No. 18-2188

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CITY OF NEW YORK,
Plaintiff/Appellant,

v.

BP P.L.C., et al.,
Defendants/Appellees.

Appeal from the United States District Court
for the Southern District of New York
No. 1:18-cv-00182 (Hon. John F. Keenan)

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

ERIC GRANT
Deputy Assistant Attorney General
R. JUSTIN SMITH
CHRISTINE W. ENNIS
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
(202) 616-9473
christine.ennis@usdoj.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions, Statutes and Court Rules

Other Authorities

INTERESTS OF THE UNITED STATES

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

STATEMENT OF THE CASE

A. Legal background

1. The Clean Air Act and Related Regulations

The Clean Air Act establishes a comprehensive program for controlling air pollutants and improving the nation's air quality through both state and federal regulation. In *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007), the Supreme Court concluded that greenhouse gases are within the CAA's definition of "air pollutant" and, thus, may be regulated under the Act. EPA subsequently determined that greenhouse gas emissions from motor vehicles "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare" under 42 U.S.C. § 7521(a). 74 Fed. Reg. 66,496 (Dec. 15,

2009). In so doing, EPA considered several effects of climate change, including "coastal inundation and erosion caused by melting icecaps and rising sea levels." *American Electric Power Co. v. Connecticut*, 564 U.S. 410, 416 (2011) (*AEP*) (citing 74 Fed. Reg. at 66,533).

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

Consistent with the Act's cooperative federalism approach, States likewise can play a meaningful role in regulating greenhouse gas emissions from sources within their borders. *See* 42 U.S.C. § 7401(a)(3). In particular, States have the initial responsibility to adopt plans to implement emissions guidelines for greenhouse gas emissions from existing sources (including electric utility generating units), *see id*. § 7411(d), and those plans are subject to EPA approval, *id*. § 7411(d)(2)(A). In addition, many States implement the PSD permitting program through a state-run permitting process that is approved by EPA and incorporated into State Implementation Plans (SIPs), *id*. § 7410(a)(2)(C).

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

2. International Climate Change Efforts

The United States has engaged in international efforts to address global climate change for decades. The United States is a party to the United Nations Framework Convention on Climate Change (UNFCCC), which establishes a cooperative multilateral framework for addressing climate change. *See* UNFCCC, May 9, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 107 (entered into force Mar. 21, 1994). More recently, the United States has indicated its intent to withdraw from the Paris Agreement, an agreement negotiated under the auspices of the UNFCCC. Among other things, the Paris Agreement requires its Parties to communicate nationally determined contributions related to the reduction of greenhouse gas emissions.

B. Similar Litigation

The United States is aware of similar suits by thirteen other municipalities, one State, and one fisheries association against fossil-fuel producing companies. The suits allege that the defendants violated state public nuisance laws by producing and selling fossil fuels that contribute to sea-level rise and other climate change-related effects. Of these, the present case is the only suit originally filed in federal court; all of the others have been removed from state court, and plaintiffs have moved to remand.

Substantive decisions have been rendered in two of the other cases, which are currently on appeal to the Ninth Circuit. *See County of San Mateo v. Chevron Corp.*, No. 17-4929 (N.D. Cal.) (Chhabria, J.), *appeal pending* No. 18-15499 (9th Cir. docketed Mar. 27, 2018); *People v. BP p.l.c.*, Nos. 17-cv-6011 and -6012 (N.D. Cal.) (Alsup, J.), *appeal pending sub nom. City of Oakland v. BP p.l.c.*, No. 18-16663 (9th Cir. docketed Sept. 4, 2018).

SUMMARY OF ARGUMENT

This Court should affirm the district court's judgment and hold that the City of New York's nuisance and trespass claims must be dismissed because they cannot be sustained regardless of whether they arise under state or federal law.

