18-2188

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CITY OF NEW YORK

Plaintiff-Appellant,

v.

BP P.L.C., CHEVRON CORPORATION, CONOCOPHILLIPS, EXXON MOBIL CORPORATION, and ROYAL DUTCH SHELL PLC,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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DISCLOSURE STATEMENTS PURSUANT TO RULES 26.1 AND 29 OF THE FEDERAL RULES OF APPELLATE PROCEDURE

Pursuant to Rules 26.1 and 29(a)(4)(A) of the Federal Rules of Appellate Procedure, counsel for *amicus curiae* hereby state that the National Association of Manufacturers has no parent corporations and has issued no stock.

Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, counsel for *amicus curiae* hereby states that (1) no party's counsel authored the brief in whole or in part; (2) no party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and (3) no person — other than the *amicus curiae*, their members, or their counsel — contributed money that was intended to fund the preparation or submission of the brief.

Pursuant to Circuit Rule 29-3, counsel for *amicus* sought consent of all parties to the submission of this proposed brief. All parties responded, and there were no objections to the filing of this *amicus curiae* brief.

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INTEREST OF *AMICUS CURIAE*

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

Between 2005 and 2015, manufacturers reduced their greenhouse gas emissions (GHGs) by over 10 percent while increasing their value to the economy by 19 percent, and their reductions are continuing. The NAM is committed to protecting the environment and to environmental sustainability, and fully supports the ongoing national effort to protect our environment and improve public health through appropriate laws and regulations. The NAM has grave concerns, though, about the attempt here to circumvent products liability law and create category liability for lawful, beneficial energy products that are essential to modern life.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This lawsuit is part of a new wave of politically-oriented litigation born out of frustration that not enough is being done, particularly in Washington, D.C., on climate change. The legal landscape for such litigation is much clearer now than when a Second Circuit panel ruled on an earlier version of this litigation in *Am. Elec. Power v. Connecticut*. Under all legal theories, state and federal, it is abundantly clear that there is no viable common law cause of action against private actors for harms caused by global climate change or any weather event associated with climate change. Defendants are engaged in the production and sale of lawful products essential to modern life. The City must not be allowed to turn the promotion and sale of energy into a liability-inducing event.

The U.S. Supreme Court, in dismissing *Am. Elec. Power v. Connecticut*, issued a broad warning against these types of climate change tort suits. *See* 564 U.S. 410 (2011). The Court went beyond the federal displacement theory at issue, stating there is "no room for a parallel track" of tort litigation over climate change policy. *Id.* at 425. The Court also recognized that climate change tort claims could come in various forms; there were two other cases in lower courts also seeking to subject manufacturers of energy products to liability for global climate change. The Court spent a considerable part of its ruling providing a road map for these and other courts to follow in such cases. It stated the "appropriate amount of regulation

in any particular greenhouse gas-producing sector cannot be prescribed in a vacuum: as with other questions of national or international policy, informed assessment of competing interests is required." *Id.* at 427. It concluded that setting climate change public policies were solely "within national legislative power." *Id*. at 421.

This Court should not allow the City to put old wine in new bottles; this case is built on the same faulty legal foundations as *AEP*. By the City's admission, it seeks to create category liability for oil, gas and other types of energy products, regardless of their utility to modern society. Its remedy would create a back-door penalty on energy production, but only on these Defendants and their products. The fact that the City is seeking to choose whom to penalize and for which products underscores the political nature of this litigation. This type of sweeping public policy raises the very competing interests the Supreme Court warned against in *AEP*. This penalty would be assessed irrespective of the ability of families and businesses to pay more for their energy needs, the impact on the U.S. economy and energy independence, or the other factors that Congress and federal agencies must consider when presented with such public policy choices.

Further, as discussed below, the City's efforts to differentiate this lawsuit from *AEP* are differences without legal distinctions. It does not matter whether a climate change tort case targets energy use or products, seeks injunctive relief or

monetary damages, is brought by individuals or governments, or is brought under federal or state law. The judiciary is not the place for making climate change public policy judgments. Prominent scholar Robert Reich, who served as Secretary of Labor under President Clinton, termed lawsuits with such an impact "regulation through litigation," concluding that circumventing Congress to enact "faux legislation . . . sacrifices democracy." Robert B. Reich, *Don't Democrats Believe in Democracy?*, Wall St. J., Jan. 12, 2000, at A22.

