No. 18-2188

IN THE
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, and BP P.L.C.,
Defendants-Appellees.

On Appeal from the United States District Court
For the Southern District of New York, No. 18-cv-00182

BRIEF OF INDIANA AND 14 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES

Office of the Attorney General
302 W. Washington Street
Indianapolis, IN 46204
(317) 924-3005
Tom.Fisher@atg.in.gov
*Counsel of Record

CURTIS T. HILL, JR.
Attorney General of Indiana
THOMAS M. FISHER*
Solicitor General
KIAN J. HUDSON
Deputy Solicitor General

Counsel for Amici *States*
Addition counsel listed with signature block

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INTEREST OF THE *AMICI* STATES

The States of Indiana, Alabama, Alaska, Arkansas, Georgia, Kansas, Louisiana, Missouri, Montana, Nebraska, Oklahoma, South Carolina, Texas, Utah, and West Virginia respectfully submit this brief as *amici curiae* in support of the Defendants-Appellees.

New York City's effort to use New York's state common law of public nuisance to regulate global climate change presents issues of extraordinary importance to the *Amici* States, for it attempts to extend New York law across not only the United States, but the entire world. Any such extraterritorial expansion of common law principles would interfere with *Amici* States' own policy choices and would flatly violate the Commerce Clause. In addition, federal adjudication of any common law claim seeking abatement of the effects of global climate change would disrupt carefully calibrated state regulatory schemes devised by politically accountable officials. Federal courts should not use amorphous nuisance and trespass theories to confound state and federal political branches' legislative and administrative processes by establishing climate-change policy (or, as is more likely, multiple conflicting climate-change policies) on a piecemeal, ad hoc basis.

The *Amici* States have an especially strong interest in this case because the list of potential defendants is limitless. The City's theory of liability involves nothing more specific than promoting the use of fossil fuels. As utility owners, power plant operators, and significant users of fossil fuels (through facilities, vehicle fleets, and highway construction, among other functions), States and their political subdivisions themselves may be future defendants in similar actions. Pursuant to Federal Rule of Appellate Procedure 29(a)(2), the *Amici* States submit this brief to explain why the Court should affirm the district court's dismissal of New York City's attempt to use common-law doctrines to regulate global climate change.

SUMMARY OF THE ARGUMENT

New York City seeks to harness the power and prestige of federal courts to remedy global climate change. It asserts that five fossil fuel corporations, by producing such fuels and promoting their use, have broken the law—but not law enacted by a legislature, promulgated by a government agency, or negotiated by a President. Rather, the law the City invokes is the common law of New York. The City says that Defendants' production, promotion, and sale of fossil fuels—combined with the subsequent use of those fuels by third parties around the world—sufficiently contributes to global warming as to constitute a "public nuisance," "private nuisance," and "trespass" that the federal judiciary should remedy by forcing Defendants to pay for costs the City incurs due to climate change.

The district court dismissed the City's claims, reaching the same conclusion as the only other federal court to have yet ruled on similar public-nuisance climate-change theories brought in several districts around the country. *See City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1029 (N.D. Cal. 2018); *see also, e.g., King County, Washington v. BP P.L.C.*, No. 2:18-cv-00758-RSL (W.D. Wash.). It was right to do so.

Even if the City's nuisance and trespass claims "to reallocate the costs imposed by lawful economic activity," App. Br. 19, are actually cognizable as a matter of state law—a highly dubious proposition—the issue of global climate change and its effects (and the proper balance between regulations and commercial activity) raises political questions not suited to resolution by courts. The City's claims lack judicially discoverable and manageable standards and require non-judicial policy determinations. Indeed, such judicial resolution would trample Congress's carefully-calibrated process of cooperative federalism where States work in tandem with the EPA to administer the federal Clean Air Act.

Moreover, even if the City's claims were justiciable, they would impermissibly regulate extraterritorial conduct in violation of the Commerce Clause. The City is seeking damages for *all* of the costs of global climate change, which under the City's own theory is caused by conduct occurring outside New York and, indeed, all over world. In addition, even if the City limited its desired damages to the small fraction of costs allegedly attributable to Defendants' in-state conduct, the causal sequence connecting the in-state conduct—production and promotion—to the

City's claimed harms—infrastructure damage, an increase in heat-related deaths, extreme precipitation events, etc.—necessarily includes a long series of actions, such as the actual carbon emissions, that take place far outside the boundaries of New York State.

