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10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 12 SAN FRANCISCO DIVISION

15 **CITY OF OAKLAND, a Municipal**
Corporation, and THE PEOPLE OF THE
 16 **STATE OF CALIFORNIA, acting by and**
through the Oakland City Attorney
 17 **BARBARA J. PARKER,**

18 Plaintiffs,

19 v.

20 **B.P., P.L.C., ET AL.,**

21 Defendants

First Filed Case: No. 3:17-cv-6011-WHA

Related Case: No. 3:17-cv-0612-WHA

STATES' AMICUS BRIEF IN SUPPORT
OF PLAINTIFFS' OPPOSITION TO
MOTION TO DISMISS

Date: May 24, 2018
 Time: 8:00 a.m.
 Dept: 12, 19th Floor
 Judge: Honorable William Alsup

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**CITY AND COUNTY OF SAN
FRANCISCO, a Municipal Corporation,
and THE PEOPLE OF THE STATE OF
CALIFORNIA, acting by and through the
San Francisco City Attorney, DENNIS J.
HERRERA,**

Plaintiffs,

v.

B.P., P.L.C., et al.,

Defendants

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INTRODUCTION

1
2 The States of California, New Jersey and Washington (“Amici States”) respectfully submit
3 this amicus brief in support of the City of Oakland’s and the City and County of San Francisco’s
4 (together, “Cities” or “Plaintiffs”) opposition to Defendants’ Motion to Dismiss and to respond to
5 arguments made in the amicus brief filed by the State of Indiana and other states (collectively
6 “Indiana”). ECF No. 224-1 (“Indiana Amicus”). Amici States have a longstanding and continuing
7 interest in the application of the common law of public nuisance, including to address harms from
8 climate change.

9 In this brief, Amici States focus on a subset of issues where our States are in a position to
10 offer a fuller picture of the case law and relevant statutes and regulations. First, we address
11 Defendants’ and Indiana’s argument that Plaintiffs’ complaints present a non-justiciable political
12 question. Most notably, their argument fails to consider persuasive precedent on this issue,
13 including the Second Circuit’s decision in *Connecticut v. American Electric Power*, 582 F.3d 309
14 (2nd Cir. 2009), reversed on other grounds, 564 U.S. 410 (2011), in which two of our States were
15 parties. Further, we respond to Indiana’s argument that Plaintiffs’ claims jeopardize our system of
16 cooperative federalism. In fact, Plaintiffs’ claims do not threaten the state climate programs
17 Indiana cites—several of which were adopted by our States. On the whole, Defendants’ and
18 Indiana’s political question arguments are overstated and should be rejected.

19 Second, Amici States respond to Defendants’ and Indiana’s invocation of state and federal
20 laws, including California law, in support of an argument that Defendants’ conduct was
21 authorized by law. Defendants and Indiana draw an incomplete picture, omitting significant state
22 and federal laws that ban or restrict fossil fuel extraction or seek to reduce demand for those
23 products. That more complete picture of the legal landscape, and a closer look at the laws they do
24 cite, demonstrates that Defendants’ and Indiana’s arguments fall well short of the legal standard
25 for this defense.

26 Third, Amici States discuss Defendants’ and Indiana’s attempts to reargue that the Clean
27 Air Act displaces Plaintiffs’ federal common law cause of action. Defendants’ and Indiana’s
28 briefs fail to add anything that the Court has not already considered and rejected in its Order

1 Denying Motions to Remand. ECF No. 134. What is new—an argument that other federal energy
2 policy laws displace federal common law—is unavailing.

3 Finally, we address the argument that Plaintiffs’ requested relief would constitute
4 extraterritorial regulation in violation of the dormant Commerce Clause or otherwise violate the
5 Constitution. The argument fails, in the first instance, because the dormant Commerce Clause
6 does not apply to federal common law claims adjudicated by a federal court. Nor do the remedies
7 sought by Plaintiffs, under either state or federal common law, constitute “extraterritorial
8 regulation” either on their face or in their impact.

9 In focusing on issues where we are in a position to assist the Court, this Amicus Brief does
10 not address several of the additional arguments raised by Defendants or Indiana. Our silence
11 should not be taken as agreement with those arguments. Rather, we urge the court to deny
12 Defendants’ motion to dismiss.

13 ARGUMENT

14 I. PLAINTIFFS’ CLAIMS ARE JUSTICIABLE

15 Ultimately, the Cities’ claims only require this court to adjudicate whether the Defendants
16 may be held liable under the common law of public nuisance for the effects of their conduct on
17 the City of Oakland and the City and County of San Francisco.¹ Such claims do not present a
18 non-justiciable political question. Defendants’ and Indiana’s arguments for non-justiciability of
19 the Cities’ complaints fail to consider persuasive, contrary authority and themselves rest on
20 authority of limited precedential value.

21 A. The Political Question Doctrine Does Not Bar Climate Change Common 22 Law Public Nuisance Claims Against Private Entities.

23 In *Connecticut v. American Electric Power Company* (“AEP”), eight states including
24 California and New Jersey, as well as other parties sought abatement of the carbon dioxide

25 ¹ While the Cities have authority to bring a public nuisance action in the name of the
26 People of the State of California, that authority does not extend their jurisdiction beyond their
27 municipal or county border. Jurisdiction to bring a “statewide” claim on behalf of the People of
28 the State of California lies with the State. See Cal. Civil Code, § 3494; Cal. Code of Civ. Proc., §
731; see also *People v. Truckee Lumber Co.*, 116 Cal. 397, 402 (1897) (Attorney General may
maintain a public nuisance action in the name of the People); *California Oregon Power Co. v.*
Superior Court of California, 45 Cal.2d 858, 871 (1955) (same).

