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

BRIEF FOR APPELLANT

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PRELIMINARY STATEMENT

This Court should reverse the judgment of the United States District Court for the Southern District of New York (Keenan, J.), which dismissed a complaint that the City of New York never filed. The City's actual complaint alleges that Defendants—the five largest investor-owned producers of fossil fuels in the world—harmed the City in concrete, measurable ways by producing, promoting, and selling massive amounts of fossil fuels that Defendants knew would contribute to global warming when used exactly as intended.

The City asserts state-law claims for nuisance and trespass to obtain compensation for costs of redressing the effects of global warming that the Defendants have foisted on the City. Those costs involve building sea walls, implementing public-health programs, and taking other resiliency measures to protect the public and municipal property from rising sea levels, increased heat and precipitation, more frequent extreme weather, and other threats. Such costs are currently being borne by taxpayers. New York common-law nuisance and trespass allow these costs to be reallocated to the Defendants, irrespective of whatever social utility Defendants' business activities may have.

This suit would not require a court to impose liability based on Defendants' emissions of greenhouse gases or to dictate any regulation of pollution. Nor is the City attempting to "solve" the problem of climate change. Yet the district court concluded that the case was effectively a suit to regulate global greenhouse-gas emissions, which then became the basis for dismissing the City's claims under a variety of doctrines granting deference to the political branches of government.

But neither Congress nor the Executive Branch has adopted a policy as to whether producers of fossil fuels must compensate communities harmed by the effects of climate change. Nor is global warming a policy issue uniquely of interest to the federal government. There is thus no basis to displace the City's state-law claims with federal common law. And because the Clean Air Act is silent on the production, promotion, and sale of fossil fuels, it neither preempts the state-law claims the City alleged here nor would displace the federal common law if it applied. Finally, the City's claims would not infringe on the separation of powers, interfere with U.S. foreign policy, or present a political question. The complaint alleges local harms for which the courts can and should provide a remedy.

JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction under 28 U.S.C. § 1332. Plaintiff is a citizen of New York for purposes of diversity jurisdiction while Defendants are citizens of California, Delaware, New Jersey, Texas, and foreign countries the United Kingdom and the Netherlands. The amount in controversy exceeds $75,000, exclusive of interest and costs (Joint Appendix ("A") 51–53). This Court has jurisdiction under 28 U.S.C. § 1291 because the City appeals from a final judgment resolving all claims (Special Appendix ("SPA") 26).

ISSUES PRESENTED FOR REVIEW

New York law provides a remedy sounding in nuisance and trespass against manufacturers of legal and regulated products that cause environmental harm when used by others as intended. The issues presented are:

1. Did the district court err by holding that federal common law displaced the state-law claims that the City pleaded?

2. Did the district court err by holding that the City's claims were barred by the Clean Air Act?

3. Did the district court err by concluding that separation-of-powers concerns warranted dismissal of the City's claims?

STATEMENT OF THE CASE

New York City seeks damages from BP, Chevron, ConocoPhillips, Exxon Mobil, and Royal Dutch Shell for the harms their products have caused New York City. The asserted New York common-law claims for public nuisance, private nuisance, and trespass will enable the City to recover costs it has incurred and will continue to incur due to the effects of global warming caused by Defendants' products.

A. Defendants' contributions to global warming by producing, promoting, and selling fossil fuels

Climate change is a reality that has already harmed New York City. Fossil fuels are the primary cause of global warming because, when used as intended, they emit greenhouse gases like carbon dioxide and methane (A45, 80–84). These gases are causing the planet to dangerously overheat, resulting in an effectively permanent rise in sea levels and more frequent extreme weather events (A79–80).

There are just 100 large fossil-fuel producers whose products have been responsible for 62% of all the greenhouse-gas pollution from industrial sources going back over a century, and for 71% of the emissions since 1988 (A46). Defendants are the five largest, investor-owned producers of fossil fuels in the world, as measured by the

cumulative carbon and methane pollution generated from the use of their fossil fuels (*id.*). They are collectively responsible, through their production, promotion, and sale of fossil fuels, for over 11% of all the carbon and methane pollution from industrial sources since the Industrial Revolution (*id.*). The majority of greenhouse gases in the atmosphere resulted from fossil fuels produced and promoted by Defendants after Defendants became aware that their products were causing a buildup of greenhouse gases in the atmosphere that would cause dangerous global warming (A47).

Defendants' own scientists and industry consultants warned them, beginning in the 1950s, that the use of fossil fuels was causing greenhouse gases to increase in the atmosphere and that the expected effects included "severe" and even "catastrophic" harms (A87–94). But Defendants continued to produce massive amounts of fossil fuels, and sought to protect their market by discrediting the scientific consensus on global warming (A48). Defendants downplayed the risks of climate change and used large-scale advertising campaigns to portray fossil fuels as environmentally responsible (A47–48, 95–106). Several Defendants created a front group that spent millions of dollars

advertising "contrarian" climate theories that the group's internal documents admitted were unfounded (A96–97).

While publicly denying the reality of climate change, Defendants took steps to protect their own business assets (A48, 93–94). These actions included raising the decks of offshore oil-drilling platforms; protecting pipelines from increasing coastal erosion; and designing helipads, pipelines, and roads for use in the warming Arctic (A93–94).

In short, Defendants have known for decades that the consumption of their products was resulting in increasingly elevated levels of greenhouse gases in the atmosphere that will remain there for hundreds of years, that this process presented a threat of severe harm through the greenhouse effect, and that avoiding dangerous climate change required reducing the use of their fossil-fuel products (A45–47, 87–94). Yet Defendants continued to produce, promote, and sell massive amounts of fossil fuels (A45, 87–88, 95).

B. The effects of climate change on New York City

New York City is particularly vulnerable to global warming because it has 520 miles of coastline and is primarily situated on islands (A49–50, 76). Climate change is already causing the City to

suffer increased hot days, flooding of low-lying areas, shoreline erosion, and higher threats of extreme weather events and catastrophic storm-surge flooding (A49–50). Sea-level rise in New York City since 1900 has occurred at nearly twice the observed global rate, and has risen more quickly in recent decades (A73). These worrying trends are projected to continue and worsen into the future (A73–78).

The City has been forced to take steps to protect itself and its residents from the current and future impacts and dangers of climate change (A106–11). In the aftermath of Hurricane Sandy, the City launched a multi-billion dollar program to increase climate resiliency across the five boroughs to protect against future harms (A107). Addressing climate change threats requires the City to build sea walls and other coastal armament, implement extensive public-health programs, and take other resiliency measures to protect the public and City property (A50–51, 106–11). Among the measures the City is undertaking are the construction of a 2.4-mile-long barrier along the East River to protect neighborhoods on Manhattan's Lower East Side from flooding (A107–08); fashioning a comprehensive "Cool Neighborhoods" program to keep communities safe during extreme heat

(A108); implementing a plan to elevate shorelines at 91 identified sites across the City (*id.*); and enlarging, elevating, and augmenting the City's storm and wastewater infrastructure (A108–09). Absent judicial relief to compensate the City, taxpayers will bear the costs of these needed resiliency measures.

C. The City's lawsuit seeking damages for its expenditures to address the changing climate

Faced with the costs of addressing the harms caused by Defendants' production, promotion, and sale of fossil fuels, New York City filed suit in the Southern District of New York. The City's amended complaint (the operative complaint here) alleged three New York state-law causes of action: public nuisance, private nuisance, and trespass (A112–17). The City seeks damages for costs it has already incurred and is continuing to incur to protect City infrastructure and property, and to protect the public health, safety, and property of its residents from the impacts of climate change (A45–46, 117–18). The complaint also seeks an injunction to abate the public nuisance and trespass that would take effect only if Defendants failed to pay court-determined damages (A118).

The City's complaint expressly disclaims any attempt to impose liability based on Defendants' emissions of greenhouse gases. (A51). The complaint focuses exclusively on Defendants' production, promotion, and sale of fossil fuels while knowing the harms they would cause. The City likewise disclaims any attempt to restrain Defendants from engaging in their business operations (A51). Nowhere does the complaint seek the imposition of emissions standards. Instead, the City seeks only compensation for the harms it has been forced to bear by Defendants' products (A45–46, 117–18).

D. The district court's dismissal of the City's lawsuit

The U.S.-based Defendants moved to dismiss the complaint under a multitude of theories (A145, 148, 151).[1] The district court granted the motions and dismissed the complaint with prejudice in its entirety (SPA24).

