No. 18-16663

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CITY OF OAKLAND, CITY AND COUNTY OF SAN FRANCISCO, AND THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiffs-Appellants

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 Northern District of California, Case Nos. 17-6011 & 17-6012, The Honorable William H. Alsup, United States District Judge

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*, its members, or its counsel — contributed money that was intended to fund the preparation or submission of the brief.

Pursuant to Rule 29(a)(2), all parties have provided a blanket consent to the filing of timely-filed *amicus* briefs.

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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 as clear, if not more so, as when the Ninth Circuit rejected an earlier version of this litigation in *Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012). Under all legal theories, state and federal, all courts to consider this issue have ruled that there is no viable common law cause of action against private actors for harms caused by global climate change or any weather event influenced by climate change. Defendants are engaged in the production and sale of lawful products essential to modern life, which as Judge Alsup recognized, have been the linchpin for "monumental progress" in global health and living standards. The Plaintiffs 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; *Kivalina* and another case were 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 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 case is built on the same faulty legal foundations rejected in *AEP*. By the Plaintiffs' admission, this is a cost-shifting effort through which they are seeking to create category liability for oil, gas and other types of energy products, regardless of their utility to modern society. Their proposed remedy would impose a penalty on energy production, but only on these Defendants and their products. The fact that Plaintiffs are 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 U.S. 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 imperative factors Congress and federal agencies must consider when presented with such public policy choices.

Further, as discussed below, the efforts by Plaintiffs and their *amici* to differentiate this lawsuit from *AEP* are differences without legal distinctions. It does

not matter whether a climate change tort case targets energy use, products or their promotion, 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. Despite the invitation from certain well-respected Senators, the Court should not take on a legislative responsibility in this case.

The best way to reduce climate change emissions and impacts is for Congress, Plaintiffs and other governments to work with America's manufacturers, including Defendants, on new technologies that reduce emissions and make energy more efficient and environmentally friendly. *See* Ross Eisenberg, *Forget the Green New Deal. Let's Get to Work on a Real Climate Bill*, Politico, Mar. 27, 2019.[1] Innovation and collaboration, not litigation, has been the proven way America has brought about society-wide technological advancement. For these reasons, as well as those stated herein, the NAM respectfully urges the Court to affirm the ruling below.

[1] https://www.politico.com/magazine/story/2019/03/27/green-new-deal-climate-bill-226239.

ARGUMENT

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

A. The Supreme Court and the Ninth Circuit Have 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 imposing monetary damages against the industry. 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, Plaintiffs 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 *Kivalina* 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 Ruth Bader 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. This Court disposed of *Kivalina*, where an Alaskan village sued many of the same companies as here for alleged damages related to rising sea levels. The Court appreciated that even though the legal theories pursued in *Kivalina* differed from *AEP*, given the Supreme Court's broader message, "it would be incongruous to allow [such litigation] to be revived in another form." 696 F.3d at 857. A federal judge then 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 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 this and other 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. Plaintiffs' Attempts to Distinguish This Case from *AEP* Do Not Cure the Groundless Nature of Climate Change Tort Litigation

The Plaintiffs spend much of the second half of their brief trying to differentiate this case from *AEP*. They assert the key difference is that this lawsuit is purely about money and cost-shifting, and specifically disclaim that they are attempting to "prevent any Defendants from continuing their existing business operations." Br. at 38. Their sole theory for liability is the Defendants act of selling fossil fuels given their understanding, as well as those around the world, that carbon dioxide released during 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 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 Plaintiffs repackaging, the differences they raise are not legal distinctions that would allow this case to go forward:

State Law v. Federal Law: Any argument that these claims fall outside the reach of *AEP* because state causes of action were left untouched by the Supreme Court is 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.

Compensation v. Regulation: Plaintiffs and their *amici* also improperly suggest 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 monetary liability under common law impose state law requirements).

This Court in *Kivalina* disposed of this argument by the Plaintiffs 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. This Court, however, expressly stated that "the Supreme Court has instructed that the type of remedy asserted is not relevant." *Kivalina*, 696 F. 3d at 857.

