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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through Oakland City Attorney BARBARA J. PARKER,

Plaintiff and Real Party in Interest,

v.

BP P.L.C., a public limited company of England and Wales, CHEVRON CORPORATION, a Delaware corporation, CONOCOPHILLIPS COMPANY, a Delaware corporation, EXXON MOBIL CORPORATION, a New Jersey corporation, ROYAL DUTCH SHELL PLC, a public limited company of England and Wales, and DOES 1 through 10,

Defendants.

First Filed Case: No. 3:17-cv-6011-WHA
Related Case: No. 3:17-cv-6012-WHA

DEFENDANTS' MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES

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

HEARING

DATE AND TIME TO BE SET BY COURT

THE HONORABLE WILLIAM H. ALSUP

THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the San Francisco City Attorney DENNIS J. HERRERA,

Plaintiff and Real Party in Interest,

v.

BP P.L.C., a public limited company of England and Wales, CHEVRON CORPORATION, a Delaware corporation, CONOCOPHILLIPS COMPANY, a Delaware corporation, EXXON MOBIL CORPORATION, a New Jersey corporation, ROYAL DUTCH SHELL PLC, a public limited company of England and Wales, and DOES 1 through 10,

Defendants.

Case No. 3:17-cv-6012-WHA

NOTICE OF MOTION AND MOTION TO DISMISS

TO THE COURT, THE CLERK, AND ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT, on a date to be set by the Court, in the United States District Court, Northern District of California, San Francisco Courthouse, Courtroom 12 - 19th Floor, 450 Golden Gate Avenue, San Francisco, CA 94102, before the Honorable William Alsup, Defendants BP p.l.c., Chevron Corporation, ConocoPhillips Company, Exxon Mobil Corporation, and Royal Dutch Shell plc (collectively, "Defendants") will and hereby do move this Court to dismiss these related actions for failure to state a claim.[1]

These actions should be dismissed because Plaintiffs have failed to state a claim for relief under federal common law. In addition, Plaintiffs' claims are barred by the foreign affairs doctrine, the Commerce Clause, the Due Process Clause, and the First Amendment; because Plaintiffs have failed to sufficiently allege causation; and for other reasons set forth below. This Motion is based upon this Notice of Motion and Motion, the Memorandum of Points and Authorities in support of the Motion, the papers on file in this case, any oral argument that may be heard by the Court, and any other matters that the Court deems appropriate.

This motion is submitted subject to and without waiver of any defense, affirmative defense, or objection, including personal jurisdiction, insufficient process, or insufficient service of process.

[1] Defendants BP p.l.c., ConocoPhillips Company, Exxon Mobil Corporation, and Royal Dutch Shell plc have simultaneously moved to dismiss the Complaints for lack of personal jurisdiction under Fed. R. Civ. P. 12(b)(2) and/or insufficiency of service of process under Fed. R. Civ. P. 12(b)(5). Their joinder in this motion is subject to, and without waiver of, those additional defenses.

March 20, 2018

Respectfully submitted,

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** Pursuant to Civ. L.R. 5-1(i)(3), the electronic signatory has obtained approval from this signatory

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs seek to hold five publicly traded energy companies liable for the impacts of "the national and international phenomenon of global warming," including "the melting of the ice caps, the rising of the oceans, and the inevitable flooding of coastal lands." No. 17-cv-06011, ECF No. 134 at 3, 5. Although Plaintiffs tried to label their claims as arising under state law, this Court properly held that their claims necessarily arise—if at all—under federal common law, because "the scope of the worldwide predicament [of climate change] demands the most comprehensive view available," which here "means our federal courts and our federal common law." *Id.* at 5. The Court cautioned, however, that "[t]his is not to say that the ultimate answer under our federal common law will favor judicial relief." *Id.* In fact, Plaintiffs have not stated viable federal common law claims for public nuisance for several reasons.

First, Congress has displaced Plaintiffs' federal common law claims based on domestic activities by "speak[ing] directly to the question at issue," *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011) ("*AEP*") (quotation marks and citation omitted), and federal common law principles do not grant Plaintiffs a cause of action for foreign activities. There is no question that Plaintiffs' claims would be displaced if they were based solely and directly on domestic greenhouse gas emissions—the Supreme Court, Ninth Circuit, and this Court have all held so, and Plaintiffs have admitted as much. *See id.*; *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 856–57 (9th Cir. 2012); No. 17-cv-06011, ECF No. 134 at 7; ECF No. 108 at 2 (admitting that "the Clean Air Act displaces the federal common law of interstate pollution"). As this Court recognized, however, Plaintiffs seek to evade *AEP* and *Kivalina* by "fixat[ing] on an earlier moment in the train of industry, the earlier moment of production and sale of fossil fuels, not their combustion." ECF No. 134 at 6. As a result of such creative pleading, this Court expressed its view that "*AEP* and *Kivalina* . . . did not recognize the displacement of the federal common law claims raised here." *Id.* But even though *AEP* and *Kivalina* may not have addressed the precise claims at issue here, this Court should nevertheless hold that the domestic portions of Plaintiffs' claims are displaced because they ultimately turn on the alleged harm caused by domestic fossil fuel *emissions*. After all, Plaintiffs do not assert that the mere

extraction or sale of fossil fuels created the alleged nuisance (nor could they), but rather that the *combustion* of fossil fuels by third-party users—such as Plaintiffs themselves—causes global warming and rising seas. The Court would thus need to find that greenhouse gas emissions are themselves a public nuisance—*i.e.*, that they unreasonably interfere with a public right—before it could assess the reasonableness of Defendants' alleged conduct. But that is the precise determination that Congress has taken away from federal courts and given to the Environmental Protection Agency ("EPA"). *See AEP*, 564 U.S. at 428; *Kivalina*, 696 F.3d at 857; *see also County of San Mateo v. Chevron Corp.*, No. 17-cv-04929, ECF No. 223 at 2 (N.D. Cal. Mar. 16, 2018) ("[*AEP*] did not confine its holding about the displacement of federal common law to particular sources of emissions, and *Kivalina* did not apply [*AEP*] in such a limited way."). In any event, even when Plaintiffs' claims are construed as targeting fossil fuel production and promotion, rather than emissions, they are still displaced by the many federal statutes that expressly regulate (and, in fact, encourage) such conduct. In short, Plaintiffs cannot avoid the dispositive effects of *AEP* and *Kivalina* as to domestic activities. As to Plaintiffs' claims based on foreign activities, federal common law principles do not support recognition of such an unprecedented cause of action, which would dramatically encroach upon policy judgments that are more appropriately made by Congress and the Executive. And as to all claims, because the "nature of the controversy makes it inappropriate for state law to control," *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981), there is no remedy available for Plaintiffs' claims under federal or state law—leaving dismissal as the only option.

Second, Plaintiffs fail to plead the required elements of a federal common law claim for public nuisance in at least four respects. (1) Plaintiffs have not alleged—and cannot allege—that Defendants' conduct was "unauthorized" by law. To the contrary, the production of fossil fuels is specifically authorized, and even encouraged, by numerous federal, state, and local laws. (2) It is undisputed that Defendants did not control the fossil fuels at the time they allegedly created the nuisance—*i.e.*, when they were combusted—and thus cannot be held liable under black-letter nuisance law. (3) Plaintiffs' allegations make plain that Defendants' alleged conduct is not the actual or legal cause of Plaintiffs' purported injuries. Rather, Plaintiffs' claims depend on an attenuated causal chain including billions of intervening third parties—*i.e.*, fossil fuel users like Plaintiffs themselves—and

complex environmental phenomena occurring worldwide over many decades. Because of the nature of the phenomena alleged, there is "no realistic possibility of tracing any particular alleged effect of global warming to any particular [action] by any specific person, entity, or group at any particular level." *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 880 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012). Moreover, Plaintiffs do not (and cannot) allege that Defendants' actions, by themselves, were sufficient to cause the climate-related harms Plaintiffs assert here. Restatement (Second) of Torts § 432(1). (4) The "abatement fund" Plaintiffs request is simply damages by another name—*i.e.*, money they can spend on favored projects. But damages can be awarded only for harm "actually incurred," and Plaintiffs allege at most speculative future harms that may never eventuate. Restatement § 821B, cmt. i. Plaintiffs' requested damages award would also violate Defendants' constitutional due process rights by imposing massive retroactive liability for conduct that was legal—in fact, encouraged—at the time it occurred (and still is today), as well as for protected First Amendment activities. In sum, Plaintiffs were correct when they conceded in their Motion to Remand that "[a]pplying federal common law to producer-based cases would extend the scope of federal nuisance law well beyond its original justification." ECF No. 64 at 9.