1. The City asserts claims under the common law of New York State based on alleged harms from out-of-state greenhouse gas emissions. Considering the complaint on its face, this Court should conclude that those claims are preempted by the Clean Air Act. The Supreme Court has held that the Clean Water Act—which has a parallel structure to the Clean Air Act—preempts state common law nuisance claims that regulate out-of-state pollution sources. *International Paper Co. v. Ouellette*, 479 U.S. 481 (1986). Here, the challenged conduct takes place almost entirely outside the State of New York, and so the City's claims must likewise be dismissed.

The City's claims also are preempted because they challenge production and consumption of fossil fuels abroad, which interferes with the conduct of foreign commerce and foreign affairs and exceeds the State's authority under the due process clause. Because these novel and sweeping claims interfere with the conduct of foreign policy and regulation of foreign commerce that falls within the domain of the representative branches of the federal government, have more than incidental or indirect effect in foreign countries, and have great potential for disruption or embarrassment for the United States in its international relations that cannot be outweighed by the relative interests of New York State, they must also be dismissed.

2. As to the district court's ruling that the City's claims arise under federal common law, the United States agrees that these claims fail if considered as arising under federal law. First, such nuisance claims under federal common law are not available to municipalities (as opposed to States), and the judgment can be affirmed on that basis alone. Second, to recognize such broad and novel claims here is inconsistent with the Supreme Court's narrow view of federal common law, and with principles of judicial restraint.

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

ARGUMENT

I. The Clean Air Act preempts the City's state-law claims.

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

The City's claims under New York law challenge out-of-state emissions and therefore are preempted by the CAA. The preemption of state law may be express or implied, as when state-law claims conflict with a federal statute. When state-law claims "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," they are preempted by federal law. *Hillsborough County v. Automated Medical Labs., Inc.*, 471 U.S. 707, 713 (1985) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); *see also AEP*, 564 U.S. at 429 ("The availability *vel non* of a state lawsuit depends . . . on the preemptive effect of the federal Act.").

The Supreme Court's decision in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1986), provides the framework for assessing whether the CAA preempts the City's state nuisance law claims. In *Ouellette*, property owners on the Vermont side of Lake Champlain sued a paper company that discharged effluents into the lake from the New York side. The property owners alleged violations of Vermont nuisance law. *Id.* at 483-84. The Supreme Court explained that the CWA creates a "comprehensive" and "all-encompassing program of water pollution regulation" that leaves available "only state[-law] suits . . . specifically preserved by the Act."

Id. at 492. In the Court's view, allowing any other suits would "undermine" the comprehensive "regulatory structure" created by Congress in the CWA. *Id*. at 497. Based on the CWA savings clause, which permits States to impose stricter standards than the CWA, 33 U.S.C. § 1370, the Court concluded that the only state-law suits preserved by the CWA are suits "pursuant to the law of the source State." 479 U.S. at 497; *see also id*. at 499 ("Because the [CWA] specifically allows source States to impose stricter standards, the imposition of source-state law does not disrupt the regulatory partnership established by the [CWA]."); *AEP*, 564 U.S. at 429 (explaining *Ouellette*'s holding "that the [CWA] does not preclude aggrieved individuals from bringing a 'nuisance claim pursuant to the law of the *source* State'").

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

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

> The CAA saving clause generally provides that nothing in the Act
>
> shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution.

42 U.S.C. § 7416; *see also* 33 U.S.C. § 1370 (CWA savings clause). Because this savings clause is virtually identical to the savings clause in the CWA, the best reading of the CAA is that (like the CWA) it preempts state-law suits involving emissions of air pollutants except those "pursuant to the law of the source State." *Ouellette*, 479 U.S. at 497. Although the plain language of the clauses makes clear that some state regulation is preserved, *see id.* at 492, it does not suggest that Congress intended to allow every State affected by air pollution to sue out-of-state sources under its own laws, irrespective of State boundaries.[1] Looking next to the

[1] Plaintiffs in *Ouellette* also argued that the citizen-suit provision of the CWA, 33 U.S.C. § 1365(e), gave them an absolute right to seek relief "under any statute or common law," 479 U.S. at 493 (quoting 33 U.S.C. § 1365(e)). That provision mirrors the comparable provision in the CAA, 42 U.S.C. §7604(e), and nothing in either provision "purport[s] to preclude pre-emption of state law by other provisions of the Act." 479 U.S. at 493.

goals and policies of the CAA, it is clear that under the CAA (as under the CWA), allowing a State to apply its law to out-of-state emissions would interfere with the "full purposes and objectives of Congress." *Id*. at 493.