Disregarding the complaint's express disclaimer of any attempt to impose liability for Defendants' emissions of greenhouse gases, the district court concluded that the crux of the City's complaint is actually

[1] The district court adjourned the time for the foreign defendants (BP and Shell) to respond to the complaint pending the resolution of these motions (SPA9 n.1).

an attempt to effectively regulate greenhouse-gas emissions (SPA13). Thus, the court concluded that the City's state-law claims were displaced by federal common law governing the control of interstate pollution (SPA11). The court then held that those federal-common-law claims were in turn displaced by the Clean Air Act, which provides for regulation of domestic emissions of certain air pollutants by EPA (SPA18).

Finally, the court ruled that to the extent the City sought damages stemming from foreign greenhouse-gas emissions, the claims were barred by the presumption against extraterritoriality in light of the possibility of "significant"—though unspecified—foreign relations implications (SPA21–23). The district court concluded with a brief attempt to distinguish this Court's holding in a previous case that a claim against fossil-fuel-fired electricity plants did not present a political question (SPA23–24). The district court did not expressly decide whether the claims here were barred by the political-question doctrine.

STANDARD OF REVIEW AND SUMMARY OF ARGUMENT

This Court reviews the district court's dismissal of the complaint *de novo*. *Allco Fin., Ltd. v. Klee*, 861 F.3d 82, 94 (2d Cir. 2017). "To survive a motion to dismiss, a complaint need only provide sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Citizens United v. Schneiderman*, 882 F.3d 374, 380 (2d Cir. 2018) (quotation marks omitted). The Court "accept[s] as true all factual allegations in the complaint and draw[s] all reasonable inferences in favor of the non-moving party." *City of Providence v. Bats Global Mkts., Inc.*, 878 F.3d 36, 48 (2d Cir. 2017).

The district court erred in dismissing the complaint. The court misunderstood the City's allegations and, on the basis of that misunderstanding, erroneously concluded that various federal-law doctrines barred the City's claims.

I. The first step in reviewing the district court's rulings on questions of federal law is to understand the nature of the New York common-law claims asserted in the City's complaint. Broadly, those claims, sounding in public nuisance, private nuisance, and trespass,

seek to require producers of fossil fuels to pay compensation for environmental harm to the City, its residents, and its property.

These long-established causes of action offer a means of providing compensation to injured plaintiffs without requiring courts to judge the social utility of a defendant's commercial activity or regulate its conduct. When brought against lawful commercial activity, an award of damages for public nuisance often seeks to reallocate the costs imposed by lawful economic activity without requiring that activity to cease or imposing a standard of conduct. Such is the core theory of liability asserted by the City here.

New York law provides that manufacturers, like Defendants, can be liable in nuisance and trespass for selling products with the knowledge that those products will cause environmental harm. Traditional concepts of causation and foreseeability serve as guideposts for determining the limits of manufacturers' potential liability for the effects of their products. Under these principles, nuisance and trespass claims have been allowed to proceed against manufacturers despite the intervening acts of other parties in using their products. Where the Defendants here produced, promoted, and sold fossil fuels knowing that

the products would cause serious environmental harm when their customers used them as intended, they can be liable under state law for nuisance and trespass.

II. The district court held that the City could not pursue the state-law claims it had pleaded because the claims had to be brought instead under federal common law. Contrary to the district court's finding, the allegations here do not render this one of the extraordinary cases where state law must be displaced by federal common law. Displacement of state law by federal common law is appropriate only where there is an actual and significant conflict between state law and a uniquely federal interest. Here, there is no uniquely federal interest at stake, nor is there a significant conflict with any such interest that may exist.

No federal policy or statute regulates the relief sought in this suit—compensation for local harms resulting from the effects of climate change—or purports to prevent state-law tort suits seeking such relief. Indeed, this Court has already rejected the argument that there is a uniquely federal interest in a damages case against producers and sellers of a product used by the military as a defoliant in a foreign war—circumstances where the federal interest was at least as strong as

any claimed here. The Supreme Court and this Court have also rejected the notion that there is a uniquely federal interest in every case involving environmental matters or even interstate pollution. Unlike in the environmental cases where a uniquely federal interest was held to warrant application of federal common law, this suit does not have the purpose, and would not have the effect, of regulating Defendants' direct discharges of out-of-state pollution. Rather, the City is merely seeking a proper allocation of costs via a tool traditionally used for that purpose: state nuisance and trespass law. The district court offered no explanation of how such an allocation could require displacing state law in an area of traditional state power like the resolution of nuisance and trespass tort claims.

Nor does this suit against private defendants implicate the federalism concerns that have, in rare cases, warranted application of a federal standard of decision displacing state common law. By interpreting the complaint to the contrary, the district court judged the need for a federal standard of decision against claims that the City does not assert. Most troubling, the court did so with no actual intention of applying federal common law to those rewritten allegations. Rather,

displacement of state law by federal common law was a mere way station on the road to finding that the judicially minted federal-common-law claims were themselves displaced by federal statute.

III. The district court then erred in holding that the Clean Air Act barred the City's claims. Because the court erroneously concluded that the City's state-law claims were displaced by federal common law, it failed to undertake an analysis of whether the state-law claims were preempted by the statute under the more demanding standard for preemption of state law. Had the court done so, it would have had to conclude that the claims could proceed. Congress did not include any express preemption statement in the Clean Air Act. Nor is Congress's regulatory scheme sufficiently comprehensive to crowd out a state-law nuisance or trespass claim seeking compensation for the costs of responding to the effects of climate change under a field-preemption analysis. Finally, state law on this matter does not stand as an obstacle to the purposes of federal law. The City's claims can continue without impairing the federal regulatory scheme.

If federal common law did displace the City's state-law claims, the Clean Air Act still would not bar the City from proceeding. While the

Clean Air Act displaces claims under federal common law seeking to directly regulate greenhouse-gas emissions, it is silent as to claims seeking monetary damages for harms caused by the production, promotion, and sale of fossil fuels. The Clean Air Act does not speak directly to the issues that this case actually presents.

The district court wrongly dismissed this distinction as illusory because the case can be said to involve emissions. But the pertinent question is a more targeted and well-defined one: whether the suit threatens to create a competing *regulation* of emissions that intrudes on the domain committed to EPA in the Clean Air Act. The claims here do not do so, because they do not seek to impose an emissions standard or rest on a finding that Defendants violated one. The primary fault the City alleges is that Defendants contributed to serious environmental harm that they knew their highly profitable production and marketing activities would cause and that they should therefore pay compensation.

And even if the Clean Air Act displaced the judicially recast federal-common-law claims, it would not take out state law along with it. A statute that displaces federal common law leaves state law intact unless that state law has been preempted by the federal statute, which

is not the case here. Notwithstanding its conclusion that federal common law governed, the district court should have separately considered whether the Clean Air Act barred the City's state-law claims after finding the federal common law displaced.

IV. The district court ended its decision by raising misplaced concerns that resolving the City's claims would interfere with the separation of powers and the President's ability to conduct foreign policy in the area of climate change. But the district court did not articulate how the City's claims offended any U.S. foreign policy on global warming. This case does not remotely present any of the concerns that have animated decisions on extraterritorial application of domestic law and foreign-policy preemption, such as suits between foreign parties for harms occurring abroad, or suits that directly conflict with an official U.S. foreign policy. The district court merely found that global warming is the subject of international negotiations. But that fact does not show a conflict between U.S. foreign policy and a tort lawsuit seeking compensation for local injuries. Nor is the City's suit barred by the political-question doctrine. Clear, judicially manageable standards for resolving the City's case are set forth in state tort law.

As with much of its analysis, the district court's reasoning on these points is based on a flawed understanding of the City's allegations. The City does not seek to regulate global greenhouse-gas emissions, implement a comprehensive solution to climate change, or interfere with any such solution that may be adopted by Congress or the President. The complaint asks only that Defendants pay for the demonstrable harms their products cause New York City.

ARGUMENT

POINT I

NEW YORK LAW RECOGNIZES NUISANCE AND TRESPASS CLAIMS AGAINST MANUFACTURERS OF LEGAL AND REGULATED PRODUCTS THAT HAVE CAUSED ENVIRONMENTAL HARM

Understanding the New York common-law claims asserted by the City provides an important backdrop to this appeal. Indeed, the district court's failure to recognize the true nature of the City's state-law tort claims was the root source of its mistaken rulings holding the suit to be barred by a cluster of federal-law doctrines.

The City's complaint alleges that Defendants' production, promotion, and sale of fossil fuels have caused and will continue to cause serious environmental harm to the City, its residents, and its

property. The complaint presents traditional state-law nuisance and trespass claims that courts applying New York law have long entertained and adjudicated. New York courts routinely permit such claims against manufacturers whose lawful products foreseeably cause environmental harms when used by others.