Third, even if Plaintiffs had managed to plead viable, non-displaced, federal common law claims (and they have not), judicial resolution would still be inappropriate because their claims conflict with the U.S. Constitution's separation of powers. The relief Plaintiffs seek from this (or any other) Court would impermissibly invade the province of the federal Executive branch in conducting foreign affairs and intrude on the federal Legislative branch's constitutionally prescribed role in regulating interstate and foreign commerce. It is not just that Plaintiffs' claims present so-called political questions (though they do); rather, Plaintiffs' claims are inherently incapable of resolution by *any* court—federal or state—because there is no legal standard for adjudicating them.

At bottom, Plaintiffs are trying to regulate the nationwide—indeed, worldwide—activity of companies that play a key role in virtually every sector of the global economy by supplying the fuels that enable production and innovation, literally keep the lights and heat on, power nearly every form of transportation, and form the basic materials from which innumerable consumer, technological, and

medical devices are fashioned. The Complaints contradict numerous federal statutes and raise myriad constitutional issues. For these reasons and more, cases asserting nearly identical claims—including several filed by the same private lawyers representing Plaintiffs here—have been repeatedly rejected by U.S. courts. The result here should be the same.

II. FACTUAL BACKGROUND

A. Global Warming Is a National and Global Issue

As an issue of national and international significance, global warming has been the subject of decades of federal laws and regulations, collaborative research, political negotiations, and diplomatic engagement with other countries. The United States has acted—and continues to act—at the national level to address global warming while balancing important economic and social interests.[1] In the Clean Air Act, for example, Congress established a comprehensive scheme to promote and balance multiple objectives, deploying resources to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1); *id.* § 7411 (providing for uniform national emission standards); *id.* § 7521 (vehicle emissions). Congress authorized the EPA to regulate air pollutants such as greenhouse gas emissions, and the EPA has exercised this authority on its own and with other federal agencies. *Id.* § 7601; *U.S. EPA, Regulations for Greenhouse Gas Emissions from Passenger Cars and Trucks*, http://bit.ly/2EWvcKK. Reflecting the complex tradeoffs inherent in national energy and security policy, the political branches of the U.S. Government have balanced environmental regulations with economic and social interests. For example, while the Kyoto Protocol was being negotiated, the U.S. Senate unanimously adopted a resolution urging President Clinton not to sign it if it would result in serious harm to the U.S. economy or did not do enough to regulate other countries' emissions. *See* S.

[1] *See*, *e.g.*, Nat'l Climate Program Act of 1978, 15 U.S.C. § 2901 *et seq*. (establishing "national climate program"); Global Climate Protection Act of 1987, 15 U.S.C. § 2901 note (directing the Secretary of State to coordinate U.S. negotiations on the issue); 15 U.S.C. § 2952(a). Congress has revisited the global warming issue several times. For example, the Global Change Research Act of 1990 established a research program for global climate issues, 15 U.S.C. § 2921, and provided for regular scientific assessments that "analyze[] current trends in global change," *id*. § 2936(3). Congress later directed the Secretary of Energy to conduct greenhouse gas assessments and report to Congress. Energy Policy Act of 1992, Pub. L. No. 102-486, § 1604, 106 Stat. 2776, 3002 (codified at 42 U.S.C. § 13384). Other laws, like the Energy Policy Act of 2005 and the Energy Independence and Security Act of 2007, sought further reductions of greenhouse gas emissions at the national level. *See* 42 U.S.C. § 13389(c)(1); 42 U.S.C. § 17001 *et seq.*

Res. 98, 105th Cong. (1997). More recently, President Trump cited similar economic concerns when he announced his intent to withdraw the U.S. from the Paris Agreement, shortly after which he reaffirmed the importance of fossil fuels to the American economy and the country's dedication to encouraging fossil fuel production. *See* Michael D. Shear, *Trump Will Withdraw U.S. From Paris Climate Agreement*, N.Y. Times (June 1, 2017), http://nyti.ms/2wNImI7; Remarks by President Trump at the Unleashing American Energy Event (June 29, 2017), http://bit.ly/2El7yWU. And state governments—including California—have recognized the importance of fossil fuels to their economies, joining the federal government in authorizing and encouraging the production of those fuels within their jurisdictions. *See, e.g.*, Cal. Pub. Util. Code § 785; Cal. Pub. Resources Code § 3106(b), (d).[2]

B. Plaintiffs Seek to Hold Five Energy Producers Solely Liable for Global Warming

According to Plaintiffs, increased carbon dioxide concentrations have led to higher global temperature, and it is "likely" that "human influence has been the dominant cause of the observed warming since the mid-20th century." Oak. Compl. ¶¶ 39, 47. Plaintiffs propose to remedy this worldwide problem by holding a select group of fossil fuel companies liable for lawful conduct occurring *around the world*. *Id.* ¶ 94; ECF No. 134 at 3. Plaintiffs allege that Defendants are the "five largest, investor-owned fossil fuel corporations in the world as measured by their historic production of fossil fuels."[3] Oak. Compl. ¶¶ 2–3. They further claim Defendants' "advertising" and "promotion" contributed to third-party emissions, and that Defendants "promoted massive use of fossil fuels by misleading the public" and "downplaying the harms and risks of global warming." *Id.* ¶¶ 62–63.[4]

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[2] The economic benefits of fossil fuel production are so important that California recently sued the federal government twice to prevent diminishment of its "share of royalty payments from oil and gas . . . produced on federal lands within" the state. *California v. U.S. Dep't of Interior*, No. 3:17-cv-02376, ECF No. 1 at ¶ 13 (N.D. Cal., Apr. 26, 2017); *see id.* ¶ 10 ("Since 2008, California has received an average of $82.5 million annually in royalties from federal mineral extraction"); *California v. U.S. Dep't of Interior*, No. 4:17-cv-05948, ECF No. 1 (N.D. Cal., Oct. 17, 2017) (same).

[3] Plaintiffs ignore corporate separateness and improperly aggregate the activities of each Defendant's subsidiaries and affiliates. *See Chan v. Soc'y Expeditions, Inc.,* 123 F.3d 1287, 1294 (9th Cir. 1997).

[4] The documents Plaintiffs cite tell a different story. For example, Plaintiffs allege that a 1998 task force memo allegedly funded by certain Defendants proposed to "manufacture uncertainty" about the causes of global warming, Oak. Compl. ¶ 68, even though an "internal . . . presentation" in 1996 showed extreme warming occurring by 2100, *id.* ¶ 67. But the 1996 presentation was simply summarizing the findings of recent IPCC reports, which themselves expressed "large uncertainties" about warming estimates and "patterns of climate variability." ECF No. 140-1 at 12 (quoting IPCC WG 1-Chapter 8) (cited in Oak Compl. ¶ 67).

Although Plaintiffs' nuisance claims arise under federal common law, Plaintiffs do not seek injunctive relief—the traditional remedy for a public nuisance—but "billions" of dollars in monetary damages in the form of "abatement fund[s]," which would "be paid for by Defendants to provide for infrastructure . . . necessary for the People to adapt to global warming impacts," as well as attorneys' fees and costs. Oak. Compl. ¶ 92; Relief Requested.

III. ARGUMENT

This is not the first (or even the second or third) time a plaintiff has tried to plead global-warming-related tort claims. Similar claims have been considered, and dismissed, by the Supreme Court, the Ninth Circuit, and district courts around the country. *See, e.g.*, *AEP*, 564 U.S. at 421; *Kivalina*, 696 F.3d at 855; *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849, 865 (S.D. Miss. 2012), *aff'd on other grounds*, 718 F.3d 460 (5th Cir. 2013); *California v. Gen. Motors Corp.*, 2007 WL 2726871, at *8, 15 (N.D. Cal. Sept. 17, 2007). Nothing has changed since those suits' dismissal. Plaintiffs' claims likewise suffer from multiple defects that require dismissal with prejudice.

