

THE HONORABLE ROBERT S. LASNIK

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

KING COUNTY,

Plaintiff,

v.

BP P.L.C., a public limited company of  
England and Wales, CHEVRON  
CORPORATION, a Delaware corporation,  
CONOCOPHILLIPS, a Delaware  
corporation; EXXON MOBIL  
CORPORATION, a New Jersey corporation,  
ROYAL DUTCH SHELL PLC, a public  
limited company of England and Wales, and  
DOES 1 through 10,

Defendants.

Case No. 2:18-cv-00758-RSL

**DEFENDANTS' MOTION TO  
DISMISS FIRST AMENDED  
COMPLAINT [12(B)(6)]**

NOTE ON MOTION CALENDAR:

November 8, 2021

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**MEMORANDUM OF POINTS AND AUTHORITIES**<sup>1</sup>**I. INTRODUCTION**

Plaintiff King County seeks to hold five out-of-state Defendants liable for the alleged effects of climate change, a global phenomenon that is at least partially the result of the worldwide accumulation of greenhouse gases in the atmosphere since the beginning of the Industrial Revolution. Plaintiff's claims suffer from numerous defects that independently warrant their dismissal. At the pleading stage, however, the Complaint should be dismissed with prejudice for one principal reason: Because of their interstate and international reach, Plaintiff's claims are exclusively governed by federal law, and federal law does not allow courts to fashion common-law remedies for the alleged local impacts of global climate change. This has been the holding of every King court to consider the merits of a tort case against an out-of-state energy company for harms allegedly caused by global greenhouse gas emissions. *E.g.*, *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 429 (2011) ("AEP"); *City of New York v. BP p.l.c.*, 325 F. Supp. 3d 466, 476 (S.D.N.Y. 2018), *aff'd*, 993 F.3d 81 (2d Cir. 2021); *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 858 (9th Cir. 2012) ("Kivalina II"); *City of Oakland v. BP PLC*, 325 F. Supp. 3d 1017, 1028–29 (N.D. Cal. 2018), *reversed and remanded on jurisdictional grounds*, 960 F.3d 570, 586 (9th Cir. 2020), *opinion amended and superseded on denial of reh'g*, 969 F.3d 895 (9th Cir. 2020).

Although Plaintiff purports to bring its claims under Washington law, the claims are not limited to harms caused by fossil fuels extracted, sold, marketed, or used in Washington. Instead, Plaintiff attempts to use Washington's state tort law to impose liability for what Plaintiff deems to be "unsafe levels" of Defendants' worldwide energy production and sales activities, which it blames for society's "unlimited use in massive quantities" of fossil fuels. Dkt. 113 ¶ 208 ("Compl."). Under the guise of state tort law, Plaintiff targets Defendants' lawful products produced and sold worldwide, which countless individuals around the globe use to heat their

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<sup>1</sup> Defendants have separately moved to dismiss the Complaint for lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2). Defendants submit this motion subject to, and without waiver of, those additional defenses.

1 homes, power their schools, hospitals, and vehicles, produce and transport their food supplies,  
2 engage in commerce, and manufacture innumerable products essential to the safety, well-being,  
3 and advancement of modern society.

4 The Washington Legislature has long recognized the importance of oil and gas to  
5 Washington's citizens and economy, declaring it "in the public interest" to "promote the  
6 exploration, development, production, and utilization of oil and gas in the state . . . ." RCW  
7 78.52.001. Indeed, even while the State has recently been legislating to address greenhouse gas  
8 emissions in some sectors, the State recognizes that the need for fossil fuels continues. For  
9 example, earlier this year Washington lawmakers *rejected* a bill aimed at phasing out natural  
10 gas for space and water heating in new buildings.<sup>2</sup>

11 Federal policy also recognizes the critical need to supply the Nation's energy, even  
12 while pursuing initiatives to address global climate change. In fact, just this month, in  
13 recognition that "[h]igher gasoline costs, if left unchecked, risk harming the ongoing global  
14 recovery," the Biden Administration called on OPEC+ nations to *increase* their fossil-fuel  
15 output: "While OPEC+ recently agreed to production increases, these increases will not fully  
16 offset previous production cuts that OPEC+ imposed during the pandemic until well into 2022.  
17 At a critical moment in the global recovery, this is simply not enough."<sup>3</sup> In doing so, "President  
18 Biden . . . made clear that he wants Americans to have access to affordable and reliable energy,  
19 including at the pump."<sup>4</sup>

20 Despite the vital role oil and gas have played in securing the safety and well-being of  
21 people in King County and worldwide, Plaintiff asks this Court to apply state law to the global  
22 production, promotion, distribution, and emissions of fossil fuels by holding a select group of  
23  
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25 <sup>2</sup> Don C. Brunell, *Rethinking a natural gas ban in Washington state*, The Bellevue Reporter (Apr. 30, 2021),  
26 <https://tinyurl.com/3m82whtc>.

27 <sup>3</sup> *Statement by National Security Advisor Jake Sullivan on the Need for Reliable and Stable Global Energy*  
28 *Markets*, The White House (Aug. 11, 2021), <https://tinyurl.com/9yxpya9c>.

<sup>4</sup> *Id.*



1 energy companies liable under Washington law for the climate impact of fossil fuel use. This,  
 2 it cannot do.

3 The Second Circuit’s recent decision affirming the dismissal of an action nearly identical  
 4 to Plaintiff’s here is directly on point. *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir.  
 5 2021). Represented by the same private law firm as Plaintiff here, the City of New York sued  
 6 the *exact same* Defendants, asserting *substantively identical* nuisance and trespass claims under  
 7 New York law stemming from the defendants’ *exact same* production, promotion, and sale of  
 8 fossil fuels. *Compare City of New York v. BP P.L.C.*, No. 1:18-cv-182-JFK, Dkt. 80 ¶¶ 132–53  
 9 (“*City of New York Complaint*”), with *King County v. BP P.L.C.*, No. 2:18-cv-758-RSL,  
 10 Dkt. 113 ¶¶ 204–26 (“*Compl.*”). Even a cursory review of the complaints quickly demonstrates  
 11 that both cases rely on *identical theories* of liability.

City of New York Complaint ¶ 76	King County Complaint ¶ 9
“Defendants are substantial contributors to the climate change that is causing injury to the City and thus are jointly and severally liable. Defendants’ cumulative production of fossil fuels over many years makes each Defendant among the top sources of GHG pollution in the world.”	“Defendants are substantial contributors to the public nuisance of global warming that is causing injury to Plaintiff and thus are jointly and severally liable. Defendants’ cumulative production of fossil fuels over many years places each of them among the top sources of global warming pollution in the world.”

18 In affirming dismissal, the Second Circuit boiled the case down to a fundamental  
 19 question: “[W]hether municipalities may utilize state tort law to hold multinational oil  
 20 companies liable for the damages caused by global greenhouse gas emissions.” *City of New*  
 21 *York*, 993 F.3d at 85. The Second Circuit’s answer was unequivocal: “Given the nature of the  
 22 harm and the existence of a complex web of federal and international environmental law  
 23 regulating such emissions, we hold that the answer is ‘no.’” *Id.* As the Second Circuit explained,  
 24 the very nature of our constitutional system compels this result. “Global warming presents a  
 25 uniquely international problem of national concern” that is “not well-suited to the application of  
 26 state law,” and by “sidestep[ping] those [federal and international] procedures and instead  
 27 institut[ing] a state-law tort suit against five oil companies . . . , the City effectively seeks to  
 28

1 replace these carefully crafted frameworks—which are the product of the political process—  
2 with a patchwork of claims under state nuisance law.” *Id.* at 86.

3 The Second Circuit’s analysis proceeds in three, straightforward steps. *First*, the court  
4 concluded that federal common law applied, rather than New York state law, because the  
5 interstate and international nature of the claims, based on alleged harms from global emissions,  
6 created an overriding need for a uniform federal rule of decision. The Second Circuit explained  
7 that “[f]or over a century, a mostly unbroken string of cases has applied federal law to disputes  
8 involving interstate air or water pollution.” *Id.* at 91. The Second Circuit concluded that because  
9 the City’s claims “implicat[ed] the conflicting rights of [s]tates [and] our relations with foreign  
10 nations,” that “case pose[d] the *quintessential example* of when federal common law is needed.”  
11 *Id.* at 92 (emphasis added). *Second*, having found that federal law necessarily governed, the  
12 court recognized that with respect to *domestic* emissions, Congress displaced “the federal  
13 common law of nuisance with a well-defined and robust statutory and regulatory scheme of  
14 environmental law” when it enacted the Clean Air Act. *Id.* at 97. As a result, “the Clean Air  
15 Act displaced the City’s common law damages claims.” *Id.* at 96. *Third*, insofar as the claims  
16 targeted *foreign* emissions, the court held that foreign policy considerations foreclosed any  
17 federal common-law remedy. *Id.* at 100.

