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STATE OF RHODE ISLAND **SUPERIOR COURT**
PROVIDENCE, SC.

STATE OF RHODE ISLAND,	:	
	:	
Plaintiff,	:	
	:	
v.	:	P.C. No. 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 PETROLEUM CORP.;	:	
MARATHON PETROLEUM COMPANY LP;	:	
SPEEDWAY LLC;	:	
HESS CORP.;	:	
MARATHON OIL COMPANY;	:	
MARATHON OIL CORPORATION;	:	
LUKOIL PAN AMERICAS, LLC;	:	
GETTY PETROLEUM MARKETING, INC.;	:	
AND	:	
DOES 1 through 100, inclusive,	:	
	:	
Defendants.	:	

DEFENDANTS' RESPONSE TO BRIEF OF FORMER U.S. GOVERNMENT OFFICIALS AS *AMICI CURIAE* SUPPORTING PLAINTIFF

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I. INTRODUCTION

The United States argues in its *amicus* brief that Plaintiff's claims fail as a matter of law because (1) they are preempted by the Clean Air Act, *see* Br. for the United States as Amicus Curiae at 8–14, *Rhode Island v. Chevron Corp.*, P.C. No. 2018-4716 ("U.S. Br."); (2) they are preempted by the Foreign Affairs Power and Foreign Commerce Clause, *see id.* at 14–18; and (3) to the extent they arise under federal common law, they are displaced by statute, *see id.* at 18–21. In response, a group of private citizens who formerly held various governmental posts ("*Amici*") filed an *amicus* brief asserting that the United States' *amicus* brief "reflects a factual misunderstanding of U.S. climate policy." Br. of Former United States Government Officials at 8–14, *Rhode Island v. Chevron Corp.*, P.C. No. 2018-4716 ("Br.") at 1. Asking the Court to defer to "*amici*'s experience" over the unambiguous representations of federal policymakers, *Amici* insist that there "is no basis for suggesting that either the process of proving [Plaintiff's] allegations or the judicial relief requested would undermine U.S. foreign policy, international climate diplomacy, existing international commitments, or relations with foreign governments." *Id.* at 3. *Amici* are mistaken.

Amici do not address the first or third grounds the United States urges for dismissal. This is unsurprising considering that several *Amici* served as high-ranking Executive Branch officials when, in *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011) ("*AEP*"), the United States under the Obama Administration made the exact same arguments in favor of dismissing federal common-law claims based on alleged injuries resulting from climate change. There, as here, plaintiffs brought claims against energy companies "that ha[d] allegedly caused, contributed to, or maintained a public nuisance by contributing to global warming[.]" Brief for the Tennessee Valley Authority as Respondent Supporting Petitioners at 2, *American Electric Power Co. v.*

Connecticut, 564 U.S. 410, No. 10-174 ("*AEP* TVA Br.").[1] In arguing that those claims could not proceed, the United States explained that, "[i]n the context of climate change, a regulatory solution will be far better suited to addressing the scope of the problem and to fashioning an appropriately tailored set of remedies than a potentially open-ended series of common-law suits in far-flung district courts." *Id.* at 18.

The United States' opposition to the sort of *ad hoc* climate change regulation-by-tort that is embodied in the common-law claims that Plaintiff asserts here is thus longstanding and consistent across administrations of both political parties—yet it is ignored by *Amici*. All of the fundamental legal and policy concerns raised by the United States in *AEP* apply equally to—indeed, even more strongly against—the common-law claims in this case. These include the difficulty in tracing alleged climate-change harms to particular emission sources and the unsuitability of disparate courts and juries throughout the country to weigh the competing policies implicated by climate change. Rather than setting forth a new policy, the United States' *amicus* brief in this Court reflects the same principles the federal government invoked almost a decade ago when it argued that common-law claims would be particularly troublesome in the field of climate change because "[t]he medium that transmits injury to potential plaintiffs is literally the Earth's entire atmosphere," such that "essentially any potential plaintiff could claim to have been injured by any (or all) of the potential defendants." *AEP* TVA Br. at 17.

