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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CITY OF OAKLAND, a Municipal Corporation, and THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Oakland City Attorney BARBARA J. PARKER, Plaintiffs, **v.** **B.P. P.L.C., *ET AL.*,** Defendants	First Filed Case: No. 3:17-cv-6011-WHA Related Case: No. 3:17-cv-0612-WHA **STATES' MOTION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS** Date: May 24, 2018 Time: 8:00 a.m. Courtroom: 12, 19th Floor Judge: Hon. William H. Alsup

CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, and THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the San Francisco City Attorney, DENNIS J. HERRERA, Plaintiffs, **v.** **B.P., P.L.C., et al.,** Defendants

The States of California, New Jersey and Washington ("Amici States"), respectfully move for leave to file an amicus curiae brief in support of the Plaintiffs' anticipated opposition to Defendants' Motion to Dismiss pursuant to this Court's Notice of April 17, 2018. ECF No. 209. A copy of the proposed brief is attached as Exhibit A hereto. Plaintiffs have consented to the filing of this motion. Defendants have been notified on May 3, 2018 of the Amici States intent to file this motion. BP P.L.C.'s counsel responded that while his client does not consider itself a party and thus is not in a position to consent, BP P.L.C. does not object to this motion. The other Defendants have not responded as of the time of this filing.

INTEREST OF THE AMICI STATES

Amici States have a longstanding and continuing interest in the application of the common law of public nuisance to the issue of climate change. California and New Jersey brought state and federal common law public nuisance claims against several major electric utilities based on their contribution to climate change and litigated their claims to the United States Supreme Court. *See American Electric Power v. Connecticut*, 564 U.S. 410 (2011). In addition, Amicus California brought state and federal common law public nuisance claims against the six largest global automobile manufacturers based on their contribution to climate change. *See California v. General Motors Corp.*, No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007).

Further, Amici States have an interest in the protection of the health and welfare of their residents and the environment, which are profoundly threatened by climate change. To that end,

1 given the interstate and global nature of climate change and its causes, Amici States have a strong
2 interest in the development and application of state and federal common law to abate the harms
3 caused within their jurisdictions by fossil fuels development elsewhere. Seeking abatement of
4 environmental harms caused by conduct outside the states' jurisdiction is a textbook example of
5 common law public nuisance.

6 **POINTS AND AUTHORITIES**

7 "There are no strict prerequisites that must be established prior to qualifying for amicus
8 status; an individual seeking to appear as amicus must merely make a showing that his
9 participation is useful to or otherwise desirable to the court." *In re Roxford Foods Litig.*, 790 F.
10 Supp. 987, 997 (E.D. Cal. 1991) (quoting *United States v. Louisiana*, 751 F. Supp. 608, 620 (E.D.
11 La. 1990)). "District courts frequently welcome amicus briefs from non-parties concerning legal
12 issues that have potential ramifications beyond the parties directly involved or if the amicus has
13 'unique information or perspective that can help the court beyond the help that the lawyers for the
14 parties are able to provide.'" *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 355 F. Supp. 2d
15 1061, 1067 (N.D. Cal. 2005) (citations omitted).

16 Here, the City Plaintiffs' complaints raise legal issues that have potential ramifications
17 beyond their two jurisdictions, as evidenced by other similar pending cases, as well as earlier
18 common law public nuisance cases. Amici States, by virtue of their past work litigating such
19 cases, bring experience and perspective that can assist the court. Finally, Amici States are in a
20 unique position to respond to the arguments made by our fellow States in support of Defendants,
21 because we hold the same place in our federal system of government.

22 **CONCLUSION**

23 For the foregoing reasons, the Amici States respectfully request that the Court grant them
24 leave to file the amicus brief attached as Exhibit A.

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Dated: May 3, 2018

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CITY OF OAKLAND, a Municipal Corporation, and THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Oakland City Attorney BARBARA J. PARKER,

Plaintiffs,

v.

B.P., P.L.C., *ET AL.*,

Defendants

First Filed Case: No. 3:17-cv-6011-WHA

Related Case: No. 3:17-cv-0612-WHA

STATES' AMICUS BRIEF IN SUPPORT OF PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

Date: May 24, 2018
Time: 8:00 a.m.
Dept: 12, 19th Floor
Judge: Honorable William Alsup

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CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, and THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the San Francisco City Attorney, DENNIS J. HERRERA,

Plaintiffs,

v.

B.P., P.L.C., et al.,

Defendants

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INTRODUCTION

The States of California, New Jersey and Washington ("Amici States") respectfully submit this amicus brief in support of the City of Oakland's and the City and County of San Francisco's (together, "Cities" or "Plaintiffs") opposition to Defendants' Motion to Dismiss and to respond to arguments made in the amicus brief filed by the State of Indiana and other states (collectively "Indiana"). ECF No. 224-1 ("Indiana Amicus"). Amici States have a longstanding and continuing interest in the application of the common law of public nuisance, including to address harms from climate change.