A. Plaintiffs' Federal Common Law Claims Have Either Been Displaced By Congress or Are Plainly Improper Under Federal Common Law Standards

As this Court held in its order denying Plaintiffs' motion to remand, "Plaintiffs' nuisance claims—which address the national and international geophysical phenomenon of global warming—are necessarily governed by federal common law." ECF No. 134 at 3. In reaching this conclusion, the Court recognized that "the geophysical problem described by the complaints, a problem centuries in the making (and studying) with causes ranging from volcanoes, to wildfires, to deforestation to stimulation of other greenhouse gases," including "the combustion of fossil fuels," "cried out for a uniform and comprehensive solution." *Id.* at 4–5. The Court cautioned, however, that while the "extent of any judicial relief should be uniform across our nation," "[t]his is not to say that the ultimate answer under our federal common law will favor judicial relief." *Id.* at 5.

Federal common law does not provide relief here because any such global warming-based tort claims—whether framed as targeting greenhouse gas emissions, oil and gas extraction and production, or fossil-fuel product promotion—have been displaced by federal statute or violate threshold

principles of federal common law. "Federal common law is a 'necessary expedient,' and when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears." *City of Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981) ("*Milwaukee II*") (citation omitted). Accordingly, "federal common law does not provide a remedy" "when federal statutes directly answer the federal question." *Kivalina*, 696 F.3d at 856. "Legislative 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." *AEP*, 564 U.S. at 423 (citation omitted). Rather, the test is "simply whether the 'statute speaks directly to the question' at issue." *Id.* at 424 (citations omitted). Here, many statutes speak directly to the issues raised by Plaintiffs' claims, and there are several other reasons why Plaintiffs' claims contravene federal common law principles.

1. Plaintiffs' claims asserting injury based on domestic greenhouse-gas emissions are displaced by the Clean Air Act

In its order denying remand, this Court stated that Plaintiffs' claims are not squarely governed by the displacement rulings in *AEP* and *Kivalina* because Plaintiffs purport to seek liability based on Defendants' worldwide upstream activities—namely the production and promotion of fossil fuels—rather than bringing claims directly against greenhouse gas emitters. ECF No. 134 at 6–7 ("*AEP* and *Kivalina* . . . did not recognize the displacement of the federal common law claims raised here."). The question before the Court, however, was simply whether Plaintiffs' claims arose under federal common law, not whether those claims could be sustained. *See Morrison v. Nat'l Australia Bank*, 561 U.S. 247, 254 (2010) (the question of subject matter jurisdiction is "quite separate from the question whether the allegations the plaintiff makes entitle him to relief"). As a result, displacement was not fully briefed by the parties—and was not briefed at all by Defendants. Now that the issue of displacement is squarely presented, this Court should rule that the logic behind *AEP* and *Kivalina* results in displacement here as well, at least as to claims based on domestic emissions. And because Plaintiffs' claims raise the "sort of federal interests that necessitate a uniform solution," ECF No. 134 at 5, they should be dismissed, *see United States v. Standard Oil*, 332 U.S. 301, 309–10 (1947) ("state

law" cannot "control" where "the question is one of federal policy").[5]

In *AEP*, the Supreme Court held that Congress, by "delegat[ing] to [the] EPA the decision whether and how to regulate carbon-dioxide emissions," had "displace[d] federal common law." 564 U.S. at 426. The Court explained that, as a result, federal courts "have no warrant to employ the federal common law of nuisance to upset the agency's expert determination" regarding the reasonable level of greenhouse gas emissions. *Id.* The global warming-based "nuisance claims asserted in *Kivalina* and *AEP*" were displaced because the Clean Air Act "'spoke directly' to the issues presented—*domestic* emissions of greenhouse gases." ECF No. 134 at 7; *see AEP*, 564 U.S. at 424–26; *Kivalina*, 696 F.3d at 857. Thus, there is no question that Plaintiffs' claims here would be displaced if they had asserted that domestic greenhouse gas emissions were the cause of the alleged public nuisance. *See* ECF No. 108 at 2 (admitting that "the Clean Air Act displaces the federal common law of interstate pollution"); ECF No. 134 at 6 ("Emissions from domestic sources are certainly regulated by the Clean Air Act").

Seeking to avoid dismissal under *AEP* and *Kivalina*, Plaintiffs disclaim any attempt "to impose liability on Defendants for their direct emissions of greenhouse gases," Oak. Compl. ¶ 11, and instead purport to bring these "claims against defendants for having put fossil fuels into the flow of international commerce." ECF No. 134 at 7. But Plaintiffs' own allegations reveal the inescapable centrality of greenhouse gas *emissions* to their alleged injuries. *E.g.*, Oak. Compl. ¶¶ 38 ("when used[,] . . . fossil fuels release greenhouse gases), 39 ("use of fossil fuels emits carbon dioxide"), 45 ("emissions resulting from human activities are substantially increasing . . . greenhouse gases"), 48 ("increase in atmospheric carbon dioxide caused by the combustion of fossil fuels"), 52 ("fossil fuels[,] . . . when combusted, emit carbon dioxide"). As this Court recognized, Plaintiffs claim that

[5] In denying Plaintiffs' motion to remand, this Court "presume[d] that when congressional action displaces federal common law, state law becomes available to the extent it is not preempted by statute." ECF No. 134 at 6 (citing *AEP*, 564 U.S. at 429). But when federal common law is displaced by federal statute, state law does not simply spring into life. To the contrary, federal common law governs in the first place precisely because the "nature of the controversy makes it inappropriate for state law to control." *Texas Indus*, 451 U.S. at 641; *see also Milwaukee II*, 451 U.S. at 313 n.7 ("if federal common law exists, it is because state law cannot be used"); *Standard Oil*, 332 U.S. at 307 (federal law, not state law, must deal "with essentially federal matters").

the *use*, not the *production*, of fossil fuels emits carbon dioxide and causes the alleged harms: "Plaintiffs allege that the combustion (by others) of fossil fuels produced by defendants has increased atmospheric levels of carbon dioxide and, as a result, raised global temperatures and melted glaciers to cause a rise in sea levels, and thus caused flooding in Oakland and San Francisco." ECF No. 134 at 1.

The fact that Plaintiffs' claims rest on a derivative theory of liability, in which Defendants allegedly caused *other* persons' excessive emissions, does not distinguish the analysis in *AEP* or *Kivalina*. As Judge Chhabria recognized, "*Kivalina* stands for the proposition that federal common law is not just displaced when it comes to claims against domestic sources of emissions but also when it comes to claims against energy producers' contributions to global warming and rising sea levels." No. 17-cv-04929, ECF No. 223 at 2 (N.D. Cal. Mar. 16, 2018). In fact, *Kivalina* expressly held that the plaintiff's derivative theory of liability—based on allegations that defendants had "conspir[ed] to mislead the public about the science of global warming"—was "dependent upon the success" of the underlying emissions-based theory of injury, and was therefore displaced by the Clean Air Act. 696 F.3d at 854, 858. So too here. Indeed, before this Court could hold Defendants liable for contributing to domestic greenhouse gas emissions, it would need to conclude that such emissions were themselves a public nuisance—*i.e.*, that they unreasonably interfered with a public right. But Congress has empowered the EPA, not federal courts, to determine the appropriate level of greenhouse gas emissions. *See AEP*, 564 U.S. at 428 (Congress "designated an expert agency, here, [the] EPA, as best suited to serve as primary regulator of greenhouse gas emissions," and the EPA "is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions"). In short, even though Plaintiffs "fixate[] on an earlier moment in the train of industry" than did the plaintiffs in *AEP* and *Kivalina*, ECF No. 134 at 6, their nuisance claims necessarily implicate the reasonableness of domestic emissions and thus "cannot be reconciled with the decisionmaking scheme Congress enacted," *AEP*, 564 U.S. at 429.

