No. 18-16663

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CITY OF OAKLAND, *et al.*

Plaintiffs-Appellants,

v.

BP p.l.c., *et al.*

Defendants-Appellees,

On Appeal from the United States District Court
for the Northern District of California
Nos. 17-cv-06011, 17-cv-06012 (The Honorable William H. Alsup)

BRIEF OF FORMER U.S. GOVERNMENT OFFICIALS AS *AMICI CURIAE* SUPPORTING REVERSAL OF THE DISTRICT COURT'S DECISION

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INTEREST OF *AMICI CURIAE*[*]

Amici curiae Susan Biniaz, Antony Blinken, Carol M. Browner, William J. Burns, Avril D. Haines, John F. Kerry, Gina McCarthy, Jonathan Pershing, John Podesta, Susan E. Rice, Wendy R. Sherman, and Todd D. Stern are former U.S. diplomats or United States government officials who have worked under presidents from both major political parties on diplomatic missions to mitigate the dangers of climate change. The Appendix lists their qualifications.

Amici take no position on the merits of this suit. They submit this brief to make one point: assuming that the allegations in the complaint are true, as this Court must when reviewing a dismissal, the district court erred in invoking "diplomatic concerns" to dismiss Plaintiffs' claims. Based on their decades of experience, *amici* explain that the district court based its finding on a factual misunderstanding of the realities of U.S. climate diplomacy. *Amici* see no reason why this lawsuit, properly managed by a trial court, could not prove and redress tortious deception and corporate misbehavior without interfering with or disrupting United States foreign policy and diplomacy.

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[*] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), counsel for *amici* certify that no party's counsel authored the brief in whole or in part and that no one other than *amici* and their counsel contributed money that was intended to fund the preparation or submission of this brief. The Defendants-Appellees did not object to the filing of this brief and the Plaintiff-Appellant has provided blanket consent.

SUMMARY OF ARGUMENT

San Francisco and Oakland ("Plaintiffs" or "Cities") brought public nuisance claims against five fossil fuel companies ("Defendants") under California statutory tort law to address local injuries stemming from Defendants' deceptive promotion and marketing of fossil fuels. The Cities seek redress through the establishment of a geographically limited abatement fund. Plaintiffs' complaints make the following allegations, which on a motion to dismiss must be accepted as true:

- The 1990 First Assessment Report of the Intergovernmental Panel on Climate Change ("IPCC"), the United Nations' assessment body for climate change science, reported a global scientific consensus that climate change is dangerous and caused by human activities.[1]
- While aware of the factual accuracy of this consensus,[2] Defendants worked

[1] Excerpts of Record ("ER") 305 ¶ 45; ER 372 ¶ 45.

[2] In other litigation, the United States has admitted that climate change is happening, that climate change is caused by anthropogenic greenhouse gas emissions, and that climate change causes sea-level rise that may harm coastal cities like San Francisco and Oakland. Federal Defendants' Answer to First Amended Complaint for Declaratory and Injunctive Relief ¶ 8, *Juliana v. United States*, No. 6:15-cv-01517-TC (D. Or. Jan. 13, 2017), ECF No. 7 ("Federal Defendants aver that current and projected concentrations of six well-mixed GHGs, which include CO_2, constitute a threat to public health and welfare.").

systematically to falsely undercut the IPCC's findings[3] and engaged in a decades-long misinformation campaign to deceive the public about both the causes of, and effects of fossil fuels on, climate change.[4]

- Protecting the Cities and replacing damaged property will cost billions of dollars.[5]

Amici take no position on the merits of the Cities' claims. *Amici* agree with

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[3] ER 100 ¶ 111; ER 318 ¶ 72; ER 385 ¶ 72 ("Exxon's promotion of fossil fuels also entailed the funding of denialist groups that attacked well-respected scientists Dr. Benjamin Santer and Dr. Michael Mann, maligning their characters and seeking to discredit their scientific conclusions with media attacks and bogus studies in order to undermine the IPCC's 1995 and 2001 conclusion that human-driven global warming is now occurring."); ER 318 ¶ 71; ER 385 ¶ 71 ("During the early- to mid-1990s, Exxon directed . . . funding to Dr. Fred Seitz, Dr. Fred Singer, and/or Seitz and Singer's Science and Environmental Policy Project ("SEPP") in order to launch repeated attacks on . . . IPCC conclusions . . . .").