As in this case, the plaintiffs in *AEP* "elected to sue a handful of defendants from among an almost limitless array of entities that emit greenhouse gases," to try to redress "the types of injuries" that "could potentially be suffered by virtually any landowner, and to an extent, by

[1] The United States Solicitor General, representing the TVA, expressed the views of the United States in *AEP*. *Id.* at 2, 13.

virtually every person, in the United States (and, indeed, in most of the world)." *Id.* at 15. The United States argued then, as it does now, that "[a] court—when no statute or regulation is in place to provide guidance—is simply not well-suited to balance the various interests of, and the burdens reasonably and fairly to be borne by, the many entities, groups, and sectors of the economy that, although not parties to the litigation, are affected by a phenomenon that spans the globe." *Id.* at 18. And even if a common-law climate-change claim could be maintained in the abstract, "such claim has been displaced by the actions that EPA has taken under the [Clean Air Act] to regulate carbon-dioxide emissions." *Id.* at 42.

To the extent that *Amici* do engage issues briefed by the United States, *Amici*'s arguments are misplaced. First, *Amici* misunderstand the character of Plaintiff's claims and thus disregard the United States' expressed objections. Plaintiff alleges "deceptive conduct," Br. at 4, in a futile effort to avoid binding federal and state law precluding tort liability for lawfully producing fossil fuels. But the alleged deception could not itself cause Plaintiff's harms, so Plaintiff also seeks to hold Defendants liable for the production, promotion, sale, and combustion of fossil fuels around the world. *See* Mot. to Dismiss for Failure to State a Claim at 7–8, 12–13. Nor does Plaintiff's Complaint seek to hold Defendants liable for alleged deceptive conduct only within the State of Rhode Island or targeted at Rhode Island residents. *See id.* at 44–50. On the contrary, Plaintiff alleges that Defendants "engaged in massive campaigns to promote the ever-increasing use of their products at ever greater volumes," and thus "contributed substantially to the buildup of CO_2" around the globe. Compl. ¶ 6. The United States emphasized this extraterritorial aspect of Plaintiff's claims, *see, e.g.*, U.S. Br. at 1 ("[Plaintiff's] Complaint does not limit liability to emissions sourced from or acts within the State of Rhode Island."), yet *Amici* do not so much as acknowledge the global aspect of Plaintiff's claims, and instead pretend that Plaintiff's claims

involve an area of "traditional state responsibility, such as the tort liability of entities that advertise and sell in-state." Br. at 9. In doing so, they effectively concede the United States' (and Defendants') arguments.

Second, Plaintiff's claims, on the face of the Complaint, run afoul of the Foreign Affairs Power and the Foreign Commerce Clause for the reasons articulated by the United States. *See* U.S. Br. at 14–18. The state-law regime for allocating the costs of climate-change "abatement" advocated by Plaintiff and *Amici* would interfere with international agreements addressing that very issue, including the United Nations Framework Convention on Climate Change ("UNFCCC"). Indeed, the Paris Agreement—at the insistence of the United States and other developed countries—expressly *rejected* calls to allow legal liability for harms allegedly attributable to climate change. While *Amici* concede that the Paris Agreement did so in the context of intergovernmental liability, they contend that the Agreement and United States policymakers were "agnostic" on the subject of corporate liability. Br. at 6. They are incorrect. The United States rejected legal liability as a tool for allocating the costs of climate change because of the inability to reliably trace specific harms to particular producers and emitters of greenhouse gases. That rationale applies with equal force here.

Moreover, especially in the international context, the distinction between "governments" and "corporations" itself is specious, because most oil-producing nations act through state-owned entities. Many of these state-owned entities have contracts with the Defendants in this action, and oil-producing nations may not look kindly on a state court judgment imposing monetary penalties based on their fossil-fuel production. Such a judgment may cause them to retaliate against U.S. products. *See* U.S. Br. at 15–18. By seeking to impose liability for, and therefore deter, worldwide fossil-fuel production and emissions, Plaintiff's lawsuit undermines the Executive's ability to

negotiate international accords in which nations commit to reducing domestic production and emissions in return for similar commitments from other nations.[2]

Finally, it is well-settled that "the 'Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.'" *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 336 (1989).

Because *Amici* spend their brief attacking strawmen, they never address the important preemption and federalism concerns that are actually at issue in this case. For the reasons provided by Defendants and the United States, those concerns compel dismissal of this action.[3]

II. ARGUMENT

Plaintiff's Complaint is riddled with fatal defects that warrant dismissal but which *Amici* do not address, among them that the claims are governed by federal common law, and are preempted by, and displaced under, the Clean Air Act ("CAA"). But even if the Court finds it necessary to reach the Foreign Affairs Power and Foreign Commerce Clause, *Amici*'s attempts to shield Plaintiff's claims from those doctrines fall short in several crucial ways.