To be sure, Plaintiffs' claims are not limited to "*domestic* emissions of greenhouse gases," but extend also to "foreign emissions [that] are out of the EPA and Clean Air Act's reach." ECF No. 134 at 7. But Plaintiffs' reliance on foreign emissions does not salvage their claims; it dooms them. Plaintiffs can point to no precedent that would support the view that federal common law provides a

cause of action based on emissions that were made by foreign entities in a foreign country and that cause injury only when combined with all similar emissions worldwide. Moreover, in another context, the Supreme Court recently underscored several factors that counsel in favor of exercising great caution before recognizing novel causes of action under federal common law, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), and each of these factors strongly confirms that federal common law principles do not support recognition of a novel claim of worldwide global-warming nuisance. Such a novel tort would contravene the Court's admonitions (1) that "the general practice has been to look for legislative guidance before exercising innovative authority over substantive law"; (2) that the "decision to create a private right of action is one better left to legislative judgment in the great majority of cases"; (3) that "even when Congress has made it clear by statute that a rule applies to purely domestic conduct, [the courts] are reluctant to infer intent to provide a private cause of action where the statute does not supply one expressly," and that such "judicial caution" also extends to the international context in light of "the possible collateral consequences"; (4) that "the potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs"; and (5) that the courts "have no congressional mandate" to recognize such claims because Congress has not "affirmatively encouraged" such "judicial creativity." *Id*. at 726–28 (applying such factors to federal common law recognition of claims under international norms). In view of these cautionary factors, Plaintiffs' effort to enlist the Court in regulating foreign emissions must be rejected. Where, as here, Congress has displaced domestic emissions claims precisely because "[f]ederal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues in this order," *AEP*, 564 U.S. at 428, it would profoundly disrespect that congressional judgment to conclude that courts may do *internationally* what they may not do domestically.

Moreover, the principles that underlie the Supreme Court's recognition of domestic federal common law nuisance claims do not justify recognition of comparable claims against *foreign* emitters based on *global* effects. As the Supreme Court explained more than a century ago, the federal common law of nuisance was needed to resolve interstate pollution disputes because the states had "sur-

rendered" "[d]iplomatic powers and the right to make war . . . to the general government[.]" *Missouri v. Illinois*, 180 U.S. 208, 241 (1901) ("an adequate remedy can only be found in this court" given "the nature of the injury complained of"). But there is no similar justification for recognizing federal common law global-warming claims based on foreign sources of pollution. The federal government, not the states, is the appropriate entity to address issues involving foreign nations, and the Constitution gives the political branches exclusive authority to address foreign sources of pollution. *Gen. Motors*, 2007 WL 2726871, at *16; *Kivalina*, 663 F. Supp. 2d at 876–77.[6] Thus, to the extent Plaintiffs have alleged federal common law claims implicating domestic greenhouse gas emissions—emissions that "are certainly regulated by the Clean Air Act," ECF No. 134 at 6—they are displaced, and to the extent they have alleged claims based on foreign emissions, there is no federal common law remedy at all. Either way, Plaintiffs' claims should be dismissed.

2. Congress has displaced any conceivable federal common law nuisance claim based on the domestic production of fossil fuels

Even framed as a case exclusively about oil and gas *production*, Plaintiffs' claims have been displaced by the numerous federal statutes that speak "directly" to the reasonableness of that conduct. The Energy Policy and Conservation Act of 1992 ("EPCA"), for example, provides that "[i]t is the goal of the United States in carrying out energy supply and energy conservation research and development . . . to strengthen national energy security by reducing dependence on imported oil." 42 U.S.C. § 13401. To that end, the EPCA directs the Secretary of Energy "to increase the recoverability of domestic oil resources" by "developing advanced techniques to recover oil not recoverable by other techniques." *Id.* § 13411(a), (b)(3); *see also id.* § 13412 (instructing the Secretary to investigate "oil shale extraction and conversion" in order "to produce domestic supplies of liquid fuels from oil shale"); *id.* § 13413(a) (enumerating strategies "to increase the recoverable natural gas resource

[6] For example, in 1991 the U.S. and Canada reached an agreement to reduce "transboundary air pollution . . . through cooperative or coordinated action providing for controlling emissions of air pollutants in both counties." Agreement Between the Government of the United States of America and the Government of Canada on Air Quality at 1 (1991), https://tinyurl.com/ya2e28yz. The Agreement noted the countries' "tradition of environmental cooperation as reflected in the Boundary Waters Treaty of 1909, the Trail Smelter Arbitration of 1941, the Great Lakes Water Quality Agreement of 1978, as amended, the Memorandum of Intent Concerning Transboundary Air Pollution of 1980, the 1986 Joint Report of the Special Envoys on Acid Rain, as well as the ECE Convention on Long-Range Transboundary Air Pollution of 1979." *Id.*

base"). And Congress authorized the Secretary to establish a research center designed to "improve the efficiency of petroleum recovery," "increase ultimate petroleum recovery," and "delay the abandonment of resources" in the midcontinent region of the United States. *Id.* § 13415(b).

The Energy Policy Act of 2005 similarly speaks directly to the production of fossil fuels. Congress enacted this statute in response to "U.S. oil production [reaching] a 50-year low, . . . placing increasing importance on imports, often from unstable regimes." S. Rep. No. 109-78 at 6. The Act therefore offered a range of financial incentives to fossil fuel producers as part of a concerted effort to increase domestic fossil fuel production. *See, e.g.*, 42 U.S.C. § 15903 (reduced royalty rates to marginal properties); *id.* § 15904 (financial incentives to deep wells in shallow waters in the Gulf of Mexico); *id.* § 15909(a) ("The purpose of this section is to promote natural gas production from the natural gas hydrate resources on the outer Continental Shelf and Federal lands in Alaska"); *id.* § 15910(a)(2)(B) ("purpose of this section is . . . to promote oil and natural gas production from the outer Continental Shelf and onshore Federal lands"); *id.* § 15927 ("[I]t is the policy of the United States that . . . United States oil shale, tar sands, and other unconventional fuels are strategically important domestic resources that should be developed to reduce the growing dependence of the United States on politically and economically unstable sources of foreign oil imports[.]").[7]

These comprehensive regulatory regimes are supplemented by an array of more specific statutes designed to promote fossil fuel production in certain locations and contexts. *See, e.g.*, Mining and Minerals Policy Act, 30 U.S.C. § 21a ("The Congress declares that it is the continuing policy of the Federal Government in the national interest to foster and encourage . . . economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help assure satisfaction of industrial, security and environmental needs[.]"); Coastal Zone Management Act, 16 U.S.C. § 1451(j) (explaining that "expanded energy activity" would further the "national objective of attaining a greater degree of energy self-sufficiency"); Federal Lands Policy Management Act, 43 U.S.C.

[7] There are also numerous provisions in the Clean Air Act that authorize (and, in some instances, require) EPA regulation of the sale of fossil fuels. Under Section 211, for example, the EPA Administrator has broad authority to regulate fuels and fuel additives, including the establishment of a Renewable Fuel Standards ("RFS") program, which prescribes target volumes for renewable fuel production and sales. 42 U.S.C. § 7545(o) (RFS requirements); *see also id.* § 7545(b)(1); *id.* § 7545(c).

§ 1701(a)(12) ("it is the policy of the United States that . . . the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals . . . from the public lands").[8]

These statutes "do[] not address every issue" regarding fossil fuel development, but to the extent that they "speak directly to [it], the courts are not free to 'supplement' Congress' answer so thoroughly that the [statutes] become meaningless." *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978). There can be no doubt that these statutes "speak directly to [the] question" at issue here—namely, whether fossil fuel production is excessive or unreasonable given the potential threat of global warming-related harms. Whereas Plaintiffs allege that Defendants' production of fossil fuels has created an "unreasonable" interference with public rights, Oak. Compl. ¶ 95, Congress has stated in no uncertain terms that fossil fuels are essential for the national economy and that their production should be accelerated. Put simply, Plaintiffs seek to use federal common law to punish the precise conduct that Congress has encouraged for decades—the development of domestic energy supplies. Accordingly, Plaintiffs' federal common law claims are displaced.