The particular theory of the claims asserted here assumes that Defendants' business activities have substantial social utility and does not hinge on a finding that those activities themselves were unreasonable or violated any obligation other than the obligation to pay compensation. Instead, the City asserts a narrower theory that would require Defendants to pay for the severe harms resulting from their lawful and profitable commercial activities, rather than allowing them to force the City to bear all costs from those harms.

A. Nuisance and trespass offer a means to reallocate the costs imposed by lawful economic activity.

Under New York law, which looks to the Restatement of Torts as a source of authority for these claims, a public nuisance "is an offense against the State" that can be remedied by "the proper governmental agency." *Copart Indus. v. Consol. Edison Co. of N.Y.*, 41 N.Y.2d 564, 568

(1977) (citing Restatement (First) of Torts, notes preceding § 822). A defendant's conduct constitutes a public nuisance if it "amounts to a substantial interference with the exercise of a common right of the public," thereby "endangering or injuring the property, health, safety or comfort of a considerable number of persons." *532 Madison Ave. Gourmet Foods v. Finlandia Ctr.*, 96 N.Y.2d 280, 292 (2001). A private nuisance is an "interference with the use or enjoyment of land." *Copart*, 41 N.Y.2d at 568. And trespass "is the intentional invasion of another's property." *Scribner v. Summers*, 84 F.3d 554, 559 (2d Cir. 1996).

These causes of action are among the oldest in Anglo-American jurisprudence. *See* George E. Woodbine, *The Origins of the Action of Trespass*, 33 Yale L.J. 799 (1924); C.H.S. Fifoot, *History and Sources of the Common Law: Tort and Contract* 3–5 (1970). In modern times, New York courts have adapted them to new and more complex forms of injury. Of particular relevance here, courts have held that production and sale of lawful products that cause environmental harm can give rise to nuisance and trespass liability. *See, e.g.*, *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 725 F.3d 65 (2d Cir. 2013) (gasoline additive).

These causes of action offer a means of providing compensation for injured plaintiffs without requiring courts to judge the social utility of a defendant's commercial activity or regulate its conduct. It is well settled that nuisance or trespass liability may be imposed on an otherwise lawful business operating in full compliance with relevant regulations when it creates or contributes to a public nuisance. *City of New York v. Beretta U.S.A. Corp.*, 315 F. Supp. 2d 256, 280–81 (E.D.N.Y. 2004) (collecting cases); *accord New York Trap Rock Corp. v. Town of Clarkstown*, 299 N.Y. 77, 81 (1949) (quarry operations); *Clawson v. Central Hudson Gas & Elec. Corp.*, 298 N.Y. 291, 294–95 (1948) (dam); *Hoover v. Durkee*, 212 A.D.2d 839, 841–42 (3d Dep't 1995) (auto racetrack).

When brought against lawful commercial activity, an award of damages for public nuisance reallocates the costs imposed by such activity without requiring that the challenged activity cease. "In determining whether to award damages, the court's task is to decide whether it is unreasonable to engage in the conduct without paying for the harm done." Restatement (Second) of Torts § 821B cmt. i. "[C]ertain types of harm may be so severe" that they can be considered a public

nuisance "regardless of the utility of the conduct." *Id.* § 829A cmt. b; *see also* William L. Prosser & W. Page Keeton, The Law of Torts § 52 (5th ed. 1984) (explaining that the "interference … can be unreasonable even when the defendant's conduct is reasonable").

In other words, "[a]lthough a general activity may have great utility it may still be unreasonable to inflict the harm without compensating for it." Restatement (Second) of Torts § 821B cmt. i. Thus, for example, in a leading case, the New York Court of Appeals concluded that the dirt, smoke, and vibrations emanating from a cement plant were a nuisance, and damages needed to be paid to those harmed, despite the fact that the plant operated legally and contributed to the local economy and thus should not be enjoined from operating. *Boomer v. Atl. Cement Co.*, 26 N.Y.2d 219, 222, 225–26 (1970). The court distinguished between the compensation remedy it was approving and a comprehensive solution to air pollution from cement plants, which was "likely to require massive public expenditure and … to depend on regional and interstate controls." *Id.* at 223. The court acknowledged that although a legislative solution was needed to resolve the wider

systemic problem, it could still perform its "essential function" of "decid[ing] the rights of parties before it." *Id.* at 222.

B. Manufacturers can be liable in nuisance or trespass for selling products that they know will cause environmental harm when used by others.

The City's claims invoke the principle of New York law that a manufacturer can be liable in nuisance and trespass for selling products with the knowledge that those products will cause environmental harm. *See, e.g., State v. Schenectady Chems., Inc.*, 117 Misc.3d 960, 966 (N.Y. Sup. Ct. 1983) (public nuisance applies to a "party who, either through manufacture or use, has sought to profit from marketing a … product" that causes environmental harm), *aff'd as modified*, 103 A.D.2d 33 (3d Dep't 1984); *State v. Fermenta ASC Corp.,* 238 A.D.2d 400, 404 (2d Dep't 1997) (upholding trespass verdict by a county water authority against a chemical manufacturer that directed consumers to apply pesticide to soil). For example, in *Williams v. Dow Chem. Co.*, the court sustained a New York public-nuisance claim against a pesticide manufacturer that knew that its product could cause harm to consumers if used in high doses. No. 01 Civ. 4307 (PKC), 2004 U.S. Dist. LEXIS 10940, at *59–64 (S.D.N.Y. June 15, 2004).

A manufacturer need not be the sole party responsible for creating a nuisance to be held liable. If the conduct of the third-party users and its effects were normal and foreseen, manufacturers may be liable for their role in creating the harm. *See Abbatiello v. Monsanto Co.*, 522 F. Supp. 2d 524, 541 (S.D.N.Y. 2007) ("Under New York law, '[e]veryone who creates a nuisance or participates in the creation or maintenance thereof is liable for it.'" (quoting *Penn Cent. Transp. Co. v. Singer Warehouse & Trucking Corp.,* 86 A.D.2d 826, 828 (1st Dep't 1982))); Restatement (Second) of Torts § 840E ("[T]he fact that other persons contribute to a nuisance is not a bar to the defendant's liability for his own contribution.").

To determine the limits of manufacturers' potential liability for the effects of their products, courts deciding New York nuisance and trespass claims have employed traditional concepts of causation and foreseeability. Where third parties' use of a product is the direct cause of the alleged injuries, the causal chain is not broken if that use is the "normal" and "foreseeable" consequence of a defendant's conduct. *Derdiarian v. Felix Contracting Corp.*, 51 N.Y.2d 308, 315 (1980); *Beretta*, 315 F. Supp. 2d at 284; *In re Opioid Litig.*, 2018 NY Slip Op

31228(U), *80-81 (N.Y. Sup. Ct. June 18, 2018). The manufacturer's acts or omissions must be a "substantial factor" in bringing about the injury, but need not be the sole factor.[2] *MTBE*, 725 F.3d at 116.

Under these principles, nuisance and trespass claims have been allowed to proceed against manufacturers despite the intervening acts of other parties in using their products. For example, in *MTBE*, this Court upheld a substantial jury verdict against Exxon (also a defendant here), the manufacturer of gasoline containing the additive methyl tertiary butyl ether (MTBE). *MTBE*, 725 F.3d 65. Despite being aware of the hazardous effects of MTBE years before the public, Exxon sold gasoline including MTBE to gasoline stations in Queens, which stored it in underground tanks, from which it seeped into water wells owned by the City. *Id.* at 88. Exxon argued that its contribution to the City's injuries was too remote because it did not release the chemicals into the

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[2] Thus, it is no defense to a public-nuisance claim that there were many other contributors, as is common in cases involving pollution. *See, e.g.*, *Boim v. Holy Land Found. For Relief & Dev.*, 549 F.3d 685, 696—97 (7th Cir. 2008) (en banc) ("'[P]ollution of a stream to even a slight extent becomes unreasonable [and therefore a nuisance] when similar pollution by others makes the condition of the stream approach the danger point. The single act itself becomes wrongful because it is done in the context of what others are doing.'") (quoting Prosser & Keeton § 52, p. 354)); *Warren v. Parkhurst*, 45 Misc. 466, 469 (N.Y. Sup. Ct. 1904), *aff'd*, 105 A.D. 239 (3d Dep't 1905), *aff'd*, 186 N.Y. 45 (1906).