In this brief, Amici States focus on a subset of issues where our States are in a position to offer a fuller picture of the case law and relevant statutes and regulations. First, we address Defendants' and Indiana's argument that Plaintiffs' complaints present a non-justiciable political question. Most notably, their argument fails to consider persuasive precedent on this issue, including the Second Circuit's decision in *Connecticut v. American Electric Power*, 582 F.3d 309 (2nd Cir. 2009), reversed on other grounds, 564 U.S. 410 (2011), in which two of our States were parties. Further, we respond to Indiana's argument that Plaintiffs' claims jeopardize our system of cooperative federalism. In fact, Plaintiffs' claims do not threaten the state climate programs Indiana cites—several of which were adopted by our States. On the whole, Defendants' and Indiana's political question arguments are overstated and should be rejected.

Second, Amici States respond to Defendants' and Indiana's invocation of state and federal laws, including California law, in support of an argument that Defendants' conduct was authorized by law. Defendants and Indiana draw an incomplete picture, omitting significant state and federal laws that ban or restrict fossil fuel extraction or seek to reduce demand for those products. That more complete picture of the legal landscape, and a closer look at the laws they do cite, demonstrates that Defendants' and Indiana's arguments fall well short of the legal standard for this defense.

Third, Amici States discuss Defendants' and Indiana's attempts to reargue that the Clean Air Act displaces Plaintiffs' federal common law cause of action. Defendants' and Indiana's briefs fail to add anything that the Court has not already considered and rejected in its Order

Denying Motions to Remand. ECF No. 134. What is new—an argument that other federal energy policy laws displace federal common law—is unavailing.

Finally, we address the argument that Plaintiffs' requested relief would constitute extraterritorial regulation in violation of the dormant Commerce Clause or otherwise violate the Constitution. The argument fails, in the first instance, because the dormant Commerce Clause does not apply to federal common law claims adjudicated by a federal court. Nor do the remedies sought by Plaintiffs, under either state or federal common law, constitute "extraterritorial regulation" either on their face or in their impact.

In focusing on issues where we are in a position to assist the Court, this Amicus Brief does not address several of the additional arguments raised by Defendants or Indiana. Our silence should not be taken as agreement with those arguments. Rather, we urge the court to deny Defendants' motion to dismiss.

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE JUSTICIABLE

Ultimately, the Cities' claims only require this court to adjudicate whether the Defendants may be held liable under the common law of public nuisance for the effects of their conduct on the City of Oakland and the City and County of San Francisco.[1] Such claims do not present a non-justiciable political question. Defendants' and Indiana's arguments for non-justiciability of the Cities' complaints fail to consider persuasive, contrary authority and themselves rest on authority of limited precedential value.

A. The Political Question Doctrine Does Not Bar Climate Change Common Law Public Nuisance Claims Against Private Entities.

In *Connecticut v. American Electric Power Company* ("*AEP*"), eight states including California and New Jersey, as well as other parties sought abatement of the carbon dioxide

[1] While the Cities have authority to bring a public nuisance action in the name of the People of the State of California, that authority does not extend their jurisdiction beyond their municipal or county border. Jurisdiction to bring a "statewide" claim on behalf of the People of the State of California lies with the State. See Cal. Civil Code, § 3494; Cal. Code of Civ. Proc., § 731; see also *People v. Truckee Lumber Co.*, 116 Cal. 397, 402 (1897) (Attorney General may maintain a public nuisance action in the name of the People); *California Oregon Power Co. v. Superior Court of California*, 45 Cal.2d 858, 871 (1955) (same).

emissions of power plant companies that comprised the five largest emitters of this pollution in the United States. The Second Circuit, in a thorough opinion discussed in more detail below, held the states' public nuisance claim did not raise a political question and thus was justiciable. 582 F.3d 309, 321-332 (2d Cir. 2009). Although the United States Supreme Court reversed the Second Circuit on the issue of displacement (discussed in Section III, *infra*), an equally divided Court affirmed that no threshold obstacle, including the political question doctrine, barred review. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 420 n.6 (2011). Thus, the Second Circuit's analysis provides important guidance on this question.[2]

Neither of the cases relied on by Defendants and Indiana requires the Court to find these cases nonjusticiable. In 2007, in an unpublished decision, the district court held that the State of California was prohibited from seeking damages against various automakers for contributing to climate change harms. *People of the State of California v. General Motors Corp.*, No. C06-05755, 2007 WL 2726871 at *16 (N.D. Cal. 2007). As a general matter, unpublished district court decisions are non-precedential. See *United States v. Heuer*, 916 F.2d 1457, 1460, n.1 (9th Cir. 1990) ("The unpublished district court opinion is not binding."); *Hupman v. Cook*, 640 F.2d 497, 501 (4th Cir. 1981) (unpublished district court decision and unpublished appellate court affirmance have no precedential effect); *United States ex rel. Rosales v. San Francisco Hous. Auth.*, 173 F.Supp.2d 987, 1008, n.9 (N.D. Cal. 2001) (declining to consider unpublished district court decisions because the Ninth Circuit "frowns upon citation to unpublished materials."). Further, California appealed the Northern District's ruling to the Ninth Circuit but voluntarily dismissed the appeal in light of an agreement reached by California, the federal government and