18 Because this case is virtually identical to *City of New York*, and presents the same  
19 concerns and policy implications that the Second Circuit identified, the Second Circuit’s  
20 analysis applies with equal force here. Therefore, the Court should dismiss this case for the  
21 same reasons the Second Circuit affirmed dismissal.

22 In the alternative, even if Plaintiff’s claims were governed by state law (they are not),  
23 they would still need to be dismissed as preempted under the Clean Air Act (for domestic  
24 emissions) and the foreign affairs doctrine (for foreign emissions). The result is the same even  
25 if Plaintiff tries to recast its claims as resting on allegedly misleading promotion of fossil fuels,  
26 rather than their production and use. The dismissed complaint in *City of New York* contained  
27 similar allegations. Any claims based on alleged deception are still inextricably connected with  
28 the combustion of fossil fuels and the emission of greenhouse gases. And even if they were not,

1 to the extent those claims are based on any supposed deception, they fail for the separate and  
 2 independent reason that they do not satisfy the pleading requirements of Rule 9(b) of the Federal  
 3 Rules of Civil Procedure.

## 4 II. BACKGROUND

5 Plaintiff's lawsuit is another in a long series of climate change-related nuisance actions  
 6 that "seek[] to impose liability and damages on a scale unlike any prior environmental pollution  
 7 case." *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 876 (N.D. Cal. 2009)  
 8 ("*Kivalina I*"), *aff'd*, *Kivalina II*, 696 F.3d 849 (9th Cir. 2012). Courts have consistently, and  
 9 properly, dismissed all such claims. The first such lawsuit asserted nuisance claims against  
 10 automobile companies for alleged contributions to climate change. *See California v. Gen.*  
 11 *Motors Corp.*, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007) (dismissing state and federal  
 12 common-law nuisance claims against automakers based on emissions for failing to state a claim  
 13 and as non-justiciable). After that failure, the next round of litigation brought claims against  
 14 direct emitters such as power companies, but that strategy also failed. *See AEP*, 564 U.S. at  
 15 424–29 (holding that claims seeking abatement of alleged public nuisance of climate change fail  
 16 because the federal common law of interstate emissions was displaced by the Clean Air Act);  
 17 *Kivalina I*, 663 F. Supp. 2d at 863 (dismissing federal common-law nuisance claims against  
 18 energy companies because they were non-justiciable and for lack of standing).

19 Now, plaintiffs have resorted to climate change claims against companies that supply the  
 20 energy that people use—claims that other courts have already declared meritless. Over the past  
 21 four years, various municipalities and several states across the country have brought similar tort  
 22 actions seeking damages for the alleged impacts of climate change. The two courts that have  
 23 reached the merits of those actions have both dismissed them as legally nonviable. *See City of*  
 24 *New York*, 993 F.3d at 103; *City of Oakland*, 325 F. Supp. 3d at 1029.<sup>5</sup>

25  
 26 <sup>5</sup> The Ninth Circuit held that the district court lacked jurisdiction because "[a]t the time of removal, [the]  
 27 complaint asserted only a single cause of action for public nuisance under California law," 969 F.3d at 906, and no  
 28 "exception to the well-pleaded complaint rule applie[d] to the Cities' original complaints," *id.* at 908. Accordingly,  
 the Ninth Circuit's decision is not relevant here, where federal jurisdiction is not disputed and Defendants are  
 challenging the *merits* of the lawsuit.

1 As in those cases, Plaintiff here asserts state-law claims against “the five, largest  
 2 investor-owned producers of fossil fuels in the world, as measured by the cumulative carbon and  
 3 methane pollution generated from the use of their fossil fuels,” Compl. ¶ 143(b),<sup>6</sup> on the ground  
 4 that the greenhouse gases emitted from those fuels globally are causing climate change-related  
 5 harms within its borders. According to Plaintiff, “[t]he use of fossil fuels—oil, natural gas, and  
 6 coal—is the primary source of the greenhouse gas pollution that causes global warming[.]” *Id.*  
 7 ¶ 2; *see also id.* ¶ 122 (“Production of fossil fuels for combustion causes global warming.”); *id.*  
 8 (“Carbon dioxide is by far the most important greenhouse gas because of the combustion of  
 9 massive amounts of fossil fuels.”); *id.* ¶ 137 (“Most of this warming has occurred since 1970.  
 10 GHG pollution from the burning of fossil fuels is the dominant cause.”); *id.* ¶ 165 (noting that  
 11 the IPCC has “confirmed the causal link between planetary warming and anthropogenic  
 12 greenhouse gas emissions”). Plaintiff alleges that “Defendants are collectively responsible,  
 13 through their production, marketing, and sale of fossil fuels, for over 11% of all the carbon and  
 14 methane pollution from industrial sources that has accumulated in the atmosphere since the dawn  
 15 of the Industrial Revolution.” *Id.* ¶ 143(c).

16 Plaintiff further alleges that “[o]ngoing and future warming caused by past and ongoing  
 17 use of massive quantities of fossil fuels will cause increasingly severe harm to King County  
 18 through accelerating sea level rise, among other impacts.” *Id.* ¶ 138; *see also id.* ¶ 198  
 19 (“Pervasive fossil fuel combustion and greenhouse gas emissions to date will cause ongoing and  
 20 future harms regardless of future fossil fuel combustion or future greenhouse gas emissions.”).  
 21 And Plaintiff asserts that these harms can be avoided only by reducing global greenhouse gas  
 22 emissions: “King County is already experiencing, and working to abate, current harms caused  
 23 by climate change. King County’s commitment to confronting climate change is documented  
 24 in the County’s Strategic Climate Action Plan . . . , which identifies actions needed to reduce  
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27 <sup>6</sup> Plaintiff ignores corporate separateness and improperly aggregates the activities of each Defendant’s  
 28 subsidiaries and affiliates. *See Ranza v. Nike, Inc.*, 793 F.3d 1059, 1070–71 (9th Cir. 2015).

1 greenhouse gas emissions and reduce climate risks to County operations, infrastructure, and  
 2 residents.” *Id.* ¶ 195.

3 Plaintiff purports to bring claims under Washington state law for public nuisance, *see id.*  
 4 ¶¶ 204–13, and trespass, *see id.* ¶¶ 214–26. It seeks relief in the form of “an abatement fund  
 5 remedy to be paid for by Defendants to provide for infrastructure, costs of studying and planning,  
 6 and other costs in King County necessary for King County to adapt to global warming impacts”;  
 7 “[c]ompensatory damages in an amount . . . of the costs of actions King County has already  
 8 taken, is currently taking, and needs to take to protect King County infrastructure and property,  
 9 and to protect the public health, safety, and property of its residents from the impacts of climate  
 10 change”; attorney’s fees; and other sums. *Id.*, Prayer for Relief.

### 11 III. LEGAL STANDARD

12 A complaint must “contain sufficient factual matter, accepted as true, to ‘state a claim to  
 13 relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). After stripping  
 14 away any “legal conclusions” and “conclusory statements,” the Court, relying on its “judicial  
 15 experience and common sense,” *id.* at 678–79, must dismiss if the remaining allegations fail to  
 16 “raise a right to relief above the speculative level,” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,  
 17 545 (2007). Dismissal is also appropriate if the claims are barred as a matter of law, such as  
 18 where they are displaced or preempted by federal law, *AEP*, 564 U.S. at 423; infringe on the  
 19 Executive’s foreign affairs power, *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 429 (2003); are  
 20 barred by the Constitution, *BMW of N. Am. v. Gore*, 517 U.S. 559, 571, 585 (1996); or are non-  
 21 justiciable, *Saldana v. Occidental Petroleum Corp.*, 774 F.3d 544, 545 (9th Cir. 2014).