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

in this manner also raises due process concerns. *Cf. BMW of North America v. Gore*, 517 U.S. 559 (1996).

Here, the City did not sue Defendants under the laws of the many States in which their fossil fuels were produced, sold, and combusted; it sued only under the law of the "affected State" of New York. The City's claims are thus preempted just as the nuisance claim under Vermont law was preempted in *Ouellette*.[2]

Neither of the City's two arguments to avoid preemption is persuasive. First, the City disavows an intent to regulate emissions, instead alleging harm from the production and sale of fossil fuels. But the City's allegations of injury from the effects of climate change all turn on greenhouse-gas emissions from burning fossil fuels, not on their production and sale. *E.g.*, Amended Complaint ¶¶ 1, 78 (alleging that "Defendants here produced . . . massive quantities of fossil fuels . . . despite knowing that the[ir] combustion and use . . . emit greenhouse gases . . . , primarily carbon dioxide").[3] Thus, the City seeks to hold Defendants liable based

---

[2] Because the City has declined to limit its claims to purely in-state sources, we do not address how such claims might be analyzed. Likewise, many States have a wide range of state-level programs relating to climate change. *See* Brief for Amici Curiae States of New York *et al.*, ECF No. 122, at 5-7. This brief is not intended to address those programs or the preemption analysis that might apply to them.

[3] Production of fossil fuels does not map directly to emissions of greenhouse gases. Coal, natural gas, and oil generate different quantities of greenhouse gases when combusted, and some have non-combustive uses like feedstock for chemical processes. Accordingly, were a court to attempt to allocate damages among Defendants, it presumably could not rest its analysis solely on the fossil fuels

on the same conduct (greenhouse gas emissions) and the same alleged harm (sea level rise) that the Supreme Court in *AEP* concluded conflicted with the CAA. 564 U.S. at 417, 423-25. As the district court observed in a similar case brought by the Cities of Oakland and San Francisco: "If an oil producer cannot be sued under the federal common law for their own emissions, *a fortiori* they cannot be sued for someone else's." *City of Oakland v. BP p.l.c.*, 325 F.Supp.3d 1017, 1024 (N.D. Cal. 2018). Indeed, all three courts to have considered this argument have rejected this attempt to distinguish *AEP*. *See id.*; *County of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 938 (N.D. Cal. 2018); *City of New York v. BP p.l.c.*, 325 F. Supp. 3d 466, 474 (S.D.N.Y. 2018).

Second, the City argues that its claims are not preempted because it seeks damages for the costs of sea walls and other infrastructure, a remedy that is assertedly not available under the CAA. The City also requests an abatement order that would come into effect in the event that Defendants do not pay. But the Supreme Court has found state common law preempted even where a federal statute does not provide precisely the same remedies as the state claim. In *Ouellette*, the United States argued that compensatory damages awarded pursuant to state law would not interfere with the CWA because they "only require the

---

produced and sold; it would need to consider the types of fossil fuels involved, how those fuels were used, and the relative contribution of those uses to global greenhouse gas *emissions* that drive the City's harm.

source to pay for the external costs created by the pollution, and thus do not 'regulate' in a way inconsistent with the Act." 479 U.S. at 498 n.19. But the Court disagreed, explaining that a defendant "might be compelled to adopt different or additional means of pollution control from those required by the Act, regardless of whether the purpose of the relief was compensatory or regulatory." *Id*. Such a result, the Court concluded, was irreconcilable with the Clean Water Act's exclusive grant of authority to the Federal Government and the source State. *Id*.

