18-2188

United States Court of Appeals
for the Second Circuit

CITY OF NEW YORK,

Plaintiff-Appellant,

against

BP P.L.C., CHEVRON CORPORATION, CONOCOPHILLIPS, EXXON MOBIL CORPORATION, and ROYAL DUTCH SHELL PLC,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

REPLY BRIEF

ZACHARY W. CARTER
Corporation Counsel
of the City of New York
Attorney for Appellant
100 Church Street
New York, New York 10007
212-356-0840 or -2502
jomoore@law.nyc.gov

STEVE W. BERMAN
Hagens Berman Sobol Shapiro LLP
1301 2nd Avenue, Suite 2000
Seattle, WA 98101

MATTHEW F. PAWA
Hagens Berman Sobol Shapiro LLP
1280 Centre Street, Suite 230
Newton Centre, MA 02459

RICHARD DEARING
CLAUDE S. PLATTON
NWAMAKA EJEBE
JOHN MOORE
of Counsel

March 25, 2019

TABLE OF CONTENTS

Page

TABLE OF CONTENTS (cont'd)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (cont'd)

Page(s)

TABLE OF AUTHORITIES (cont'd)

Page(s)

TABLE OF AUTHORITIES (cont'd)

Page(s)

TABLE OF AUTHORITIES (cont'd)

Page(s)

Other Authorities

TABLE OF AUTHORITIES (cont'd)

Page(s)

PRELIMINARY STATEMENT

Defendants ask this Court to shield fossil-fuel producers from all common-law liability related to harms imposed by climate change, without demonstrating any basis in federal law—common or statutory—to do so. The political branches could grant this immunity, but have not done so. No statute or executive action bars claims seeking this relief. This Court should decline Defendants' invitation to fill that void, and should reverse the district court's ruling granting Defendants an immunity that Congress has not bestowed.

Contrary to Defendants' mischaracterization, this suit does seek to "solve" the worldwide crisis of climate change. Instead, it reflects the City's attempts to live with that reality. Nor does the suit have the purpose or effect of regulating greenhouse-gas emissions. Rather, it seeks to shift some of the cost of addressing local harms arising from Defendants' production, promotion, and sale of fossil fuels. And, despite Defendants' assertions, their products are not too important, nor are the City's claims too complex, for the courts to assess liability. New York law has been applied in a wide variety of contexts, including complex claims involving massive industries and global products.

Because Defendants have failed to identify any uniquely federal interest or a significant conflict with a federal policy, there is no basis to displace state tort law with federal common law. This case presents no greater conflict between a uniquely federal interest and the application of state law than any claim against a manufacturer that makes and sells its products worldwide. Nor does the Clean Air Act displace or preempt common-law nuisance and trespass claims for damages arising from the production, promotion, and sale of fossil fuels, as the statute does not regulate such conduct at all.

Defendants' argument that the City has failed to state a claim under state law runs headlong into precedents under New York nuisance and trespass law holding manufacturers liable for intentional environmental harm. Neither state law, nor the various constitutional doctrines that Defendants invoke, provides a basis to short-circuit this litigation.

ARGUMENT

POINT I

FEDERAL LAW DOES NOT BAR THE CITY'S CLAIMS

Defendants' primary argument is that the federal Clean Air Act (CAA) bars the City's suit (Appellees' Br. 1-2, 10-11, 26-34). Usually, proving this assertion requires demonstrating preemption, but Defendants make only a half-hearted gesture in that direction. Unable to demonstrate preemption, they are left to demand a series of displacements—state law by federal common law, federal common law by federal statute—to pursue the same end without having to show congressional intent to forbid state tort remedies. But this attempt to invoke preemption by another name also fails.

Underlying these moves is the unsupported and sweeping assertion that any claim related to climate change must be governed by federal common law (Appellees' Br. 9-10, 14, 16). The contention's breadth is rendered more startling by Defendants' assertions that any such claim under federal common law is dead on arrival, defeated either by the CAA or foreign-affairs concerns. Thus, Defendants ask this Court to replace state law with a nullity.

Defendants' amici aptly summarize this position: "climate change tort litigation, in all forms" cannot proceed, "regardless of the tort, court or parties involved." NAM Br. 4, 7; *accord* Chamber of Commerce Br. 6. Under the guise of judicial modesty and deference to the political branches, Defendants and their amici would dramatically repurpose federal law to declare a particular policy—tort immunity for fossil-fuel producers—that the political branches never adopted.

A. Federal common law does not displace the City's state-law claims.

While claiming that the City's state-law claims must be displaced by federal common law, Defendants pay only lip service to the governing standard. They do not show, as they must, (1) the presence of a uniquely federal interest and (2) an actual and significant conflict between state law and an identifiable federal policy or interest. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507-08 (1988); *Empire HealthChoice Assurance, Inc. v. McVeigh*, 396 F.3d 136, 138, 140 (2d Cir. 2005), *aff'd* 547 U.S. 677 (2006). They never even cite this controlling standard.