City's water supply. This Court was unpersuaded, holding that the City had established causation with evidence that "Exxon knew that MTBE gasoline it manufactured would make its way into Queens, where it was likely to be spilled, and once spilled, would likely infiltrate the property of others." *Id.* at 121.

Similarly, in *Abbatiello v. Monsanto Co.*, the court allowed a private-nuisance claim to proceed against Monsanto, which manufactured and sold materials and products containing polychlorinated biphenyls, or PCBs, to General Electric. 522 F. Supp. 2d 524. The court found that allegations that Monsanto had for years suppressed and concealed facts about the dangers of PCBs from GE and the plaintiffs (GE employees and owners of land near a GE facility) was sufficient to support a claim that "Monsanto participated to a substantial extent in creating the nuisance." *Id.* at 541.

So too, in *Fermenta,* 238 A.D.2d at 404, the court upheld a trespass verdict against an herbicide manufacturer even though the immediate cause of injury to the public was the application of the herbicide to the soil by third parties. The court held that the manufacturer could be held liable because "defendants' actions in

directing consumers to apply [the herbicide] to the soil was substantially certain to result in the entry of [the toxin] into [the county's] wells." *Id.*; *see also Schenectady*, 117 Misc. 2d at 967 (sustaining public-nuisance claim against chemical manufacturer despite the intervening actions of a third party).[3]

Like the manufacturer defendants in *MTBE, Abbatiello,* and *Fermenta,* Defendants here produced, promoted, and sold fossil fuels knowing that the products would cause serious environmental harm if their customers used them as intended (A45–48, 87–94). Nevertheless, for decades, Defendants promoted their fossil-fuel products by concealing and downplaying the harms of climate change, profited from the misconceptions they promoted as to the cause of climate change, and knowingly shifted the cost of these harms to cities like New York (A48, 95–106). New York nuisance and trespass law offers the City a

[3] The district court questioned whether the City's trespass claim properly alleged an "unlawful" invasion (SPA17). An invasion is "unlawful" if it is "without justification or permission." *Emerson Enters., LLC v. Kenneth Crosby New York, LLC*, 781 F. Supp. 2d 166, 181 (W.D.N.Y. 2011) (quotation marks omitted); *see also Marone v. Kally*, 109 A.D.3d 880, 882 (2d Dep't 2013); 104 N.Y. Jur. 2d Trespass § 5. The City properly alleged that Defendants' conduct was substantially certain to result in an invasion "without permission or right of entry" (A116–17).

remedy for these wrongs, and the complaint as pleaded alleges the necessary facts to be awarded that remedy.

Defendants contended below (in an argument that the district court did not address) that New York law would refuse to extend liability in nuisance and trespass to producers of lawful products that cause harm when used by third parties (Dkt. 100 at 39–41). The cases recounted above refute any suggestion that New York law disallows such claims when environmental harms are alleged. Moreover, Defendants misread the two cases on which they primarily relied. Those cases involved suits against gun companies for harms caused by third parties' criminal use of their products. *See Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222 (2001); *People v. Sturm, Ruger & Co.*, 309 A.D.2d 91 (1st Dep't 2003). At bottom, those cases are rooted in the law's traditional reluctance to hold a defendant responsible for another's intervening criminal acts.

Neither *Hamilton* (a negligence action brought by relatives of persons killed by handguns) nor *Sturm, Ruger* (a public-nuisance action alleging that gun companies contributed to the high number of illegally possessed handguns) purported to cast doubt on the established

principles that lawful products can cause nuisances or trespasses and that manufacturers can be liable for foreseeable conduct by their customers who use the product precisely as is intended.[4] Indeed, *Hamilton* emphasized that "a manufacturer may be held liable for complicity in dangerous … activity," 96 N.Y.2d at 235, and held open the possibility that this complicity could be proved with proper evidence in the future even against the gun companies regarding harms caused by users' criminal acts, *id.* at 237. The cases thus provide no cause to doubt the viability of the City's claims here. The City's complaint presents traditional nuisance and trespass claims under New York law.

POINT II

FEDERAL COMMON LAW DOES NOT DISPLACE THE CITY'S STATE-LAW CLAIMS

The district court wrongly held that federal common law displaces the City's state-law claims. The City's claims apply traditional New

[4] In *Hamilton*, the court found that the plaintiffs' trial evidence failed to show that their relatives' deaths were traceable to the defendants' marketing practices. *Sturm, Ruger* relied on these findings from the *Hamilton* trial evidence and concluded that nearly identical claims for gun murders were "caused directly and principally by the criminal activity of intervening third parties," over whom defendants "have absolutely no control." *Sturm, Ruger*, 309 A.D.2d at 99, 103–04.

York nuisance and trespass principles to seek compensation for funds it spent and will spend addressing the local effects of the use of Defendants' products, without inviting or requiring the courts to regulate the greenhouse-gas emissions of Defendants' customers. In these circumstances, displacement of state common law by federal common law was unwarranted.

Any discussion of displacing state law with federal common law must begin with the principle, unacknowledged by the district court, that such displacement is greatly disfavored and reserved for "extraordinary cases." *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 89 (1994). Generally, unless Congress has expressly authorized the courts to formulate substantive rules (which has not happened here), federal common law arises "only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases." *Tex. Indus. v. Radcliff Materials*, 451 U.S. 630, 641 (1981). None of those interests are present here.

A. The City's lawsuit does not pose a significant conflict with any identifiable federal interest.

A party seeking to displace state law with federal common law must overcome a "substantial burden" of showing (1) 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, 508 (1988); *Empire HealthChoice Assurance, Inc. v. McVeigh*, 396 F.3d 136, 138, 140 (2d Cir. 2005); *Woodward Governor Co. v. Curtiss-Wright Flight Sys.*, 164 F.3d 123, 127 (2d Cir. 1999). The conflict must be significant to warrant the displacement of state law. *O'Melveny & Myers*, 512 U.S. at 87; *Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981) ("*Milwaukee II*"); *Empire HealthChoice*, 396 F.3d at 138, 140; *Woodward,* 164 F.3d at 127 ("[A]n actual, significant conflict between a federal interest and state law must be specifically shown, and not generally alleged." (quotation marks omitted)). Both prongs of the test must be satisfied before federal common law will displace state law. *Boyle*, 487 U.S. at 507; *Empire HealthChoice*, 396 F.3d at 140–41; *Woodward Governor Co.*, 164 F.3d at 128.

Having skipped this analysis, the district court never identified *any* actual and specific federal policy or interest that conflicts with the

City's lawsuit. The City seeks compensation for the costs of constructing infrastructure and implementing programs necessary to protect itself and its residents from the local impacts of climate change such as rising sea levels, extreme weather, and increased flooding. There is no uniquely federal interest in the adjudication of such a case; nor does this lawsuit pose a conflict with any interest that may exist.

No federal policy or statute regulates the relief sought in this suit—compensation for local harms that result from fossil-fuel production—or purports to prevent state-law tort suits seeking such relief. Congress has never enacted legislation to immunize fossil-fuel producers from bearing the costs for the harms their products inevitably create when used as intended. This contrasts with, for example, the case of firearms manufacturers and dealers, who are shielded by federal law from liability for the criminal or unlawful misuse of their products. 15 U.S.C. §§ 7901–03. Indeed, this Court already has found that "there really is no unified [federal] policy on greenhouse gas emissions." *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 331–32 (2d Cir. 2009) ("*AEP I*"), *aff'd in relevant part, rev'd on other grounds by* 564 U.S. 410 (2011) ("*AEP II*"). Absent an identifiable federal policy, there is no

uniquely federal interest that can conflict with this suit for damages from the production and sale of an inherently harmful product.

Indeed, this Court has already rejected the argument that federal common law displaced state law in a damages case against producers and sellers of products where the federal interest was at least as weighty as any claimed here. *In re "Agent Orange" Prod. Liab. Litig.*, 635 F.2d 987, 994–95 (2d Cir. 1980). In *Agent Orange*, Vietnam War veterans who had suffered injuries from military use of herbicides as defoliants during the war sued the chemical companies that manufactured the herbicides. *Id.* at 988. This Court recognized the "obvious interests" of the United States in both the welfare of its military veterans and in ensuring the supplies of war materiel, but nonetheless held that state law—not federal common law—applied. *Id.* at 994–95. "Although Congress has turned its attention to the Agent Orange problem, it has not determined what the federal policy is with respect to the reconciliation of these two competing interests." *Id.* In the absence of such a decision by Congress, the separation of powers and federalism concerns cut *against* the application of federal common law and in favor of state law. *See id.* So too here, where there is no

determination by Congress weighing the competing interests of parties injured by climate change and companies that produce, promote, and sell fossil fuels. There are certainly no stronger federal interests presented in this case that would point to a different result.