22 Furthermore, Federal Rule of Civil Procedure 9(b) is implicated by factual allegations  
 23 that “necessarily constitute fraud (even if the word ‘fraud’ is not used),” *Vess v. Ciba-Geigy*  
 24 *Corp. USA*, 317 F.3d 1097, 1105 (9th Cir. 2003), and Rule 9(b) requires that, “[i]n alleging fraud  
 25 or mistake, a party must state with particularity the circumstances constituting fraud or mistake,”  
 26 Fed. R. Civ. P. 9(b). “To satisfy Rule 9(b)’s particularity requirement, the plaintiff must allege  
 27 the ‘who, what, where, when, and how’ of the charged misconduct.” *Bronzich v. Persels &*  
 28

1 *Assocs., LLC*, 2011 WL 2119372, at \*4 (E.D. Wash. May 27, 2011) (quoting *Cooper v. Pickett*,  
 2 137 F.3d 616, 627 (9th Cir. 1997)).

#### 3 IV. ARGUMENT

4 Plaintiff's claims should be dismissed. Although ostensibly pleaded under state law,  
 5 Plaintiff's claims are *necessarily governed by federal common law* because they concern  
 6 interstate and international pollution and therefore implicate federal interests that necessitate a  
 7 uniform rule of decision. And *federal common law does not provide a remedy* for harms  
 8 allegedly attributable to greenhouse gas emissions because those remedies have been displaced  
 9 by the Clean Air Act to the extent they involve domestic emissions, and because foreign policy  
 10 considerations prevent extraterritorial application of federal common law.

11 Even if Plaintiff's claims were governed by state law (they are not), they are preempted  
 12 because applying Washington state law to Defendants' conduct would conflict with the federal  
 13 policies embodied in the Clean Air Act and the Executive Branch's foreign policy prerogatives.  
 14 Moreover, to the extent Plaintiff's claims are based on Defendants' alleged deception in the  
 15 promotion of fossil fuels, federal law would still apply (and provide no remedy) because  
 16 Plaintiff's alleged injuries are still entirely based on worldwide greenhouse gas emissions arising  
 17 from the production, marketing, sale, and use of fossil fuels. In addition, to the extent Plaintiff's  
 18 claims sound in fraud, they should be dismissed for the independent reason that they fail to  
 19 satisfy the heightened pleading standard set forth in Rule 9(b).

#### 20 A. Plaintiff's Claims Are Necessarily Governed By Federal Common Law Because 21 They Implicate Federal Interests That Necessitate A Uniform Rule Of Decision, 22 And Federal Law Provides Plaintiff With No Remedy.

23 Plaintiff's claims are necessarily governed by federal law, which does not provide a right  
 24 to relief for harms arising out of global greenhouse gas emissions. The Court should, therefore,  
 25 dismiss Plaintiff's Complaint for failure to state a claim, applying the same three-step analysis  
 26 that the Second Circuit applied in affirming the dismissal of a nearly identical climate change-  
 27 related action on the pleadings. *First*, notwithstanding the fact that Plaintiff pleads its claims  
 28 under state law, those claims are necessarily governed by federal common law because they seek  
 to impose liability for harms allegedly caused by interstate and international emissions, raising



1 uniquely federal interests in uniformity and federalism that preclude application of state law.  
 2 *Second*, to the extent Plaintiff’s federal common law claims target *domestic* emissions, they are  
 3 displaced by the Clean Air Act, which does not provide Plaintiff a remedy in tort. *Third*, to the  
 4 extent Plaintiff’s federal common law claims target *foreign* emissions, they are also invalid  
 5 because they are impermissibly extraterritorial and would unduly impinge on the political  
 6 branches’ exclusive authority over foreign policy.

7 **1. Plaintiff’s Claims Are Exclusively Governed By Federal Law.**

8 Plaintiff’s claims are exclusively subject to federal—not state—law because they seek  
 9 to impose liability based on transboundary and international emissions. The Supreme Court has  
 10 consistently admonished that “where there is an overriding federal interest in the need for a  
 11 uniform rule of decision,” *Illinois v. City of Milwaukee*, 406 U.S. 91, 105 n.6 (1972)  
 12 (“*Milwaukee I*”), “state law cannot be used,” *City of Milwaukee v. Illinois & Michigan*, 451 U.S.  
 13 304, 313 n.7 (1981) (“*Milwaukee II*”). Interstate pollution is one such area: “When we deal with  
 14 air and water in their ambient or interstate aspects, there is a federal common law.” *Milwaukee*  
 15 *I*, 406 U.S. at 103. As the Supreme Court explained, “[f]ederal common law and not the varying  
 16 common law of the individual States is . . . necessary to be recognized as a basis for dealing in  
 17 uniform standard with the environmental rights of a State against improper impairment by  
 18 sources outside its domain.” *Id.* at 107 n.9. In fact, as the Second Circuit noted with respect to  
 19 the nearly identical claims asserted by the City of New York, because these claims “implicat[e]  
 20 the conflicting rights of [s]tates [and] our relations with foreign nations, this case poses the  
 21 *quintessential example* of when federal common law is needed.” *City of New York*, 993 F.3d at  
 22 92 (emphasis added) (quoting *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641  
 23 (1981)). “[T]he basic scheme of the Constitution . . . demands” that federal common law apply  
 24 in these circumstances. *AEP*, 564 U.S. at 421.

25 The Supreme Court has squarely held that claims asserting climate change-related  
 26 injuries resulting from greenhouse gas emissions—such as the claims asserted by Plaintiff  
 27 here—are governed by federal law. *See AEP*, 564 U.S. at 421–22. In *AEP*, eight States and  
 28 various other plaintiffs sued five electric utility companies, contending that “the defendants’

1 carbon-dioxide emissions” had substantially contributed to climate change, thereby “creat[ing]  
2 a ‘substantial and unreasonable interference with public rights,’ in violation of the federal  
3 common law of interstate nuisance, or, in the alternative, of state tort law.” *Id.* at 418. The  
4 Supreme Court held that such claims necessarily require “federal law governance” and that  
5 “borrowing the law of a particular State would be inappropriate” for such claims. *Id.* at 421,  
6 422.

7         The Second Circuit drew on *AEP* and other cases that “ha[ve] applied federal law to  
8 disputes involving interstate air or water pollution” in concluding that federal common law  
9 necessarily governed the City of New York’s purportedly state-law claims. *City of New York*,  
10 993 F.3d at 91 (collecting cases). The Second Circuit recognized that “federal common law  
11 exists in only [a] ‘few and restricted’ enclaves,” *id.* at 89, including “those in which a federal  
12 rule of decision is necessary to protect uniquely federal interests,” *id.* at 90. But it concluded  
13 that claims implicating global climate change fit within the narrow purview of federal common  
14 law because “[g]reenhouse gases once emitted become well mixed in the atmosphere,” such  
15 that “emissions in [New York or] New Jersey may contribute no more to flooding in New York  
16 than emissions in China.” *Id.* at 92. And because different states (and countries) will have  
17 different energy and environmental policies within their borders, climate change-related  
18 litigation “implicate[s] two federal interests that are incompatible with the application of state  
19 law: (i) the ‘overriding . . . need for a uniform rule of decision’ on matters influencing national  
20 energy and environmental policy, and (ii) ‘basic interests of federalism.’” *Id.* at 91–92; *see also*  
21 *id.* at 93 (“[A]s states will invariably differ in their assessment of the proper balance between  
22 these national and international objectives, there is a real risk that subjecting the Producers’  
23 global operations to a welter of different states’ laws would undermine important federal policy  
24 choices.”). In light of this well-established principle, the Second Circuit had no difficulty  
25 resolving the question “whether a nuisance suit seeking to recover damages for the harms caused  
26 by global greenhouse gas emissions may proceed under New York law. Our answer is simple:  
27 no.” *Id.* Indeed, “[s]uch a sprawling case is simply beyond the limits of state law.” *Id.*  
28



1 So, too, is this case, which is on all fours with *City of New York*. Indeed, the facts that  
 2 the Second Circuit found dispositive in that case are virtually identical to the facts alleged by  
 3 Plaintiff here:

