UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CITY OF NEW YORK, **Plaintiff,** **v.** **BP P.L.C.; CHEVRON CORPORATION; CONOCOPHILLIPS; EXXON MOBIL CORPORATION; and ROYAL DUTCH SHELL PLC,** **Defendants.**	**No. 18-cv-182-JFK**

AMICUS CURIAE BRIEF OF THE STATES OF NEW YORK, CALIFORNIA, NEW JERSEY AND WASHINGTON IN SUPPORT OF PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

INTRODUCTION

Defendants Chevron Corporation, ConocoPhillips, and Exxon Mobil Corporation (together, Chevron) have moved to dismiss New York City's action for damages resulting from the production, marketing, and sale of oil and gas. The States of New York, California, New Jersey and Washington (Amici States) respectfully submit this amicus brief in support of the City's opposition to Chevron's motion, and in particular to respond to arguments made in the amicus brief filed by the State of Indiana and other States (together, Indiana) (Dkt. No. 123-1).

First, directly applicable Second Circuit precedent squarely forecloses Indiana's argument that the City's claims are non-justiciable under the political question doctrine. In *Connecticut v. American Electric Power Co.*, 582 F.3d 309, 332 (2d Cir. 2009), *reversed on other grounds*, 564 U.S. 410 (2011), the Second Circuit held that common-law public-nuisance claims to recover for climate change harms did not present non-justiciable political questions because courts are well-equipped to adjudicate such claims under judicially discoverable and manageable standards, without intruding on policy determinations dedicated to other branches of government. Further, Indiana's alternative theory that the

City's claims are non-justiciable because they would jeopardize cooperative-federalism schemes is a reworking of its political question argument and is foreclosed for the same reasons. In any event, Indiana is simply wrong that there is any conflict between the City's public-nuisance claims and various cooperative-federalism programs.

Second, Indiana argues that the Clean Air Act and other federal laws displace federal common-law claims made by the City under the Supreme Court's ruling in *Connecticut v. American Electric Power Co*. But the City brought its claims under state common law, not federal common law, and the Supreme Court in *AEP* expressly declined to rule on the availability of such claims. In any event, even if the City were bringing only federal common-law claims, there would be no displacement under *AEP*. That case found displacement only because federal law authorized regulation of the same emissions from the same power plants that were the subject of plaintiffs' federal common-law public-nuisance claims. Here, by contrast, no federal law provides for the relief that the City seeks to obtain against the defendants for their production and sale of fossil fuels.

Finally, Indiana argues that the relief requested by the City would constitute extraterritorial regulation in violation of the dormant

Commerce Clause. But the dormant Commerce Clause applies only to state and local laws, not to judicial relief ordered by a federal court. And federal courts have repeatedly granted relief to abate public nuisances when out-of-state conduct causes in-state harm—the precise situation giving rise to the City's state common-law claims here.

ARGUMENT

POINT I

THE CITY'S CLAIMS ARE JUSTICIABLE

A. The City's Claims Do Not Present a Non-Justiciable Political Question.

Indiana argues that the City's common-law public-nuisance claims present a political question under *Baker v. Carr*, 369 U.S. 186 (1962), because the claims are not governed by "judicially discoverable and manageable standards" but instead by "policy determination[s] of a kind clearly for non-judicial discretion." Indiana Br. 4 (quoting *Baker*, 369 U.S. at 217). The Second Circuit's ruling in *Connecticut v. American Electric Power Co.*, 582 F.3d 309, squarely forecloses this argument.[1]

[1] Given the Second Circuit's precedent, the three district court decisions cited by Indiana are inapposite. See Indiana Br. 3 (discussing *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F.Supp.2d 863 (N.D. Cal. 2009), *aff'd on other grounds*, 696 F.3d 849 (9th Cir. 2012); *California v. Gen. Motors Corp.*, No. 06-cv-05755-MJJ, 2007 WL 2726871 at *6, *16

In *American Electric Power Co.*, eight States—including Amici States New York, California and New Jersey—and the City of New York (together, AEP States) brought a public-nuisance action in this Court against the five largest power companies in the United States, claiming that emissions of greenhouse gases from the defendants' power plants had harmed the States by contributing to climate change and seeking injunctive relief reducing those emissions. 582 F.3d at 316-17. The climate-change injuries for which the AEP States sought relief included many of the same injuries for which the City seeks damages here, including impacts on public health as a result of prolonged heat waves and damage to coastal infrastructure caused by sea-level rise. *See id.* at 317-18; Amended Complaint (Dkt. No. 80), ¶¶ 133-34. Several land trusts brought similar claims and the two actions were heard together.

