No. 18-16663

IN THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CITY OF OAKLAND, *ET AL.*,
Plaintiffs-Appellants,

v.

BP P.L.C., *ET AL.*,
Defendants-Appellees.

On Appeal from the United States District Court
Northern District of California
Nos. 3:17-cv-06011-WHA, 3:17-cv-06012-WHA
Hon. William H. Alsup

BRIEF OF INDIANA AND 17 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES

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INTEREST OF THE *AMICI* STATES

A*mici curiae*, States of Indiana, Alabama, Alaska, Arkansas, Georgia, Kansas, Louisiana, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, Texas, Utah, West Virginia, and Wyoming respectfully submit this brief in support of Defendants-Appellees.

The justiciability of climate change lawsuits is an issue of extraordinary importance to the *Amici* States. Adjudication of claims to abate harms allegedly produced by global climate change would disrupt carefully calibrated state-federal regulatory schemes devised by politically accountable officials. Courts should not use public nuisance theories to confound state and federal political branches' legislative and administrative processes. Courts should not be in the business of establishing emissions policy (or, as is more likely, multiple conflicting emissions policies) on a piecemeal, ad hoc, case-by-case basis under the aegis of common law.

States have an especially strong interest in this case because the list of potential defendants is limitless. Plaintiffs' theory involves nothing more specific than promoting fossil fuels. As utility owners, power plant operators, and significant users of fossil fuels, States and their political subdivisions themselves may be future defendants in similar actions.

SUMMARY OF THE ARGUMENT

Suing in the name of the People of California, the cities of San Francisco and Oakland seek judicial resolution of one of the most complicated and contentious issues confronting policymakers across the United States and around the world—global climate change. Plaintiffs concede that the "in-state harms" for which they seek relief "result[] from conduct that occurred in California *as well as elsewhere*." Appellants Br. 43 (emphasis added). According to Plaintiffs' own theory of the case, their injuries are caused by *global* climate change that is itself the direct result of greenhouse gases emitted by countless entities all over the world.

In this suit, however, Plaintiffs take aim at just five companies that extract and refine fossil fuels—neglecting entirely entities that combust fossil fuels and thereby emit greenhouse gases. Plaintiffs argue that these five companies should be forced to pay into an abatement fund because, by producing fossil fuels and promoting their use, the companies have broken the law—but not law enacted by a legislature, promulgated by a government agency, or negotiated by a President. Rather, the law Plaintiffs invoke is the common law: They claim that Defendants' production and promotion of fossil fuels constitutes a "public nuisance" such that

courts may impose on this small group of defendants the costs of remedying *all* of Plaintiffs' alleged injuries.

Plaintiffs' claims are not appropriate for this or any other court's consideration. At bottom, their argument is that the common law of public nuisance authorizes courts to assign as they see fit responsibility for remedying climate change. Yet the issues surrounding climate change and its effects—and the proper balance of regulatory and commercial activity—present political questions that cannot be resolved by judicial decree. Indeed, were the Court to intervene here it would trample Congress's carefully calibrated process of cooperative federalism, in which States work in tandem with EPA to administer the federal Clean Air Act.

Abandoning the political process to make global climate change policy, Plaintiffs urge judges to impose their preferred remedies by fiat. Their supporting *amici*—which include members of the political branches—contend that climate-change policy is too important and time-sensitive to be handled by unreliable politicians, California et al. Br. 6, and that political opposition to "legislative solutions" makes judicial intervention necessary, U.S. Senators Br. 31. In our system of government,

however, the judiciary is neither a regulator-of-last-resort nor a guarantor against political gridlock. Indeed, the need for broad agreement in addressing global climate change is precisely why courts should *not* be involved. Policy responses to massive problems such as global climate change inevitably require decision-makers to balance competing interests and allocate myriad costs—precisely the sort of question the Constitution reserves to the political branches.

