18-2188

United States Court of Appeals for the Second Circuit

CITY OF NEW YORK,

Plaintiff-Appellant,

V.

BP P.L.C., CHEVRON CORPORATION, CONOCO PHILLIPS, 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

BRIEF OF *AMICUS CURIAE* PROFESSOR RICHARD A. EPSTEIN IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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INTEREST OF *AMICUS CURIAE*[1]

Richard A. Epstein is the Laurence A. Tisch Professor of Law at New York University Law School, the Peter and Kirsten Bedford Senior Fellow at the Hoover Institution at Stanford University, and the James Parker Hall Distinguished Service Professor Emeritus and Senior Lecturer at the University of Chicago Law School.

Professor Epstein is a leading national scholar in the field of tort law. He was the sole editor of *Cases and Materials on Torts* for the Third Edition in 1977 through the Ninth Edition in 2008. At his request, Professor Catherine M. Sharkey joined him as a co-editor for the tenth and eleventh editions of that work. He is also the author of *Torts* (1999), a treatise on the law of torts. He has published many articles on the law of nuisance, including articles addressing the application of nuisance doctrine to environmental protection—and including, specifically, the application of public nuisance to global warming. *See, e.g.*, Richard A. Epstein, *Beware of Prods and Pleas: A Defense of the Conventional Views on Tort and Administrative Law in the Context of Global Warming*, 121 Yale L. J. Online 317 (2011); Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. Legal Stud. 49, 101-02 (1979).

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus* states that no party's counsel in this case authored this brief, and no party, party's counsel in this case, or person other than *amicus* or his counsel contributed financial support intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

Professor Epstein has particular interest in this case because his scholarship has been cited—incorrectly—in support of Appellant New York City's position. *See* Brief of Professor Catherine M. Sharkey as *Amicus Curiae* in Support of Plaintiff-Appellant at 2-3, 5, 16 (Doc. 115) ("Sharkey Br."). Professor Epstein submits this brief to clarify the record, as his views are in fact diametrically opposed to those Professor Sharkey cites his writings to support. *See, e.g.*, Epstein, *Beware of Prods and Pleas*, 121 Yale L. J. Online at 329. In the view of Professor Epstein, the application of common law nuisance doctrine urged by the City would involve its dramatic and unwise expansion, beyond the discrete private harms to which it has always been limited.

SUMMARY OF ARGUMENT

Because this case is controlled by the Supreme Court's decision in *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011) ("*AEP*"), this Court ultimately need not consider the underlying merits of any claim that fossil fuels have, or have not, been the dominant source of global warming. What is decisive for this case is that the City's claims, if allowed, would expand the law of public nuisance far beyond its common law foundations, and, in doing so, would lead to a morass of litigation that would produce arbitrary, inconsistent and ill-considered outcomes in multiple jurisdictions in the United States and even overseas.

While the City and its *amici* portray this case as a simple application of established public nuisance rules, in doing so they disregard a key limitation on the doctrine. Since at least the sixteenth century, courts have barred public nuisance claims for diffuse harms—holding that members of the public cannot recover for general damages, *i.e.* the common damage suffered by a large number of members of the public. This approach remains the law today, including in New York, where the State's high court has recognized that plaintiffs can only pursue a public nuisance claim for "special" damages. And, critically, courts hold that special damages must be different *in kind* from the damages suffered by the general public, not merely different in degree, if they are to form the basis for a public nuisance claim.

This rule is essential to prevent the public nuisance doctrine from swamping the courts in a morass of litigation. If every person who suffered a diffuse harm could bring a private action, the courts would be inundated with suits, as even a single public nuisance could give rise to thousands or even millions of claims. The administrative costs of so much litigation would quickly eclipse its social value, for the mass of claims would distract courts from dealing with ordinary harms that are amenable to litigation, such as automobile accidents or product-related injuries. For that reason, courts have long recognized that these types of diffuse harms are only the proper subject of administrative regulation. Thus, as early as the 1536 case of *Anonymous*, the Court Leet (an administrative body) was found responsible for

imposing sanctions on any party that placed an obstacle on a public road, delaying traffic and causing harm to a large number of users. *See Anon*, Y.B. Mich. 27 Hen. 8, f. 27, pl. 10 (1536), *reprinted in* Richard A. Epstein & Catherine M. Sharkey, *Cases and Materials on Torts* 621 (11th ed. 2016). Only a party that suffered special injuries from contact with that obstacle—distinct from the injuries suffered by the public as a whole—could maintain an individual lawsuit.