The defendants argued in the Second Circuit, as Indiana does here, that the AEP States' and land trusts' public-nuisance claims should be dismissed as non-justiciable under the political question doctrine because they were not governed by "judicially discoverable and manageable

(N.D. Cal. Sept. 17, 2007); and *Comer v. Murphy Oil USA, Inc.*, No. 05-cv-436-LG, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007) (unpublished ruling), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010)).

standards," *Baker*, 369 U.S. at 217. The Second Circuit rejected that argument, 582 F.3d at 321-22, and an equally divided Supreme Court affirmed that ruling.[2] 564 U.S. at 420 & n.6, 426-29.

Specifically, the Second Circuit found "that federal courts have successfully adjudicated complex common law public nuisance cases for over a century" based on "a long line of federal common law of nuisance cases where federal courts employed familiar public nuisance precepts, grappled with complex scientific evidence, and resolved the issues presented, based on a fully developed record." 582 F.3d at 326, 327.

The Second Circuit also ruled that the States and land trusts were not required to "wait for the political branches to craft a 'comprehensive' global solution to global warming" before seeking relief under common law. *Id.* at 331. Indiana's arguments here essentially reflect the same political-question arguments already rejected by the Second Circuit. *See* Indiana Br. 5. The City's claims thus should not be dismissed on that ground.

[2] The Court also ruled that the plaintiffs' *federal* common-law claims had been displaced by the Clean Air Act. 564 U.S. at 424. As explained below, see *infra* Point II, that ruling does not affect the City's *state* common-law claims.

B. The City's Claims Do Not Jeopardize Cooperative Federalism.

Indiana also argues that the City's claims are not justiciable because they "jeopardize our national system of cooperative federalism." Indiana Br. 5 (section heading). Indiana cites no decisions finding a case non-justiciable on this ground and its contention appears to be merely a reworking of its political-question argument—the brief states repeatedly that the City's claims involve "political" and "policy" considerations. Indiana Br. 5, 6, 9, 11, 12, 13. The Second Circuit's decision in *American Electric Power Co.* thus forecloses this version of the political-question argument as well.

In any event, the premise of Indiana's argument is incorrect because the City's claims simply do not jeopardize or conflict with any of the laws, regional initiatives, or treaties that Indiana discusses. For example, Indiana identifies as an example of cooperative federalism the Clean Air Act's requirement that EPA establish "National Ambient Air Quality Standards" that the States then implement. Indiana Br. 6. But there is no National Ambient Air Quality Standard for greenhouse gases. The City's lawsuit cannot possibly interfere with any State's implementation of a nonexistent federal standard.

Indiana also discusses regional initiatives that establish cap-and-trade programs to lower greenhouse gas emissions. Indiana Br. 7. These initiatives, in which several of the Amici States participate—New York and New Jersey in the Regional Greenhouse Gas Initiative[3] and California in the Western Climate Initiative[4]—are implemented by the participating States solely pursuant to state law and regulations and are thus not examples of programs "where the federal government creates federal standards and leaves the implementation to the States" (Indiana Br. 6).[5] In any event, the City's claims against oil and gas producers cannot interfere with these regional initiatives, which apply only to emitters of greenhouse gases such as power plants.

The same is true of many other programs discussed in Indiana's brief, including New York's and Virginia's commitments to shift from nonrenewable sources of electricity (like fossil fuels) to renewable sources (Indiana Br. 8), which do not conflict with the City's claims about the harms caused by the use of fossil fuels to generate electricity, and certain

[3] *See* https://www.rggi.org (last visited June 8, 2018).