The best way to reduce climate change impacts is for governments to work with America's manufacturers, including Defendants, on new technologies that reduce emissions and make energy more efficient and environmentally friendly. Innovation, not litigation, has been the proven way America has brought about societal-wide technological advancement. For these reasons, as well as those stated herein, the NAM respectfully urges the Court to affirm the ruling below.

ARGUMENT

I. CLIMATE CHANGE TORT LITIGATION, IN ALL FORMS, HAS BEEN REJECTED AS UNSUPPORTED BY THE LAW

A. The Supreme Court Has Already Spoken Against the Judiciary's Involvement in Climate Change Policy

The first set of climate change tort suits was filed fifteen years ago against Defendants and other participants in the fossil fuel industry. At the time, the plaintiffs embraced the political nature of the litigation against the Bush Administration. They felt EPA was not doing enough to regulate CO_2 emissions,

so they sued hoping courts would regulate emissions through injunctive relief or by making the fossil fuel industry pay for climate change damages. As Maine Attorney General Stephen Rowe said, "It's a shame that we're here, here we are trying to sue [companies]…because the federal government is being inactive." Symposium, *The Role of State Attorneys General in National Environmental Policy*, 30 Colum. J. Envtl. L. 335, 339 (2005).

Each of these climate change tort suits, as with the one at bar, bases its claims on a common factual theory: the companies named in their lawsuits manufactured products or engaged in operations that contributed to the build-up of GHGs in the atmosphere; the accumulation of GHGs over the past 150 years has caused the earth to warm; and this, in turn, has caused or will cause a change in weather patterns that has or will harm the plaintiffs. As these lawsuits have shown, such allegations are not particular to any defendant or industry. GHGs are released through numerous natural and artificial activities, including the use of energy around the world since the Industrial Revolution. By choosing which companies and products to target in this litigation, governments and their counsel are trying to pick who they want to blame for global climate change.

The most prominent climate change tort case was *AEP*. Several state attorneys general sued six major Midwest power companies seeking a court order for a three percent reduction in CO_2 emissions per year for ten years. In the second

case, *California v. General Motors Corp.*, the California attorney general sought to subject car manufacturers to liability for making cars that emit GHGs through vehicle exhaust. *See* No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007). The other two cases were *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012) and *Comer v. Murphy Oil USA, Inc.*, 718 F.3d 460 (5th Cir. 2013) where, as here, producers of oil, gas and other energy sources were sued for damages over impacts of global climate change.

The Supreme Court unanimously dismissed *AEP* in an opinion written by Justice Ginsburg. The Court held that all federal common law causes of action, including public nuisance claims, had been displaced. The Court did not stop there; it explained the institutional deficiencies with courts being enmeshed in the climate change public policy debate, regardless of legal doctrine. The Court stressed that setting national energy policy to account for climate change concerns was "within national legislative power," and that Congress and EPA are "better equipped to do the job than individual district judges issuing ad hoc, case-by-case" decisions. 564 U.S. at 421, 428. The Court further explained that any trial court trying to adjudicate such a claim would end up regulating defendants' products or conduct "by judicial decree," and that there is "no room for a parallel track" of tort litigation for emissions or other aspects of climate change policy. *Id.* at 425, 427.

Soon after *AEP*, the two remaining climate change tort suits were dismissed. The Ninth Circuit disposed of *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012), where an Alaskan village sued many of the same companies as here for alleged damages related to rising sea levels. The Ninth Circuit stated that even though the legal theories pursued in *Kivalina* differed from *AEP*, given the Court's broader message, "it would be incongruous to allow [such litigation] to be revived in another form." *Id.* at 857. A federal judge dismissed Mississippi homeowners' claims in *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 249 (S.D. Miss. 2012) over property damage caused by Hurricane Katrina, finding *AEP* preempted the state law claims. The fourth case had already been dismissed, with the judge concluding that liability cannot attach to manufacturers "for doing nothing more than lawfully engaging in their respective spheres of commerce." *General Motors Corp.*, 2007 WL 2726871, at *14.

As of 2012, it appeared the courts had drawn clear lines on climate change tort litigation against private actors regardless of the tort, court or parties involved. The dismissed cases included claims over products and conduct, filed by public officials and private plaintiffs, under federal and state law, and for injunctive relief and monetary damages. Repackaging the claims did not change the outcomes.