There is also no uniquely federal interest in every case involving environmental matters. *See New York v. Shore Realty Corp.*, 759 F.2d 1032, 1050 (2d Cir. 1985) (applying New York common law alongside federal statutory claim). States and cities have important and obvious interests in addressing the consequences of the changing climate that are felt within their borders.[5] *Cf. Nat'l Audubon Soc'y v. Dep't of Water*, 869 F.2d 1196, 1203 (9th Cir. 1988) ("[T]here is not 'a uniquely federal interest' in protecting the quality of the nation's air."). Likewise, states have an interest in applying their own law to local environmental harms caused by fossil-fuel products. *See MTBE*, 725 F.3d 65.

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[5] Indeed, numerous states and cities have passed laws, regulations, and policies on climate change. *See, e.g.*, *Rocky Mtn. Farmers v. Corey*, 730 F.3d 1070, 1106–07 (9th Cir. 2013) (upholding state law regulating carbon intensity of ethanol sold in interstate commerce); *Coal. for Competitive Elec. v. Zibelman*, 272 F. Supp. 3d 554, 559 (S.D.N.Y. 2017) (upholding state program promoting clean energy sources), *aff'd* 906 F.3d 41 (2d Cir. 2018).

The district court grounded its decision to displace state law primarily on the supposed need for a "uniform standard of decision" (SPA14). This reasoning was in error. The need for uniformity—"that most generic (and lightly invoked) of alleged federal interests"—is insufficient to justify displacing state common law. *O'Melveny & Myers*, 512 U.S. at 88; *accord Woodward Governor Co.*, 164 F.3d at 129; *In re "Agent Orange,"* 635 F.2d at 993–94. Tort causes of action employed solely to allocate harms from a product or activity, like the nuisance and trespass claims alleged here, fall "well within the state's historic powers to protect the health, safety, and property rights of its citizens." *MTBE*, 725 F.3d at 96. The application of federal common law is especially disfavored where it would affect such "areas traditionally occupied by the states." *Marsh v. Rosenbloom*, 499 F.3d 165, 177, 182 (2d Cir. 2007) (rejecting uniformity as a cause to invoke federal common law).

The purported need for uniformity is particularly misplaced here. To start, it is not at all clear that there is significant variation among the states' common law on these issues. *See AEP I*, 582 F.3d at 351 n.28 ("A majority of states have adopted the Restatement's definition of public nuisance."). But even if different states did vary in the degree to

which they would allow Defendants to be held liable for creating a public nuisance, that variation would not create a conflict with any federal policy.

Differences in state tort law merely require defendants to bear certain costs imposed in one state that they may not bear in another. If New York law here imposes liability while, say, Indiana law does not, the price of oil (or the profits that Defendants collect) will simply reflect those internalized costs. The possibility of different tort standards faces every producer who sells goods across state or national boundaries. But that does not require imposing a federal standard of decision on all claims involving goods in the interstate market. *See In re "Agent Orange,"* 635 F.2d at 994–95; *see also Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1324 (5th Cir. 1985) (en banc) (holding that federal common law did not govern claim against asbestos manufacturers).

The need for uniformity weighs differently when a suit under state law would regulate the defendant's direct discharges of pollution across state lines. This concern arises in state-law suits seeking to dictate standards for emissions (which inevitably cross state lines),

because those suits raise the prospect that an emitter would be unable to determine whether its conduct is lawful in every jurisdiction that its emissions reach. *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 496–97 (1987). For this reason, the interstate-pollution cases in which the Supreme Court has looked to federal common law to supply the rule of decision have entailed a plaintiff seeking to enjoin the conduct of parties in discharging pollution in another state. *See AEP II*, 564 U.S. at 415 ("[P]laintiffs ask for a decree setting carbon-dioxide emissions for each defendant at an initial cap, to be further reduced annually.")[6]; *Illinois v. Milwaukee*, 406 U.S. 91, 93 (1972) ("*Milwaukee I*") ("Plaintiff asks that we abate this public nuisance.").

But this case does not seek to regulate out-of-state (or indeed, any) emissions or impose an emissions standard. Rather, it seeks to allocate the costs of protecting the property, health, and safety of the City and its residents from the impacts of climate change on infrastructure and public health. The City here assumes that Defendants will continue to

[6] In *AEP*, the plaintiffs pleaded federal-common-law causes of action, with state-law claims alleged only in the alternative (A160, 201, 203). The Supreme Court assumed without deciding that federal common law applied. *AEP II*, 564 U.S. at 423. The Court did not decide whether federal common law displaced state law or address the standard for such displacement. *See generally id.*

produce, promote, and sell fossil fuels. The complaint merely seeks compensation for the local harms those products are causing. Nothing about such a complaint poses a significant conflict with any uniquely federal interest.

B. Previous decisions applying federal common law to the control of interstate emissions do not dictate the result here.

In lieu of applying the controlling test for determining the extraordinary cases when federal common law displaces state law, the district court erroneously concluded that cases related to interstate pollution are exclusively governed by federal common law (SPA11–13). In doing so, the district court vastly oversimplified the analysis. The relevant question is not whether the suit can fairly be said to relate to interstate pollution; thus, the fact that emissions constitute a component of the causal chain for the harm alleged in the complaint does not control. The appropriate question is whether the suit implicates and threatens to impair a uniquely federal interest. And here, as discussed, it does not.

The cases where the Supreme Court has held that federal common law controls present federalism and other concerns that are not present

here. The seminal case is *Milwaukee I*, where the Supreme Court considered a suit filed by the State of Illinois against several cities and local sewage commissions in Wisconsin seeking to enjoin them from continuing to discharge untreated sewage into Lake Michigan. 406 U.S. 91. As the Supreme Court noted, this lawsuit between one sovereign state and direct dischargers of pollution from sources in another sovereign state touched "basic interests of federalism" that counseled in favor of fashioning a federal rule of decision. *Id.* at 105 n.6. Namely, if Illinois law could be used to regulate a pollution source in Wisconsin, it would be invading Wisconsin's sovereign prerogatives. But if Wisconsin law did not provide a remedy for Illinois, that would invade Illinois' sovereign prerogative to protect its citizenry. The foreseeable result of either situation is significant conflict between the states. *Id.* at 107. Such federalism concerns are absent in this suit between New York City and private producers of products that, unlike a point source of pollution, are untethered to a specific jurisdiction.

It is thus unsurprising that all of the cases the district court cited for the proposition that federal law applies to the control of interstate pollution directly challenged the emission of pollutants into the air or

water (SPA11). This case does not. The distinction between production, promotion, and sales on the one hand, and emissions on the other, is significant for multiple reasons.

First, one of the Supreme Court's repeated rationales for authorizing federal common law to override state law in the domain of emissions is that it was necessary to "fill in statutory interstices" in areas where Congress has acted within the national legislative power. *AEP II*, 564 U.S. at 421(quotation marks omitted); *see also Milwaukee I*, 406 U.S. at 103. Congress acted in the realm of interstate air pollution with the passage of the Clean Air Act. But, as discussed below, that statute does not address the production, promotion, and sale of fossil fuels. Thus, a court would not be filling the "statutory interstices" by imposing federal common law, but would rather be striking out into entirely new terrain. A court tempted to engage in such an endeavor should "remain[] mindful that it does not have creative power akin to that vested in Congress." *AEP II*, 564 U.S. at 422.

Second, a suit challenging a defendant's direct emissions of greenhouse gases or other pollutants naturally implicates conduct that sets up a conflict between the source state and the state where the

harm occurs. As discussed, where the plaintiff seeks to regulate such emissions, the application of a federal standard of decision may be necessary to avoid interstate conflict. But the production, promotion, and sale of products does not involve such a conflict. Indeed, countless products today are sold in interstate and international commerce, but this fact alone does not create the necessary conflict to require displacing state common law with federal common law. *See In re "Agent Orange,"* 635 F.2d at 994; *Jackson*, 750 F.2d at 1324. If it were otherwise, the federal courts would be "awash in 'federal common-law' rules." *O'Melveny & Myers*, 512 U.S. at 88.