A. *Amici* Tacitly Concede the Validity of the United States' Foreign Affairs and Foreign Commerce Clause Arguments by Failing to Address the Extraterritorial Impacts of Plaintiff's Claims

The United States argues that Plaintiff's claims contravene the Foreign Commerce Clause and Foreign Affairs Power *because they seek to regulate extraterritorial conduct*: "Rhode Island

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[2] *Amici*'s views on the Foreign Affairs Power and Foreign Commerce Clause were apparently not shared by the Solicitor General representing the United States in *AEP*: "The United States, including TVA, agrees that plaintiffs' common-law nuisance suits present serious concerns regarding the role of an Article III court under the Constitution's separation of powers—especially in light of the representative Branches' ongoing efforts to combat climate change by formulating and implementing domestic policy and *participating in international negotiations*." *AEP* TVA Br. at 13 (emphasis added).

[3] By filing this response, Defendants do not waive their challenges to personal jurisdiction.

asks this Court to conclude that Defendants' international fossil fuel production and sale, and the resulting emissions in foreign countries, constitute various torts under Rhode Island law." U.S. Br. at 14. But as the United States correctly notes, this is impermissible insofar as it "would have the 'practical effect' of curbing fossil fuel production in foreign countries—an outcome inconsistent with the Foreign Commerce Clause because it 'control[s] conduct beyond the boundaries of the [country].'" *Id.* at 15 (quoting *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 69 (1st Cir. 1999)). Similarly, "[a]pplication of state law to pay for the costs of adaptation—particularly on a theory that imposes that liability through the regulation of production and consumption of fossil fuels overseas—would substantially interfere with the ongoing foreign policy of the United States." *Id.* at 16. Indeed, the United States repeatedly emphasizes the centrality of this action's extraterritorial implications to the Foreign Commerce Clause and Foreign Affairs Power. *See, e.g.*, *id.* at 2 ("This suit—premised on imposing liability on out-of-state conduct and including emissions now regulated by EPA—is preempted (or displaced) by federal law and should be dismissed."); *id.* at 17 ("Rhode Island's novel theory of liability and causation seeks compensation for costs of climate adaptation allegedly caused by the production and use of Defendants' products abroad."); *id.* at 18 ("Because Rhode Island's claims challenging production and consumption of fossil fuels outside the United States have the effect of regulating conduct beyond U.S. boundaries and impermissibly interfere with the conduct of foreign affairs, they are preempted by the Foreign Commerce Clause and the foreign affairs power."). As the United States argued in *AEP*, such suits "would inevitably entail multifarious policy judgements, which should be made by decision makers who are politically accountable, have expertise, and are able to pursue a coherent national or international strategy[.]" *AEP* TVA Br. at 19,

Amici ignore the extraterritoriality concerns that lie at the heart of the United States' analysis. Instead, they recast this litigation as dealing only with questions of corporate liability for unidentified deceptive conduct by "entities that advertise and sell in-state," before attempting to explain why such a hypothetical complaint would not raise any preemption or federalism issues. Br. at 9; *see also, e.g.*, *id.* at 4 ("[*A*]*mici* believe that a state court finding of corporate liability for deceptive conduct will not disrupt any of the United States' international climate negotiations with respect to national costs."); *see also id.* at 7, 9. But this case bears no resemblance to a run-of-the-mill fraud claim based on deceptive in-state marketing.

The closest *Amici* come to grappling with the extraterritorial implications of this litigation is a passing—and inaccurate—assertion that "Rhode Island's complaint centers on claims of corporate deception and the effects of such deception on the State of Rhode Island, not on the lawful sale of fossil fuels, nationally or internationally," and that "[p]roviding a remedy in Rhode Island would not imply nationwide or international liability." *Id.* at 11. But *Amici* provide no explanation for why this is the case—other than the non-sequitur that "tort law remains largely a matter of state law." *Id.*

Amici's characterization of this action cannot be reconciled with Plaintiff's own allegations. Far from alleging mere "deception" or localized tort, Plaintiff alleges that "Defendants, individually and collectively, extracted a substantial percentage of all raw fossil fuels recovered globally since 1965" and "manufactured, promoted, marketed, and sold a substantial portion of all fossil fuel products used and combusted during that period." Compl. ¶ 197. It claims that "CO_2 emissions attributable to fossil fuels that Defendants extracted from the Earth and injected into the market are responsible for a substantial percentage of greenhouse gas pollution since 1965," *id.* ¶ 198, and in particular, that "Defendants' individual and collective conduct—