[4] *See* http://www.wci-inc.org (last visited June 8, 2018).

[5] Indiana also discusses the Midwestern Greenhouse Gas Reduction Accord, Indiana Br. 7, but that compact is no longer functional.

international treaties and agreements that, as Indiana makes clear, directly seek to reduce greenhouse gas emissions, rather than addressing the production and sale of oil and gas by fossil fuel companies like the defendants (Indiana Br. 9-11).

Indiana also argues that these international efforts to address climate change "demonstrate the political nature of environmental and fossil fuel regulation and reaffirm the need for such discussions to be the subject of political debate and accountability." Indiana Br. 11. Indiana again overlooks the Second Circuit's decision in *American Electric Power Co.*, which rejected the same argument, holding that a federal court's public-nuisance decision "does not establish a *national* or *international* emissions policy." 582 F.3d. at 325 (emphases in original). The court also explained that, in contrast, "[w]e could envision a political question arising if, for example, Plaintiffs sued the President directly, in an effort to force him to sign international global warming treaties." *Id.* at 325 n.5. The City has brought no such claim here.

Finally, Indiana discusses state and federal programs that promote the development of oil and gas resources and argues that "States and the federal government themselves could be subject to liability if Plaintiff's

claims are permitted to proceed." *See* Indiana Br. 13. But Indiana does not articulate any claim that could be made against States or the federal government based on the City's claims for damages against fossil fuel producers.

Thus, even if there were authority for Indiana's argument that a case could be dismissed as non-justiciable because it jeopardizes cooperative federalism, the City's case does not threaten such interference.

POINT II

THE CITY'S CLAIMS HAVE NOT BEEN DISPLACED BY THE CLEAN AIR ACT OR OTHER FEDERAL STATUTES

Indiana argues that the City makes federal common-law claims that have been displaced by the Clean Air Act and other federal statutes. But the City made clear in its opposition to Chevron's motion to dismiss (Dkt. No. 101, p. 8) that its claims are made under New York common law, not federal common law. The Supreme Court's decision in *AEP* held only that the Clean Air Act displaced certain federal common-law claims against utility defendants, and expressly declined to address whether similar state common-law claims would be available. 564 U.S. at 429. Moreover, it would be a mistake to extend the Supreme Court's reasoning about federal common-law displacement to the City's state common-law

claims; as the Court observed, "[l]egislative displacement of federal common law does not require the 'same sort of evidence of a clear and manifest [congressional] purpose' demanded for preemption of state law." *Id.* at 423.

In any event, even if the City's claims were made under federal common law alone, they would not be displaced because neither the Clean Air Act nor the other federal statutes discussed by Indiana provides a means for the City to obtain the relief that it seeks against the particular defendants it has sued here.

The Supreme Court in *AEP* found displacement because the plaintiffs' federal public-nuisance claims there sought to abate *emissions* of greenhouse gases from power plants—the "same relief," against the same companies, that the Clean Air Act already authorized. *Id.* at 425. Here, by contrast, the City seeks relief for injuries from the production and sale of oil and gas by fossil fuel companies—activities that the Clean Air Act does not regulate. The Clean Air Act thus would not displace the City's claims, even if they were brought solely under federal common law.

Indiana also argues that the City's claims are displaced by other federal statutes, Indiana Br. 14-15, but again those statutes would not

displace a federal common-law claim because they do not provide a means for the City to obtain relief for the injuries it has suffered from fossil fuel companies as a result of their production, marketing, and sale of oil and gas.

