18-2188

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

CITY OF NEW YORK,

Plaintiff-Appellant,

v.

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

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF THE NATIONAL LEAGUE OF CITIES; THE U.S. CONFERENCE OF MAYORS; AND THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1, the National League of Cities, the U.S. Conference of Mayors and the International Municipal Lawyers Association ("Local Government Amici"), by and through their undersigned attorney, hereby certify that they each have no parent corporation and that no publicly held corporation owns 10% or more of any of their stock.

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STATEMENT OF IDENTIFICATION[1]

Local Government Amici comprises three of the nation's leading local government associations. The National League of Cities (NLC) is the oldest and largest organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. Working in partnership with forty-nine State municipal leagues, NLC serves as a national advocate for more than 19,000 cities and towns, representing more than 218 million Americans. Its Sustainable Cities Institute serves as a resource hub for climate change mitigation and adaptation for cities. The U.S. Conference of Mayors (USCM) is the official non-partisan organization of U.S. cities with a population of more than 30,000 people (approximately 1,400 cities in total). USCM is home to the Mayors Climate Protection Center, formed to assist with implementation of the Mayors Climate Protection Agreement. The International Municipal Lawyers Association (IMLA) is a nonprofit, nonpartisan professional organization consisting of more than 2,500 members. The membership is composed of local government entities, including cities and counties, and

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E) and Local Rule 29.1(b), *amici* states that no party's counsel authored this brief, and no party, party's counsel, or person other than *amici* or its members or counsel contributed financial support intended to fund the preparation or submission of this brief.

subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts.

Over eighty percent of Americans now live in urban areas, and even more of them work there; as a consequence, Local Government Amici's members are responsible for understanding the risks to and planning for the wellbeing of the great majority of Americans. The concentration of people, activity, and infrastructure in cities makes them uniquely valuable economically. It also serves to compound the adverse impacts of a host of climatic changes, including sea level rise; increasingly frequent and severe storms that pose immediate threats to human life and critical infrastructure; damaged and disappearing coastlines; degraded ecosystems and reduced ecosystem services function; increases in heat-related deaths; poor air quality and exacerbated health problems; longer droughts that combine with increased temperatures and water evaporation rates to strain water supplies; and heightened wildfire risk. *See* S.L. Cutter, et al., *Ch. 11: Urban Systems, Infrastructure, and Vulnerability* in Climate Change Impacts in the United States: The Third National Climate Assessment 283 (J. M. Melillo, Terese (T.C.) Richmond, and G. W. Yohe, eds. 2014).

Local Government Amici have an interest in the Court's proper recognition of the existence and availability of state common law claims for climate change impacts. The district court's conversion of Plaintiff's state common law claims to federal common law claims and the subsequent dismissal of those converted federal common law claims threatens to intrude upon municipal governments' authority, within our federalist system, to rely on state law to seek redress for harms that, in a contemporary world defined by complex economic and environmental systems that transcend multiple borders, arise in significant part beyond their jurisdictions but nonetheless have highly localized impacts.

Local Government Amici file this brief pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, and all parties to the appeal have consented to the filing of this brief.

BACKGROUND

State common law public nuisance and tort claims provide an important means for cities and local governments to seek damages for localized harms arising from activities that cross jurisdictional boundaries as well as justice for their residents suffering those harms, including their most vulnerable populations. Cities have long employed common law public nuisance to address conduct offensive to the community, from environmental pollution to red light districts, as an exercise of their inherent and reserved police power. *See* William L. Prosser, *Private Action for*

Public Nuisance, 52 Va. L. Rev. 997 (1966) (tracing the history of public nuisance). As the New York Court of Appeals noted some 80 years ago:

> "[W]here the public health is involved, the right of the town to bring such an action to restrain a public nuisance may be tantamount to its right of survival. In permitting the creation of such local subdivisions, the Legislature obviously conferred upon them the right to protect their own existence, and it is clear that a public nuisance which injures the health of the citizens of a municipality imperils the very existence of that municipality as a governmental unit. The right to exist necessarily implies the right to take such steps as are essential to protect existence."

N.Y. Trap Rock Corp. v. Town of Clarkstown, 299 N.Y. 77, 84, 85 N.E.2d 873, 877-78 (1949). In this long history courts have always played a crucial role, balancing competing interests to determine where there has been an "unreasonable interference" with a public right. State and federal legislation addressing particular social problems has undoubtedly reduced the domain of public nuisance, but it has not eliminated it. Indeed, public nuisance continues to play a vital role for cities, offering an opportunity to fill the gaps left by statutes and allowing cities to play a *parens patriae*-like role on behalf of their residents.