Defendants seek to avoid the fact that this case bears none of the hallmarks of federal-common-law displacement by framing their

analysis in the abstract, arguing that federal common law must apply because this case relates to global warming. But the displacement inquiry requires more a precise analysis of the claims at issue. By refusing to undertake that analysis, Defendants have failed to meet their "substantial burden" to show that federal common law displaces state law here. *Woodward Governor Co. v. Curtiss-Wright Flight Sys.*, 164 F.3d 123, 127 (2d Cir. 1999).

Their argument relies on a series of inapposite cases (Appellees' Br. 16-17). In the Supreme Court's decision in *AEP* and the Ninth Circuit's decision in *Kivalina*, the plaintiffs pleaded claims under federal common law for harms related to the defendants' emissions, and both courts assumed without deciding that federal common law applied. *Am. Elec. Power Co. v. Connecticut* ("*AEP II*"), 564 U.S. 410, 415, 423 (2011); *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 853, 855-56 (9th Cir. 2012). Thus, neither case answers the question of when federal common law displaces state law. To the extent that these cases address situations where federal common law might apply, they do so only in the context of claims challenging and attempting to regulate the

defendants' own emissions of transboundary pollution.[1] The City's claims, in contrast, have neither the purpose nor effect of regulating interstate pollution. Thus, they bear none of the features that courts have looked to when deciding when federal common law displaces state claims.

To start, this case does not seek to impose limits on Defendants' emissions through an injunction. *Cf. AEP II*, 564 U.S. at 415; *Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987); *Illinois v. Milwaukee* ("*Milwaukee I*"), 406 U.S. 91, 93 (1972). Moreover, unlike the appellate decisions Defendants cite applying federal common law, the City's claims do not target emissions at all. *See AEP II*, 564 U.S. 410; *Milwaukee I*, 406 U.S. 91; *Ouellette*, 479 U.S. 481; *Kivalina*, 696 F.3d 849. Emissions are part of the causal chain by which Defendants' intentional conduct results in

---

[1] Defendants fare no better in their repeated reliance on two district court decisions issued in the same case, *see City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017 (N.D. Cal. 2018); *California v. BP P.L.C.*, No. C17-06011, 2018 U.S. Dist. LEXIS 32990 (N.D. Cal. Feb. 27, 2018), which Defendants neglect to mention is currently on appeal, *City of Oakland v. BP P.L.C.*, No. 18-16663 (9th Cir.) (appeal docketed Sept. 4, 2018). The court there accepted the same mischaracterization that Defendants urge here: that claims against fossil-fuel producers seeking compensation for climate impacts constitute a regulation of emissions in conflict with the CAA. Moreover, a different judge of the same court rejected application of federal common law in similar cases. *Cty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 937 (N.D. Cal. 2018), *appeal pending*, No. 18-15503 (9th Cir.).

severe harm to the City, but the City's claims will not require a court to set an acceptable level of emissions, either to assess liability or to provide a remedy. The nature of any impact on emissions is impossible to predict because it rests on an award's diffuse potential impacts on "billions" of fossil-fuel users downstream from the defendants in this case (Appellees' Br. 13).

There is also no need for federal common law to ensure a consistent nationwide standard because the compensation sought does not turn on Defendants' failure to satisfy a particular standard of care even as to the production, promotion, or sale of fossil fuels. Instead, the City can prevail on its nuisance claim by proving that Defendants' conduct was intentional and has caused environmental harm that is "severe and greater than [it] should be required to bear without compensation." Restatement (Second) of Torts ("Restatement") § 829A. In appropriate circumstances, a business that properly locates its facility, exercises the "utmost care" in minimizing harms to its neighbors, and "is serving society well" through its conduct may still be "required to pay for the inevitable harm caused to neighbors." William L. Prosser & W. Page Keeton, *The Law of Torts* § 88 (5th ed. 1984). The

focus of the claims is on the harm suffered, not on whether the underlying conduct satisfied a standard of care.

Neither case Defendants cite for the proposition that damages awards *can* regulate behavior held that such awards *always* do so (Appellees' Br. 22). In both cases, the defendants failed to abide by a particular standard of care, and neither case dealt with the application of federal common law. *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 637 (2012); *BMW of N. Am. v. Gore*, 517 U.S. 559, 572-73 & n.17 (1996). Where, as here, the claim by its nature turns on the extent of harm suffered, rather than the failure to satisfy a prescribed duty, a damages award would not necessarily function as judicial regulation of Defendants' behavior.

Defendants' contention that a damages award here will affect their conduct in some never-defined way (Appellees' Br. 21-22) is too formless to fill the gap. To be sure, the effect of the City's nuisance suit could be to induce Defendants to internalize the costs of the harms their products cause (*see* Sharkey Br. 3-12). This might lead to reduced profits, increased prices, or other production-side changes. But those possibilities fall short of requiring a federal rule of decision. And

Defendants identify no direct line from those possible effects to the creation of a de facto standard governing emissions.

Nor does this case implicate other concerns pointing toward federal-common-law displacement. Among the primary concerns in cases like *Milwaukee I* was the need to forestall competing state attempts to control specific sources in a particular state. 406 U.S. at 107. Here, there is no attempt to control particular sources of pollution. To deal with this mismatch between their argument and the caselaw, Defendants assert they are "tethered" to a specific jurisdiction, just like the place-bound, point-source emitters in cases like *Milwaukee I*. But the jurisdiction Defendants identify is "all 50 states and foreign nations" (Appellees' Br. 25). If Defendants are "tethered" everywhere, then they are tethered nowhere. Suing them for harms their products cause does not infringe on any particular state's sovereign prerogatives, or create the possibility of interstate conflict.