3. Plaintiffs have no conceivable federal common law nuisance claim based on "promotion" of lawful products

Plaintiffs have also described their public nuisance claims as aimed (at least in part) at Defendants' promotion and marketing activities. *See, e.g.*, Oak. Compl. ¶ 5. Plaintiffs allege that "Defendants promoted massive use of fossil fuels by misleading the public about global warming by emphasizing the uncertainties of climate science and through the use of paid denialist groups and individuals." *Id.* ¶ 62; *see also id.* ¶ 63. But any theory of public nuisance based on misleading "promotion" of a lawful product, one which is still necessary to daily life today, has been displaced because numerous federal statutes "speak directly" to allegations of misleading advertising.

Since the Federal Trade Commission Act was implemented in 1914, "unfair or deceptive acts or practices in or affecting commerce" have been "unlawful." 15 U.S.C. § 45(a)(1). The Federal Trade Commission has interpreted this Act to prohibit "misrepresent[ing], directly or by implication, that a product, package, or service offers a general environmental benefit." 16 C.F.R. § 260.4(a). More recently, Congress has enacted two pieces of legislation that speak directly to misrepresentation

[8] In addition to encouraging private businesses to produce fossil fuels, Congress has also enacted statutes directing federal agencies to increase production. *See* ECF No. 92 at 34–38.

in the promotion of fossil fuels. The Energy Policy Act of 2005 states that "[i]t shall be unlawful for any entity, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas . . . any manipulative or deceptive device or contrivance[.]" 15 U.S.C. § 717c-1. And the Energy Independence and Security Act of 2007 declares that "[i]t is unlawful for any person, directly or indirectly, to use or employ, in connection with the purchase or sale of crude oil gasoline or petroleum distillates at wholesale, any manipulative or deceptive device or contrivance[.]" 42 U.S.C. § 17301. The Act's implementing regulations expressly outlaw "the making of any untrue statement of material fact—that operates or would operate as a fraud or deceit upon any person," as well as "[i]ntentionally fail[ing] to state a material fact that under the circumstances renders a statement made by such person misleading." 16 C.F.R. § 317.3. These statutes speak directly to Plaintiffs' allegation that Defendants have misrepresented the environmental impacts of fossil fuels, and therefore displace Plaintiffs' federal common law cause of action.[9]

Moreover, Plaintiffs' promotion allegations are inimical to the First Amendment—a further reason that federal common law is unavailable. As part of their public nuisance claim, Plaintiffs allege that Defendants were "affirmative[ly] advertising . . . fossil fuels and downplaying global warming risks," arguing that such conduct has "encouraged continued fossil fuel consumption at massive levels[.]" Oak. Compl. ¶ 62. They also seek to punish Defendants for funding scientific research, "media attacks," and a newspaper editorial. *Id.* ¶¶ 69–76. But the federal common law of nuisance has *never* been used to punish a company for its speech. And for good reason—the speech that Plaintiffs seek to punish, whether commercial advertising or political discourse, is constitutionally protected. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481–82 (1995) (First Amendment protects "the free flow of commercial information") (citation omitted); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976) ("the free flow of commercial information is indispensable"); *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) (there is "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-

[9] To the extent Plaintiffs' claims are based on alleged misstatements to shareholders or the SEC, *see, e.g.*, Oak. Compl. ¶¶ 75, 81, 83, they are displaced by the securities laws, which comprehensively regulate corporate communications with investors and regulators. *See* 15 U.S.C. § 77a *et seq*; *id.* § 78a *et seq*; 17 C.F.R. § 240.10b-5.

open"). Plaintiffs may disagree with the point of view allegedly expressed by some Defendants, but "[d]iscussion of public issues . . . [is] integral to the operation of [our] system of government," *Buckley v. Valeo*, 424 U.S. 1, 14 (1976), and "the First Amendment stands against attempts to disfavor certain subjects or viewpoints," *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). Because Plaintiffs' requested remedy would have a "'chilling' effect . . . antithetical to the First Amendment's protection of true speech on matters of public concern," *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986), the federal common law cannot provide the remedy they seek.

In short, whether Plaintiffs' nuisance claims are based on domestic emissions, production, or promotion, they are squarely displaced by statute and must be dismissed, and to the extent that they are based on such foreign conduct, Plaintiffs have no federal common law remedy at all.

B. Plaintiffs Have Failed to Plead Viable Claims

Dismissal is also warranted because Plaintiffs have failed to state a claim for federal common law nuisance. Federal common law has never been extended to the "novel theory" of derivative liability asserted by Plaintiffs here. ECF No. 134 at 5; *see AEP*, 564 U.S. at 422 ("Nor have we ever held that a State may sue to abate any and all manner of pollution originating outside its borders."). Indeed, Plaintiffs have conceded that "[a]pplying federal common law to producer-based cases would extend the scope of federal nuisance law well beyond its original justification." ECF No. 81 at 9; *see also* ECF No. 134 at 5. Plaintiffs' claims also fail because the allegedly tortious conduct has been authorized by statute; Defendants are not in control of fossil fuels when they are combusted and emit greenhouse gases; Plaintiffs cannot prove causation as to any one Defendant, much less all of them; and the relief Plaintiffs seek is unavailable and unconstitutional.

1. Defendants' conduct is authorized and encouraged by law and therefore cannot be a nuisance

Federal courts have largely adopted the Restatement's definition of public nuisance as "an unreasonable interference with a right common to the general public." Restatement § 821B(1); *see Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 328 (2d Cir. 2009), *rev'd on other grounds*, 564 U.S. 410 (2011) ("[W]e apply the Restatement definition of public nuisance to the federal common

law of nuisance[.]").[10] A defendant's conduct cannot be deemed "unreasonable" when that conduct has been expressly sanctioned by statute, for it is well established that, even where "it would be a nuisance at common law, conduct that is fully authorized by statute, ordinance or administrative regulation does not subject the actor to tort liability." Restatement § 821B cmt. f; *see also id.* cmt. e (if defendant's conduct "does not come within one of the traditional categories of the common law crime of public nuisance or is not prohibited by a legislative act, the court is acting without an established and recognized standard").[11] "This is especially true 'where the conduct sought to be enjoined implicates the technically complex area of environmental law.'" *N. Carolina, ex rel. Cooper v. Tn. Valley Auth.*, 615 F.3d 291, 309 (4th Cir. 2010) ("*Cooper*") (citation omitted). Courts have thus held that nuisance claims are precluded where a statute either (i) expressly authorizes the supposedly tortious conduct, or (ii) implicitly authorizes such conduct "from the powers expressly conferred." *See Varjabedian v. City of Madera*, 20 Cal. 3d 285, 291 (1977) (citation omitted).

As discussed above, numerous federal statutes authorize, encourage, and sometimes even require the production of fossil fuels. California law also authorizes and encourages Defendants' conduct. The California Public Utilities Code, for example, mandates that the Public Utilities Commission "*shall . . . encourage, as a first priority, the increased production of gas in this state*[.]" Cal. Pub. Util. Code § 785 (emphasis added). And the California Public Resource Code permits "the owners or operators of [] wells to utilize *all* methods and practices known to the oil industry for the purpose of *increasing* the ultimate recovery of underground hydrocarbons," declaring it the "policy of this state" to maximize fossil-fuel production. Cal. Pub. Res. Code § 3106(b) (emphasis added); *id.* § 3106(d) (directing the supervisor "to encourage the wise development of oil and gas resources."). The Code also directs the Secretary of the Natural Resources Agency to conduct a "scien-

[10] *Nat'l Sea Clammers Ass'n v. City of New York*, 616 F.2d 1222, 1234 (3d Cir. 1980), *vacated on other grounds*, *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981) ("[W]e are convinced that the Court would . . . look to the Restatement formulation as an appropriate source for a federal rule."); *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1353 (Fed. Cir. 2001) (looking to Restatement for contours and scope of common law nuisance).