[2] Additionally, in *Comer v. Murphy Oil*, 585 F.3d 855, 860 (5th Cir. 2009), the Fifth Circuit similarly held that public and private nuisance, trespass, and negligence claims against oil and energy companies for the harms such as sea level rise caused by climate change were justiciable. Although the district court's contrary ruling, not the Fifth Circuit's, ultimately survived when an *en banc* rehearing of the case was granted but the Fifth Circuit was unable to assemble a quorum to hear the case (*Comer v. Murphy Oil*, 607 F.3d 1049, 1055 (5th Cir. 2010)), the Fifth Circuit's rationale is at least instructive here. Just as the Second Circuit did, the Fifth Circuit rejected the argument that there are no judicially discoverable or manageable standards with which to decide climate change nuisance claims. *Comer*, 585 F.3d at 875. Common law tort rules provided the standards and thus the court found it would not be forced to rely on nonjudicial policy determinations. *Id.*

automakers to establish national greenhouse gas emission standards for vehicles and set stricter corporate average fuel economy standards. Unopposed Motion to Dismiss Appeal, *California v. Gen. Motors Corp.*, No. 07-16908, 2009 WL 1915707 at *3 (9th Cir. 2009). California's dismissal of the appeal was based on external circumstances, not the court's political question analysis.

Similarly, the district court's decision in *Native Village of Kivalina v. ExxonMobil Corp*., 663 F.Supp.2d 863 (N.D. Cal. 2009) ("*Kivalina*") is of limited precedential value here. There, the court held that plaintiffs' public nuisance action presented the court with a non-justiciable political question (*id*. at 883); on appeal, the Ninth Circuit affirmed the lower court's decision pursuant to a different legal theory that this Court has now deemed inapplicable here, displacement under the Clean Air Act. *Native Village of Kivalina v. ExxonMobil Corp.,* 696 F.3d 849, 858 (9th Cir. 2012). In avoiding the political question doctrine, the Ninth Circuit bypassed the jurisdictional issue (*see Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 980 (9th Cir. 2007)) and instead addressed the merits of the case, leaving the persuasive value of the district court's political question analysis in substantial doubt. *See Aloe Vera of America, Inc. v. United States*, 580 F.3d 867, 871 (9th Cir. 2009) (holding "jurisdictional questions must be decided prior to reaching the merits of a case….").

Therefore, this Court should analyze Defendants' and Indiana's political question arguments under the reasoning of the Second and Fifth Circuits in *AEP* and *Comer* respectively.

B. Defendants' and Indiana's Political Question Arguments Have Been Rejected by Courts as Overstated.

Between them, Defendants and Indiana raise at least four variations of a political question argument. Amici States address each in turn. First, Defendants and Indiana argue that there are no manageable standards by which the Court can assess the impacts of climate change on the Cities. Indiana Amicus at 10; Defendants' Motion to Dismiss First Amended Complaints: Memorandum of Points and Authorities ("Defs.' Mot.") at 25 (ECF No. 225). The Second Circuit rejected a very similar argument by American Electric Power and its co-defendants, finding that the "argument is undermined by the fact that federal courts have successfully adjudicated complex

common law public nuisance cases for over a century." *AEP*, 582 F.3d at 326-329 (reviewing a litany of complex environmental public nuisance cases). Just because "Plaintiffs' injuries are part of a worldwide problem does not mean Defendants' contributions to that problem cannot be addressed through principled adjudication." *AEP*, 582 F.3d at 329.

In *AEP* the Second Circuit found the defendants' similar arguments "overstated," noting that:

> In adjudicating the federal law of nuisance claim pleaded here, the district court will be called upon to address and resolve the particular nuisance issue before it, which does not involve assessing and balancing the kind of broad interests that a legislature or a President might consider in formulating a national emissions policy. The question presented here is discrete, focusing on Defendants' alleged public nuisance and the Plaintiffs' alleged injuries.

Id. at 329. Similarly, here, the Cities' amended complaints allege that Defendants' specific alleged conduct (producing and selling fossil fuels while intentionally misleading consumers about climate science and the risks of global warming) is causing a nuisance (harms stemming from sea-level rise) within their jurisdictions. See, e.g., Oakland First Amended Complaint, ¶¶ 2-6 (ECF No. 202-1). This Court can address and resolve these discrete, largely factual issues without weighing the factors that Congress or a President might weigh in setting national climate policy.[3]

Second, Defendants and Indiana argue that the Cities' cases present a political question because they require the Court to make an "initial policy determination that is more appropriately addressed by the other branches of government." Indiana Amicus at 10-11; Defs.' Mot. at 25. Indiana's argument is based largely on the United States Environmental Protection Agency's ("EPA") 2003 denial of a petition for rulemaking that did little more than acknowledge that greenhouse gas emissions have been the subject of scientific, technical and political discussions

[3] Indiana relies on the district court's decision in *Kivalina* to argue to the contrary. Indiana Amicus at 10 (citing *Kivalina*, 663 F.Supp.2d at 874-877). In addition to the limited precedential value of that decision (see *supra*, Part I.A.), Indiana overlooks differences between the complaint before the district court in 2009 and the complaints before this Court in 2018. Here, the Cities' complaints rely on advances in the science of climate change research into allocation of defendants' contribution to climate change that will provide the Court with the evidence it needs to identify judicially discoverable and manageable standards. See, e.g., City of Oakland's First Amended Complaint, at ¶¶ 92-94, 124-136 (ECF No. 202-1).

