

EXHIBIT A

THE HONORABLE ROBERT S. LASNIK

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KING COUNTY,

Plaintiff,

v.

BP P.L.C., a public limited company of England and Wales, CHEVRON CORPORATION, a Delaware corporation, CONOCOPHILLIPS, 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. 2:18-CV-00758RSL

AMICUS BRIEF OF INDIANA AND ELEVEN OTHER STATES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT

NOTED ON MOTION CALENDAR: September 28, 2018

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICI STATES 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT..... 3

I. King County’s Claims Are Non-Justiciable 3

 A. King County’s claims raise political questions and must fail..... 3

 B. King County’s claims jeopardize our national system of cooperative
federalism 8

II. Federal Statutes Have Displaced the Federal Common Law King County Invokes 18

III. This Case Threatens Extraterritorial Regulation by Imposing King County’s
Policy Choices on Areas and Transactions Outside King County..... 21

CONCLUSION..... 24

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

TABLE OF AUTHORITIES

CASES

American Electric Power Co. v. Connecticut,
564 U.S. 410 (2011) (*AEP*)2, 19

Antolok v. United States,
873 F.2d 369 (D.C. Cir. 1989)..... 5

Baker v. Carr,
369 U.S. 186 (1962)3, 6, 7

BMW of North America, Inc. v. Gore,
517 U.S. 559 (1996)22

California v. Gen. Motors Corp.,
No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007).....4

Carmichael v. Kellogg, Brown & Root Servs., Inc.,
572 F.3d 1271 (11th Cir. 2009)..... 5

Caterpillar Inc. v. Williams,
482 U.S. 386 (1987)22

Chaser Shipping Corp. v. United States,
649 F. Supp. 736 (S.D.N.Y. 1986) 5, 6

City of New York v. BP P.L.C. et al.,
No. 18 Civ. 182 (JFK), 2018 WL 3475470 (S.D.N.Y. Jul. 19, 2018).....4, 13, 20

City of Oakland v. BP P.L.C. et al.,
Nos. C 17-06011, C 17-06012 (WHA), 2018 WL 3109726 (N.D. Cal. June 25,
2018).....4, 20

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 Aug. 30, 2007) (unpublished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).....5

Healy v. Beer Inst., Inc.,
491 U.S. 324 (1989)22

La. Pub. Serv. Comm’n v. Tex. & N.O.R. Co.,
284 U.S. 125 (1931)21

1 **CASES [CONT'D]**

2 *Marbury v. Madison*,

3 5 U.S. (1 Cranch) 137 (1803)3

4 *Native Vill. of Kivalina v. ExxonMobil Corp.*,

5 663 F. Supp 2d 863 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012)4, 6, 20

6 *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petrol.*,

7 577 F.2d 1196 (5th Cir. 1978)5

7 **STATUTES**

8 42 U.S.C. § 7410(a).....9

9 42 U.S.C. § 74169

10 42 U.S.C. § 1340121

11 Cal. Pub. Res. Code § 300417

12 Cal. Pub. Res. Code § 3106(b), (d).....17

13 Clean Air Act, 42 U.S.C. § 7401 *et seq.*.....8

14 Coastal Zone Management Act, *codified at* 16 U.S.C. § 1451(j).....21

15 Consolidated Appropriations Act of 2016, *codified at* 42 U.S.C. § 6212a(b).....18

16 David R. Wooley & Elizabeth M. Morss, § 10:30. *Regional greenhouse gas*

17 *reduction initiatives*, Clean Air Act Handbook (2017)10

18 Energy Policy Act of 2005, *codified at* 42 U.S.C. § 15910(a)(2)(B).....18, 20, 21

19 Energy Policy and Conservation Act of 1992 (“EPCA”), *codified at* 42 U.S.C. §

20 1340120

21 Federal Lands Policy Management Act, *codified at* 43 U.S.C. 1701(a)(12)21

22 Mining and Minerals Policy Act, *codified at* 30 U.S.C. § 21a21

23 New York Environmental Conservation Law § 23-030117

24 Presidential Executive Order on Promoting Energy Independence and Economic

25 Growth (Mar. 28, 2017), § 1(a)18

26

1 | **STATUTES [CONT'D-**

2 | Tex. Nat. Res. Code § 34.052..... 17

3 | Tex. Nat. Res. Code § 34.055..... 17

4 | Tex. Nat. Res. Code § 131.002..... 17

5 | Wash. Rev. Code § 78.52.001 16, 17

6 | **OTHER AUTHORITIES**

7 | 4 W. Blackstone, Commentaries *167 (1763)..... 23

8 | Clean Air Rule, Department of Ecology State of Washington,
9 | [https://ecology.wa.gov/Air-Climate/Climate-change/Carbon-reduction-](https://ecology.wa.gov/Air-Climate/Climate-change/Carbon-reduction-targets/Clean-Air-Rule)
10 | [targets/Clean-Air-Rule](https://ecology.wa.gov/Air-Climate/Climate-change/Carbon-reduction-targets/Clean-Air-Rule)..... 11

11 | *Clean Energy Standard*, New York State, [https://www.nyscrda.ny.gov/All-](https://www.nyscrda.ny.gov/All-Programs/Programs/Clean-Energy-Standard)
12 | [Programs/Programs/Clean-Energy-Standard](https://www.nyscrda.ny.gov/All-Programs/Programs/Clean-Energy-Standard) 11

13 | *Control of Emissions from New Highway Vehicles and Engines*, Notice of Denial
14 | of Pet. for Rulemaking, 68 Fed. Reg. 52922, 52928 (Sept. 8, 2003) 7

15 | Copenhagen Accord, UNFCCC, December 7–19, Decision 2/CP.15, 15th sess.
16 | (2010)..... 14

17 | CRR-NY 550.1 17

18 | David G. Tuerck *et al.*, *The Economic Analysis of the Western Climate Initiative’s*
19 | *Regional Cap-and-Trade Program 1* (Mar. 2009), available at
20 | <https://www.washingtonpolicy.org/library/docLib/westernclimateinitiative.pdf> 10

21 | Elisabeth Rosenthal, *Obama’s Backing Raises Hopes for Climate Pact*, N.Y.
22 | Times Feb. 28, 2009, [https://www.nytimes.com/2009/03/01/science/earth/](https://www.nytimes.com/2009/03/01/science/earth/01treaty.html)
23 | [01treaty.html](https://www.nytimes.com/2009/03/01/science/earth/01treaty.html)..... 15

24 | *FACT SHEET: U.S. Reports Its 2025 Emissions Target to the UNFCCC* The
25 | White House (Mar. 31, 2015), [https://obamawhitehouse.archives.gov/the-](https://obamawhitehouse.archives.gov/the-press-office/2015/03/31/fact-sheet-us-reports-its-2025-emissions-target-unfccc)
26 | [press-office/2015/03/31/fact-sheet-us-reports-its-2025-emissions-target-unfccc](https://obamawhitehouse.archives.gov/the-press-office/2015/03/31/fact-sheet-us-reports-its-2025-emissions-target-unfccc) 16

27 | Holly Doremus & W. Michael Hanemann, *Of Babies and Bathwater: Why the*
28 | *Clean Air Act’s Cooperative Federalism Framework is Useful for Addressing*
29 | *Global Warming*, 50 Ariz. L. Rev. 799 (2008)..... 8