ARGUMENT

I. Plaintiffs' Claims Raise Non-Justiciable Political Questions

Plaintiffs' claims ask for nothing less than judicial creation of a global regulatory regime governing the production, promotion, sale, and use of fossil fuels. They characterize their claims as seeking "an equitable abatement remedy under California public nuisance law" on the theory that "each Defendant wrongfully promoted the use of its fossil-fuel products" while it knew "devastating impacts . . . would result from the expanded use of" fossil fuels—impacts that Plaintiffs allege "*begin[] with the extraction of fossil fuels and continu[e] with their production, sale, and combustion*." Appellant Br. 32 (emphasis added).

Plaintiffs thus acknowledge the obvious—that their alleged injuries occur only as the culmination of incalculable actions taken all around the world. According to Plaintiffs' own causal theory, Defendants produce, promote, and sell fossil fuels, but those fossil fuels lead to Plaintiffs' alleged injuries only when and if the fossil fuels' eventual combustion produces greenhouse gases—which combine with other greenhouse gases from emission sources across the globe to produce climate change, which *then* finally causes Plaintiffs' alleged injuries.

Plaintiffs' claims would require *courts* to determine, out of the innumerable actors taking part in this worldwide series of actions, who should bear what costs to address climate change's consequences. Plaintiffs contend the five Defendants should bear the *entire* cost of redressing all of their alleged injuries, but resolving those claims would require courts to answer immensely complicated political questions that "lack . . . satisfactory criteria for a judicial determination." *Baker v. Carr*, 369 U.S. 186, 210 (1962). Plaintiffs' claims ultimately sound in public policy, not law, and are therefore inappropriate for judicial resolution.

1. Longstanding Supreme Court precedent establishes that a claim presents non-justiciable political questions if its adjudication would

not be governed by "judicially discoverable and manageable standards" or would require "an initial policy determination of a kind clearly for non-judicial discretion." *Baker*, 369 U.S. at 217. The political question doctrine arises from the Constitution's core structural values of judicial modesty and restraint. As early as *Marbury v. Madison*, Chief Justice Marshall explained that "[q]uestions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." 5 U.S. (1 Cranch) 137, 170 (1803). These questions, Marshall wrote, "respect the nation, not individual rights." *Id.* at 166. There, in the very case that establishes the power of judicial review, the political question doctrine received its judicial imprimatur.

The political question doctrine has repeatedly foreclosed attempts to regulate global climate change via public nuisance lawsuits. Indeed, the U.S. District Court for the Southern District of New York recently dismissed virtually identical claims against the same five companies relying in part on the political question doctrine. It recognized that "the immense and complicated problem of global warming requires a comprehensive solution that weighs the global benefits of fossil fuel use with the gravity of the impending harms." *City of New York v. BP p.l.c.*, 325 F.

Supp. 3d 466, 475–76 (S.D.N.Y. 2018), *appeal pending*, No. 18-2188 (docketed Jul. 26, 2018). The court "decline[d] to recognize" the plaintiffs' claims because litigating "an action for injuries from foreign greenhouse gas emissions in federal court would severely infringe upon the foreign-policy decisions that are squarely within the purview of the political branches of the U.S. Government." *Id.* at 476.

Similarly, the U.S. District Court for the Northern District of California has dismissed two cases seeking relief from industry for harms allegedly caused by global climate change. In one case, it dismissed an Alaskan village's claims seeking damages from dozens of energy companies for coastal erosion allegedly caused by global warming, observing that "the allocation of fault—and cost—of global warming is a matter appropriately left for determination by the executive or legislative branch." *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp 2d 863, 877 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012). In another, it dismissed public nuisance claims against automakers, recognizing "the complexity of the initial global warming policy determinations that must be made by the elected branches prior to the proper adjudication of Plaintiff's federal common law nuisance claim[,]" and the "lack of judicially

discoverable or manageable standards by which to properly adjudicate Plaintiff's federal common law global warning nuisance claim." *See California v. Gen. Motors Corp.*, No. C06-05755, 2007 WL 2726871 at *6, *16 (N.D. Cal. Sept. 17, 2007). And a district court in Mississippi dismissed on political question grounds a lawsuit by Gulf of Mexico residents against oil and gas companies for damages from Hurricane Katrina, which plaintiffs alleged was strengthened by climate change. *Comer v. Murphy Oil I,* No. 05-436, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007) (unpublished ruling), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010), *mandamus denied*, No. 10-294 (U.S. Jan. 10, 2011).