globally. Indiana Amicus at 10-11.[4] Here too, the Second Circuit in *AEP* rejected a similar argument, finding that "[n]ot every case with political overtones is non-justiciable." *AEP*, 582 F.3d. at 332. The court noted that plaintiffs were not required to "wait for the political branches to craft a 'comprehensive' global solution to global warming" before seeking the focused remedy they sought. *Id.* at 331. This Court can therefore apply federal common law to create the focused remedy sought by the Cities. As in *AEP*, "where a case appears to be an ordinary tort suit, there is no impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." *Id.* at 331 (internal quotation omitted, citations omitted).[5]

Third, Indiana adds its own argument that "Plaintiffs' claims jeopardize our national system of cooperative federalism" put in place by the Clean Air Act, thereby "underscor[ing] the political nature of this case." Indiana Amicus at 11. But, the examples Indiana offers fail to show any connection to cooperative federalism, much less a risk to it. To begin with, Indiana cites the example of National Ambient Air Quality Standards ("NAAQS"), pursuant to which States adopt their own State Implementation Plans. *Id.* at 12. Current NAAQS standards, however, do not regulate greenhouse gas emissions, much less levels of fossil fuel production. *Washington Environmental Council v. Bellon*, 732 F.3d 1131, 1136 (9th Cir. 2013) ("To date, the EPA has developed NAAQS for six criteria pollutants… . 40 C.F.R. § 50. The EPA has not established NAAQS for greenhouse gases.") Thus, the connection to the Cities' public nuisance claims is lacking.

[4] EPA's denial of that petition led directly to the filing of lawsuits that culminated in the Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497, 510-511 (2007) ("*Mass. v. EPA*"). The Supreme Court's ruling is notable because the Court rejected EPA's argument that the States lacked standing to sue because their lawsuit would interfere with Congress's consideration of climate change issues. *Id.* at 512-513, 526.

[5] Indiana relies on the contrary conclusion of the district court in *Kivalina*, which concluded that the executive or legislative branch should make the determination of liability and allocation of fault in the first instance. Indiana Amicus at 9 (citing *Kivalina*, 633 F. Supp. 2d at 877). The precedential value of that decision is limited. Further, district courts are well equipped to make such determinations, and further, San Francisco's and Oakland's complaints provide substantial additional facts and data on which the court can rely. See, e.g., City of Oakland, First Amended Complaint, at ¶¶ 92-94, 124-136 (ECF No. 202-1).

1 Next, Indiana references a series of state greenhouse gas programs led by States that did not
2 join their brief: the Western States Climate Initiative (Amici California and Washington
3 participated)[6]; the ten-state Regional Greenhouse Gas Initiative;[7] and California's greenhouse gas
4 cap and trade program. Indiana Amicus at 12-14. Indiana's examples miss the mark, because
5 Amici States and others did not establish these programs to implement the Clean Air Act. Each
6 program is a creation of state law.[8] Nor can Amici States discern any threat to these state laws
7 from Plaintiffs' common law public nuisance action against private corporate Defendants seeking
8 abatement of the harms they face within their jurisdictions from sea level rise. This is also evident
9 in the fact that multiple states, including California and New Jersey, sought to pursue climate
10 change public nuisance claims against electric generating companies in *AEP* during the
11 development and implementation of climate programs.

12 Fourth, Defendants and Indiana argue that because of the international attention to climate
13 change, adjudication of Plaintiffs' claims would intrude upon the executive branch's authority
14 over foreign policy, in violation of the political question doctrine. Defs.' Mot. at 23-24; Indiana
15 Amicus at 15-17. Several states have rebutted such arguments previously, as in *AEP*, where they
16 argued successfully that "[t]hat Plaintiffs' injuries are part of a worldwide problem does not mean
17 Defendants' contribution to that problem cannot be addressed through principled adjudication."
18 *AEP*, 582 F.3d. at 329. Similarly, in *Massachusetts v. EPA*, the Supreme Court held that the fact
19 that "these climate-change risks are 'widely shared' does not minimize Massachusetts interest in
20 the outcome of" its challenge to EPA, based in part on the alleged injury to state lands from sea
21 level rise. *Mass. v. EPA*, 549 U.S. 497, 522 (2007). Additionally, even the district court's decision

22 [6] See *Western Climate Initiative, Design Recommendations for the WCI Regional Cap-*
23 *and-Trade Program* (Sept. 23, 2008), available at
http://www.energy.ca.gov/2008publications/WCI-1000-2008-025/WCI-1000-2008-025.PDF (last
24 visited April 30, 2018).

25 [7] See https://www.rggi.org (last visited April 30, 2018).

26 [8] California's Cap and Trade program was adopted pursuant to authority granted by state
statute in the Global Warming Solutions Act of 2006. See Cal. Health & Safety Code, §§ 38500,
27 38562, 38570; see also Cal. Code Regs. tit. 17, §§ 95801-96022. Similarly, for example, New
York and Massachusetts adopted regulations pursuant to state law to implement the Regional
28 Greenhouse Gas Initiative in their states. See, e.g., 6 NYCRR 242; see also Code Mass. Regs. tit.
310, § 7.70.

in *Kivalina*, upon which Defendants rely (and which, as discussed above, is of questionable precedential value) rejected virtually the same argument made by Defendants and Indiana here. *Kivalina*, 663 F.Supp.2d at 872-873. The court held that "[t]he indisputably international dimension of this particular environmental problem does not render the instant controversy a non-justiciable one." *Id.* at 873. The court found it significant that "none of the Defendants cite to any express provision of the Constitution or provision from which it can be inferred that the power to make the final determination regarding air pollution or global warming has been vested in either the executive or legislative branch of government." *Id.* So too, here, Defendants and Indiana fail to cite any provision of the Constitution.[9]

While Defendants and Indiana offer many variations of the political question argument, none is availing, and, therefore, this Court should hold that the Cities' claims are justiciable.