1 **OTHER AUTHORITIES [CONT'D]**

2 *How the Carbon Dioxide Budget Trading Program Works*, New York State
 3 Department of Environmental Conservation,
 4 <https://www.dec.ny.gov/energy/39276.html>..... 11, 12

5 *Information Provided by Parties to the Convention Relating to the Copenhagen*
 6 *Accord*, U.N. Climate Change,
 7 <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>..... 15

8 Kyoto Protocol to the UNFCCC, 37 I.L.M. 22 (1998), Dec. 10, 1997..... 14

9 Marrakesh Accords of 2005, UNFCCC, October 29–November 10, Decision
 10 11/CP.7, 7th sess. (2001)..... 14

11 Michael Weisslitz, *Rethinking the Equitable Principle of Common but*
 12 *Differentiated Responsibility: Differential Versus Absolute Norms of*
 13 *Compliance and Contribution in the Global Climate Change Context*, 13
 14 *Colo. J. Int'l Env'tl. L. & Pol'y* 473, 507–08 (2002) 14, 15

15 Mike Porter, *Governor Unveils New Virginia Energy Plan during VCU Visit*,
 16 VCU NEWS, Sept. 13, 2007,
 17 https://news.vcu.edu/article/Governor_unveils_new_Virginia_Energy_Plan_during..... 12

18 N.Y. Comp. Codes R. & Regs. tit. 6, § 242..... 11

19 New York State Department of Environmental Conservation,
 20 <https://www.dec.ny.gov/energy/39276.html>..... 11

21 Org. for Econ. Co-Operation & Dev., 2010/15 *OECD Economic Surveys: United*
 22 *States* 129 (Sept. 2010)), available at https://www.eenews.net/assets/2010/09/20/document_cw_01.pdf..... 10

23 *Paris Agreement – Status of Ratification*, U. N. Climate Change,
 24 <https://unfccc.int/process/the-paris-agreement/status-of-ratification> 15

25 Paris Agreement, art. 2 (Dec. 12, 2015), available at
 26 https://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf..... 15

Paris Agreement, UNFCCC, November 30–December 13, Decision 1/CP.21, 21st
 sess. (2016)..... 14

1 **OTHER AUTHORITIES [CONT'D]**

2 Phillip Weiser, *Towards a Constitutional Architecture for Cooperative*

3 *Federalism*, 79 N.C. L. Rev. 663, 668–70, 671–73 (2001) 8

4 *President Trump Announces U.S. Withdrawal from the Paris Climate Accord*, The

5 White House (June 1, 2017), [https://www.whitehouse.gov/articles/president-](https://www.whitehouse.gov/articles/president-trump-announces-u-s-withdrawal-paris-climate-accord/)

6 [trump-announces-u-s-withdrawal-paris-climate-accord/](https://www.whitehouse.gov/articles/president-trump-announces-u-s-withdrawal-paris-climate-accord/)..... 16

7 *Regional Greenhouse Gas Initiative auction prices are the lowest since 2014*,

8 TODAY IN ENERGY, U.S. Energy Info. Admin. (May 31, 2017),

9 <https://www.eia.gov/todayinenergy/detail.php?id=31432> 10

10 *State Climate Policy Maps*, Center for Climate & Energy Solutions,

11 <https://www.c2es.org/content/state-climate-policy/> 11

12 *Status of Ratification of the Convention*, U.N. Climate Change,

13 [https://unfccc.int/process/the-convention/what-is-the-convention/status-of-](https://unfccc.int/process/the-convention/what-is-the-convention/status-of-ratification-of-the-convention)

14 [ratification-of-the-convention](https://unfccc.int/process/the-convention/what-is-the-convention/status-of-ratification-of-the-convention)..... 13

15 *Sustaining Earth and its People: Translating Science into Practice*, University of

16 Nebraska Carbon Sequestration Program, <http://csp.unl.edu/public/> 12

17 *The Kyoto Protocol—Status of Ratification*, United Nations Climate Change,

18 <https://unfccc.int/process/the-kyoto-protocol/status-of-ratification> 14

19 U.N. Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S.

20 107; S. Treaty Doc No. 102-38 (entered into force March 21, 1994)..... 13

21 U.S. Energy Info. Admin., *Regional Greenhouse Gas Initiative Auction Prices*

22 *Are the Lowest Since 2014*, Today in Energy (May 31, 2017), [https://www.](https://www.eia.gov/todayinenergy/detail.php?id=31432)

23 [eia.gov/todayinenergy/detail.php?id=31432](https://www.eia.gov/todayinenergy/detail.php?id=31432)..... 10

24 *What are United Nations Climate Change Conferences?*, United Nations Climate

25 Change, [https://unfccc.int/process/conferences/what-are-united-nations-](https://unfccc.int/process/conferences/what-are-united-nations-climate-change-conferences)

26 [climate-change-conferences](https://unfccc.int/process/conferences/what-are-united-nations-climate-change-conferences)..... 13, 14

What is the Kyoto Protocol?, U.N. Climate Change, [https://unfccc.int/process/the-](https://unfccc.int/process/the-kyoto-protocol/what-is-the-kyoto-protocol)

[kyoto-protocol/what-is-the-kyoto-protocol](https://unfccc.int/process/the-kyoto-protocol/what-is-the-kyoto-protocol)..... 14

1 **INTEREST OF THE *AMICI* STATES**

2 The justiciability of climate change lawsuits is an issue of extraordinary importance to the
3 *Amici* States. To permit federal adjudication of demands for millions of dollars to be paid toward
4 an abatement fund would disrupt carefully calibrated state regulatory schemes devised by
5 politically accountable officials. Federal courts should not use public nuisance and trespass
6 theories to confound state and federal political branches’ legislative and administrative processes.
7 Emissions policy (or, as is more likely, multiple conflicting emissions policies) should not be
8 established on a piecemeal, ad hoc basis.
9

10 States have an especially strong interest in this case because the list of potential
11 defendants is limitless. King County’s theory of liability involves nothing more specific than
12 promoting the use of fossil fuels. As utility owners, power plant operators, and generally
13 significant users of fossil fuels (through facilities, vehicle fleets and highway construction,
14 among other functions), States and their political subdivisions themselves may be future
15 defendants in similar actions.
16

17 **SUMMARY OF THE ARGUMENT**

18 King County seeks to harness the power and prestige of federal courts to remedy global
19 climate change. It asserts that five fossil fuel corporations, by producing such fuels and
20 promoting their use, have broken the law—but not law enacted by a legislature, promulgated by a
21 government agency, or negotiated by a President. Rather, the law King County invokes is
22 common law. It says that Defendants’ production of fossil fuels and the subsequent use of those
23 fuels by third parties sufficiently contributes to global warming as to constitute a “public
24 nuisance” and “trespass” that the federal judiciary should remedy.
25
26

1 But the questions of global climate change and its effects—and the proper balance of
 2 regulatory and commercial activity—are political questions not suited for resolution by any court.
 3 Indeed, such judicial resolution would trample Congress’s carefully-calibrated process of
 4 cooperative federalism where States work in tandem with EPA to administer the federal Clean
 5 Air Act.
 6