[11] *See also Cooper*, 615 F.3d at 309 ("Courts traditionally have been reluctant to enjoin as a public nuisance activities which have been considered and specifically authorized by the government.") (citation omitted); *Dina v. People ex rel. Dep't of Transp.*, 151 Cal. App. 4th 1029, 1052–53 (2007).

tific study on well stimulation treatments," with the express goal of determining where such "treatments are likely to spur or enable oil and gas exploration and production." *Id.* § 3160(a).

Numerous other statutes and regulations authorize the extraction, production, sale, and use of fossil fuels by necessary implication. For example, the California Business and Professions Code prohibits persons "engaged in the business of extracting oil or gas from lands within the state, or of producing motor vehicle fuels for sale within the state" from "refus[ing] to sell to any city or county sufficient quantities of his or her motor vehicle fuels or lubricants, or both, sold during the normal course of business for the essential services provided by the city or county." Cal. Bus. & Prof. Code § 13410(a).[12] Because a necessary predicate for all of these laws is the extraction and production of fossil fuels, they implicitly authorize the conduct challenged by Plaintiffs.[13] Defendants' extraction and production of fossil fuels thus "cannot be a nuisance." *See Cooper*, 615 F.3d at 309–10 (TVA's energy-generating operations could not be a nuisance because it was permitted by statute); *Farmers Ins. Exch. v. State of California*, 175 Cal. App. 3d 494, 503 (1985) (release of chemicals into the atmosphere that damaged property was not a nuisance because it was authorized to prevent pests).

2. Plaintiffs have not alleged that Defendants had sufficient control over the product allegedly causing the public nuisance

Most courts, including many that expressly rely on the Restatement, have held that an indispensable element of a public nuisance claim is that the defendant "have *control* over the instrumentality causing the alleged nuisance *at the time the damage occurs*." *State v. Lead Indus. Ass'n, Inc.*, 951 A.2d 428, 449 (R.I. 2008); *id.* at 449–53 (relying on Restatement to reject public nuisance claims against the manufacturers of lead paint because plaintiffs failed to allege "that defendants had control over the lead pigment at the time it caused harm to children"); *In re Lead Paint Litig.*, 924 A.2d 484, 498–99 (N.J. 2007) (relying on the Restatement to conclude that "a public nuisance, by definition, is related to conduct, performed in a location within the actor's control, which has an adverse effect on

[12] *See also* Cal. Pub. Res. Code § 6815.1; Cal. Bus. & Prof. Code § 13441; Cal. Sts. & High. Code § 2105; Cal. Code Regs. tit. 14, §§ 1740.5, 18621.

[13] Plaintiffs' *own laws* also authorize the very activities that they now label a nuisance. Oakland permits businesses such as "gas generating plant[s] [and] compressor plant[s]," *see* Oakland Mun. Code § 9.32.030, and those involved in the "sale of petroleum products," *see id.* § 17.10.470, to operate within the city. Similarly, San Francisco's Planning Code specifically envisions using land for "oil and gas exploration, development and processing." *See* San Francisco Planning Code, art. 12.

a common right").[14] This is because "liability for damage caused by a nuisance turns on whether the defendant is in control of the instrumentality alleged to constitute a nuisance, *since without control a defendant cannot abate the nuisance*." *Tioga Pub. Sch. Dist. No. 15 of Williams Cty., N.D. v. U.S. Gypsum Co.*, 984 F.2d 915, 920 (8th Cir. 1993) (emphasis added); *see also Nat'l Gypsum Co.*, 637 F. Supp. at 656 ("a basic element of the tort of nuisance is absent" because, "after the time of manufacture and sale, [defendants] no longer had the power to abate the nuisance").

Plaintiffs assert that their alleged damages were "caused by the combustion of fossil fuels," which emit carbon dioxide and other greenhouse gases, contributing to increased global temperatures. SF Compl. ¶ 49. But far from alleging that Defendants had control over fossil fuel products at the time of combustion, Plaintiffs concede that the "*use of fossil fuel*" by others—not the Defendants' alleged extraction, production, and promotion—"is the primary source of greenhouse gas pollution that causes global warming." Oak. Compl. ¶ 2 (emphasis added); *see also* SF Compl. ¶ 51. Because Plaintiffs base their claims on Defendants' production, marketing and sales of fossil fuels, and *not* on Defendants' use thereof or emissions, Plaintiffs have not alleged (and cannot allege) that Defendants had sufficient control over the products at the time these products allegedly created the nuisance. *See* Remand Hr'g Tr. 25:19–21 ("[L]et me be clear that our claim is about the selling of products and the improper promotion of products."). This insurmountable legal deficiency alone warrants dismissal.

Moreover, *no court* has ever held that public nuisance claims based on the production or distribution of lawful products can proceed under federal common law. Courts applying state law have also overwhelmingly rejected such claims. *See*, *e.g.*, *Lead Industries*, 951 A.2d at 456 ("The law of public nuisance never before has been applied to products."); *City of Bloomington, Ind. v. Westinghouse Elec. Corp.*, 891 F.2d 611, 614 (7th Cir. 1989) (noting lack of cases "holding manufacturers liable for public or private nuisance claims arising from the use of their product subsequent to the point of sale"); *Tioga*, 984 F.2d at 920; *Camden*, 273 F.3d at 540. Put simply, "[m]ost courts agree that the manufacture or distribution of a lawful product does not meet the requirements for liability

[14] *See City of Manchester v. Nat'l Gypsum Co.*, 637 F. Supp. 646, 656 (D.R.I. 1986); *Camden Cty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536, 540–41 (3rd Cir. 2001). Certain California courts, however, have abandoned the "control" requirement for public nuisance claims under California law. *People v. ConAgra Groc. Prods. Co.*, 17 Cal. App. 5th 51, 162–65 (2017).

under public nuisance law." *Donald G. Gifford*, Public Nuisance as a Mass Products Liability Tort, 71 U. Cin. L. Rev 741, 833 (2003); *but cf.* ECF No. 134 at 5 n.2 (distinguishing contrary cases).

This Court should reject Plaintiffs' attempt to "stretch the concept of public nuisance far beyond recognition and . . . create a new and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort of public nuisance." *Lead Paint Litig.*, 191 N.J. at 421. Plaintiffs' claims would turn the law of nuisance into "a monster that would devour in one gulp the entire law of tort." *Tioga*, 984 F.2d at 921.

3. Plaintiffs cannot prove that Defendants' conduct caused their alleged injuries

"Causation is a necessary element of a public nuisance claim." *City of San Jose v. Monsanto Co.*, 231 F. Supp. 3d 357, 363 (N.D. Cal. 2017); *In re Exxon Valdez*, 270 F.3d 1215, 1253 (9th Cir. 2001). But causation does not include every event "without which any happening would not have occurred." Restatement § 431 cmt. a. To distinguish those causal factors for which a defendant may be held liable from the multitude of factors giving rise to any given event, courts generally require a plaintiff to prove that the defendant's conduct was both the "cause in fact" and the "proximate" cause of the alleged injury. *Osborn v. Irwin Mem'l Blood Bank*, 5 Cal. App. 4th 234, 252 (1992); *see* Dan B. Dobbs et al., Dobbs' Law of Torts § 185 (2d ed.). Plaintiffs cannot prove either element.

With respect to cause in fact, the Restatement has adopted the "substantial factor" test, under which an act will be considered to have caused the injury only where the injury would not have happened but for the act. Restatement § 432(1); *Mitchell v. Gonzales*, 54 Cal. 3d 1041, 1052 (1991). Plaintiffs do not—and cannot—assert that their alleged injuries from sea rise would not have occurred if any Defendant had altered its behavior and stopped producing fossil fuel products, reduced production, or warned the public about the possible risks. Instead, Plaintiffs generically allege that the global warming nuisance was "caused by Defendants," Oak. Compl. ¶ 14, but do not allege any facts showing that any particular defendant's conduct necessarily caused their injuries. Nor could they, as the "undifferentiated nature of greenhouse gas emissions from all global sources and their worldwide accumulation over long periods of time . . . make[] clear that there is no realistic possibility of tracing any particular alleged effect of global warming to any particular [action] by any specific person, entity, [or] group at any particular point in time." *Kivalina*, 663 F. Supp. 2d at 880.