In an article that he wrote forty years ago (which was not cited by Professor Sharkey), well before global warming assumed the importance it has today, *Amicus* observed that widespread air pollution is not a proper subject for public nuisance actions. "Every automobile, for example, creates a nuisance by the emission of smoke and other pollutants; yet it is inconceivable for practical reasons to entertain the prospect of systematic redress for each violation of individual rights." Epstein, *Nuisance Law*, 8 J. Legal Stud. at 101. Of course that does not mean that pollution must go unaddressed. Rather, "[p]ublic regulation is justified . . . because all private remedies are inadequate for the protection of admitted private rights, given the administrative complications that they spawn." *Id.* at 102. That was true of air pollution then, and it is true of global warming today.

Indeed, global warming perfectly illustrates the wisdom of the rule that bars public nuisance claims for diffuse harms. If the City's claim were allowed to proceed, there would be no principled reason why the *other* thirty-nine thousand

municipalities in the United States could not follow with suits of their own. Nor is there any reason why *private* businesses and individuals could not also sue—for instance, because they own land along the coastline and (like the City alleges here) claim that they will be forced to build levees and seawalls in order to mitigate the impact of climate change. The courts would quickly become inundated with an almost unlimited number of claims.

Moreover, even if courts could handle that mass of litigation, courts would face the additional problem of identifying which of numerous sources of carbon emissions is the proper defendant for such a claim. Everyone on the planet contributes to carbon emissions—by driving cars, by using electricity, by consuming products manufactured in carbon-emitting facilities, and even by exhaling. There is no clear reason why these particular fossil fuel producers should be held uniquely responsible for harms that are generated by all human activity, especially when the City targeted these entities in its Complaint only as part of a futile effort to avoid the precedential effect of the *AEP* decision, which barred claims against entities that *directly emit* carbon dioxide. No one company—or set of companies—can be tagged with responsibility for this complex global phenomenon. Indeed, the City itself makes use of fossil fuels and is thus partly responsible for the harms that it wishes to blame on others.

Finally, even putting all that aside, courts would struggle to quantify the damages caused by carbon emissions given the complexity of the climate system. Without contesting that carbon emissions have real effects, it remains the case that scientists cannot say *precisely* what those effects are, let alone quantify the damages that they cause or the risks that they create. Thus, while the City claims to have expended resources to improve its infrastructure in response to Hurricane Sandy, it is difficult to pin Hurricane Sandy on global warming, given that hurricanes of this magnitude have occurred numerous times before the recent increase in carbon dioxide levels.

None of this is to say that global warming lies beyond government's reach. Rather, as *Amicus* has stated elsewhere, "[i]n my view, the only workable solution requires (alas) a federal administrative agency—here the EPA—to orchestrate the effort." Epstein, *Beware of Prods and Pleas*, 121 Yale L.J. Online at 320. That is, in essence, what the Supreme Court held in *AEP*, and in the wake of that decision the EPA has in fact promulgated rules to address global warming, which can be applied through administrative actions subject to judicial oversight. Global warming can be effectively addressed, but not in the first instance by the courts, and not in connection with private rights of action.

ARGUMENT

I. SINCE THE SIXTEENTH CENTURY, THE COMMON LAW HAS RECOGNIZED THAT NUISANCE LAW SHOULD NOT BE USED TO REGULATE DIFFUSE HARMS.

While the City and its *Amici* paint their claims as a straightforward application of public nuisance doctrine, in doing so they fail to grapple with a key element of that doctrine. Courts have long recognized that public nuisance does not extend to diffuse harms, which are instead the appropriate sphere of administrative regulation. The City's claims ignore that longstanding limitation on public nuisance doctrine and, in doing so, urge an expansion of the doctrine that would be both significant and unwise.