ARGUMENT

I. The City's Claims Present Non-Justiciable Political Questions

The City's claims are not appropriate for judicial resolution because they present public policy questions that require a balancing of interests better suited to the political branches than courts. The political question doctrine bars federal courts from deciding a dispute presented when (1) there is "a lack of judicially discoverable and manageable standards for resolving it," or the issue (2) would require "an initial policy determination of a kind clearly for nonjudicial discretion." *Baker v. Carr*, 369 U.S. 186, 217 (1962); *see also Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 202 (2012) (citing *Baker*, 369 U.S. at 217). This doctrine arises from the Constitution's core structural values of judicial modesty and restraint.

As early as *Marbury v. Madison*, Chief Justice Marshall stated that "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." 5 U.S. (1 Cranch) 137, 170 (1803). These questions, Marshall wrote, "respect the nation, not individual rights." *Id.* at 166. Here, the City's claims implicate national concerns, not just individual rights—a point that becomes glaringly obvious when one considers that they would require a determination that that the production, promotion, and sale of fossil-fuel products is "unreasonable." *Ewen v. Macherone*, 927 N.Y.S.2d 274, 276 (App. Term 2011); Restatement (Second) of Torts § 821B (1979). Such judgment is best left to the political branches.

A. *AEP* does not control on this issue, and other attempts to litigate climate change public nuisance lawsuits have run headlong into the political question doctrine

The City relies on *Connecticut v. American Electric Power Company.*, 582 F.3d 309, 325 (2d Cir. 2009), *rev'd.* 564 U.S. 410 (2011), to support its assertion that resolution of tort claims "touching on climate change rests with the judiciary", App. Br. 64, but that is far too broad a characterization of the holding in that case. There, this Court held that claims seeking abatement of six electricity plants' contributions to global

warming did not present a non-justiciable political question because "[a] decision by a single federal court concerning a common law of nuisance cause of action, brought by domestic plaintiffs against domestic companies for domestic conduct, does not establish a *national* or *international* emissions policy." *Id.* at 325. As the district court properly concluded, however, just because the claims in *AEP* were sufficiently narrowly targeted to avoid political question concerns does not perforce mean that the claims in *this* case are justiciable. *See* ECF No. 153, Opinion and Order at 22–23. Here, the City seeks to impose billions of dollars of damages "against both foreign and domestic corporations, all five of whom produce and sell fossil fuels worldwide." *Id.* at 23. The Court must undertake a separate political question analysis in this case to ensure that, in view of the vast scope of harm and relief plaintiffs seek to litigate, this is an appropriate case for judicial resolution.

Taking this inquiry seriously is all the more important because other district courts previously dismissed similar cases seeking relief for harms allegedly caused by global climate change. In a case nearly identical to this one—brought by the Cities of Oakland and San Francisco, who were represented by the same private attorneys and who alleged

very similar claims as New York City here—the district court held that the claims were "foreclosed by the need for federal courts to defer to the legislative and executive branches when it comes to . . . international problems" such as global climate change. *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1024 (N.D. Cal. 2018).

In another case, the district court dismissed an Alaskan village's claims seeking damages from dozens of energy companies for coastal erosion allegedly caused by global warming, observing that "the allocation of fault—and cost—of global warming is a matter appropriately left for determination by the executive or legislative branch." *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 877 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012).

And in yet another case, the district court dismissed public nuisance claims against automakers, recognizing "the complexity of the initial global warming policy determinations that must be made by the elected branches prior to the proper adjudication of Plaintiff's federal common law nuisance claim[,]" and the "lack of judicially discoverable or manageable standards by which to properly adjudicate Plaintiff's federal

common law global warning nuisance claim." *See California v. Gen. Motors Corp.*, No. C06-05755, 2007 WL 2726871 at *6, *16 (N.D. Cal. Sept. 17, 2007).

More broadly, several Circuits and other federal courts have recognized that the political question doctrine excludes certain cases from the courts' authority, despite the presentation of familiar tort claims. *See, e.g., Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petrol.*, 577 F.2d 1196, 1203 (5th Cir. 1978) (concluding tortious conversion claims were barred by the political question doctrine); *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1282–83 (11th Cir. 2009) (finding tort claims arising from automobile accident were barred by the political question doctrine); *Antolok v. United States*, 873 F.2d 369, 383–84 (D.C. Cir. 1989) (noting that "[i]t is the political nature of the [issue], not the tort nature of the individual claims, that bars our review and in which the Judiciary has no expertise.").