Second Circuit’s Reasoning	Plaintiff’s Allegations
4 The City’s claims “stem[med] from the 5 Producers’ production, promotion, and sale of 6 fossil fuels.” 993 F.3d at 88. 7	“Defendants’ production and promotion of massive quantities of fossil fuels, and their promotion of those fossil fuels’ pervasive use, ha[ve] caused . . . global warming-induced sea level rise and other climate change hazards, a public nuisance in King County.” Compl. ¶ 206.
8 “[T]he City d[id] not seek to hold the 9 Producers liable for the effects of emissions 10 released in New York, or even in New York’s 11 neighboring states,” but rather “intend[ed] to 12 hold the Producers liable, under New York 13 law, for the effects of emissions made around 14 the globe over the past several hundred 15 years.” 993 F.3d at 92.	“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,” Compl. ¶ 143(c), and “[t]he cumulative greenhouse gases in the atmosphere attributable to each Defendant ha[ve] increased the global temperature and contributed to sea level rise, including in King County,” <i>id.</i> ¶ 141.
16 The City sought “compensatory damages for 17 the past and future costs of climate-proofing 18 its infrastructure and property.” 993 F.3d at 19 88; <i>see also id.</i> at 93 (“[W]hile the City is not 20 expressly seeking to impose a standard of 21 care or emission restrictions on the 22 Producers . . . [,] [i]f the Producers want to 23 avoid all liability, then their only solution would be to cease global production altogether.”).	Plaintiff seeks damages to recover the “substantial dollars to mitigate the damage caused by the nuisance,” including “[b]uilding infrastructure to protect King County and its residents, [which] will, upon information and belief, cost hundreds of millions of dollars.” Compl. ¶ 213.

24 Moreover, like the City of New York, Plaintiff here seeks to avoid established law  
 25 rejecting prior climate change suits by pursuing a theory of injury that is *even more attenuated*  
 26 than the theory asserted unsuccessfully in *AEP* and *Kivalina II*. Instead of suing companies for  
 27 their own emissions (such as from power plants), Plaintiff here has sued companies that produce  
 28

1 or sell fossil fuels that eventually are combusted by billions of end users around the world  
2 (including Plaintiff itself), resulting in the global emissions that allegedly contribute to climate  
3 change and caused Plaintiff’s injuries. But the Second Circuit made clear that no matter what  
4 aspect of a defendant’s conduct a climate-change plaintiff professes to target in its complaint,  
5 its alleged injuries are necessarily caused by cumulative global greenhouse gas emissions. *City*  
6 *of New York*, 993 F.3d at 91, 97 (rejecting the notion that the case was “merely a local spat about  
7 the City’s eroding shoreline”). “Artful pleading cannot transform the City’s complaint into  
8 anything other than a suit over global greenhouse gas emissions. It is precisely *because* fossil  
9 fuels emit greenhouse gases—which collectively ‘exacerbate global warming’—that the City is  
10 seeking damages.” *Id.* at 91. The court observed that the “Complaint whipsaws between  
11 disavowing any intent to address emissions and identifying such emissions as the singular source  
12 of the City’s harm. But the City cannot have it both ways.” *Id.* Put simply, Plaintiff’s alleged  
13 harms are the result of global greenhouse gas emissions.

14 For all these reasons, *Milwaukee I*, *Milwaukee II*, *AEP*, and *City of New York* compel the  
15 conclusion that Plaintiff’s claims “must be brought under federal common law.” *Id.* at 94.

## 16 **2. Plaintiff’s Claims Targeting Domestic Emissions Are Displaced By The Clean** 17 **Air Act.**

18 Although claims based on global greenhouse gas emissions are necessarily subject to  
19 federal law, that answers only the first part of the inquiry. Once the Court confirms that federal  
20 law governs, the Court must then determine whether Plaintiff has stated a valid claim under  
21 federal law. It has not. The Supreme Court, the Ninth Circuit, and the Second Circuit have all  
22 held that a federal common-law claim alleging harms arising from domestic interstate  
23 greenhouse gas emissions *necessarily* fails because Congress displaced any such remedies when  
24 it enacted the Clean Air Act, which comprehensively regulates interstate emissions but provides  
25 no cause of action for emissions-related harms. *See AEP*, 564 U.S. at 423–29; *Kivalina II*, 696  
26 F.3d at 856–58 (“[F]ederal common law does not provide a remedy” “when federal statutes  
27 directly answer the federal question[.]”); *City of New York*, 993 F.3d at 98 (“[F]ederal common  
28 law claims concerning domestic greenhouse gas emissions are displaced by statute.”).

1           The Second Circuit held that federal common-law claims for harms caused by  
2 greenhouse gas emissions are displaced by statute. “Congress displaces federal common law  
3 when it passes a statute that ‘speaks directly to the question’ that the judge-made rule was  
4 designed to answer.” *City of New York*, 993 F.3d at 95 (quoting *AEP*, 564 U.S. at 424). The  
5 Second Circuit explained that “[s]uch displacement requires a showing that ‘Congress has  
6 provided a sufficient legislative solution to the particular [issue] to warrant a conclusion that  
7 [the] legislation has occupied the field to the exclusion of federal common law.’” *Id.* (quoting  
8 *Michigan v. U.S. Army Corps of Eng’rs*, 667 F.3d 765, 777 (7th Cir. 2011)). Congress did just  
9 that by enacting the Clean Air Act, which speaks directly to domestic transboundary emissions,  
10 and, as a result, “the Clean Air Act displaces federal common law claims concerned with  
11 domestic greenhouse gas emissions.” *Id.*

12           The Second Circuit has built on two preceding cases from the Supreme Court and the  
13 Ninth Circuit. In *AEP*, the Supreme Court recognized that because greenhouse gas emissions  
14 “qualify as air pollution subject to regulation under the [Clean Air] Act,” *AEP*, 564 U.S. at 424  
15 (citing *Massachusetts v. EPA*, 549 U.S. 497, 528–29 (2007)), “the Clean Air Act and the EPA  
16 actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide  
17 emissions from fossil-fuel fired power plants,” *id.* And in *Kivalina II*, the Ninth Circuit  
18 concluded that, because *AEP* established that “Congress has directly addressed the issue of  
19 domestic greenhouse gas emissions from stationary sources and has therefore displaced federal  
20 common law,” *AEP* required dismissal of public nuisance claims brought by local governmental  
21 entities against a broad array of oil, gas, and coal companies (many of which are named as  
22 Defendants here). 696 F.3d at 856–58. This is so even where plaintiffs seek “damages, rather  
23 than abatement.” *City of New York*, 993 F.3d at 96; *see also Kivalina II*, 696 F.3d at 853.  
24 “[W]hen *AEP* concluded that the Clean Air Act preempted ‘common law public nuisance  
25 abatement actions,’ it also ‘extinguished [the *Kivalina* plaintiff’s] federal common law public  
26 nuisance damage action.’” *City of New York*, 993 F.3d at 96 (quoting *Kivalina II*, 696 F.3d at  
27 853). Under *AEP* and *Kivalina II*, Plaintiff’s claims are plainly governed and precluded by  
28 federal law. *See AEP*, 564 U.S. at 421–22; *Kivalina II*, 696 F.3d at 856.

1 Relying on *AEP* and *Kivalina II*, the Second Circuit held that the City of New York’s  
 2 claims based on domestic greenhouse gas emissions were “extinguished” because the Clean Air  
 3 Act displaced any such federal common-law claims. *See City of New York*, 993 F.3d at 95–98.  
 4 The same result follows here. Just as in *City of New York*, *AEP*, and *Kivalina II*, Plaintiff is  
 5 suing for injuries allegedly caused by excessive worldwide *emissions*.<sup>7</sup> Such claims are  
 6 exclusively governed by federal law, but any federal common law claim is displaced by the  
 7 Clean Air Act.

8 That Congress displaced the federal common law of nuisance “with a well-defined and  
 9 robust statutory and regulatory scheme of environmental law is by no means surprising.” *City*  
 10 *of New York*, 993 F.3d at 97. “Numerous courts have bemoaned the ‘often . . . vague and  
 11 indeterminate standards’ attached to nuisance law.” *Id.* (quoting *Int’l Paper Co. v. Ouellette*,  
 12 479 U.S. 481, 496 (1987)). And given the “complex balancing” of competing interests that are  
 13 implicated, *AEP*, 564 U.S. at 428, it is fitting that the “worldwide problem of global warming  
 14 should be determined by our political branches, not by our judiciary,” *City of Oakland*, 325  
 15 F. Supp. 3d at 1029. Congress enacted the Clean Air Act because it determined that “an expert  
 16 agency, here, EPA, [i]s best suited to serve as primary regulator of greenhouse gas emissions.”  
 17 *AEP*, 564 U.S. at 428. Thus, Plaintiff’s concerns about emissions-related harms “must rest in  
 18 the hands of the legislative and executive branches of our government, not the federal common  
 19 law.” *Kivalina II*, 696 F.3d at 858.