Even if Defendants' productions were considered cumulatively, the allegations fail to demonstrate that Plaintiffs' injuries would not have arisen but for Defendants' conduct. Though Plaintiffs assert that Defendants are "five of the ten largest producers" of fossil fuels, Oak. Compl. ¶ 52, they have not sued the third, fifth, seventh, eighth, or tenth largest producers, *see id.* ¶ 10. Nor did they sue any one of the thousands of smaller producers that supply the remainder of the world's fossil fuels. Because these unnamed producers would likely have increased production to meet worldwide demand for fossil fuels if Defendants had decreased their extraction activities, Plaintiffs cannot prove that worldwide greenhouse gas emissions would have been materially lower but for Defendants' conduct. *Cf. Sierra Club v. U.S. Def. Energy Support Ctr.*, 2011 WL 3321296, at *5 (E.D. Va. July 29, 2011) (plaintiff failed to show that "if there had been a reduction in the amount of greenhouse gases emitted by producers of fuel from oil sands crude, those reductions would not have been offset by increased emissions elsewhere on the planet"); *City of Chi. v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1137 (Ill. 2004) (affirming dismissal because it was "not at all clear that the condition would cease to exist even if these particular defendants entirely ceased selling firearms."). Plaintiffs have, therefore, failed to allege facts showing that Defendants are the "cause in fact" of their injuries.[15]

The highly attenuated nature of Plaintiffs' claims also precludes them from adequately pleading that Defendants were the "proximate" cause of their purported injuries. To prove proximate causation, the plaintiff must demonstrate a "direct relationship between the injury and the alleged wrongdoing." *Or. Laborers-Employers Health & Welfare Trust Fund v. Philip Morris Inc.*, 185 F.3d 957, 963 (9th Cir. 1999). These requirements apply to nuisance claims, and the court may dismiss on the pleadings where the plaintiff fails to allege facts establishing proximate causation. *See Benefiel v. Exxon Corp.*, 959 F.2d 805, 807 (9th Cir. 1992) (affirming dismissal where alleged injuries were "remote and derivative" and defendants' conduct "did not directly cause any injury" to the plaintiffs). Plaintiffs cannot establish proximate cause here because global warming claims are "dependent on a

[15] Plaintiffs also allege that emissions from fossil fuels produced by Defendants *contributed* to global warming. Oak. Compl. ¶ 95. But "given the extremely attenuated causation scenario alleged in [the] Complaint[s], it is entirely irrelevant whether any defendant 'contributed' to the harm because [fossil fuel production], standing alone, is insufficient to establish injury." *Kivalina*, 663 F. Supp. 2d at 880.

series of events far removed both in space and time from the Defendants'" alleged misconduct. *Kivalina*, 663 F. Supp. 2d at 881. Indeed, Plaintiffs seek to hold Defendants accountable for conduct that allegedly began in "*the mid Nineteenth Century*." *See* Oak. Compl. ¶ 10 (emphasis added); *see also id.* ¶ 48. But "where a great length of time has elapsed between the actor's negligence and harm to another . . . the effect of the actor's conduct may . . . become so attenuated as to be insignificant and unsubstantial as compared to the aggregate of the other factors which have contributed." Restatement § 433 cmt. f. Here, there are countless "other factors" contributing to global warming, and Defendants are "simply too far removed from the [alleged harm] to be held responsible for it." *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S. 2d 192, 202 (N.Y. App. Div. 2003).

Under the Restatement, the plaintiff also must show that the defendant's conduct was a "substantial" factor in bringing about the alleged harm, Restatement § 431, a showing that "depends in part on whether 'the actor's conduct . . . has created a situation harmless unless acted upon by other forces for which the actor is not responsible.'" *Benefiel*, 959 F.2d at 807 (omission in original) (quoting Restatement § 433(b)). Plaintiffs do not dispute that Defendants' production of fossil fuels, which has been encouraged by every level of government, was harmless in and of itself. Plaintiffs' alleged injuries have arisen only because countless intervening users, including Plaintiffs themselves, independently combusted the fossil fuels Defendants—and many other private and state-owned companies around the world—produced for transportation, electricity, or heat, and the greenhouse gases those users emitted combined with the aggregated emissions of billions of other users from around the world for many decades to increase the concentration of greenhouse gases in the atmosphere. Plaintiffs' claims thus flout the "uniformly accepted principle[] of tort law" that the plaintiff must "prove more than that the defendant's action triggered a series of other events that led to the alleged injury." *Id.* Other courts dealing with allegations of injury caused by global warming have relied on precisely this attenuation to find causation lacking. *E.g.*, *Comer*, 839 F. Supp. 2d at 868; *Amigos Bravos v. U.S. Bureau of Land Mgmt.*, 816 F. Supp. 2d 1118, 1136 (D.N.M. 2011); *Sierra Club*, 2011 WL 3321296, at *5. As the court in *Comer* explained, "[t]he assertion that the defendants' emissions combined over a period of decades or centuries with other natural and man-made gases to cause or strengthen a hurricane and damage personal property is precisely the type of remote, improbable, and

extraordinary occurrence that is excluded from liability." 839 F. Supp. 2d at 868; *see also Kivalina*, 696 F.3d at 868 (Pro, J., concurring).

4. The relief Plaintiffs seek is unavailable and would be unconstitutional

Dismissal is also warranted because the relief Plaintiffs seek is not available under federal common law. Although in appropriate circumstances a federal court "may grant equitable relief to abate a public nuisance that is occurring or to stop a threatened nuisance from arising," *Michigan v. U.S. Army Corps of Engineers*, 667 F.3d 765, 781 (7th Cir. 2011), Plaintiffs do not seek an injunction. Nor could they, as the Complaint fails to identify any specific conduct in any particular location that allegedly caused the nuisance. And even if this Court were to issue a nationwide injunction against *all* fossil fuel production, such an order would not abate the alleged nuisance—though it would devastate the U.S. economy—because global warming is caused by *global* emissions that this Court has no power to enjoin. Nor could this Court order Defendants to build sea walls to protect against flooding, as the Army Corps of Engineers has exclusive authority over construction and dredging activities in navigable waters of the United States, including the San Francisco Bay. 33 U.S.C. § 403; *see also* 33 U.S.C. § 426i (authorizing the Corps "to investigate, study, plan, and implement structural and nonstructural measures for the prevention or mitigation of shore damages").[16] Without the Corps's approval, neither Plaintiffs nor Defendants could take any meaningful action to prevent the navigable waters of the United States from flooding Plaintiffs' land.

Perhaps recognizing the futility of requesting a true equitable remedy, Plaintiffs instead ask for "an abatement fund remedy to be paid for by Defendants." Oak. Compl. "Relief Requested." But there is no functional difference between the purported "abatement fund" Plaintiffs seek here—*i.e.*, a pot of money that Plaintiffs can spend as they think best—and damages. The Restatement explains that "an award of damages is retroactive, applying to past conduct, while an injunction applies only to the future." Restatement § 821B cmt. i. "[F]or damages to be awarded significant harm must have been actually incurred, while for an injunction harm need only be threatened and need not actually have been sustained at all." *Id.* Here, although Plaintiffs vaguely allege that global warming "has

[16] *See also* Water Resource Development Act of 2007, Pub. L. 110-114 § 4027(a)(1), 121 Stat. 1041, 1177; *South San Francisco Bay Shoreline Phase I Study: Final Integrated Document* 9-2 (Sept. 2, 2015), https://tinyurl.com/y9l72v5c.

caused" sea level rise, Oak Compl. ¶ 85, they seek billions of dollars primarily to prevent injuries they *expect to suffer* over the next 75 years. Oak. Compl. ¶¶ 84–92. Thus, even if damages were available under federal common law—a dubious proposition[17]—Plaintiffs have failed to allege facts that could sustain a damages award.

