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 19 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES' PETITION FOR PANEL REHEARING AND/OR REHEARING EN BANC

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INTRODUCTION AND INTEREST OF THE *AMICI* STATES

A*mici curiae*, States of Indiana, Alabama, Alaska, Arkansas, Georgia, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, and Wyoming, respectfully submit this brief in support of the Petition for Panel Rehearing and/or Rehearing En Banc.

This case presents an issue of extraordinary importance to the *Amici* States. The Cities of San Francisco and Oakland seek judicial resolution of one of the most complicated and contentious issues confronting policymakers today—global climate change. The Cities contend their injuries are caused by climate change that is in turn the result of greenhouse gases emitted by countless entities all over the globe. Yet here they take aim at just five fossil fuel companies: They argue these companies, by producing fossil fuels and promoting their use, have broken the law—but not law enacted by a legislature, promulgated by a government agency, or negotiated by a President. Rather, the law the Cities invoke is the common law. They claim the 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* the Cities' alleged injuries.

The Cities' claims threaten to unconstitutionally supplant States' own regulatory decisions in this area, usurp the political branches' policymaking authority, and undermine important cooperative federalism programs. This case thus presents issues of enormous importance and deserves this Court's consideration on rehearing en banc.

At bottom, the Cities' argument is that the common law of public nuisance authorizes courts to assign responsibility for remedying climate change as they see fit. Judicial intervention here, however, would violate the Commerce Clause's extraterritorial doctrine by effectively allowing the Cities to supersede States' own authority over environmental regulation. The Cities' claims would also force courts to decide the proper balance of regulatory and commercial activity—a political question that cannot be resolved by judicial decree—and would trample Congress's carefully calibrated process of cooperative federalism.

Accordingly, the *Amici* States have a strong interest in this case—as sovereigns responsible for environmental regulation, as participants in cooperative federalism programs, and as potential defendants. In light of the important issues this case presents, the Court should grant the petition for rehearing en banc.

ARGUMENT

I. The Cities' Claims Violate the Commerce Clause

1. The Cities' claims ask for nothing less than judicial creation of a global regulatory regime governing the production, promotion, sale, and use of fossil fuels. The Cities characterize their claims as seeking "an equitable abatement remedy" 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 the Cities allege "*begin[] with the extraction of fossil fuels and continu[e] with their production, sale, and combustion*." Appellant Br. 32 (emphasis added). The Cities contend the five Defendants should bear the *entire* cost of redressing all of their alleged injuries.

The Cities thus acknowledge the obvious—that their alleged injuries occur only as the culmination of incalculable actions taken all around the world. The Cities' 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.

The Cities' claims thus seek to regulate conduct that occurs outside California, and even outside the United States. If allowed to proceed,

these claims would effectively usurp States' own authority to respond to global climate change in the manner they consider most appropriate.

Throughout American history, States have functioned as laboratories for democracy, utilizing their regulatory authority to address important concerns, like climate change, in a method tailored to their State-specific values and State-specific needs. *See Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015) ("[The Supreme] Court has 'long recognized the role of the States as laboratories for devising solutions to difficult legal problems.'" (quoting *Oregon v. Ice*, 555 U.S. 160, 171 (2009)). And to protect States' sovereignty and independent regulatory authority from undue interference, the extraterritoriality doctrine of the Commerce Clause bars States and litigants from regulating conduct that occurs in other States.

The extraterritoriality doctrine protects *each* State's independent policymaking authority by authorizing federal courts to intervene when one State attempts to regulate out-of-state conduct and thereby impose *its* public policy choices on other, co-equal sovereigns. In this way, the Commerce Clause not only functions as a restraint on laws adopted by state legislatures, but also as a limit to state common law claims that

apply to or directly control out-of-state conduct. *See West v. Broderick & Bascom Rope Co.*, 197 N.W.2d 202, 214 (Iowa 1972); *cf. The Florida Star v. B.J.F.*, 491 U.S. 524, 532 (1989); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 57 (1988) (both holding that the First Amendment applies to common law restrictions as well as statutory restrictions).

Accordingly, the Commerce Clause at a minimum precludes (1) application of tort claims to "commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State," and (2) tort claims that have the "practical effect" of "directly control[ling] commerce occurring wholly outside the boundaries of a State." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 335–37 (1989) (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 642–43 (1982) (plurality opinion)).

2. As noted, here the Cities are attempting to hold a handful of fossil fuel companies liable for wholly out-of-state conduct, including conduct undertaken by entirely separate entities. The Cities are seeking abatement in the amount of *all* of the harm they have allegedly suffered because of global climate change, even though it is certain that the defendant companies' conduct—much less their within-California conduct—is not responsible for all of this alleged harm.

And even if the Cities restricted their theory only to Defendants' in-state conduct, the "practical effect" of their claims would be to regulate global conduct "occurring wholly outside the boundaries of" California. *Healy*, 491 U.S. at 336. By attempting to regulate conduct occurring outside California's boundaries, the Cities' claims impermissibly intrude on the authority of other States to regulate climate change in a State-specific manner: A State that wishes to encourage fossil fuel production by adopting a light regulatory touch would find its efforts obstructed by the Cities' extraterritorial regulation-by-litigation. This intrusion on other States' sovereignty violates the Commerce Clause.