In finding that the City's state-law claims were displaced, the district court mistakenly reasoned that the federal common law must govern any case somehow pertaining to emissions (SPA12–14). To be sure, the complaint discusses greenhouse-gas emissions. But those emissions are a step in the causal chain by which Defendants' products caused the City harm. A step in the causal chain is not the basis for the claim itself. Indeed, the City neither alleges that Defendants themselves emitted greenhouse gases nor seeks to impose any liability for any emissions Defendants did release. These points are not

superficial: they go to the fundamental question whether this lawsuit will operate as a regulation of cross-boundary emissions. Because the City's claims will not, directly or indirectly, establish any standard for emissions, they should not be understood to regulate them. If the City, as plaintiff, is to remain the "master of the complaint," *Marcus v. AT&T Corp.*, 138 F.3d 46, 52 (2d Cir. 1998), the district court's misconstruction of that complaint must be rejected. Federal common law does not displace the state-law claims that the City alleged here.

POINT III

THE CITY'S CLAIMS ARE NOT BARRED BY THE CLEAN AIR ACT

The district court further erred in concluding that the Clean Air Act barred the City's claims. Federal preemption of state law requires clear and manifest evidence of congressional intent. There is no such evidence here. But because the district court erroneously concluded that the City's state-law claims were displaced by federal common law, it did not engage in a preemption analysis, and instead considered only whether the Clean Air Act in turn displaced the federal claims (SPA14). Even assuming, however, that federal common law does displace the City's state-law claims, the court was wrong to find those claims

displaced by the Clean Air Act, which does not speak directly to the particular issues raised in this lawsuit.

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

Had the district court engaged in a preemption analysis, it would have had to conclude that the City's state-law claims are not preempted by the Clean Air Act. Courts considering the preemption of state law start with the assumption that claims within "the historic police powers of the States"—including those asserting nuisance and trespass—are not preempted "unless that was the clear and manifest purpose of Congress." *MTBE*, 725 F.3d at 96 (quotation marks omitted); *see also AEP II*, 564 U.S. at 423. There are three situations in which the Supreme Court has found a congressional intent to preempt state law: "(1) where Congress expressly states its intent to preempt; (2) where Congress's scheme of federal regulation is sufficiently comprehensive to give rise to a reasonable inference that it leaves no room for the state to act; and (3) where state law actually conflicts with federal law." *Marsh*, 499 F.3d at 177. None of those situations is present here.

First, Congress did not include any statement of preemption in the Clean Air Act. Instead, the congressional findings for the statute explain that the prevention and control of air pollution "is the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3). It is therefore unsurprising that the Clean Air Act contains no provision precluding state courts from taking action under traditional tort theories. *MTBE*, 725 F.3d at 97. To the contrary, the statute states that its provision of private remedies shall not "restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation *or to seek any other relief*." 42 U.S.C. § 7604 (emphasis added).

Second, there is no viable argument that Congress's regulatory scheme is sufficiently comprehensive that it crowds out state action. Field preemption exists only "where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law." *New York SMSA Ltd. P'ship v. Town of Clarkstown*, 612 F.3d 97, 104 (2d Cir. 2010) (quotation marks omitted). The City is not aware of any case in which this Court—or any court—has embraced field preemption of state law under the Clean Air

Act. *See Ass'n of Taxicab Operators, USA v. City of Dallas*, 866 F. Supp. 2d 595, 603 (N.D. Tex. 2012) (rejecting contention that the Clean Air Act occupied the field of air pollution regulation), *aff'd*, 720 F.3d 534 (5th Cir. 2013). To the contrary, the Clean Air Act explicitly contemplates active state and local participation. *See* 42 U.S.C. § 7401(a)(3).

Third, this is not a situation where state law actually conflicts with—or even poses an obstacle to—the enforcement of federal law. In order to establish obstacle preemption, there must be a "sharp" and "actual conflict" between New York law and "the overriding federal purpose and objective" of the Clean Air Act. *MTBE*, 725 F.3d at 101. This is a heavy burden, and is only met where a "repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together"; mere "tension" is not enough. *Id.* at 102 (quotation marks omitted).

In part because the district court never engaged in the preemption analysis, it never identified any actual conflict between state nuisance law and the Clean Air Act. The closest the court came was its statement that determining liability on the City's claims would require factfinders

"to consider whether emissions resulting from the combustion of Defendants' fossil fuels created an 'unreasonable interference' and an 'unlawful invasion' on City property" and that such a finding would supposedly conflict with EPA's authority to issue emissions limits under the Clean Air Act (SPA17–18). But this is wrong as a matter of tort law and the Clean Air Act.

Adjudicating liability in a nuisance case does not intrude into the sphere of regulating emissions. For example, in *Boomer*, the New York Court of Appeals concluded that it lacked the expertise to determine if air pollution from a cement plant could or should be reduced, and that enjoining the plant's operation was out of the question because of its size and social value as a large employer. 26 N.Y.2d at 223, 225–26. But the court still held that the cost of pollution should be borne by the plant and not by those it had injured, and awarded damages. *Id.* at 226. Similarly, the Restatement requires proof that the interference with public rights is "unreasonable," but explains that this can be shown in a damages case by proving "severe" harm that would be unreasonable if uncompensated. Restatement (Second) of Torts § 829A.

The City's trespass claim likewise is not tantamount to setting emissions standards. It requires only proof that Defendants were substantially certain that their production, promotion, and sale of fossil fuels would interfere with the City's right to possession of real property (*e.g.*, by seawater intruding onto the City's land) yet continued to engage in this harmful conduct. *See MTBE*, 725 F.3d at 119–20. The City's claims involve traditional questions of tort liability, without threatening EPA's expertise or its authority under the Clean Air Act to regulate emissions.

But even if the utility or reasonableness of Defendants' conduct were at issue, imposing liability would not commit a court to an actual conflict with the Clean Air Act, much less one that is "direct and positive" or "sharp." *MTBE*, 725 F.3d at 101. The activities at issue in this lawsuit involve the production, promotion, and sale of fossil fuels—activities that are not regulated by the Clean Air Act. Rather, the statute regulates emissions. As discussed above, there is no chance here of Defendants being subject to conflicting obligations.

B. If federal common law applied, it would not be displaced by the Clean Air Act.

If the Court were to find that federal common law displaces the City's state-law claims here, those federal-common-law claims still would not be barred by the Clean Air Act (SPA14–21). Displacement of federal common law occurs only where a federal statute "speaks directly to the question at issue." *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978); *AEP II*, 564 U.S. at 424; *see also Cty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 237 (1985) ("[F]ederal common law is used as a 'necessary expedient' when Congress has not 'spoken to a *particular* issue.'" (quoting *Milwaukee II*, 451 U.S. at 313)). Regulation that only generally relates to the subject matter is insufficient to displace federal common law. *Milwaukee I*, 406 U.S. at 104; *AEP I*, 582 F.3d at 381–87.

The Clean Air Act does not speak to the particular issues presented here. It addresses emissions, but is silent as to the remedy for environmental harms to the City's property resulting from the production, promotion, and sale of fossil fuels. "Congress's mere refusal to legislate … falls far short of an expression of legislative intent to supplant the existing [federal] common law in that area." *United States*

v. Texas, 507 U.S. 529, 535 (1993) (quotation marks omitted). Where Congress expressly regulates in one domain (*e.g.*, emissions) but not in others (*e.g.*, the production, promotion, and sale of fossil fuels), courts presume that Congress intended not to determine the latter issues. *See Marsh*, 499 F.3d at 181.

While "[e]missions from domestic sources are certainly regulated by the Clean Air Act," the City here has pleaded allegations arising from "the earlier moment of production and sale of fossil fuels" when Defendants sold a harmful product knowing that it would cause local harms when used exactly as intended. *California v. BP P.L.C.*, No. C 17-06011 WHA, 2018 U.S. Dist. LEXIS 32990, at *12 (N.D. Cal. Feb. 27, 2018). The Clean Air Act does not speak directly to that "earlier moment" and so cannot displace the claims the City raised here.

Moreover, as discussed, the particular causes of action asserted in the complaint here do not rest on the claim that Defendants violated any standard of conduct governing emissions. To be sure, emissions by users of fossil fuels form part of the causal chain leading to the City's injury. But the City's claims for compensation are premised on Defendants' decision to manufacture, market, and sell a product that

they knew would cause harm as a result of those emissions. While it is possible that Defendants may elect to adjust their production, promotion, or sales activities in some way in response to a liability finding, that falls far short of establishing that the suit operates as a regulation of emissions that intrudes upon territory covered by the Clean Air Act.