7 And even were that not so, the Supreme Court has already said that the Clean Air Act and
 8 related EPA regulations have displaced the federal common law on which King County bases its
 9 claim in this case: “We hold that the Clean Air Act and the EPA actions it authorizes displace
 10 any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel
 11 fired power plants.” *Am. Elec. Power Co. v. Connecticut (AEP)*, 564 U.S. 410, 424 (2011). King
 12 County seeks to evade *AEP*’s mandate by framing the “nuisance” as “produc[ing]” and
 13 “marketing” the use of fossil fuels rather than emitting carbon dioxide, but this tactic serves only
 14 to show that its claim is too attenuated. ECF No. 113, First Amended Compl. ¶ 28. Similarly, it
 15 requests relief in the form of a damages to abate the public nuisance and trespass rather than
 16 outright abatement. Ultimately, neither stratagem changes the essential nature of King County’s
 17 claim or of the liability that it is asking the court to impose—liability that could serve as the
 18 predicate for myriad remedies in this and future cases.
 19
 20

21 Finally, King County’s claims, if successful, would have impermissible extraterritorial
 22 impact. Consider: King County is asking the court to order Defendants to fund an abatement
 23 program to build infrastructure and to finance programs to combat the effects of global climate
 24 change for a single county. Such a remedy could cost several billion dollars and seriously impact
 25 Defendants’ ability to provide energy to the rest of the country. In effect, King County would be
 26

1 imposing limitations on commerce that takes place wholly outside King County’s borders. Such
 2 limitations violate the Commerce Clause just as surely as any statutory enactment, and the court
 3 should not permit them.

4 ARGUMENT

5 I. King County’s Claims Are Non-Justiciable

6 A. King County’s claims raise political questions and must fail

7 King County’s objections to fossil fuel use are based in public policy, not law, and are
 8 thus inappropriate for judicial resolution.
 9

10 1. Longstanding Supreme Court precedent has established that a claim presents non-
 11 justiciable political questions if its adjudication would not be governed by “judicially
 12 discoverable and manageable standards” or would require “an initial policy determination of a
 13 kind clearly for nonjudicial discretion.” *Baker v. Carr*, 369 U.S. 186, 217 (1962). The political
 14 question doctrine arises from the Constitution’s core structural values of judicial modesty and
 15 restraint. As early as *Marbury v. Madison*, Chief Justice Marshall stated that “[q]uestions, in their
 16 nature political, or which are, by the constitution and laws, submitted to the executive, can never
 17 be made in this court.” 5 U.S. (1 Cranch) 137, 170 (1803). These questions, Marshall wrote,
 18 “respect the nation, not individual rights.” *Id.* at 166. There, in the very case that establishes the
 19 power of judicial review, the political question doctrine received its judicial imprimatur.
 20
 21

22 Earlier attempts to litigate climate change public nuisance lawsuits have run headlong
 23 into the political question doctrine. Indeed, other district courts previously dismissed four cases
 24 seeking relief from industry for harms allegedly caused by global climate change. Two of these
 25 cases were decided just this summer, dismissing claims nearly identical to those raised by King
 26

1 County. Dismissing suits brought by Oakland and San Francisco, one district court explained that
 2 “these claims are foreclosed by the need for federal courts to defer to the legislative and
 3 executive branches when it comes to such international problems.” *City of Oakland v. BP P.L.C.*,
 4 Nos. C 17-06011 WHA, C 17-06012 WHA, 2018 WL 3109726, at *6 (N.D. Cal. June 25, 2018).
 5 Likewise, in *City of New York v. BP P.L.C.*, the court refused to recognize a cause of “action for
 6 injuries from foreign greenhouse gas emissions in federal court,” reasoning that doing so “would
 7 severely infringe upon the foreign-policy decisions that are squarely within the purview of the
 8 political branches of the U.S. Government.” No. 18 Civ. 182 (JFK), 2018 WL 3475470, at *7
 9 (S.D.N.Y. July 19, 2018).

10
 11 In an earlier case, the district court dismissed an Alaskan village’s claims seeking
 12 damages from dozens of energy companies for coastal erosion allegedly caused by global
 13 warming, observing that “the allocation of fault—and cost—of global warming is a matter
 14 appropriately left for determination by the executive or legislative branch.” *Native Vill. of*
 15 *Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 877 (N.D. Cal. 2009), *aff’d*, 696 F.3d 849
 16 (9th Cir. 2012). In another, the district court dismissed public nuisance claims against
 17 automakers, recognizing “the complexity of the initial global warming policy determinations that
 18 must be made by the elected branches prior to the proper adjudication of Plaintiff’s federal
 19 common law nuisance claim,” and the “lack of judicially discoverable or manageable standards
 20 by which to properly adjudicate Plaintiff’s federal common law global warming nuisance claim.”
 21 *See California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871, at *6, *16 (N.D.
 22 Cal. Sept. 17, 2007). Similarly, a district court in Mississippi dismissed on political question
 23 grounds a lawsuit by Gulf of Mexico residents against oil and gas companies for damages from
 24
 25
 26

1 Hurricane Katrina, which plaintiffs alleged was strengthened by climate change. *Comer v.*
 2 *Murphy Oil USA, Inc.*, No. 1:05-CV-436-LG-RHW, 2007 WL 6942285 (S.D. Miss. Aug. 30,
 3 2007) (unpublished ruling), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010), *mandamus denied*,
 4 No. 10-294 (U.S. Jan. 10, 2011).

5
 6 More broadly, several Circuits and other federal courts have recognized that political
 7 questions may arise in cases that are nominally tort claims. *See, e.g., Carmichael v. Kellogg,*
 8 *Brown & Root Servs., Inc.*, 572 F.3d 1271, 1281 (11th Cir. 2009) (finding tort claims arising
 9 from automobile accident were barred by the political question doctrine); *Antolok v. United*
 10 *States*, 873 F.2d 369, 383–84 (D.C. Cir. 1989) (noting that “[i]t is the political nature of the
 11 [issue], not the tort nature of the individual claims, that bars our review and in which the
 12 Judiciary has no expertise”); *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of*
 13 *Petroleum Laden Aboard the Tanker Dauntless Colocotronis*, 577 F.2d 1196, 1203–04 (5th Cir.
 14 1978) (concluding tortious conversion claims were barred by the political question doctrine). For
 15 example, in *Chaser Shipping Corp. v. United States*, 649 F. Supp. 736, 738–39 (S.D.N.Y. 1986)
 16 *aff’d*, 819 F.2d 1129 (2d Cir. 1987), the district court applied political question doctrine to reject
 17 claims for damages to a foreign vessel that struck a mine allegedly placed by the United States in
 18 a Nicaraguan harbor. The court observed that “[e]ven though awarding tort damages is a
 19 traditional function for the judiciary, it is apparent that there is a clear lack of judicially
 20 discoverable and manageable standards for arriving at such an award.” *Id.* at 738. Ultimately, it
 21 “avoid[ed] becoming embroiled in sensitive foreign policy matters . . . [by] declin[ing] to
 22 interpose its own will above the will of the President or the Congress” where adjudication of
 23
 24
 25
 26

1 plaintiffs' claims would have "force[d] the Court to resolve sensitive issues involving the foreign
2 policy conduct of executive branch officials." *Id.* at 739.

3 This authority demonstrates that, although King County's theories of liability in this case
4 may formally be styled as tort claims, its claims are in substance political and are therefore
5 nonjusticiable.
6

7 2. King County's claims plainly are not governed by "judicially discoverable and
8 manageable standards." *Baker*, 369 U.S. at 217. They are instead governed by "policy
9 determination[s] of a kind clearly for nonjudicial discretion." *Id.*; *see also Kivalina*, 663 F. Supp.
10 2d at 874–77. There are no judicially enforceable common law "nuisance" standards to apply, or
11 any practical limitation on the judicial policymaking role as the court decides whether the
12 prospect of global climate change makes it "unreasonable" for energy companies to extract and
13 produce fossil fuels.