POINT III

THE RELIEF SOUGHT BY THE CITY DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE

Indiana argues that the remedy sought by the City would constitute extraterritorial regulation in violation of the dormant Commerce Clause. Indiana Br. 15-19. But the dormant Commerce Clause does not restrict the rights of the City, or any plaintiff, to seek judicial relief to redress injuries nor does it have any application to the power of federal courts to order appropriate remedies in cases before them. Instead, it "precludes the application of a *state statute* to commerce that takes place wholly outside of the State's borders." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989) (emphasis added; internal quotation marks and citations omitted). While Indiana argues that the dormant Commerce Clause should apply in common-law actions, none of the decisions it cites apply the dormant Commerce Clause to court-ordered remedies. *See La. Pub. Serv. Comm'n v. Tex. & N.O.R. Co.*, 284 U.S. 125 (1931) (not discussing the dormant

Commerce Clause, and holding only that Congress has the authority to set interstate shipping rates); *Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660, 662 (7th Cir. 2010) (invalidating state statute under the dormant Commerce Clause); *North Dakota v. Heydinger*, 825 F.3d 912, 922 (8th Cir. 2016) (invalidating state statute).

The only case cited by Indiana that even involves court-ordered relief is *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), where the Supreme Court reversed as grossly excessive an Alabama court's award of two million dollars in punitive damages against BMW for failure to disclose that a car had been repaired. That ruling was based on the Due Process Clause of the Fourteenth Amendment, not the Commerce Clause. 517 U.S. at 568. While the Court also observed that the Alabama court could not "punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents," *id.* at 572-73, New York City does not seek *any* punitive damages. Instead, it seeks compensatory damages under New York common law for defendants' conduct that directly injures New York City and its residents. Amended Complaint, pp. 73-74.

Indiana's argument that the dormant Commerce Clause prohibits

the relief that the City seeks here is also foreclosed by the long line of public-nuisance cases on which the Second Circuit relied when it rejected the defendants' political-question argument in *American Electric Power Co.* *See* 582 F.3d at 326-27. All of those cases involved claims by States or local governments for relief from out-of-state conduct that created an in-state public nuisance and would have been foreclosed if, as Indiana argues, the dormant Commerce Clause prohibits a federal court from awarding relief for out-of-state conduct that has impacts within a plaintiff's jurisdiction. *See Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) (sewage discharge in Milwaukee that entered Illinois constituted public nuisance); *New Jersey v. City of New York*, 283 U.S. 473 (1931) (New Jersey sought to enjoin New York from dumping garbage into the ocean, polluting New Jersey beaches and water); *North Dakota v. Minnesota*, 263 U.S. 365 (1923) (North Dakota sought to enjoin, as public nuisance, a Minnesota irrigation project that contributed to flooding of North Dakota farmland); *New York v. New Jersey*, 256 U.S. 296 (1921) (New York sought to enjoin sewage discharge into boundary waters that caused pollution); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907) (Georgia alleged that emissions from out-of-state plants were destroying

forests, orchards, and crops in Georgia); *Missouri v. Illinois*, 180 U.S. 208 (1901) (public nuisance suit by Missouri seeking to prevent sewage discharge into a channel that emptied into the Mississippi River above St. Louis).

Thus, the dormant Commerce Clause does not apply to the City's request for relief in this action.

CONCLUSION

For the foregoing reasons, the Amici States respectfully urge the Court to deny Chevron's motion to dismiss.

Dated: June 11, 2018

Respectfully submitted,

BARBARA D. UNDERWOOD
Attorney General of New York

By: /s/ *Max Shterngel*
Max Shterngel
Assistant Attorney General
Monica Wagner
Deputy Bureau Chief
Gavin G. McCabe (*pro hac* to be filed)
Special Assistant Attorney General
Environmental Protection Bureau
28 Liberty Street
New York, New York 10005
(212) 416-6692
max.shterngel@ag.ny.gov
monica.wagner@ag.ny.gov
gavin.mccabe@ag.ny.gov

ADDITIONAL COUNSEL

XAVIER BECERRA
Attorney General
State of California
Office of the Attorney General
1300 I Street
Sacramento, CA 94244

GURBIR S. GREWAL
Attorney General
State of New Jersey
Office of the Attorney General
Division of Law, Environmental Practice Group
R.J. Hughes Justice Complex
25 Market Street
P.O. Box 093
Trenton, NJ 08625

ROBERT W. FERGUSON
Attorney General
State of Washington
800 Fifth Avenue
Suite 2000
Seattle, WA 98104