In *Chaser Shipping Corp. v. United States*, 649 F. Supp. 736, 738–740 (S.D.N.Y. 1986) *aff'd*, 819 F.2d 1129 (2d Cir. 1987), the court applied the political question doctrine to reject claims for damages to a foreign

vessel that struck a mine allegedly placed by the United States in a Nicaraguan harbor. There, the court observed that "[e]ven though awarding tort damages is a traditional function for the judiciary, it is apparent that there is a clear lack of judicially discoverable and manageable standards for arriving at such an award." *Id.* at 738. Ultimately, the court "avoid[ed] becoming embroiled in sensitive foreign policy matters . . . [by] declin[ing] to interpose its own will above the will of the President or the Congress" where adjudication of plaintiffs' claims would have "force[d] the Court to resolve sensitive issues involving the foreign policy conduct[.]" *Id.* at 739. This Court affirmed without issuing an opinion. *Chaser Shipping Corp. v. United States*, 819 F.2d 1129 (2d Cir. 1987).

In contrast, the City's citation to *Comer v. Murphy Oil USA*, 585 F.3d 855, 875, 879 (5th Cir. 2009), *vacated for en banc review*, 598 F.3d 208 (5th Cir. 2010) (*en banc*), *appeal dismissed for failure of quorum*, 607 F.3d 1049 (5th Cir. 2010) (*en banc*) to argue against political-question dismissal falls short of the mark. Even assuming *Comer* is still valid law post vacatur, it focused solely on whether the issue before it was textually committed by the Constitution or other federal law to another branch of the government. 585 F.3d at 875–76. It largely ignored the

other factors enumerated in *Baker*, and in particular failed to address in any meaningful way whether questions of climate-change policy could be adjudicated with "judicially discoverable and manageable standards," or whether they required "an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217.

In sum, substantial authority establishes that merely framing one's policy-making claim in traditional-sounding labels like "public nuisance" and "tort" is insufficient to avoid political question scrutiny. The Court must undertake the critical analysis whether the claim *actually* seeks application of judicially manageable standards or whether it will inevitably embroil the judiciary in policymaking for which it is institutionally incompetent.

B. The City's claims lack judicially discoverable and manageable standards, and they require non-judicial policy determinations

The City has asked the Court to resolve problems of global climate change without identifying any judicially enforceable common law "nuisance" standards or any practical limitation on this exercise of judicial policymaking. Such claims lack "judicially discoverable and manageable standards," *Baker*, 369 U.S. at 217, and are instead governed by "policy

determination[s] of a kind clearly for nonjudicial discretion." *Id.*; *see also Kivalina*, 663 F. Supp. 2d at 874–77.

To determine liability, a court would need to conclude that the City has a "right" to the climate—in all of its infinite variations—as it stood at some unspecified time in the past, then find not only that this idealized climate has changed, but that Defendants caused that change through "unreasonable" action that deprived the City of its right to this idealized climate. Restatement (Second) of Torts § 821B (1979). And, as a remedy, it would need to impose a regulatory scheme on fossil fuel emissions already subjected to a comprehensive state-federal regulatory scheme by way of balancing the gravity of harm alleged by the City against the utility of each Defendant's conduct. See Phillip Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. Rev. 663, 668–70, 671–73 (2001). Such decisions have no principled or reasoned standards.

The City contends that its claims do "not hinge on a finding that those activities themselves were unreasonable or violated any obligation other than the obligation to pay compensation." App. Br. 19. But it is highly doubtful that New York public nuisance law authorizes courts to

"reallocate the costs imposed by lawful commercial activity," *id.*, "without requiring courts to judge the social utility of a defendant's commercial activity or regulate its conduct." App. Br. 21. A public nuisance claim traditionally requires a showing that the defendant "*unreasonabl[]y]* interfere[d] with a right common to the general public," such as by demonstrating that the defendant's conduct was "proscribed" by law. Restatement (Second) of Torts § 821B (1979). Defendants' alleged conduct at issue here is not only lawful and socially useful, but has been promoted and encouraged by both state and federal governments, including New York itself. *See* N.Y. Envtl. Conserv. Law § 23-0301; N.Y. Comp. Codes R. & Regs. Tit. 6 § 550.1; *see also* 42 U.S.C. § 13401.