B. The City's Attempts to Distinguish This Case from *AEP* Do Not Cure the Groundless Nature of Climate Change Tort Litigation

The City spends much of its brief trying to differentiate this case from *AEP*, asserting the key difference is that this lawsuit is purely about money. It specifically disclaims that it is "attempting to 'solve' the problem of climate change" or "restrain Defendants from engaging in their business operations." Br. at 2, 9. It states its sole theory for liability here is Defendants' mere act of selling fossil fuels given their understanding, as well as those around the world, that carbon dioxide released during the use of their products contributes to global climate change. This lawsuit is one of fourteen such suits filed since 2017.

The strategy for this round of climate change litigation was developed in 2012, when environmentalists and lawyers brainstormed on new ideas for pursuing their political agenda on climate change. *See* Findings of Fact and Conclusions of Law, *In re ExxonMobil Corp.*, No. 096-297222-18 (Tex. Dist. Ct.–Tarrant Cty. Apr. 24, 2018), at 3 (discussing the "Workshop on Climate Accountability, Public Opinion, and Legal Strategies"). After 2016, frustration with Washington built again, and two law firms recruited several localities to file these lawsuits on contingency fee bases. They viewed this litigation as a way for "maintaining pressure on the industry that could eventually lead to its support for legislative and regulatory responses to global warming." *Id.*

Despite the City's repackaging, the differences it raises are not legal distinctions that would allow this case to go forward:

Compensation v. Regulation: The City wrongly suggests that liability seeking only compensation is not regulatory in nature. To the contrary, the Supreme Court has consistently held that tort damages "directly regulate" conduct the same way as legislation and regulations. *See, e.g., Riegel v. Medtronic, Inc.*, 552 U.S. 312, 325 (2008) ("tort duties of care" under state law "directly regulate" a defendant's conduct). A person subjected to liability must change the offending conduct to avoid liability, just as it must to comply with statutes and regulations. *See Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005) (finding common law actions for monetary liability impose state law requirements).

The Ninth Circuit in *Kivalina* disposed of this argument by the City directly in the climate change context. The plaintiffs there similarly tried to limit *AEP* by arguing that it precludes only actions seeking to directly regulate emission levels, namely injunctive relief and abatement, not money damages. The Ninth Circuit, however, expressly stated that "the Supreme Court has instructed that the type of remedy asserted is not relevant." *Kivalina*, 696 F. 3d at 857.

Unreasonable Conduct v. Unreasonable Injury: The City also wrongly argues that tort liability, including under public nuisance theory, does not require wrongdoing. This notion was also dispelled in *Kivalina*, as plaintiffs there also

suggested that "unreasonableness in a damages action is… not one of whether the defendant's conduct is reasonable or unreasonable but rather one of who should bear the cost of that conduct." *See* Brief for Appellant, *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), at 25. The Ninth Circuit explained, however, that "the solution to Kivalina's dire circumstance must rest in the hands of the legislative and executive branches of our government." *Kivalina*, 696 F. 3d at 858.

To be clear, public nuisance liability not only requires unreasonable conduct, but has largely been associated with offenses rising to the level of common law *crimes*. *See Tull v. United States*, 481 U.S. 412, 421 (1987) (referring to public nuisance as "a civil means to redress a miscellaneous and diversified group of minor criminal offenses.") (internal quote omitted). The Restatement (Second) of Torts further states that "[i]f the conduct of the defendant is not of a kind that subjects him to liability . . . the nuisance exists, but he is not liable for it." § 821A, cmt. c (1979). Determining whether the conduct giving rise to public nuisance liability is "reasonable" is rarely controversial because public nuisance activities have no public benefit. *See id.* § 821 cmt. e. By contrast, Defendants' energy products at issue here are highly beneficial. They are a staple of modern life that advance people's health and safety, including in New York City homes, office buildings, theaters, sports arenas, roadways and hospitals.

The Supreme Court has also been clear that requiring wrongdoing is essential for providing fair notice of conduct that could give rise to liability and how to avoid liability. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 43 (1991) (O'Connor, J., dissenting) (vagueness doctrine applies to common law liability); *Eastern Enterprises v. Apfel*, 524 U.S. 498, 528-29 (1998) (it stretches constitutional limits to impose "severe retroactive liability on a limited class of parties that could not have anticipated the liability"). This reason is why category liability, as sought here, has been disfavored. Defendants would not be able to avoid liability other than to stop manufacturing and selling their lawful, beneficial products. In addition to underscoring the regulatory aspects of this litigation, such a result here would cause enormous social and economic upheaval.