The district court's reliance on the Supreme Court's decision in *AEP II* and the Ninth Circuit's extension of that holding in *Kivalina* ignored the significant differences between the claims presented in those cases and the claims the City has made here. In *AEP II*, the plaintiffs filed "federal common-law public nuisance claims against carbon-dioxide emitters" and sought "a decree setting carbon-dioxide emissions for each defendant at an initial cap, to be further reduced annually." *AEP II*, 564 U.S. at 415. Thus, the Court's holding resolved only claims under federal common law for injunctive relief for carbon emissions. *Id.* at 424. The plaintiffs in *Kivalina* sought damages under federal common law for harms arising from the defendants' own emissions of greenhouse-gas. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 853 (9th Cir. 2012).

Both cases centered on claims that are not present here. Unlike here, the plaintiffs in both cases alleged that the defendants' *emissions* caused them harms. And it makes sense to conclude that Congress spoke directly to the regulation of emissions when it passed the Clean Air Act. As the Supreme Court explained, the Clean Air Act directs the EPA Administrator to regulate greenhouse-gas emissions and provides multiple avenues for enforcement of those emissions regulations that do not involve common-law claims. *AEP II*, 564 U.S. at 424–25. Indeed, it was a "critical point" in the Court's analysis that Congress delegated regulation of carbon-dioxide emissions to EPA. *Id.* at 426. Thus, the Court saw "no room for a parallel track" invoking federal common law. *Id.* at 425; *see also Kivalina*, 696 F.3d at 856. But this case will not create a parallel track on matters regulated by the Clean Air Act. While the Clean Air Act speaks directly to the regulation of emissions, Congress did not delegate authority to EPA over the production, promotion, and sale of fossil fuels. Thus, a "critical point" of the Supreme Court's reasoning in *AEP II* is missing from this case.

The district court mistakenly concluded that *AEP II* and *Kivalina* held that the Clean Air Act displaces not only claims regulating

emissions, but all "claims against energy producers' contributions to global warming and rising sea levels" (SPA18 (quoting *Cty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 937 (N.D. Cal. 2018)).[7] Nothing in the Clean Air Act suggests that Congress spoke directly to every issue related to global warming and its effects. Indeed, the Supreme Court has held that the parallel Clean Water Act lacks the requisite "clear indication of congressional intent to occupy the entire field of pollution remedies" to displace a federal-common-law claim seeking damages. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 488–89 (2008). This case presents an even less-likely candidate for displacement than *Exxon Shipping*, which involved the liability of a direct discharger of pollution. Holding the Clean Air Act to displace the City's claims here would stretch the statutory displacement doctrine well beyond its breaking point.

And while the distinction between remedies may not always matter in itself, sometimes the remedy sought in a particular case helps confirm the nature of the underlying cause of action. Critically, in

[7] To the extent that the Ninth Circuit's decision in *Kivalina* might be read to support such a conclusion, it was wrongly decided.

public-nuisance cases, precedents related to actions for injunctive relief "are by no means interchangeable" with precedents in actions for damages. Restatement (Second) of Torts § 821B cmt. i. This is because the question for injunctive relief is necessarily whether a harm is so unreasonable that it must be stopped or directly curtailed, while some actions for damages instead ask only whether the harm is unreasonable if uncompensated. *Id.* "It may be reasonable to continue an important activity if payment is made for the harm it is causing, but unreasonable to continue it without paying." *Id.*[8] The City here alleges that the severe harms it has suffered from Defendants' products are unreasonable so as to warrant compensation.

The Clean Air Act does not displace nuisance and trespass claims seeking such damages for harms arising from the production, promotion, and sale of fossil fuels. This case is simply too far removed from the ambit of the Clean Air Act to be displaced by that statute. The

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[8] The nature of the remedy that a party seeks cannot be simultaneously a critical point in the displacement analysis and irrelevant to it. Indeed, although the *Kivalina* majority mistakenly ascribed no significance to the remedy, the concurring judge properly recognized that congressional displacement or preemption can turn on whether the claim seeks injunctive relief or damages. *See Kivalina*, 696 F.3d at 857; *id.* at 863 (Pro, J., concurring).

statute does not directly speak to that conduct and there is nothing to suggest a broad congressional intent to displace federal common law in all suits related to global warming. Because the City's claims here do not intrude on the domain Congress staked out in passing the Clean Air Act, the district court erred in finding the claims displaced by statute.

C. Displacement of federal common law does not automatically also preempt related state tort law.

After concluding that the Clean Air Act displaced the City's newly recast federal-common-law claims, the district court erred by not considering whether the City's claims, as originally pleaded under state law, were also preempted by the statute. That is because, when a federal statute displaces federal common law, a state-law claim may still be asserted unless it has been preempted by the statute. *AEP II*, 564 U.S. at 429; *Cty. of San Mateo*, 294 F. Supp. 3d at 937; *see also California v. BP*, 2018 U.S. Dist. LEXIS 32990, at *12.

The Supreme Court applied this principle in *Ouellette*. There, the Court noted that water pollution had been governed by federal common law until that law was displaced by the Clean Water Act. *Ouellette*, 479 U.S. at 488–89. Accepting that the Clean Water Act displaced all

federal common law, the Court then turned to the question of whether and to what extent the statute preempted state law. *Id.* at 489, 491. This analysis compels the conclusion that state-law claims survive the statutory displacement of federal common law.

The Court applied similar logic in *AEP II* when, after holding that the federal-common-law claims were displaced, it left the question of the Clean Air Act's preemptive effect on the state-law claims open on remand. *AEP II*, 564 U.S. at 429. If state-law claims touching areas of federal common law are forever barred by the statutory displacement of the federal common law, this portion of the Court's decision would be inexplicable.[9]

Ignoring the Supreme Court's reasoning in *Ouellette* and *AEP*, the district court thought that it would be "illogical to allow the City to bring state law claims when courts have found that these matters are

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[9] The district court wrongly believed that *AEP II*'s preservation of state common law has no bearing here because the plaintiffs in that case pleaded their alternative state law claims under the law of the source states, whereas the City here pleads under New York law. But, unlike this case against producers, sellers and marketers of products, *AEP* was a case against direct dischargers of federally regulated pollution and thus, under *Ouellette*, the alternative state-law claims in *AEP* had to be pleaded under the law of the source states. *See* 479 U.S. at 500. No similar requirement exists for suits brought against the producers, promoters, and sellers of harmful products.

areas of federal concern" (SPA20). But it is nothing of the kind. The conclusion that the statutory displacement of federal common law allows for state-law claims to proceed makes perfect sense and is in fact the correct result. The standard for preempting state law is higher than that for displacing federal common law, reflecting federalism concerns not present in displacement analysis. *AEP II*, 564 U.S. at 423; *Milwaukee II*, 451 U.S. at 316–17; *In re Complaint of Oswego Barge Corp.*, 664 F.2d 327, 335 (2d Cir. 1981). Permitting statutory displacement of federal common law to extend to state-law claims in the same area would create an end-run around the presumption against preempting state law.

Nor does the conclusion that Congress chose to displace an area of federal common law with the Clean Air Act logically imply that Congress also intended to preempt state law in that domain. *See Merrick v. Diageo Ams. Supply, Inc.*, 805 F.3d 685, 693 (6th Cir. 2015) ("There are fundamental differences, however, between displacement of federal common law by the [Clean Air] Act and preemption of state common law by the Act."). Answering the latter question requires an entirely separate analysis—one the district court skipped.

POINT IV

THE CITY'S CLAIMS DO NOT IMPLICATE SEPARATION OF POWERS OR FOREIGN-POLICY CONCERNS

The district court supported its decision to dismiss the City's complaint with references to misplaced concerns that resolving the City's claims would interfere with the separation of powers (SPA21–23). Drawing on an amalgamation of doctrines, the court held that the City's claims would infringe on foreign-policy decisions, act extraterritorially, transgress the need for judicial caution in expanding federal-common-law liability, and raise political questions (SPA21–23). The district court's skepticism toward the claims here arose from its belief that some entity other than the courts should redress the City's injuries. That belief neither is well-founded nor would warrant dismissal of the City's complaint if it were.

A. Foreign-policy considerations do not displace or preempt the City's claims.

The district court erred by finding that foreign-policy concerns required dismissing the complaint. Such a dismissal is appropriate only where there is "clear conflict" between state law and some concrete statement of U.S. foreign policy, such as an executive agreement with a

foreign state or a federal statute. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 421 (2003) (executive agreement); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372–73 (2000) (statute). No such conflict exists here.