Defendants' assertions of federal interests are all premised on the misconception that the City's suit would compel courts to regulate interstate emissions as part of an effort to "solve" global warming (Appellees' Br. 19-25). The City's suit is far more modest: it seeks to

recover tangible costs imposed by Defendants' products. Like other suits asserting that a product manufactured elsewhere caused local harms, this case should be resolved under state, not federal, common law (*contra* Appellees' Br. 24-25). *See Jackson v. Johns-Manville Sales*, 750 F.2d 1314, 1327 (5th Cir. 1985) (en banc); *In re "Agent Orange,"* 635 F.2d 987, 994-95 (2d Cir. 1980).

B. If federal common law applied, the Clean Air Act would not displace the City's claims.

Having just dedicated substantial briefing to arguing that federal common law must apply to the City's claims, Defendants then argue it cannot apply after all. But Defendants' argument for displacement of common law by the CAA misreads both precedent and the City's complaint (Appellees' Br. 26-31).[2]

The CAA does not speak directly to the particular issue presented by the City's claims: the remedy for environmental harms to the City's property resulting from the production, promotion, and sale of fossil

[2] Contrary to DOJ's contention (DOJ Br. 21-22), political subdivisions may bring federal-common-law claims. *See Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 349-61 (2d Cir. 2009) ("*AEP I*"), *rev'd on other grounds by AEP II*, 564 U.S. 410. DOJ cites no contrary authority.

fuels. Defendants claim that the Supreme Court in *AEP II* ruled that the statute displaces all "global warming-based tort claims" (Appellees' Br. 26). In fact, the Court did not go nearly so far. It held only that the CAA displaced the "federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired powerplants." *AEP II*, 564 U.S. at 424; *see also Kivalina*, 696 F.3d at 856. The City's claims have a different aim, one that the CAA nowhere speaks to. *Cf. Exxon Shipping Co. v. Baker*, 554 U.S. 471, 489 & n.7 (2008) (Clean Water Act does not displace maritime tort claims for damages arising from oil spill because such monetary claims do not amount "to arguments for effluent-discharge standards different from those provided by the CWA").

As discussed, this suit does not threaten to create a competing regulation of greenhouse-gas emissions that would trench upon the CAA's regime. It does not seek to abate emissions by injunction or otherwise. Nor does it challenge emissions or emitters' activities at all. And even as to the defendant producers, it seeks only reimbursement for out-of-pocket expenses to address the harms caused by their products, without exerting control over their activities. Collectively,

these distinctions place the suit far afield from emissions regulation. The fact that this case, like *AEP*, somehow relates to climate change is not itself ground to find that the CAA governs.[3]

Equally unfounded is the charge that the City's claims call for regulation by requiring courts to balance the harms and benefits of fossil-fuel production (Appellees' Br. 28-29). Restatement § 821B cmt. i; Prosser & Keeton, *supra*, § 88. The Restatement sets out three circumstances that can support a public-nuisance finding; none requires a court to engage in balancing. Restatement § 821B. This explains how the New York Court of Appeals could assess damages for nuisance against a cement plant whose social value made enjoining its operations out of the question. *Boomer v. Atl. Cement Co.*, 26 N.Y.2d 219, 222, 225-

[3] Defendants and DOJ paint the CAA as "comprehensive" (Appellees' Br. 5, DOJ Br. 1), but ignore recent precedent holding that EPA cannot regulate new or modified stationary sources under the CAA's "Prevention of Significant Deterioration" or Title V permit programs based solely on emission of greenhouse gases. *See Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014). And EPA is now proposing to further narrow its and states' authority to regulate greenhouse gases. *See* Proposed Rule: Emissions Guidelines for GHG Emissions from Existing Electricity Utility Generating Units, 83 Fed. Reg. 44,746, 44,750 (Aug. 31, 2018) ("the CAA cannot necessarily be applied to GHGs in the same manner as other pollutants"); *id.* at 44,753 (rejecting EPA's authority to change sources' "mix" of fuels). While the City disagrees with EPA's new interpretation of the CAA, this Court should be aware that the statute's supposedly "comprehensive" nature is now very much contested, including by the federal government itself.

26 (1970). The Supreme Court's reference in *AEP II* to "complex balancing" reflected the fact that the plaintiffs there sought to impose emissions caps by injunction. *AEP II*, 564 U.S. at 415, 427. That conclusion says nothing about the City's suit (*contra* Appellees' Br. 28). Restatement § 826 cmt. f (balancing is "inappropriate when the suit is for compensation for the harm imposed").

Defendants make much of the fact that the City's prayer for relief includes a request for an injunction (Appellees' Br. 1, 7, 22, 29; *see* A118). However, that injunction is not a stand-alone remedy, but instead a backstop to ensure Defendants' compliance with a money judgment. *See Boomer*, 26 N.Y.2d at 226. Moreover, the injunction here would not limit Defendants' business operations, but instead would require them to abate the harms by constructing seawalls and other local infrastructure if they fail to pay damages. Such an injunction does not alter the nature of the City's claims and certainly does not intrude into the CAA's domain.

