18-2188

United States Court of Appeals for the Second Circuit

CITY OF NEW YORK,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

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

BRIEF OF AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1, the Chamber of Commerce of the United States of America certifies that it is a non-profit business federation. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

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AMICUS CURIAE'S IDENTITY, INTEREST, AND AUTHORITY TO FILE[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

The Chamber believes that the global climate is changing, and that human activities contribute to those changes. The Chamber also believes that global climate change poses a serious long-term challenge that deserves serious solutions. And it believes that businesses, through technology, innovation, and ingenuity, will offer the best options for reducing

[1] No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than the Chamber, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief.

greenhouse gas emissions and mitigating the impacts of climate change. Thus, businesses must be part of any productive conversation on how to address global climate change. Thoughtful governmental policies aimed at global climate change should come from the federal government, and in particular Congress and the Executive Branch, not through the courts, much less a patchwork of actions under state common law.

The Chamber is especially concerned that allowing such state common law actions to proliferate would, as New York City seems to attempt here, fashion a new tort that marries the broadest elements of public-nuisance and product-liability claims, but with none of the historical limits on those doctrines—especially causation. The City's theory would impose massive retroactive liability on American businesses for decades-old conduct that was lawful when and where it occurred, even though—by the City's own account—countless other actors across the globe contributed to the City's alleged harms. If accepted, that theory would sprawl into other industries, with potentially drastic consequences. These concerns underscore why uniform legislative and Executive action, not countless state-law tort suits, are the best solution to the challenges of global climate change.

The Chamber has participated as amicus curiae in many cases concerning global climate change and the application of state law, *see, e.g.*, *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011); *North Dakota v. Heydinger*, 825 F.3d 912 (8th Cir. 2016); *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012), including a pending case in the Ninth Circuit raising issues very similar to those presented here, *County of San Mateo v. Chevron Corp.*, No. 18-15499 (9th Cir. docketed Mar. 27, 2018).

All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Climate change is a pressing public policy issue with global implications. This appeal, however, raises much narrower questions: Do tort claims related to the effects of climate change arise under federal law, and does the Constitution bar such claims under state law? Under settled legal principles, the answer to both questions is yes. The Chamber thus submits this brief in the hope of assisting the Court in resolving this appeal based on those settled principles.

I. This Court has already held that claims alleging harms from the effects of global climate change arise under federal common law. *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 349–71 (2d Cir. 2009) (*AEP I*), *rev'd on other grounds,* 564 U.S. 410 (2011); *see also Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 422 (2011) (*AEP II*). And with good reason: Federal common law governs claims that involve uniquely federal interests or require a uniform rule of decision. Both are true of global climate change, which is by definition a national and international problem requiring a uniform, coordinated federal response. A patchwork of state law tort rules would be ineffective and unadministrable. Such claims therefore arise under federal law. That remains true regardless of the remedy sought or the precise form of the defendants' alleged contribution to climate change.

This conclusion is also unchanged by the fact that Congress has displaced federal common law in this area with the Clean Air Act. That federal common law governs a particular area necessarily means state law cannot apply there. Adding federal statutory law on top of federal common law does not create a vacuum that state law can fill; it simply means the federal courts are not free to create causes of action in the area

Congress has occupied. State law remains excluded. The alternative rule, urged by New York City here, would illogically mean that federal legislation in an area of uniquely federal concern deprives the federal courts of original jurisdiction and opens the door to inconsistent state-law standards.

II. State-law tort claims based on the effects of global climate change also violate the constitutional prohibition against extraterritorial state laws. The Supreme Court has given effect to this prohibition, which grows out of the States' status as equal sovereigns that are part of a single nation, through the Commerce Clause. *See Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989). A State may not make laws that, in practical effect, control conduct beyond its territorial boundaries. *Id.* Such laws intrude on the other States' sovereign prerogatives and interfere with Congress's power to make uniform laws regulating interstate and foreign commerce. These restrictions apply not only to state statutes but also to tort claims that would impose liability for conduct in another state—or another country. Because that is precisely what New York City seeks to do here, the Constitution bars the City's state-law tort claims. *See Am. Booksellers Found. v. Dean*, 342 F.3d 96, 99 (2d Cir. 2003).