Regardless, the political question doctrine bars the City's claims. Under the City's own theory, its claims not only would require the Court to calculate the total costs to New York of global climate change—itself an immensely difficult task—but would also require the Court to allocate those costs across the innumerable entities—such as producers and emitters of fossil fuels—it finds responsible. The City's harms are allegedly caused by global climate change that is itself the result of the actions of millions of individuals. Unlike distributing the cost of remedying

the harm caused by pollution emitted by a single factory in an ordinary nuisance case, distributing the costs the City alleges across all of the individuals potentially responsible is an irreducibly *political* task that is not fit for judicial resolution.

Federal judges are not in a position to discern, as a matter of common law, the proper regulatory balance. There should be no doubt that adjudicating these claims would require a complex "initial policy determination" that is more appropriately addressed by other branches of government. *Baker*, 369 U.S. at 217. The EPA reaffirmed this point long ago when it observed that "[t]he issue of global climate change . . . has been discussed extensively during the last three Presidential campaigns; it is the subject of debate and negotiation in several international bodies; and numerous bills have been introduced in Congress over the last 15 years to address the issue." *Control of Emissions from New Highway Vehicles and Engines*, Notice of Denial of Pet. for Rulemaking, 68 Fed. Reg. 52922, 52928 (Sept. 8, 2003). Furthermore, EPA observed, "[u]navoidably, climate change raises important foreign policy issues, and it is the President's prerogative to address them." *Id.* at 52931.

For these reasons, "[v]irtually every sector of the U.S. economy is either directly or indirectly a source of [greenhouse gas] emissions, and the countries of the world are involved in scientific, technical, and political-level discussions about climate change." *Id.* at 52928. Federal courts face immutable practical limits in terms of gathering information about complex public policy issues and predicting long-term consequences that might flow from judicial decisions. And critically, federal courts lack political accountability for decisions based on something other than neutral principles.

The City contends that foreign-policy considerations do not displace or preempt City's claims, citing *American Insurance Association, v. Garamendi*, 539 U.S. 396, 421 (2003) and *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372–73 (2000). However, unlike the displacement and preemption analysis involved in these cases, direct conflict is not required to find that foreign-policy decisions bar judicial determination of the issue under the political question doctrine. Instead, the relevant questions are whether (1) there is "a lack of judicially discoverable and manageable standards for resolving it," or the issue (2) would require "an initial policy determination of a kind clearly for non-

judicial discretion." *Baker*, 369 U.S. at 217; *Zivotofsky*, 566 U.S. at 202 (citing *Baker*, 369 U.S. at 217). Because there are no judicially enforceable common law standards to apply to the City's claims, and because the City's claims would require the judiciary to make an initial policy determination as to whether the prospect of global climate change makes it "unreasonable" for energy companies to extract and produce fossil fuels, the issues presented implicate both prongs of the political question doctrine. The City's claims are thus non-justiciable.

II. The City's Claims Violate the Commerce Clause

Though the Commerce Clause typically operates as a restraint on laws adopted by state legislatures, it also limits state common-law claims that apply to or directly control wholly out-of-state conduct. *West v. Broderick & Bascom Rope Co.*, 197 N.W.2d 202, 214 (Iowa 1972). *Cf. The Florida Star v. B.J.F.*, 491 U.S. 524, 532 (1989); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 57 (1988) (both holding that the First Amendment applies to common law restrictions as well as statutory restrictions). At a minimum, the Commerce Clause precludes (1) application of state law to "commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the

State," and (2) state laws that have the "practical effect" of "directly control[ling] commerce occurring wholly outside the boundaries of a State." *Healy v. Beer Institute*, 491 U.S. 324, 335–37 (1989) (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 642–43 (1982) (plurality opinion)).

Courts evaluating Commerce Clause challenges must consider "what effect would arise if not one, but many or every, State adopted similar [laws]," *id.* at 336, because the purpose of the Commerce Clause is to prevent States from "arbitrarily . . . exalt the public policy of one state over that of another," *Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660, 667–68 (7th Cir. 2010); *see also North Dakota v. Heydinger*, 825 F.3d 912, 922 (8th Cir. 2016) (invalidating under the Commerce Clause a Minnesota law that prohibited the importation of electricity generated by a "new large energy facility" because the law's "practical effect" was to impose Minnesota's "policy on neighboring States by preventing [utilities] from adding capacity from prohibited sources anywhere in the grid"). Here, the City's theory of damages attempts to hold Defendants liable for wholly out-of-state conduct, including conduct undertaken by entirely separate entities. And even if the City restricted its damages theory only to Defendants' in-state conduct, the "practical effect" of the

claims would be to regulate global conduct "occurring wholly outside the boundaries of" New York State. *Healy*, 491 U.S. at 336.