[4] ER 98 ¶ 103; ER 167 ¶ 103; ER 439 ¶ 62 ("Defendants promoted massive use of fossil fuels by misleading the public about global warming by emphasizing the uncertainties of climate science and through the use of paid denialist groups and individuals . . . ."); ER 98 ¶ 104; ER 168 ¶ 103 ("Defendants have engaged in advertising and communications campaigns intended to promote their fossil fuel products by downplaying the harms and risks of global warming. Initially, the campaign tried to show that global warming was not occurring. More recently, the campaign has sought to minimize the risks and harms from global warming. The campaign's purpose and effect has been to help Defendants continue to produce fossil fuels and sell their products on a massive scale.").

[5] ER 177 ¶ 130 ("Projected sea level rise in Oakland threatens property with a total replacement cost of between $22 and $38 billion."); ER 180 ¶ 136 ("Building infrastructure to protect Oakland and its residents, will, upon information and belief, cost billions of dollars.").

the district court's finding that "the vast scientific consensus" has established "that the combustion of fossil fuels has materially increased atmospheric carbon dioxide levels, which in turn has increased the median temperature of the planet and accelerated sea level rise."[6] *Amici* further agree with the district court that "[e]veryone has contributed to the problem of global warming and everyone will suffer the consequences—the classic scenario for a legislative or international solution."[7] But *amici* disagree with the lower court's suggestion that pursuing such an international or legislative solution *necessarily and absolutely precludes judicial rulings to the same effect.* Legislative and international solutions routinely expect and depend on the active role of judicial actions to help achieve their goals.

The court below gave two reasons why it deemed dismissal necessary to

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[6] *City of Oakland v. BP p.l.c.*, 325 F. Supp. 3d 1017, 1026 (N.D. Cal. 2018). *Amici* further note that, notwithstanding unsupported factual denials by members of the current administration, this scientific consensus is supported by all credible scientific bodies, including the federal U.S. Global Change Research Program's recent *Fourth National Climate Assessment*, a comprehensive report about the urgency of mitigating the drivers of climate change and adapting to its impacts. U.S. Global Change Research Program, *Climate Science Special Report: Fourth National Climate Assessment, Volume I*, at 14 (2017) ("Many lines of evidence demonstrate it is *extremely likely* that human influence has been the dominant cause of the observed warming since the mid-20th century. Over the last century, there are no convincing alternative explanations supported by the extent of the observational evidence . . . .").

[7] *City of Oakland*, 325 F. Supp. 3d at 1026.

avoid "impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs."[8] First, "[g]lobal warming is already the subject of international agreements" and "[t]he United States is also engaged in active discussions with other countries as to whether and how climate change should be addressed through a coordinated framework."[9] Second, a verdict for the Cities would "undoubtedly implicate the interests of countless governments, both foreign and domestic," many of which "actively support the very activities targeted by [the Cities'] claims."[10]

Amici file this brief to explain why the district court's overstated foreign affairs concerns do not require dismissal at this very early stage of litigation.[11] Because the United States' international climate negotiations involve neither corporations nor corporate civil liability, there is no reason to believe that ongoing diplomatic discussions or U.S. foreign policy regarding climate change would be disrupted by well-managed state adjudication of corporate liability for deceptive conduct. Also, the United States has no foreign policy interest in immunizing corporate deception, misconduct, and concealment of the kind alleged by the

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[8] *Id.* at 1025-26.

[9] *Id.* at 1026 (citing Amicus Curiae Br. of United States of America 18, ECF No. 245).

[10] *Id.* (citing Amicus Curiae Br. of United States of America 18, ECF No. 245).

[11] *Id.* at 1029.

Plaintiffs from judicial review. Furthermore, well-managed state tort lawsuits are not likely to provoke an international backlash, because the international community supports subnational abatement efforts and because a series of civil procedural hurdles would need to be cleared before any foreign company might be held liable. Contrary to the district court's supposition that "[n]uisance suits in various United States judicial districts regarding conduct worldwide . . . could interfere with reaching a worldwide consensus,"[12] this lawsuit is consistent with the emerging worldwide consensus that legal action is needed on climate change, and that it is wise to allow national governments to respond to climate change in their own variegated ways.

