18-2188

United States Court of Appeals for the Second Circuit

CITY OF NEW YORK,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

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

BRIEF FOR AMICI CURIAE STATES OF NEW YORK, CALIFORNIA, MARYLAND, NEW JERSEY, OREGON, RHODE ISLAND, VERMONT, AND WASHINGTON, AND THE DISTRICT OF COLUMBIA IN SUPPORT OF APPELLANT

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Dated: November 15, 2018

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INTEREST OF AMICI

Amici—eight States and the District of Columbia—have experienced profound and costly impacts from climate change and are heavily invested in mitigating the future impacts of climate change. Within our borders, climate change already is causing a loss of land due to rising seas;[1] reductions in drinking water supplies due to decreased snowpack;[2] reductions in air and water quality; reductions in the productivity of agriculture and aquaculture; the decimation of biodiversity and overall ecosystem health; and increases in the frequency and intensity of heatwaves, insect-borne diseases, wildfires, severe storms, and flooding.[3]

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[1] *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 522-23 (2007) (discussing how greenhouse gases cause sea level rise that had "already begun to swallow Massachusetts' coastal land").

[2] *See, e.g.*, *Connecticut v. American Elec. Power Co. ("AEP")*, 582 F.3d 309, 341-42 (2d Cir. 2009) (noting that reduced snowpack is already occurring, and that "declining water supplies and the flooding occurring as a result of the snowpack's earlier melting obviously injure property owned by the State of California"), *rev'd on other grounds*, 564 U.S. 410 (2011).

[3] For a detailed description of climate harms to various States and localities, see generally Appendix A to Comments of the Attorneys General of New York, et al. on EPA's Proposed Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units (Oct. 31, 2018) (internet). (For sources available on the internet, full URLs appear in the table of authorities.)

Because climate change is unlikely to abate in the near future, amici States—like plaintiff the City of New York (City)—likely will have to undertake significant, costly measures to adapt to a warmer world. The City seeks to use New York's common law of nuisance and trespass to ensure that some of the adaptation costs it has already started to incur are shared by the five largest publicly owned fossil fuel corporations. As detailed in the City's Amended Complaint (Complaint), those companies have profited from the marketing and sale of their fossil fuel products that are responsible for climate change, and are thus properly held responsible for some of the foreseeable costs of the use of their products.

The United States District Court for the Southern District of New York (Keenan, J.) dismissed the City's common-law claims on the ground that they are based on harms from the emissions of greenhouse gases and such harms are governed exclusively by federal law. But that holding ignores the fact that the City's tort claims do not seek relief for *emissions*—which have long been subject to standards set pursuant to federal common law and then the federal Clean Air Act—but instead seek relief for *marketing and selling* defendants' environmentally harmful products, conduct which has not been regulated by federal common law

or delegated exclusively to the U.S. Environmental Protection Agency (EPA) under the Clean Air Act. The district court's dismissal of the City's claims reflects its incorrect view that federal law alone governs *all* actions touching on climate harms.

Courts have consistently held otherwise, recognizing that States have not only critical interests in abating climate change and mitigating climate harms, but also authority to address those interests. Amici States already have adopted numerous measures to mitigate the dangers of a warming world, including carbon-trading programs, efficiency mandates, adaptation measures, and more. Like the City's common-law claims here, many of these measures impose mandates or responsibilities on contributors to climate change in order either to reduce greenhouse-gas emissions or to respond to their effects.

The district court's holding here would lead to the extraordinary conclusion that no law at all applies to the environmental harms caused by defendants' allegedly tortious activities. Under the district court's view, state common law is displaced by federal common law and federal common law is displaced by the Clean Air Act, which provides no remedies to the City for the conduct and harms alleged in the complaint.

This Court should reject that approach and hold that state common law may properly provide a remedy for defendants' conduct.