II. THE PUBLIC NUISANCE ALLEGED BY THE CITIES WAS NOT AUTHORIZED BY STATE OR FEDERAL LAWS.

Defendants cite to a handful of California laws and federal statutes concerning fossil fuel production in support of an argument that their conduct was authorized by law and therefore cannot constitute a public nuisance. Defs.' Mot. at 16-18.[10] Defendants are incorrect. A court is not deprived of its ability to fashion a remedy to a public nuisance unless the specific conduct alleged to be causing the nuisance is expressly and wholly authorized by a statute or regulation,

[9] Indiana makes an additional argument that California law concerning the supervision of oil and gas development renders the Cities claims non-justiciable. The argument suffers from several basic flaws. To start, Indiana relies on general pronouncements that California's Public Resources Code demonstrates the "inherently political nature" of fossil fuel production. Indiana Amicus at 17. As the Second Circuit cautioned, however, "[i]t is error to equate a political question with a political case." *AEP*, 582 F.3d at 332. Thus, the Court should look to specific factors set forth by the Supreme Court in *Baker v. Carr*, 369 U.S. 186 (1962), not generalized notions. If any of those factors are implicated, it would be the fourth through sixth factors. See *Baker*, 369 U.S. at 217. The Second Circuit addressed those three factors in *AEP*, finding that, where the government's pronouncements are "variegated" and lack a unified policy, allowing the litigation to proceed "does not demonstrate any lack of respect for the political branches, contravene a relevant political decision already made, or result in multifarious pronouncements that would embarrass the nation." *AEP*, 582 F.3d at 331-332. Here, as discussed in Part II. A. below, California's laws authorize some fossil fuel extraction but prohibit other extraction, and seek to reduce the state's reliance on the fossil fuels produced by Defendants. On such a record, the fourth through sixth *Baker* factors do not bar adjudication of Plaintiffs' claims.

[10] Indiana also argues that the existence of these laws demonstrates that the Cities' public nuisance claims raise a political question. Indiana Amicus at 17-18. See footnote 9 above.

which is not the situation before this Court. Further, the manner in which an authorized activity is carried out may still give rise to a public nuisance claim. *See Ileto v. Glock Inc.*, 349 F.3d 1191, 1214–15 (9th Cir. 2003). Here, Defendants' argument that governments promoted their fossil fuel extraction activity ignores significant state and federal efforts to restrict their activity and promote alternatives to Defendants' products. In addition, Defendants' argument ignores the full scope of the Cities' allegations, including Defendants' alleged promotion of their products and concealing of knowledge about the harms from their products.

A. Significant California and Federal Laws Seek to Regulate and Restrict Fossil Fuel Production and Demand.

Defendants and Indiana tell a one-sided story of unbounded endorsement of extraction and consumption of fossil fuels by California and the federal government. That is simply not the case.

As to California, Defendants and Indiana fail to mention state laws that explicitly seek to limit the production of or reduce the State's reliance on fossil fuels. For example, the California Coastal Sanctuary Act of 1994 prohibits state agencies from entering into new leases "for the extraction of oil or gas" along the California coast. Cal. Pub. Res. Code § 6243. In addition, the California Low Carbon Fuels Standard, first adopted by the California Air Resources Board in 2009, requires an increasing percentage of California's transportation fuels come from "low carbon" sources rather than from traditional gasoline and diesel fuel. See Cal. Code Regs. tit. 17, §§ 95480- 95497.[11] And, California's Sustainable Communities and Climate Protection Act of 2008 requires land use planning entities to take into account measures to reduce driving distances in order to help the state "reduce its dependence on petroleum." Stats.2008, c. 728 (S.B.375) § 1(d).

Nor do Defendants and Indiana provide sufficient context for the California laws they do cite. For example, Defendants and Indiana rely on section 3016 of the California Public Resources Code, which concerns California's "supervision" (i.e., regulation) of oil and gas drilling. Indiana Amicus at 17; Defs.' Mot. at 17. First passed in 1939, that statute establishes a

[11] For a description of the Low Carbon Fuels Standard, see https://www.arb.ca.gov/fuels/lcfs/lcfs.htm (last visited April 30, 2018).

1 policy of preventing oil and gas operations from damaging public health and important resources
2 such as water supplies, seeking to eliminate wasteful oil and gas operations (by maximizing
3 recovery from those wells that are drilled) and taking a "wise" approach to oil and gas
4 development. Cal. Pub. Util. Code § 3106(a), (b) and (d). Defendants also cite a 1980 California
5 law that prohibits anticompetitive conduct (refusing to sell motor vehicle fuels to local
6 governments for essential services) and a portion of California's regulation of hydraulic
7 fracturing drilling practices. Defs.' Mot. at 17-18 (citing Cal. Bus. & Prof. Code § 13410(a), and
8 Cal. Pub. Res. Code § 3160(a)). Instead of simply endorsing every act relating to fossil fuel
9 extraction and consumption, California, through some of the very laws Defendants and Indiana
10 cite, has repeatedly attempted to mitigate the harms caused by fossil fuel production.