ARGUMENT

New York City alleges injuries "from the impacts of climate change" and seeks damages to compensate for those impacts. A117–18. But climate change is a national—indeed, global—issue, addressed by federal statutes, international treaties, and federal common law. The district court thus correctly held that these claims arise under federal common law. And climate change's global nature means that state-law tort claims based on the effects of climate change would impermissibly impose extra-territorial liability in violation of the Commerce Clause and basic principles of federalism.

I. Climate Change is a National and International Issue that Requires a Uniform, Federal Rule of Decision.

Global climate change is, by definition, a national and international issue that is not amenable to a patchwork of local regulation—much less regulation through countless state-law tort actions. That is why tort claims based on the effects of climate change arise (if at all) under federal common law. This is true regardless of the precise remedy sought, the specific form of the defendants' alleged contribution to global climate change, or the presence of a federal statutory regime like the Clean Air Act.

A. The District Court Properly Held That Tort Claims Related to Ambient Air Pollution Arise under Federal Common Law.

While a "federal general common law" no longer exists, *Erie R.R. v. Tompkins,* 304 U.S. 64, 78 (1938), there is still a body of "federal decisional law" that "addresses subjects within national legislative power where Congress has so directed or where the basic scheme of the Constitution so demands," *AEP II*, 564 U.S. at 421 (internal quotation marks omitted). This body of federal common law includes claims that "deal with air and water in their ambient or interstate aspects." *Id.* (quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972)); *see Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987). This Court has thus held "that the federal common law of nuisance applies" to tort claims alleging that power companies' carbon dioxide emissions contributed to global climate change. *AEP I*, 582 F.3d at 392; *see also AEP II*, 564 U.S. at 422 (in this context, "borrowing the law of a particular State would be inappropriate"); *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 855 (9th Cir. 2012) (applying federal common law to similar claims). The district court properly recognized that the same reasoning applies here.

The crux of New York City's claims is that Defendants' "conduct causes and continually exacerbates global warming and all of its impacts, including hotter temperatures, longer and more severe heat waves, [and] extreme precipitation." A45; *see* NYC Br. 63. The City thus seeks to hold Defendants responsible for "damage from climate change." A45. As these allegations make plain, the City's claims turn on the effects of "*all* the carbon and methane pollution from industrial sources that has accumulated in the atmosphere since the dawn of the Industrial Revolution." A46 (emphasis added). Nor could it be otherwise: Because such emissions become "well mixed globally in the atmosphere," 74 Fed. Reg. 66,496, 66,499 (2009), and because Plaintiffs' claims turn on the effects of decades of greenhouse gas accumulation, *see* A68–80, the ultimate issue here is the effect of all greenhouse gas emissions across the globe, by millions (if not billions) of actors across hundreds of nations.

In this context, federal common law, not state tort law, must govern. Air and water do not abide state lines or national boundaries, and the sources and effects of greenhouse gas emissions are not isolated in any one location. As the district court recognized, there is thus an "overriding federal interest in the need for a uniform rule of decision" to govern

claims like these. *See AEP I*, 582 F.3d at 365. "If ever a problem cried out for a uniform and comprehensive solution, it is the geophysical problem described by the complaint[ ], a problem centuries in the making (and studying) with causes ranging from volcanoes, to wildfires, to deforestation to stimulation of other greenhouse gases—and, most pertinent here, to the combustion of fossil fuels." *California v. BP P.L.C.*, No. C-17-6011, 2018 WL 1064293, at *3 (N.D. Cal. Feb. 27, 2018), *appeal docketed*, No. 18-16663 (9th Cir. Sept. 4, 2018). That is why this Court applied federal common law in *AEP I*, 582 F.3d at 365, and why the Supreme Court agreed that applying state law would be "inappropriate," *AEP II*, 564 U.S. at 422.