Their fallback is to dismiss the form of the remedy the City seeks because awarding damages would supposedly put the oil companies out of business (Appellees' Br. 29-31). This remarkable claim is

unsupported, speculative, and more than a little improbable given the companies' massive profitability. Moreover, this kind of fact-bound question cannot be resolved on a motion to dismiss.

Foreign-policy considerations likewise would not bar the City's claims under federal common law. Here again, Defendants mistakenly contend that the City's lawsuit will regulate conduct occurring outside New York's borders. In support, Defendants incorrectly assert that the geographic focus of a nuisance claim is on the conduct that created the nuisance (Appellee's Br. 37 n.11). In fact, the focus is on where the injury occurred. *See, e.g.*, *New Jersey v. City of N.Y.*, 283 U.S. 473, 482 (1931) ("The situs of the acts creating the nuisance, whether within or without the United States, is of no importance."); *see also Morrison v. Nat'l Australia Bank*, 561 U.S. 247 (2010) (focus of securities fraud is the market where the injury occurred).

Defendants' heavy reliance on *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018), is also unavailing. *Jesner* involved almost entirely foreign conduct, foreign harms, and foreign parties, as well as demonstrated harm to foreign relations. *See id.* at 1406-07 (litigation viewed by key ally as "grave affront"). These circumstances made the

Court reluctant to infer a new private right of action against foreign corporations under the Alien Tort Statute, which had been enacted to reduce such tensions. But those circumstances are absent here. This is not an ATS case; most of the Defendants (and all Appellees who filed a brief in this Court) are domestic corporations; all of them have substantial U.S. operations; no ally has objected; and the harm is domestic. A defendant cannot avoid liability merely by speculating about possible foreign-policy impacts (*see* Foreign Relations Law Scholars Br. 15-17).

C. The Clean Air Act does not preempt the City's state-law claims.

Neither the CAA nor any other federal statute preempts the City's claims (*contra* Appellees' Br. 54-56). Tellingly, Defendants cite no authority from any court supporting their assertion of field preemption under the CAA. Nor could they where the statute evidences the exact opposite intention: to protect states' authority to act in the realm of air pollution (*see* Opening Br. 44-45; NY Br. 19-22).

Defendants' conflict-preemption argument based on the CAA is equally misbegotten (Appellees' Br. 55-56)—as well as waived, being

presented only in a footnote, *City of Syracuse v. Onondaga County*, 464 F.3d 297, 308 (2d Cir. 2006). Defendants contend that the City's claims will pose an obstacle to achieving the CAA's objectives, but they never explain how holding producers of severely harmful products liable in tort for climate-change impacts will interfere with federal emissions policy. This is particularly true because the City's claims seeking damages for harms arising from the production, promotion, and sale of fossil fuels have neither the purpose nor effect of regulating interstate pollution.[4]

The Department of Justice, as amicus, also argues preemption while laboring under the same misconceptions as Defendants (DOJ Br. 7-13). It recognizes that the CAA preempts, at most, "state-law suits involving emissions regulation" (DOJ Br. 8), but ignores the fact that the City's suit does not fall within that domain. A key case in DOJ's analysis provides a helpful contrast. In *Ouellette*, the plaintiffs challenged the defendant's conduct in releasing emissions and sought

[4] Defendants' conflict preemption argument based on other federal laws is a bare assertion made in two sentences, fails to cite a single case (Appellees' Br. at 55-56), and is thus also waived as insufficiently briefed. *See Zhang v. Gonzales*, 426 F.3d 540, 546 n.7 (2d Cir. 2005).

$120 million in mostly punitive damages along with injunctive relief to require the defendant "to restructure part of its water treatment system." 479 U.S. at 484. The concerns raised by such a theory of liability and form of relief are not present in a suit seeking compensatory damages from the producers, promoters, and sellers of products that cause severe harm. Like Defendants, DOJ offers conclusory assertions that this suit seeks to regulate emissions, but fails to engage with the City's allegations or the nature of our claims.

POINT II

THE CITY HAS ALLEGED VIABLE CLAIMS UNDER NEW YORK LAW

Defendants also raise various fact-intensive objections to the City's causation allegations under New York law. But "[b]ecause questions concerning what is foreseeable and what is normal may be the subject of varying inferences," these issues "generally are for the fact finder to resolve." *Derdiarian v. Felix Contracting Corp.*, 51 N.Y. 2d 308, 315 (1980). The City's allegations are more than sufficiently pleaded. And neither Defendants' policy objections nor their strained argument about the City's supposedly unclean hands provides a basis for dismissal.

A. The City has adequately alleged causation.

Defendants wrongly insist that they are not a factual cause of the City's harm because others also played a role (Appellees' Br. 42, 48). But New York law recognizes that multiple parties' conduct can be a cause-in-fact of a nuisance. Thus, the proper defendants are those who "in some way were parties in the creation or maintenance of" the nuisance, and "all those who participate in creating or maintaining [a] nuisance are liable for any damages sustained." *Sullivan v. McManus*, 19 A.D. 167, 168 (1st Dep't 1897); *accord In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 725 F.3d 65, 121 (2d Cir. 2013).