These cases demonstrate precisely why Plaintiffs' *amici* are wrong to claim—rather paradoxically—that "widespread harm," Cal. State Ass'n of Counties 8, can only be prevented by "local solutions," Nat'l League of Cities Br. 13. The complexity of global climate change and the accompanying worldwide allocation of fault requires national or international action, not the ad hoc intervention of individual courts acting at the behest of a handful of local governments. *See Kivalina*, 663 F. Supp. 2d at 877; *Gen. Motors Corp.*, 2007 WL 2726871 at *6, *16.

More broadly, several Circuits and other federal courts have recognized that political questions may arise in cases that nominally involve tort claims. *See, e.g.*, *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petrol.*, 577 F.2d 1196, 1203 (5th Cir. 1978) (concluding tortious conversion claims were barred by the political question doctrine); *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271 (11th Cir. 2009) (finding tort claims arising from automobile accident were barred by the political question doctrine); *Antolok v. United States*, 873 F.2d 369, 383 (D.C. Cir. 1989) (noting that "[i]t is the political nature of the [issue], not the tort nature of the individual claims, that bars our review and in which the Judiciary has no expertise."); *Chaser Shipping Corp. v. United States*, 649 F. Supp. 736, 738 (S.D.N.Y. 1986) ("Even though awarding tort damages is a traditional function for the judiciary, it is apparent that there is a clear lack of judicially discoverable and manageable standards for arriving at such an award.").

Even Plaintiffs' *amici* recognize the political nature of the claims at issue here. One, for example, devotes a majority of its brief to discussing the political background and history of efforts to address climate change,

describing lobbying efforts, proposed legislation, and various international initiatives. U.S. Senators Br. 8–30. As *amici* recognize, the United States' climate-change policy has changed significantly over the course of the past three presidencies, *id.* at 9–10, which only underscores the necessity of political, and not judicial, action.

Another *amicus* brief even agrees with the court below that "[e]veryone has contributed to the problem of global warming and everyone will suffer the consequences—the classic scenario for a legislative or international solution." Former U.S. Gov't Officials Br. 4 (quoting *City of Oakland v. BP p.l.c.*, 325 F. Supp. 3d 1017, 1026 (N.D. Cal. 2018)). Yet, unremarkable though it may be to observe that "[l]egislative and international solutions routinely expect and depend on the active role of judicial actions to help achieve their goals," *id.* at 4, it is equally critical to grasp the limits of the judicial role. The judiciary may properly allocate fault (and costs) only *after* the political branches initially determine "goals" and standards to guide those allocations.

Adjudicating Plaintiffs' claims would require a complex initial policy determination more appropriately addressed by other branches of government. The Environmental Protection Agency reaffirmed this

point long ago when it observed that "[t]he issue of global climate change . . . has been discussed extensively during the last three Presidential campaigns; it is the subject of debate and negotiation in several international bodies; and numerous bills have been introduced in Congress over the last 15 years to address the issue." *Control of Emissions from New Highway Vehicles and Engines,* Notice of Denial of Pet. for Rulemaking, 68 Fed. Reg. 52922, 52928 (Sept. 8, 2003). As EPA further noted, "[u]navoidably, climate change raises important foreign policy issues, and it is the President's prerogative to address them." *Id.* at 52931. For these reasons, "[v]irtually every sector of the U.S. economy is either directly or indirectly a source of [greenhouse gas] emissions, and the countries of the world are involved in scientific, technical, and political-level discussions about climate change." *Id.* at 52928.

Indeed, addressing global climate change necessarily requires balancing any environmental costs of fossil fuel production against the economic and geopolitical *benefits* fossil fuels generate. And as a 2017 Executive Order recently recognized, these benefits are vast: While burdensome regulations can "encumber energy production, constrain economic

growth, and prevent job creation," "the prudent development of [our Nation's] natural resources is essential to ensuring the Nation's geopolitical security." Exec. Order No. 13,783, 82 Fed. Reg. 16093 (Mar. 28, 2017). Judges are simply not well positioned to discern, as a matter of common law, the proper regulatory balance.