20 Because Plaintiff seeks to hold oil and gas companies “liable for emissions,” as was the  
 21 case in *City of New York*, the Clean Air Act dictates that Defendants “cannot be sued under the  
 22

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23 <sup>7</sup> *See, e.g.*, Compl. ¶ 2 (“The use of fossil fuels—oil, natural gas, and coal—is the primary source of the  
 24 greenhouse gas pollution that causes global warming.”); *id.* ¶ 122 (“Production of fossil fuels for combustion causes  
 25 global warming. When used as intended, fossil fuels release greenhouse gases, including carbon dioxide (CO<sub>2</sub>) and  
 26 methane, which trap atmospheric heat and increase global temperatures.”); *id.* ¶ 140 (“For many years, Defendants  
 27 have produced massive quantities of fossil fuels that, when combusted, emit carbon dioxide, the most important  
 28 greenhouse gas.”); *id.* ¶ 141 (“Each defendant has produced fossil fuels, which are used exactly as intended and  
 emit carbon dioxide, a greenhouse gas.”); *id.* ¶ 198 (“Pervasive fossil fuel combustion and greenhouse gas  
 emissions to date will cause ongoing and future harms regardless of fossil fuel combustion or future greenhouse  
 gas emissions.”); *id.* ¶ 199 (“The risk of harm to King County and its citizens will increase, just as rising sea levels  
 and other climate change impacts will continue due to past and current greenhouse gas emissions.”).

1 federal common law,” and thus Plaintiff’s claims must be dismissed. *City of New York*, 993  
 2 F.3d at 97 (quoting *City of Oakland*, 325 F. Supp. 3d at 1024).<sup>8</sup>

3 **3. Plaintiff’s Claims Targeting Foreign Emissions Are Impermissibly**  
 4 **Extraterritorial.**

5 Plaintiff’s claims of injury based on *foreign* emissions are also barred. Even if there is  
 6 no “clear indication” that the Clean Air Act was meant to apply *outside* of the territorial  
 7 jurisdiction of the United States, “that does not mean that . . . claims [for harms caused by  
 8 foreign emissions] may proceed as a matter of federal common law.” *City of New York*, 993  
 9 F.3d at 100 (citations omitted). In fact, as the Second Circuit has made clear, “a federal common  
 10 law cause of action targeting emissions emanating from beyond our national borders” is not  
 11 viable because “foreign policy concerns foreclose” any such claims. *Id.* at 101.

12 Judicial restraint is necessary when addressing foreign emissions because of “concerns  
 13 over separation of powers, intrusion on the political branches’ monopoly over foreign policy,  
 14 and judicial caution with respect to creating (or extending) federal common law causes of  
 15 action.” *Id.* at 102. The Supreme Court has explained that “the danger of unwarranted judicial  
 16 interference in the conduct of foreign policy,” which underlies the presumption against  
 17 extraterritorially in the statutory context, “is magnified” where “the question is not what  
 18 Congress has done but instead what courts may do.” *Kiobel v. Royal Dutch Petroleum Co.*, 569  
 19 U.S. 108, 116 (2013). To hold Defendants here “accountable for purely foreign activity . . .  
 20 would require them to internalize the costs of climate change and would presumably affect the  
 21 price and production of fossil fuels abroad,” “bypass[ing] the various diplomatic channels that  
 22 the United States uses to address” climate change. *City of New York*, 993 F.3d at 103. The

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23 <sup>8</sup> Crucially, the displacement of federal common law does not resuscitate the state-law claims pleaded in  
 24 Plaintiff’s Complaint because *those claims never existed*. It is impossible to “resuscitate” something that never  
 25 existed in the first place. Claims based on worldwide emissions give rise to federal common law precisely because  
 26 “the interstate or international nature of the controversy makes it inappropriate for state law to control,” and thus  
 27 “our federal system does not permit the controversy to be resolved under state law.” *Texas Indus., Inc. v. Radcliff*  
 28 *Materials, Inc.*, 451 U.S. 630, 640 (1981). In *City of New York*, the plaintiff argued that, once federal common law  
 has been displaced, state-law claims “may snap back into action unless specifically preempted by statute.” 994  
 F.3d at 98. But the Second Circuit rejected this argument, explaining that “state law does not suddenly become  
 presumptively competent to address issues that demand a unified federal standard simply because Congress saw fit  
 to displace a federal court-made standard with a legislative one.” *City of New York*, 993 F.3d at 98.

1 Second Circuit found that “[s]uch an outcome would obviously sow confusion and needlessly  
 2 complicate the nation’s foreign policy, while clearly infringing on the prerogatives of the  
 3 political branches.” *Id.* “[T]he need for judicial caution in the face of delicate foreign policy  
 4 decisions” dictates that Plaintiff cannot state a claim for foreign emissions under federal  
 5 common law. *City of New York*, 993 F.3d at 104 (citing *Kiobel v. Royal Dutch Petroleum Co.*,  
 6 569 U.S. 108 (2013); *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1408 (2018) (“The political  
 7 branches . . . surely are better positioned than the Judiciary to determine if corporate liability  
 8 would, or would not, create special risks of disrupting good relations with foreign  
 9 governments.”)). Accordingly, to the extent Plaintiff’s claims are based on foreign emissions,  
 10 they too should be dismissed.

11 **B. In The Alternative, Plaintiff’s Common-Law Claims Are Preempted By The**  
 12 **Clean Air Act And The Foreign Affairs Power Because They Stand As An**  
 13 **Obstacle To The Accomplishment Of Federal Objectives.**

14 Even if Plaintiff’s claims were governed by state law (which they are not), they would  
 15 be preempted by the Clean Air Act and the foreign-affairs doctrine because the claims seek to  
 16 apply state law to out-of-state and international sources of greenhouse gas emissions.

17 A court “will find preemption . . . where ‘under the circumstances of [a] particular case,  
 18 [the challenged state law] stands as an obstacle to the accomplishment and execution of the full  
 19 purposes of Congress.’” *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372–73 (2000).  
 20 This is just such a case.

21 The Supreme Court has already held in *Ouellette* that the Clean Water Act “pre-empts  
 22 state law to the extent that the state law is applied to an out-of-state point source.” 479 U.S. at  
 23 500. There, “a group of property owners who reside[d] or lease[d] land on the Vermont shore”  
 24 of Lake Champlain filed a class action against International Paper Company, which operated a  
 25 pulp and paper mill on the New York side of the lake, “claiming, *inter alia*, that [its] discharge  
 26 of effluents constituted a ‘continuing nuisance’ under Vermont common law.” *Id.* at 484.  
 27 Although the Court acknowledged that the Clean Water Act did not expressly preempt state-law  
 28 suits like the one asserted by the plaintiffs, it emphasized that preemption “may be presumed  
 when the federal legislation is ‘sufficiently comprehensive to make reasonable the inference that



1 Congress left no room for supplementary state regulation.” *Id.* at 491. And the Clean Water  
2 Act was certainly comprehensive, “‘establish[ing] an all-encompassing program of water  
3 pollution regulation’” that “‘applies to all point sources and virtually all bodies of water” and  
4 “‘provides its own remedies, including civil and criminal fines for permit violations, and ‘citizen  
5 suits’ that allow individuals (including those from affected States) to sue for injunction to  
6 enforce the statute.” *Id.* at 492.

7 The Court acknowledged that the Clean Water Act carved out some space for state  
8 involvement. For example, the statute “‘provides that the Federal Government may delegate to  
9 a State the authority to administer the [National Pollutant Discharge Elimination System]  
10 program with respect to point sources located within the State” and allows a “‘source State [to]  
11 require discharge limitations more stringent than those required by the Federal Government.”  
12 *Id.* at 489–90. But “[w]hile source States have a strong voice in regulating their own pollution,”  
13 they “‘only ha[ve] an advisory role in regulating pollution that originates beyond [their]  
14 borders”—primarily through “‘notice and the opportunity to object to the proposed standards” in  
15 a permit issued to an out-of-state source. *Id.* at 490.