1 emissions of power plant companies that comprised the five largest emitters of this pollution in
2 the United States. The Second Circuit, in a thorough opinion discussed in more detail below, held
3 the states' public nuisance claim did not raise a political question and thus was justiciable. 582
4 F.3d 309, 321-332 (2d Cir. 2009). Although the United States Supreme Court reversed the
5 Second Circuit on the issue of displacement (discussed in Section III, *infra*), an equally divided
6 Court affirmed that no threshold obstacle, including the political question doctrine, barred review.
7 *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 420 n.6 (2011). Thus, the Second Circuit's
8 analysis provides important guidance on this question.²

9 Neither of the cases relied on by Defendants and Indiana requires the Court to find these
10 cases nonjusticiable. In 2007, in an unpublished decision, the district court held that the State of
11 California was prohibited from seeking damages against various automakers for contributing to
12 climate change harms. *People of the State of California v. General Motors Corp.*, No. C06-
13 05755, 2007 WL 2726871 at *16 (N.D. Cal. 2007). As a general matter, unpublished district court
14 decisions are non-precedential. See *United States v. Heuer*, 916 F.2d 1457, 1460, n.1 (9th Cir.
15 1990) ("The unpublished district court opinion is not binding."); *Hupman v. Cook*, 640 F.2d 497,
16 501 (4th Cir. 1981) (unpublished district court decision and unpublished appellate court
17 affirmance have no precedential effect); *United States ex rel. Rosales v. San Francisco Hous.*
18 *Auth.*, 173 F.Supp.2d 987, 1008, n.9 (N.D. Cal. 2001) (declining to consider unpublished district
19 court decisions because the Ninth Circuit "frowns upon citation to unpublished materials.").
20 Further, California appealed the Northern District's ruling to the Ninth Circuit but voluntarily
21 dismissed the appeal in light of an agreement reached by California, the federal government and

22 _____
23 ² Additionally, in *Comer v. Murphy Oil*, 585 F.3d 855, 860 (5th Cir. 2009), the Fifth
24 Circuit similarly held that public and private nuisance, trespass, and negligence claims against oil
25 and energy companies for the harms such as sea level rise caused by climate change were
26 justiciable. Although the district court's contrary ruling, not the Fifth Circuit's, ultimately
27 survived when an *en banc* rehearing of the case was granted but the Fifth Circuit was unable to
28 assemble a quorum to hear the case (*Comer v. Murphy Oil*, 607 F.3d 1049, 1055 (5th Cir. 2010)),
the Fifth Circuit's rationale is at least instructive here. Just as the Second Circuit did, the Fifth
Circuit rejected the argument that there are no judicially discoverable or manageable standards
with which to decide climate change nuisance claims. *Comer*, 585 F.3d at 875. Common law tort
rules provided the standards and thus the court found it would not be forced to rely on nonjudicial
policy determinations. *Id.*

1 automakers to establish national greenhouse gas emission standards for vehicles and set stricter
2 corporate average fuel economy standards. Unopposed Motion to Dismiss Appeal, *California v.*
3 *Gen. Motors Corp.*, No. 07-16908, 2009 WL 1915707 at *3 (9th Cir. 2009). California’s
4 dismissal of the appeal was based on external circumstances, not the court’s political question
5 analysis.

6 Similarly, the district court’s decision in *Native Village of Kivalina v. ExxonMobil Corp.*,
7 663 F.Supp.2d 863 (N.D. Cal. 2009) (“*Kivalina*”) is of limited precedential value here. There, the
8 court held that plaintiffs’ public nuisance action presented the court with a non-justiciable
9 political question (*id.* at 883); on appeal, the Ninth Circuit affirmed the lower court’s decision
10 pursuant to a different legal theory that this Court has now deemed inapplicable here,
11 displacement under the Clean Air Act. *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d
12 849, 858 (9th Cir. 2012). In avoiding the political question doctrine, the Ninth Circuit bypassed
13 the jurisdictional issue (*see Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 980 (9th Cir. 2007)) and
14 instead addressed the merits of the case, leaving the persuasive value of the district court’s
15 political question analysis in substantial doubt. *See Aloe Vera of America, Inc. v. United States*,
16 580 F.3d 867, 871 (9th Cir. 2009) (holding “jurisdictional questions must be decided prior to
17 reaching the merits of a case....”).

18 Therefore, this Court should analyze Defendants’ and Indiana’s political question
19 arguments under the reasoning of the Second and Fifth Circuits in *AEP* and *Comer* respectively.