1. Since at least 1536, the common law has limited the availability of private rights of action for diffuse harms. In the early case of *Anon*, the defendant had "stopped the King's highway," causing delays and other difficulties for every person who relied upon the road. *Anon*, Y.B. Mich. 27 Hen. 8, f. 27, pl. 10 (1536), *reprinted in* Richard A. Epstein & Catherine M. Sharkey, *Cases and Materials on Torts* 621 (11th ed. 2016). The opinion of the Chief Justice recognized that it would be impractical to extend a cause of action to every person so harmed, as, "if one person shall have an action for this, by the same reason every person shall have an action, and so [the defendant] will be punished a hundred times on the same case." *Id.* On the other hand, Justice Fitzherbert stated that the plaintiff could recover damages if he "suffered greater damage than all others," for instance because he "had more

convenience by this highway than any other person." *Id.* Absent a showing of such special damages, the defendant's actions would be "punishable in the Leet," meaning through fines imposed by an administrative agency. *Id.* In other words, absent a claim to special damages, diffuse harms were appropriately redressed through regulatory action.

Today, this rule remains a foundational part of public nuisance doctrine, as "[i]n order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public." Restatement (Second) of Torts § 821C. The law in New York is no exception, as the State's high court has acknowledged that public nuisances are not actionable through individual lawsuits unless the plaintiff "suffered special injury beyond that suffered by the community at large." *532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc.*, 750 N.E.2d 1097, 1104 (N.Y. 2001). As the court explained, "[t]his principle recognizes the necessity of guarding against the multiplicity of lawsuits that would follow if everyone were permitted to seek redress for a wrong common to the public." *Id*.

Importantly, in drawing the line between general and special damages, courts consider the type of damage and the mechanism of damage, rather than the amount of damage suffered. *See* Epstein, *Beware of Prods and Pleas*, 121 Yale L.J. Online at 323-24. "It is not enough that [the plaintiff] has suffered the same kind of harm

or interference but to a greater extent or degree." Restatement (Second) of Torts § 821C. Thus, for instance, in *532 Madison Avenue*, the New York high court held that businesses located along a public road could not recover damages for its closure, explaining that, "[w]hile the degree of harm to the named plaintiffs may have been greater than to the window washer, per diem employee or neighborhood resident unable to reach the premises, in kind the harm was the same." 750 N.E.2d at 1105. Even significant damages from diffuse harms are not recoverable in tort.

2. Limiting the availability of nuisance actions for diffuse harms makes good sense, as it prevents the administrative costs of litigation from growing out of control and swamping the basic utility of the legal system.

At base, tort law is designed to address discrete harms with discrete causes. The simplest paradigm "is the direct and immediate application of force against the person and property." Epstein, *Nuisance Law*, 8 J. Legal Stud. at 56. In this paradigm, both victim and perpetrator are readily identified and damages are readily assessed. From there, tort expands to cover a slightly more complex paradigm, "the creation of dangerous conditions" by defendants that cause injury to plaintiffs upon application of some external force. *Id*. In this circumstance, as well, causation remains apparent and the parties are readily identifiable. Traditional nuisance suits, finally, require only a slight further shift, as the harm caused by smoke, noise, or heat can be seen as a large number of separate physical invasions, and "if each

individual particle, each individual event, is attributable to the defendant's activities, then so too is their aggregate impact." *Id*. at 57. Because a classic nuisance case involves localized injuries to at most a small group of plaintiffs, both the victim and perpetrator remain identifiable, and any issues of causation are likewise readily susceptible to judicial resolution. Indeed, so long as the number of parties remains small, courts are in a good position to combine injunctive relief to prevent future harm with damages for past harm. The flexibility of injunctive relief is high in cases involving specific defendants responsible for discrete harms, for it is common for courts to require different responses from defendants at night, when quiet is needed, more than in the day, when it is less so. Those forms of fine-tuning are utterly unavailable in mass tort cases where it is impossible to calibrate any remedy to the unique position of identifiable parties.