The City cannot distinguish *Ouellette* by framing its claims as production and sale rather than emissions, or by seeking damages in addition to an injunction. Because the City seeks to hold Defendants accountable under New York nuisance law for countless domestic emissions sources outside the State, the City's claims are preempted.

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

The City's novel claims are also preempted by the Foreign Commerce Clause and by the foreign affairs power of the Executive Branch because they have more than an incidental or indirect effect on the actions of foreign nations and impermissibly intrude into the field of foreign affairs. The City asked the district court to conclude that Defendants' international fossil-fuel production and sale, and the resulting emissions in foreign countries, constitutes a nuisance under New York State law. That is, the City seeks to hold Defendants liable according to the

alleged impacts of such foreign actions on climate-change effects in New York City. Where, as here, the City seeks to project state law into the jurisdiction of other nations, the potential is particularly great for inconsistent legislation and resulting conflict, as well as for interference with United States foreign policy, and therefore the City's claims are preempted.

The Constitution expressly grants authority to Congress to "regulate commerce with foreign nations" (the Foreign Commerce Clause), art. I, § 8, cl. 3, and to the President to "make Treaties" (among other authorities collectively described as the "foreign affairs" power), art II, § 2, cl. 2. By extension of the rule established by the Interstate Commerce Clause, the Foreign Commerce Clause prohibits States from regulating commerce wholly outside their borders, whether or not effects are felt in state. *See Healy v. Beer Institute*, 491 U.S. 324, 336 (1989). Here, an award to the City based on Defendants' foreign extraterritorial conduct could have the "practical effect" of curbing fossil-fuel production in foreign countries—an outcome inconsistent with the Foreign Commerce Clause because it "control[s] conduct beyond the boundaries of the [country]." *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 69 (1st Cir. 1999) (quoting *Healy*, 491 U.S. at 336), *aff'd*, 530 U.S. 363 (2000).

Energy production decisions, including by foreign governments, are inherently sovereign acts. *See MOL, Inc. v. Peoples Republic of Bangladesh*, 736

F.2d 1326, 1329 (9th Cir. 1984) (holding that regulation of natural resources is a "uniquely sovereign" activity); *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1165 (D.C. Cir. 2002) (concluding that licensing the removal of uranium is a sovereign act). Foreign governments also have their own laws and policies to regulate greenhouse gas emissions. In contrast, the interest of any single U.S. State in foreign energy and environmental regulatory regimes is so attenuated as to raise serious due process concerns. *See, e.g.*, *BMW*, 517 U.S. at 568-73. Moreover, as discussed in Section I.A above, the CAA limits the authority of States to apply their nuisance laws to air emissions outside their borders, underlining the limited authority of the State in this arena. To the extent that the City's claims interfere with these foreign regulatory regimes, they are preempted by the Foreign Commerce Clause.

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

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

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

The City's claims—which are pled to reach conduct spanning the globe—threaten to conflict with the United States' foreign policy, including the balance of

national interests struck by the UNFCCC. *See, e.g.*, *In re Philippine National Bank*, 397 F.3d 768, 772 (9th Cir. 2005) (endorsing "the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder the conduct of foreign affairs" (internal quotation marks omitted)). The City seeks compensation for costs of climate adaptation allegedly caused by the production and consumption of Defendants' products abroad. Such a result would not only conflict with the United States' international position regarding compensation, it also could undermine the approach to the provision of financial assistance to address climate change implemented reflected in UNFCCC Articles 4 and 11. *See American Insurance Ass'n v. Garamendi*, 539 U.S. 396, 427 (2003); *In re Assicurazioni Generali, S.P.A.*, 592 F.3d 113, 118 (2d Cir. 2010) (applying same principle to invalidate state statutory and common-law claims that sufficiently "conflicted with the Government's policy that [Holocaust] claims should be resolved exclusively through" an international body).