20 **B. Defendants’ and Indiana’s Political Question Arguments Have Been**
21 **Rejected by Courts as Overstated.**

22 Between them, Defendants and Indiana raise at least four variations of a political question
23 argument. Amici States address each in turn. First, Defendants and Indiana argue that there are no
24 manageable standards by which the Court can assess the impacts of climate change on the Cities.
25 Indiana Amicus at 10; Defendants’ Motion to Dismiss First Amended Complaints: Memorandum
26 of Points and Authorities (“Defs.’ Mot.”) at 25 (ECF No. 225). The Second Circuit rejected a
27 very similar argument by American Electric Power and its co-defendants, finding that the
28 “argument is undermined by the fact that federal courts have successfully adjudicated complex

1 common law public nuisance cases for over a century.” *AEP*, 582 F.3d at 326-329 (reviewing a
2 litany of complex environmental public nuisance cases). Just because “Plaintiffs’ injuries are part
3 of a worldwide problem does not mean Defendants’ contributions to that problem cannot be
4 addressed through principled adjudication.” *AEP*, 582 F.3d at 329.

5 In *AEP* the Second Circuit found the defendants’ similar arguments “overstated,” noting
6 that:

7 In adjudicating the federal law of nuisance claim pleaded here, the district court will
8 be called upon to address and resolve the particular nuisance issue before it, which
9 does not involve assessing and balancing the kind of broad interests that a legislature
10 or a President might consider in formulating a national emissions policy. The
11 question presented here is discrete, focusing on Defendants’ alleged public nuisance
12 and the Plaintiffs’ alleged injuries.

13 *Id.* at 329. Similarly, here, the Cities’ amended complaints allege that Defendants’ specific
14 alleged conduct (producing and selling fossil fuels while intentionally misleading consumers
15 about climate science and the risks of global warming) is causing a nuisance (harms stemming
16 from sea-level rise) within their jurisdictions. See, e.g., Oakland First Amended Complaint, ¶¶ 2-
17 6 (ECF No. 202-1). This Court can address and resolve these discrete, largely factual issues
18 without weighing the factors that Congress or a President might weigh in setting national climate
19 policy.³

20 Second, Defendants and Indiana argue that the Cities’ cases present a political question
21 because they require the Court to make an “initial policy determination that is more appropriately
22 addressed by the other branches of government.” Indiana Amicus at 10-11; Defs.’ Mot. at 25.
23 Indiana’s argument is based largely on the United States Environmental Protection Agency’s
24 (“EPA”) 2003 denial of a petition for rulemaking that did little more than acknowledge that
25 greenhouse gas emissions have been the subject of scientific, technical and political discussions

26 ³ Indiana relies on the district court’s decision in *Kivalina* to argue to the contrary.
27 Indiana Amicus at 10 (citing *Kivalina*, 663 F.Supp.2d at 874-877). In addition to the limited
28 precedential value of that decision (see *supra*, Part I.A.), Indiana overlooks differences between
the complaint before the district court in 2009 and the complaints before this Court in 2018.
Here, the Cities’ complaints rely on advances in the science of climate change research into
allocation of defendants’ contribution to climate change that will provide the Court with the
evidence it needs to identify judicially discoverable and manageable standards. See, e.g., City of
Oakland’s First Amended Complaint, at ¶¶ 92-94, 124-136 (ECF No. 202-1).

1 globally. Indiana Amicus at 10-11.⁴ Here too, the Second Circuit in *AEP* rejected a similar
2 argument, finding that “[n]ot every case with political overtones is non-justiciable.” *AEP*, 582
3 F.3d. at 332. The court noted that plaintiffs were not required to “wait for the political branches to
4 craft a ‘comprehensive’ global solution to global warming” before seeking the focused remedy
5 they sought. *Id.* at 331. This Court can therefore apply federal common law to create the focused
6 remedy sought by the Cities. As in *AEP*, “where a case appears to be an ordinary tort suit, there is
7 no impossibility of deciding without an initial policy determination of a kind clearly for
8 nonjudicial discretion.” *Id.* at 331 (internal quotation omitted, citations omitted).⁵

9 Third, Indiana adds its own argument that “Plaintiffs’ claims jeopardize our national system
10 of cooperative federalism” put in place by the Clean Air Act, thereby “underscor[ing] the political
11 nature of this case.” Indiana Amicus at 11. But, the examples Indiana offers fail to show any
12 connection to cooperative federalism, much less a risk to it. To begin with, Indiana cites the
13 example of National Ambient Air Quality Standards (“NAAQS”), pursuant to which States adopt
14 their own State Implementation Plans. *Id.* at 12. Current NAAQS standards, however, do not
15 regulate greenhouse gas emissions, much less levels of fossil fuel production. *Washington*
16 *Environmental Council v. Bellon*, 732 F.3d 1131, 1136 (9th Cir. 2013) (“To date, the EPA has
17 developed NAAQS for six criteria pollutants... . 40 C.F.R. § 50. The EPA has not established
18 NAAQS for greenhouse gases.”) Thus, the connection to the Cities’ public nuisance claims is
19 lacking.

20
21
22 ⁴ EPA’s denial of that petition led directly to the filing of lawsuits that culminated in the
23 Supreme Court’s decision in *Massachusetts v. EPA*, 549 U.S. 497, 510-511 (2007) (“*Mass. v.*
24 *EPA*”). The Supreme Court’s ruling is notable because the Court rejected EPA’s argument that
the States lacked standing to sue because their lawsuit would interfere with Congress’s
consideration of climate change issues. *Id.* at 512-513, 526.