16 This proved crucial to the preemption analysis, as the Court reasoned that “[i]f a New  
17 York source were liable for violations of Vermont law, that law could effectively override both  
18 the permit requirements and the policy choices made by the source state,” with the practical  
19 effect of imposing different legal standards “‘from those approved by the EPA, even though the  
20 affected State had not engaged in the same weighing of the costs and benefits.” *Id.* at 495. “‘The  
21 inevitable result of such suits would be that Vermont and other States could do indirectly what  
22 they could not do directly—regulate the conduct of out-of-state sources.” *Id.* at 495. This would  
23 result in “‘a serious interference with the achievement of the ‘full purposes and objectives of  
24 Congress.’” *Id.* at 493. Consequently, the Court “‘conclude[d] that the CWA precludes a court  
25 from applying the law of an affected State against an out-of-state source.” *Id.* at 494.

26 The reasoning of *Ouellette* applies with equal force to state common-law claims targeting  
27 air, rather than water, pollution. Like the Clean Water Act, the Clean Air Act “‘was intended  
28 comprehensively to regulate, through guidelines and controls, the complexities of restraining

1 and curtailing modern day air pollution.” *Bunker Hill Co. Lead & Zinc Smelter v. U.S. Env’tl.*  
2 *Prot. Agency*, 658 F.2d 1280, 1284 (9th Cir. 1981). The statute “regulates pollution-generating  
3 emissions from both stationary sources, such as factories and powerplants, and moving sources,  
4 such as cars, trucks, and aircraft.” *Util. Air Regulatory Grp. v. Env’tl. Prot. Agency*, 573 U.S.  
5 302, 308 (2014). Like the Clean Water Act, the Clean Air Act gives states “a meaningful role  
6 in regulating greenhouse gases and other emissions from sources within their borders,” *City of*  
7 *New York*, 993 F.3d at 88 (citing 42 U.S.C. § 7401(a)(3)), including by “adopt[ing] plans to  
8 implement emission standards applicable to any existing [in-state] source of air pollution,” *id.*  
9 (citing 42 U.S.C. § 7411(d))—plans that “may [be] more stringent” than the federal standards,  
10 *id.* (citing 42 U.S.C. § 7416). But also like the Clean Water Act, “[t]he Clean Air Act gives  
11 states a much more limited role” with respect to “pollution sources beyond their borders,”  
12 typically “limit[ing] states to commenting on proposed EPA rules or on another state’s emission  
13 plan.” *Id.* (citing 42 U.S.C. §§ 7607(d)(5), 7475(a)(2), 7410(a)(1)).

14 In light of these close parallels between the two statutes, there can be little doubt that  
15 applying state law to impose liability for interstate domestic greenhouse gas emissions would  
16 conflict with the comprehensive transborder emissions regime embodied in the Clean Air Act.  
17 As the Supreme Court has explained, “[t]he appropriate amount of regulation in any particular  
18 greenhouse gas-producing sector cannot be prescribed in a vacuum,” but rather, “[a]s with other  
19 questions of national or international policy, informed assessment of competing interests is  
20 required,” including “the environmental benefit potentially achievable, our Nation’s energy  
21 needs and the possibility of economic disruption.” *AEP*, 564 U.S. at 427. In passing the Clean  
22 Air Act, “Congress delegated to EPA” the authority to weigh the competing interests and strike  
23 the appropriate balance. *Id.* at 426. It did so because “an expert agency, here, EPA, [is] best  
24 suited to serve as primary regulator of greenhouse gas emissions.” *Id.* at 428. Federal judges  
25 applying common-law standards, by contrast, “lack the scientific, economic, and technological  
26 resources an agency can utilize in coping with issues of this order” and “may not commission  
27 scientific studies or convene groups of experts for advice, or issue rules under notice-and-  
28 comment procedures inviting input by any interested person, or seek the counsel of regulators



1 in the States where the defendants are located.” *Id.* Simply put, allowing state common law to  
2 govern harms allegedly attributable to pollution originating outside the state would “undermine  
3 the important goals of efficiency and predictability” underlying the Clean Air Act and subject  
4 energy companies “to a variety of common-law rules established by the different States”—rules  
5 that “often are ‘vague’ and ‘indeterminate.’” *Ouellette*, 479 U.S. at 496.

6 It is therefore no surprise that federal courts have routinely held that the Clean Air Act  
7 preempts state common-law claims applying in-state standards to air pollution originating out  
8 of state. In *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849 (S.D. Miss. 2012), for example,  
9 property owners filed a lawsuit against a number of defendants, including oil companies,  
10 alleging that “the oil company defendants released by-products that led to the development and  
11 increase of global warming, which produced the conditions that formed Hurricane Katrina,  
12 which damaged their property.” *Id.* at 852. The plaintiffs asserted “public and private nuisance,  
13 trespass, and negligence claims against the defendants.” *Id.* at 854. The court concluded that  
14 “all of the plaintiffs’ claims are preempted by the Clean Air Act.” *Id.* at 868. Other federal  
15 courts are in accord. *See, e.g., Merrick v. Diageo Ams. Supply, Inc.*, 805 F.3d 685, 693 (6th Cir.  
16 2015) (“[C]laims based on the common law of a non-source state . . . are preempted by the Clean  
17 Air Act.”); *Bell v. Cheswick Generating Station*, 734 F.3d 188, 194–96 & n.6 (3d Cir. 2013)  
18 (same); *N.C. ex rel. Cooper v. TVA*, 615 F.3d 291, 301, 306 (4th Cir. 2010) (same).

19 The Clean Air Act contains two savings clauses, but neither affects the preemption  
20 analysis. *First*, the “citizen suit savings clause” provides that “[n]othing in this section shall  
21 restrict any right which any person (or class of persons) may have under any statute or common  
22 law to seek enforcement of any emission standard or limitation or to seek any other relief  
23 (including relief against the Administrator or a State agency).” 42 U.S.C. § 7604(e). But a  
24 materially identical savings clause appears in the Clean Water Act: “Nothing in this section  
25 shall restrict any right which any person (or class of persons) may have under any statute or  
26 common law to seek enforcement of any effluent standard or limitation or to seek any other  
27 relief (including relief against the Administrator or a State agency).” 33 U.S.C. § 1365(e). And  
28 in *Ouellette*, the Supreme Court held that this provision “merely says that ‘[n]othing in this

1 *section,* *i.e.*, the citizen-suit provisions, shall affect an injured party’s right to seek relief under  
2 state law; it does not purport to preclude pre-emption of state law by other provisions of the  
3 Act.” 479 U.S. at 493. So, too, here. *See Cooper*, 615 F.3d at 304 (“*Ouellette* held that the  
4 Clean Water Act’s savings clause, which is similar to the one found in the Clean Air Act, did  
5 not preserve a broad right for states to ‘undermine this carefully drawn statute through a general  
6 savings clause.’ . . . We thus cannot allow non-source states to ascribe to a generic savings  
7 clause [in the Clean Air and Clean Water Acts] a meaning that the Supreme Court in *Ouellette*  
8 held Congress never intended.”); *Bell*, 734 F.3d at 195 (“[T]he citizen suit savings clause of the  
9 Clean Water Act is ‘virtually identical’ to its counterpart in the Clean Air Act.”).

10 *Second*, the “states’ rights savings clause” provides that “nothing in this chapter shall  
11 preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any  
12 standard or limitation respecting emissions of air pollutants or (2) any requirement respecting  
13 control or abatement of air pollution.” 42 U.S.C. § 7416. Again, however, the Clean Water Act  
14 contains a nearly identical provision: “[N]othing in this chapter shall (1) preclude or deny the  
15 right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any  
16 standard or limitation respecting discharges of pollutants, or (B) any requirement respecting  
17 control or abatement of pollution.” 33 U.S.C. § 1370. This provision “is narrowly  
18 circumscribed, and has been interpreted to permit only state lawsuits brought under ‘the law of  
19 the [pollution’s] *source* [s]tate.’” *City of New York*, 993 F.3d at 100 (alteration in original)  
20 (collecting cases). No court has construed the states’ rights savings clause to allow application  
21 of a state’s common law to emissions occurring *outside* the state.

