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STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

STATE OF RHODE ISLAND

Plaintiff,

vs.

Case No.: PC-2018-4716

CHEVRON CORP.;
CHEVRON U.S.A. INC.;
EXXONMOBIL CORP.;
BP P.L.C.;
BP AMERICA, INC.;
BP PRODUCTS NORTH AMERICA, INC.;
ROYAL DUTCH SHELL PLC;
MOTIVA ENTERPRISES, LLC;
SHELL OIL PRODUCTS COMPANY LLC;
CITGO PETROLEUM CORP.;
CONOCOPHILLIPS;
CONOCOPHILLIPS COMPANY;
PHILLIPS 66;
MARATHON OIL COMPANY;
MARATHON OIL CORPORATION;
MARATHON PETROLEUM CORP.;
MARATHON PETROLEUM COMPANY LP;
SPEEDWAY LLC;
HESS CORP.;
LUKOIL PAN AMERICAS, LLC;
GETTY PETROLEUM MARKETING, INC.; AND
DOES 1 through 100, inclusive,

Defendants.

PLAINTIFF STATE OF RHODE ISLAND'S MEMORANDUM OF LAW IN RESPONSE TO BRIEF OF AMICUS CURIAE UNITED STATES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

I. INTRODUCTION

The Memorandum of Law by Amicus Curiae the United States in Support of Defendants' Motion to Dismiss ("U.S. Amicus Brief" or "Amicus") contains no new facts, no new issues, and no significant new case citations not already discussed by the State of Rhode Island ("State") and by the Defendants in their respective briefing on the Defendants' Motion to Dismiss for Failure to State a Claim. Despite the United States' averment that it is "uniquely positioned to provide information" concerning this case's purported relationship to the Clean Air Act and foreign policy, *see* Motion for Leave to File Brief of the United States as Amicus Curiae at 1 (May 4, 2020), the U.S. Amicus Brief attaches no exhibits or declarations, and, more importantly, presents no specific policies, rules, or agency actions with which the State's claims would necessarily conflict. The Amicus adds nothing, and the Court should give it no weight.

The U.S. Supreme Court has long held that courts should give no deference to a federal agency's legal position on whether a federal statute preempts state law. The Court has "given 'some weight' to an agency's views about the impact of tort law on federal objectives when 'the subject matter is technica[l] and the relevant history and background are complex and extensive,'" but in such instances the Court "[has] not deferred to an agency's *conclusion* that state law is pre-empted. Rather, [it has] attended to an agency's explanation of how state law affects the regulatory scheme." *Wyeth v. Levine*, 555 U.S. 555, 576–77 (2009) (quoting *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 863 (2000)) (emphasis in original). Here, the United States has not even suggested

any meaningful explanation of how this case might affect any federal regulatory scheme, nor any foreign policy.[1]

Instead, the United States relies on three circuit court opinions to argue that under the "source state rule" first promulgated in *Ouellette*, the Clean Air Act ("CAA") preempts the State's claims. Amicus at 8–11. Each of these cases, and the application of *Ouellette*'s well-established source state rule governing permitted emitters, are already discussed at length in the parties' merits briefs, and they do not support dismissal. *See* Mem. of Law in Support of Defs.' Mot. to Dismiss

[1] The United States fails to articulate an express federal policy with which the State's tort claims interfere. To the extent the State disagrees with or challenges any federal policy positions concerning greenhouse gas emissions and curbing climate change, it does so, and has always done so, in the appropriate forum and within its role in the federalist system. For example, the State of Rhode Island was among the plaintiffs in *Massachusetts v. EPA*, 549 U.S. 497 (2007), which successfully challenged EPA's "refusal to decide whether greenhouse gases cause or contribute to climate change" under the Clean Air Act and its resulting refusal to regulate new car carbon dioxide emissions, *id.* at 534. The State has also adopted stringent regulatory emissions and fuel economy standards for new motor vehicles, and challenged rollbacks of emissions regulations like the "SAFE" rule cited by the United States in its amicus brief—which would eliminate the State of California's authority to establish more stringent fuel economy standards on new vehicles, resulting in the *addition* of 923 million metric tons of greenhouse gas emissions. *See* "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks," 85 Fed. Reg. 24,174 (Apr. 30, 2020). The State also recently joined an amicus curiae brief opposing the United States' motion for summary judgment in its case against California challenging that state's emissions "cap-and-trade" agreement with the Canadian Province of Quebec. *See United States v. California, et al.*, 2:19-cv-02142-WBS-EFB, Dkt. 116 (E.D. Cal. May 26, 2020). And in contrast to the United States' November 4, 2019 decision to withdraw from the Paris Agreement to the United Nations Framework Convention on Climate Change, Rhode Island is a member of the Regional Greenhouse Gas Initiative, the first mandatory market-based program in the United States to reduce greenhouse gas emissions that allows the State to invest proceeds in state programs.