Cities' use of state common law claims to address cross-jurisdictional issues began more than three decades ago, when cities joined state attorneys general litigating asbestos and tobacco claims.[2] *See* Sarah L. Swan, *Plaintiff Cities*, 71 Vand.

[2] New York City, San Francisco, and Los Angeles, along with Cook County, Illinois, and Erie County, New York, all joined the 1998 Master Settlement

L. Rev. 1227, 1233 (2017). In the mid-1990s, cities again sought to protect their residents by suing the gun industry, invoking state public nuisance. *See, e.g.*, *City of Gary v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1227 (Ind. 2003) (upholding public nuisance claim); *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1142 (Ohio 2002) (upholding public nuisance claim); *White v. Smith & Wesson Corp.*, 97 F. Supp. 2d 816, 829 (N.D. Ohio 2000) (allowing public nuisance claim). Another decade later, cities pursued litigation to abate the harms caused by the gasoline additive MTBE and lead paint. *See, e.g.*, *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 725 F.3d 65, 121 (2d Cir. 2013); *People v. ConAgra Grocery Prod. Co.*, 227 Cal. Rptr. 3d 499, 598 (Ct. App. 2017), *reh'g denied* (Dec. 6, 2017), *review denied* (Feb. 14, 2018), *cert. denied sub nom. ConAgra Grocery Prod. Co. v. California*, 2018 WL 3477388 (U.S. Oct. 15, 2018), and *cert. denied sub nom. Sherwin-Williams Co. v. California*, 2018 WL 3477401 (U.S. Oct. 15, 2018); *City of Milwaukee v. NL Indus.*, 762 N.W.2d 757, 770 (Wis. Ct. App. 2008); *State v. Lead Indus., Ass'n, Inc.*, 951 A.2d 428, 458 (R.I. 2008); *In re Lead Paint Litig.*, 924 A.2d 484, 503 (2007); *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 116 (Mo. 2007); *City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d

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Agreement. *See* Nat'l Ass'n of Attorneys Gen., Master Settlement Agreement, exh. N, at http://www.naag.org/assets/redesign/files/msa-tobacco/MSA.pdf (last visited Nov. 14, 2018).

126, 140 (Ill. App. Ct. 2005). In recent years, cities have brought state public nuisance claims against financial institutions for the consequences of the subprime mortgage crisis, claims against pharmaceutical companies to help carry the costs needed to address the opioid epidemic, and claims against Monsanto to compensate for harms from PCB contamination. *See, e.g.*, *In re: National Prescription Opiate Litigation*, 1:17-MD-2804 (N.D. Ohio Dec. 8, 2017); *In re Opioid Litig.*, 2018 NY Slip Op 31228(U) (N.Y. Sup. Ct. June 18, 2018); *Cleveland v Ameriquest*, 621 F. Supp. 2d 513, 536 (N.D. Ohio 2009); *Abbatiello v. Monsanto Co.*, 522 F. Supp. 2d 524, 541 (S.D.N.Y. 2007).

All of these cases involved claims under state common law, and *none* of them saw a state common law claim judicially converted into a federal common law claim, much less converted into a federal common law claim to be summarily dismissed with allusion to separation of powers principles. The district court's disposition below on these grounds is almost unprecedented. In fact, the only decision to come out the same way was the recent decision in *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1028 (N.D. Cal. 2018), *appeal docketed*, *City of Oakland v. BP, P.L.C.*, No. 18-16663 (9th Cir. Sept. 4, 2018), another outlier from an otherwise consistent body of jurisprudence.

The district court's decision warrants reversal. As Plaintiff-Appellant New York City argues in its brief, this is a case against product manufacturers that sounds

in nuisance and trespass under state law and, in light of those manufacturers' conduct, seeks to recover costs expended by the City to address foreseeable harms suffered as a result of the intended use of their products. It is indistinguishable from a solid body of case law allowing such claims to be raised against national and international manufacturers and retailers of numerous products, which are subject to multiple layers of regulation, and which also used as intended but produced significant harms nonetheless. There are no "uniquely federal interests" at stake in this case. This is not a case about regulating greenhouse gas emissions in other states, or controlling federal fossil fuel leasing programs on public lands, or dictating foreign governments' climate policies or energy regimes. This case raises a textbook nuisance claim, seeking to allocate fairly a portion of the significant costs required to protect city residents from harms inflicted by Defendants' products. Moreover, even if uniform adjudication of the financial burdens cities bear for climate change adaptation measures might be desirable, it is not necessary. Moreover, where a federal common law claim might lie its displacement by federal legislation revives the parallel state claim.