including, but not limited to, their extraction, refining, and/or formulation of fossil fuel products" and "their introduction of fossil fuel products into the stream of commerce"—is "a substantial factor in causing the increase in global mean temperature and consequent increase in global mean sea surface height and disruptions to the hydrologic cycle," *id.* ¶ 199. Plaintiff repeats these claims in its response to the United States' *amicus* brief: "The State's claims concern Defendants' production, marketing and sale of fossil fuels . . . ." Plaintiff's Br. in Response to Amicus Curiae Brief for the United States at 3 n.1 ("Pltf's Br.") (emphasis omitted). It does so despite parroting *Amici*'s accusation that "the U.S. Amicus Brief relies on the same central misrepresentation of the State's Rhode Island law claims that Defendants repeat *ad nauseum* [sic]: 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." *Id.* at 4 (citing U.S. Br. at 1–2).

When Plaintiff refers to "the market" and the "stream of commerce," it means the *global* market—not the fossil-fuel market in Rhode Island. As the United States correctly notes, Plaintiff's theory of causation—however speculative or remote—depends on these allegations of worldwide conduct because Plaintiff does not and cannot allege that Defendants' conduct in Rhode Island since 1965 caused climate change—much less that Defendants' supposedly "misleading" "overpromotion" in Rhode Island did. *See* U.S. Br. at 13. Indeed, Plaintiff asserts that the "main driver of gravely dangerous changes occurring to the global climate" which allegedly will cause it harm, are global emissions from global fossil fuel consumption. Compl. ¶ 2.

Plaintiff's public nuisance claim provides a clear example of how state lawsuits filed around the country undermine foreign policy decisions made by the political branches of the federal government. The Complaint asks a state court to measure the "harms and benefits" of the

sale and use of fossil fuels by weighing their "social benefit" against their societal costs. Compl. ¶ 184; *see also Corvello v. New England Gas Co.*, 460 F. Supp. 2d 314, 323 (D.R.I. 2006) ("The critical inquiry [under Rhode Island public nuisance law] in deciding whether an interference with the protected rights of others is 'unreasonable' is whether 'the gravity of the harm caused outweighs the utility of the conduct.'" (quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 88 (5th ed. 1984))). This balancing of environmental concerns against economic and national security concerns is exactly the trade-off addressed by treaty on the international stage. United Nations Framework Convention on Climate Change, S. Treaty Doc. 102-38, 1771 U.N.T.S. 107 (entered into force Mar. 21, 1994) (recognizing that "responses to climate change should be coordinated with social and economic development").[4] And it is a judgment uniquely consigned to the political branches of the United States in charge of foreign policy, rather than trial courts throughout the country.

Moreover, even if the Court could, contrary to the Complaint's actual allegations, treat this as a mere "deception" case involving representations wholly inside Rhode Island, that would not eliminate the extraterritorial impacts that demand analysis under the Foreign Affairs Power and the Foreign Commerce Clause. Plaintiff alleges deceptive promotion only insofar as it has caused an "*unrestrained* use and consumption" of fossil fuels worldwide. Plaintiff's Opposition to Mot. to Dismiss for Failure to State a Claim ("Opp.") at 33 (emphasis added). And it accuses

[4] To highlight one example, the United States' decision to withdraw from the Paris Agreement was based in large part on the current Administration's conclusion that that treaty did not strike the proper balance between environmental and national security concerns. *See* Statement by the President of the United States on the Paris Climate Accord, The White House (June 1, 2017). A different Administration may take a different view. Under *Amici*'s view, however, a jury in a state court could decide for itself how to strike the balance among competing policy imperatives, thereby overriding an Executive Branch decision on foreign policy. But a state lacks the constitutional authority to do so. *United States v. Pink*, 315 U.S. 203, 233 (1942) ("Power over external affairs is not shared by the States; it is vested in the national government exclusively.").

Defendants of "*over*production and misleading *over*promotion" of fossil fuels. *Id.* at 37 (emphases added). Accordingly, this Court could not resolve any deception claim without determining what constitutes a reasonable amount of *worldwide* production and consumption of fossil fuels, or how much "*over*production" resulted from the alleged deception. And of course, the imposition of liability on this ground would have the necessary—and *intended*—effect of forcing Defendants to modify their worldwide business practices—including their extraction and sale of fossil fuels—on a prospective basis in order to avoid continuing liability under Rhode Island common law.