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 Plaintiffs allege 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 cities of Oakland and San Francisco. Indeed, the crux of Plaintiffs' allegations is that promoting and selling fossil fuels based on the knowledge that fossil fuels cause climate change is tortious conduct. Yet, Plaintiffs fully concede that even if they win, "Defendants will continue to have the right to produce, promote, and sell fossil fuels." Br. at 41. Plaintiffs cannot have it both ways; lawful conduct cannot be tortious conduct. Manufacturing and selling products with known risks does not give rise to liability. Otherwise, there would be no limit to litigation, as most products have some known risk.

Further, the Plaintiffs' own pleadings show that during the time it accuses Defendants of illicitly 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

Plaintiffs acknowledge that "[s]cientists have known for many years that the use of fossil fuels emits carbon dioxide and that carbon dioxide is a greenhouse gas" and detailed studies since the 1950s finding that "global warming may become significant during future decades if industrial fuel combustion continues to rise exponentially." Pl. Compl. at 25-26. Based on this body of knowledge, though, the U.S. Government continued to promote the extraction and use of these energy sources, and the Plaintiffs continue to purchase and use them. Thus, the act of making, promoting and selling them cannot retroactively be classified as wrongful.

Unreasonable Conduct v. Unreasonable Injury: To be clear, public nuisance liability requires objectively unreasonable conduct and 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 Bay Area homes, office buildings, theaters, sports arenas, roadways and hospitals.

The Supreme Court has also been clear that requiring objective 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.

Any 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). These situations arise only when a limited group of people are impacted by neighboring operations. *See id.* 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); *see also People ex rel. Gallo v. Acuna*, 929 P. 2d 596, 603 (Cal.), *cert. denied*, 521 U.S. 1121 (1997) (explaining that private nuisance public nuisance "emerged from distinctly different historical origins").

The Court appreciated this distinction in *Kivalina*. The Village asserted that liability could ensue without any determination of whether the defendants' conduct was "reasonable or unreasonable," and instead, asked the court to determine "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 Court responded that "the solution to Kivalina's dire circumstance must rest in the hands of the legislative and executive branches." *Kivalina*, 696 F. 3d at 858.

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

As Judge Alsup 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. Each source has its positives and limits; each is "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).[2] 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.[3] In the past ten years, technologies

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

[3] 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

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, 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.[4]

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.[5] Further, since 2000, ExxonMobil has spent

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Technologies, National Mining Ass'n, at https://nma.org/wp-content/uploads/2017/06/FINAL-Advanced-Coal-Technologies-2018.pdf.

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

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

more than $9 billion on developing lower emission energy solutions.[6] 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.[7] ConocoPhillips developed a Climate Change Action Plan that details 73 specific actions designed to better manage emissions, develop knowledge about risks, and improve consistency in recording and reporting emissions.[8] Royal Dutch Shell is investing in the production of second-generation biofuels such as sugar-cane ethanol, which is the lowest-carbon biofuel.[9] 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.[10]

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[6] *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.

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

[8] *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/.

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

[10] *See* BP and Clean Energy Partner to Expand U.S. Renewable Natural Gas Transportation Fueling Capabilities, BP, Mar. 1, 2017, at

Overall, the U.S. has made greater GHG reductions over the past decade than any other nation.[11] 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 emissions. *See* Inventory of U.S. Greenhouse Gas Emissions and Sinks, 1990-2015, Envtl. Prot. Agency (2017), at 4-3.[12] 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 innovation.

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

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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.

[11] *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.

[12] https://www.epa.gov/sites/production/files/201702/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).

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 Plaintiffs are seeking here merely for selling products with known 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"). In each state, including California, manufacturers may sell lawful, non-defective products. *See, e,g., Kim v. Toyota Motor Corp.*, 424 P.3d 290, 296 (Cal. 2018) (discussing requirements for a product liability claim and rejecting efforts to impose absolute liability on manufacturers). 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. Phil Goldberg, Christopher E. Appel & Victor E. Schwartz, *The Liability Engine that Could Not: Why Decades-Long Litigation Pursuit of Natural Resource Suppliers Should Grind to a Halt*, 12 J.L. Econ. & Pol'y 47 (2016). 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 teamed 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 do not have 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 appreciated that allowing the claims would give local, county, or state attorneys unrestrained ability to file litigation whenever a product had a risk. "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, this Court can reaffirm the Supreme Court's clear holdings that the solutions to the complex challenges posed by climate

change are committed to Congress, 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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