defendants' alternative theories of removal. But should this Court hold that the jurisdictional question is not moot, the United States urges the Court *not* to affirm the district court's conclusion that jurisdiction may be sustained because the Cities' alleged flooding-related injuries would be most immediately caused by the "navigable waters of the United States." 1 E.R. 34. The CWA regulates *discharges of pollutants to* — not flooding from — "navigable waters" as defined by the statute. *See* 33 U.S.C. §§ 1311, 1362(12). The United States is not aware of any basis for concluding that the CWA federalizes common-law claims that are based on damage caused by flooding from "navigable waters." It was inappropriate for the district court to create federal common law for this purpose for the same reason that it was inappropriate to do so for private climate-related claims. *See infra* Section III.A (pp. 20-24).

II. The Clean Air Act preempts the Cities' state-law claims.

A. The Cities' claims alleging harm from domestic sources are preempted.

The Cities' claims under California law challenge out-of-state emissions and therefore are preempted by the CAA. The Supreme Court's decision in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1986), provides the roadmap for reaching this conclusion. In *Ouellette*, property owners on the Vermont side of Lake Champlain

sued a paper company that discharged effluent into the lake from New York, alleging violations of Vermont nuisance law. *Id.* at 483-84. The Supreme Court explained that the CWA creates a "comprehensive" and "all-encompassing program of water pollution regulation" that leaves available "only state[-law] suits . . . specifically preserved by the Act." *Id*. at 492. Allowing any other suits would "undermine" the comprehensive "regulatory structure" created by Congress in the CWA. *Id*. at 497. Based on the CWA's savings clause, which permits States to impose stricter standards than the CWA, 33 U.S.C. § 1370, the Court concluded that the only state-law suits preserved by the CWA are suits "pursuant to the law of the source State." 479 U.S. at 497; *see also id*. at 499; *AEP*, 564 U.S. at 429 (explaining that the CWA "does not preclude aggrieved individuals from bringing a 'nuisance claim pursuant to the law of the *source* State' ").

The state-law nuisance claims here are preempted by the CAA for the same reasons that the state-law nuisance claims in *Ouellette* were preempted by the CWA. Like the CWA, the CAA contains a comprehensive program of emissions regulation that preempts all state-law suits involving emissions regulation except those preserved by the Act. *Cf. Ouellette*, 479 U.S. at 492. Both statutes authorize EPA to promulgate standards addressing water or air pollution, respectively, to enforce the law, and to assess civil and criminal penalties for violations; both include similar savings clauses and citizen suit provisions. *See id*. Recognizing these parallels,

three other courts of appeals have applied *Ouellette*'s reasoning to analyze state-law claims related to air emissions. *See Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685, 693 (6th Cir. 2015); *Bell v. Cheswick Generating Station*, 734 F.3d 188, 190-91 (3d Cir. 2013); *North Carolina ex rel. Cooper v. TVA*, 615 F.3d 291, 301 (4th Cir. 2010).

The CAA saving clause generally provides that nothing in the Act "shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution." 42 U.S.C. § 7416. Because this savings clause is virtually identical to the savings clause in the CWA, the best reading of the CAA is that (like the CWA) it preempts state-law suits involving emissions of air pollutants except those "pursuant to the law of the source State." *Ouellette*, 479 U.S. at 497. Although the plain language of the clauses makes clear that some state regulation is preserved, *see id.* at 492, it does not suggest that Congress intended to allow every State affected by air pollution to sue out-of-state sources under its own laws, irrespective of interstate boundaries. Looking next to the goals and policies of the CAA, it is clear that under the CAA (as under the CWA), allowing a State to apply its law to out-of-state emissions would interfere with the "full purposes and objectives of Congress." *Id*. at 493.