Knowledge of Risk v. Unlawful Risks: In an effort to associate Defendants with a semblance of culpability, at least in the minds of the media, the City alleges Defendants should be liable for studying the potential impacts of carbon emissions on climate change and continuing to promote and sell their products to the consuming public, including the City. Knowledge of product risks does not give rise to liability. Otherwise, there would be no limit to civil litigation, as products from household chemicals to sugar to cutlery have known risks.

The City's own pleadings show that during the time it accuses Defendants of studying the impact of their products on global climate change, the scientific

community and government agencies responsible for regulating emissions and setting national energy policy were doing the same. The City concedes that the "basic facts of the greenhouse effect have been known for a long time" and details studies since the 1950s finding that "global warming may become significant during the future decades if industrial fuel combustion continues to rise exponentially." Pl. Compl. at 28-30. Based on this body of knowledge, though, the U.S. Government has continued to promote the extraction and use of these energy sources, and the City continues to purchase and use them.

Public v. Private Nuisance: The notion that a person or business can be required to pay costs of harm even for lawful, reasonable conduct is a concept limited to the state common law tort of *private* nuisance and applies only to *localized* impacts. *See* Restatement (Second) of Torts § 829A cmt. a (1979) (defining private nuisance). Private and public nuisances are distinct torts; they are "unrelated" even though they share a common name. William L. Prosser, *Private Action for Public Nuisance*, 52 Va. L. Rev. 997, 999 (1966). The cases the City cites make it clear that this remedy has been applied in equity only when a limited group of people are impacted by neighborly operations and the recovery is small. *See Copart Indus. v. Consol. Edison Co. of N.Y.*, 362 N.E.2d 968 (N.Y. Ct. App. 1977) ("A private nuisance threatens one person or a relatively few."); *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870 (N.Y. Ct. App. 1970) (same). Thus, the tort

of private nuisance is inapposite to global climate change, the global nature of the promotion and sale of fossil fuels, and the broad allegations of harm that this lawsuit, as well as its sister suits around the country, are claiming.

State Law v. Federal Law: The City's argument that its claims fall outside the reach of *AEP* because state causes of action were left untouched by the Supreme Court is also inconsistent with the rationale of *AEP*. Throughout its opinion, the Supreme Court clearly conveyed that the public policy at issue in global climate change tort cases is "of special federal interest" and that "borrowing the law of a particular State would be inappropriate." *AEP*, 564 U.S. at 422-24. In oral argument, Justice Kennedy identified the legal awkwardness of having only a federal cause of action before them, saying that "[i]t would be very odd" or illogical for state courts to set national caps on GHG emissions when federal courts are barred from doing so. Transcript of Oral Argument, *Am. Elec. Power v. Connecticut*, 564 U.S. 410 (2011), at 32. Thus, the Court's lack of opportunity to squarely address state claims should not be confused with allowing them.

Judges applying state law are certainly no better situated to make national energy policy than judges applying federal law. The Supreme Court's concerns were that judges "lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order." *AEP*, 564 U.S. at 428. They "are confined by a record comprising the evidence the parties present," and

"may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators in the States where the defendants are located." *Id.* Also, they cannot weigh any "environmental benefit potentially achievable [against] our Nation's energy needs and the possibility of economic disruption." *Id.* at 427. More problematic is that state judge-made public policies over these energy issues would undoubtedly vary from court to court, and state to state. Thus, there also can be no room for a parallel track of state tort litigation.

Property Damage v. Trespass: Finally, a claim for trespass requires Defendants to have intended to physically be upon a parcel of land. New York courts have applied trespass to manufacturers, but only when their products end up on the property in an immediate or inevitable, non-remote way. *See Abbatiello v. Monsanto Co.*, 522 F. Supp. 2d 524, 542 (S.D.N.Y. 2007) (finding against liability when the connection was too tenuous). No such allegations are made here.