At a certain point, however, harms become sufficiently diffuse that they can no longer be addressed through private litigation. It would be an understatement to say that litigation is expensive—both for the parties and society. *See* Epstein, *Nuisance Law*, 8 J. Legal Stud. at 75-76. In a paradigmatic case involving discrete harms, those costs are justified as a means to achieve justice in the individual case. *See id.* at 75. However, the costs of litigation "are apt to be overwhelming where a large number of persons are both entitled to compensation and obligated to pay it." *Id.* at 78-79. "Let these administrative costs be sufficiently large and it follows that

all persons may be worse off in differing degrees if a systematic policy of individual compensation is pursued." *Id.* at 79. In that case, "[t]he faithful application of a theory of justice can become so expensive as to be self-defeating." *Id.* Put differently, if courts were required to adjudicate all of the myriad harms caused by human activity, the judicial system would collapse under its own weight and would no longer be able to serve its legitimate function.

This is not to say that diffuse harms must go unaddressed; instead, it simply means such harms are the proper subject of administrative regulation. Fines can serve much the same purpose as damage awards: When a fine is imposed, "the defendant will be induced to take greater precautions even in the absence of private rights of action." Epstein, *Beware of Prods and Pleas*, 121 Yale L.J. Online at 324. And regulation may take other forms as well, including "direct emissions controls, taxes, quotas, impact statements, and any other device that legal and technical minds might devise." Epstein, *Nuisance Law*, 8 J. Legal Stud. at 102. Thus, while the City and its *amici* insist that a public nuisance action is necessary to provide redress for global warming, the fact is that government has a broad range of tools available to address the concern. And, indeed, while the EPA's response to carbon emissions is certainly open to criticism from a variety of perspectives, there is no question that the EPA is active in this area.

Long before global warming became a major issue, *Amicus* noted that these considerations supported an administrative approach to air pollution. Forty years ago, *Amicus* wrote: "Every automobile, for example, creates a nuisance by the emission of smoke and other pollutants; yet it is inconceivable for practical reasons to entertain the prospect of systematic redress for each violation of individual rights." Epstein, *Nuisance Law*, 8 J. Legal Stud. at 101. In these cases, "[p]ublic regulation is justified . . . because all private remedies are inadequate for the protection of admitted private rights, given the administrative complications that they spawn." *Id.* at 102. That remains true today: "[O]rdinary litigation is not easily scalable," and "[w]hat works for a dispute between two neighboring landowners may not work with the constant interaction of traditional pollutants, let alone for carbon dioxide." Epstein, *Beware of Prods and Pleas*, 121 Yale L.J. Online at 322-23.

3. The City and its *amici* cite a number of cases that they characterize as supporting the application of public nuisance doctrine to global warming. Those cases, however, ultimately support the position that Professor Epstein has consistently taken. In each, a discrete tortfeasor or group of tortfeasors caused a special harm to a discrete group of victims.

Both the City and Professor Sharkey rely extensively on *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870 (N.Y. 1970). Yet that case, despite dealing with air pollution, falls well inside the longstanding limits discussed above. The plaintiffs in

that case were "neighboring land owners" of a "large cement plant" who sought damages for "dirt, smoke and vibration emanating from the plant." *Id.* at 871. The source of the injuries was clear and discrete—as the court explained, the plaintiffs "sought specific relief from a single plant operation." *Id*. Because the source of the dirt, smoke, and vibration could be clearly identified, there were no difficult issues involved in linking the plaintiff's harm to the defendant's action; nor were there any special issues of joint causation. *Id.* at 871-72. Moreover, the general public did not experience the same harms, and thus could not have brought similar claims. *Id.* The suit was, in short, a classic nuisance case.

Other environmental nuisance cases cited by the City and Professor Sharkey likewise involved discrete sources of discrete harms. For instance, *In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation*, 725 F.3d 65, 121 (2d Cir. 2013), involved contamination of groundwater by chemicals that leaked from gas stations' underground tanks. The defendant did not just manufacture the chemicals, but also operated at least some of the gas stations; as the court noted, the defendant's "extensive involvement in the [local] gasoline market belies any claim that its conduct was too geographically remote to sustain liability." *Id.* at 122. Likewise, *Abbatiello v. Monsanto Co*., 522 F. Supp. 2d 524, 528 (S.D.N.Y. 2007), involved a factory that gave off harmful chemicals and contaminated neighboring land. These cases did not require abandoning the traditional limits of nuisance doctrine.