The structure of the CAA makes plain that only suits under the law of the source State survive. The Act establishes a comprehensive system of federal regulation, *see North Carolina*, 615 F.3d at 301, while preserving States' role in controlling air pollution within their borders, *see* 42 U.S.C. § 7401(a)(3) ("[A]ir pollution control at *its source* is the primary responsibility of States and local governments." (emphasis added)); *id*. § 7416. Allowing an affected State to hold sources outside its borders accountable to its own pollution laws would disrupt and undermine the source States' authority under the Act. In this scenario, for example, a court in an affected state could assess penalties requiring a source in another State to change pollution-control methods, notwithstanding the source's compliance with all source state and federal permit obligations. Affected States could thereby "do indirectly what they could not do directly — regulate the conduct of out-of-state sources." *Ouellette*, 479 U.S. at 495; *see also North Carolina*, 615 F.3d at 296, 302-04 (noting the "unpredictable consequences and potential confusion" that could flow from application of the nuisance laws of multiple States, with "the prospect of multiplicitous decrees or vague and uncertain nuisance standards"). Allowing States to reach conduct beyond their own borders in this manner also raises due process concerns. *Cf. BMW of North America v. Gore*, 517 U.S. 559 (1996).

Here, the Cities did not sue Defendants under the laws of the many States in which their fossil fuels were produced, sold, and combusted; they sued only under

the law of the "affected State" of California. The Cities' claims are thus preempted just as the nuisance claim under Vermont law was preempted in *Ouellette*.[*] Neither of the Cities' two arguments to avoid preemption is persuasive.

First, the Cities disavow an intent to regulate emissions, instead alleging harm from the production and sale of fossil fuels. But the Cities' allegations of injury from the effects of climate change turn on greenhouse gas emissions from burning fossil fuels, not on the production and sale of fossil fuels. *See, e.g.*, 2 E.R. 89, ¶ 92 (alleging that for "many years, Defendants have produced massive quantities of fossil fuels that, when combusted, emit carbon dioxide, the most important greenhouse gas"); 2 E.R. 159, ¶ 92 (same). Thus, the Cities seek to hold Defendants liable based on the same conduct (greenhouse gas emissions) and the same alleged harm (sea level rise) that the Supreme Court in *AEP* concluded conflicted with the Clean Air Act. 564 U.S. at 417, 423-25. As the district court rightly observed: "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." 1 E.R. 19. Indeed, each court that has considered the Cities' argument has rejected plaintiffs' attempts to distinguish *AEP*. *See id.*; *County of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d

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[*] Because the Cities have declined to limit their claims to purely in-state sources, we do not address how such claims might be analyzed. Likewise, many States have a wide range of state-level programs relating to climate change. *See* Brief for Amici Curiae States of California et al., ECF No. 38, at 6-8. This brief is not intended to address those programs or any preemption analysis that might apply to them.

934, 938 (N.D. Cal. 2018); *City of New York v. BP p.l.c.*, 325 F. Supp. 3d 466, 474 (S.D.N.Y. 2018).

Second, the Cities argue that their claims are not preempted because they seek an abatement fund for the costs of sea walls and other infrastructure, a remedy that is not available under the CAA. But the Supreme Court has held state common law preempted even when a federal statute does not provide precisely the same remedies. In *Ouellette*, the United States argued that compensatory damages awarded pursuant to state law would not interfere with the CWA because they "only require the source to pay for the external costs created by the pollution, and thus do not 'regulate' in a way inconsistent with the Act." 479 U.S. at 498 n.19. The Court disagreed: a defendant "might be compelled to adopt different or additional means of pollution control from those required by the Act, regardless of whether the purpose of the relief was compensatory or regulatory." *Id*. Such a result is irreconcilable with the CWA's exclusive grant of authority to EPA and the source State. *Id*.

The Cities cannot distinguish *Ouellette* by framing their claims as production and sale rather than emissions, or by seeking an abatement fund in lieu of an injunction. Because the Cities seek to hold Defendants accountable under California nuisance law for countless domestic emissions sources outside the State, the Cities' claims are preempted.

B. The Cities' state-law claims alleging harm from sources outside the United States also are preempted.

The Cities' claims are also preempted by the Foreign Commerce Clause and by the foreign affairs power of the Executive Branch because they have more than an incidental or indirect effect on the actions of foreign nations and impermissibly intrude into the field of foreign affairs. The Cities asked the district court to conclude that Defendants' international fossil fuel production and sale, and the resulting emissions in foreign countries, constitutes a nuisance under California law. Where, as here, the Cities seek to project state law into the jurisdiction of other nations, the potential is particularly great for inconsistent legislation and resulting conflict, as well as for interference with United States foreign policy.