ARGUMENT

POINT I

STATES AND LOCALITIES HAVE ADOPTED A BROAD RANGE OF MEASURES TO ABATE AND MITIGATE CLIMATE HARMS

At the heart of the district court's erroneous ruling is its conclusion that defendants' conduct is subject exclusively to federal laws governing transboundary emissions of air pollution—even though that conduct is distinct from any emissions activity that is directly governed by such laws. A recurring theme of the district court's opinion—one that appears in its analyses of the effect of federal common law (SPA 13), the effect of federal statutory law (SPA 20), and the effect of federal foreign policy (SPA 23) on the City's claims—is that the federal government is the appropriate entity to formulate solutions to the harms of climate change: only the federal government can develop a "uniform, national solution" to "an immense and complicated problem" that "requires a comprehensive solution weighing the global benefits of fossil fuel use with the gravity of impending harms." (SPA 20-21, 23.)

The district court's reasoning, however, is inconsistent with the States' longstanding authority to protect their residents from environmental harms. "It is well settled that states have a legitimate interest in combating the adverse effects of climate change on their residents," and that they may use their broad sovereign powers "to protect the health of citizens in the state" from the harms of climate-altering air pollution. *American Fuel & Petrochem. Mfrs. v. O'Keeffe*, 903 F.3d 903, 913 (9th Cir. 2018) (quotation marks omitted); *see also Massachusetts*, 549 U.S. at 521-23 (recognizing significant state interests in climate change). Exercising such powers, States have taken substantial steps in the past years to reduce climate-altering emissions and to prepare the adaptation measures required to survive in a warming world.

For example, New Jersey's Global Warming Response Act requires set levels of carbon reductions—culminating in a 2050 level that is 80% lower than the State's 2006 level—and also establishes funding for climate-related projects and initiatives. N.J. Stat. Ann. §§ 26:2C-37 to -58. Washington law requires the largest electric utilities to meet a series of benchmarks on the amount of renewables in their energy mix, and to achieve 15% reliance on renewables by 2020. Wash. Rev.

CodeP§§ 19.285.010-19.285.903. And Maryland recently amended its laws to require that utilities derive 25% of their sales from renewable sources by 2020, and to encourage, through tax credits and study methods, installation of energy storage measures that will facilitate the integration of renewable energy into its energy grid. Md. Laws Ch. 1 (2017) (Pub. Utils. § 7-703(b)(15)); Md. Laws Ch. 389 (2017) (Tax Law § 10-719); Md. Laws. Ch. 382 (2017).[4]

The States also have collaborated on successful regional solutions. California is part of the Western Climate Initiative, which comprises a multi-sector approach to reducing greenhouse gas emissions, including through a cap-and-trade program.[5] Nine northeastern States (including several amici) are part of the Regional Greenhouse Gas Initiative,[6] a cap-and-trade system codified and implemented through each participating States' laws and regulations, which places increasingly stringent limits

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[4] For a broader sampling of state-led initiatives, see generally Appendix B to Comments of the Attorneys General of New York, et al. on EPA's proposed Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units (Oct. 31, 2018) (internet).

[5] *See* http://www.wci-inc.org.

[6] *See* https://www.rggi.org.

on carbon pollution from power plants. Since this initiative's implementation, the participating States have reduced power-sector carbon-dioxide emissions by forty percent.[7] And, California, Oregon, and Washington are members of the Pacific Coast Collaborative, a West Coast initiative that includes aggressive commitments for greenhouse-gas emission reductions by 2050.[8]

To be sure, efforts to address climate change or redress its harms would be enhanced if undertaken nationwide—and even more so if adopted globally. But, in the meantime, state law—including state common law—can provide a valuable tool to combat these harms. Indeed, this Court has already rejected the argument that state common-law suits are barred by a need to "wait for the political branches to craft a 'comprehensive' global solution to global warming," *AEP*, 582 F.3d at 331, and the Supreme Court affirmed that ruling, 564 U.S. at 420 & n.6 (rejecting threshold challenges by equally divided court). And contrary to the district court's reasoning (SPA 20-21, 23), Congress has not required

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[7] Acadia Center, Outpacing the Nation: RGGI's Environmental and Economic Success 3 (Sept. 2017) (internet).

[8] *See* http://pacificcoastcollaborative.org/about/.

the States to rely solely on the federal government to formulate solutions to the harms of climate change. Indeed, as set forth below (at __-__), the Clean Air Act's broad reservation of state authority belies the notion that the federal government has *exclusive* authority to address air pollution and climate harms. Rather, the States retain broad authority to address climate harms, whether through positive enactments or the common law.