The District Court recognized that "the City ultimately seeks to hold Defendants liable for the same conduct at issue in *AEP* and *Kivalina*" and properly dismissed this lawsuit. *See* 325 F. Supp. 3d 466, 474 (S.D.N.Y. 2018). As the District Court further appreciated, "Climate change is a fact of life, as is not contested by Defendants. But the serious problems caused thereby are not for the

judiciary to ameliorate. Global warming and solutions thereto must be addressed by the two other branches of government." *Id.* at 474-75.

II. INNOVATION, NOT UNFOUNDED LITIGATION, IS THE WAY TO REDUCE FOSSIL FUEL EXTERNALITIES

As the District Court fully appreciated, balancing benefits of energy products with their externalities are public policy decisions requiring a careful weighing of the amount of emissions society will allow given the benefits of the activities. Policymakers have long understood that the public relies on oil, gas and the other energy sources at issue in this litigation for their health and well-being. *See* George Constable & Bob Somerville, *A Century of Innovation: Twenty Engineering Achievements That Transformed Our Lives* (Joseph Henry Press 2003) (calling the societal electrification the "greatest engineering achievement" of the past century). These energy sources provide electricity for homes and businesses, oil and gas for heating, and fuel for transportation. They also are the foundation for the economy, spurring technology advancements and fueling manufacturing.

Congress and federal agencies, regardless of political party, have long taken a thoughtful, "all-of-the-above" strategy for helping America meet its energy needs. America's mix of energy sources include nuclear, natural gas, coal, hydroelectric dams, wind, solar, and biomass. Just as each source has positives, they all have limits; they are "limited by cost, limited by scale, limited by physics and chemistry, [or] limited by thermodynamics." James Fallows, *Dirty Coal,*

Clean Future, The Atlantic (Dec. 2010) (quoting Julio Friedmann of Lawrence Livermore National Laboratory).[1] Right now, fossil fuels represent the vast majority of energy in the United States because they are baseload fuels. This reliable baseload energy powers the continued development of renewable sources of energy like wind and solar.

The thrust of America's effort to reduce externalities of energy production and use has been to foster technological developments. For example, coal use tripled from the 1970s to 2010 because America prioritized energy independence after the 1970s oil crisis. During this time, regulated emissions from coal-based electricity fell by 40 percent due to such advancements.[2] In the past ten years, technologies leading to the shale revolution have reduced reliance on coal, leading to reductions in GHG emissions. Manufacturers have also focused on developing new technologies to lower GHG emissions in energy use. Fuel efficiency in cars and the increased use and desirability of electric cars have been major technological and market-based successes. Also, the U.S. Government has many programs, such as Energy Star, U.S. Green Building Council's LEED certification,

[1]http://www.theatlantic.com/magazine/archive/2010/12/dirty-coal-clean-future/8307/.

[2] New power plants emit 90 percent less pollutants, such as SO_2, NO_x, particulates and mercury, than the plants they replace. *See* Fact Sheet: Advanced Coal Technologies, National Mining Ass'n, at https://nma.org/wp-content/uploads/2017/06/FINAL-Advanced-Coal-Technologies-2018.pdf.

Sustainable Materials Management (SMM) initiative, and E3 community partnerships, to spur these advancements. *See also* Energy Efficiency Policies and Programs, Dep't of Energy, Office of Efficiency & Renewable Energy.[3]

Energy manufacturers, including Defendants, are also investing substantial resources in technological innovations to reduce GHG emissions. The five largest energy manufacturers reduced their own emissions by an average of 13 percent between 2010 and 2015, outpacing the U.S.'s 4.9 percent reduction over the same period. *See* Anna Hirtenstein, *Big Oil Becomes Greener with Progress in Cutting Pollution*, Bloomberg, Sept. 18, 2017.[4] Further, since 2000, ExxonMobil has spent more than $9 billion on developing lower emission energy solutions.[5] Chevron has invested more than $1 billion in carbon capture and storage that, once operational, are expected to reduce GHG emissions by about 5 million metric tons per year.[6] ConocoPhillips developed a Climate Change Action Plan that details 73 specific

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[3] https://www.energy.gov/eere/slsc/energy-efficiency-policies-and-programs.

[4] https://www.bloomberg.com/news/articles/2017-09-18/big-oil-becomes-greener-with-cuts-to-greenhouse-gas-pollution.

[5] *See* Meeting Needs and Reducing Emissions, EnergyFactor, at https://energyfactor.exxonmobil.com/news/meeting-needs-and-reducing-emissions/; Reducing Emissions – Mitigating Greenhouse Gas Emissions Within Our Own Operations, ExxonMobil, at https://corporate.exxonmobil.com/en/current-issues/climate-policy/climate-perspectives/natural-gas-reducing-ghg-emissions.