ARGUMENT

Amici do not express any view on whether any of Plaintiffs' allegations can eventually be proved. They note only that there is no basis for suggesting that either the process of proving those allegations or the judicial relief requested would disrupt U.S. climate diplomacy or foreign policy. Based on long experience, *amici* believe that a state court finding of corporate liability for deceptive conduct will not disrupt the United States' international climate negotiations, which involve neither corporations nor corporate civil liability. Also, there is no reason to believe

[12] *Id.* at 1026.

that a state court adjudicating or granting liability for corporate deception would prevent the United States from speaking with "one voice" on the world stage, because no principle of U.S. foreign policy requires immunizing corporations for deceptive conduct. If anything, the international community supports such subnational abatement efforts. For these reasons, there is also no basis for invoking either foreign affairs preemption[13] or "judicial caution"[14] as a basis for dismissal at this early stage.

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[13] Foreign affairs preemption does not apply because the Cities' claims, based in California common law, fall within an area of "traditional state responsibility" under *American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003). *See generally* Amicus Br. of Conflict of Laws and Foreign Relations Scholars.

[14] The district court improperly imported unspecified concerns about "judicial caution" from other doctrinal settings. *City of Oakland*, 325 F. Supp. 3d at 1025 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004)). But the concept of judicial caution does not require dismissal of a suit that concerns domestic torts and does not genuinely interfere with U.S. foreign policy. Nor does "judicial caution," standing alone, authorize federal courts to modify or limit causes of action created under state law. When the Supreme Court in *Sosa* counseled "great caution," citing the risk of "impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs," the Court was addressing a concern that "a foreign government or its agent" had violated international law, not that a corporation had violated state tort law. 542 U.S. at 727. On their face, the Cities' complaints only ask the Defendants to abate injuries allegedly caused by deceptive activities, not to regulate emissions levels either domestically or internationally.

I. Corporate liability for deceptive conduct will not disrupt the United States' international climate negotiations, which involve neither corporations nor corporate civil liability.

Plaintiffs claim that Defendants contributed to a public nuisance by promoting and marketing fossil fuels while engaging in a decades-long misinformation campaign about the causes and effects of climate change. Their suit seeks an abatement fund to mitigate harms in the Cities caused by the Defendants' deliberate deception and nondisclosure.

Payments from private companies to subnational governments to abate climate-related injuries are not addressed by the two agreements at the heart of international climate diplomacy: the United Nations Framework Convention on Climate Change ("UNFCCC") and the recent Paris Agreement. In *amici's* experience, these agreements (which some *amici* helped to negotiate) were designed expressly to apply only to countries and regional economic integration organizations (such as the European Union).

Neither the UNFCCC nor the Paris Agreement subjects private companies to climate-related obligations. Although the Agreement includes provisions relating

to the payment[15] and mobilization[16] of financial contributions, these provisions are limited to intergovernmental assistance that flows either directly between countries or through intermediary financial institutions like the World Bank. Furthermore, these provisions funnel assistance almost exclusively from developed to developing countries and thus have nothing to do with the claims in this lawsuit, which seeks a transfer of funds from a private company to subnational governments located in the United States.

There is thus no basis to conclude that a judgment here would affect ongoing intergovernmental climate negotiations, which do not address issues of corporate liability. In our experience, given the intergovernmental nature of multilateral discussions, countries involved in international climate negotiations over the last two decades have addressed neither questions of legal blame with regard to

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[15] *E.g.*, Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 13, 2015, art. 9, *in* Rep. of the Conference of the Parties on the Twenty-First Session, U.N. Doc. FCCC/CP/2015/10/Add.1, annex (2016) [hereinafter Paris Agreement] ("Developed country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention.").

[16] *See* Joint Statement, 18 Donor States Determined To Commit 100 Billions for Climate Finance (Sept. 7, 2015), https://unfccc.int/news/18-industrial-states-release-climate-finance-statement (defining "public finance" to include "de-risking instruments" such as loan guarantees for the private sector).

corporations nor the narrower issue of whether corporations should be shielded from liability for misleading practices.