14 To determine liability, the court would need to determine that King County has a "right"
15 to the climate—in all of its infinite variations—as it stood at some unspecified time in the past,
16 then find not only that this idealized climate has changed, but that Defendants caused that change
17 through "unreasonable" action that deprived Plaintiff of its right to the idealized climate. And, as
18 a remedy, it would need to impose a regulatory scheme on fossil fuel emissions already subjected
19 to a comprehensive state-federal regulatory scheme by way of balancing the gravity of harm
20 alleged by King County against the utility of each Defendant's conduct. Such decisions have no
21 principled or reasoned standards. Federal judges are not in a position to discern, as a matter of
22 common law, the proper regulatory balance.
23
24
25
26

1 There should be no doubt that adjudicating these claims would require a complex “initial
2 policy determination” that is more appropriately addressed by other branches of government.
3 *Baker*, 369 U.S. at 217. EPA reaffirmed this point long ago when it observed that “[t]he issue of
4 global climate change . . . has been discussed extensively during the last three Presidential
5 campaigns; it is the subject of debate and negotiation in several international bodies; and
6 numerous bills have been introduced in Congress over the last 15 years to address the
7 issue.” *Control of Emissions from New Highway Vehicles and Engines*, 68 Fed. Reg. 52922-02,
8 52928 (EPA Sept. 8, 2003) (notice of denial of pet. for rulemaking). Furthermore, EPA observed,
9 “[u]navoidably, climate change raises important foreign policy issues, and it is the President’s
10 prerogative to address them.” *Id.* at 52931. For these reasons, “[v]irtually every sector of the U.S.
11 economy is either directly or indirectly a source of [greenhouse gas] emissions, and the countries
12 of the world are involved in scientific, technical, and political-level discussions about climate
13 change.” *Id.* at 52928.

14
15
16 Federal courts should not set nationwide energy and environmental policy—or, more
17 likely, competing policies—on an *ad hoc*, case-by-case basis under the aegis of federal common
18 law. They face immutable practical limits in terms of gathering information about complex
19 public policy issues and predicting long-term consequences that might flow from judicial
20 decisions. And critically, federal courts lack political accountability for decisions based on
21 something other than neutral principles.
22
23
24
25
26

1 **B. King County’s claims jeopardize our national system of cooperative**
 2 **federalism**

3 King County’s desired remedies are nothing more than a form of regulatory policymaking
 4 and enforcement through the courts. King County seeks to inject its political and policy opinions
 5 into the national regulatory scheme of energy production, promotion, and use. Yet *all* States and
 6 localities play a critical regulatory role within their respective borders, and Congress has
 7 leveraged and augmented that authority by way of the Clean Air Act, a cooperative federalist
 8 program designed to permit each State to achieve its optimal balance of regulation and
 9 commercial activity. Cooperative federalism in the environmental and energy production policy
 10 arena underscores the political nature of this case.
 11

12 1. Cooperative federalism—where the federal government creates federal standards
 13 and leaves the implementation to the States—allows States significant discretion and power and,
 14 as a consequence, encourages multiple levels of political debate and negotiation. *See* Philip J.
 15 Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. Rev.
 16 663, 668–70, 671–73 (2001). It proves to be especially beneficial in areas of regulation where
 17 economic trade-offs and regional variation are important, such as the balance between energy
 18 production and environmental law. *See generally* Holly Doremus & W. Michael Hanemann, *Of*
 19 *Babies and Bathwater: Why the Clean Air Act’s Cooperative Federalism Framework Is Useful*
 20 *for Addressing Global Warming*, 50 Ariz. L. Rev. 799 (2008).
 21
 22

23 As underscored by the Supreme Court’s decision in *AEP*, the Clean Air Act, 42 U.S.C.
 24 § 7401 *et seq.*, serves as the most significant political instrument to address the consequences of
 25 air emissions and is a prime example of cooperative federalism in action. While the Clean Air
 26

1 Act requires EPA to establish national health-based air quality standards to protect against
2 common environmental pollutants, it also assigns States a significant role in enforcing these
3 standards. It thereby illustrates the inherently political undertaking regulation of environmental
4 standards weighed against energy production and emission-producing activities.
5

6 For example, States adopt their own State Implementation Plans (SIPs) for compliance
7 with National Ambient Air Quality Standards within three years of EPA promulgation. *See* 42
8 U.S.C. § 7410(a). While such plans must meet basic requirements and are subject to EPA
9 approval or disapproval, they must be adopted through a process involving public input, ensuring
10 that the plans are adapted to the particular circumstances of each State. *Id.* States are free to
11 choose how best to meet federal requirements within their borders and are expressly allowed to
12 have more stringent requirements than the basic federal mandate. *See id.* § 7416. As a
13 consequence, no two SIPs are identical. And even the EPA SIP approval process is subject to
14 public notice and comment, which permits a wide range of participation by the public and helps
15 ensure that EPA and the States make reasonable trade-offs in the course of implementing the
16 Clean Air Act.
17

18
19 2. The political negotiations and compromises necessary for accountable regulatory
20 action extend beyond the Clean Air Act to regional compacts, where groups of States, with the
21 blessing of Congress, can add yet more greenhouse gas limits. These compacts differ greatly as
22 they address a wide spectrum of issues related to global climate change. Some target emissions,
23 and in so doing vary in reduction targets. Whereas the Regional Greenhouse Gas Initiative
24 (RGGI) aims to reduce CO₂ emissions from 2009 levels by 10% by the year 2018, the
25
26 Midwestern Greenhouse Gas Reduction Accord seeks to reduce emissions by 20% from 2005

1 levels by the year 2020. *Compare* U.S. Energy Info. Admin., *Regional Greenhouse Gas Initiative*
 2 *Auction Prices Are the Lowest Since 2014*, Today in Energy (May 31, 2017), [https://www.](https://www.eia.gov/todayinenergy/detail.php?id=31432)
 3 [eia.gov/todayinenergy/detail.php?id=31432](https://www.eia.gov/todayinenergy/detail.php?id=31432) with Org. for Econ. Co-Operation & Dev., 2010/15
 4 *OECD Economic Surveys: United States* 129 (Sept. 2010), available at [https://www.eenews.net/](https://www.eenews.net/assets/2010/09/20/document_cw_01.pdf)
 5 [assets/2010/09/20/document_cw_01.pdf](https://www.eenews.net/assets/2010/09/20/document_cw_01.pdf). Another compact, the Western Climate Initiative, has
 6 targeted a 15% reduction from 2005 levels by the year 2020. David G. Tuerck *et al.*, *The*
 7 *Economic Analysis of the Western Climate Initiative's Regional Cap-and-Trade Program* 1
 8 (Mar. 2009), available at <https://www.washingtonpolicy.org/library/docLib/westernclimate>
 9 [initiative.pdf](https://www.washingtonpolicy.org/library/docLib/westernclimate).