And properly so. State authority is essential to respond to one of the most important public policy issues of our time. As this Court noted in 2009, "there really is no unified [federal] policy on greenhouse gas emissions." *AEP*, 582 F.3d at 331-32. Since that time, there has been no significant federal climate change legislation from Congress, and the Executive Branch has been unwilling (or unable, because of court challenges) to declare a consistent, coherent climate policy or to sustain engagement in international negotiations on carbon reductions or climate-change mitigation.[9] The district court's view that use of state

[9] In June 2017, the President initiated the United States' withdrawal from the Paris Accord (a process that cannot be completed before 2020), the current international framework in which member nations undertake to address climate change. More recently, in explaining his view that no urgent measures were required to address rising temperatures and increasing greenhouse gas emissions, the

common law to mitigate climate harms should cede to a unitary national or international policy is inconsistent with that reality. The States must retain authority to address climate-change harms through the use of their historical sovereign powers, including through the use of state common law to address the gaps not regulated by federal law.

POINT II

CLAIMS SEEKING TO REQUIRE FOSSIL FUEL PRODUCERS TO BEAR SOME OF THE COSTS OF THEIR PRODUCTS ARE NOT DISPLACED BY FEDERAL COMMON LAW OR PREEMPTED BY THE CLEAN AIR ACT

The district court ignored the crucial distinction between this suit against sellers of fossil fuel products and a suit against emitters of air pollution. (*See, e.g.*, SPA 14, 17-18, 20). As a result, it mistakenly invoked case law relating to emitters, and mistakenly held that the City's state common-law claims were barred by federal common law and the federal Clean Air Act, although each addresses the obligations of pollution emitters and not the marketing and sale of fossil fuels by these defendants.

President expressed doubts that climate change was due to human activity. *See* President Donald J. Trump, Statement on the Paris Climate Accord (June 1, 2017) (internet); Interview by Lesley Stahl with President Donald J. Trump, *60 Minutes* (Oct. 15, 2018) (internet).

A. The State-Law Claims Pleaded by the City Are Not Governed by Federal Common Law.

1. State common law has traditionally governed sales of products that lead to environmental harms.

The district court based its determination that the City's claims must be brought under federal common law on the incorrect premise that tort suits seeking to redress the harms from greenhouse-gas emissions are categorically outside the purview of state common law. (*See* SPA 11.) The Supreme Court decisions cited by the district court do not go so far. Rather, those cases hold only that federal common-law standards governed suits by States seeking direct limits on out-of-state pollution emissions into interstate flows. *See Illinois v. City of Milwaukee (Milwaukee I)*, 406 U.S. 91, 103-04 (1972); *see also International Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987) (explaining that Clean Water Act displaced this federal common law); *AEP*, 564 U.S. at 429 (listing cases applying federal common law in "suits brought by one State to abate pollution emanating from another State").[10]

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[10] The district court also cited to the Ninth Circuit's decision in *Native Village of Kivalina v. ExxonMobil Corporation*, 696 F.3d 849, 855 (9th Cir. 2012), which similarly addressed the conduct of those responsible for transboundary pollution discharges.

The City's claims here are quite different. The City's damages suit seeks to hold defendants liable for some share of the costs that defendants have inflicted on the City and its residents by selling and marketing fossil fuel products whose foreseeable use will cause harm to the City. The City thus does not seek to directly abate any interstate air pollution or even to regulate the conduct of emitters.

Whether or not the City can prove the elements of its tort claims, the conduct that the City has alleged plainly falls within the realm of state law. Unlike regulating out-of-state discharges into interstate streams of air or water, it has always been the province of the States to develop standards (including common-law tort standards) to regulate the sales of products whose use causes environmental harm. Moreover, it is of no moment under state law whether parties other than defendants ultimately introduced those products into the environment or caused the exposures that inflicted the harms: tort law regularly imposes liability on multiple actors for different conduct that collectively causes or facilitates a harm. *See, e.g.*, *Chianese v. Meier*, 98 N.Y.2d 270, 273-74 (2002) (apportioning personal injury tort damages between intentional assailant and negligent landlord); *Penn Cent. Transp. Co. v. Singer*

Warehouse & Trucking Corp., 86 A.D.2d 826, 828 (1st Dep't 1982) ("Everyone who creates a nuisance or participates in the creation or maintenance thereof is liable for it." (quotation marks omitted)).