11 Similarly, some of the federal statutes Defendants rely on show that the federal government
12 was simultaneously seeking to limit use of fossil fuels. For example, the Energy Policy Act of
13 1992, cited by Defendants, required the Secretary of Energy, in Subpart B of Title XX, "Oil and
14 Gas Demand Reduction and Substitution," to develop a program "to reduce the demand for oil in
15 the transportation sector for all motor vehicles . . . through increased energy efficiency and the
16 use of alternative fuels." 42 U.S.C. § 13431. Also in the 1992 Act Congress incentivized
17 reduction in natural gas use through "energy conservation and load shifting programs and . . .
18 other demand-side management measures," 15 U.S.C. § 3203(b)(4), and directed the Secretary to
19 "promote the replacement of petroleum motor fuels with replacement fuels to the maximum
20 extent practicable," 42 U.S.C. § 13252(a), and to issue guidelines on "comprehensive State
21 alternative fuels and alternative fueled vehicle incentives and program plans designed to
22 accelerate the introduction and use of such fuels and vehicles." 42 U.S.C. § 13235(a)(1). The
23 Energy Policy Act of 2005, which Defendants also rely on, includes provisions that would
24 discourage the extraction of fossil fuels, such as providing tax incentives for alternative fueled
25 vehicles, 26 U.S.C. § 30B, and allowing the federal government to commercialize solar energy to
26 "reduce the national consumption of fossil fuel," 40 U.S.C. § 3177(a)(1).

27 The Defendants and Indiana likewise ignore the wide range of federal statutory policies,
28 from the 1970s through the present, that seek to promote energy conservation and renewable

energy and fuels and to reduce fossil fuel use. *See, e.g.*, Energy Independence and Security Act of 2007, Pub. L. 110-140, § 806 (1), (3) (sense of Congress that "the United States has a quantity of renewable energy resources that is sufficient to supply a significant portion of the energy needs of the United States" and that "accelerated development and use of renewable energy technologies provide numerous benefits to the United States, including improved national security, improved balance of payments, healthier rural economies, improved environmental quality, and abundant, reliable, and affordable energy for all citizens of the United States"); Alternative Motor Fuels Act of 1988, Pub. L. 100-494, § 2 (finding that "the Nation's security, economic, and environmental interests require that the Federal Government should assist clean-burning, nonpetroleum transportation fuels to reach a threshold level of commercial application and consumer acceptability at which they can successfully compete with petroleum-based fuels"); Public Utility Regulatory Policies Act of 1978, Pub. L. 95–617, § 2 ("The Congress finds that the protection of the public health, safety, and welfare, the preservation of national security, and the proper exercise of congressional authority under the Constitution to regulate interstate commerce require—(1) a program providing for increased conservation of electric energy, increased efficiency in the use of facilities and resources by electric utilities, and equitable retail rates for electric consumers . . . (4) a program for the conservation of natural gas while insuring that rates to natural gas consumers are equitable."); Energy Conservation and Policy Act of 1975, Pub. L. 94-163, § 2(4)-(5) (purposes of Act include "to conserve energy supplies through energy conservation programs, and, where necessary, the regulation of certain energy use" and "to provide for improved energy efficiency of motor vehicles, major appliances, and certain other consumer products"); *cf.* Energy Act of 2000, Pub. L. 106-149, § 102(2) (*repealing* provision of Energy Policy and Conservation Act of 1975 stating statutory policy "to increase the supply of fossil fuels in the United States, through price incentives and production requirements.").

B. Defendants' Alleged Conduct is Not Specifically Authorized by Law.

Defendants point out that the Restatement definition of public nuisance excludes "conduct that is fully authorized by statute, ordinance or administrative regulation." Restatement (Second) of Torts § 821B cmt. f (1979). But, even if an activity is authorized by statute, the way it is

carried out may still give rise to an actionable public nuisance. *See Ileto.*, 349 F.3d at 1214–15 (applying California common law of public nuisance; "although gun manufacturing is legal and the sale of guns is regulated by state and federal law, the distribution and marketing of guns in a way that creates and contributes to a danger to the public generally and to the plaintiffs in particular is not permitted under law"; "The fact that a statute recognizes the legality of a certain occupation and makes provision for its regulation to avoid injuries does not justify or legalize such a business when it becomes a public nuisance.").

Defendants do not, of course, point to any laws that explicitly authorize them to market fossil fuels while intentionally concealing their knowledge about the harms from those fuels, which is conduct the Plaintiffs complain of. *See*, *e.g.*, City of Oakland, First Amended Complaint at ¶¶ 5, 6, 103 (ECF No. 202-1). Thus, the Restatement's exception to public nuisance for conduct "fully authorized by statute, ordinance or administrative regulation" has not been triggered. Moreover, even the statutes and regulations Defendants cite to in their motion show that those engaged in fossil fuel extraction or marketing are required to refrain from fraudulent or misleading statements. *See* Defs.' Mot. at 14.

In sum, Defendants' argument their conduct was "authorized by law" overreaches and cannot establish that Plaintiffs have failed to state a claim for common law public nuisance.