Finally, while *Mills v. Hall & Richards*, 9 Wend. 315 (N.Y. Sup. Ct. 1832), lies closer to the outer boundary of nuisance doctrine, it also involved a discrete harm. The defendant "erected and maintained" a dam that allegedly "spread disease and death through the neighborhood." *Id*. at 316. The harm allegedly traced to a single source—the dam. And while the harms were widespread, the plaintiff had suffered a special injury, as he and his family had fallen sick. *Id*. The court found it "very questionable" whether the dam "was the means or principal cause" of the plaintiff's sickness, but concluded that "[t]he jury were the most competent judges upon this matter." *Id*. The court's decision to let that difficult question of causation rest with the jury does not support any novel development by which courts or juries could impose liability without regard to causation, and it certainly does not support imposing liability for the far more diffuse harms at issue here.

II. GLOBAL WARMING IS A PARTICULARLY INAPPROPRIATE SUBJECT TO ADDRESS THROUGH NUISANCE SUITS.

While there may be marginal cases that lie at the borderline between private nuisance and administrative regulation, global warming does *not* present such a case. Global warming is an extreme example of a diffuse phenomenon, with an almost unlimited number of potential plaintiffs and a similarly broad range of novel types of harm. That combination renders these cases singularly ill-suited to resolution through individualized litigation.

A. Because Everybody Is Harmed By Global Warming, Courts Could Not Possibly Assess The Resulting Damages.

The City's proposed cause of action perfectly illustrates the practical problems associated with nuisance actions for general damages, as allowing this claim to go forward would swamp the courts with countless similar suits.

After all, if the City can recover for its damages, what would stop every other municipality in the country from pursuing similar claims? As noted *supra* pp. 8-9, the line between "special" and "general" damages turns on the *type* of damage, not the degree, so the City cannot claim to suffer special damages simply because it is larger than other municipalities. And the threats of climate change and resulting "increased hot days, flooding of low-lying areas, shoreline erosion, and higher threats of extreme weather events and catastrophic storm-surge flooding" are surely not limited to New York City. Brief for Appellant at 7 (Doc. 89) ("Appellant Br."). With over thirty-nine thousand municipalities in the United States, assessing the damages of each separate municipality would easily consume the resources of the courts, particularly given that these commonplace injuries are not caused *only* or entirely by global warming.[2] Indeed, right now, far inland, Boulder and San Miguel counties, along with the City of Boulder, have brought actions against ExxonMobil

[2] *See* Nat'l League of Cities, Number of Municipal Governments & Population Distribution, https://www.nlc.org/number-of-municipal-governments-population-distribution.

and Suncor based on global warming, seeking recovery for the costs of road repair and air conditioning.[3]

And that would just be the beginning, as countless private companies and individuals could surely claim that they too suffered from similar harms. One of the City's primary claims to injury rests on its status as a coastal landowner; it alleges that it "must build sea walls, levees, dunes, and other coastal armaments and must elevate, solidify, and adapt a vast array of City-owned structures, properties, and parks along its whole coastline." Compl. ¶ 122. The same allegation could be raised by any other party—private or public—that owns land along the nation's approximately 95,000 miles of shoreline.[4] Moreover, there is no reason why the universe of non-governmental plaintiffs should be limited to coastal landowners. As the City alleges, private companies (including the defendants in this case) also "have been taking climate change impacts into account when planning for and building their own operations and infrastructure, the same thing that the City now must do." Compl. ¶ 127. With practically everyone in the world affected by global warming, where would the litigation end?

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[3] *See* Charlie Brennan, *Boulder spearheads lawsuit seeking damages from ExxonMobil, Suncor over climate change impacts*, Boulder News, Apr. 17, 2018, *available at* http://www.dailycamera.com/news/boulder/ci_31810658/boulder-sues-exxon-suncor-climate-change.

[4] *See* NOAA, How long is the U.S. shoreline?, https://oceanservice.noaa.gov/facts/shorelength.html.