For example, this Court found that a worldwide producer, wholesaler, and marketer of gasoline was liable under New York nuisance law for supplying a third-party service station with gasoline containing a toxic additive that ultimately leached into the ambient environment through the service station's leaky tanks. *In re "MTBE" Prods. Liability Litig.*, 725 F.3d 65, 121 (2d Cir. 2013). This Court also has held that state common law governed veterans' claims against the manufacturer and seller of a herbicide for injuries caused by the military's use of that chemical abroad. *In re "Agent Orange" Prod. Liability Litig.*, 635 F.2d 987, 993-94 (2d Cir. 1980). Similarly, the en banc Fifth Circuit allowed state common-law suits against the major manufacturers and sellers of asbestos by plaintiffs exposed in the workplace. *See Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1316 (5th Cir. 1985) (en banc). As these cases all recognize, the manufacturer or producer of a product may be held liable under the common law for the foreseeable harms caused by the use of their

products, even if the manufacturer or producer was not itself directly responsible for that use.

The district court failed to recognize these black-letter common-law principles and instead mischaracterized the City's allegations. It reframed the complaint as "based on the 'transboundary' emission of greenhouse gases" (SPA 14) or, alternatively, as addressing the "combustion of Defendants' fossil fuels" on a "worldwide basis" by entities other than defendants (SPA 20). But that framing is irreconcilable with the City's actual allegations: that defendants marketed and sold large quantities of their fossil fuel products, including in New York State, when defendants for decades have known that those fuels would cause climate harms. Whether or not that theory comprises a viable nuisance or trespass claim, it is not displaced by any established body of federal common law.

2. Defendants cannot show a uniquely federal interest or a significant conflict with that interest.

This Court should not expand the scope of federal common law to reach a new class of environmental case absent the type of "actual, significant conflict between state law and a federal interest" not present

here. *See Woodward Governor Co. v. Curtiss-Wright Flight Sys., Inc.*, 164 F.3d 123, 127 (2d Cir. 1999). "Cases that call for the creation of federal common law are few and restricted." *Marsh v. Rosenbloom*, 499 F.3d 165, 181 (2d Cir. 2007) (quotation marks omitted). Federal common law arises only in areas "involving uniquely federal interests" that "are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) (quotation marks omitted). There is no uniquely federal interest at stake in this matter because there is no "genuinely identifiable" federal policy (see *supra* at 8-10) implicated by claims against those who produce, market, and sell the fossil fuels responsible for the lion's share of global warming. *See O'Melveny & Myers v. FDIC*, 512 U.S. 79, 89 (1994).

The district court focused on a purported need for a federally driven, uniform solution to the overall problem of climate change. But "a mere federal interest in uniformity is insufficient to justify displacing state law in favor of a federal common law rule," and "variations in rules among states do not prove a need for uniformity." *Marsh*, 499 F.3d at 182-83 (quotation marks omitted); *see also In re "Agent Orange" Litig.*, 635 F.2d

at 993, 996 (no sufficient federal interest in creating a uniform federal rule to set litigation standards in suit involving more than two million plaintiffs in up to forty different judicial districts). The Supreme Court has made it clear that uniformity will suffice as a uniquely federal interest only where there is a need for a single rule to govern "the primary conduct of the United States" or its agents. *E.g.*, *O'Melveny & Myers*, 512 U.S. at 88.[11] Otherwise, "we would be awash in 'federal common-law' rules." *Id.* at 88. Thus, for claims like the one here—which are "against private manufacturers" and are not "asserted by or against the United States," and where "no substantial rights or duties of the government hinge on [their] outcome"—there is no uniquely federal interest in uniformity that would justify overriding state law. *In re "Agent Orange" Litig.*, 635 F.2d at 993.[12]

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[11] "[F]ederal courts since *O'Melveny*"—which was decided in 1994, after the Supreme Court cases on which the district court relied—"have shown a marked reluctance to displace state law by finding a significant conflict with a federal interest." *Woodward Governor*, 164 F.3d at 127.