III. THE CITIES' CLAIMS HAVE NOT BEEN DISPLACED BY THE CLEAN AIR ACT OR OTHER FEDERAL STATUTES.

Defendants and Indiana also contend that the Cities' federal common law nuisance claims have been displaced by the Clean Air Act or other federal statutes authorizing the development and regulation of fossil fuels. Amici States take no position on the threshold issue of whether federal common law applies to a public nuisance claim for climate change harms (as this Court has held), or state common law applies (as held by the court in the San Mateo case). But assuming this court's holding is correct, the Cities' federal common law nuisance claims have not been displaced.

1 First, the Clean Air Act does not displace the Cities' claims. In rejecting the Cities' motion
2 to remand to state court, this Court rejected the same displacement argument, finding that "*AEP*
3 and *Kivalina* . . . did not recognize the displacement of federal common law claims raised here."
4 Order Denying Motions to Remand at 6 (ECF No. 134). Here, this Court correctly reasoned that
5 the Clean Air Act did not displace the Cities' claims against Defendants and there has been no
6 material change in the law or facts that warrant changing that view. The Clean Air Act regulates
7 specific emissions from certain sources of air pollution, not the overall production and marketing
8 of fossil fuels, not "deceiving the public regarding the dangers of global warming and the benefits
9 of fossil fuels," and not defendants' conduct outside the United States. *Id.* at 7. In contrast, in
10 *AEP* and *Kivalina* the plaintiffs sought to remedy defendants' direct emissions of carbon dioxide.
11 In *AEP*, the Supreme Court reasoned that, because the plaintiffs could petition EPA to set the
12 power-plant emission standards that the plaintiffs' federal common-law claims sought (and in fact
13 had done so), "[t]he Act itself . . . provides a means to seek limits on the emissions of carbon
14 dioxide from domestic powerplants—the same relief the plaintiffs seek by invoking federal
15 common law." *AEP*, 564 U.S. at 425. Defendants have identified no such remedy provided by the
16 Clean Air Act to address the conduct in question here. As this Court found, "the Clean Air Act
17 does not provide a sufficient legislative solution to the nuisance alleged to warrant a conclusion
18 that this legislation has occupied the field to the exclusion of federal common law." Order at 7.
19 Second, the Cities' claims are also not displaced by federal statutes authorizing the
20 development of fossil fuels. Defendants cite a number of federal statutes, including the Energy
21 Policy Acts of 1992 and 2005, for the proposition that these laws "speak directly to the
22 reasonableness of that conduct [developing fossil fuels]." Def. Mot. at 13 (internal quotations
23 omitted). These statutes encourage specific kinds of production of fossil fuel and thus do not
24 regulate the conduct for which the Cities seek relief: "an alleged scheme to produce and sell fossil
25 fuels while deceiving the public regarding the dangers of global warming and the benefits of
26 fossil fuel." Order at 7. Just as none of the cited laws generally authorizing the exploration and
27 production of fossil fuels would preclude public nuisance claims stemming from, for example,
28 spilling petroleum, causing unreasonable fumes from improper storage of gasoline, or excessive

noise during drilling operations, nor do those laws prevent a nuisance cause of action premised on the wrongful conduct alleged here. Just as the Cities have no apparent avenue under the Clean Air Act to petition EPA for the particular relief they seek here, they do not have any opportunity to do so under these other statutes. In the absence of such a right, their federal common-law claims are not displaced.

IV. ENFORCEMENT OF THE CITIES STATE OR FEDERAL COMMON LAW OF PUBLIC NUISANCE DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE.

In support of Defendants' motion to dismiss, Indiana argues that imposition of the remedy sought in the Cities' complaints seeks to regulate extraterritorially in violation of the dormant Commerce Clause.[12] Indiana Amicus at 20-23 ("such remedies represent an effort by one state to occupy the field of environmental and energy production regulation across the nation"). This argument is predicated on several assumptions that are not supported in fact or law: 1) that the dormant Commerce Clause applies to court-ordered remedies of federal common law claims; 2) that the Supreme Court's decision in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) controls here; and 3) that these cases constitute "extraterritorial regulation" either on their face or in their impact.

A. The Dormant Commerce Clause does not Apply to Judicially-Imposed Remedies Under Federal Common Law.

Indiana argues that the dormant Commerce Clause applies to judicial remedies sought in the Cities' complaints, which of course include a federal common law claim. Indiana Amicus at 20-22. Enlarging the reach of the dormant Commerce Clause to encompass court-ordered remedies in federal common law cases is unsupported by case law, and would expand the doctrine beyond recognition.

The Amici States know of no case law applying the dormant Commerce Clause to a federal court's imposition of remedies for federal common law claims. None of the cases cited by Indiana support their view of the dormant Commerce Clause or extraterritoriality. *See La. Pub. Serv.*

[12] Defendants' motion to dismiss hints at such an argument but does not explicitly so argue. Specifically, Defendants argue that "Plaintiffs' claims would also usurp Congress's 'exclusive' power 'to regulate interstate and foreign commerce.'" Defs.' Mot. at 25.

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); *Healy v. Beer Inst., Inc.*, 491 U.S. 324 (invalidating state statute under the dormant Commerce Clause); *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) (holding that excessive punitive damages awarded in state court violated BMW's due-process rights); *Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660 (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; non-precedential because no majority opinion).