Apparently recognizing this difficulty, the City gestures toward the special damages requirement by contending that "New York City is particularly vulnerable to global warming because it has 520 miles of coastline and is primarily situated on islands." Appellant Br. 6. But this is no different from a plaintiff who argues he suffered special damages from the blockage of a highway because of the amount of time he spent stuck in traffic—an argument that has been soundly and repeatedly rejected. *See* Epstein, *Beware of Prods and Pleas*, 121 Yale L.J. Online at 323. As New York's high court recognized in *532 Madison Avenue*, a rule that allowed a claim to proceed based solely on the size of a plaintiff's injury would be unfair to smaller potential plaintiffs, including smaller municipalities, who naturally suffer smaller harms and yet may feel those harms just as keenly. *See* 750 N.E.2d at 1105. Regardless of whether the City's injuries are greater in magnitude, its injuries are not different in kind and thus do not merit special treatment.

The City gives no reason whatsoever for courts to abandon the line to which they have hewed since 1536. Whatever challenges it may pose, global warming is not a reason to abandon the principle. Rather, "the only workable solution requires (alas) a federal administrative agency—here the EPA—to orchestrate the effort." Epstein, *Beware of Prods and Pleas*, 121 Yale L.J. Online at 320. As a global problem, global warming demands an administrative solution.

B. Because Literally Everybody Contributes To Global Warming, Courts Are Not In A Position To Say Who Should Bear The Cost.

Even setting aside the administrative cost associated with the almost infinite number of lawsuits that would result from the City's theory, treating global warming as a public nuisance would give rise to the additional problem of how to apportion the loss among the equally large number of responsible parties, out of whom the City has sued just five.

As Professor Epstein has written recently about these law suits:

> First, just looking at the American scene, some good chunk of the carbon dioxide releases are from other oil companies not named in the complaint. Another, probably larger, chunk comes from burning coal, making cement, and human and animal respiration. Carbon dioxide is also released in large quantities by forest fires, including those that recently overwhelmed Northern and Southern California. And that's just in America; vast amounts of carbon dioxide are released from a similar range of human activities all across the globe.
>
> Here are some numbers: As of 2015, all carbon dioxide emissions from the United States comprised 14.34 percent of the global total, while China's emissions stood at 29.51 percent. Even if the five oil companies were somehow responsible for, say, 10 percent of the United States' carbon dioxide emissions, that would be less than one percent of the total human releases.

Richard A. Epstein, *Is Global Warming a Public Nuisance?*, Hoover Defining Ideas (Jan. 15, 2018).[5]

[5] *Available at* https://www.hoover.org/research/global-warming-public-nuisance.

While the City argues that oil and gas producers are uniquely responsible for global warming, that claim is undermined by the fact that these companies were not even the City's first choice of defendants. Instead, in 2004, a group of plaintiffs including the City sued six power companies, alleging that they were "the five largest emitters of carbon dioxide in the United States."[6] The City brought the current case only after that first foray ended in the Supreme Court's *AEP* decision, which found the claims there displaced by federal statute. Having initially directed its litigation efforts at parties who directly emit carbon dioxide, the City cannot seriously argue that the entire problem ought to rest at the feet of companies who stand one step further removed up the causal chain. Problems of causation almost certainly would have doomed the claims in *AEP*—as this global phenomenon cannot be traced to just a few companies, no matter how large their carbon footprint—and those problems are only more pronounced here.

In her *amicus* brief, Professor Sharkey argues that oil and gas producers are the "cheapest cost avoiders." Sharkey Br. 9-12 (citing Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089, 1096 (1972)). There are two responses. *First*, even if the point were true, it hardly follows that direct litigation is preferable to

[6] Complaint, *Connecticut v. Am. Elec. Power Co., Inc.*, No. 04-cv-5669, at 1 (S.D.N.Y. July 21, 2004).

administrative action. *Second*, it is far from clear that these defendants are the cheapest cost avoiders, relative to the entities that actually *emit* carbon dioxide. Nor is it true that oil and gas producers alone have "the relevant expertise and resources to conduct cost-benefit analyses comparing increased consumption with increased costs produced by that consumption." Sharkey Br. 10. The relevant knowledge is publicly available, and indeed has already been used by the EPA to set regulatory policy. Moreover, that regulatory policy ultimately must be implemented by the emitters of carbon dioxide, not by the companies that produce fossil fuels.