Moreover, "a uniform and comprehensive" regime already exists for controlling emissions and responding to climate change: The federal Clean Air Act, the EPA regulations it authorizes, and a network of international and interstate agreements and organizations that deal with environmental regulation. *See AEP II*, 564 U.S. at 417, 424–25 (describing EPA's "greenhouse gas regulation" and the applicable Clean Air Act provisions); *see generally* U.N. Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107; S. Treaty Doc No. 102-38 (entered into

force March 21, 1994). These multifaceted efforts balance myriad economic, social, geographic, and political factors across the entire Nation. They also emphasize coordinated, cooperative action rather than focusing narrowly on a single sector or group of entities.

These broad-based forms of regulation reflect priorities and compromises that legislatures and executive agencies are best suited to balance. Such regulation is also appropriately forward-looking and does not seek to hold companies retroactively liable for lawful activities. A patchwork of state-law rules adopted in individual tort suits, by contrast, cannot provide a coherent or effective answer to the *global* problem presented by climate change. For one thing, a single State's law cannot redress the effects of a problem caused by countless sources around the globe. For another, an individual tort case decided under one State's law cannot adequately weigh the immeasurably complex interests and equities implicated by a global issue like this. And these problems are compounded by the fact that, per the complaint, climate change is caused in part by emissions dating back decades or centuries. *See* A46.

Indeed, retroactive tort liability of any kind is ill-suited to address this issue, which is better resolved through federal legislative action in

coordination with governments around the world. To the extent tort claims on this subject are viable, however, a uniform—and thus federal—rule of decision is needed. *See AEP I*, 582 F.3d at 365. At a minimum, a uniform rule is necessary to avoid inconsistent or duplicative obligations on various actors across the Nation, or even the world. The contributors to climate change are scattered across the globe, and any local effects of climate change cannot be isolated to nearby local contributors. Quite the contrary, local effects of climate change reflect contributions by countless actors around the world. As the district court correctly held, only a uniform rule can ensure consistent obligations. SPA14.

Neither of the City's proffered reasons for a different result—that it does not seek "to impose liability based on Defendants' emissions of greenhouse gases or to dictate any regulation of pollution," NYC Br. 2—withstands scrutiny. It is immaterial that the City's claims challenge fossil-fuel *production and sales* rather than *emissions*. *Id.* at 39–40. The City alleges no harms from these activities themselves. Rather, the City claims to have been harmed by the global effects of the *emissions* that resulted. *See* A68–80. These claims thus raise the same issues, and require the same uniform treatment, as suits directly challenging fossil-

fuel emissions. Likewise, it does not matter that the City seeks damages rather than an injunction that would "regulate … emissions." NYC Br. 32, 37. "[State] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 246–47 (1959); *accord Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 637 (2012). The district court properly concluded that the City's claims arise under federal common law.

B. Congress's Statutory Displacement of Federal Common Law Does Not Revive State Law.

This conclusion is unchanged by the fact that "the Clean Air Act and the EPA actions it authorizes displace any federal common law" related to greenhouse gas emissions. *See AEP II*, 564 U.S. at 424. To be sure, "[w]hen Congress has acted to occupy the entire field, that action displaces any previously available federal common law action." *Kivalina*, 696 F.3d at 857. But this does not mean that state tort law springs back to life when federal statutes displace federal common law. That view, which the City urges here (at 54–56), misunderstands the basic relationship between federal common law and state law.

By definition, post-*Erie* federal common law applies only in those "few areas, involving uniquely federal interests," that are "committed by the Constitution and laws of the United States to federal control." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) (internal quotation marks omitted). In these areas, "our federal system does not permit the controversy to be resolved under state law." *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). Thus, the conclusion that a particular type of claim "should be resolved by reference to federal common law" implies the "corollary" that "state common law" does not apply in that space. *Int'l Paper Co.*, 479 U.S. at 488. That is, "if federal common law exists, it is because state law cannot be used." *Illinois v. City of Milwaukee*, 451 U.S. 304, 313 n.7 (1981). That does not change when *Congress* displaces federal common law with statutory law. The subject remains federal in nature, and such tort claims thus arise—if at all—under federal law.