Taken to its logical conclusion, Indiana's argument would undercut long-standing precedent, including cases permitting states and local governments to sue for out-of-jurisdiction nuisance conduct. The wealth of cases in which states have sued other jurisdictions for nuisances originating extraterritorially demonstrates that the common law does not contemplate any such result. *See*, e.g., *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); *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); *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); *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) (Court held sewage discharge in Milwaukee that entered Illinois constituted public nuisance).

B. The Supreme Court's Decision in *BMW of North America v. Gore* is Inapplicable to the Cities' State or Federal Common Law Claims.

In *BMW*, the Supreme Court held that Alabama courts could not impose punitive damages on BMW for commerce with no nexus to Alabama—cars repaired and sold in other states. 517

U.S. at 572-574. But Alabama courts could enforce the State's disclosure laws and impose punitive damages for undisclosed repairs with respect to cars sold in Alabama, regardless of the fact that the repairs occurred outside the State. *See id.*; *see also id*. at 563 n.1. In other words, the Court upheld the State's authority to impose a punitive damages award with respect to damages suffered in-state, even when that award implicated out-of-state activity. Here, the harm Plaintiffs seek to have remedied is purely in-jurisdiction. See, e.g., Oakland First Amended Complaint, at p. 55 (Relief Requested) (ECF No. 202-1) (seeking an abatement fund "to provide for infrastructure in Oakland necessary for Oakland to adapt to global warming impacts such as sea level rise."). Thus, if anything, *BMW* supports Plaintiffs' ability to bring claims of localized damages.

Similarly, in *Ileto v. Glock*, the Ninth Circuit rejected as "meritless" defendants' attempt to rely on *BMW* to argue that a state common law public nuisance claim violated the dormant Commerce Clause. 349 F.3d at 1217. In *Ileto*, plaintiffs alleged that defendants had unlawfully created and promoted a secondary market in guns that led to the sale of guns used in crimes against them. *Id.* at 1198-1199. The Ninth Circuit found that *BMW* was inapplicable because plaintiffs had amended their complaints to remove any request for injunctive relief and economic sanctions in the form of punitive damages to protect the rights of citizens from other states. *Id.* at 1217. Here, the Cities do not seek punitive damages, nor do they assert the rights of anyone other than their residents.[13]

C. These Cases Do Not Constitute "Extraterritorial Regulation" of Interstate Commerce.

Even if Plaintiffs' common law claims were subject to a dormant Commerce Clause

[13] Notably, another post-*BMW* case from this District found that the dormant Commerce Clause *does not apply* to state common law claims. *See Crowley v. CyberSource Corp.*, 166 F.Supp.2d 1263, 1272 (N.D. Cal. 2001). In *Crowley*, defendant Amazon sought dismissal of the plaintiff's state-law claims based on the dormant Commerce Clause. Judge Orrick declined to dismiss the plaintiff's state-law claims, finding that case law does not support the argument that common-law claims could violate the dormant Commerce Clause. *Crowley* at 1272. As noted in *Crowley*, the Third Circuit has also expressed doubt as to whether state common law claims could violate the dormant commerce clause. *See Buzzard v. Roadrunner Trucking, Inc.*, 966 F.2d 777, 784 n.9 (3d Cir. 1992).

1 analysis, there are no grounds for dismissal of this case. Laws impermissibly regulate out-of-state
2 commerce only if they control commerce occurring wholly outside the regulating jurisdiction.
3 *Healy*, 491 U.S. at 336. Plaintiffs do not seek to regulate wholly out-of-state commerce (or in-
4 state commerce for that matter), but rather seek abatement of locally-suffered harms. If there are
5 extraterritoriality concerns about the remedy that might be crafted here should Plaintiffs prevail
6 on the merits, the Court can, and should, address those concerns at the remedy stage, not on a
7 motion to dismiss.

8 Thus, Indiana's argument for a dramatic expansion of the dormant Commerce Clause is
9 unsupported in the law and would not constitute a reason for dismissal of these cases on the
10 pleadings.

11 **CONCLUSION**

12 For the foregoing reasons, Amici States respectfully urge the Court to deny Defendants'
13 Motion to Dismiss.

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Dated: May 3, 2018

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CITY OF OAKLAND, a Municipal Corporation, and THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Oakland City Attorney BARBARA J. PARKER, Plaintiffs, **v.** **B.P. P.L.C., *ET AL.*,** Defendants	First Filed Case: No. 3:17-cv-6011-WHA Related Case: No. 3:17-cv-0612-WHA **[PROPOSED] ORDER GRANTING STATES' MOTION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS** Date: May 24, 2018 Time: 8:00 a.m. Courtroom: 12, 19th Floor Judge: Hon. William H. Alsup

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CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, and THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the San Francisco City Attorney, DENNIS J. HERRERA,

Plaintiffs,

v.

B.P., P.L.C., et al.,

Defendants

10 The States of California, New Jersey and Washington's Motion for Leave to File Amicus
11 Brief in Support of Plaintiffs' Opposition to Motion to Dismiss came on for hearing before this
12 Court on May 24, 2018 at 8:00 a.m. After full consideration of the matter, the Court orders as
13 follows:

14 The States' Motion for Leave to File Amicus Curiae Brief is GRANTED.

15 DATED: May __, 2018

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WILLIAM ALSUP
United States District Judge

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