A defendant's contribution need not be enough, standing alone, to have caused the nuisance. *See Warren v. Parkhurst*, 45 Misc. 466, 469 (N.Y. Sup. Ct. 1904) (two dozen mill owners could be liable for polluting a stream even though each owner's contribution was insufficient to cause harm), *aff'd*, 105 A.D. 239 (3d Dep't 1905), *aff'd*, 186 N.Y. 45 (1906); *see also Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 696-97 (7th Cir. 2008) (en banc) (noting that "pollution of a stream to even a slight extent" is sufficient, if pollution by others makes the stream "approach the danger point" (quotation marks omitted)). It is

enough that the defendant knew that its conduct would combine with others' to create harm. *See* Restatement § 840E cmt. b (defendant contributing "to a relatively slight extent" can be liable if acting with knowledge of others' actions).

Defendants' contributions to the climate impacts affecting the City amply satisfy these standards. Indeed, Defendants stand apart from any other contributor to the nuisance. They are responsible for producing "massive quantities of fossil fuels," accounting for 11% of all carbon and methane from industrial sources (A46, 95-97)—far more than the slight contributions described in the above authorities—and their products are a primary contributor to the City's harm (A80-85). Defendants also contributed to the nuisance by undertaking extraordinary efforts to deceive the public about the climate impacts of fossil fuels and to promote consumption at levels they knew were harmful (A95-106).[5] No one has done more than Defendants to exacerbate the harm or to prevent others from learning of the gravity of

[5] Defendants say that this suit would hold them responsible for "prevent[ing] effective regulation of emissions" and "lobbying" (Appellees' Br. 7). But the portions of the complaint that they cite are unrelated to regulation and lobbying.

the threat. Moreover, Defendants were well aware of each other's actions and at times worked in close coordination (A95-97, 109, 102).[6]

Defendants counter that they are not the "but-for" cause of the nuisance (Appellees' Br. 48-50). While "but-for" causation governs some types of tort cases, it simply "will not work" in certain others involving multiple tortfeasors. *Basko v. Sterling Drug, Inc.*, 416 F.2d 417, 429 (2d Cir. 1969). As just discussed, the Restatement and a long line of cases make plain that a nuisance involving multiple contributors is such a context where a "but-for" test makes no sense.

No more availing is Defendants' prediction that if they had not produced their products, others would have stepped in (Appellees' Br. 50). Defendants cannot sidestep the consequences of their actual conduct by speculating about what other producers would have done in a hypothetical world. And the long line of cases permitting recovery in nuisance where each contributor's action alone would not have been

---

[6] Given these standards, Defendant miss the mark in arguing that the City has failed to trace any particular effect of global warming to any particular defendant (Appellees' Br. 49). The City is required to allege, as it has done, only that Defendants have jointly contributed to the nuisance experienced by the City (A85-86).

sufficient to create the nuisance would be rendered senseless if each could escape liability by pointing to the others.

The City has also properly pleaded proximate causation. Under New York law, conduct is a legal cause of an injury "if it was a substantial factor in bringing about the injury," a standard that is met if "reasonable people" would regard the conduct "as a cause of the injury." *MTBE*, 725 F.3d at 116 (quotation marks omitted). This language tracks the Restatement's causation rules, which New York law follows. *Id.* at 121; *see* Restatement § 834 cmt. d (nuisance causation test informed by substantial-factor test under Restatement §§ 431-33). Being a substantial factor "does not depend on the percentage of fault that may be apportioned to that party." *Rothberg v. Reichelt*, 293 A.D.2d 948, 949 (3d Dep't 2002) (quotation marks omitted). Proximate cause centers on foreseeability, and when a third party's actions are at play, liability turns on whether the party's "intervening act is a normal or foreseeable consequence of the situation created by the defendant's [conduct]." *Derdiarian*, 51 N.Y.2d at 315; *accord* Restatement §§ 442A, 443.

Thus, as explained in the City's opening brief (at 23-24), a manufacturer can be liable in nuisance or trespass for the normal and foreseeable use of its harmful product by third parties. The City has alleged that the climate-change impacts it faces are the direct result of such use (A68-80, 87-94, 113-117). The emission of greenhouse gases from the use of Defendants' products, and the harm from those emissions, were foreseeable.[7] The existence of other "factors" or "forces" in creating climate change (Appellees' Br. 40, 42) does not negate Defendants' responsibility, particularly in nuisance, which has a long history of being applied in environmental cases involving large numbers of contributors.[8] Restatement § 840E; *Warren*, 45 Misc. at 469.

For these same reasons, Defendants are incorrect to say that their conduct is immune from liability because it "'created a situation harmless unless acted upon by other forces'" (Appellees Br. 40-42

---

[7] *See, e.g.*, *City of Rochester v. Premises Located at 10-20 S. Washington St.*, 180 Misc. 2d 17, 21 (N.Y. Sup. Ct. 1998) ("[L]iability for nuisance may be imposed upon one who sets in motion the forces which eventually cause the tortious act"[.]" (quotation marks omitted)).