Climate change plainly is not a "local problem." Nat'l League of Cities Br. 13. As the term implies, global climate change is a global issue that can be addressed only at the national—or even international—level. Thus, while Plaintiffs' claims may be styled as torts, they are in substance requests for judicial resolution of political problems. They are therefore not justiciable.

2. Even beyond being inherently political, Plaintiffs' claims also are ungoverned by "judicially discoverable and manageable standards[.]" *Baker*, 369 U.S. at 217; *see also Kivalina*, 663 F. Supp. 2d at 874–77. No common law nuisance standards exist that could limit judicial policymaking in the course of deciding whether the prospect of global climate change makes it "unreasonable" for energy companies to produce and promote fossil fuels.

To determine liability, the Court would need to determine that plaintiffs have a "right" to the climate—in all of its infinite variations—as it stood at some unspecified time in the past, then find not only that this idealized climate has changed, but that Defendants caused that change through "unreasonable" action that deprived Plaintiffs of their right to the idealized climate. And, as a remedy, the Court would need to impose a regulatory scheme—which would need to balance the gravity of harm alleged by Plaintiffs against the utility of each Defendant's conduct—on fossil fuel emissions that are *already* subject to comprehensive state and federal regulation. In order to do so, the Court would be forced to make decisions without recourse to any principled, judicially administrable standards. Courts are not in any position to undertake the tradeoffs required to adjudicate Plaintiffs' claims.

Courts should not be in the business of setting nationwide energy and environmental policy—or, more likely, competing policies—on an *ad hoc*, case-by-case basis under the aegis of common law. They face insuperable practical hurdles in terms of gathering information about complex public policy issues and predicting long-term consequences that might flow from their decisions. And most critically, courts lack political

accountability for decisions based on something other than neutral legal principles. The district court correctly recognized that "questions of how to appropriately balance the[] worldwide negatives against the worldwide positives of" fossil fuels, "and of how to allocate the pluses and minuses among the nations of the world, demand the expertise of" officials in the political branches of government. *City of Oakland*, 325 F. Supp. 3d at 1026. Its decision should be affirmed.

II. Plaintiffs' Claims Jeopardize Our National System of Cooperative Federalism

By attempting to force Defendants to pay to abate all injuries Plaintiffs allegedly suffer as a result of global climate change, Plaintiffs seek to inject their political and policy preferences into the national framework regulating the production, promotion, and use of energy. Congress has leveraged and augmented States' preexisting regulatory authority by way of the Clean Air Act, a program of cooperative federalism designed to permit each State to achieve its optimal balance of regulation and commercial activity. If the Court were to grant Plaintiffs' requested relief, it would seriously undermine this national regulatory system—a system in which *all* States play a critical policymaking role. The Court should not

do so. The threat Plaintiffs' claims pose to America's system of cooperative federalism underscores the political nature of their claims and provides yet another reason for dismissing those claims.

1. Cooperative federalism—where the federal government creates broad standards to be tailored and implemented by States on the basis of local conditions—allows States significant policymaking discretion and, as a consequence, encourages multiple levels of political debate and negotiation. *See* Phillip Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. Rev. 663, 668–73 (2001). Cooperative federalism has proven to be especially beneficial in areas of regulation where economic trade-offs and regional variation are important, such as balancing energy production and environmental considerations. *See generally,* Holly Doremus & W. Michael Hanemann, *Of Babies and Bathwater: Why the Clean Air Act's Cooperative Federalism Framework is Useful for Addressing Global Warming*, 50 Ariz. L. Rev. 799 (2008).

The Clean Air Act, 42 U.S.C. § 7401 *et seq*., is a prime example of cooperative federalism in action: While it requires EPA to establish health-based National Ambient Air quality standards, it assigns States a significant role in tailoring and enforcing those standards. States may

impose more stringent requirements than EPA's standards, *id.* § 7416, and are required to use a public comment process in adopting their implementation plans to ensure their plans adapt to local circumstances, *id.* § 7410(a). EPA's approval of state plans is also subject to notice and comment, which permits a wide range of participation by the public and helps ensure that EPA and States make reasonable regulatory trade-offs.