Far from addressing corporate liability, the Paris Agreement does not even address intergovernmental liability. In fact, those *amici* who took part in negotiating the Paris Agreement's provisions specifically took care to ensure that it was clear that Article 8 was agnostic regarding the issue of legal blame. Thus, Article 8, addressing "loss and damage," explicitly "does not involve or provide a basis for any liability or compensation."[17] And, although the United States would have opposed intergovernmental liability provisions that would have established *America's* liability to other governments based on historical emissions, this lawsuit alleging corporate liability for harms to American subnational governments for deceptive conduct raises an entirely different issue, because any payments ordered would flow to, not from, the United States.[18]

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[17] Rep. of the Conference of the Parties on the Twenty-First Session ¶ 52, U.N. Doc. FCCC/CP/2015/10/Add.1 (Jan. 29, 2016) [hereinafter Decision Adopting Paris Agreement].

[18] For this reason, the government was incorrect to rely on a quotation from *amicus* Special Envoy for Climate Change Todd Stern regarding the United States' opposition to intergovernmental "compensation and liability" in other litigation. *See* Brief of the United States as Amicus Curiae at 16, *City of New York v. BP p.l.c.*, No. 18-2188 (2d Cir. Mar. 7, 2019). The government misleadingly equated *amicus* Stern's discussion of the United States' traditional opposition to its *own* liability with a claim that U.S. government foreign policy interests also oppose the

Of course, there are well-established international standards for dealing with fraudulent and deceptive commercial practices. For example, the Organisation for Economic Co-operation and Development's ("OECD") guidelines expect member countries (including the United States) to have domestic laws that effectively address such conduct.[19] Neither past nor ongoing international climate negotiations have suggested that countries should depart from these standards in the climate change context. For these reasons, there is no reason to believe that domestic state law tort actions would disrupt ongoing U.S. climate discussions.

Finally, there is nothing about state tort lawsuits that indicates that they will necessarily interfere even with federal negotiations on closely related subject matters. During the Obama Administration, for example, the United States participated in the negotiation and signature of the Arms Trade Treaty, an international treaty that regulates the international trade in conventional arms and seeks to prevent and eradicate illicit trade and diversion of conventional arms by establishing international standards governing arms transfers. Yet there was never

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imposition of all corporate liability whatsoever, including in judgments rendered after fully tried state tort actions.

[19] *See* OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders 11 (2003) (calling for "[e]ffective mechanisms to stop businesses and individuals engaged in fraudulent and deceptive commercial practices" and "mechanisms that provide redress").

any basis for suggesting that those ongoing treaty negotiations or the final treaty occupied the field such that United States courts needed to dismiss lawsuits against gun manufacturers in state courts.[20]

In any event, international negotiations on climate change are substantially grounded in the work of the IPCC,[21] the very international body that Defendants allegedly sought to discredit. If anything has disrupted America's international climate negotiations, it has not been state tort lawsuits, but rather Defendants' allegedly deceptive attacks on the scientific consensus that the United States and all other Parties to the Paris Agreement have endorsed.[22]

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[20] *See, e.g.*, *Soto v. Bushmaster Firearms Int'l*, Nos. SC-19832, SC-19833, 2019 WL 1187339 (Conn. Mar. 19, 2019) (allowing lawsuit for wrongful marketing and advertising of AR-15 assault rifle to proceed). Notably, Congress in 2006 passed legislation that immunized firearms manufacturers from most—but not all—state tort claims, illustrating how Congress can pass legislation to limit state tort actions when it deems necessary. *See* Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901-03 (2018) (prohibiting "qualified civil liability action[s]," defined as lawsuits against gun manufacturers or sellers for the criminal misuse of their products, but establishing an exception for negligent entrustment tort claims).

[21] *E.g.*, Decision Adopting Paris Agreement ¶ 21 (inviting the IPCC to publish a special report on the impacts of planetary warming by 1.5 degrees Celsius); Paris Agreement art. 13 (requiring Parties to inventory greenhouse gas emissions and removals using methodologies accepted by the IPCC).

[22] *See supra* note 3 and accompanying text.

II. Adjudicating corporate deception claims would not prevent the United States from speaking with "one voice" on the world stage.