[8] *See, e.g., California v. Gold Run Ditch & Mining Co.*, 4 P. 1152, 1156 (Cal. 1884) (defendant liable even though its pollution alone would not have caused injury); *Woodyear v. Schaefer*, 57 Md. 1, 9 (Md. 1881) ("It is no answer to a complaint of nuisance that a great many others are committing similar acts of nuisance upon the stream.").

(quoting *In re MTBE*, 739 F. Supp. 2d 576, 596 & n.129 (S.D.N.Y. 2010)). They fail to note that the quoted passage continues with the words "for which the actor is not responsible." *Id*. (quotation marks omitted). Defendants are responsible for the harm caused by the third-party consumption of their products because these acts were "a normal consequence of a situation created by" Defendants' conduct. Restatement § 443.

Likewise mistaken is Defendants' contention that the harm here is too "remote" from their conduct (Appellees' Br. 43, 47). Defendants misunderstand the remoteness limitation, which is aimed at causal chains broken by actions that the defendant cannot be held responsible for, or harms to the plaintiff that are derivative of harms to a third party. Thus, *People v. Sturm, Ruger & Co.*, dismissed a public-nuisance action seeking to hold gun manufacturers and sellers responsible for criminal misuse of firearms because the "connection between defendants, *criminal wrongdoers* and plaintiffs is remote." 309 A.D.2d 91, 96-104 (1st Dep't 2003) (emphasis added). The harm there was "caused directly and principally by the criminal activity of intervening third parties," perhaps *the* paradigmatic example of a wanton and

independent act for which the defendant should not be responsible. *Id.* at 103.

But here, the City's harm results from using Defendants' products exactly as intended. And *Sturm, Ruger* expressly contrasted the plaintiff's theory of liability with the sorts of harms "directly attributable" to and "inextricably intertwined" with a business. *Id.* at 98 & n.2. In so doing, it cited with approval cases dealing with environmental harm in which third parties purchased and used the defendant manufacturer's product as intended. *See id.* at 98 n.2 (citing *State v. Fermenta ASC Corp.*, 238 A.D.2d 400 (2d Dep't 1997), and *State v. Schenectady Chems.*, Inc., 117 Misc. 2d 960 (N.Y. Sup. Ct. 1983)). This line of authority now includes more recent cases like *MTBE* and others cited in the City's opening brief (at 23-27), which make clear that knowingly selling a lawful but harmful product like fossil fuels in mass quantities can give rise to nuisance or trespass liability.

To downplay the importance of intervening criminal conduct in *Sturm, Ruger*, Defendants point to a footnote citing the remoteness analysis in certain tobacco cases, including *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229 (2d Cir. 1999)

(Appellees' Br. 44, 47-48). That analysis has no relevance here. In *Laborers Local*, a federal RICO action, the Court considered the "direct-injury" test, which bars recovery by a plaintiff who asserts a derivative claim based on "harm flowing merely from the misfortunes visited upon a third person by the defendant's acts." *Id.* at 235 (quotation marks omitted). Applying this test, the Court held that health and welfare trust funds could not recover from tobacco companies for the health-related costs of smoking that were entirely derivative of injuries to plan participants. *Id.* at 239-41. But here, the City sues for its own injuries and as a proper governmental plaintiff to protect public health and welfare; these injuries are not derivative.

Nor do the City's claims violate a purported requirement of temporal or spatial proximity (*contra* Appellees' Br. 43). A "defendant's misconduct is not too remote for liability merely because time or distance separates the defendant's act from the plaintiff's harm." 1 Dan B. Dobbs, *The Law of Torts* § 208, at 720-21 (2d ed. 2011). "[W]here it is evident that the influence of the actor's [tortious conduct] is still a substantial factor, mere lapse of time, no matter how long," does not preclude proximate cause. Restatement § 433 cmt. f. Nor do New York

nuisance claims require geographic proximity. *See MTBE*, 725 F.3d at 122 n.43.[9] In any event, Defendants overstate the issue: most of the greenhouse-gas pollution from their fuels was emitted in the last 40 years, and important elements of their conduct took place locally (A54-67, 85).

Instead of imposing spatial and temporal tests, this Court and others applying New York law have found it reasonable to hold manufacturers liable for a nuisance when they knew that their product would cause environmental harm and failed to remedy the situation. *See MTBE*, 725 F.3d at 122 n.43 ("Exxon knew of the dangers of MTBE and failed to take actions to mitigate MTBE contamination."); *Abbatiello v. Monsanto Co.*, 522 F. Supp. 2d 524, 541 (S.D.N.Y. 2007) (defendant suppressed and concealed facts about the dangers of PCBs). Defendants here have known since the 1950s that their products could cause "severe" and even "catastrophic" harms (A47-48).

---

[9] Defendants wrongly attribute a geographic-proximity requirement to *MTBE* (Appellees' Br. 46-47). *MTBE* did not involve only a local nuisance caused by tortious conduct occurring in New York. Exxon, the defendant there, manufactured all of the MTBE gasoline out of state. *See In re Methyl Tertiary Butyl Ether (MTBE) Prod. Liab. Litig.*, 591 F. Supp. 2d 259, 270 (S.D.N.Y. 2008). Moreover, Exxon's role as a manufacturer, irrespective of its role as a direct spiller, was sufficient to establish nuisance and trespass. *MTBE*, 725 F.3d at 120-21.