10
 11 These programs share a “cap and trade” methodology, combined with technology
 12 investments and offsets, in order to allow regional economic growth while pursuing
 13 environmental goals. Despite this similarity, each differs in its particular implementation based
 14 on the aggregate conditions—both economic and ecologic—of the region. What is more, while
 15 some place mandatory requirements on their member States, others urge voluntary compliance.
 16
 17 *Compare supra* *Regional Greenhouse Gas Initiative* (describing RGGI as “the nation’s first
 18 mandatory cap-and-trade program for greenhouse gas emissions”) with David R. Wooley &
 19 Elizabeth M. Morss, § 10:30. *Regional greenhouse gas reduction initiatives*, Clean Air Act
 20 Handbook (2017) (noting that “an advisory panel [of the Midwestern Regional Greenhouse Gas
 21 Reduction Accord] released its final recommendations for a regional GHG cap-and-trade
 22 program” but “the governors of the states who signed the Accord never adopted
 23 the recommendations of the advisory panel[.]”). These compacts—each the result of yet more
 24
 25
 26

1 politics—further demonstrate the unsuitability of a one-size-fits-all environmental and energy
2 production regulatory regime as a matter of judicial review.

3 This is not to say that such policies are implemented solely on federal and regional levels.
4
5 At least 21 States have designed individual regulations addressing those sources of greenhouse
6 gases of greatest local concern, in a way consistent with their local priorities. *See State Climate*
7 *Policy Maps*, Center for Climate & Energy Solutions, [https://www.c2es.org/content/state-](https://www.c2es.org/content/state-climate-policy/)
8 [climate-policy/](https://www.c2es.org/content/state-climate-policy/) (providing a dynamic maps of state and regional activities in the United States).
9 The State of Washington, for instance, has adopted its own plan for controlling emissions. In
10 2016 the State of Washington’s Department of Ecology adopted a Clean Air Rule requiring
11 businesses emitting large amounts of greenhouse gases to cap and reduce their emissions. *Clean*
12 *Air Rule*, Department of Ecology State of Washington, [https://ecology.wa.gov/Air-](https://ecology.wa.gov/Air-Climate/Climate-change/Carbon-reduction-targets/Clean-Air-Rule)
13 [Climate/Climate-change/Carbon-reduction-targets/Clean-Air-Rule](https://ecology.wa.gov/Air-Climate/Climate-change/Carbon-reduction-targets/Clean-Air-Rule). Although the Rule is
14 currently suspended by court order—a ruling that has been appealed to the Washington Supreme
15 Court—facilities covered by the Rule are still required to report emissions as required under
16 Washington law. *Id.* Other States have taken different steps. New York, for example, has become
17 a member of RGGI and in 2016 enacted its own regulatory scheme, the Clean Energy Standard,
18 which requires 50% of New York’s electricity to come from renewable energy sources by 2030.
19 *See Clean Energy Standard*, New York State, [https://www.nyserda.ny.gov/All-Programs/](https://www.nyserda.ny.gov/All-Programs/Programs/Clean-Energy-Standard)
20 [Programs/Clean-Energy-Standard](https://www.nyserda.ny.gov/All-Programs/Programs/Clean-Energy-Standard). Additionally, New York State regulates CO2 output for the
21 purpose of “reduc[ing] anthropogenic emissions of CO2, a greenhouse gas, from CO2 budget
22 sources.” N.Y. Comp. Codes R. & Regs. tit. 6, § 242-1.1; *see also How the Carbon Dioxide*
23 *Budget Trading Program Works*, New York State Department of Environmental Conservation,
24
25
26

1 | <https://www.dec.ny.gov/energy/39276.html>. In contrast, Nebraska invests in research on the
 2 | effectiveness of using agricultural land for carbon sequestration. *See, e.g., Sustaining Earth and*
 3 | *its People: Translating Science into Practice*, University of Nebraska Carbon Sequestration
 4 | Program, <http://csp.unl.edu/public/>. And Virginia has committed to a 30% reduction in
 5 | greenhouse gas emissions from 2007 levels by 2025, driven by energy conservation and
 6 | renewable energy usage. Mike Porter, *Governor Unveils New Virginia Energy Plan During VCU*
 7 | *Visit*, VCU NEWS, Sept. 13, 2007, [https://news.vcu.edu/article/Governor_unveils_new_Virginia](https://news.vcu.edu/article/Governor_unveils_new_Virginia_Energy_Plan_during_VCU_visit)
 8 | [_Energy_Plan_during_VCU_visit](https://news.vcu.edu/article/Governor_unveils_new_Virginia_Energy_Plan_during_VCU_visit). Each State's decision implicitly reflects a balancing of the
 9 | costs of climate change regulation weighed against the benefits likely to accrue from the
 10 | regulation.
 11 |
 12 |

13 | Thus, through the cooperative federalism model, States use their political bodies to secure
 14 | environmental benefits for their citizens without sacrificing their livelihoods, and each does so in
 15 | a different fashion—a natural result of the social, political, environmental, and economic
 16 | diversity that exists among States. A plan to modify greenhouse gas emissions that is acceptable
 17 | to New York or Vermont may be unacceptable to Indiana, Georgia, or Texas, for example.
 18 |

19 | 3. If these multi-level approaches are not enough to demonstrate the political nature
 20 | of the claim King County has brought to federal court, the very description of the problem this
 21 | case seeks to address surely resolves any remaining doubt. King County is worried not about
 22 | *national* climate change, but about *global* climate change. And, indeed, the global nature of
 23 | concerns over anthropogenic climate change has spawned a variety of treaties and other
 24 | international initiatives aimed at addressing air emissions. This activity has been multifaceted,
 25 | balancing a variety of economic, social, geographic, and political factors and emphasizing
 26 |

1 multiparty action rather than arbitrarily focusing on a single entity or small group of entities. *See*
 2 *City of New York*, 2018 WL 3475470, at *4 (“[T]he City’s claims are ultimately based on the
 3 ‘transboundary’ emission of greenhouse gases, indicating that these claims arise under federal
 4 common law and require a uniform standard of decision.”).

5
 6 The United Nations has responded to concerns about the possibility of climate change by
 7 creating the United Nations Framework Convention on Climate Change (UNFCCC). This treaty
 8 has been joined by 196 nations and 1 regional development group. *See Status of Ratification of*
 9 *the Convention*, United Nations Climate Change, [https://unfccc.int/process/the-convention/what-](https://unfccc.int/process/the-convention/what-is-the-convention/status-of-ratification-of-the-convention)
 10 [is-the-convention/status-of-ratification-of-the-convention](https://unfccc.int/process/the-convention/what-is-the-convention/status-of-ratification-of-the-convention) (providing link to listing of 197
 11 signatories to the UNFCCC). The UNFCCC is mostly aspirational, with provisions suggesting
 12 that parties “should” attempt to “anticipate, prevent, or mitigate” climate change. *See generally*
 13 U.N. Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107; S. Treaty
 14 Doc No. 102-38 (entered into force March 21, 1994). A number of provisions also focus on
 15 technology transfers from developed to developing nations and economic sustainability of
 16 environmental policies. *See id.* Countries retain discretion to set their individual policies in
 17 pursuit of these goals on the basis of the specific conditions of each party. *See id.* art. 3, ¶3.