Without reference to the cumulative *worldwide* levels of CO_2 emissions, it is impossible to understand what Plaintiff could mean when it accuses Defendants of "produc[ing] and promot[ing] fossil fuels *at levels* they knew would be harmful." Opp. at 2 (emphasis added). Plaintiff does not and cannot allege that there is any "Rhode Island level" of production or promotion that caused it injury. The Supreme Court recognized the inherently international nature of the problem in *AEP*: "Greenhouse gases once emitted become well mixed in the atmosphere; emissions in New Jersey may contribute no more to flooding in New York than emissions in China." *AEP*, 564 U.S. at 422 (internal quotation marks and citation omitted). The United States was thus correct when it stated that "Rhode Island has no theory of harm" without worldwide emissions because "Rhode Island's allegations of injury from Defendants' conduct come from the effects of climate change," and climate change "in turn traces through the emission of greenhouse gases from burning fossil fuels, not the mere production and sale." U.S. Br. at 13.

By failing to seriously contend with, or even acknowledge, the extraterritorial impacts of Plaintiff's claims, *Amici* tacitly concede the validity of the United States' argument that Plaintiff's claims raise serious foreign policy concerns that require dismissal.

B. The United States Is Correct That Plaintiff's Claims Violate the Foreign Affairs Power and the Foreign Commerce Clause

Taking Plaintiff's claims as they are actually presented in the Complaint, it is clear that they run afoul of numerous federal prerogatives—just as the United States explained in its *amicus* brief. Although *Amici* do not attempt to rebut the United States' showing that Plaintiff's claims are preempted and/or displaced by the Clean Air Act, *Amici* do dispute that Plaintiff's claims contravene the Foreign Affairs Power and the Foreign Commerce Clause. In this, *Amici* are wrong.

1. Foreign Affairs Power

There is no question that Plaintiff's action intrudes on the federal government's Foreign Affairs Power. The U.S. Supreme Court has made clear that "an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the 'concern for uniformity in this country's dealings with foreign nations' that animated the Constitution's allocation of the foreign relations power to the National Government in the first place." *American Insurance Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964)). It is not necessary that this intrusion create a direct or irreconcilable conflict. Rather, state laws are preempted whenever they "frustrate the operation of the particular mechanism the President has chosen." *Id.* at 424. According to the United States, the use of state tort law to punish the extraterritorial extraction, sale, and combustion of fossil fuels would interfere with this federal power by intruding on the UNFCCC's framework for "stabiliz[ing] greenhouse gas concentrations while also enabling sustainable economic development," and by undermining the federal Executive's ability to speak with one voice in international negotiations on "whether and how to pay for the costs to adapt to climate change and whether and how to share costs among different countries and international stakeholders." U.S. Br. at 16.

Amici contend that "Rhode Island's tort claims do not 'undermine[] the approach to the provision of financial assistance under the UNFCCC'" because the UNFCCC does not "subject[] private companies to climate-related obligations." Br. at 5 (quoting U.S. Br. at 17). And while *Amici* acknowledge that the Paris Agreement contains "provisions relating to financial contributions to cover 'mitigation and adaptation' costs," they insist that these provisions are irrelevant here because they "are limited to the payment and mobilization of *intergovernmental* assistance" rather than legal liability. Br. at 5–6.[5]

Plaintiff's lawsuit collides head-on with the United States' categorical rejection of liability for climate-related harms. Article 8 of the Paris Agreement is not—as *Amici* argue—"agnostic regarding the issue of legal blame." Br. at 6. As one commentator explains, "[d]eveloped countries felt deeply uncomfortable with the notion of liability and have consistently refused to negotiate any liability under the Convention." Darragh Conway, *Loss and Damage: In the Paris Agreement*, Climate Focus (Dec. 2015) at 3, https://tinyurl.com/y8yuuhqg. Although Article 8 of the Paris Agreement provides for loss and damage payments among countries, these "obligations are of cooperative and facilitative character" and "exclud[e] any trace of the proposals on legal responsibility and financial obligations" that some developing countries advocated. *Id.*; *see also id.* at 3–4 ("The accompanying COP decision confirms this, explicitly excluding the possibility of liability or compensation under loss and damage."). In fact, *Amicus* John Kerry insisted that the Paris Agreement preclude any liability for climate change: "'We're not against [loss and damage]. We're in favor of framing it in a way that doesn't create a legal remedy because Congress will

[5] Contrary to *Amici*'s suggestions, the fact that "the United States has asked to withdraw from the Paris Agreement" is inconsequential for the relevant issues. Br. at 6. As *Amici* concede, this withdrawal does not suggest any change in the United States' long-standing foreign policy against legal liability for climate harms.