The activity described above illustrates the State's involvement—in other fora—in ongoing policy and regulatory processes concerning greenhouse gas remissions and regulatory responses to the climate crisis. This case, however, addresses different issues and seeks an unrelated remedy, based on well-known state law claims, to protect Rhode Island and its citizens from deceptive practices and to provide resiliency to the effects of climate change. The State's claims concern *Defendants'* production, marketing and sale of fossil fuels and related disinformation campaign and their associated local harms, not emissions regulation under the Clean Air Act, or international negotiations between sovereign nations on the general subject of climate change.

for Failure to State a Claim at 42–43 ("Mot."); State's Mem. of Law in Opp. to Defs.' Mot. to Dismiss for Failure to State a Claim at 40–42 ("Opp.").

The United States further opines that the State's claims would in some unspecified way interfere with general foreign policy preferences and goals. Amicus at 15–17. Each of the cases cited, and each of the policies discussed, repeat what has been presented to this Court in the Defendants' Motion and the State's Opposition. *See* Mot. at 44–47 (foreign affairs), 48 n.31 (foreign commerce); Opp. at 46–48 (foreign affairs), 45 n.26 (foreign commerce). Moreover, the Brief of Former U.S. Government Officials as Amici Curiae Supporting Plaintiff and Denial of Defendants' Motion to Dismiss ("Former Gov't Officials Amicus") thoroughly debunks the United States' position. Those amici, which include several senior diplomats in both Democratic and Republic administrations who drafted or negotiated the international agreements on which the United States relies here, explained based on their collective decades of foreign policy experience that "if properly managed, this state court lawsuit can redress the alleged corporate misbehavior and tortious deception without interfering with or disrupting United States foreign policy." Former Gov't Officials Amicus at 1. Indeed, as amici point out, "no aspect of U.S. foreign policy seeks to exonerate companies for knowingly misleading consumers about the dangers of their products." *Id*. at 10.

Finally, the United States argues that the State's claims arise under federal common law and are therefore displaced by the Clean Air Act. Amicus at 18–21. That theory was already rejected by Chief Judge Smith of the Federal District Court for the District of Rhode Island, as explained in the State's Opposition brief. *See* Opp. at 39–40 & n.21. The absence of any federal common law claim in this case was recently confirmed by the Ninth Circuit, which held flatly that a "state-law claim for public nuisance" by public entities seeking redress from climate crisis

injuries "does not arise under federal law." *See City of Oakland v. BP p.l.c.*, No. 18-16663, __ F.3d __, 2020 WL 2702680, at *2 (9th Cir. May 26, 2020) ("*Oakland*").

Fundamentally, the U.S. Amicus Brief relies on the same central misrepresentation of the State's Rhode Island law claims that Defendants repeat *ad nauseum*: that the State would ask the Court to "regulate out-of-state pollution sources," "set emissions standards under tort law," control the conduct of foreign governments, and rewrite swaths of American foreign policy. *See* U.S. Amicus Br. at 1–2. None of this is true. Rather, the State alleges that Defendants, individually and in concert, engaged in "tortious production, deceptive marketing, and sale of fossil fuel products and associated communications," furthered by "a multi-decadal campaign of deceit that undermined public confidence in climate-related science and scientists," which "they knew would cause climate change and attendant harms." Opp. at 1, 2. The United States argues fervently, with little regard for the contents of the Complaint, that the State's claims are "emissions-based," "however labeled or spun." *See* U.S. Amicus Br. at 1.[2] Repeating that mischaracterization at increasing volume, however, does not make it correct. Neither the State's theories of liability nor its requested relief are "emissions-based."