18
 19 These commitments implicate delicate matters of national and international policy,
 20 including the relationships between “developing nations” and “developed nations;” the transfer
 21 of technology and skills between nations; education; methods of containing climate change; and
 22 the timetables involved in doing so. *See id.* art. 4. Because of the complex nature of these
 23 commitments, the member countries of the UNFCCC and its different committees have met
 24 regularly since 1996 to discuss implementation. *See What Are United Nations Climate Change*
 25
 26

1 | *Conferences?*, United Nations Climate Change, <https://unfccc.int/process/conferences/what-are->
 2 | [united-nations-climate-change-conferences](https://unfccc.int/process/conferences/what-are-united-nations-climate-change-conferences). At these meetings, the nations involved discuss
 3 | implementation of the aspirational commitments contained within the UNFCCC and recent
 4 | scientific developments. *See generally id.*

5 |
 6 | UNFCCC meetings have spawned numerous ancillary agreements, including the Kyoto
 7 | Protocol to the UNFCCC, 37 I.L.M. 22 (1998), Dec. 10, 1997; the Marrakesh Accords of 2005,
 8 | UNFCCC, October 29–November 10, Decision 11/CP.7, 7th sess. (2001); the Copenhagen
 9 | Accord, UNFCCC, December 7–19, Decision 2/CP.15, 15th sess. (2010), and the Paris
 10 | Agreement, UNFCCC, November 30–December 13, Decision 1/CP.21, 21st sess. (2016). These
 11 | agreements, unlike the original UNFCCC, typically require binding commitments from members.
 12 | *See, e.g., What Is the Kyoto Protocol?*, United Nations Climate Change, [https://unfccc.int/](https://unfccc.int/process/the-kyoto-protocol/what-is-the-kyoto-protocol)
 13 | [process/the-kyoto-protocol/what-is-the-kyoto-protocol](https://unfccc.int/process/the-kyoto-protocol/what-is-the-kyoto-protocol) (stating the Kyoto Protocol “commits its
 14 | Parties by setting internationally binding emission reduction targets” (emphasis in original)).

15 |
 16 | Notably, President Clinton signed the Kyoto Protocol, which required reductions of
 17 | “developed nations” but not “developing nations,” but the United States did not ratify the treaty.
 18 | *See The Kyoto Protocol—Status of Ratification*, United Nations Climate Change, [https://](https://unfccc.int/process/the-kyoto-protocol/status-of-ratification)
 19 | unfccc.int/process/the-kyoto-protocol/status-of-ratification. Explaining the United States’
 20 | decision not to ratify the Protocol, President Bush noted that it exempted from its limitations
 21 | 80% of the world, including India and China, and that he believed it would harm the United
 22 | States’ economy. *See, e.g., Michael Weisslitz, Rethinking the Equitable Principle of Common*
 23 | *but Differentiated Responsibility: Differential Versus Absolute Norms of Compliance and*
 24 |
 25 |
 26 |

1 | *Contribution in the Global Climate Change Context*, 13 Colo. J. Int'l Envtl. L. & Pol'y 473, 507–
2 | 08 (2002).

3 | In contrast, President Obama placed the United States at the forefront of the negotiation
4 | of the Copenhagen Accord in 2009, with the hope that this new agreement would ameliorate the
5 | flaws of the Kyoto Protocol. *See, e.g.*, Elisabeth Rosenthal, *Obama's Backing Raises Hopes for*
6 | *Climate Pact*, N.Y. Times, Feb. 28, 2009, [https://www.nytimes.com/2009/03/01/science/earth/](https://www.nytimes.com/2009/03/01/science/earth/01treaty.html)
7 | [01treaty.html](https://www.nytimes.com/2009/03/01/science/earth/01treaty.html). The United States has since agreed to be bound by it. *See Information Provided by*
8 | *Parties to the Convention Relating to the Copenhagen Accord*, United Nations Climate Change,
9 | [https://unfccc.int/process/conferences/pastconferences/copenhagen-climate-change-conference-](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)
10 | [december-2009/statements-and-resources/information-provided-by-parties-to-the-convention-](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)
11 | [relating-to-the-copenhagen-accord](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).

12 | More recently, the United States entered into the Paris Agreement, which went into force
13 | on November 4, 2016. *See Paris Agreement – Status of Ratification*, United Nations Climate
14 | Change, <https://unfccc.int/process/the-paris-agreement/status-of-ratification>. The Paris
15 | Agreement's central aim is address climate change by limiting global temperature increase to
16 | well below 2 degrees Celsius, and also pursuing efforts to further limit the increase to 1.5
17 | degrees. Paris Agreement, art. 2, (Dec. 12, 2015), *available at* [https://unfccc.int/files/essential_](https://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf)
18 | [background/convention/application/pdf/english_paris_agreement.pdf](https://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf). Parties to the Paris
19 | Agreement are also required to work to reduce its emissions by adopting a Nationally
20 | Determined Contributions (NDCs) including requirements that all Parties report their emissions
21 | and efforts to reduce such emissions. *Id.* art. 3. On March 31, 2015, the United States filed its
22 | Intended Nationally Determined Contribution (INDC), which serves as a formal statement of the
23 |
24 |
25 |
26 |

1 United States that it would work to reduce emissions by 26–28% below 2005 levels by 2025, and
 2 to make best efforts to reduce by 28%. *See Fact Sheet: U.S. Reports Its 2025 Emissions Target to*
 3 *the UNFCCC*, The White House (Mar. 31, 2015), [https://obamawhitehouse.archives.gov/the-](https://obamawhitehouse.archives.gov/the-press-office/2015/03/31/fact-sheet-us-reports-its-2025-emissions-target-unfccc)
 4 [press-office/2015/03/31/fact-sheet-us-reports-its-2025-emissions-target-unfccc](https://obamawhitehouse.archives.gov/the-press-office/2015/03/31/fact-sheet-us-reports-its-2025-emissions-target-unfccc). With the change
 5 in administrations, however, President Trump announced he would withdraw the United States
 6 from the Paris Climate Change Agreement on June 1, 2017. *See President Trump Announces*
 7 *U.S. Withdrawal from the Paris Climate Accord*, The White House (June 1, 2017), [https://www.](https://www.whitehouse.gov/articles/president-trump-announces-u-s-withdrawal-paris-climate-accord/)
 8 [whitehouse.gov/articles/president-trump-announces-u-s-withdrawal-paris-climate-accord/](https://www.whitehouse.gov/articles/president-trump-announces-u-s-withdrawal-paris-climate-accord/).

10 The past two decades have thus seen four Presidencies with widely divergent views of
 11 what the United States’ foreign policy on climate change and greenhouse gas emissions should
 12 be. These shifts in direction further demonstrate the political nature of environmental and fossil
 13 fuel regulation and reaffirm the need for such decisions to be the subject of political debate and
 14 accountability.

16 4. King County’s decision to frame its claims in terms of energy production rather
 17 than emissions does not make this case any less inherently political. If anything, it underscores
 18 the political nature of the global climate change problem by casting a spotlight on yet more
 19 political choices that bear on the issue.