As a consequence of this multi-level process for crafting state-specific solutions, no two state plans are identical. *See, e.g.,* Jessica Ranucci, *Reviving the Clean Air Act's Requirement That States Adequately Fund and Staff Clean Air Programs*, 40 Harv. Envtl. L. Rev. 351, 364–65 (2016) (contrasting state plans in terms of the state resources they commit to implementing the plan). Federal law endorses these differences among the States because in adopting the Clean Air Act Congress recognized that the process of balancing health and environmental considerations against the value of energy production is an inherently political undertaking that must be responsive to local conditions. This arrangement could not be further from the judicially created, one-size-fits-all solution Plaintiffs are asking the Court to impose.

2. The political negotiations necessary for accountable regulatory action extend to regional compacts, where groups of States, with the blessing of Congress, can add yet more requirements, including requirements related to greenhouse gas emissions. Such compacts vary widely and address a broad spectrum of issues related to global climate change.

For example, the Midwestern Greenhouse Gas Reduction Accord (MGGRA) and the Regional Greenhouse Gas Initiative (RGGI) shared a "cap and trade" methodology and combined technology investments and offsets to promote regional economic growth while pursuing environmental goals. But each compact differed based on regional conditions—both economic and ecologic—and extensive political negotiation. While the MGGRA sought to reduce emissions by 15%–20% by 2020, *see* World Resources Inst., *Midwest Coal States Endorse Aggressive Regional Climate Action* (Apr. 2009), http://pdf.wri.org/factsheets/factsheet_coal_states_action.pdf, the RGGI originally aimed to reduce CO_2 emissions from 2009 levels by 10% by 2018, *see* U.S. Energy Info. Admin., *Regional Greenhouse Gas Initiative auction prices are the lowest since 2014* (May 31, 2017), https://www.eia.gov/todayinenergy/detail.php?id=31432. And the RGGI imposed mandatory requirements on member States, while the

MGGRA urged voluntary compliance. *Compare id.* (describing RGGI as "the nation's first mandatory cap-and-trade program for greenhouse gas emissions"), *with* David R. Wooley & Elizabeth M. Morss, *§ 10:30. Regional greenhouse gas reduction initiatives*, Clean Air Act Handbook (2017) (noting that "an advisory panel [of the MGGRA] released its final recommendations for a regional GHG cap-and-trade program" but "the governors of the states who signed the Accord never adopted the recommendations of the advisory panel[.]").

In addition, at least 21 States have adopted regulations addressing sources of greenhouse gases in ways consistent with their local priorities. *See* Pew Center on Global Climate Change, https://www.c2es.org/content/state-climate-policy/ (providing dynamic maps of state and regional activities in the United States). California, for example, has its own cap-and-trade program, requires power companies to source 33% of their electricity from renewable sources, and requires greenhouse gas emission reporting. *See Climate Change Programs*, California Air Res. Bd., http://www.arb.ca.gov/cc/cc.htm. In contrast, Nebraska invests in research on the effectiveness of using agricultural land for carbon sequestration. *See, e.g.,* University of Nebraska Carbon Sequestration Program,

http://csp.unl.edu/public/. Each State's policy reflects a State-specific balancing of the costs and benefits of climate change regulation: A plan to modify greenhouse gas emissions that is acceptable to California or Vermont may be unacceptable to Indiana, Georgia, or Texas.

In sum, through the cooperative federalism model, States' political decision-making bodies secure environmental benefits for their citizens without sacrificing their citizens' livelihoods. Each State does so in a different fashion—a natural result of the social, political, environmental, and economic diversity among the States.

3. The global nature of concerns over global climate change has generated a variety of treaties and other international initiatives as well. And these international actions have similarly balanced a variety of economic, social, geographic, and political factors while emphasizing multiparty action rather than the unilateral directives Plaintiffs have sought from the courts.