Rather than mitigate the harm, Defendants sought to protect their own interest, spending millions of dollars leading a public-relations strategy for the fossil-fuel industry to discredit the scientific consensus on global warming, downplay the risks of climate change, and portray their products as environmentally responsible (A87-106). Given Defendants' unique role in concealing the climate impacts of fossil fuels and aggressively promoting their use, the City has properly pleaded that they were "a cause" of the City's harms and liable for their contributions to those harms. *MTBE*, 725 F.3d at 116.

B. Defendants' and their amici's policy objections to the City's claims are unfounded.

The policy concerns raised by Defendants and their amici also provide no basis for dismissal. One is that climate change should be addressed by legislative action, technological innovation, or regulation (Appellees' Br. 39, 44; WLF Br. 10; NAM Br. 15; Epstein Br. 6). But nothing about this suit impairs such efforts. Nor does it seek a comprehensive solution for climate change, but rather compensation for climate-change effects from those most responsible. "However preferable a legislative solution might be, in its absence [the City's]

claims are justiciable notwithstanding the complexity of the issues involved and the magnitude of the relief requested." *Oneida Indian Nation v. New York*, 691 F.2d 1070, 1083 (1982). New York law is clear that a "court performs its essential function when it decides the rights of parties before it," even though its "decision of private controversies may sometimes greatly affect public issues." *Boomer*, 26 N.Y.2d at 222.

Nor does the possibility that Defendants will face other lawsuits justify dismissing this one (WLF Br. 16-18; Epstein Br. 2). Tort law contains mechanisms to address these concerns, including the "special-injury" rule, which acts to bar private individuals from bringing a nuisance suit unless they can demonstrate an injury different from that of the public at large. *532 Madison Avenue Gourmet Foods v. Finlandia Center*, 96 N.Y.2d 280, 292 (2001).[10] This rule, along with damage-apportionment procedures and case-management tools, can appropriately narrow the pool of potential plaintiffs and defendants and

[10] Contrary to amicus's assertion (Epstein Br. 8), the special-injury rule does not bar suits by municipalities. *See 532 Madison Ave.*, 96 N.Y.2d at 292 ("A public nuisance is actionable *by a private person* only if it is shown that the person suffered special injury beyond that suffered by the community at large." (emphasis added)).

allow orderly resolution of claims.[11] Here, as in other contexts, tort law and the federal courts are up to the task of providing a just remedy to injured parties with meritorious claims. Were it not so, the courts never would have provided remedies in a host of cases involving widespread harm, including asbestos and tobacco cases, nor would they be grappling now with litigation over opioids or PCB pollution.

Finally, amici are wrong to say that the City is calling for a "radical new tort rule" (WLF Br. 12). The City's suit seeks to apply longstanding tort rules to a new environmental harm. But if this case did require breaking new ground, the New York Court of Appeals has emphasized that "[t]ort law is ever changing," *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 242 (2001), and that, when required, "the ever-evolving dictates of justice and fairness, which are the heart of our common-law system" will ensure a remedy, *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 507 (1989). Should this Court have any doubt, however,

---

[11] *See, e.g.*, Restatement § 840E cmt. a (nuisance apportionment rules); *People v. ConAgra Grocery Prods.*, 227 Cal. Rptr. 3d 499, 549 (Cal. Ct. App. 2017) (noting defendants had avenues for determining how to apportion nuisance liability among themselves); *In re Nat'l Prescription Opiate Litig.,* 2018 WL 4019413, at *1 (N.D. Ohio Aug. 23, 2018) (describing MDL management of over 1,100 opioid cases); Sharkey Br. 20-21 (discussing tort rules that restrain liability).

that New York law would recognize this claim, it should certify the question to the New York Court of Appeals. *See Ajdler v. Province of Mendoza*, 890 F.3d 95, 104-06 (2d Cir. 2018).

C. The *in pari delicto* defense does not apply.

The vast difference between Defendants' challenged conduct and the City's use of fossil fuels precludes Defendants' *in pari delicto* defense (Appellees' Br. 50-51). The defense is available "only where … the plaintiff bears at least substantially equal responsibility for the violations he seeks to redress." *Pinter v. Dahl*, 486 U.S. 622, 633 (1988) (quotation marks omitted); *see Kirschner v. KPMG LLP*, 15 N.Y.3d 446, 464 (2010). But the City has never participated in the massive and dangerous production, promotion, and sale of fossil fuels that created the public nuisance. And its conduct—whether investing in fossil-fuel companies or using fossil fuels for power—is categorically different from Defendants' actions. Defendants have not shown how the City bears equal responsibility.

POINT III

NOTHING IN DEFENDANTS' GRAB BAG OF CONSTITUTIONAL DOCTRINES WARRANTS DISMISSAL

A. Foreign-affairs powers

The City's claims do not infringe on U.S. foreign relations. Defendants fail to identify any concrete U.S. foreign policy that presents a "clear conflict" with the City's claims. *Compare* Appellees' Br. 52-54, *with Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 421 (2003) (conflict with executive agreement), *and Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-74 (2000) (conflict with statute). DOJ attempts to fill this void by pointing to an irrelevant portion of the United Nations Framework Convention on Climate Change that speaks to an agreement for developed countries to assist developing countries in meeting the Convention's obligations (DOJ Br. 16 (citing UNFCCC, art. 4.3)). The press-conference statements by a U.S. envoy regarding "compensation and liability" refer to obligations between nations, not any policy opposing a tort lawsuit against private companies.