The Constitution grants authority to Congress to "regulate commerce with foreign nations" (the Foreign Commerce Clause), art. I, § 8, cl. 3; and to the President to "make Treaties" (among other authorities collectively described as the "foreign affairs" power), art. II, § 2, cl. 2. By extension of the rule established by the Interstate Commerce Clause, the Foreign Commerce Clause prohibits a State from regulating commerce wholly outside its borders, whether or not effects are felt within the State. *See Healy v. Beer Institute*, 491 U.S. 324, 336 (1989). Here, a monetary award to the Cities based on Defendants' foreign extraterritorial conduct could have the "practical effect" of curbing fossil fuel production in foreign countries — an outcome inconsistent with the Foreign Commerce Clause because it

"control[s] conduct beyond the boundaries of the [country]." *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 69 (1st Cir. 1999) (quoting *Healy*, 491 U.S. at 336), *aff'd*, 530 U.S. 363 (2000).

Decisions by foreign governments about energy production are a species of "uniquely sovereign" acts. *MOL, Inc. v. Peoples Republic of Bangladesh*, 736 F.2d 1326, 1329 (9th Cir. 1984). Such governments also have their own laws and policies to regulate greenhouse gas emissions. In contrast, the interest of a single American State in foreign energy and environmental regulatory regimes is so attenuated as to raise serious due process concerns. *See, e.g., BMW*, 517 U.S. at 568-73. Moreover, as discussed in the previous section, the CAA limits the authority of States to apply their nuisance laws to air emissions outside their borders, underlining the limited authority of the State in this arena. Because the Cities' claims interfere with these foreign regulatory regimes, they are preempted by the Foreign Commerce Clause.

Such interference would further undermine the exclusive grants of authority to the representative branches of the federal government to conduct the Nation's foreign policy. Efforts to address climate change, including in a variety of multilateral fora, have for decades been a focus of U.S. foreign policy. In particular, international negotiations related to climate change regularly consider whether and how to pay for the costs to adapt to climate change and whether and how to share costs among different countries and international stakeholders — the very issues

raised by the Cities' suit. Application of state nuisance law to pay for the costs of adaptation and to regulate production and consumption of fossil fuels overseas would substantially interfere with the ongoing foreign policy of the United States.

Importantly, the United States is a Party to the UNFCCC, which aims to stabilize greenhouse gas concentrations while also enabling sustainable economic development. UNFCCC art. 2. A particularly contentious aspect of climate-related negotiations has been the provision of financial assistance. In this regard, the UNFCCC calls for the provision of financial resources through a mechanism to assist developing countries in implementing measures to mitigate and adapt to climate change. UNFCCC arts. 4.3, 11. Of particular relevance here, the United States' longstanding position in international negotiations is to oppose the establishment of sovereign liability and compensation schemes at the international level. *See, e.g.*, Todd Stern, Special Envoy for Climate Change, Special Briefing (Oct. 28, 2015), https://2009-2017.state.gov/s/climate/releases/2015/248980.htm ("We obviously do have a problem with the idea, and don't accept the idea, of compensation and liability and never accepted that and we're not about to accept it now.").

The Cities' claims threaten to conflict with the United States' foreign policy, including the balance of national interests struck by the UNFCCC. *See, e.g.*, *In re Philippine National Bank*, 397 F.3d 768, 772 (9th Cir. 2005) (endorsing "the strong sense of the Judicial Branch that its engagement in the task of passing on the validity

of foreign acts of state may hinder the conduct of foreign affairs" (internal quotation marks omitted)). The Cities seek compensation for costs of climate adaptation allegedly caused by the production and consumption of Defendants' products abroad. Such a result would not only conflict with the United States' international position regarding compensation, it also could undermine the approach to the provision of financial assistance under the UNFCCC. *See American Insurance Ass'n v. Garamendi*, 539 U.S. 396, 427 (2003); *In re Assicurazioni Generali, S.P.A.*, 592 F.3d 113, 118 (2d Cir. 2010) (applying same principle to invalidate state statutory and common-law claims that sufficiently "conflicted with the Government's policy that [Holocaust] claims should be resolved exclusively through" an international body).