21 In some instances, States themselves promote the very energy production and marketing
 22 targeted in this case. For example, Washington has “declared [it] to be in the public interest to
 23 foster, encourage, and promote the exploration, development, production, and utilization of oil
 24 and gas in the state” and “to provide for the operation and development of oil and gas properties
 25 in such manner as to assure that the maximum economic recovery of oil and gas may be
 26

1 obtained.” Wash. Rev. Code § 78.52.001. Washington is far from alone. New York State enacted
2 New York Environmental Conservation Law section 23-0301 “declar[ing] to be in the public
3 interest . . . to authorize . . . development of oil and gas properties in such a manner that a greater
4 ultimate recovery of oil and gas may be had.” Similarly, the New York Department of
5 Environmental Conservation declares in that its rules are promulgated with the following
6 “objectives: (a) the fostering, encouragement and promotion of the development, production and
7 utilization of the natural resources of oil and gas in such a manner as will prevent waste . . . [and]
8 in such a manner that a greater ultimate recovery of oil and gas may be had[.]” CRR-NY 550.1.
9

10 In California, the State Oil and Gas Supervisor is charged with “encourag[ing] the wise
11 development of oil and gas resources” and “permit[ing] the owners or operators of the wells to
12 utilize all methods and practices known to the oil industry for the purpose of increasing the
13 ultimate recovery of underground hydrocarbons[.]” Cal. Pub. Res. Code §§ 3004, 3106(b), (d).
14 Similarly, Texas permits the “land subject to its control surveyed or subdivided into tracts, lots,
15 or blocks which will, in its judgment, be most conducive and convenient to facilitate the
16 advantageous sale of oil, gas, or mineral leases[.]” Tex. Nat. Res. Code § 34.052, and allows the
17 issuance of “a permit for geological, geophysical, and other surveys and investigations on land . .
18 . that will encourage the development of the land for oil, gas, or other minerals.” *Id.* § 34.055.
19 More specifically, in addressing the extraction of such fossil fuels the Texas legislature found
20 that “the extraction of minerals by surface mining operations is a basic and essential activity
21 making an important contribution to the economic well-being of the state and nation[.]” *Id.* §
22 131.002(1).
23
24
25
26

1 And the federal government is no different; numerous federal statutes expressly state the
 2 government's intention "to promote the efficient exploration, production, storage, supply,
 3 marketing, pricing, and regulation of energy resources, including fossil fuels" Consolidated
 4 Appropriations Act of 2016, *codified at* 42 U.S.C. § 6212a(b); *see also* Energy Policy Act of
 5 2005, *codified at* 42 U.S.C. § 15910(a)(2)(B) ("The purpose of this section is . . . to promote oil
 6 and natural gas production"); Presidential Executive Order on Promoting Energy
 7 Independence and Economic Growth (Mar. 28, 2017), § 1(a) ("[T]he prudent development of
 8 these natural [energy] resources is essential to ensuring the Nation's geopolitical security.").

9
 10 Such promotion not only demonstrates the inherently political nature of this issue, but
 11 also suggests that States and the federal government themselves could be subject to liability if
 12 King County's claims are permitted to proceed.

13
 14 ***

15 To weigh environmental policy against promotion of energy production in the context of
 16 a nuisance and trespass lawsuit would render pointless the process of interpreting and applying
 17 the political branches' resolutions of such policy disputes. A judicial determination inserting the
 18 common law of nuisance and trespass into the state, regional, national, and international debates
 19 on energy production and environmental policy would be untenable. It would render the results
 20 of previous debates moot and would irrevocably define the terms of future debate.

21
 22 **II. Federal Statutes Have Displaced the Federal Common Law King County Invokes**

23 In the alternative, even if King County's claims are theoretically justiciable, federal
 24 statutes have displaced any common law theories King County invokes. King County's
 25 complaint sounds in state common law. ECF No. 113, First Amended Compl. at ¶ 205. In
 26

1 response, Defendants provide powerful arguments for why all claims must be either grounded in,
 2 or preempted by, federal law. ECF No. 120, Defts' Mot. To Dismiss at 26–28. This brief will
 3 leave the preemption argument to Defendants and focus only on the displacement defense.

4 The Supreme Court held more than seven years ago that Congress, by “delegat[ing] to
 5 EPA the decision whether and how to regulate carbon-dioxide emissions,” had “displace[d]
 6 federal common law.” *AEP*, 564 U.S. at 426. There is no relief available for King County’s
 7 common law tort claims because—like those in *AEP*—its theory relies on an alleged harm based
 8 on global climate change. It does not matter that King County here focuses on production and
 9 promotion rather than emissions; ultimately the alleged harm still arises from emissions, which is
 10 exactly what Court deemed off limits to public nuisance claims in *AEP*.

11 King County claims that it is “not seek[ing] to impose liability on Defendants for their
 12 direct emissions of greenhouse gases, and do[] not seek to restrain Defendants from engaging in
 13 their business operations.” ECF No. 113, First Amended Compl. at ¶ 10. Yet in the very same
 14 breath, it requests “compensatory damages and an order requiring Defendants to abate the global
 15 warming-induced nuisance[,]” because Defendants allegedly “exacerbate global warming . . .
 16 causing recurring, intermittent, continuous, and/or ongoing harm[,]” ECF No. 113, First
 17 Amended Compl. at ¶¶ 10, 210. Indeed, King County alleges “[d]efendants’ cumulative
 18 production of fossil fuels over many years makes each Defendant among the top sources of
 19 global warming pollution in the world.” ECF No. 113, First Amended Compl. at ¶ 9. It also
 20 alleges that “[e]ach Defendant . . . continues to be aware, that the inevitable emissions of
 21 greenhouse gases from the fossil fuels it produces combines with the greenhouse gas emissions
 22 from fossil fuels . . . to result in dangerous levels of global warming with grave harms, including
 23
 24
 25
 26

1 the harms to coastal areas like King County[.]” ECF No. 113, First Amended Compl. at ¶ 206. In
 2 short, King County alleges the harm is global climate change, which in its view is caused by
 3 carbon dioxide *emissions*.

4
 5 The *AEP* Court rejected the same theory of liability on grounds of displacement, and to
 6 conclude otherwise here would suggest that the transaction of a legally permissible commodity
 7 can be a public nuisance without any causal connection to any supposed harm to King County or
 8 the public. The Ninth Circuit rejected similar arguments in *Kivalina* when it concluded that
 9 allegations that energy companies “conspir[ed] to mislead the public about the science of global
 10 warming” could only be successful if the underlying theory of injury based on emissions was
 11 successful. 696 F.3d at 854, 858. And earlier this year, two federal district courts rejected similar
 12 attempts to hold liable the five fossil fuel companies named as defendants here by reframing the
 13 alleged harms. *City of Oakland*, 2018 WL 3109726, at *6 (“The harm alleged . . . remains a harm
 14 caused by fossil fuel *emissions*, not the mere extraction or even sale of fossil fuels. . . . If an oil
 15 producer cannot be sued under the federal common law for their own emissions, *a fortiori* they
 16 cannot be sued for someone else’s.”); *City of New York*, 2018 WL 3475470, at *4 (“[R]egardless
 17 of the manner in which the City frames its claims . . . the City is seeking damages for global-
 18 warming related injuries resulting from greenhouse gas emissions, and not only the production of
 19 Defendants’ fossil fuels.”).