The sole question before the Court is whether, as to each of the State's claims, "'it is clear beyond a reasonable doubt that the [State] would not be entitled to relief from the defendant under any set of facts that could be proven in support of'" that claim. *See Hyatt v. Vill. House Convalescent Home, Inc.*, 880 A.2d 821, 824 (R.I. 2005) (quoting *Hendrick v. Hendrick*, 755 A.2d

[2] *See also, e.g., id*. at 6, (complaint would "impose liability on Defendants, collectively, for all of their emissions, worldwide"), 7 ("emissions-based claims"), 10 n.1 ("challenge out-of-state emissions"), 12 ("Rhode Island collectively sued Defendants for all emissions, direct and indirect, over fifty years, worldwide"), 14 ("Rhode Island seeks to hold Defendants accountable under its law for countless emissions sources outside the State"), 15 ("novel nature of these claims, which depend on collectivized, fifty-year combustion of products and subsequent emissions").

784, 793 (R.I. 2000)). Nothing in the U.S. Amicus Brief comes close to meeting this standard, or even adds to what Defendants have already argued.

II. ARGUMENT

A. The United States' Argument That the Clean Air Act Preempts the State's Claims Merely Repeats—Ineffectually—Defendants' Arguments.

The United States argues that the State's claims are "overwhelmingly" a "challenge to out-of-state emissions" of greenhouse gases. Amicus at 8. Based on that mischaracterization, it contends that all the State's claims are preempted under the source state rule first articulated in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987) and subsequently applied in a trio of Clean Air Act cases. *See* Amicus at 8–14 (discussing *Merrick v. Diageo Ams. Supply, Inc.*, 805 F.3d 685 (6th Cir. 2015); *Bell v. Cheswick Generating Station*, 734 F.3d 188 (3d Cir. 2013); *N.C. ex rel. Cooper v. TVA*, 615 F.3d 291 (4th Cir. 2010)). While the United States devotes more pages to this argument than Defendants, its reasoning and citations are identical to theirs, and have already been refuted in the State's Opposition. *See* Opp. at 40–42.

The United States seeks further support from the district court's decision (now reversed) in *City of Oakland v. BP p.l.c.*, 325 F. Supp. 3d 1017 (N.D. Cal. 2018), *vacated and remanded*, No. 18-16663, 2020 WL 2702680, at *7–9 (9th Cir. May 26, 2020), which dismissed municipal plaintiffs' claims on the premise that "an oil producer cannot be sued under the federal common law . . . for someone else's [emissions]." *See* Amicus at 13. The lower court's earlier determination that the plaintiffs' claims were "necessarily governed" by federal common law was unanimously reversed by the Ninth Circuit, which concluded "the state-law claim for public nuisance *does not arise under federal law*." *Oakland*, 2020 WL 2702680, at *2 (emphasis added). The district court's conclusion that those misconstrued "federal" claims were displaced by the Clean Air Act is thus void; moreover, the Ninth Circuit's opinion eviscerates the foundation of the United States' (and

Defendants') position here.[3] In addition, as the State has repeatedly explained, "the State does not seek to impose liability for anyone's emissions, but rather Defendants' production, *deceptive promotion*, and *deceptive marketing* of *known dangerous products*." Opp. at 42 (emphasis added). None of the cases cited by Defendants or the United States hold or even suggest that such claims are preempted by the CAA or any other federal law.

B. The United States' Foreign Commerce Clause and Foreign Affairs Arguments Are Also Identical to Defendants' Arguments on the Same Topics, and Equally Inapt.

1. The State's Claims Do Not Usurp or Impede the Federal Government's Conduct of Foreign Affairs.

As the State has already explained, the foreign affairs doctrine does not preempt the State's claims. *See* Opp. at 46–48. This lawsuit invokes state tort, statutory and constitutional law to address climate impacts on public health and welfare from deceptive marketing of dangerous products, areas that fall quintessentially into Rhode Island's "traditional state responsibility." *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420 n.11 (2003). "The regulation of advertising that threatens the public health, safety, and morals has long been considered a core exercise of the states' police powers," and is not preempted absent clear congressional intent to "supersede the states' traditional authority to regulate the wrongful advertising of dangerous products . . . ." *Soto v. Bushmaster Firearms Int'l, LLC*, 331 Conn. 53, 66, 138, *cert. denied sub nom. Remington Arms Co., LLC, et al. v. Soto*, 140 S. Ct. 513 (2019).