25 ⁵ Indiana relies on the contrary conclusion of the district court in *Kivalina*, which
26 concluded that the executive or legislative branch should make the determination of liability and
27 allocation of fault in the first instance. Indiana Amicus at 9 (citing *Kivalina*, 633 F. Supp. 2d at
28 877). The precedential value of that decision is limited. Further, district courts are well equipped
to make such determinations, and further, San Francisco’s and Oakland’s complaints provide
substantial additional facts and data on which the court can rely. See, e.g., *City of Oakland, First*
Amended Complaint, at ¶¶ 92-94, 124-136 (ECF No. 202-1).

1 Next, Indiana references a series of state greenhouse gas programs led by States that did not
2 join their brief: the Western States Climate Initiative (Amici California and Washington
3 participated)⁶; the ten-state Regional Greenhouse Gas Initiative;⁷ and California’s greenhouse gas
4 cap and trade program. Indiana Amicus at 12-14. Indiana’s examples miss the mark, because
5 Amici States and others did not establish these programs to implement the Clean Air Act. Each
6 program is a creation of state law.⁸ Nor can Amici States discern any threat to these state laws
7 from Plaintiffs’ common law public nuisance action against private corporate Defendants seeking
8 abatement of the harms they face within their jurisdictions from sea level rise. This is also evident
9 in the fact that multiple states, including California and New Jersey, sought to pursue climate
10 change public nuisance claims against electric generating companies in *AEP* during the
11 development and implementation of climate programs.

12 Fourth, Defendants and Indiana argue that because of the international attention to climate
13 change, adjudication of Plaintiffs’ claims would intrude upon the executive branch’s authority
14 over foreign policy, in violation of the political question doctrine. Defs.’ Mot. at 23-24; Indiana
15 Amicus at 15-17. Several states have rebutted such arguments previously, as in *AEP*, where they
16 argued successfully that “[t]hat Plaintiffs’ injuries are part of a worldwide problem does not mean
17 Defendants’ contribution to that problem cannot be addressed through principled adjudication.”
18 *AEP*, 582 F.3d. at 329. Similarly, in *Massachusetts v. EPA*, the Supreme Court held that the fact
19 that “these climate-change risks are ‘widely shared’ does not minimize Massachusetts interest in
20 the outcome of” its challenge to EPA, based in part on the alleged injury to state lands from sea
21 level rise. *Mass. v. EPA*, 549 U.S. 497, 522 (2007). Additionally, even the district court’s decision

22 ⁶ See *Western Climate Initiative, Design Recommendations for the WCI Regional Cap-*
23 *and-Trade Program* (Sept. 23, 2008), available at
24 <http://www.energy.ca.gov/2008publications/WCI-1000-2008-025/WCI-1000-2008-025.PDF> (last
visited April 30, 2018).

25 ⁷ See <https://www.rggi.org> (last visited April 30, 2018).

26 ⁸ California’s Cap and Trade program was adopted pursuant to authority granted by state
27 statute in the Global Warming Solutions Act of 2006. See Cal. Health & Safety Code, §§ 38500,
28 38562, 38570; see also Cal. Code Regs. tit. 17, §§ 95801-96022. Similarly, for example, New
York and Massachusetts adopted regulations pursuant to state law to implement the Regional
Greenhouse Gas Initiative in their states. See, e.g., 6 NYCRR 242; see also Code Mass. Regs. tit.
310, § 7.70.

1 in *Kivalina*, upon which Defendants rely (and which, as discussed above, is of questionable
 2 precedential value) rejected virtually the same argument made by Defendants and Indiana here.
 3 *Kivalina*, 663 F.Supp.2d at 872-873. The court held that “[t]he indisputably international
 4 dimension of this particular environmental problem does not render the instant controversy a non-
 5 justiciable one.” *Id.* at 873. The court found it significant that “none of the Defendants cite to any
 6 express provision of the Constitution or provision from which it can be inferred that the power to
 7 make the final determination regarding air pollution or global warming has been vested in either
 8 the executive or legislative branch of government.” *Id.* So too, here, Defendants and Indiana fail
 9 to cite any provision of the Constitution.⁹

10 While Defendants and Indiana offer many variations of the political question argument,
 11 none is availing, and, therefore, this Court should hold that the Cities’ claims are justiciable.

12 **II. THE PUBLIC NUISANCE ALLEGED BY THE CITIES WAS NOT AUTHORIZED BY STATE**
 13 **OR FEDERAL LAWS.**

14 Defendants cite to a handful of California laws and federal statutes concerning fossil fuel
 15 production in support of an argument that their conduct was authorized by law and therefore
 16 cannot constitute a public nuisance. Defs.’ Mot. at 16-18.¹⁰ Defendants are incorrect. A court is
 17 not deprived of its ability to fashion a remedy to a public nuisance unless the specific conduct
 18 alleged to be causing the nuisance is expressly and wholly authorized by a statute or regulation,