In addition, foreign governments may view an award of damages to the Cities based on energy production within their borders as interfering in their own regulatory and economic affairs, and they could respond by seeking to prevent the imposition of these costs, by seeking payment of reciprocal costs, or by taking other action. *See, e.g.*, *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 269 (2010); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 450 (1979) (explaining that affected foreign nations "may retaliate against American-owned instrumentalities present in their jurisdictions," causing the Nation as a whole to suffer). If other countries were to seek transnational compensation or funding for

adaptation to climate change, such claims would need to be addressed by the federal government, not one or more States. The approach advanced by the Cities would "compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments." *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 381 (2000).

Because the Cities' claims challenging production and consumption of fossil fuels outside the United States have the effect of regulating conduct beyond U.S. boundaries and impermissibly interfere with the conduct of foreign affairs, they are preempted by the Foreign Commerce Clause and the foreign affairs power.

III. The Cities likewise have no remedy if their claims arise under federal common law.

The district court concluded that any applicable federal common law claims are displaced or should be dismissed because they interfere with separation of powers. The United States agrees that regardless of whether the Cities' claims arise under California law or under federal common law, the Cities have no remedy. To resolve the merits, therefore, this Court need not decide which law governs: the result is the same under either analysis, requiring dismissal of the Cities' claims.

As discussed in Part II above, the Cities may not pursue their claims if they are viewed as arising under California law. The same is true if these claims are viewed as arising under federal common law. Such law does not afford a remedy to the Cities, both because (1) federal common law remedies for interstate

environmental harms are restricted to States (as opposed to subdivisions thereof); and (2) courts correctly have declined to recognize federal common law claims to address complex, transboundary harms like those in this case — and this Court should not be the first to do so. But if any federal common law claims might theoretically exist in the present circumstances, then the district court correctly held that such claims would necessarily be displaced by the Clean Air Act.

A. Federal common law remedies are narrowly constrained.

The Supreme Court has recognized a limited remedy available to *States* under the federal common law of nuisance to redress certain interstate environmental harms. *See Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) (*Milwaukee I*). But the Supreme Court has never extended such a remedy to other categories of plaintiffs and other categories of claims. This Court may not take such a step without infringing on Congress's authority to conclusively establish and define remedies arising under federal law.

The Supreme Court has not recognized a nuisance claim under federal common law for almost half a century. Even the claim identified in *Milwaukee I* is no longer applicable, as it was displaced by the later-enacted CWA. *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) (*Milwaukee II*). Moreover, in the decades since *Milwaukee I* and *II*, the Supreme Court has stressed in a wide range of contexts that it is the prerogative of *Congress* to create causes of action expressly

by statute, and that implied or non-statutory remedies are disfavored. In *AEP*, for example, the Court opined that it "remains mindful that it does not have creative power akin to that vested in Congress." 564 U.S. at 422; *see also Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017); *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001).

In *AEP*, the Supreme Court expressly left open two antecedent issues: (1) whether non-state plaintiffs, including political subdivisions of a state, may bring federal common law nuisance claims; and (2) whether federal common law claims are available to redress climate-related harms at all. 564 U.S. at 422-23. This case implicates both questions, which we address in turn.

1. Political subdivisions of States should not be afforded federal common law nuisance claims.

States have a central role in the Constitution's framework, and Article III confers original jurisdiction on the Supreme Court for suits in which States are parties. *See* U.S. Const. art. III, § 2, cl. 2; *see also id.* § 2, cl. 1 (extending the judicial power to controversies between states and between a state and a citizen of another state). Historically, nuisance actions under federal common law were brought by States invoking the Supreme Court's original jurisdiction; the Court later broadened these claims to allow States to proceed in other courts as well. *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1973). Article III's grant of original jurisdiction, as implemented by Congress in 28 U.S.C. § 1251, implicitly authorizes the Court to fashion federal common law to govern suits involving States. By contrast, there is

no basis in the text of the Constitution or in any statute for federal courts to create a federal common law of nuisance claim in favor of non-state parties.

The Supreme Court has never authorized any party other than a State (or the United States) to bring such a claim. *See AEP*, 564 U.S. at 422 ("We have not yet decided whether private citizens . . . or political subdivisions . . . of a State may invoke the federal common law of nuisance to abate out-of-state pollution."). As we have discussed, in the one case in which the Supreme Court did address private party claims for interstate environmental harms, it treated those claims as properly arising under state law, subject to preemptive limitations of the cooperative federalism scheme of the federal environmental statutes. *See Ouellette*, 479 U.S. at 489.