[6] *See* Greenhouse Gas Management, Chevron, at https://www.chevron.com/corporate-responsibility/climate-change/greenhouse-gas-management.

actions designed to better manage emissions, develop knowledge about risks, and improve consistency in recording and reporting emissions.[7] Royal Dutch Shell is investing in the production of second-generation biofuels such as sugar-cane ethanol, which is the lowest-carbon biofuel.[8] And, BP partnered with Clean Energy in 2017 to accelerate capabilities for renewable natural gas and meet a growing demand for natural gas vehicle fuel.[9]

Overall, the U.S. has made greater GHG reductions over the past decade than any other nation.[10] Manufacturers reduced their GHG emissions by more than 10 percent between 2005 and 2015 while increasing their value to the economy by 19 percent, and are continuing to reduce their emissions. *See* Inventory of U.S.

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[7] *See* Cathy Cram, *How ConocoPhillips Works With Stakeholders to Deliver Natural Gas and Oil Sustainability*, Nat'l Ass'n of Mfrs., Aug. 7, 2018, at https://www.shopfloor.org/2018/08/conocophillips-works-stakeholders-deliver-natural-gas-sustainable-way/; Taking Action on Climate Change, ConocoPhillips, at http://www.conocophillips.com/environment/climate-change/climate-change-action-plan/.

[8] *See* Climate Change and Energy Transition, Shell, at https://www.shell.com/sustainability/environment/climate-change.html.

[9] *See* BP and Clean Energy Partner to Expand U.S. Renewable Natural Gas Transportation Fueling Capabilities, BP, Mar. 1, 2017, at https://www.bp.com/en_us/bp-us/media-room/press-releases/bp-and-clean-energy-partner-to-expand-us-renewable-natural-gas-transportation-fuelingcapabilities.html.

[10] *See* Robert Rapier, *The U.S. Leads All Countries In Lowering Carbon Dioxide Emissions*, Forbes.com, June 19, 2016, at https://www.forbes.com/sites/rrapier/2016/06/19/the-u-s-leads-all-countries-in-lowering-carbon-dioxide-emissions/#351312ae5f48.

Greenhouse Gas Emissions and Sinks, 1990-2015, Envtl. Prot. Agency (2017), at 4-3.[11] In fact, the industrial sector produces fewer GHG emissions today than in 1990. *See id.* Many of these reductions have come from improved efficiency and changes to the mix of fuels.

These initiatives, not lawsuits, are the best ways to mitigate global climate change. Liability law is ill suited for this task; it looks backwards to assess whether conduct was wrongful in its time. *See* Enterprise Responsibility for Personal Injury: Reporter's Study, Am. Law Inst., at 87 (1991) (explaining the shortcoming of tort liability to manage "public risk"). The production and use of oil and gas are hardly public nuisances. They are essential to modern life, and their risks and externalities are being managed and reduced.

III. COURTS HAVE CONSISTENTLY REJECTED ATTEMPTS TO SUBJECT MANUFACTURERS TO LIABILITY FOR DOWNSTREAM EXTERNALITIES OF LAWFUL PRODUCTS

American tort law does not recognize the absolute, category liability the City is seeking here merely for selling products with risks of harm. *See* Restatement of the Law, Third: Prods. Liab. § 2 cmt d (1998) (reporting "courts have not imposed liability for categories of products that are generally available and widely used").

[11] https://www.epa.gov/sites/production/files/2017-02/documents/2017_complete_report.pdf; Inventory of U.S. Greenhouse Gas Emissions and Sinks, 1990-2017, Envtl. Prot. Agency (2019), at 4-3, at https://www.epa.gov/sites/production/files/2019-02/documents/us-ghg-inventory-2019-main-text.pdf (EPA draft report showing reduction for same sector of over 13 percent between 2005 and 2017).

In each state, including New York, manufacturers may sell lawful, non-defective products. *See, e,g., Robinson v. Reed-Prentice Div. of Package Mach. Co.*, 403 N.E.2d 440, 443-44 (N.Y. 1980) (discussing requirements for a product liability claim and rejecting efforts to "impos[e] absolute liability on manufacturers"); *Kim v. Toyota Motor Corp.*, 424 P.3d 290, 296 (Cal. 2018) (same). Products liability and other laws that apply to the promotion and sale of goods provide legal standards designed to balance the interests of consumers, manufacturers and the public at-large by facilitating recoveries and the exercise of due care.