A. The City is seeking damages for global conduct

Here, the City's requested remedy requires Defendants to pay to abate *all* of the effects of climate change—which was, according to the City itself, originally caused by activity that largely occurred far outside the boundaries of New York. The City's requested remedy therefore goes far beyond damages caused by in-state conduct, and its claims thus apply state law to "commerce that takes place wholly outside of the State's borders." *Healy*, 491 U.S. at 336.

The City raises claims of trespass, public nuisance, and private nuisance against Defendants. App. Br. 4. As compensation, the City seeks damages for costs already incurred, costs it is currently incurring, and its future costs resulting from the effects of climate change. ECF No. 80, First Amended Compl. at 73–74. Though the total amount is unspecified, it reaches into the billions of dollars. ECF No. 80, First Amended Compl. at ¶ 119 ("The City . . . launched a $20 billion-plus multilayered investment program in climate resiliency across all five boroughs. These first steps of the City's resiliency effort will take many years to complete,

and include constructing levees and seawalls, elevating City facilities and streets, waterproofing and hardening City infrastructure, and modifying or reconstructing sewers and stormwater infrastructure to handle additional stormwater and adapt to interference with outfalls from sea level rise.").

As the City acknowledges, climate change and the consequences thereof are the result of *global* conduct. App. Br. 63 ("The fact that the harm here arises *through the combined effects of Defendants' products when used both domestically and abroad* is simply a product of the fact that local environmental harms are caused by conduct affecting the global atmosphere.") (emphasis added). Driving a vehicle, using electricity, eating beef, or simply breathing all directly or indirectly contribute to global warming. Even accepting, *arguendo*, the City's theory that liability can be extended up the causal chain to the production, promotion, and sale of fossil fuel products, these upstream activities occur all around the world. And here, the City is seeking to hold Defendants liable for *all* of the City's costs allegedly caused by climate change. That is, the City seeks to hold Defendants liable for *all* the production, promotion, and sale activities that allegedly cause greenhouse gas emissions around

the world—the City does not even limit their theory to just those activities attributable to *Defendants'* conduct, much less Defendants' *in-state* conduct.

The City therefore requests compensation for conduct which occurred wholly outside New York's state boundaries. This regulation of extraterritorial commerce violates the Commerce Clause, and is thus unconstitutional. *Healy*, 491 U.S. at 335–37; ECF No. 153, Opinion and Order at 20, n.2 ("[T]he City's claims pertain to 'worldwide' greenhouse gas emissions, not only those that originate in the United States.").

What is more, the City does not even attempt to distinguish between harm derived from in-state conduct and harm derived from conduct occurring around the globe. ECF No. 80, First Amended Compl. at 73–74. All attempts to quantify Defendants' contribution to climate change necessarily focus on *emissions* and not in-state production, promotion, and sale of fossil fuels. App. Br. 4–5 ("Defendants are the five largest, investor-owned producers of fossil fuels in the world, *as measured by the cumulative carbon and methane pollution* generated from the

use of their fossil fuels.") (emphasis added); App. Br. 5 ("They are collectively responsible . . . for over 11% of all the carbon and methane pollution from industrial sources since the Industrial Revolution.").

Although the City makes a vague attempt to quantify Defendants' contribution *of emissions*, it does not attempt to tie any emissions to Defendants' in-state conduct. To do so, the City would need to show the percentage of emissions attributable to Defendants' production, promotion, and sale of fossil fuels on a global scale; it would then need to take the global emissions attributable to Defendants and calculate the percentage of those emissions that are purportedly derived from conduct occurring *in the State of New York*. The City has not even attempted this calculation. Indeed, it has admitted it is impossible to do so. ECF No. 80, First Amended Compl. at 41 ("Greenhouse gas molecules cannot be traced to their source, and greenhouse gases quickly diffuse and comingle in the atmosphere."). Yet, the City insists that producing, promoting, and selling fossil fuel products in New York is sufficient to hold Defendants liable for the *entire* cost of climate change abatement. The Commerce Clause strictly forbids such regulatory overreach: The City's

regulation of this out-of-state commercial activity is wholly unconstitutional. *Healy*, 491 U.S. at 335–37.