[12] *See also Woodward Governor*, 164 F.3d at 128 (finding no sufficient federal interest in dispute between private subcontractors under federal procurement contract because "the United States has no immediate interest" in the outcome "and there is no allegation that the United States could incur liability").

Even if there were a uniquely federal interest somewhere in this field, such an interest still would establish only "a necessary, not a sufficient, condition for the displacement of state law," *Boyle*, 487 U.S. at 506. Defendants also would have to show "an actual, significant conflict," by identifying, at a bare minimum, at least "a single state law or state-imposed duty" at odds with the federal interest. *Empire Healthchoice Assurance, Inc. v. McVeigh*, 396 F.3d 136, 141 (2d Cir. 2005) (quotation marks omitted), *aff'd*, 547 U.S. 677 (2006). Yet the district court never explained how a liability imposed on the companies who market and sell fossil fuels would conflict with, rather than further, the policies embodied by federal law.[13] *See Woodward Governor*, 164 F.3d at 127 (conflict "must be specifically shown, and not generally alleged" (quotation marks omitted)).

[13] *Cf.* Energy Policy Act of 1992, 42 U.S.C. § 13382(a)(2), (g) (policy of "stabilization and eventual reduction in the generation of greenhouse gases"); Global Climate Protection Act of 1987, Pub. L. No. 100-204, § 1103(a)(3), 101 Stat. 1331, 1408 (policy to "limit mankind's adverse effect on the global climate").

3. The district court's invocation of federal common law is inconsistent with its separate conclusion that federal common law has been displaced by the Clean Air Act.

The district court also erred for a separate reason in concluding that federal common law on transboundary air pollution applied here. The court reasoned that the City's "'interstate pollution' claims arise under federal common law, and the Clean Air Act displaces [federal common law] claims." (SPA 20.) But that analysis is internally inconsistent: if the Clean Air Act displaces the applicable federal common law, then there is no federal common law available to in turn displace state common law. Instead, the only remaining analysis is whether the Clean Air Act preempts state law. For the reasons given below (see *infra* at 19-26), it does not.

The Supreme Court's decisions in *AEP* and *Ouellette* confirm this point. In *AEP*, the Supreme Court held that the Clean Air Act displaced federal common-law nuisance claims seeking to impose greenhouse-gas emission limits on power plants. 564 U.S. at 423, 429. Turning then to the state common-law claims also pleaded in that case, the Court cited twice to *Ouellette* to hold that the availability of such claims would depend on "the preemptive effect" of the federal Clean Air Act—not on

whether such state common-law claims would be covered by the now-displaced federal common law. *Id.* at 429; *see also Ouellette*, 479 U.S. at 497 (holding that when federal common-law claims for interstate water pollution were displaced by the Clean Water Act, state common-law claims were viable except to the extent preempted by that act).

The district court's failure to follow *AEP* and *Ouellette* led it to invoke the wrong presumption here. When the question is whether a federal statute has displaced federal common law, "separation of powers concerns create a presumption in favor of" displacement. *In re Oswego Barge Corp.*, 664 F.2d 327, 335 (2d Cir. 1981). By contrast, when the question is whether a federal statute preempts state law, "federalism concerns create a presumption against preemption of state law, including state common law." *Id.* The district court asked whether the Clean Air Act displaced federal common law (which in turn had displaced state common law), when the proper inquiry is whether the Clean Air Act preempts state common law. As a result, the district court improperly applied the presumption in favor of displacement, using a test that "does not require the same sort of evidence of a clear and manifest

congressional purpose demanded for preemption of state law." *AEP*, 564 U.S. at 423 (quotation marks and alteration omitted).

B. The Clean Air Act Does Not Preempt the City's Claims.

The district court erred in determining that the Clean Air Act barred the City's state-law claims. A finding that the federal Clean Air Act preempts state common law would require a showing that Congress had a "clear and manifest" intent to do so. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 69 (2002). That showing could be made in one of three ways: by establishing (1) that Congress "expressly preempted" the state law; (2) that Congress "has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law"; or (3) that "local law conflicts with federal law such that it is impossible for a party to comply with both or the local law is an obstacle to the achievement of federal objectives." *New York SMSA Ltd. P'ship v. Town of Clarkstown*, 612 F.3d 97, 104 (2d Cir. 2010) (quotation marks omitted).