The district court's concerns about foreign policy are entirely misplaced. The district court asserted that the City's "claims implicate countless foreign governments and their laws and policies" and that litigating this suit "would severely infringe upon the foreign-policy decisions that are squarely within the purview of the political branches" (SPA23). But the court never explained how. It never said how treating these five defendants like other product-makers sued in tort would conflict with any foreign-policy decisions by the United States. The court noted that climate change is the subject of international agreements, but it never articulated how a suit for damages between the City and private defendants would pose an obstacle to the accomplishment and execution of those agreements. The relevant agreements—such as the United Nations Framework Convention on Climate Change and the Paris Climate Accords—apply to nations instead of private parties.

This is a far cry from a state law seeking to impose a foreign-affairs approach contrary to one expressly set out by Congress in a statute (as in *Crosby*) or by executive agreements between the president and foreign states (as in *Garamendi*). This is a tort suit brought against companies whose products cause demonstrable harm in New York City. The fact that two of those companies are incorporated in foreign countries does not render them immune from U.S. tort law.

In the end, the district court's reasoning seems to be that because climate change is the subject of ongoing international discussions, any lawsuit related to climate change must conflict with foreign policy. But the existence of international discussions is insufficient to preempt tort law. In fact, courts that have considered the issue have repeatedly held that even direct state regulations of greenhouse gases are not preempted by attempts to negotiate international emissions reductions. *See Green Mt. Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 396–97 (D. Vt. 2007) (holding that foreign-policy preemption did not apply to Vermont regulation of motor-vehicle greenhouse-gas emissions); *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp.

2d 1151, 1183–88 (E.D. Cal. 2007) (same, as to California regulation). There must actually be a clear conflict. Here, there is none.

B. The City's claims do not implicate prudential doctrines limiting the application of U.S. law to conduct abroad.

Even if this Court finds that it was proper to federalize the City's claims, it should reject the district court's reasoning that these claims were barred by the presumption against extraterritorial application of U.S. law or the need for judicial caution in extending or creating federal causes of action. These prudential doctrines have no place here.

The district court made passing reference to the canon of statutory construction known as the presumption against extraterritoriality (SPA 21–22), but did not discuss how that presumption might apply outside the context of construing a federal statute. Indeed, the first step in analyzing this issue is determining "whether the statute gives a clear, affirmative indication that it applies extraterritorially." *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016). This is an incoherent question where there is no statute to consider.

Even assuming the presumption applies here, there is no need to consider whether it is overcome—that is, whether the common-law

claims at issue *could* apply extraterritorially—because the City's claims for the local harms it is suffering simply do not apply extraterritorially. Instead, the "focus" of the City's claims is a "domestic injury." *RJR Nabisco*, 136 S. Ct. at 2106; *see id.* at 2101 n.5 (stating that a court may "in appropriate cases" begin with the "focus" inquiry rather than determining the extraterritorial reach of a law).

In determining whether a claim is extraterritorial, courts must determine whether the claim "touch[es] and concern[s] the territory of the United States." *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108, 124–25 (2013). The first step is to identify the territorial events or relationships that are the focus of the cause of action. *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 267–68 (2010); *Mastafa v. Chevron Corp.*, 770 F.3d 170, 183 (2d Cir. 2014). The next step is to examine the plaintiff's allegations regarding where these events or relationships are located. If, as here, this location is within U.S. territory, the claim has domestic application.

The City's claims are focused on local, domestic injuries and so are not extraterritorial under this standard. Nuisance and trespass are quintessential causes of action focused on particular injuries rather

than the conduct that produced those injuries. Public nuisance is any "unreasonable interference with a right common to the general public." Restatement § 821B. The defendants' liability thus does not turn on the reasonableness or utility of the underlying conduct producing the interference. *Id.* §§ 829A, 826. The same is true of trespass, which is concerned with protecting property from invasion. The City's claims therefore focus on the site of its injuries—within its own local borders—not the site of the conduct giving rise to those injuries.

There is also no bar to the City's claims in the case law calling for judicial caution in creating or extending new federal-common-law causes of action that interfere with foreign policies. In finding to the contrary, the district court relied on *Jesner v. Arab Bank, PLC*, where foreign victims of terrorist acts occurring abroad sued a Jordanian bank under the Alien Tort Statute. 138 S. Ct. 1386 (2018). The Court there expressed reluctance to extend international law in this direction because foreign corporate liability was likely to hamper foreign relations, and indeed had in that particular case. *See Jesner*, 138 S. Ct. at 1406–07.

Here, in contrast, any impact on foreign relations from the City's suit would be purely speculative. Foreign corporations are regularly sued in the United States for injuries that their products cause in the United States. The fact that the harm here arises through the combined effects of Defendants' products when used both domestically and abroad is simply a product of the fact that local environmental harms are caused by conduct affecting the global atmosphere. The district court never identified any concrete way in which this lawsuit would adversely affect U.S. foreign policy on climate change. Indeed, the court's attempt to shoehorn this case into a framework set when construing the Alien Tort Statute—involving a lawsuit by foreign citizens against a foreign company for conduct undertaken entirely outside the United States and arguably implicating foreign governments—shows how far afield the court ventured in seeking grounds to dismiss the City's claims.

C. The City's claims do not present political questions.

In the final paragraph of its opinion, the district court gestured toward the notion that the City's suit may be barred by the political-question doctrine (SPA23–24). The decision is unclear because the court

attempted to distinguish contrary precedent under the political-question doctrine without offering any affirmative statement of why that doctrine might apply. But to the extent the court rested its decision on this doctrine, it again erred.

Indeed, this Court has already rejected the district court's conclusion. In *AEP I* it held that the responsibility for resolution of tort claims touching on climate change rests with the judiciary. 582 F.3d at 325. The Court explained that tort liability for injuries resulting from climate change can be addressed through principled adjudication. *Id.* at 329. In fact, federal courts have "successfully adjudicated complex common law public nuisance cases for over a century." *Id.* at 326. If a suit like *AEP*—where the plaintiffs requested that the district court weigh various harms and benefits in the course of mandating a specific 10-year plan for emissions reductions—does not implicate political questions assigned to the political branches, then the resolution of the state-law tort claim for damages against producers of fossil fuels here surely does not. *See also Comer v. Murphy Oil USA*, 585 F.3d 855, 875, 879 (5th Cir. 2009) (declining to find that state-law tort case alleging that the defendants' fossil fuel emissions caused harms suffered during

Hurricane Katrina presented a political question), *vacated for en banc review*, 598 F.3d 208 (5th Cir. 2010) (*en banc*), *appeal dismissed for failure of quorum*, 607 F.3d 1049 (5th Cir. 2010) (*en banc*).[10]

The district court's repeated statement that climate change is a matter left solely to the political branches of government lacks merit (SPA21, 23). The Supreme Court has been clear that federal courts are not barred from considering "political cases," only "political questions." *Baker v. Carr*, 369 U.S. 186, 217 (1962). Even if a legislative solution were preferable, the federal judiciary is not deprived of the ability to act. *Oneida Indian Nation v. New York*, 691 F.2d 1070, 1083 (2d Cir. 1982). Nor should it be. State-law nuisance and trespass claims offer a means for the City to seek redress for the local injuries it has suffered and continues to suffer.

Finally, the district court seemed to despair because it believed the problem of climate change was simply too large for judicial

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[10] The Fifth Circuit regards the 2009 panel opinion in *Comer* as good law notwithstanding the procedural vacatur. *See Servicios Azucareros de Venezuela, C.A. v. John Deere Thibodeaux, Inc.*, 702 F.3d 794, 800 (5th Cir. 2012). And regardless of the subsequent procedural history, the panel's reasoning remains persuasive authority, particularly where the Fifth Circuit has never repudiated that reasoning.

resolution (SPA14, 20–21, 23). Nor is it the only district court to have done so. *See City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1026 (N.D. Cal. 2018). But judicial surrender on viable claims is not permitted. "The defendants point to the scale of the wrong alleged and the size of the remedy sought as rendering the claims nonjusticiable.… Yet we know of no principle of law that would relate the availability of judicial relief inversely to the gravity of the wrong sought to be redressed." *Oneida Indian Nation*, 691 F.2d at 1083.

Contrary to the district court's recasting of the City's complaint, the City is not attempting to implement a "comprehensive solution" to climate change. Nor is it seeking anything that would interfere with such a solution that may be put forward by Congress or the President. The City is asking nothing more than that Defendants pay the costs of addressing the harms that their products cause when used as intended. A court can consider those claims and should be permitted the opportunity to do so here.

CONCLUSION

This Court should reverse the district court's judgment dismissing the complaint.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word 2010, and according to that software, it contains 13,395 words, not including the table of contents, table of authorities, this certificate, and the cover.

/s/
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