22 Of course, the Clean Air Act cannot preempt Plaintiff’s “claims to the extent they seek  
23 recovery for harms caused by foreign emissions” because that statute does not apply  
24 extraterritorially. *Id.* at 101. But to the extent Plaintiff’s purportedly state-law claims touch  
25 upon foreign emissions, they are preempted by the foreign affairs doctrine. The Supreme Court  
26 has long acknowledged that “complete power over international affairs is in the national  
27 government and is not and cannot be subject to any curtailment or interference on the part of the  
28 several states.” *United States v. Belmont*, 301 U.S. 324, 331 (1937); *see also United States v.*

1 *Pink*, 315 U.S. 203, 233 (1942) (“Power over external affairs is not shared by the States; it is  
 2 vested in the national government exclusively.”). For this reason, “the likelihood that state  
 3 legislation will produce something more than incidental effect in conflict with the express  
 4 foreign policy of the National Government would require preemption.” *Garamendi*, 539 U.S.  
 5 at 419 n.11. That is certainly the case here. As the Second Circuit observed, “the United States  
 6 has worked cooperatively with foreign governments through diplomatic channels to coordinate  
 7 a global response to climate change and greenhouse gas emissions,” *City of New York*, 993 F.3d  
 8 at 88, and “condoning an extraterritorial nuisance action here would . . . risk jeopardizing our  
 9 nation’s foreign policy goals,” *id.* at 103.

10 This is especially so as the United States reenters the Paris Agreement.<sup>9</sup> In negotiating  
 11 that agreement, “[d]eveloped countries felt deeply uncomfortable with the notion of liability and  
 12 have consistently refused to negotiate any liability under the Convention.”<sup>10</sup> Although Article  
 13 8 of the Paris Agreement provides for loss and damage payments among countries, those  
 14 “obligations are of cooperative and facilitative character” and “exclud[e] any trace of the  
 15 proposals on legal responsibility and financial obligations” that some participants advocated.<sup>11</sup>  
 16 In fact, when the United States first entered the Paris Agreement, then-Secretary of State John  
 17 Kerry insisted that it preclude any liability for climate change: “We’re not against [loss and  
 18 damage]. We’re in favor of framing it in a way that doesn’t create a legal remedy because  
 19 Congress will never buy into an agreement that has something like that. . . . [T]he impact of it  
 20 would be to kill the deal.”<sup>12</sup> The chief U.S. climate negotiator at the Paris meetings reaffirmed  
 21 this position: “There’s one thing that we don’t accept and won’t accept in this agreement and  
 22  
 23

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24 <sup>9</sup> See *The United States Officially Rejoins the Paris Agreement*, U.S. Department of State (Feb. 19, 2021),  
 25 <https://tinyurl.com/3rvz367u>.

26 <sup>10</sup> Darragh Conway, *Loss and Damage: In the Paris Agreement* 3, Climate Focus (Dec. 2015),  
 27 <https://tinyurl.com/y8yuuhqg>.

28 <sup>11</sup> *Id.*

<sup>12</sup> Saleemul Huq & Roger-Mark De Souza, *Not Fully Lost and Damaged: How Loss and Damage Fared in the  
 Paris Agreement*, Wilson Center (Dec. 22, 2015), <https://tinyurl.com/yd6fo2gk>.

1 that is the notion that there should be liability and compensation for loss and damage. That’s a  
2 line that we can’t cross.”<sup>13</sup>

3 Plaintiff asks this Court to invoke state law to cross the line that the Executive refused  
4 to cross. But even if state law purported to sweep so broadly, it is preempted because it would  
5 “frustrate the operation of the particular mechanism the President has chosen” to combat global  
6 climate change. *Garamendi*, 539 U.S. at 424; *see also Crosby*, 530 U.S. at 380 (“The fact of a  
7 common end hardly neutralizes conflicting means, and the fact that some companies may be  
8 able to comply with both sets of sanctions does not mean that the state Act is not at odds with  
9 achievement of the federal decision about the right degree of pressure to employ.”).

10 **C. The Complaint Does Not Satisfy Federal Rule Of Civil Procedure 9(b).**

11 At times, Plaintiff appears as if it might be attempting to cast its claims as based in part  
12 on Defendants’ alleged deception regarding the environmental impacts of fossil fuels. *See, e.g.*,  
13 Compl. ¶ 154 (“Defendants promoted massive use of fossil fuels by misleading the public about  
14 global warming[.]”); *id.* ¶ 169 (Defendants engaged in “a decades-long campaign of misleading  
15 statements on global warming that primed the pump for massive use of their fossil fuel  
16 products”). For the reasons explained above, this purported theory is irrelevant: Because  
17 Plaintiff’s “case hinges on the link between the release of greenhouse gases and the effect those  
18 emissions have on the environment,” any attempt by Plaintiff to “focus on this ‘earlier moment’  
19 in the global warming lifecycle is merely artful pleading and does not change the substance of  
20 its claims.” *City of New York*, 993 F.3d at 97. Indeed, Plaintiff repeatedly insists that  
21 “production of fossil fuels for combustion causes global warming,” Compl. ¶ 122, that  
22 ““emissions of greenhouse gases[] are the dominant cause of the observed warming since the  
23 mid-20th century,”” *id.* ¶ 134, and that “GHG pollution from the burning of fossil fuels is the  
24 dominant cause” of “[m]ost of th[e] warming [that] has occurred since 1970,” *id.* ¶ 137.<sup>14</sup>

25  
26  
27 <sup>13</sup> Press Release, Office of the Special Envoy for Climate Change – U.S. Department of State, *COP21 Press Availability with Special Envoy Todd Stern* (Dec. 4, 2015), <https://tinyurl.com/pajd8zbr>.

28 <sup>14</sup> During oral argument on the motions to dismiss in *Oakland*, counsel for plaintiffs, who also represents Plaintiff here, acknowledged that “the primary conduct . . . that gives rise to the nuisance is the production of fossil fuels,”

1 But even if Plaintiff’s Complaint could be re-characterized as centering on deception (it  
 2 cannot), Plaintiff’s claims should also be dismissed because the Complaint fails to satisfy the  
 3 pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure. Rule 9(b) provides  
 4 that “[i]n alleging fraud or mistake, a party must state with particularity the circumstances  
 5 constituting fraud or mistake.” Fed. R. Civ. P. 9(b). Specifically, “[t]o satisfy Rule 9(b)’s  
 6 particularity requirement, the plaintiff must allege the ‘who, what, where, when, and how’ of  
 7 the charged misconduct.” *Bronzich*, 2011 WL 2119372, at \*4. Further, any detrimental reliance  
 8 on the allegedly false representations also must be pleaded with particularity. *See Xia Bi v.*  
 9 *McAuliffe*, 927 F.3d 177 (4th Cir. 2019) (“How and whether a party relied on a misstatement is  
 10 every bit as much a ‘circumstance[] constituting fraud’ as any other element.”); *Kearns v. Ford*  
 11 *Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009); *Benanav v. Healthy Paws Pet Ins., LLC*, 495  
 12 F. Supp. 3d 987, 995 (W.D. Wash. 2020).

13 Rule 9(b) is implicated by factual allegations that “necessarily constitute fraud (even if  
 14 the word ‘fraud’ is not used).” *Vess*, 317 F.3d at 1105. Even where plaintiffs do not assert a  
 15 fraud cause of action, or where fraud is not a necessary element of the claims alleged, if a  
 16 plaintiff alleges “a unified course of fraudulent conduct in support of a claim,” the claims are  
 17 said to be “‘grounded in fraud’ or . . . ‘sound in fraud,’ and the pleading of that claim as a whole  
 18 must satisfy the particularity requirement of Rule 9(b).” *Id.* at 1103–04; *see also id.* at 1107  
 19 (“When an entire complaint, or an entire claim within a complaint, is grounded in fraud and its  
 20 allegations fail to satisfy the heightened pleading requirements of Rule 9(b), a district court may  
 21 dismiss the complaint or claim.”); *Nemykina v. Old Navy, LLC*, 461 F. Supp. 3d 1054, 1058  
 22 (W.D. Wash. 2020) (holding that a claim under the Washington Consumer Protection Act was  
 23 “subject to Rule 9(b)’s heightened particularity requirement” because “Plaintiff repeatedly  
 24 invoke[d] claims of fraud, and state[d] that Defendants’ pricing was an ‘overarching fraudulent  
 25 scheme’ that Defendants employed as part of a ‘marketing plan’”).