The United Nations, for example, has responded to climate change concerns by creating the United Nations Framework Convention on Climate Change (UNFCCC). *See Status of Ratification of the Convention*, U.N. Climate Change, https://unfccc.int/process/the-convention/what-is-

the-convention/status-of-ratification-of-the-convention (providing link to list of 197 signatories). The UNFCCC is mostly aspirational and suggests that parties "should" attempt to "anticipate, prevent, or mitigate" climate change. *See generally* U.N. Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107; S. Treaty Doc No. 102-38 (entered into force March 21, 1994). These commitments implicate delicate matters of national and international policy, including education, relations between "developing nations" and "developed nations," international technology transfer, and the proper methodology and timetable for addressing climate change. *See id.* art. 4. For this reason, the signatories retain discretion to set individual policies in pursuit of these goals on the basis of each country's specific conditions. *See id.* art. 3, ¶3.

Moreover, because of the complex nature of these commitments, the UNFCCC's signatories and its different committees have met regularly since 1996 to discuss recent scientific developments and implementation of the agreement's aspirational commitments. These meetings have spawned numerous ancillary agreements, including the Kyoto Protocol to the UNFCCC, 37 I.L.M. 22 (1998), Dec. 10, 1997; the Marrakesh Accords of 2005, UNFCCC, October 29–November 10, Decision 11/CP.7, 7th sess.

(2001); the Copenhagen Accord, UNFCCC, December 7–19, Decision 2/CP.15, 15th sess. (2010), and the Paris Agreement, UNFCCC, November 30–December 13, Decision 1/CP.21, 21st sess. (2016). These agreements, unlike the UNFCCC, typically require binding commitments from members. *See, e.g.*, *What is the Kyoto Protocol*, U.N. Climate Change, https://unfccc.int/process/the-kyoto-protocol/what-is-the-kyoto-protocol (stating the Kyoto Protocol "commits its Parties by setting internationally binding emission reduction targets").

Notably, President Clinton signed the Kyoto Protocol, which required reductions from "developed nations" but not "developing nations," but the United States did not ratify the treaty. *See Status of Ratification of the Kyoto Protocol*, U.N. Climate Change, https://unfccc.int/process/the-kyoto-protocol/status-of-ratification. Explaining the United States' decision not to ratify the Protocol, President Bush argued that it would harm the United States' economy and noted that it exempted 80% of the world from its limitations, including India and China. *See, e.g.*, Michael Weisslitz, *Rethinking the Equitable Principle of Common but*

Differentiated Responsibility: Differential Versus Absolute Norms of Compliance and Contribution in the Global Climate Change Context, 13 Colo. J. Int'l Envtl. L. & Pol'y 473, 507–08 (2002).

In contrast, President Obama placed the United States at the forefront of the negotiation of the Copenhagen Accord in 2009, with the hope that this new agreement would ameliorate the flaws of the Kyoto Protocol. *See, e.g.,* Elisabeth Rosenthal*, Obama's Backing Raises Hopes for Climate Pact*, N.Y. Times (Mar. 1, 2009), https://www.nytimes.com/2009/03/01/science/earth/01treaty.html. The United States has since joined the agreement. *See Information Provided by Parties to the Convention Relating to the Copenhagen Accord*, U.N. Climate Change, https://unfccc.int/process/conferences/pastconferences/copenhagen-climate-change-conference-december-2009/statements-and-resources/information-provided-by-parties-to-the-convention-relating-to-the-copenhagen-accord.