19 ⁹ Indiana makes an additional argument that California law concerning the supervision of
 20 oil and gas development renders the Cities claims non-justiciable. The argument suffers from
 21 several basic flaws. To start, Indiana relies on general pronouncements that California’s Public
 22 Resources Code demonstrates the “inherently political nature” of fossil fuel production. Indiana
 23 Amicus at 17. As the Second Circuit cautioned, however, “[i]t is error to equate a political
 24 question with a political case.” *AEP*, 582 F.3d at 332. Thus, the Court should look to specific
 25 factors set forth by the Supreme Court in *Baker v. Carr*, 369 U.S. 186 (1962), not generalized
 26 notions. If any of those factors are implicated, it would be the fourth through sixth factors. See
 27 *Baker*, 369 U.S. at 217. The Second Circuit addressed those three factors in *AEP*, finding that,
 28 where the government’s pronouncements are “variegated” and lack a unified policy, allowing the
 litigation to proceed “does not demonstrate any lack of respect for the political branches,
 contravene a relevant political decision already made, or result in multifarious pronouncements
 that would embarrass the nation.” *AEP*, 582 F.3d at 331-332. Here, as discussed in Part II. A.
 below, California’s laws authorize some fossil fuel extraction but prohibit other extraction, and
 seek to reduce the state’s reliance on the fossil fuels produced by Defendants. On such a record,
 the fourth through sixth *Baker* factors do not bar adjudication of Plaintiffs’ claims.

¹⁰ Indiana also argues that the existence of these laws demonstrates that the Cities’ public
 nuisance claims raise a political question. Indiana Amicus at 17-18. See footnote 9 above.

1 which is not the situation before this Court. Further, the manner in which an authorized activity is
2 carried out may still give rise to a public nuisance claim. *See Iletto v. Glock Inc.*, 349 F.3d 1191,
3 1214–15 (9th Cir. 2003). Here, Defendants’ argument that governments promoted their fossil fuel
4 extraction activity ignores significant state and federal efforts to restrict their activity and promote
5 alternatives to Defendants’ products. In addition, Defendants’ argument ignores the full scope of
6 the Cities’ allegations, including Defendants’ alleged promotion of their products and concealing
7 of knowledge about the harms from their products.

8 **A. Significant California and Federal Laws Seek to Regulate and Restrict**
9 **Fossil Fuel Production and Demand.**

10 Defendants and Indiana tell a one-sided story of unbounded endorsement of extraction and
11 consumption of fossil fuels by California and the federal government. That is simply not the case.

12 As to California, Defendants and Indiana fail to mention state laws that explicitly seek to
13 limit the production of or reduce the State’s reliance on fossil fuels. For example, the California
14 Coastal Sanctuary Act of 1994 prohibits state agencies from entering into new leases “for the
15 extraction of oil or gas” along the California coast. Cal. Pub. Res. Code § 6243. In addition, the
16 California Low Carbon Fuels Standard, first adopted by the California Air Resources Board in
17 2009, requires an increasing percentage of California’s transportation fuels come from “low
18 carbon” sources rather than from traditional gasoline and diesel fuel. See Cal. Code Regs. tit. 17,
19 §§ 95480- 95497.¹¹ And, California’s Sustainable Communities and Climate Protection Act of
20 2008 requires land use planning entities to take into account measures to reduce driving distances
21 in order to help the state “reduce its dependence on petroleum.” Stats.2008, c. 728 (S.B.375) §
22 1(d).

23 Nor do Defendants and Indiana provide sufficient context for the California laws they do
24 cite. For example, Defendants and Indiana rely on section 3016 of the California Public
25 Resources Code, which concerns California’s “supervision” (i.e., regulation) of oil and gas
26 drilling. Indiana Amicus at 17; Defs.’ Mot. at 17. First passed in 1939, that statute establishes a

27 _____
28 ¹¹ For a description of the Low Carbon Fuels Standard, see
<https://www.arb.ca.gov/fuels/lcfs/lcfs.htm> (last visited April 30, 2018).

1 policy of preventing oil and gas operations from damaging public health and important resources
2 such as water supplies, seeking to eliminate wasteful oil and gas operations (by maximizing
3 recovery from those wells that are drilled) and taking a “wise” approach to oil and gas
4 development. Cal. Pub. Util. Code § 3106(a), (b) and (d). Defendants also cite a 1980 California
5 law that prohibits anticompetitive conduct (refusing to sell motor vehicle fuels to local
6 governments for essential services) and a portion of California’s regulation of hydraulic
7 fracturing drilling practices. Defs.’ Mot. at 17-18 (citing Cal. Bus. & Prof. Code § 13410(a), and
8 Cal. Pub. Res. Code § 3160(a)). Instead of simply endorsing every act relating to fossil fuel
9 extraction and consumption, California, through some of the very laws Defendants and Indiana
10 cite, has repeatedly attempted to mitigate the harms caused by fossil fuel production.

11 Similarly, some of the federal statutes Defendants rely on show that the federal government
12 was simultaneously seeking to limit use of fossil fuels. For example, the Energy Policy Act of
13 1992, cited by Defendants, required the Secretary of Energy, in Subpart B of Title XX, “Oil and
14 Gas Demand Reduction and Substitution,” to develop a program “to reduce the demand for oil in
15 the transportation sector for all motor vehicles . . . through increased energy efficiency and the
16 use of alternative fuels.” 42 U.S.C. § 13431. Also in the 1992 Act Congress incentivized
17 reduction in natural gas use through “energy conservation and load shifting programs and . . .
18 other demand-side management measures,” 15 U.S.C. § 3203(b)(4), and directed the Secretary to
19 “promote the replacement of petroleum motor fuels with replacement fuels to the maximum
20 extent practicable,” 42 U.S.C. § 13252(a), and to issue guidelines on “comprehensive State
21 alternative fuels and alternative fueled vehicle incentives and program plans designed to
22 accelerate the introduction and use of such fuels and vehicles.” 42 U.S.C. § 13235(a)(1). The
23 Energy Policy Act of 2005, which Defendants also rely on, includes provisions that would
24 discourage the extraction of fossil fuels, such as providing tax incentives for alternative fueled
25 vehicles, 26 U.S.C. § 30B, and allowing the federal government to commercialize solar energy to
26 “reduce the national consumption of fossil fuel,” 40 U.S.C. § 3177(a)(1).