Professor Sharkey also suggests that oil and gas producers are in a position to "spread costs to shareholders or consumers." Sharkey Br. 12 (marks and citation omitted). But any such cost-spreading is better done through direct regulation, rather than through haphazard and uncoordinated litigation. While the City alleges that these companies' products can be traced to a significant share of *past* carbon emissions, no litigation can tie emissions spanning generations to uncertain claims for *future* uncertain harms that, as of yet, no one can measure, especially if due weight is given to the ever large share of carbon emissions that trace to China, India, and other nations beyond the reach of the Court's jurisdiction. *See* Epstein, *Beware of Prods and Pleas*, 121 Yale L.J. Online at 325.[7] While it might be tempting to

[7] *See also* Union of Concerned Scientists, Each Country's Share of CO2 Emissions, https://www.ucsusa.org/global-warming/science-and-impacts/science/each-countrys-share-of-co2.html.

think that a damages award could function as a kind of tax on carbon emissions—impacting consumer behavior by raising prices—no court has the sweeping jurisdiction that would be necessary to impose an effective tax on fossil fuels.

None of this is meant to minimize the significance of global warming or to suggest that the problem is hopeless. The point is not to suggest that nothing can or should be done. Rather, the point is that, given that global warming is quite literally the product of all human activity across the world, it is not the appropriate role of the federal courts to say who should bear the cost. As *Amicus* has written elsewhere: "There is excessive discussion on how to deal with global warming right now, so the issue can hardly be said to be concealed in some remote location. Given that high level of public deliberation and engagement, it does not seem plausible that any ill-conceived lawsuit will add sense to the mix." Epstein, *Beware of Prods and Pleas*, 121 Yale L.J. Online at 329.

C. Because Of The Complexity Of The Climate System, Courts Are Not In A Position To Identify Damages Caused By Carbon Emissions.

Finally, even if all of the foregoing could somehow be overcome, there still would be the problem of identifying and quantifying the damages caused by carbon emissions. Given the complexity of the climate system, that task "cannot be shoehorned into the usual public nuisance cases." Epstein, *Beware of Prods and Pleas*, 121 Yale L.J. Online at 325. Rather, it seems unlikely that any court could accurately identify and quantify the harms produced by carbon emissions.

Without disputing that carbon emissions have real effects, it still bears emphasis that nobody can say with any certainty precisely *what* those effects may be. For instance, while the City alleges that it has expended resources in response to Hurricane Sandy, *see* Compl. ¶ 119, scientists say that "attributing any particular extreme weather event to global warming remains beyond the current limits of scientific capability."[8] And even taking as a given the City's allegation that severe storms are more likely as a result of global warming, scientists still cannot say *how much* more likely. Given that uncertainty, courts are not in a position to draw a causal link between carbon emissions and particular injuries, as would be necessary to justify any award of damages.

Professor Sharkey proposes to square that circle by saying the Court should award the cost of any steps that the City takes to mitigate the impact of climate change. *See* Sharkey Br. 20-21. The problem with this approach is that—without knowing global warming's effects—it is impossible to say what those mitigation costs ought to be, much less to estimate future costs with any acceptable degree of accuracy. *See* Restatement (Second) of Torts § 919 (explaining that only "reasonable" mitigation costs are recoverable as damages).

[8] NOAA, Earth System Research Laboratory, Global Monitoring Division, https://www.esrl.noaa.gov/gmd/outreach/faq_cat-1.html.

The cumulative difficulties in the path of the City's nuisance action cannot be avoided. The only correct conclusion is that global warming is "rightly the exclusive province of administrative agencies." Epstein, *Beware of Prods and Pleas*, 121 Yale L.J. Online at 326. That is what the Supreme Court held in *AEP*, when it found similar claims displaced by federal environmental laws, and that is what this Court should hold here.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Dated: February 14, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation in Fed. R. App. P. 29(a)(5). This brief contains 5,519 words and was prepared in Microsoft Word using a proportional serif 14-point font.

I further certify that I am a member of the bar of this Court.

Dated: February 14, 2019

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