The lack of any textual basis for this category of claims also means that no existing federal authority defines the contours of such a claim, or even who is or is not a proper claimant. In comparison, many federal environmental statutes do authorize private claims — but only subject to the express limitations imposed by Congress. A court recognizing a federal common law nuisance claim would lack a basis in positive law to define the scope and other limits of that claim.

In *Connecticut v. American Electric Power Co.*, 582 F.3d 309, 349-61 (2d Cir. 2009), the Second Circuit ruled that non-State plaintiffs may bring a nuisance claim under federal common law, and that such a claim is available to redress alleged climate-related harms. But the Supreme Court subsequently vacated that decision

and expressly declined to reach both questions. *AEP*, 564 U.S. at 422-23. Nor did this Court decide these issues in *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012). That decision noted in passing the possibility that "federal common law can apply to transboundary pollution suits," *id.* at 855, but then proceeded to apply *AEP* to hold that any federal common law claims that may otherwise exist were displaced by the Clean Air Act.

2. The nature of the case does not justify judicial creation of federal common law claims.

To maintain the secondary role of federal courts in creating legal norms, and concomitantly to protect the primary role of the representative branches, federal common law is ordinarily interstitial in character, such that it is not available for claims as broad and novel as those in this case. The worldwide scope of this case raises complex scientific issues of causation that implicate the global atmosphere and climate system well beyond the more localized harms at issue in *Milwaukee I* and its antecedents. *See Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 238 (1907) (enjoining noxious gases traveling from the defendant's plants across the state line into Georgia). The present litigation concerns the production and sale of fossil fuels in numerous states and foreign countries — products that are intermingled in complicated, interdependent streams of international commerce. The Cities' claims for damages depend on the combustion of those products and the subsequent emissions of greenhouse gases by countless sources worldwide. *See AEP*, 564 U.S.

at 422 ("Greenhouse gases once emitted become well mixed in the atmosphere; emissions in New Jersey may contribute no more to flooding in New York than emissions in China." (internal quotation marks and citation omitted)); *see also Washington Environmental Council v. Bellon*, 732 F.3d 1131, 1143 (9th Cir. 2013).

Were the Court to fashion a cause of action under federal common law in these circumstances, a host of plaintiffs could proceed in federal court against any defendants with some causal link to greenhouse gas emissions, from businesses to individuals to domestic or foreign governments. Multiple federal district courts hearing these cases could not conceivably arrive at uniform standards for causation and liability. *See AEP*, 564 U.S. at 428 (explaining that "federal district judges, sitting as sole adjudicators, lack authority to render precedential decisions binding other judges, even members of the same court"). Judicial fashioning of a federal common law cause of action here would intrude on Congress' legislative power, expand the traditional role of the federal judiciary, and be inconsistent with principles of judicial restraint — all contrary to Supreme Court precedent. *See Bush v. Lucas*, 462 U.S. 367, 389-90 (1983); *United States v. Standard Oil Co.*, 332 U.S. 301, 316-17 (1947).

B. Any applicable federal common law claim is displaced.

In the event that the Court concludes that a cause of action is available to the Cities here, it should nevertheless affirm (on either of two independent grounds) the

district court's conclusion that such a cause of action must be displaced. First, the Supreme Court's decision in *AEP* is directly applicable, and it holds that the Clean Air Act displaces any federal common law claim that might apply on these facts. Second, the international dimensions of this claim likewise trigger displacement. The analysis of these displacement issues resembles the preemption analysis set forth above in Sections II.A and II.B. We summarize rather than repeat that analysis.

In *AEP*, the Court held that the CAA displaced "any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants." 564 U.S. at 424. The Court explained that "displacement of federal common law does not require the 'same sort of evidence of a clear and manifest [congressional] purpose' demanded for preemption of state law," *id*. at 423 (quoting *Milwaukee II*, 451 U.S. at 317), because "it is primarily the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest," *id*. at 424. Instead, the test for whether legislation displaces federal common law is simply whether the statute "speak[s] directly to [the] question." *Id*. (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)). *AEP* held that the CAA speaks directly to greenhouse gas emissions from fossil-fuel combustion at power plants, and accordingly found displacement. *Id*.