The City contends that, because the Supreme Court in *AEP II* "left the question of the Clean Air Act's preemptive effect on the state-law claims open on remand," the logic of the Court's final paragraph suggests that state law might spring back into effect. NYC Br. 55. But the state-

law claims the Court declined to address "sought relief under … *the law of each State where the defendants operate power plants*." *AEP II*, 564 U.S. at 429 (emphasis added). Thus, the Court at most left open the possibility, as in *Ouellette*, that "aggrieved individuals [might] bring[] a 'nuisance claim pursuant to the law of the *source* State.'" *Id.* (quoting *Ouellette*, 479 U.S. at 497). But that theory has no application here because, as the City itself emphasizes, it does not challenge emissions from any particular source(s) in New York (or anywhere else). NYC Br. 2. Rather, it alleges harms from cumulative interstate and international emissions, which fall squarely within *AEP II*'s conclusion that applying "the law of a particular State would be inappropriate." 564 U.S. at 422. In all events, the Supreme Court's reservation of an issue that was neither briefed to that Court nor addressed below hardly suggests that the Court was silently abandoning the basic premise of its federal common law doctrine: Where a case implicates uniquely federal interests, "state law cannot be used." *Milwaukee*, 451 U.S. at 313 n.7. Indeed, the state law claims in *AEP* were voluntarily dismissed on remand. *See* Notice of Voluntary Dismissal, *Connecticut v. Am. Elec. Power Co.*, No. 04-CV-05669 (S.D.N.Y. Dec. 6, 2011), ECF No. 94.

A contrary rule would also have bizarre effects. If a claim is so connected with federal interests, or so clearly requires a uniform rule of decision, as to arise under federal common law, the federal courts will have original jurisdiction to hear that claim. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 850 (1985). But on the City's view, if Congress adds another layer of federal law in the form of a comprehensive statutory regime, the claim will (absent diversity jurisdiction) proceed in state court under state law, subject only to an ordinary-preemption defense. It makes no sense to say that *adding* a federal statutory regime in a uniquely federal area *revives* state law and relegates the issue to state court.

II. The Constitution Bars New York from Imposing Liability Based on Lawful Conduct that Occurred Beyond its Borders.

State-law tort claims arising from the effects of climate change would also violate the Constitution. The entire structure of the Constitution, and the Commerce Clause in particular, prohibit the States from regulating beyond their territorial bounds. State-law nuisance claims like these violate that prohibition because they would impose liability for

conduct in other States—or other nations—that was perfectly lawful where and when it occurred.

In our federal system, the "sovereignty of each State … implie[s] a limitation on the sovereignty of all of its sister States." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980). A single State may not "impos[e] its regulatory policies on the entire Nation," *BMW of N. Am. v. Gore*, 517 U.S. 559, 571, 585 (1996), and therefore lacks the "power to exercise 'extra territorial jurisdiction,' that is, to regulate and control activities wholly beyond its boundaries," *Watson* v. *Emp'rs Liab. Assurance Corp.*, 348 U.S. 66, 70 (1954). This prohibition, which the Supreme Court has enforced through the Commerce Clause, applies "whether or not the [out-of-state activity] has effects within the State." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989). The "critical inquiry is whether the *practical effect*" of the state law "is to control conduct" beyond the State's boundaries. *Id.* (emphasis added). Evaluating this effect requires considering both how the state law itself would operate and what would happen "if not one, but many or every, State adopted similar" rules. *Healy*, 491 U.S. at 336. A similar but even "more rigorous and

searching scrutiny" applies when a State attempts to burden foreign commerce. *See S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984).