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[3] The similar opinion in *City of New York v. BP p.l.c.*, 325 F. Supp. 3d 466 (S.D.N.Y. 2018), *appeal argued*, No. 18-2188 (2d Cir. Nov. 22, 2019), dismissing the City of New York's complaint was likewise wrongly decided. The court there held that the City's New York common law nuisance and trespass claims were "governed by federal common law," and were thus displaced by the Clean Air Act and preempted based on foreign policy and separation of powers concerns. *Id.* at 471–76. For the reasons explained by the Ninth Circuit, the district court's reasoning that the City's claims arose under and were governed by federal common law was incorrect, as were all reasoning and conclusions flowing from that flawed premise.

The State's claims do not "take a position on a matter of foreign policy," *id.*, and the United States makes no coherent argument that it does. The speculative assertion that the State's claims "conflict with" or "undermin[e]" the general federal position against "establishment of sovereign liability and compensation schemes," Amicus at 16–17, is baseless. Defendants are not sovereigns, and the issue of developed nations' potential obligations to pay compensation for "loss-and-damage" to, for instance, developing small island states, is not at play here. Indeed, the essential disconnect between the case at bar and the other branches' conduct of foreign affairs is explicated in the Former Government Officials Amicus. *Cf.* Former Gov't Officials Amicus at 5–6 (UNFCCC's financial assistance provisions "were not intended to preclude domestic state tort lawsuits against a private company for climate-related damages" and Paris Agreement financial assistance provisions "are limited to the payment and mobilization of *intergovernmental* assistance . . . almost exclusively from developed to developing countries and thus have nothing to do with the claims in this lawsuit") (emphasis in original).

2. The State's Claims Do Not Violate the Foreign Commerce Clause.

The entirety of the United States' argument that the State's claims violate the Commerce Clause is discussed in the State's Opposition to the Defendants' Motion to Dismiss, primarily in the context of interstate, rather than international, commerce. Opp. at 44–46. As explained there, state regulation is impermissibly extraterritorial only when it would have "the practical effect of regulating commerce occurring wholly outside that State's borders." *Pharm. Research and Mfrs. of Am. v. Concannon*, 249 F.3d 66, 80 (1st Cir. 2001) (quoting *Healy v. Beer Inst.*, 491 U.S. 324, 332 (1989)). A violation occurs only where a state law "*directly* controls commerce occurring wholly outside the [State's] boundaries" and where it "*necessarily* requires out-of-state commerce to be conducted according to in-state terms." *Id.* at 79 (emphasis added). The abatement and damages remedies sought here do not meet these standards.

The United States makes several leaps of logic to argue that the State's claims impermissibly attempt to control international commerce. First, it appeals to "elementary principals [sic] of logic and economics," without explaining what those principles might be. *See* Amicus at 15. Even if some clearly defined "principles" showed both that a tort action could constitute regulation and that there would be downstream economic effects in other jurisdictions due to this case, state action that "has only indirect effects on interstate commerce and regulates evenhandedly" does not violate the Commerce Clause. *See Brown-Forman Distillers Corp. v. N.Y. Liquor Auth.*, 476 U.S. 573, 578–79 (1986); *see also, e.g.*, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 472 (1981) (burden imposed on out-of-state plastics industry by state law not clearly excessive in light of the substantial state interest in promoting conservation of energy and other natural resources and easing solid waste disposal problems).

Second, the United States' suggestion that foreign governments might retaliate against Rhode Island is wholly speculative and does not change the result. The case that the United States and Defendants' both rely on, *Japan Line, Ltd. v. Los Angeles Cty.*, 441 U.S. 434 (1979), is plainly distinguishable. *See* Amicus at 17; Mot. at 48 n.31. There, California sought to impose a "tax on foreign-owned instrumentalities (cargo containers) of international commerce" that passed through its ports. *Japan Line*, 441 U.S. at 436. The plaintiffs all "operate[d] vessels used exclusively in foreign commerce" which were "registered in Japan and ha[d] their home ports there." *Id.* The Court addressed the "narrow [question] whether instrumentalities of commerce that are owned, based, and registered abroad and that are used exclusively in international commerce, may be subjected to apportioned ad valorem property taxation by a State." *Id.* at 443–44. The Court held that the ad valorem tax "as applied to appellants' containers" violated the Commerce Clause for two reasons. *Id.* at 451. First, the tax "result[ed] in multiple taxation of the instrumentalities of