As explained in Section II.A above (pp. 9-14), the CAA likewise speaks directly to the regulation of greenhouse gas emissions. When the Act addresses

regulation of the emissions that would form the basis of a federal common law claim, the Supreme Court has determined there is "no room for a parallel track." *AEP*, 564 U.S. at 425; *see also Kivalina*, 696 F.3d at 853-57. *AEP* emphasized that displacement did not turn on how EPA exercised that authority: "the relevant question for purposes of displacement is 'whether the field has been occupied, not whether it has been occupied in a particular manner.' " 564 U.S. at 426 (quoting *Milwaukee II*, 451 U.S. at 324)). As set forth in Part II, the fact that the Cities' claims target production and sale of fossil fuels, rather than directly targeting the resulting emissions, is immaterial to the analysis.

Nor is the remedy sought by the Cities relevant to displacement. Rather, the relevant issue is the scope of the challenged act. *See Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 21-22 (1981) (holding that the "comprehensive scope" of the CWA sufficed to displace federal common law remedies that have no analogue in that statute, such as claims for compensatory and punitive damages); *see also Kivalina*, 696 F.3d at 857 ("[T]he type of remedy asserted is not relevant to the applicability of the doctrine of displacement.").

The international aspects of the Cities' claims likewise require that, if a federal common-law cause of action could be fashioned here, it could not be extended to impose liability on production, sale, or combustion of fossil fuels outside the United States. To the United States' knowledge, no nuisance claim with an international

component has ever been sustained under federal common law by the federal courts. Nuisance claims under federal common law originated in disputes between States — disputes that are inherently domestic in scope and have a foundation in the Constitution. *Wyandotte*, 401 U.S. at 495-96.

As the Supreme Court recently reaffirmed in *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018), non-statutory remedies like those sought by the Cities are all the more out of place in the international context, where the risk that courts and litigants will encroach on the proper functions of Congress and the Executive Branch is acute. The *Jesner* plurality concluded that it would be inappropriate to extend liability through federal common law fashioned under the Alien Tort Statute (ATS) to corporations because "judicial caution . . . 'guards against our courts triggering . . . serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches.'" *Id.* at 1407 (quoting *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124 (2013)); *accord id.* at 1408 (Alito, J., concurring in the judgment) (endorsing plurality's "judicial caution" rationale); *id.* at 1412 (Gorsuch, J., concurring in the judgment) (agreeing that "the job of creating new causes of action and navigating foreign policy disputes belongs to the political branches"); *see also Kiobel*, 569 U.S. at 116-17 (holding that the presumption against extraterritoriality applies to the fashioning of a federal common law cause of action under the ATS).

In sum, the Cities have no remedy under federal common law.

IV. The Cities' claims are inconsistent with constitutional principles of separation of powers.

If the Court does not affirm the dismissal of the Cities' claims on the grounds discussed above, then it should affirm because the claims are not "consistent with a system of separated powers" or the role and equitable jurisdiction of the federal courts under Article III. *Allen v. Wright*, 468 U.S. 737, 752 (1984). With respect to regulation of greenhouse gases, the Supreme Court has cautioned that "[f]ederal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order." *AEP*, 564 U.S. at 428. This warning is magnified here, where the City is pursuing parties that are even further down the chain of causation than the defendants in *AEP*.

To grant relief on these claims would intrude impermissibly on the role of the representative branches to determine what level of greenhouse gas regulation is reasonable. As *AEP* rightly observed, the "appropriate amount of regulation in any particular greenhouse gas-producing sector cannot be prescribed in a vacuum." 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.* A court otherwise disposed to grant relief to the Cities would lack "judicially discoverable and manageable standards" to govern such a decision, which would require "an initial policy determination of a kind clearly for non-

judicial discretion." *Baker v. Carr*, 369 U.S. 186, 217 (1962). Instead, such a sensitive and central determination "is appropriately vested in branches of the government which are periodically subject to electoral accountability." *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973).

Therefore, the Cities' claims also should be dismissed as fundamentally inconsistent with the constitutional separation of powers.

CONCLUSION

For all of the foregoing reasons, the judgment of the district court should be affirmed.

Dated: May 17, 2019.

Respectfully submitted,

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