Over the past several decades, there have been repeated attempts to circumvent this body of law, particularly with respect to natural resources. In particular, the architects of this effort have tried to transform the tort of public nuisance into such a tool for industry-wide liability. *See* Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 Ecol. L.Q. 755, 838 (2001) (recounting campaign to change elements of the tort that would have "[broken] the bounds of traditional public nuisance"). Public nuisance, though, has proven not to be a tort without boundaries.

Indeed, courts have consistently rejected these lawsuits. The first test case for the new theories was *Diamond v. General Motors Corp.*, 97 Cal. Rptr. 639 (Cal. Ct. App. 1971), which presented a scenario similar to the one at bar. Plaintiffs pursued corporations for manufacturing products and engaging in

operations that emitted gases that collectively contributed to smog in Los Angeles. The court dismissed the claims because plaintiffs were "simply asking the court to do what the elected representatives of the people have not done: adopt stricter standards over the discharge of air contaminants." *Id.* at 645. Granting relief would "halt the supply of goods and services essential to the life and comfort of the persons whom plaintiff seeks to represent." *Id*. at 644.

In the 1980s and 1990s, contingency fee lawyers started teaming with governments to bring these lawsuits. By cloaking their claims in the force and legitimacy of the State's police power, they sought to take advantage of the belief by some that participation of states and cities brings credibility to litigation. These lawsuits have targeted several products with externalities. *See* Victor E. Schwartz, Phil Goldberg & Christopher E. Appel, *Can Governments Impose a New Tort Duty to Prevent External Risks? The "No-Fault" Theories Behind Today's High-Stakes Government Recoupment Suits*, 44 Wake Forest L. Rev. 923 (2009). Courts held that governments also do not have such near-limitless ability to impose liability on manufacturers for product harms. *See, e.g.*, *County of Johnson v. U.S. Gypsum Co.*, 580 F. Supp. 284, 294 (E.D. Tenn. 1984) (rejecting efforts to "convert almost every products liability action into a [public] nuisance"); *City of Cincinnati v. Beretta U.S.A. Corp.*, No. A9902369, 1999 WL 809838, at *2 (Ct. Com. Pl. Ohio Oct. 7, 1999) ("To permit public nuisance law to be applied to the design and

manufacture of lawful products would be to destroy the separate tort principles which govern those activities.")

State and federal courts, again including in New York, appreciated that allowing these claims would give local, county, or state attorneys unrestrained ability to file litigation whenever a product had a risk associated with a hazard. "All a creative mind would need to do is construct a scenario describing a known or perceived harm of a sort that can somehow be said to relate back to the way a company or an industry makes, markets, and/or sells its non-defective, lawful product or service, and a public nuisance claim would be conceived and a lawsuit born." *Spitzer v. Sturm, Ruger & Co.*, 309 A.D.2d 91, 96 (N.Y. App. Div. 2003).

By affirming the lower court's ruling, the Court can provide a check on lawsuits that would violate constitutional due process protections and traditional tort law to make manufacturers pay for well-known externalities, in and outside of the climate change context. Although some people may disagree with a business's products or operations, whether a product or conduct is unreasonable in the public nuisance context is not determined by personal preferences. If, when, and under which circumstances any entity should bear the costs of known externalities of beneficial, legal products is a determination best left to legislatures, which can balance the interests, assign responsibility, and allocate funding in light of broad public welfare considerations.

CONCLUSION

For these reasons, the NAM respectfully urges this Court to affirm the ruling below to dismiss this lawsuit.

Respectfully submitted,

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Dated: February 14, 2019

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2016 in 14 point Times New Roman font for text and footnotes.

I further certify that this brief contains 5,172 words and complies with the type-volume limitations of Fed. R. App. P. 29 and Second Circuit Rule 32.1.

/s/ Philip S. Goldberg
Philip S. Goldberg

Dated: February 14, 2019

CERTIFICATE OF SERVICE

I certify that on February 14, 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 e-mail address of record, who have appeared and consent to electronic service in this action.

/s/ Philip S. Goldberg
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Dated: February 14, 2019