More recently, the United States entered into the Paris Climate Change Agreement, which went in to force on November 4, 2016. *See Paris Agreement – Status of Ratification*, U. N. Climate Change, https://unfccc.int/process/the-paris-agreement/status-of-ratification. The

agreement's central goal is to limit any increase in global temperature to well below 2 degrees Celsius. Paris Agreement, art. 2, (Dec. 12, 2015), https://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf. Each of the agreement's signatories has committed to adopting a Nationally Determined Contribution and to reporting emissions and corresponding efforts to reduce such emissions. *Id.* at art. 3. On March 31, 2015, the United States filed its Intended Nationally Determined Contribution, which said that United States would work to reduce emissions by 26–28% below 2005 levels by 2025. *See U.S. Reports its 2025 Emissions Target to the UNFCCC* (Mar. 31, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/03/31/fact-sheet-us-reports-its-2025-emissions-target-unfccc. But on June 1, 2017, President Trump changed course and announced that the United States would withdraw from the agreement. *See President Trump Announces U.S. Withdrawal from the Paris Climate Accord* (Jun. 1, 2017), https://www.whitehouse.gov/articles/president-trump-announces-u-s-withdrawal-paris-climate-accord/.

The past two decades have thus seen four presidential administrations with widely divergent perspectives on the United States' foreign

policy regarding climate change and global greenhouse gas emissions. These administrations' shifting positions further demonstrate the political nature of environmental regulation in general and climate change in particular. They thus reaffirm the reasons why such decisions are properly the subject of the political branches, not unaccountable courts.

4. Judicial intervention into global climate change not only would interfere with cooperative federalism programs and international agreements, but would also obstruct initiatives the States themselves have taken to promote the very energy production and marketing targeted in this case. The California State Oil and Gas Supervisor, for example, is charged with "encourag[ing] the wise development of oil and gas resources" and "permit[ing] the owners or operators of the wells to utilize all methods and practices known to the oil industry for the purpose of increasing the ultimate recovery of underground hydrocarbons[.]" Cal. Pub. Res. Code §§ 3004, 3106(b), (d).

Similarly, Texas permits public lands to be "surveyed or subdivided" in order to "be most conducive and convenient to facilitate the advantageous sale of oil, gas, or mineral leases," Tex. Nat. Res. Code § 34.052, and allows the issuance of "a permit for geological, geophysical,

and other surveys and investigations on land . . . that will encourage the development of the land for oil, gas, or other minerals," *id.* § 34.055; *see also id.* § 131.002(1) (declaring that "the extraction of minerals by surface mining operations is a basic and essential activity making an important contribution to the economic well-being of the state and nation").

The federal government is no different: Numerous federal statutes expressly affirm the government's intention "to promote the efficient exploration, production, storage, supply, marketing, pricing, and regulation of energy resources, including fossil fuels." Consolidated Appropriations Act, 2016, *codified at* 42 U.S.C. § 6212a(b); *see also* Energy Policy Act of 2005, *codified at* 42 U.S.C. § 15910(2)(B) ("The purpose of this section is . . . to promote oil and natural gas production . . . .").

The States' and the federal government's promotion of fossil fuels not only demonstrates the inherently political nature of this issue, but also suggests that States and the federal government *themselves* could be subject to liability if Plaintiffs' claims are permitted to proceed. Indeed, in view not only of Plaintiffs' expansive theories of liability, but also their presumption of suing as relators on behalf of the State, this case might as well be styled *California v. California.*

***

Global climate change has been the subject of state, regional, national, and international debates for decades. Plaintiffs ask the Court to resolve these disputes once and for all. It should not do so. Regulating global climate change by court order would be administratively untenable and, more importantly, would render the previous—and ongoing—political processes redundant. The political question doctrine exists for precisely such cases as this: Plaintiffs' claims "lack of judicially discoverable . . . standards," inevitably demand "an initial policy determination of a kind clearly for nonjudicial discretion," require trampling over the decisions of "coordinate branches of government," and invite incoherent and "multifarious pronouncements by various departments." *Baker v. Carr*, 369 U.S. 186, 217 (1962). The district court's order dismissing these claims should be affirmed.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) this document contains 4,769 words.

Dated: May 17, 2019

/s/ Thomas M. Fisher
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Solicitor General

CERTIFICATE OF SERVICE

I certify that on May 17, 2019 I caused service of the foregoing brief to be made by electronic filing with the Clerk of the Court using the CM/ECF system, which will send a Notice of Electronic Filing to all parties with an email address of record, who have appeared and consent to electronic service in this action.

Dated: May 17, 2019

/s/ Thomas M. Fisher
Thomas M. Fisher
Solicitor General