U.S. foreign policy does not shield corporations that deceive consumers about the effects of their products. In fact, the Cities' lawsuit to protect local property and abate a public nuisance addresses a traditional state-law responsibility that has never been deemed preempted by foreign policy concerns. Such concerns no more require dismissal here than in suits alleging that tobacco or lead paint manufacturers deceived the public about the poisonous effects of their products.[23]

When state law addresses a traditional state responsibility, it is only preempted if it conflicts with either a comprehensive treaty or an explicit federal policy.[24] The wisdom of this rule is clear: if no actual conflict were necessary, the

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[23] *See People v. ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d 499, 534-58 (Cal. Ct. App. 2017), *reh'g denied*, *cert. denied by Cal. Sup. Ct.*, No. S246102 (Cal. 2018), *cert. denied by U.S. Sup. Ct.*, 139 S. Ct. 377, 139 S. Ct. 378 (2018) (lead paint manufacturers created a public nuisance by concealing the poisonous effects of lead paint).

[24] *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420 n.11 (2003) ("Where . . . a State has acted within what Justice Harlan called its 'traditional competence,' but in a way that affects foreign relations, it might make good sense [for the doctrine of foreign affairs preemption] to require a conflict, of a clarity or substantiality that would vary with the strength or the traditional importance of the state concern asserted." (quoting *Zschernig v. Miller*, 389 U.S. 429, 459 (1968) (Harlan, J., concurring))); *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1071–72 (9th Cir. 2012) ("[A] state law must yield when it conflicts with an express federal foreign policy . . . [and] in the absence of any express federal policy, a state law

proliferation of international agreements addressing traditionally domestic concerns, from labor to anti-discrimination, would obliterate states' historic police powers.[25] Yet no aspect of U.S. foreign policy seeks to exonerate companies for knowingly misleading consumers about the dangers of their products. In fact, federal policy expressly *prohibits* companies from misleading the public about their products,[26] as demonstrated by the Trump Administration's recent

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still may be preempted under the foreign affairs doctrine if it intrudes on the field of foreign affairs without addressing a traditional state responsibility.").

[25] *See*, *e.g.*, North American Agreement on Labor Cooperation, Sept. 14, 1993, Can.-Mex.-U.S., 32 I.L.M. 1499; International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969).

[26] *E.g.*, Federal Trade Commission Act § 5(a), 15 U.S.C. § 45(a) (2018) ("Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."); Securities and Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (2018) ("It shall be unlawful for any person . . . by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe . . . ."); 15 U.S.C. § 717c-1 (2018) ("It shall be unlawful for any entity . . . to use or employ, in connection with the purchase or sale of natural gas . . . any manipulative or deceptive device or contrivance . . . in contravention of such rules and regulations as the Commission may prescribe . . . ."); 18 C.F.R. § 1c.1(a) (2018) ("It shall be unlawful for any entity . . . in connection with the . . . sale of natural gas . . . [t]o make any untrue statement . . . or to omit to state a material fact necessary in order to . . . not [be] misleading.").

renegotiation of the North American Free Trade Agreement.[27] Additionally, as explained earlier, the United States adheres to OECD guidelines that explicitly reinforce the idea that countries should use their domestic judicial systems to protect their citizens from misleading consumer practices.[28] Nor has the current administration made any statements implying corporate amnesty or immunity from lawsuits that could fairly be read to constitute federal policy with the "force of domestic law" required to preempt state or subnational action.[29]

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[27] United States-Mexico-Canada Agreement art. 21.4 (Sept. 30, 2018) (pending ratification), https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/21_Competition_Policy.pdf ("Each Party shall adopt or maintain national consumer protection laws or other laws or regulations that proscribe fraudulent and deceptive commercial activities, recognizing that the enforcement of those laws and regulations is in the public interest.").

[28] OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders (2003).

[29] *Medellin v. Texas*, 552 U.S. 491, 529 (2008). Even an explicitly presidentially directed "commitment to negotiate under certain conditions and according to certain principles" would not constitute a federal policy sufficient to displace contrary state law. *Cent. Valley Chrysler-Jeep, Inc. v. Goldstone*, 529 F. Supp. 2d 1151, 1186 (E.D. Cal. 2007); *see Garamendi*, 539 U.S. at 398, 420 (requiring a "clear conflict" between a state law and an executive agreement that is "fit to preempt state law"); *Zschernig*, 389 U.S. at 459 (Harlan, J. concurring) ("States may legislate in areas of their traditional competence . . . ."); *Cent. Valley Chrysler-Jeep, Inc.*, 529 F. Supp. 2d at 1186-87 ("In order to conflict or interfere with foreign policy within the meaning of *Zschernig* [and] *Garamendi* . . . the interference must be with a policy . . . [enacted in a] negotiated agreement, treaty, partnership or the like" and "not simply with the means of negotiating a policy.").