20
 21 Moreover, even if this Court considers the case exclusively about fossil fuel production
 22 and promotion rather than emissions, *other* federal statutes still displace King County’s federal
 23 common law claims. Congressional enactments such as the Energy Policy and Conservation Act
 24 of 1975 (“EPCA”), *codified at* 42 U.S.C. § 13401; the Energy Policy Act of 2005 *codified at* 42
 25
 26

1 U.S.C. § 15910(a)(2)(B); the Mining and Minerals Policy Act, *codified at* 30 U.S.C. § 21a; the
 2 Coastal Zone Management Act, *codified at* 16 U.S.C. § 1451(j), and the Federal Lands Policy
 3 Management Act, *codified at* 43 U.S.C. 1701(a)(12), all speak “directly” to the reasonableness of
 4 the Defendants’ conduct in producing and promoting such materials. EPCA, for example,
 5 provides that “[i]t is the goal of the United States in carrying out energy supply and energy
 6 conservation research and development . . . to strengthen national energy security by reducing
 7 dependence on imported oil.” 42 U.S.C. § 13401.
 8

9 As a result, there is no relief available for King County’s common law tort claims here
 10 because—whether King County’s claims fall directly under *AEP* or not—such claims are
 11 displaced by federal statutes.
 12

13 **III. This Case Threatens Extraterritorial Regulation by Imposing King County’s Policy**
 14 **Choices on Areas and Transactions Outside King County**

15 King County seeks “[c]ompensatory damages” and “an order requiring Defendants to
 16 abate the global warming-induced nuisance [.]” ECF No. 113 at ¶ 10, because King County must
 17 “build infrastructure and finance programs that are urgently needed to protect human safety and
 18 public and private property.” ECF No. 113, First Amended Compl. at ¶ 10. Imposing such
 19 financial consequences on business activity contravenes Congress’s exclusive power to regulate
 20 interstate and foreign commerce. *La. Pub. Serv. Comm’n v. Tex. & N.O.R. Co.*, 284 U.S. 125,
 21 130 (1931). One county (or even one State) should not have the power to seek a judicial remedy
 22 as means of implementing a national regulatory regime for environmental and energy production
 23 policy. Such a scheme is contrary to fundamental notions of horizontal federalism.
 24
 25
 26

1 Restrictions on King County’s ability to regulate out-of-state commerce “reflect the
2 Constitution’s special concern both with the maintenance of a national economic union
3 unfettered by state-imposed limitations on interstate commerce and with the autonomy of the
4 individual States within their respective spheres.” *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 335–36
5 (1989). King County’s attempt to restrict and punish out-of-state production of fossil fuels by
6 suing producers with a *common law* cause of action implicates these constitutional concerns the
7 same way a suit based on a state *statutory* cause of action would. The Supreme Court observed
8 in *Healy* that “[t]he limits on a State’s power to enact substantive legislation *are similar to the*
9 *limits on the jurisdiction of state courts. In either case, ‘any attempt “directly” to assert*
10 *extraterritorial jurisdiction over persons or property would offend sister States and exceed the*
11 *inherent limits of the State’s power.’”* *Id.* at n.13 (emphasis added) (quoting *Edgar v. MITE*
12 *Corp.*, 457 U.S. 624, 643 (1982) (plurality opinion)). And in *BMW of North America, Inc. v.*
13 *Gore*, it held that “a State may not impose economic sanctions on violators of its laws with the
14 intent of changing the tortfeasors’ lawful conduct in other States,” observing that “[s]tate power
15 may be exercised as much by a jury’s application of a state rule of law in a civil lawsuit as by a
16 statute.” 517 U.S. 559, 572 & n.17 (1996).

17
18
19
20 Moreover, because King County is a local unit of government, Commerce Clause
21 extraterritoriality doctrine should apply even to the degree King County invokes federal common
22 law. The plaintiff is the “master of the complaint,” meaning it has discretion, particularly in
23 common law cases, to craft the legal theories and the desired relief. *See, e.g., Caterpillar Inc. v.*
24 *Williams*, 482 U.S. 386, 392 (1987). Here, King County seeks redress for the types of injuries
25 only a government entity can claim—essentially for collective injury to the populace from
26

1 warming temperatures, acidifying marine waters, rising seas, increasing flooding risk, decreasing
 2 mountain snowpack, and less water in the summer. ECF No. 113, First Amended Compl. at ¶ 1.
 3 *See also* 4 W. Blackstone, Commentaries *167 (1763) at 219- 20 (recognizing the unique
 4 position of government in stating “no action lies for a public or common nuisance, but an
 5 indictment only . . . only the king [can act] in his public capacity of supreme governor, and pater-
 6 familias of the kingdom.”).

8 Even if it formally asserts a “federal” claim, the County does not invoke remedies
 9 prescribed by Congress under the Commerce Clause power, but instead seeks to advance its own
 10 policy goals by demanding remedies supposedly available under the amorphous and
 11 indeterminate aegis of federal common law. But if the Commerce Clause does not permit state
 12 and local governments to regulate extraterritorial energy production via positive law, it also
 13 should not permit them to do so by means of choosing common law remedies, even when the
 14 formal law being invoked is federal. In short, Congress has not given its blessing for States and
 15 localities to engage in such national regulatory efforts. If the Commerce Clause does not so limit
 16 States and localities, other such governments may similarly fasten common law remedies to
 17 attenuated legal theories in an attempt to promote their desired policy positions.
 18
 19

20 By asking a single federal judge to impose energy production penalties on defendant
 21 companies, each of which presumably complies with the regulations of each State in which it
 22 operates, King County is attempting to export its preferred environmental policies and its
 23 corresponding economic effects to other States and localities. Allowing it to do so would be
 24 detrimental to the regulatory innovation and regional approaches that have prevailed through the
 25 political branches to date.
 26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

CONCLUSION

The Amici States respectfully urge the Court to grant the Motion to Dismiss.

Respectfully submitted this 3rd day of October, 2018.

TUPPER MACK WELLS PLLC

By: s/ James A. Tupper, Jr.
James A. Tupper, Jr., WSBA No. 16873
Tupper Mack Wells PLLC
2025 First Avenue, Suite 1100
Seattle, WA 98121
Telephone: (206) 493-2300
Email: Tupper@tmw-law.com

OFFICE OF THE ATTORNEY GENERAL

Thomas M. Fisher, Solicitor General*
Office of the Attorney General
302 W. Washington Street, IGCS 5th Floor
Indianapolis, IN 46204-2770
Telephone: (317) 924-3005
Email: Tom.Fisher@atg.in.gov

Kian J. Hudson, Deputy Attorney General*
Office of the Attorney General
302 W. Washington Street, IGCS 5th Floor
Indianapolis, IN 46204-2770
Telephone: (317) 924-3005
Email: Kian.Hudson@atg.in.gov

Attorneys for Amici Curiae States of Indiana, Alabama,
Arkansas, Colorado, Georgia, Louisiana, Nebraska,
Oklahoma, South Carolina, Texas, Utah, and Wisconsin
*Pro hac vice motions pending

APPENDIX

LIST OF AMICI STATES

1. STATE OF INDIANA
Curtis T. Hill, Jr., Attorney General
2. STATE OF ALABAMA
Steve Marshall, Attorney General
3. STATE OF ARKANSAS
Leslie Rutledge, Attorney General
4. STATE OF COLORADO
Cynthia H. Coffman, Attorney General
5. STATE OF GEORGIA
Christopher M. Carr, Attorney General
6. STATE OF LOUISIANA
Jeff Landry, Attorney General
7. STATE OF NEBRASKA
Doug Peterson, Attorney General
8. STATE OF OKLAHOMA
Mike Hunter, Attorney General
9. STATE OF SOUTH CAROLINA
Alan Wilson, Attorney General
10. STATE OF TEXAS
Ken Paxton, Attorney General
11. STATE OF UTAH
Sean D. Reyes, Attorney General
12. STATE OF WISCONSIN
Brad D. Schimel, Attorney General

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

CERTIFICATE OF SERVICE

I certify under penalty of perjury that on this date, I caused the foregoing document to be electronically filed with the United States District Court Clerk using the CM/ECF system, and that service of the foregoing document will be accomplished by the CM/ECF system.

Dated at Seattle, Washington this 3rd day of October, 2018.

/s/James A. Tupper, Jr.
James A. Tupper, Jr, WSBA No. 16873

4833-4794-8918, v. 1