27 The Defendants and Indiana likewise ignore the wide range of federal statutory policies,
28 from the 1970s through the present, that seek to promote energy conservation and renewable

1 energy and fuels and to reduce fossil fuel use. *See, e.g.*, Energy Independence and Security Act of
2 2007, Pub. L. 110-140, § 806 (1), (3) (sense of Congress that “the United States has a quantity of
3 renewable energy resources that is sufficient to supply a significant portion of the energy needs of
4 the United States” and that “accelerated development and use of renewable energy technologies
5 provide numerous benefits to the United States, including improved national security, improved
6 balance of payments, healthier rural economies, improved environmental quality, and abundant,
7 reliable, and affordable energy for all citizens of the United States”); Alternative Motor Fuels Act
8 of 1988, Pub. L. 100-494, § 2 (finding that “the Nation's security, economic, and environmental
9 interests require that the Federal Government should assist clean-burning, nonpetroleum
10 transportation fuels to reach a threshold level of commercial application and consumer
11 acceptability at which they can successfully compete with petroleum-based fuels”); Public Utility
12 Regulatory Policies Act of 1978, Pub. L. 95-617, § 2 (“The Congress finds that the protection of
13 the public health, safety, and welfare, the preservation of national security, and the proper
14 exercise of congressional authority under the Constitution to regulate interstate commerce
15 require—(1) a program providing for increased conservation of electric energy, increased
16 efficiency in the use of facilities and resources by electric utilities, and equitable retail rates for
17 electric consumers . . . (4) a program for the conservation of natural gas while insuring that rates
18 to natural gas consumers are equitable.”); Energy Conservation and Policy Act of 1975, Pub. L.
19 94-163, § 2(4)-(5) (purposes of Act include “to conserve energy supplies through energy
20 conservation programs, and, where necessary, the regulation of certain energy use” and “to
21 provide for improved energy efficiency of motor vehicles, major appliances, and certain other
22 consumer products”); *cf.* Energy Act of 2000, Pub. L. 106-149, § 102(2) (*repealing* provision of
23 Energy Policy and Conservation Act of 1975 stating statutory policy “to increase the supply of
24 fossil fuels in the United States, through price incentives and production requirements.”).

25 **B. Defendants’ Alleged Conduct is Not Specifically Authorized by Law.**

26 Defendants point out that the Restatement definition of public nuisance excludes “conduct
27 that is fully authorized by statute, ordinance or administrative regulation.” Restatement (Second)
28 of Torts § 821B cmt. f (1979). But, even if an activity is authorized by statute, the way it is

1 carried out may still give rise to an actionable public nuisance. *See Iletto.*, 349 F.3d at 1214–15
2 (applying California common law of public nuisance; “although gun manufacturing is legal and
3 the sale of guns is regulated by state and federal law, the distribution and marketing of guns in a
4 way that creates and contributes to a danger to the public generally and to the plaintiffs in
5 particular is not permitted under law”; “The fact that a statute recognizes the legality of a certain
6 occupation and makes provision for its regulation to avoid injuries does not justify or legalize
7 such a business when it becomes a public nuisance.”).

8 Defendants do not, of course, point to any laws that explicitly authorize them to market
9 fossil fuels while intentionally concealing their knowledge about the harms from those fuels,
10 which is conduct the Plaintiffs complain of. *See, e.g., City of Oakland, First Amended Complaint*
11 *at* ¶¶ 5, 6, 103 (ECF No. 202-1). Thus, the Restatement’s exception to public nuisance for
12 conduct “fully authorized by statute, ordinance or administrative regulation” has not been
13 triggered. Moreover, even the statutes and regulations Defendants cite to in their motion show
14 that those engaged in fossil fuel extraction or marketing are required to refrain from fraudulent or
15 misleading statements. *See* Defs.’ Mot. at 14.

16 In sum, Defendants’ argument their conduct was “authorized by law” overreaches and
17 cannot establish that Plaintiffs have failed to state a claim for common law public nuisance.

18 **III. THE CITIES’ CLAIMS HAVE NOT BEEN DISPLACED BY THE CLEAN AIR ACT OR** 19 **OTHER FEDERAL STATUTES.**

20 Defendants and Indiana also contend that the Cities’ federal common law nuisance claims
21 have been displaced by the Clean Air Act or other federal statutes authorizing the development
22 and regulation of fossil fuels. Amici States take no position on the threshold issue of whether
23 federal common law applies to a public nuisance claim for climate change harms (as this Court
24 has held), or state common law applies (as held by the court in the San Mateo case). But
25 assuming this court’s holding is correct, the Cities’ federal common law nuisance claims have not
26 been displaced.