Finally, even if adjudicating tort liability for deceptive corporate conduct could disrupt America's international relationships or create an international backlash, it is entirely premature to reach that conclusion at this moment, based solely on the allegations in the Cities' complaints. The current administration's characterization of this issue before the district court was extremely vague and entirely conjectural.[30] It is thus too early, before the extent of the liability has been established and the positions of foreign governments have been clarified, to dismiss the case for such speculative reasons. Depending upon where this case ultimately lands, either the district court or the California state trial court will have ample later opportunity to evaluate these concerns—and dismiss the case if necessary—based on more complete information.

There are many reasons to believe that the international impact of this case and future cases, and therefore their potential to spark backlash, are exaggerated. Careful judges have successfully managed very expensive and diplomatically sensitive cases—like those that challenged deception by the tobacco industry[31] and

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[30] Amicus Curiae Br. of United States of America 19, ECF No. 245 ("If those governments view this judicial action as interference in their internal affairs, they could respond by seeking to prevent the imposition of these costs, by seeking payment of reciprocal costs, or by taking other action.").

[31] *See* Tobacco Master Settlement Agreement (1998), https://public healthlawcenter.org/sites/default/files/resources/master-settlement-agreement.pdf

sought recovery of Holocaust assets[32]—by using their broad discretion to craft equitable remedies.

Plaintiffs' legal theory centers on claims of corporate deception and not on the lawful sale of fossil fuels.[33] It was thus incorrect for the district court to suggest that defendants' alleged conduct was "lawful" wherever conducted.[34] Moreover, the availability of a remedy in California would not imply nationwide liability, as tort law is largely a matter of state law.[35] Finally, as always, this and future litigation remain subject to a suite of limiting principles of civil procedure, such as personal jurisdiction, *forum non conveniens*, foreign sovereign immunity, the act of state doctrine, equitable discretion, and practical limits on which assets may be

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(providing for payments from the tobacco industry of $9 billion per year in perpetuity and precluding future state and subnational litigation).

[32] *See* Swiss Bank Settlement Agreement (1999), http://www.swissbankclaims.com/Documents/Doc_9_Settlement.pdf (providing for $1.25 billion in payments from Swiss Banks to victims of Nazi persecution and looting, including for slave labor).

[33] ER 60 ¶ 6; ER 98-102 ¶¶ 103-116; ER 132 ¶ 6; ER 167-171 ¶¶ 103-116.

[34] *See City of Oakland*, 325 F. Supp. 3d at 1026.

[35] *Compare Santa Clara v. Atl. Richfield Co.*, 40 Cal. Rptr. 3d 313 (Cal. Ct. App. 2006) (recognizing the viability of public nuisance actions under California law for promotion of lead paint with knowledge of the hazard), *with In re Lead Paint Litig.*, 924 A.2d 484, 501 (N.J. 2007) (dismissing public nuisance for promotion of lead paint in part because New Jersey law requires continued "control of the nuisance").

recovered by Plaintiffs.

Based on our detailed knowledge of world leaders and foreign ministers engaged in climate diplomacy, we are aware of no current diplomatic protests criticizing or even addressing state tort litigation for corporate deception. To the contrary, the nearly two hundred parties to the Paris Agreement (including the United States[36]), do not oppose, but rather support, subnational abatement efforts.[37] If anything, any diplomatic backlash against the United States in recent years has been caused not by state court adjudication of civil liability for corporate deception, but rather by the current administration's efforts to walk away from the

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[36] This administration's June 2017 announcement disengaging from the Paris Agreement expressed a statement of future intent that did not legally disengage the United States from the Paris Agreement. Since the Paris Agreement entered into force on November 4, 2016, the earliest date that the United States can give a notice of withdrawal is November 4, 2019. A notice of withdrawal takes effect one year after it is submitted. Paris Agreement art. 28.1-2 ("At any time after three years from the date on which this Agreement has entered into force for a Party [for the United States, November 4, 2016], that Party may withdraw from this Agreement by giving written notification to the Depositary. . . . Any such withdrawal shall take effect upon expiry of one year from the date of receipt by the Depositary of the notification of withdrawal. . . .").