Although the district court did not reach the necessary preemption analysis, it could not have found preemption here. It is undisputed that no provision of the Act expressly preempts the City's state-law claims.[14]

Nor does the Act bar the City's suit by occupying the field. The district court focused on the Act's various procedures to set emission standards for stationary sources that emit air pollutants (including greenhouse gases). But those provisions do not touch on the sale and marketing of fossil fuels.[15] "There is no federal pre-emption in vacuo, without a constitutional text or a federal statute to assert it," and here, no "enacted statutory text" supports the district court's exceptionally

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[14] While a provision of the Clean Air Act does give EPA a circumscribed authority to preempt state regulations imposing controls or prohibitions on motor vehicle fuels, that provision has no bearing on this suit, and defendants have not argued otherwise. *See* 42 U.S.C. § 7545(c)(4) (preempting state regulations of vehicle fuels if they (1) are aimed at controlling motor vehicle emissions; and (2) the Administrator has prescribed a control or prohibition on a particular fuel's characteristic or component or published a determination that no such control or prohibition is necessary).

[15] Nor does any provision of the Clean Air Act speak to the type of damages remedy the City here pursues. *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 488-89 (2008) (holding that plaintiffs could seek damages not authorized by Clean Water Act because that Act did not "occupy the entire field of pollution remedies").

broad reading of those provisions.[16] *See Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988).

Any possibility of field preemption is also foreclosed by the Act's express recognition that addressing air pollution "is the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3); *see also New York Pub. Interest Research Grp. v. Whitman*, 321 F.3d 316, 320 (2d Cir. 2003). The Act thus expressly preserves the ability of States and political subdivisions to "adopt or enforce," inter alia, "any requirement respecting control or abatement of air pollution," except that such requirements may not be "less stringent" than required by the Act or EPA. 42 U.S.C. § 7416; *see also Connecticut v. EPA*, 696 F.2d 147, 151 (2d Cir. 1982) (describing Act's "cooperative federalism" approach). While the federal government is tasked with developing baseline air-pollution standards, the States "are expressly allowed to employ standards more stringent than those specified by the federal requirements," and the

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[16] Indeed, Congress's delegation of authority to a federal agency should not be read to "negate the lawful exercise of state authority" over activity that Congress has not given that agency authority to regulate. *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 880 F.2d 422, 428-29 (D.C. Cir. 1989) (delineating preemptive effect of Communications Act).

States determine in the first instance how to achieve the relevant standards.[17] *Bell v. Cheswick Operating Station*, 734 F.3d 188, 190 (3d Cir. 2013); 42 U.S.C. § 7416. The Act's express terms thus foreclose any interpretation that would "leave[] no room for state law" in the field of air pollution regulation. *See New York SMSA*, 612 F.3d at 104 (quotation marks omitted).

Conflict preemption is similarly foreclosed. Subjecting defendants to the City's causes of action for damages would not interfere with the Act's emissions-related procedures or "effectively override" any such policy choice that the Clean Air Act delegates to federal and state agencies. *See Ouellette*, 479 U.S. at 495. The district court's concern that this suit would conflict with the emissions regulations actually covered by the Clean Air Act hinged entirely on its misplaced belief that granting relief would require the court to assess the conduct of nonparty emitters and to determine "what constitutes a reasonable amount of greenhouse

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[17] The federal government also serves a backstop function when States fail to comply in the first instance with their obligations under the Act. *See, e.g.*, 42 U.S.C. § 7410(c)(1) (requiring EPA to promulgate federal implementation plans in cases where state implementation plans are missing or defective). That role is not at issue here.

gas emission under the Clean Air Act." (SPA 18.) But the City is not asking for the court to "determine, in the first instance, what amount of carbon-dioxide emissions is unreasonable" for any given emitter or emitting industry, nor to "decide what level of reduction is practical, feasible and economically viable." *See AEP*, 564 U.S. at 428 (quotation marks omitted). Rather, the City seeks only to compel defendants to bear some portion of the costs that have been imposed on the City by the intended and foreseeable use of the products that defendants have sold. By seeking damages rather than injunctive relief, the City's claims would not prevent defendants (much less any party regulated by the Clean Air Act) from engaging in any type or level of conduct. Rather, defendants need only bear some of the costs of the harms that their profitable activities have externalized onto others.