In addition, foreign governments may view an award of damages to the City based on energy production within their borders as interfering in their own regulatory and economic affairs, and they could respond by seeking to prevent the imposition of these costs, by seeking payment of reciprocal costs, or by taking other action. *See, e.g.*, *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 269 (2010); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 450 (1979)

(explaining that affected foreign nations "may retaliate against American-owned instrumentalities present in their jurisdictions," causing the Nation as a whole to suffer). If countries were to seek transnational compensation or funding for adaptation to climate change, such claims would need to be addressed by the federal government, not one or more States. The approach advanced by the City would "compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments." *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 381 (2000).

Because the City'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.

II. The City likewise has no remedy if its claims arise under federal common law.

The district court concluded that the City's claims, although pleaded under the law of New York, properly arose under federal common law, but that any applicable federal common law claims are displaced by the Clean Air Act. We agree that regardless of whether the claims in this case properly arise under New York law or under federal common law, the City has no remedy here. Thus, the Court need not decide which law governs, because the result is the same under either analysis: the Court should affirm the dismissal.

As discussed in Section I above, the City cannot maintain its claims if they are viewed as arising under New York law. As we discuss below, the same is true if these claims are viewed as arising under federal common law. Federal common law plainly does not afford a remedy to the City, both because (1) federal common law remedies for interstate environmental harms are restricted to States, and (2) courts correctly have declined to recognize federal common law claims to address complex, transboundary harms like those in this case—and this Court should not be the first to do so. But if any federal common-law claims might theoretically exist on these facts, then the district court was correct to hold that such claims would necessarily be displaced by the CAA.

A. Federal common law remedies are narrowly constrained.

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

The Supreme Court has not recognized a nuisance claim under the federal common law for almost half a century. Even the cause of action identified in

Milwaukee I is no longer applicable, as it was displaced by the later-enacted Clean Water Act. *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) (*Milwaukee II*). Moreover, in the decades since *Milwaukee I* and *II*, the Supreme Court has stressed in a wide range of contexts that it is Congress's prerogative to create causes of action expressly by statute, and that implied or non-statutory remedies are disfavored. In *AEP*, for example, the Court opined that it "remains mindful that it does not have creative power akin to that vested in Congress." 564 U.S. at 422. The Court also has expressed reluctance to recognize judicially fashioned causes of action. *See, e.g.*, *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017); *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). In *Ziglar*, the Court explained:

> When a party seeks to assert an implied cause of action under the Constitution itself . . . separation-of-powers principles are or should be central to the analysis. The question is "who should decide" whether to provide for a damages remedy, Congress or the courts? . . . . In most instances, the Court's precedents now instruct, the Legislature is in the better position to consider if "the public interest would be served" by imposing a "new substantive legal liability."

137 S. Ct. at 1857 (citations omitted).

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

1. Political subdivisions of States have not been afforded federal common law claims.

States have a central role in the Constitution's framework, and Article III confers original jurisdiction on the Supreme Court for suits in which States are parties. *See* U.S. Const. art. III, § 2, cl. 2; *see also id.* § 2, cl. 1 (extending the judicial power to controversies between states and between a state and a citizen of another state). Historically, nuisance actions under federal common law were brought by States invoking the Supreme Court's original jurisdiction; the Court later broadened these claims to allow States to proceed in other courts as well. *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1973). Article III's grant of original jurisdiction, as implemented by Congress's statutory grant of jurisdiction in 28 U.S.C. § 1251, implicitly authorizes the Court to fashion federal common law to govern suits involving States. By contrast, there is no basis in the text of the Constitution or in any statute for federal courts to create a federal common law of nuisance claim in favor of non-state parties.

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

properly arising under state law, subject to preemptive limitations implied by the cooperative federalism scheme of the federal environmental statutes. *See Ouellette,* 479 U.S. at 489.