Indeed, by requesting a remedy that requires Defendants to pay to abate *all* of the effects of climate change, the Cities seek to hold Defendants liable for damages caused by *global* conduct, not Defendants' in-state conduct. And even accepting, *arguendo*, the Cities' theory that liability can be extended up the causal chain to the expanded production, promotion, and sale of fossil fuel products, these upstream activities occur all around the world. The Cities do not endeavor to limit their theory to just those activities attributable to *Defendants'* conduct at all, much

less their *in-state* conduct. This attempt to regulate extraterritorial commerce is an unconstitutional violation of the Commerce Clause. *Healy*, 491 U.S. at 335–37.

Furthermore, the Cities concede that the harms they allege "are triggered by a cumulative sequence of events, beginning with the extraction of fossil fuels and continuing with their production, sale, and combustion," but they make no attempt to differentiate between harm derived from Defendants' in-state conduct and harm derived from other conduct by other actors or conduct occurring elsewhere around the world. App. Br. 32–33. In fact, the Cities make no attempt to even quantify Defendants' *in-state* contribution to climate change, instead vaguely claiming that the Defendants wrongfully promoted the expanded use of fossil-fuel products, which led to climate change, which in turn caused devastating impact on coastal communities that should be remediated by Defendants. *Id.*

The Cities have framed their allegations in terms of Defendants' upstream activities—producing, promoting, and selling fossil fuels—in order to circumvent the reach of *American Electric Power Co. v. Connect-*

icut, where the Supreme Court *rejected* similar common-law public-nuisance claims attempting to hold fossil-fuel emitters responsible for climate change. 564 U.S. 410, 424 (2011). But this framing runs headlong into the Cities' concession that much of the conduct causing their injuries occurred outside California, and that "some of the conduct and emissions contributing to the nuisance arise *outside the United States*." App. Br. 45 (emphasis added; internal quotation marks and citation omitted). That the Cities' alleged *harms* occurred in California does not change the fact that their attempt to regulate that extraterritorial *conduct* violates the Commerce Clause.

The Cities fail to show any emissions attributable to Defendants' in-state conduct, yet insist that Defendants' expanded production, promotion, and sale of fossil fuels in California is sufficient to hold Defendants liable for the entire cost of climate change abatement. The Commerce Clause strictly forbids such regulatory overreach: The Cities' regulation of this out-of-state commercial activity is thus wholly unconstitutional. *Healy*, 491 U.S. at 335–37.

Even if the Cities limited their requested relief to the fraction of damages allegedly caused by in-state production, promotion, and sale of

fossil fuels, their claims would still violate the Commerce Clause, for the alleged harms are only caused when in-state conduct combines with wholly out-of-state conduct. After all, the global climate change that allegedly caused these harms is the product of *global* emissions, not merely emissions from one State. App. Br. 32–33, 45. Under the Cities' theory, *out-of-state emissions* are the direct cause of their harms; any in-state commerce, such as Defendants' production, promotion, and sale of fossil fuel products within California, is thus insufficient to cause the totality of harms alleged by the Cities. The Cities' attempt to regulate *out-of-state emissions* by imposing abatement requirements on fossil-fuel *producers* violates the Commerce Clause and usurps individual States' policymaking authority—including States' authority to establish independent environmental standards generally and to address climate change specifically in the manner they think is most appropriate. This Court should not allow these claims to proceed.

II. The Cities' Claims Raise Non-Justiciable Political Questions

The Cities claims would not only unconstitutionally regulate out-of-state conduct, but would also require courts to answer immensely com-

plicated political questions that "lack . . . satisfactory criteria for a judicial determination." *Baker v. Carr*, 369 U.S. 186, 210 (1962). The Cities' claims ultimately sound in public policy, not law. They 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 has repeatedly foreclosed attempts to regulate global climate change via public nuisance lawsuits. *See, e.g.*, *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 475–76 (S.D.N.Y. 2018), *appeal pending*, No. 18-02188 (docketed Jul. 26, 2018) (dismissing virtually identical claims against the same five companies as the case at hand and recognizing that "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."); *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) (observing that "the allocation of fault—and cost—of global warming is a matter appropriately left for determination by the executive or legislative branch."); *California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871 at *6, *16 (N.D. Cal. Sept. 17, 2007) (dismissing 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.").

These cases demonstrate precisely why the *amici* who supported the Cities at the panel stage were 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 1271,1296 (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, 383–84 (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), *aff'd*, 819 F.2d 1129 (2d Cir. 1987) ("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.").

Indeed, even the Cities' *amici* recognize the political nature of the claims at issue here. One such amicus brief, for example, is principally devoted to discussing the political background and history of efforts to address climate change, noting significant changes over the course of the past three presidencies. U.S. Senators Br. 8–30. The difficult policy questions surrounding this issue, and variety of answers these questions have

prompted, only underscores the fact that global climate change can be addressed only by political, and not judicial, action.