ARGUMENT

I. THERE ARE NO "UNIQUELY FEDERAL INTERESTS" AT STAKE IN THIS CASE SUFFICIENT TO REQUIRE CONVERSION OF PLAINTIFF'S STATE LAW CLAIMS INTO FEDERAL LAW CLAIMS

The district court wrongly concluded that, because of the transboundary nature of anthropogenic climate change, there are "uniquely federal interests" at issue in this case, requiring that the nuisance and trespass claims be treated solely as a matter of federal law. Yet the Supreme Court has described cases involving such "uniquely federal interests" as those "narrow areas [that are] . . . 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., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (citation omitted). As the City persuasively argues in its brief, this case invokes none of those concerns.

The district court's reasoning poses a risk to cities across the country. If endorsed, the district court's reasoning could empower federal common law to hold domain over a broad swath of policy areas subverting cities' and other local governments' ability to rely on traditional legal tools to pursue remedies for environmental harms, among other things.

This potential outcome is especially worrisome in the context of climate change. Climate change directly impacts subnational governmental interests. *See*

e.g., N.Y. Community Risk and Resiliency Act, Assemb. B. A6558A; S.B. S6617A 2014 N.Y. Sess. Laws Ch. 355 (S. 6617-B) (McKinney) 335 (requiring that state environmental agency adopt science-based sea-level rise projections into regulation and that applicants for permits or funding in a number of specified programs demonstrate that future physical climate risk due to sea-level rise, storm surge and flooding have been considered); Cal. Health & Safety Code § 38501(2017) (finding that greenhouse gas emissions are degrading the State's air quality, reducing the quantity and quality of available water, increasing risks to public health, damaging the State's natural environment and causing sea levels to rise). As a result, States have taken a wide array of actions to combat climate change, including adopting adaptation or resilience plans. These efforts require the expenditure of significant funds and use of public resources. *See* Center for Climate and Energy Solutions, State Climate Policy Maps, https://www.c2es.org/content/state-climate-policy/ (last visited Nov. 14, 2018).

Cities have also been at the forefront of climate action. At last count, 1,060 mayors have joined the U.S. Conference of Mayors' Climate Protection Agreement. Some 280 cities and counties have joined the "We Are Still In" coalition, a group of more than 3,600 mayors, county executives, governors, tribal leaders, college and university leaders, businesses, faith groups, and investors who have committed to take action consistent with the United States' Paris Agreement

commitments. National and transnational peer networks such as Climate Mayors, Carbon Neutral Cities Alliance, C40, and ICLEI – Local Governments for Sustainability have been formed to provide cities, city political leaders, and city agency staff with support and capacity to take on climate change challenges.

Importantly, courts have routinely upheld subnational climate actions in the face of challenges that they interfere with national interests or priorities. *See, e.g.*, *Electric Power Supply Association v. Star*, 904 F.3d 518 (7th Cir. 2018) (upholding Illinois promoting zero-carbon energy sources against dormant commerce cause and preemption by the Federal Power Act); *Coal. for Competitive Elec. v. Zibelman*, 272 F. Supp. 3d 554, 559 (S.D.N.Y. 2017) (holding New York State program promoting zero-carbon energy sources did not violate dormant commerce cause), *aff'd* 906 F.3d 41 (2d Cir. 2018); *Energy and Env't Legal Inst. v. Epel*, 43 F. Supp. 3d 1171 (D. Colo. 2014) (finding Colorado renewable energy mandate did not violate dormant commerce clause); *Rocky Mtn. Farmers v. Corey*, 730 F.3d 1070, 1106–07 (9th Cir. 2013) (upholding California's low carbon fuel standard against dormant commerce clause challenge). *But cf. Columbia Pac. Bldg. Trades Council v. City of Portland*, 412 P.3d 258 (Or. Ct. App. 2018) (holding zoning ordinance banning new and expanded fossil fuel export terminals did not violate dormant commerce clause but not reaching whether reducing greenhouse gasses is a legitimate local interest due to other interests supporting city's decision).

This consistent treatment by the courts of state and local efforts affirms that global climate change is also a local problem, requiring local solutions. As discussed in Part II below, courts have also, until now, upheld the availability of state law claims for climate harms. This Court should put this case back in line with previous cases.

II. THE DISPLACEMENT OF A FEDERAL COMMON LAW CAUSE OF ACTION FOR NUISANCE REQUIRES THE STATE LAW CAUSE OF ACTION BE TREATED ON ITS OWN TERMS

As the City argues in its brief, the district court erred in dismissing the complaint based on its holding that the judicially invented federal common law claims were displaced by the Clean Air Act, to the extent they sought redress for domestic activities, and barred by separation of powers principles, to the extent they sought redress for activities in other countries. With respect to separation of powers, it bears noting that the two U.S. Courts of Appeals that have addressed the justiciability issue directly, including this Court, have held that there is nothing non-justiciable about federal common law claims relating to climate change. *Comer v. Murphy Oil USA*, 585 F.3d 855, 860 (5th Cir. 2009) (*Comer I*) *petition for writ of mandamus denied sub nom. In re Comer*, 562 U.S. 1133 (2011); *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009), *rev'd on other grounds*, *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011) (*AEP*).