In any event, even if the City's claims could be construed as somehow regulating the emitting sources that the Clean Air Act directly regulates, those claims still would not necessarily conflict with the Act. The Supreme Court's interpretation of the preemptive scope of the Clean Water Act—a statute that resembles the Clean Air Act in key

respects[18]—illustrates the narrow class of conflict that would be required to trigger preemption. The Supreme Court has squarely held that the Clean Water Act does not preempt States from regulating effluent discharges through applying the common law of a State in which a discharge occurs. Rather, States are preempted only from applying their own common law to a wholly out-of-state discharge authorized by a Clean Water Act permit, as such a cross-border application would impermissibly allow a nonsource State to "effectively override both the permit requirements and the policy choices made by the source State." *Ouellette*, 479 U.S. at 495-97; *see also AEP*, 564 U.S. at 429 (citing *Ouellette* analysis as applicable to Clean Air Act).

Applying this same analysis to the Clean Air Act, the Third and Sixth Circuits have declined to apply conflict preemption, allowing

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[18] As with the Clean Air Act, the Clean Water Act broadly reserves state authority over pollution discharges, and contains a savings clause that uses virtually the same language as the Clean Air Act in recognizing the States' principal regulatory role. To the extent there are any differences between the statutes, courts have generally concluded that "Congress intended to preserve more rights for the states, rather than less," in the Clean Air Act as compared to the Clean Water Act. *Bell*, 734 F.3d at 190.

common-law suits brought directly against air-pollution emitters to proceed under the laws of the States in which they operated. *See Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685, 690 (6th Cir. 2015) ("the Clean Air Act expressly preserves the state common law standards on which plaintiffs sue"); *Bell*, 734 F.3d at 190 ("source state common law actions are not preempted").[19] But here, failing to apprehend that state common law may be viable even in suits brought against emitters regulated by the Act, the district court failed to specify how granting the City relief would result in a sharp conflict with the Clean Air Act's procedures or the Act's statutory allocation of authority. *See Ouellette*, 479 U.S. at 497-99; *see also In re MTBE Litig.*, 725 F.3d at 101 (preemption requires "sharp" and "actual conflict" (quotation marks omitted)).

For preemption purposes, it is also immaterial that this suit is based on state common law rather than state legislation or regulation.

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[19] In *North Carolina ex rel. Cooper v. Tennessee Valley Authority*, the Fourth Circuit relied on *Ouellette* to hold that North Carolina could not use its own state nuisance law to limit the purely out-of-state emissions of power plants located in Tennessee and Alabama. 615 F.3d 291 (4th Cir. 2010). To the extent that the Fourth Circuit, in dicta, read *Ouellette* as creating a general presumption against nuisance suits in the field of air pollution, even as applied to in-state sources, *see id.* at 303, the court simply misread the Supreme Court's decision.

The preemption analysis requires the same showing of a manifest intent to preclude the operation of state law, whatever its source. *See, e.g.*, *Sprietsma*, 537 U.S. at 69. And nothing in the Clean Air Act reflects a congressional intent to more broadly preclude state common law than state statutes and regulations. To the contrary, the Clean Air Act's savings clause preserves States' ability to "adopt or enforce . . . any *requirement* respecting control or abatement of air pollution," 42 U.S.C. § 7416 (emphasis added), and the term "requirement" in preemption clauses is routinely construed to "reach[] beyond positive enactments, such as statutes and regulations, to embrace common-law duties." *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 443 (2005); *accord Cipollone v. Liggett Grp.*, 505 U.S. 504, 521 (1992); *see also Ouellette*, 479 U.S. at 497-99 (holding that the similarly structured Clean Water Act preserves state common-law suits except those incompatible with that act's procedures).

CONCLUSION

For the reasons above, amici urge this Court to reverse the decision below and confirm the continuing vitality of state law to address the conduct alleged in the City's complaint.

Dated: New York, New York
November 15, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Oren L. Zeve, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 5,412 words and complies with the typeface requirements and length limits of Rules 29 and 32(a)(5)-(7), and Circuit Local Rule 32.1.

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