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

In *Connecticut v. AEP*, 582 F.3d 309, 349-61 (2d Cir. 2009), this Court ruled that non-State plaintiffs may bring a nuisance claim under federal common law, and that such a claim is available to redress climate-related harms. But the Supreme Court subsequently vacated that decision and expressly declined to reach both questions. *AEP*, 564 U.S. at 422-23. Nor did the Ninth Circuit decide these issues in *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012). That decision noted in passing the possibility that "federal common law can apply to transboundary pollution suits," *id.* at 855, but then proceeded to apply *AEP* to hold that any federal common law claims that may otherwise exist were displaced by the enactment of the CAA.

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

To maintain the role of federal courts and protect the primary role of the representative branches, federal common law is ordinarily interstitial in character, such that it is not available for claims as broad and novel as those in this case. The worldwide scope of this case raises complex scientific issues of causation that implicate the global atmosphere and climate system well beyond the more localized harms at issue in *Milwaukee I* and its antecedents. *See Georgia v. Tennessee Copper Co*., 206 U.S. 230, 238 (1907) (enjoining noxious gases traveling from the defendant's plants across the state line into Georgia). The present litigation concerns the production and sale of fossil fuels in numerous states and foreign countries—products that are intermingled in complicated, interdependent streams of international commerce. The City's claim for damages depends on the combustion of those products and the subsequent emissions of greenhouse gases by countless sources worldwide. *See AEP*, 564 U.S. at 422 ("Greenhouse gases once emitted become well mixed in the atmosphere; emissions in New Jersey may contribute no more to flooding in New York than emissions in China." (internal quotation marks and citation omitted)); *see also Washington Environmental Council v. Bellon*, 732 F.3d 1131, 1143 (9th Cir. 2013).

Were the Court to fashion a cause of action under federal common law in these circumstances, a host of plaintiffs could proceed in federal court against a

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

B. Any applicable federal common law claim is displaced.

In the event that the Court nevertheless concludes that a cause of action could be created under federal common law and could govern here, it should affirm (on either of two independent grounds) the district court's conclusion that such a claim in these circumstances must be displaced. First, the Supreme Court's decision in *AEP* is directly applicable, and it holds that the Clean Air Act displaces any federal common-law claim that might apply on these facts. Second, the international dimensions of this claim likewise trigger displacement. The analysis of these displacement issues resembles the preemption analysis set forth above in

Sections I.A and I.B. Accordingly, we summarize, rather than repeat, the foregoing analysis.

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

As explained in detail in Section I.A above, the Clean Air Act likewise speaks directly to the regulation of greenhouse gas emissions. As the Supreme Court determined in *AEP*, when the Clean Air Act addresses regulation of the emissions that would form the basis of a federal common law claim, there is "no

room for a parallel track." 564 U.S. at 425.[4] The Ninth Circuit applied this determination to find displacement of a nuisance claim in *Kivalina*, 696 F.3d at 853-857. As set forth in Section I, the fact that the City's claims target production and sale of fossil fuels, rather than directly targeting the resulting emissions, is immaterial to the Court's analysis.

Nor is the remedy that the City seeks relevant. The Supreme Court has held that the relevant issue is the scope of the act, not the particular remedy sought. *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 21-22 (1981) (holding that the "comprehensive scope" of the Clean Water Act sufficed to displace federal common law remedies that have no analogue in that statute, such as claims for compensatory and punitive damages); *see also Kivalina*, 696 F.3d at 857 (holding that "the type of remedy asserted is not relevant to the applicability of the doctrine of displacement").