never buy into an agreement that has something like that. . . . [T]he impact of it would be to kill the deal.'" 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. And the chief U.S. climate negotiator at the Paris meetings, *Amicus* Todd D. Stern, drew a line in the sand, reaffirming the U.S. position: "There's one thing that we don't accept and won't accept in this agreement and that is the notion that there should be liability and compensation for loss and damage. That's a line that we can't cross. And I think in that regard we are in the exact same place my guess is with virtually all if not all developed countries." 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://2009-2017.state.gov/s/climate/releases/2015/250363.htm. More broadly, a substantial set of countries "warned that they would permit the principle of loss and damage to exist in the Paris agreement only if the exclusion of compensation and liability was made explicit." Lisa Vanhala & Cecilie Hestbaek, *Framing Climate Change Loss and Damage in UNFCCC Negotiations*, 16 Global Environmental Politics 4 at 124 (Nov. 30, 2016).

Amici attempt to brush aside the United States' (and, ultimately, the Paris Agreement's) categorical rejection of legal liability for climate change, characterizing these positions and provisions as dealing with "the liability of [the United States] itself or its constitutive state governments" and aid "from developed to developing countries," such that they "have nothing to do with the claims in this lawsuit, which seek a transfer of funds from a private company to a subnational government located in the United States." Br. at 5–6. But the Paris Agreement (and multilateral climate-change negotiations under the UNFCCC more generally) has always focused on *national* emissions—not the emissions of *governments*. *See, e.g.*, United Nations Framework

Convention on Climate Change, S. Treaty Doc. 102-38, 1771 U.N.T.S. 107 (entered into force Mar. 21, 1994) ("Emissions means the release of greenhouse gases and/or their precursors into the atmosphere over a specified area and period of time."); *Inventory of U.S. Greenhouse Gas Emissions and Sinks*, EPA (Apr. 13, 2020), https://www.epa.gov/ghgemissions/inventory-us-greenhouse-gas-emissions-and-sinks (providing a "comprehensive accounting of total greenhouse gas emissions for all man-made sources in the United States"). Moreover, *Amici* ignore the *reasons why* the United States and the Paris Agreement so decisively rejected liability. In particular, the participants in the negotiations understood that "state responsibility and liability becomes problematic to apply in the context of climate change, in particular due to the high number of actors involved and the difficulty in linking damage to any given actor." Darragh Conway, *Loss and Damage: In the Paris Agreement*, Climate Focus (Dec. 2015) at 3, https://tinyurl.com/y8yuuhqg. The United States, along with other developed countries, focused on two key problems with imposing liability for climate-change harms: (1) the impossibility of attributing damages to specific emissions; and (2) the difficulty of attributing damages to climate change, as opposed to other factors.

Regarding the first argument, the United States and other developed countries have long pointed to the fact that it is impossible to link any damages bio-physically or economically to specific greenhouse gas emissions from any source. *See, e.g.*, *Global Greenhouse Gas Emissions*, EPA (Aug. 2016) at 1, https://19january2017snapshot.epa.gov/sites/production/files/2016-08/documents/print_global-ghg-emissions-2016.pdf ("Every country around the world emits greenhouse gases into the atmosphere, meaning the root cause of climate change is truly global in scope."). Regarding the second argument, the "attribution of specific incidences of loss and damage to climate change, as opposed to natural climate variability and/or vulnerabilities

stemming from non-climatic stresses and trends like deforestation and development patterns, is technically impossible in most every case." *Views and Information from Parties and Relevant Organizations on the Possible Elements to be Included in the Recommendations on Loss and Damage in Accordance with Decision 1/CP.16* 34, United Nations Framework Convention on Climate Change (Nov. 19, 2012) at 34, https://digitallibrary.un.org/record/737998?ln=en.

The United States raised these same concerns in arguing that the plaintiffs in *AEP* could not assert common-law tort claims related to climate change, emphasizing that the "EPA has recognized the complexity and resulting uncertainty that exists about many of the localized effects of climate change." *AEP* TVA Br. at 19. Thus, contrary to *Amici*'s representations, the arguments raised by the United States in opposing Plaintiff's claims are consistent with the views not only of the international community as embodied in the Paris Agreement, but also the long-held position of the federal government—including under the Obama Administration.