foreign commerce." *Id.* at 451–52. Second, the tax "prevent[ed] this Nation from 'speaking with one voice' in regulating foreign trade," specifically the "treatment of containers used exclusively in foreign commerce," by "creat[ing] an asymmetry in maritime taxation operating to Japan's disadvantage." *Id.* at 452–53. The Court noted "the risk of retaliation by Japan, under these circumstances, is acute," and that "[r]etaliation by some nations could be automatic" based on codified reciprocal trade schemes. *Id.* at 453 & n.18.

The facts here are entirely different from *Japan Line*, and neither Defendants nor the United States even attempt to draw a meaningful analogy between the cases. Tort claims against private corporations for their tortious marketing and promotion of a known dangerous product, coupled with a multi-decadal campaign of deception, is a far cry from a uniform state tax on international shipping containers. The United States speculates that "foreign governments may view an award of damages to Rhode Island . . . as interfering in their own regulatory and economic affairs," and might "tak[e] other action against the United States as a whole." Amicus at 17. But the United States offers absolutely no factual or theoretical rationale for this extraordinary claim, nor any historic precedent that could support it. Commerce Clause analysis cannot hinge on such unsupported supposition.

As the Former Government Officials' Amicus Brief explains, it is at best "premature to conclude that liability for fossil fuel companies would cause other nations to retaliate against the United States in any way." Former Gov't Officials Amicus at 4. As those deeply experienced amici note, they are "aware of no current diplomatic protests criticizing or even addressing state tort litigation for corporate deception," *Id.* at 6, and the United States has identified none here. "To the contrary, the nearly two hundred parties to the Paris Agreement (including the United States), do not oppose, but rather support, subnational abatement efforts." *Id.* at 12–13. The Defendants and

the United States have not come close to showing "beyond a reasonable doubt that the [State] would not be entitled to relief from the defendant under any set of facts" based on the foreign affairs doctrine. *See Hyatt*, 880 A.2d at 824.

C. The United States' Arguments Concerning Federal Common Law Fail.

As the State has explained, the argument that the State's claims "arise under" federal law was already fully litigated and Chief Judge Smith decided the issue in the State's favor. Opp. at 39–40. The contrary district court opinion in *Oakland*, on which the United States, like Defendants, chiefly relies, was squarely rejected by Ninth Circuit, which held in no uncertain terms "that the state-law claim for public nuisance does not arise under federal law for purposes of [federal subject-matter jurisdiction]." *Oakland*, 2020 WL 2702680 at *2; *id.* at *5 ("the state-law claim for public nuisance fails to raise a substantial federal question"); *see also* n.3, *supra* (discussing application of Ninth Circuit's reasoning to similar opinion in *City of New York v. BP p.l.c.*, 325 F. Supp. 3d 466 (S.D.N.Y. 2018), *appeal argued*, No. 18-2188 (2d Cir. Nov. 22, 2019)). Accordingly, the United States' argument concerning the fate of an imagined federal common law claim is irrelevant.

III. CONCLUSION

The United States' Amicus Brief rehashes arguments that Defendants have already submitted, and to which the State has already responded. The United States, despite arguably being in the best position to do so, has added neither specificity nor expertise in support of Defendants' arguments that the State's claims would purportedly interfere with administration of the Clean Air Act or foreign affairs. The Amicus does not add any strength to Defendants' arguments, which the Amicus largely repeats. As the State has already explained at length, the Court should deny Defendants' Motion to Dismiss for Failure to State a Claim in full.

STATE OF RHODE ISLAND
By Its Attorneys,

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Date: June 2, 2020

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CERTIFICATION

I hereby certify that on the 2nd day of June, 2020, I served the within, Plaintiff State Of Rhode Island's Memorandum of Law in Response to Brief of Amicus Curiae United States in Support of Defendants' Motion to Dismiss, via the Electronic Filing System ("EFS") on each counsel of record for the above mentioned matters and that it is available for viewing and downloading.

/s/ Matthew K. Edling