Unable to identify any foreign policy that would pose a clear conflict with the City's claims, Defendants posit a conflict with the President's ability to use domestic emissions reductions as a

"bargaining chip" in negotiations with foreign nations (Appellees' Br. 52-54). But this Court already rejected the bargaining chip argument. *AEP I*, 582 F.3d at 388. Even more fundamentally, the conflict is illusory because the City's case does not seek to regulate greenhouse-gas emissions. The fact that the President may discuss measures to curb emissions with foreign nations does not pose a clear conflict with the City's pursuit of state tort claims (*see* Foreign Relations Law Scholars Br. 17-22).

B. Commerce Clause

Relying predominantly on inapposite decisions evaluating state statutes and regulations, Defendants and their amici incorrectly argue that an award of compensatory damages here would amount to a protectionist regulation of out-of-state and foreign commercial activities (Appellees' Br. 56-57; DOJ Br. 13-14; Indiana Br. 16-18). But an award for the City would not have "the practical effect of requiring out-of-state commerce to be conducted at the regulating state's direction." *VIZIO, Inc. v. Klee*, 886 F.3d 249, 255 (2d Cir. 2018) (emphasis and quotation marks omitted). At most, the award might result in a permissible "upstream pricing impact'" just like "one of innumerable valid state

laws affecting pricing decisions in other States." *Id.* at 256 (quotation marks and brackets omitted); *see Freedom Holdings v. Spitzer*, 357 F.3d 205, 220 (2d Cir. 2004). Moreover, the claims clearly do not involve forbidden "protectionist measures." *VIZIO*, 866 F.3d at 259 (quotation marks omitted).

C. Due process and takings

The City's claims do not violate the Due Process or Takings Clause by subjecting Defendants to monetary liability for past and ongoing conduct. Indeed, the principle that judicial decisions—such as those imposing tort liability—"operate retrospectively[] is familiar to every law student." *United States v. Sec. Indus. Bank*, 459 U.S. 70, 79 (1982).

Defendants' reliance on punitive-damages cases is misplaced (Appellees' Br. 57-58)—the City does not seek punitive damages. And those cases approved of state tort judgments aimed at remedying local injuries. *State Farm Mutual Automobile Ins. v. Campbell*, 538 U.S. 408, 419-20 (2003); *BMW*, 517 U.S. at 572-73. The City seeks compensation for harms suffered within its own boundaries, so it is irrelevant that a state may not punish out-of-state conduct that harms out-of-state individuals. *Id.*

Defendants' cases involving retroactive legislative liability are equally inapposite (Appellees' Br. 58), because this case involves judicial relief, not legislation. Nuisance and trespass are well-established, long-standing torts that put the Defendants on notice of potential liability, particularly where they knew of the global-warming harm from their products decades ago (A46-48, 87-94).

D. Political question

Despite raising several issues not reached by the district court (Appellees' Br. 39-51, 54-58), Defendants do not defend a ground on which the court did opine: that this case is purportedly barred by the political-question doctrine. An Indiana-led amicus brief fails to correct that omission (Indiana Br. 5-16).

The states assert that the City's claims lack judicially manageable standards and require non-judicial policy determinations. But this Court already rejected that argument, concluding that "[w]ell-settled principles of tort and public nuisance law provide appropriate guidance" to courts and that no initial policy determination was needed before applying those principles. *AEP I*, 582 F.3d at 329, 331. The states contend that the *AEP* claims are distinguishable (Indiana Br. 6-7), but

the distinctions they draw make the argument for the political-question doctrine even weaker here. The *AEP* plaintiffs sought exactly the kind of regulatory determination that troubles the states (*id.* 12-14). *AEP I*, 582 F.3d at 318. But even when the plaintiffs expressly sought emission caps, this Court rejected the political-question argument.

DOJ argues that the City's claims are inconsistent with the separation of powers (DOJ Br. 28-29). This argument has it backward. The political branches could determine the allocation of costs for climate-change-related harms and could even grant Defendants the immunity they seek. But until they do, there is no warrant for a court to decline to hear a viable tort claim.

CONCLUSION

This Court should reverse the district court's judgment.

Dated: New York, NY
March 25, 2019

Respectfully submitted,

ZACHARY W. CARTER
Corporation Counsel
of the City of New York
Attorney for Appellant

By: /s/
JOHN MOORE
Assistant Corporation Counsel

100 Church Street
New York, NY 10007
212-356-0840
jomoore@law.nyc.gov

STEVE W. BERMAN
MATTHEW F. PAWA
Hagens Berman Sobol Shapiro LLP

RICHARD DEARING
CLAUDE S. PLATTON
NWAMAKA EJEBE
JOHN MOORE
of Counsel

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word 2010, and according to that software, it contains 6,985 words, not including the table of contents, table of authorities, this certificate, and the cover.

/s/
JOHN MOORE