Even if corporate liability did not directly conflict with the United States' foreign policy when it negotiated the UNFCCC and the Paris Agreement, such liability would still conflict with United States policy and the Foreign Affairs Power. In fact, the U.S. Supreme Court has repeatedly held that state laws are preempted where they "frustrate the operation of the particular *mechanism* the President has chosen," even where they purport to complement federal policies. *Garamendi*, 539 U.S. at 424 (emphasis added); *see also Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 380 (2000) ("The fact of a common end hardly neutralizes conflicting means, and the fact that some companies may be able to comply with both sets of sanctions does not mean that the state Act is not at odds with achievement of the federal decision about the right degree of pressure to employ."). Using state law to superimpose an *additional* mechanism for allocating so-called "'mitigation and adaptation' costs" on top of that established by international agreements would

plainly serve as "an obstacle to the success of the National Government's chosen 'calibration of force.'" *Garamendi*, 539 U.S. at 425.[6]

Although *Amici* perceive no "reason to believe that a state court adjudicating or granting liability for corporate deception would prevent the United States from speaking with 'one voice' on the world stage," Br. at 4, the United States explained that this action *would* interfere with its foreign policy, *see* U.S. Br. at 17 (noting that Plaintiff's claims would "conflict with the United States' international position regarding compensation," "undermine[] the approach to the provision of financial assistance under the UNFCCC," and risk retaliation from foreign governments). And it is well established that, although courts "do not unquestioningly defer to the legal judgments expressed in Executive Branch statements when determining a federal act's preemptive character, [they] have never questioned their competence to show the practical difficulty of pursuing a congressional goal requiring multinational agreement" given that "the 'nuances' of 'the foreign policy of the United States . . . are much more the province of the Executive Branch and Congress than of this Court.'" *Crosby*, 530 U.S. at 385–86 (quoting *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 196 (1983)). Here, the United States was so concerned about the impact of Plaintiff's claims on foreign policy that it took the highly unusual step of filing an *amicus* brief in a state trial court to express its views. Its concerns about Plaintiff's interference with foreign affairs is well founded given that part of the asserted

[6] Even if *Amici* were correct that Plaintiff's theory would not conflict with the UNFCCC, it would not change the outcome. While state laws that "conflict with a treaty . . . must bow to the superior federal policy," the U.S. Supreme Court has also made clear that "even in absence of a treaty, a State's policy may disturb foreign relations." *Zschernig v. Miller*, 389 U.S. 429, 441 (1968). In *Zschernig*, the Court struck down an Oregon law that restricted the right of foreign citizens to inherit property in that state under certain conditions because it "ma[de] unavoidable judicial criticism of nations established on a more authoritarian basis than our own." *Id.* at 440. The claims asserted by Plaintiff similarly require a court to make judgments about the energy and environmental policies of foreign sovereigns.

misconduct includes Defendants allegedly "disrupt[ing] international efforts" to address "greenhouse gas emissions." Compl. ¶ 164; *see also id.* ¶ 151. Adjudicating Plaintiff's deception theory thus would require a court to pass judgment on the political branches' decision-making in the realm of foreign affairs.[7]

The only response *Amici* offer to the representations of the United States is the claim that "*Amici* know of no aspect of U.S. foreign policy that seeks to exonerate companies for knowingly misleading consumers about the dangers of their products." Br. at 10. But this misunderstands the claims as pleaded in the Complaint and disregards the *effects* of such state-law claims on broader climate policy. The ability to impose restrictions on domestic energy production and combustion is one of the Executive's key bargaining chips in extracting reciprocal commitments from the global community. *See* Clifford Krauss, *Oil Nations, Prodded by Trump, Reach Deal to Slash Production*, N.Y. Times (Apr. 13, 2020), https://tinyurl.com/usplxmw (detailing an "effort by Russia, Saudi Arabia and the United States to stabilize oil prices and, indirectly, global financial markets" by "agree[ing] to the largest production cut ever negotiated"). If this Court were to impose liability on Defendants for their production and sale of fossil fuels under state tort law, it would "minimize or wholly eliminate this 'bargaining chip.'" *Dames & Moore v. Regan*, 453 U.S. 654, 673 (1981). This is far more than an incidental impact—it is a direct conflict with the Nation's foreign policy.

[7] *Amici* assert 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." Br. at 1; *see also* Pltf's Br. at 3–4. But this case goes to the heart of our constitutional system's separation of powers, and the prerogatives of the Executive and Legislative Branches in the realm of foreign affairs do not—and cannot—turn on sanguine assessments of the "limiting principles of civil procedure." Br. at 12.