[37] Decision Adopting Paris Agreement ¶¶ 134-35 ("Welcom[ing] the efforts of all non-Party stakeholders to address and respond to climate change, including those of . . . cities and other subnational authorities . . . [and] [i]nvit[ing] the non-Party stakeholders . . . to scale up their efforts and support actions to . . . build resilience and decrease vulnerability to the adverse effects of climate change and demonstrate these efforts via the Non-State Actor Zone for Climate Action platform . . . .").

Paris Agreement.[38] Far from interfering with diplomacy, prudent adjudication of claims of corporate liability for deception might even enhance U.S. diplomatic efforts by reinforcing U.S. credibility with respect to the climate problem.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to reverse the district court's decision, insofar as it disallows the Cities' claims based upon concerns about interference with U.S. foreign policy at this stage in the litigation.

Dated: March 20, 2019

Respectfully submitted,

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[38] *E.g.*, Nadeem Muaddi & Sarah Chiplin, *World Leaders Accuse Trump of Turning His Back on the Planet*, CNN (June 1, 2017), https://edition.cnn.com/2017/06/01/world/trump-paris-agreement-world-reaction/index.html (aggregating critical statements from countries including Brazil, Canada, and Sweden); Somini Sengupta et al., *As Trump Exits Paris Agreement, Other Nations Are Defiant*, N.Y. Times (June 1, 2017), https://www.nytimes.com/2017/06/01/world/europe/climate-paris-agreement-trump-china.html (describing disapproval by the United Kingdom, France, Germany, Italy, and Belgium).

APPENDIX

LIST OF *AMICI CURIAE*[*]

Susan Biniaz served in the Legal Adviser's office at the State Department from 1984 to 2017, was Deputy Legal Adviser, and was the principal U.S. government lawyer on the climate change negotiations from 1989 through early 2017.

Antony Blinken served as Deputy Secretary of State from 2015 to 2017. He previously served as Deputy National Security Advisor to the President from 2013 to 2015.

Carol M. Browner served as Director of the White House Office of Energy and Climate Change Policy from 2009 to 2011 and previously served as Administrator of the Environmental Protection Agency from 1993 to 2001.

William J. Burns served as Deputy Secretary of State from 2011 to 2014. He previously served as Under Secretary of State for Political Affairs from 2008 to 2011, as U.S. Ambassador to Russia from 2005 to 2008, as Assistant Secretary of State for Near Eastern Affairs from 2001 to 2005, and as U.S. Ambassador to Jordan from 1998 to 2001.

Avril D. Haines served as Deputy National Security Advisor to the President from 2015 to 2017. From 2013 to 2015, she served as Deputy Director of the Central Intelligence Agency.

John F. Kerry served as Secretary of State from 2013 to 2017.

Gina McCarthy served as Administrator of the Environmental Protection Agency from 2013 to 2017.

Jonathan Pershing served as United States Special Envoy for Climate Change from 2016 to early 2017.

John Podesta served as Counselor to the President with respect to matters of climate change from 2014 to 2015 and White House Chief of Staff from 1998 to 2001.

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[*] Institutional Affiliations for identification purposes only.

Susan E. Rice served as U.S. Permanent Representative to the United Nations from 2009 to 2013 and as National Security Advisor to the President from 2013 to 2017.

Wendy R. Sherman served as Under Secretary of State for Political Affairs from 2011 to 2015.

Todd D. Stern served as United States Special Envoy for Climate Change from 2009 to 2016.

CERTIFICATE OF COMPLIANCE

This amicus brief complies with the type-volume limitation of Local Rule 29.1(c) because this brief contains 4,818 words, excluding the items excluded by the Fed. R. App. P. 32(f). This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Respectfully submitted,

/s/ *Dan Jackson*

CERTIFICATE OF SERVICE

I, Dan Jackson, hereby certify that on March 20, 2019, the foregoing document was filed and served through the CM/ECF system.

Respectfully submitted,

/s/ *Dan Jackson*