26  
 27 \_\_\_\_\_  
 28 No. 17-cv-6011, Dkt. 265 at 63:20–21, and that “any such promotion remained merely a ‘plus factor’” to plaintiffs’  
 theory, *id.*, Dkt. 283 at 6.

1 Here, too, Plaintiff’s Complaint alleges, at times, that Defendants engaged in a  
2 “campaign of misleading statements” and misrepresentation, *see, e.g.*, Compl. ¶ 169, thereby  
3 triggering the pleading requirements of Rule 9(b). For example, Plaintiff alleges that  
4 “Defendants promoted massive use of fossil fuels by misleading the public about global  
5 warming,” *id.* ¶ 154, and “promote[d] their fossil fuel products by downplaying the harms and  
6 risks of global warming,” *id.* ¶ 155; *see also id.* ¶ 6 (“Defendants’ promotion of fossil fuels has  
7 also entailed denying mainstream climate science or downplaying the risks of global  
8 warming.”).

9 Notwithstanding these allegations, Plaintiff fails to comply with Rule 9(b) and has not  
10 purported to comprehensively identify, let alone with particularity, the allegedly deceptive  
11 statements on which it bases its claims. Plaintiff points to a few unremarkable marketing  
12 statements made by Defendants that note the importance of fossil fuels in powering modern  
13 society. *See, e.g.*, Compl. ¶ 169(b) (complaining that one Defendant’s website “states: ‘We are  
14 helping to meet the world’s growing energy demand while limiting CO<sub>2</sub> emissions, by delivering  
15 more cleaner-burning natural gas’”); *id.* ¶ 169(e) (alleging that another Defendant “state[s] that  
16 it ‘responsibly suppl[ies] the energy that powers modern life’” and “has the following  
17 advertising slogan on its website: ‘Providing energy to improve quality of life’”). But the  
18 Complaint does not assert that these statements are themselves misleading, and moreover, for  
19 *some* Defendants, it does not identify *any* allegedly misleading statements that they purportedly  
20 made. These deficiencies do not satisfy Rule 9(b)’s purpose of “inform[ing] each defendant  
21 separately of the allegations surrounding his alleged participation in the fraud.” *Swartz v. KPMG*  
22 *LLP*, 476 F.3d 756, 764 (9th Cir. 2007); *see also id.* (Plaintiff “must, at a minimum, ‘identif[y]  
23 the role of [each] defendant[] in the alleged fraudulent scheme.’”); *Depot, Inc. v. Caring for*  
24 *Montanans, Inc.*, 915 F.3d 643, 668 (9th Cir. 2019) (finding that the complaint did not satisfy  
25 Rule 9(b) where “Plaintiffs vaguely allege that defendants made these misrepresentations ‘[i]n  
26 the course of marketing’ the plans to plaintiffs over a period of eight years” but “do not allege  
27 the details of these misrepresentations, such as when defendants made them, where or how  
28



1 defendants made them, to whom they were made, or the specific content of the  
2 misrepresentations”).

3 The Complaint also fails to specify whether and how Plaintiff or anyone else, in  
4 Washington or elsewhere, even heard—let alone detrimentally relied on—any Defendant’s  
5 alleged misrepresentations, deceptions, or concealment. *See Kearns*, 567 F.3d at 1125–26  
6 (affirming dismissal where plaintiff failed to “specify which sales material he relied upon”);  
7 *Benanav*, 495 F. Supp. 3d at 995 (“[A] plaintiff pleading under Rule 9(b) must also identify  
8 which fraudulent statements were relied upon . . .”). In fact, the words “rely,” “relied,” and  
9 “reliance” appear nowhere in Plaintiff’s Complaint. Plaintiff’s vague and conclusory assertions  
10 that Defendants’ conduct “primed the pump for massive use of their fossil fuel products,”  
11 Compl. ¶ 169, are insufficient to plead reliance with the specificity required by Rule 9(b).

12 To the extent Plaintiff’s claims are predicated on an underlying fraud, it makes no  
13 difference that reliance is not an element of Plaintiff’s claims. *See Kearns*, 567 F.3d at 1125–  
14 26 (affirming dismissal for failure to plead reliance with specificity, even though “fraud [wa]s  
15 not a necessary element of [plaintiff’s claims]”); *see also United Food & Com. Workers Cent.*  
16 *Pennsylvania & Reg’l Health & Welfare Fund v. Amgen, Inc.*, 400 F. App’x 255, 257 (9th Cir.  
17 2010) (finding that “complaint sounded in fraud” and therefore affirming dismissal because  
18 plaintiff failed to plead “an adequate theory of causation or reliance” as to “the complaint in its  
19 entirety, including its UCL ‘unlawful’ and ‘unfair’ claims” (citing *Kearns*, 567 F.3d at 1125–  
20 26)). In any event, causation *is* an element of each of Plaintiff’s claims, and Plaintiff cannot  
21 adequately allege causation without alleging how Defendants’ alleged misrepresentations link  
22 up with the increased greenhouse gas emissions and resulting climate change that Plaintiff  
23 claims caused its injuries.

24 Rule 9(b) was designed to protect against exactly the type of generalized allegations  
25 Plaintiff makes here, which fail “to ‘give defendants notice of the particular misconduct . . . so  
26 that they can defend against the charge and not just deny that they have done anything wrong.’”  
27 *Clark v. Eddie Bauer LLC*, 2021 WL 1222521, at \*3 (W.D. Wash. Apr. 1, 2021) (quoting *Bly-*  
28 *Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001)). Plaintiff asserts that Defendants’

1 alleged deception misled the public, thus increasing demand for fossil fuels and increasing  
 2 global emissions. *See, e.g.*, Compl. ¶ 169. Such a theory necessarily requires Plaintiff to identify  
 3 the allegedly deceptive statements that purportedly increased global demand for fossil fuels, how  
 4 much they increased demand above what it otherwise would have been absent the alleged  
 5 deception, and when this occurred.<sup>15</sup>

6 But the Complaint is devoid of any such allegations. The Complaint does not allege at  
 7 all, much less with any particularity, that Plaintiff or consumers more generally were actually  
 8 aware of and relied on Defendants' supposed misrepresentations, nor does the Complaint  
 9 address how any such awareness affected global demand for fossil fuels. The Complaint thus  
 10 falls short of the requirements of Rule 9(b) and should be dismissed.

11 **D. The Court Should Dismiss The Complaint With Prejudice.**

12 The foregoing defects in Plaintiff's Complaint are fatal and the Court therefore should  
 13 dismiss Plaintiff's Complaint in its entirety. Plaintiff cannot amend its pleading to cure these  
 14 defects because any allegations in support of an emissions-related tort claim could not overcome  
 15 the fact that such claims are barred as a matter of law. Thus, just like in *City of New York*, the  
 16 Court should dismiss the Complaint with prejudice. 993 F.3d at 88; *see also Cervantes v.*  
 17 *Countrywide Home Loans*, 656 F.3d 1034, 1041 (9th Cir. 2011) ("Although leave to amend  
 18 should be given freely, a district court may dismiss without leave where a plaintiff's proposed  
 19 amendments would fail to cure the pleading deficiencies and amendment would be futile.").

20 **V. CONCLUSION**

21 For the foregoing reasons, Plaintiff's claims should be dismissed with prejudice.

22  
 23  
 24  
 25 <sup>15</sup> That is particularly true here given the First Amendment values that are at stake. As the Ninth Circuit has  
 26 explained, under the Supreme Court's "*Noerr-Pennington* doctrine, "[t]hose who petition government for redress  
 27 are generally immune from" liability, and "[a] publicity campaign directed at the general public and seeking  
 28 government action is covered by *Noerr-Pennington* immunity." *Manistee Town Ctr. v. City of Glendale*, 227 F.3d  
 1090, 1093 (9th Cir. 2000). Specificity is essential for Defendants—and the Court—to determine the applicability  
 of this defense, particularly because Plaintiff's oblique references to deception and misrepresentation appear to  
 center on speech "seeking government action" and thus would qualify for protection under the *Noerr-Pennington*  
 doctrine.



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