B. Even if the City were only seeking damages for in-state conduct, the alleged harm is caused by global conduct

It is easy to see why the City frames its allegations in terms of Defendants' production, promotion, and sale of fossil fuels. The City alleges that greenhouse gas *emissions* are directly responsible for the effects of climate change, ECF No. 80, First Amended Compl. at 4, but the Supreme Court has already rejected common-law climate-change theories against emitters. *See American Electric Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011) (*AEP*) ("We hold that the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil fuel fired power plants."). The City seeks to evade the reach of *AEP* by instead looking upstream, arguing that emissions are caused by the production, promotion, and sale of fossil-fuel products. But this theory is foreclosed by the Commerce Clause, and for that reason alone the City's claims should be dismissed.

Even if the City limited its requested relief to the small fraction of damages allegedly caused by in-state production, promotion, and sale of

fossil-fuel products, the City's claims would still violate the Commerce Clause because the harms are caused only when in-state conduct *combines with wholly out-of-state conduct*. App. Br. 63. It is not enough that Defendants produce, promote, and sell fossil fuel products within the State of New York; by itself, this in-state commerce does not cause the cause the harms the City alleges. Under the City's theory, *out-of-state emissions* are the direct cause of its harms. Its attempt to regulate these out-of-state *emissions* by imposing abatement requirements on fossil-fuel *producers* violates the Commerce Clause.

In an attempt to deflect the Commerce Clause problems with its case, the City relies on *VIZIO, Inc. v. Klee*, 886 F.3d 249, 255–57 (2d Cir. 2018), where this Court permitted Connecticut to require appliance manufacturers to pay an "e-waste" fee to private recycling facilities based on each manufacturer's share of the national market. Critically, however, Connecticut's law sought to redress a harm—the increased cost of recycling electronics—directly caused by conduct occurring *within* the State of Connecticut. *Id.* at 252. Here, the harm the City is seeking to redress—*i.e.*, the costs of remedying the effects of climate change—are caused by *global* conduct, namely, emissions occurring around the world.

It would be as if Connecticut imposed a fee for recycling electronics in other States because that action ultimately caused some impact on the environment in Connecticut. Such regulatory action seeks to control wholly out-of-state conduct in violation of the Commerce Clause.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Respectfully submitted,

/s/ Thomas M. Fisher
Thomas M. Fisher
Solicitor General

Office of the Attorney General
302 W. Washington Street
Indianapolis, IN 46204
(317) 924-3005
Tom.Fisher@atg.in.gov
*Counsel of Record

CURTIS T. HILL, JR.
Attorney General of Indiana
THOMAS M. FISHER*
Solicitor General
KIAN J. HUDSON
Deputy Solicitor General

Counsel for Amici *States*

ADDITIONAL COUNSEL

Counsel for Amici *States*

STEVE MARSHALL
Attorney General
State of Alabama

KEVIN G. CLARKSON
Attorney General
State of Alaska

LESLIE RUTLEDGE
Attorney General
State of Arkansas

CHRISTOPHER M. CARR
Attorney General
State of Georgia

DEREK SCHMIDT
Attorney General
State of Kansas

JEFF LANDRY
Attorney General
State of Louisiana

ERIC S. SCHMITT
Attorney General
State of Missouri

TIM FOX
Attorney General
State of Montana

DOUG PETERSON
Attorney General
State of Nebraska

MIKE HUNTER
Attorney General
State of Oklahoma

ALAN WILSON
Attorney General
State of South Carolina

KEN PAXTON
Attorney General
State of Texas

SEAN D. REYES
Attorney General
State of Utah

PATRICK J. MORRISEY
Attorney General
State of West Virginia

CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) this document contains 4,521 words.

Dated: February 14, 2019

/s/ Thomas M. Fisher
Thomas M. Fisher
Solicitor General

CERTIFICATE OF SERVICE

I certify that on February 14, 2019 I caused service of the foregoing brief to be made by electronic filing with the Clerk of the Court using the CM/ECF system, which will send a Notice of Electronic Filing to all parties with an email address of record, who have appeared and consent to electronic service in this action.

Dated: February 14, 2019

/s/ Thomas M. Fisher
Thomas M. Fisher
Solicitor General