This Court applied these principles in *American Booksellers Foundation v. Dean* to strike down a Vermont statute that prohibited the distribution of sexually explicit materials to minors through the internet. *See* 342 F.3d 96, 99 (2d Cir. 2003). "Because the internet does not recognize geographic boundaries," the statute made criminals of people outside Vermont who posted material online "for the intended benefit of other people" in other states. *Id.* at 103. The statute was thus impermissibly extraterritorial. It was irrelevant that Vermont "aim[ed] to protect only Vermont minors," or that some internet commerce occurs within Vermont: "In practical effect, Vermont 'has projected its legislation into other States, and *directly regulated* commerce therein,' in violation of the dormant Commerce Clause." *Id.* at 103–04. Indeed, the Court viewed the internet as falling "within the class of subjects"—like pollution from well-mixed greenhouse gases, *see supra* § I.A—"that are protected from State regulation because they 'imperatively demand[ ] a single uniform

rule.'" 342 F.3d at 104 (quoting *Cooley v. Bd. of Wardens*, 53 U.S. 299, 319 (1851)).

The same reasoning applies here. Like the internet, climate change "does not recognize geographic boundaries." *Id.* at 103. Indeed, the City's claims depend on the cumulative effects of all greenhouse-gas emissions—by anyone—around the world. *See supra* p. 8. The "boundaryless nature" of this issue "makes state regulation impracticable." *Am. Booksellers*, 342 F.3d at 103–04.

Likewise, just as the Vermont statute proscribed conduct that took place outside Vermont, the City's claims here turn on the alleged effects of Defendants' fossil-fuel production and exploration in other States and across the globe. *See, e.g.*, A58 ("ConocoPhillips … produces oil in the Bakken formation in North Dakota"); A60 ("Exxon … owns and operates gasoline refineries in Baton Rouge, Louisiana; Baytown, Texas; and Beaumont, Texas"), A86 ("Chevron, Exxon, BP, and ConocoPhillips produce significant amounts of fossil fuels from tar sands in Canada"). "This means that those outside [New York] must comply with [New York tort law] or risk" liability in New York. *Am. Booksellers*, 342 F.3d at 103. That is impermissible, "whether or not the [out-of-state] commerce has

effects within the State." *Healy*, 491 U.S. at 336. Indeed, allowing claims like these would give New York—or any other State—the power to veto lawful commerce in every other State, and even in other nations. "This kind of potential regional and even national regulation … is reserved by the Commerce Clause to the Federal Government and may not be accomplished piecemeal through the extraterritorial reach of individual state [laws]." *Healy*, 491 U.S. at 340.

It does not matter that the City seeks damages rather than injunctive relief, or that this case concerns tort claims rather than a statute. "[A] State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States," and "State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute." *Gore*, 517 U.S. at 572 & n.17; *see also San Diego Bldg. Trades*, 359 U.S. at 246–47. Likewise, whether a state seeks to regulate by statute or by court decision, "any attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power." *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982) (plurality opinion); *see also Bristol-Myers Squibb Co.* v. *Superior Court of Cal.*, 137

S. Ct. 1773, 1780 (2017) (the due-process limits on "the coercive power of a State" over non-resident litigants are "a consequence of territorial limitations on the power of the respective States") (citation omitted).

In sum, the City's state-law tort claims would impose liability—and potentially massive financial consequences—for lawful conduct that took place in other States and other nations. That extraterritorial conduct may have "effects within the State," but that does not change the constitutional rule: A state may not seek to control "commerce that takes place wholly outside of the State's borders." *Healy*, 491 U.S. at 336.

CONCLUSION

For these reasons, the Court should affirm the district court's dismissal order.

February 14, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on February 14, 2019.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Peter D. Keisler
Peter D. Keisler

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(g), I certify that:

This brief complies with Rule 29(a)(5)'s type-volume limitation because it contains 3,939 words (as determined by the Microsoft Word 2016 word-processing system used to prepare the brief), excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with Rule 32(a)(5)'s typeface requirements and Rule 32(a)(6)'s type-style requirements because it has been prepared in a proportionately spaced typeface using the 2016 version of Microsoft Word in 14-point Century Schoolbook font.

/s/ Peter D. Keisler
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