However, the court's error regarding the relationship between displacement and the viability of state common law claims is of even greater concern to Local Government Amici. The Supreme Court, as all parties to the present litigation acknowledge, directly addressed the displacement of federal public nuisance in *AEP*, explaining that "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement" of GHG emissions. 564 U.S. at 424. The Ninth Circuit, following this precedent, held "if a cause of action is displaced, displacement is extended to all remedies," including damages. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 857 (9th Cir. 2012) (*Kivalina*). Neither *AEP* nor *Kivalina* foreclosed a public nuisance claim based on state law.

Indeed, they did just the opposite. Until the district court's decision below (and the similarly flawed decision in *City of Oakland*) every court thamerat examined the viability of state-based nuisance and tort claims for climate change concluded that state law claims survived displacement of federal law claims. *See Cty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal. 2018). The Supreme Court's express view is that the existence of a federal common law claim that has been displaced by federal legislation does *not* erase the possibility of state common law claims; rather, it converts the availability of state claims into a question of statutory preemption. *See City of Milwaukee v. Illinois*, 451 U.S. 304, 327-329 (1981); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987). Accordingly, in her

opinion for a unanimous court in *AEP*, Justice Ginsburg wrote, "In light of our holding that the Clean Air Act displaces federal common law, the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act." *AEP*, 564 U.S. at 429. *See also Merrick v. Diageo Ams. Supply, Inc.*, 805 F.3d 685, 690 (6th Cir. 2015) and *Little v. Louisville Gas & Elec. Co.*, 805 F.3d 695, 698 (6th Cir. 2015) (state common law nuisance for interstate pollution not preempted by Clean Air Act).

The Ninth Circuit's decision in *Kivalina* further supports proceeding on state law claims in this case. Discussing the supplemental state law claims filed there, the Ninth Circuit panel noted that the district court had declined to exercise supplemental jurisdiction and dismissed the claim without prejudice to re-file in state court. 696 F.3d at 854-55. *See also Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 882 (N.D. Cal. 2009) (stating that a federal court "may decline to exercise supplemental jurisdiction over a claim if it has dismissed all claims over which it has original jurisdiction"), *aff'd* 696 F.3d 849, 857 (9th Cir. 2012); *California v. General Motors Corp.*, No. 06-cv-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007) (dismissing federal climate change nuisance claim on political questions grounds and declining to exercise jurisdiction over pendent state nuisance claim). The concurrence in *Kivalina* stated unequivocally that "[d]isplacement of the federal common law does not leave those injured by air pollution without a remedy,"

and suggested state nuisance law as "an available option to the extent it is not preempted by federal law." 696 F.3d at 866 (Pro, J., concurring). Here, as New York City argues, there can be no such preemption because federal law does not address, and therefore could not preempt, climate change adaptation damages. Regardless, the preemption analysis is the appropriate way to address the viability of the claim, and not the district court's magically erasing it.

The Supreme Court jurisprudence, echoed by the Ninth Circuit and the district courts in California, is also consistent with the Fifth Circuit's 2009 decision in *Comer I*, 585 F.3d 855, and decision in the second *Comer v. Murphy Oil USA, Inc.* 718 F.3d 460 (5th Cir. 2013) (*Comer II*). In *Comer I*, plaintiffs seeking damages for injuries suffered as a result of Hurricane Katrina had invoked federal jurisdiction based on diversity. The Fifth Circuit found that a diversity suit brought under state common law for damages was materially distinguishable from public nuisance claims brought under federal common law and sustained the claims. 585 F.3d at 878-79. The Fifth Circuit upheld dismissal of the largely identical complaint filed in *Comer II* on *res judicata* grounds. 718 F.3d at 468-69.

The weight of this precedent is overwhelming, and the district court's opinion is at odds with it. As New York City argues in its brief, the district court appears to have misunderstood the City's allegations, and on that basis, converted state law claims challenging one set of behaviors—production, marketing, and sale of a

product—into a federal law claim challenging another set of behaviors—combustion of the product and emission of greenhouse gases. This Court should correct that error. But even if this court were to accept the district court's determination that there is a federal common law claim that could apply in this context, its displacement would demand the state law claim be heard on its own terms.

CONCLUSION

For the foregoing reasons, Local Government Amici urge this Court to reverse the district court's Opinion and Order and remand the case for further proceedings.

Dated: November 15, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Second Circuit Rules 29.1(c) and 32.1(a)(4) and Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7) because this brief contains 3,332 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

Dated: November 15, 2018

s/ Michael Burger
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Counsel for Amici Curiae