2. Foreign Commerce Clause

Plaintiff's suit is also preempted by the Foreign Commerce Clause, which vests Congress with the power "[t]o regulate commerce with foreign nations." U.S. Const., art. I., § 8. *Amici*'s attempted distinction between nation-states and corporations carries no weight in the Foreign Commerce Clause analysis, where most such commerce is carried on by corporate entities. Although *Amici* contend that a state law can violate the Foreign Commerce Clause only when "it conflicts with either a comprehensive treaty or an explicit federal policy," Br. at 9–10, the U.S. Supreme Court has squarely rejected the proposition that "a State is free to impose demonstrable burdens on commerce, so long as Congress has not pre-empted the field by affirmative regulation." *Japan Line, Ltd. v. Los Angeles County*, 441 U.S. 434, 454 (1979). On the contrary, "it long has been 'accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation . . . affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests.'" *Id.* (quoting *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945)).[8]

The "competing demands of state and national interests" weigh decisively against Plaintiff's attempt to hold Defendants liable for the global extraction, sale, and combustion of fossil fuels. As the United States explained, "[T]he Foreign Commerce Clause prohibits a State from regulating commerce wholly outside its borders, whether or not the effects are felt within the

[8] *Amici* purport to recognize this, yet nevertheless contend that "[c]ourts have required [a] showing[] of express congressional intent to invalidate state action under the dormant Foreign Commerce Clause." Br. at 10. But of course, the very point of the *dormant* Foreign Commerce Clause is that it operates where there is *not* any "express congressional intent."

State." U.S. Br. at 14–15 (citing *Healy*, 491 U.S. at 336). Indeed, the U.S. Supreme Court has emphasized that "the Commerce Clause protects against inconsistent legislation arising from the projection of one state's regulatory regime into the jurisdiction of another state"—a concern that "must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." *Healy*, 491 U.S. at 336–37. These concerns apply with even greater force when foreign, as distinct from interstate, commerce is at issue. *See Japan Line*, 441 U.S. at 448 ("Although the Constitution . . . grants Congress power to regulate commerce 'with foreign Nations' and 'among the several States' in parallel phrases, there is evidence that the Founders intended the scope of the foreign commerce power to be the greater.").

Thus, even if *Amici* were correct to construe this action as involving only "deception" in Rhode Island, that still would not ameliorate the Foreign Commerce Clause concerns. In *Japan Line*, for example, Japanese shipping companies challenged a California property tax on shipping containers that passed through California in the course of foreign commerce. 441 U.S. at 436–37. The Supreme Court struck down the tax under the Foreign Commerce Clause because "California's tax result[ed] in multiple taxation of the instrumentalities of foreign commerce," which were also taxed in Japan, *id.* at 451–52, and because "California's tax prevents [the] Nation from 'speaking with one voice' in regulating foreign trade" by "creat[ing] an asymmetry in international maritime taxation," in turn creating a "risk of retaliation by Japan" that "of necessity would be felt by the Nation as a whole," *id.* at 453.

So, too, here. As in *Japan Line*, Plaintiff purports merely to ensure that Defendants "bear the costs of th[eir] impacts on Rhode Island." Compl. ¶ 12; *see also Japan Line*, 441 U.S. at 456

("If California cannot tax appellants' containers, they complain, . . . the State will go uncompensated for the services it undeniably renders the containers."). But as in *Japan Line*, doing so creates the risk that Defendants effectively "would be paying a double tax," 441 U.S. at 452 (quotations omitted), insofar as at least some of Defendants' alleged "profit[s] from externalizing the responsibility for" climate change, Compl. ¶ 12, have already been subject to carbon taxes, cap-and-trade regimes, and other regulations in foreign states. *See* Steven Nadel, *More States and Provinces Adopt Carbon Pricing to Cut Emissions*, ACEEE (Jan. 3, 2019), https://tinyurl.com/yczxh2uh. *Amici*'s suggestion that "[c]areful judges have successfully managed very expensive and diplomatically sensitive cases," Br. at 11, is beside the point because "[e]ven a slight overlapping of tax—a problem that might be deemed *de minimis* in a domestic context—assumes importance when sensitive matters of foreign relations and national sovereignty are concerned." *Japan Line*, 441 U.S. at 456. And "[t]he risk of retaliation"—including by the domiciles of the foreign Defendants named in this action—"would be felt by the Nation as a whole," rather than just Rhode Island. *Id*. at 443.

III. CONCLUSION

For these reasons, Defendants respectfully request that the Court dismiss Plaintiff's Complaint in its entirety.

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CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2020, I filed and served this document through the Rhode Island Judiciary's Electronic Filing System on all counsel who are registered for e-service. This document electronically served is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System.

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