Under these circumstances, it is critical to grasp the limits of the judicial role. Adjudicating the Cities' claims would require a complex initial policy determination more appropriately addressed by other branches of government. The judiciary may properly allocate fault (and costs) only *after* the political branches initially determine standards to guide those allocations. Judges are simply not well positioned to discern, as a matter of common law, the proper regulatory balance between the costs and benefits involved with fossil fuels. Thus, while the Cities' claims may be styled as torts, substantively, they are requests for judicial resolution of political problems. They are therefore not justiciable.

2. Beyond being inherently political, the Cities' claims also lack "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, any court considering the Cities' claims would need to determine that the Cities' 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 the Cities' of their right to the idealized climate. And, as a remedy, the court would need to impose a regulatory scheme—balancing the gravity of the Cities' alleged harms against the utility of each Defendant's conduct—on fossil fuel emissions that are *already* subject to comprehensive state and federal regulation. Doing so would force the court to make decisions without recourse to any principled, judicially administrable standards.

Courts should not be in the business of setting nationwide energy and environmental policy. 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.

III. The Cities' Claims Jeopardize Our National System of Cooperative Federalism

Finally, by attempting to force Defendants to pay to abate all injuries the Cities allegedly suffer as a result of global climate change, the Cities seek to inject their political and policy preferences into the national framework regulating the production, promotion, and use of energy. Congress, however, has already addressed this issue, and 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. The relief the Cities seek would seriously undermine this national regulatory system, a system in which all States play a critical policymaking role. The threat the Cities' claims pose to America's system of cooperative federalism underscores both the political nature of their claims and the importance of this Court addressing—and 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 J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. Rev. 663, 668–73 (2001).

The Clean Air Act, 42 U.S.C. § 7401 *et seq*., is a prime example of cooperative federalism in action: While it requires the federal government to establish health-based air-quality standards, it assigns States a significant role in tailoring and enforcing those standards. The multi-level process for crafting state-specific solutions necessarily means that 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).

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 the Cities 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 to address a broad spectrum of issues related to global climate change.

These compacts vary widely. 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. *Compare* World Resources Inst., *Midwest Coal States Endorse Aggressive Regional Climate Action* (Apr. 2009), http://pdf.wri.org/factsheets/factsheet_coal_states_action.pdf, *with* 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.

In addition, at least 21 States have adopted regulations addressing sources of greenhouse gases in ways consistent with 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). Each State's policy reflects a State-specific balancing of the costs and benefits of climate change regulation.

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 international nature of global climate change has also generated a variety of treaties and multilateral initiatives. These actions have similarly balanced a variety of economic, social, geographic, and political factors while emphasizing multiparty action, rather than the unilateral directives the Cities 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's signatories meet regularly and

have created several ancillary agreements which typically require binding commitments from members. One such agreement, the Kyoto Protocol, required reductions from "developed nations" but not "developing nations," and was signed by President Clinton. The United States later refused to ratify the treaty because President Bush believed it would harm the United States' economy. *See Status of Ratification of the Kyoto Protocol*, U.N. Climate Change, https://unfccc.int/process/the-kyoto-protocol/status-of-ratification; 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).

More recently, under President Obama's administration, the United States entered into the Paris Climate Change Agreement, which went in to force on November 4, 2016 and committed signatories to adopting a Nationally Determined Contribution and to reporting emissions and corresponding efforts to reduce such emissions. *See Paris Agreement – Status of Ratification*, U.N. Climate Change, https://unfccc.int/process/the-paris-agreement/status-of-ratification; Paris Agreement, art. 3,

(Dec. 12, 2015), https://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf. 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/.

Thus, the past two decades have seen four presidential administrations with widely divergent perspectives on the proper foreign policy to address 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. And they highlight the reasons why such decisions are properly the province of the political branches, not unaccountable courts.

4. Consideration of the Cities' claims and the concomitant judicial intervention into the political debate over global climate change would not only interfere with cooperative federalism programs and inter-

national agreements; it would also obstruct initiatives the States *themselves* have taken to promote the very energy production and marketing targeted in this case.

For example, the California State Oil and Gas Supervisor 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). Texas encourages similar initiatives. *See* Tex. Nat. Res. Code § 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"); *see also* Tex. Nat. Res. Code §§ 34.052, 34.055.

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).

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 could themselves be subject to liability if the Cities' claims are permitted to proceed. Indeed, in view not only of the Cities' expansive theories of liability, but also their claim to sue 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. The Cities now seek to have courts resolve these disputes once and for all. This Court should not allow them to do so. The political question doctrine exists for precisely such cases as this: The Cities' 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). 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. This Court should grant the petition and affirm the district court's order dismissing these claims.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for rehearing en banc and affirm the district court's judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Circuit Rule 29-2(c)(2) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 4,087 words.

Dated: July 20, 2020

/s/ Thomas M. Fisher
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CERTIFICATE OF SERVICE

I certify that on July 20, 2020, 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: July 20, 2020

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