1 First, the Clean Air Act does not displace the Cities’ claims. In rejecting the Cities’ motion
2 to remand to state court, this Court rejected the same displacement argument, finding that “*AEP*
3 and *Kivalina* . . . did not recognize the displacement of federal common law claims raised here.”
4 Order Denying Motions to Remand at 6 (ECF No. 134). Here, this Court correctly reasoned that
5 the Clean Air Act did not displace the Cities’ claims against Defendants and there has been no
6 material change in the law or facts that warrant changing that view. The Clean Air Act regulates
7 specific emissions from certain sources of air pollution, not the overall production and marketing
8 of fossil fuels, not “deceiving the public regarding the dangers of global warming and the benefits
9 of fossil fuels,” and not defendants’ conduct outside the United States. *Id.* at 7. In contrast, in
10 *AEP* and *Kivalina* the plaintiffs sought to remedy defendants’ direct emissions of carbon dioxide.
11 In *AEP*, the Supreme Court reasoned that, because the plaintiffs could petition EPA to set the
12 power-plant emission standards that the plaintiffs’ federal common-law claims sought (and in fact
13 had done so), “[t]he Act itself . . . provides a means to seek limits on the emissions of carbon
14 dioxide from domestic powerplants—the same relief the plaintiffs seek by invoking federal
15 common law.” *AEP*, 564 U.S. at 425. Defendants have identified no such remedy provided by the
16 Clean Air Act to address the conduct in question here. As this Court found, “the Clean Air Act
17 does not provide a sufficient legislative solution to the nuisance alleged to warrant a conclusion
18 that this legislation has occupied the field to the exclusion of federal common law.” Order at 7.

19 Second, the Cities’ claims are also not displaced by federal statutes authorizing the
20 development of fossil fuels. Defendants cite a number of federal statutes, including the Energy
21 Policy Acts of 1992 and 2005, for the proposition that these laws “speak directly to the
22 reasonableness of that conduct [developing fossil fuels].” Def. Mot. at 13 (internal quotations
23 omitted). These statutes encourage specific kinds of production of fossil fuel and thus do not
24 regulate the conduct for which the Cities seek relief: “an alleged scheme to produce and sell fossil
25 fuels while deceiving the public regarding the dangers of global warming and the benefits of
26 fossil fuel.” Order at 7. Just as none of the cited laws generally authorizing the exploration and
27 production of fossil fuels would preclude public nuisance claims stemming from, for example,
28 spilling petroleum, causing unreasonable fumes from improper storage of gasoline, or excessive

1 noise during drilling operations, nor do those laws prevent a nuisance cause of action premised on
 2 the wrongful conduct alleged here. Just as the Cities have no apparent avenue under the Clean Air
 3 Act to petition EPA for the particular relief they seek here, they do not have any opportunity to do
 4 so under these other statutes. In the absence of such a right, their federal common-law claims are
 5 not displaced.

6 **IV. ENFORCEMENT OF THE CITIES STATE OR FEDERAL COMMON LAW OF PUBLIC**
 7 **NUISANCE DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE.**

8 In support of Defendants’ motion to dismiss, Indiana argues that imposition of the remedy
 9 sought in the Cities’ complaints seeks to regulate extraterritorially in violation of the dormant
 10 Commerce Clause.¹² Indiana Amicus at 20-23 (“such remedies represent an effort by one state to
 11 occupy the field of environmental and energy production regulation across the nation”). This
 12 argument is predicated on several assumptions that are not supported in fact or law: 1) that the
 13 dormant Commerce Clause applies to court-ordered remedies of federal common law claims; 2)
 14 that the Supreme Court’s decision in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996)
 15 controls here; and 3) that these cases constitute “extraterritorial regulation” either on their face or
 16 in their impact.

17 **A. The Dormant Commerce Clause does not Apply to Judicially-Imposed**
 18 **Remedies Under Federal Common Law.**

19 Indiana argues that the dormant Commerce Clause applies to judicial remedies sought in
 20 the Cities’ complaints, which of course include a federal common law claim. Indiana Amicus at
 21 20-22. Enlarging the reach of the dormant Commerce Clause to encompass court-ordered
 22 remedies in federal common law cases is unsupported by case law, and would expand the
 23 doctrine beyond recognition.

24 The Amici States know of no case law applying the dormant Commerce Clause to a federal
 25 court’s imposition of remedies for federal common law claims. None of the cases cited by Indiana
 26 support their view of the dormant Commerce Clause or extraterritoriality. *See La. Pub. Serv.*

27 ¹² Defendants’ motion to dismiss hints at such an argument but does not explicitly so
 28 argue. Specifically, Defendants argue that “Plaintiffs’ claims would also usurp Congress’s
 ‘exclusive’ power ‘to regulate interstate and foreign commerce.’” Defs.’ Mot. at 25.

1 *Comm'n v. Tex. & N.O.R. Co.*, 284 U.S. 125 (1931) (not discussing the dormant Commerce
2 Clause, and holding only that Congress has the authority to set interstate shipping rates); *Healy v.*
3 *Beer Inst., Inc.*, 491 U.S. 324 (invalidating state statute under the dormant Commerce Clause);
4 *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) (holding that excessive punitive
5 damages awarded in state court violated BMW's due-process rights); *Midwest Title Loans, Inc. v.*
6 *Mills*, 593 F.3d 660 (7th Cir. 2010) (invalidating state statute under the dormant Commerce
7 Clause); *North Dakota v. Heydinger*, 825 F.3d 912, 922 (8th Cir. 2016) (invalidating state statute;
8 non-precedential because no majority opinion).