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

[4] The Court emphasized that displacement did not turn on how EPA exercised that authority: "the relevant question for purposes of displacement is 'whether the field has been occupied, not whether it has been occupied in a particular manner.'" 564 U.S. at 426 (quoting *Milwaukee II*, 451 U.S. at 324)).

with an international component has ever been sustained under federal common law by the federal courts. Nuisance claims under federal common law originated in disputes between States—disputes that are inherently domestic in scope and have a foundation in the Constitution. *Wyandotte*, 401 U.S. at 495-96. Congress must state expressly when a federal statute is to have extraterritorial application; courts may not divine what "Congress would have wished" if it had addressed the problem. *Morrison*, 561 U.S. at 260 (internal quotation marks omitted). A court fashioning a federal common law cause of action here would lack any authorization from Congress to extend that cause of action extraterritorially. In the Clean Air Act, Congress envisioned States primarily regulating sources within their borders, and a court asked to fashion a federal common-law cause of action must respect the line Congress drew.

As the Supreme Court recently reaffirmed in *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018), non-statutory remedies like those sought by the City are all the more out of place in the international context, where the risk that courts and litigants will encroach on the proper functions of Congress and the Executive Branch is acute. The *Jesner* plurality concluded that it would be inappropriate to extend liability through federal common law fashioned under the Alien Tort Statute (ATS) to corporations because "judicial caution . . . 'guards against our courts triggering . . . serious foreign policy consequences, and instead defers such

decisions, quite appropriately, to the political branches.'" *Id.* at 1407 (quoting *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124 (2013)); *accord id.* at 1408 (Alito, J., concurring in the judgment) (endorsing plurality's "judicial caution" rationale); *id.* at 1412 (Gorsuch, J., concurring in the judgment) (agreeing that "the job of creating new causes of action and navigating foreign policy disputes belongs to the political branches"). Similarly, in *Kiobel v. Royal Dutch Petroleum, Co.*, 569 U.S. 108, 116-17 (2013), the Court held that the presumption against extraterritoriality applies to the fashioning of a federal common law cause of action under the ATS. And in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004), the Court explained that in crafting new private rights of action, courts must be "particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs."

In sum, the City has no remedy under federal common law.

III. The City's claims are inconsistent with constitutional principles of separation of powers.

If the Court does not affirm the dismissal of the City's claims on the grounds above, then it should affirm because the claims are not "consistent with a system of separated powers," or the role and equitable jurisdiction of the federal courts under Article III. *Allen v. Wright*, 468 U.S. 737, 752 (1984). With respect to regulation of greenhouse gases, the Supreme Court has cautioned that "[f]ederal judges lack the scientific, economic, and technological resources an agency can utilize in

coping with issues of this order." *AEP*, 564 U.S. at 428. This warning is magnified here, where the City is pursuing parties that are even further down the chain of causation than the defendants in *AEP*.

To grant relief on these claims would intrude impermissibly on the role of the representative branches to determine what level of greenhouse gas regulation is reasonable. As *AEP* observed, the "appropriate amount of regulation in any particular greenhouse gas-producing sector cannot be prescribed in a vacuum." 564 U.S. at 427. "Along with the environmental benefit potentially achievable, our Nation's energy needs and the possibility of economic disruption must weigh in the balance." *Id*. A court would lack "judicially discoverable and manageable standards" to govern such a decision, which would require "an initial policy determination of a kind clearly for non-judicial discretion." *Baker v. Carr*, 369 U.S. 186, 217 (1962). Instead, such a sensitive and central determination "is appropriately vested in branches of the government which are periodically subject to electoral accountability." *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973).

For these reasons, the City's claims also should be dismissed as fundamentally inconsistent with the constitutional separation of powers.

CONCLUSION

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

Respectfully submitted,

s/ Christine W. Ennis
ERIC GRANT
Deputy Assistant Attorney General
R. JUSTIN SMITH
CHRISTINE W. ENNIS
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice

March 7, 2019
90-12-15502

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(a)(5) and Local Rule 29.1(c) because it contains **6,997 words**, excluding the parts of the brief exempted under Rule 32 (a)(7)(B)(iii), according to the count of Microsoft Word.

s/ Christine W. Ennis
CHRISTINE W. ENNIS

Counsel for the United States
as Amicus Curiae