Moreover, awarding billions of dollars in damages would violate the Constitution. "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421 (2003) ("A State cannot punish a defendant for conduct that may have been lawful where it occurred."). In *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), the Court invalidated a federal statute that made coal companies retroactively liable for the medical costs of former coal miners. Justice O'Connor, writing for a four-justice plurality, observed that the Coal Act was unconstitutional under the Takings Clause because it "divest[ed] Eastern of property long after the company believed its liabilities . . . to have been settled[,] [a]nd the extent of Eastern's retroactive liability is substantial and particularly far reaching." *Id.* at 534. The plurality struck down the Act because it "improperly place[d] a severe, disproportionate, and extremely retroactive burden on Eastern." *Id.* at 538; *see also id.* at 539, 549 (Kennedy, J., concurring in the judgment and dissenting in part) (statute "must be invalidated as contrary to essential due process principles" because it had "a retroactive effect of unprecedented scope").[18] Because Defendants' fossil fuel extraction was incontrovertibly lawful when it occurred (and still is today), imposing the type of massive retroactive liability that Plaintiffs seek here would constitute a grievous violation of due process.

"Because the relief sought by [Plaintiffs] is unavailable as a matter of law, the case[s] must be dismissed." *Schweiker v. Chilicky*, 487 U.S. 412, 429 (1988).

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[17] "[T]here is no right either historically, or through the Restatement['s] formulation, for the public entity to seek to collect money damages[.]" *Lead Paint Litig.*, 924 A.2d at 498–99 (citing Restatement § 821C(1)). The Supreme Court has not yet decided "whether a cause of action may be brought under federal common law by a private plaintiff, seeking damages." *Sea Clammers*, 453 U.S. at 21.

[18] Courts have held that *Eastern Enterprises* "stands for a clear principle: a liability that is severely retroactive, disruptive of settled expectations and wholly divorced from a party's experience may not constitutionally be imposed." *Me. Yankee Atomic Power Co. v. United States*, 44 Fed. Cl. 372, 378 (1999); *see also Franklin Cty. Convention Facilities Auth. v. Am. Premier Underwriters*, 61 F. Supp. 2d 740, 743 (S.D. Ohio 1999); *Peterson v. Islamic Rep. of Iran*, 758 F.3d 185, 192 (2d Cir. 2014).

C. Plaintiffs' Claims Violate the Separation of Powers

Plaintiffs ask this Court to decide whether the extraction and production of fossil fuels worldwide is "unreasonable" given the alleged connection to global warming and the potential that such warming will lead to future harms. But the decision they seek is not within "the proper—and properly limited—role of the courts in a democratic society." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006). Absent legislative authorization and guidance, Courts are "without competence" to address matters "of high policy," such as global warming, *Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980), and they lack authority to "formulate national policies or develop standards for matters not legal in nature," *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). Matters of global concern, such as rising seas allegedly caused by worldwide emissions, are "committed by the Constitution to the political departments of the Federal Government." *United States v. Pink*, 315 U.S. 203, 222–23 (1942). For this reason, "the political branches have . . . made foreign policy determinations regarding the United States' role in the international concern about global warming." *Gen. Motors*, 2007 WL 2726871, at *14.

As Defendants have explained, greenhouse gas emissions and responses to global warming are the subject of numerous international agreements. *See supra* II.A. Plaintiffs, apparently dissatisfied with the state of these agreements, seek to impose their own normative judgments as to the proper limits for fossil fuel production and use by imposing damages on Defendants that would force them to "change [their] methods of doing business and controlling pollution to avoid the threat of ongoing liability." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 495 (1987). But crippling the nation's fossil fuel producers would weaken the President's bargaining position vis-à-vis other nations, thereby "undercutting [his] diplomatic discretion and the choice he has made exercising it." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 423–24 (2003); *Gen. Motors*, 2007 WL 2726871, at *14 ("[B]y seeking to impose damages for the [Defendants'] lawful worldwide [fossil fuel extraction], [plaintiffs'] nuisance claims sufficiently implicate the political branches' powers over . . . foreign policy[.]"). Accordingly, as several courts—including this one—have previously recognized, global warming-based tort claims cannot be adjudicated without dragging the Court "into precisely the geopolitical debate more properly assigned to the coordinate branches." *Gen. Motors*, 2007 WL

2726871, at *10; *see also Kivalina*, 663 F. Supp. 2d at 876–77; *Comer*, 839 F. Supp. 2d at 865.

Plaintiffs' claims would also usurp Congress's "exclusive" power "to regulate interstate and foreign commerce." *La. Pub. Serv. Comm'n v. Tex. & N.O.R. Co.*, 284 U.S. 125, 130 (1931). Plaintiffs are seeking "billions" in damages, Oak. Compl. ¶ 92, and the Supreme Court has repeatedly recognized that "regulation can be . . . effectively exerted through an award of damages," *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 637 (2012). *See id.* ("[T]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy[.]"); *see also BMW of N. Am.*, 517 U.S. at 572 n.17 ("State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute."). The Court should decline to become the de facto regulator of fossil fuel production, especially since the ad-hoc regulation Plaintiffs seek "would require the Court to balance the competing interests of reducing global warming emissions and the interests of advancing and preserving economic and industrial development"—precisely "the type of initial policy determination" entrusted to Congress. *Gen. Motors*, 2007 WL 2726871, at *8.

The claims are also ill-suited for judicial resolution because, unlike Congress, which may weigh competing policy interests, courts "must be governed by *standard*, by *rule*." *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality). As this Court has twice recognized, there is no manageable standard for balancing the utility of using fossil fuels against the risks posed by emissions. *Kivalina*, 663 F. Supp. 2d at 874–75; *Gen. Motors*, 2007 WL 2726871, at *15. Nor is there a "manageable method of discerning the entities that are creating and contributing to the alleged nuisance" because "there are multiple worldwide sources of atmospheric warming across myriad industries and multiple countries." *Gen. Motors*, 2007 WL 2726871, at *15. There is likewise no "guidance" for "determining who should bear the costs associated with the global climate change that admittedly result from multiple sources around the globe." *Id.* Accordingly, "the allocation of fault—and cost—of global warming is a matter appropriately left for determination by the executive or legislative branch." *Kivalina*, 663 F. Supp. 2d at 877.

IV. CONCLUSION

For the foregoing reasons, the Court should grant the Motion and dismiss these actions.

March 20, 2018

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through Oakland City Attorney BARBARA J. PARKER,

Plaintiff and Real Party in Interest,

v.

BP P.L.C., a public limited company of England and Wales, CHEVRON CORPORATION, a Delaware corporation, CONOCOPHILLIPS COMPANY, a Delaware corporation, EXXONMOBIL CORPORATION, a New Jersey corporation, ROYAL DUTCH SHELL PLC, a public limited company of England and Wales, and DOES 1 through 10,

Defendants.

First Filed Case: No. 3:17-cv-6011-WHA
Related Case: No. 3:17-cv-6012-WHA

[PROPOSED] ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

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

HEARING

TO BE SET BY COURT

THE HONORABLE WILLIAM H. ALSUP

THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the San Francisco City Attorney DENNIS J. HERRERA,

Plaintiff and Real Party in Interest,

v.

BP P.L.C., a public limited company of England and Wales, CHEVRON CORPORATION, a Delaware corporation, CONOCOPHILLIPS COMPANY, a Delaware corporation, EXXON MOBIL CORPORATION, a New Jersey corporation, ROYAL DUTCH SHELL PLC, a public limited company of England and Wales, and DOES 1 through 10,

Defendants.

Case No. 3:17-cv-6012-WHA

This matter came before the Court on Defendants' Motion to Dismiss. Having fully reviewed and considered all papers filed in support of and in opposition to Defendants' Motion, the Court GRANTS the Motion to Dismiss with respect to all claims and causes of action asserted against Defendants because Plaintiffs' allegations fail to state a claim upon which relief may be granted. **IT IS HEREBY ORDERED** that:

i. Defendant's Motion to Dismiss is **GRANTED** in its entirety;

ii. Plaintiffs' Complaints are hereby **DISMISSED** with prejudice; and

iii. The Clerk of the Court is to enter judgment as to those claims in Defendants favor.

IT IS SO ORDERED.

DATED: _____ BY: _____

HON. WILLIAM H. ALSUP
UNITED STATES DISTRICT JUDGE