9 Taken to its logical conclusion, Indiana's argument would undercut long-standing
10 precedent, including cases permitting states and local governments to sue for out-of-jurisdiction
11 nuisance conduct. The wealth of cases in which states have sued other jurisdictions for nuisances
12 originating extraterritorially demonstrates that the common law does not contemplate any such
13 result. *See, e.g., Missouri v. Illinois*, 180 U.S. 208 (1901) (public nuisance suit by Missouri
14 seeking to prevent sewage discharge into a channel that emptied into the Mississippi River above
15 St. Louis); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907) (Georgia alleged that emissions
16 from out-of-state plants were destroying forests, orchards, and crops in Georgia); *New Jersey v.*
17 *City of New York*, 283 U.S. 473 (1931) (New Jersey sought to enjoin New York from dumping
18 garbage into the ocean, polluting New Jersey beaches and water); *North Dakota v. Minnesota*,
19 263 U.S. 365 (1923) (North Dakota sought to enjoin, as public nuisance, a Minnesota irrigation
20 project that contributed to flooding of North Dakota farmland); *New York v. New Jersey*, 256 U.S.
21 296 (1921) (New York sought to enjoin sewage discharge into boundary waters that caused
22 pollution); *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) (Court held sewage discharge in
23 Milwaukee that entered Illinois constituted public nuisance).

24 **B. The Supreme Court's Decision in *BMW of North America v. Gore* is**
25 **Inapplicable to the Cities' State or Federal Common Law Claims.**

26 In *BMW*, the Supreme Court held that Alabama courts could not impose punitive damages
27 on BMW for commerce with no nexus to Alabama—cars repaired and sold in other states. 517
28

1 U.S. at 572-574. But Alabama courts could enforce the State’s disclosure laws and impose
2 punitive damages for undisclosed repairs with respect to cars sold in Alabama, regardless of the
3 fact that the repairs occurred outside the State. *See id.*; *see also id.* at 563 n.1. In other words, the
4 Court upheld the State’s authority to impose a punitive damages award with respect to damages
5 suffered in-state, even when that award implicated out-of-state activity. Here, the harm Plaintiffs
6 seek to have remedied is purely in-jurisdiction. *See, e.g.,* Oakland First Amended Complaint, at p.
7 55 (Relief Requested) (ECF No. 202-1) (seeking an abatement fund “to provide for infrastructure
8 in Oakland necessary for Oakland to adapt to global warming impacts such as sea level rise.”).
9 Thus, if anything, *BMW* supports Plaintiffs’ ability to bring claims of localized damages.

10 Similarly, in *Ileto v. Glock*, the Ninth Circuit rejected as “meritless” defendants’ attempt to
11 rely on *BMW* to argue that a state common law public nuisance claim violated the dormant
12 Commerce Clause. 349 F.3d at 1217. In *Ileto*, plaintiffs alleged that defendants had unlawfully
13 created and promoted a secondary market in guns that led to the sale of guns used in crimes
14 against them. *Id.* at 1198-1199. The Ninth Circuit found that *BMW* was inapplicable because
15 plaintiffs had amended their complaints to remove any request for injunctive relief and economic
16 sanctions in the form of punitive damages to protect the rights of citizens from other states. *Id.* at
17 1217. Here, the Cities do not seek punitive damages, nor do they assert the rights of anyone other
18 than their residents.¹³

19 **C. These Cases Do Not Constitute “Extraterritorial Regulation” of Interstate**
20 **Commerce.**

21 Even if Plaintiffs’ common law claims were subject to a dormant Commerce Clause
22

23 ¹³ Notably, another post-*BMW* case from this District found that the dormant Commerce
24 Clause *does not apply* to state common law claims. *See Crowley v. CyberSource Corp.*, 166
25 F.Supp.2d 1263, 1272 (N.D. Cal. 2001). In *Crowley*, defendant Amazon sought dismissal of the
26 plaintiff’s state-law claims based on the dormant Commerce Clause. Judge Orrick declined to
27 dismiss the plaintiff’s state-law claims, finding that case law does not support the argument that
28 common-law claims could violate the dormant Commerce Clause. *Crowley* at 1272. As noted in
Crowley, the Third Circuit has also expressed doubt as to whether state common law claims could
violate the dormant commerce clause. *See Buzzard v. Roadrunner Trucking, Inc.*, 966 F.2d 777,
784 n.9 (3d Cir. 1992).

1 analysis, there are no grounds for dismissal of this case. Laws impermissibly regulate out-of-state
2 commerce only if they control commerce occurring wholly outside the regulating jurisdiction.
3 *Healy*, 491 U.S. at 336. Plaintiffs do not seek to regulate wholly out-of-state commerce (or in-
4 state commerce for that matter), but rather seek abatement of locally-suffered harms. If there are
5 extraterritoriality concerns about the remedy that might be crafted here should Plaintiffs prevail
6 on the merits, the Court can, and should, address those concerns at the remedy stage, not on a
7 motion to dismiss.

8 Thus, Indiana's argument for a dramatic expansion of the dormant Commerce Clause is
9 unsupported in the law and would not constitute a reason for dismissal of these cases on the
10 pleadings.

11 CONCLUSION

12 For the foregoing reasons, Amici States respectfully urge the Court to deny Defendants'
13 Motion to Dismiss.

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