

THE HONORABLE ROBERT S. LASNIK

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KING COUNTY,

Plaintiff,

v.

BP P.L.C., a public limited company of
England and Wales, CHEVRON
CORPORATION, a Delaware corporation,
CONOCOPHILLIPS, a Delaware
corporation; EXXON MOBIL
CORPORATION, a New Jersey corporation,
ROYAL DUTCH SHELL PLC, a public
limited company of England and Wales, and
DOES 1 through 10,

Defendants.

Case No. 2:18-cv-00758

**DEFENDANTS' MOTION TO
DISMISS [12(b)(6)]; MEMORANDUM
OF POINTS AND AUTHORITIES**

NOTED ON MOTION CALENDAR:

Noted: October 5, 2018

ORAL ARGUMENT REQUESTED

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MEMORANDUM OF POINTS AND AUTHORITIES¹**I. INTRODUCTION**

Plaintiff King County seeks to hold five energy companies liable for the impacts of global warming. Relying on public nuisance and trespass theories, Plaintiff alleges that it has been harmed by worldwide fossil fuel production and the global greenhouse gas emissions of countless global consumers, including King County itself and its resident citizens and businesses. Plaintiff's claims are not limited to harms allegedly caused by fossil fuels extracted, sold, marketed, or used in King County. Instead, Plaintiff attempts to use state tort law to regulate the nationwide (indeed, worldwide) activity of companies that play a key role in virtually every sector of the global economy—Defendants and their subsidiaries supply the fuels that enable production and innovation, literally keep the lights and heat on, power nearly every form of transportation, and form the basic materials from which innumerable consumer, technological, and medical devices are fashioned. The Complaint raises federal statutory, regulatory, and constitutional issues; aims to upset bedrock federal-state divisions of responsibility; and has profound implications for the global economy, international relations, and America's national security. For these reasons and more, cases asserting nearly identical claims have universally been rejected by U.S. courts. In fact, in the last five weeks, both the Northern District of California and the Southern District of New York have dismissed the same claims, against the same five Defendants, brought by the same private lawyers representing Plaintiff here. *City of Oakland v. BP P.L.C.*, 2018 WL 3109726, at *6 (N.D. Cal. June 25, 2018); *City of New York v. BP P.L.C.*, 2018 WL 3475470 (S.D.N.Y. July 19, 2018). The result here should be the same.

As the courts in *City of Oakland* and *City of New York* both recognized, the law that governs the sort of global warming tort claims asserted here is *federal common law*, but Plaintiff's Complaint fails to state a viable cause of action under federal common law standards. Indeed, the Complaint's conflict with federal law and policy could not be starker.

¹ Defendants have moved to dismiss the Complaint for lack of personal jurisdiction under Fed. R. Civ. P. 12(b)(2). Defendants' joinder in this motion is subject to, and without waiver of, those additional defenses.

1 For nearly 50 years, the federal government has aimed to achieve energy independence by
2 decreasing the Nation’s reliance on oil imports, including by opening federal lands and coastal
3 areas to promote fossil fuel extraction, establishing strategic petroleum reserves, and
4 contracting with fossil fuel companies to develop those resources. During this time, the U.S.
5 has also enacted environmental statutes and regulations designed to strike an appropriate—and
6 evolving—balance between protecting the environment and ensuring economic and national
7 security. U.S. foreign policy has pursued these dual goals by negotiating with other countries
8 to craft workable international frameworks to respond to global warming while evaluating how
9 such regulation could affect the economy, national security, and foreign relations. This lawsuit
10 takes issue with, and runs counter to, these efforts, threatening to upend the government’s
11 longstanding energy and environmental policies and “compromis[ing] the very capacity of the
12 President to speak for the Nation with one voice in dealing with other governments” on global
13 warming issues. *See Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 424 (2003).

14 This case is about *global* production and *global* emissions, not a local nuisance.
15 Plaintiff asks this Court to disregard the recognized boundaries of tort law and hold these
16 select Defendants liable for the actions of literally billions of third parties not just in King
17 County, but around the world. These claims cannot be adjudicated without deciding whether
18 the alleged harms are outweighed by the social utility of fossil fuels—not just in King County,
19 but around the world. Under well-established principles of federal law, such claims cannot
20 proceed for multiple reasons, as *City of Oakland* and *City of New York* concluded. *See City of*
21 *Oakland*, 2018 WL 3109726, at *6; *City of New York*, 2018 WL 3475470, at *7; *see also Am.*
22 *Elec. Power Co. v. Conn.*, 564 U.S. 410, 421 (2011) (“AEP”); *Native Vill. of Kivalina v.*
23 *ExxonMobil Corp.*, 696 F.3d 849, 855 (9th Cir. 2012).

24 Moreover, even assuming arguendo that state law could properly be applied to
25 Plaintiff’s claims, those claims are not viable under Washington law for multiple reasons. In
26 particular, nuisance and trespass claims are not viable where, as here, Defendants’ conduct was
27 authorized by law. In fact, Washington’s official policy is to “promote the exploration,
28 development, production, and utilization of oil and gas in the state,” as “in the public interest.”

1 Wash. Rev. Code § 78.52.001. Plaintiff’s claims additionally fail because the relevant conduct
 2 occurred outside the state, Plaintiff has failed to allege actual and substantial injury,
 3 Defendants’ conduct was not the proximate cause of Plaintiff’s injuries, and an “abatement
 4 fund” is not an available remedy under Washington law.

5 In sum, this Complaint asserts already-rejected claims based on already-rejected
 6 theories. It too should be rejected and dismissed.

7 **II. BACKGROUND**

8 **A. Global Warming Is a National and Global Issue**

9 Global warming is an important international issue that concerns every nation on Earth.
 10 Plaintiff does not contend that global warming is a localized issue, unique to King County, but
 11 rather alleges that worldwide greenhouse gas emissions have caused “planetary warming.”
 12 Compl. ¶ 93. As an issue of planetary significance, global warming is “the subject of
 13 international agreements” and “active discussions . . . as to whether and how climate change
 14 should be addressed through a coordinated framework.” *City of Oakland*, 2018 WL 3109726,
 15 at *7. International discussions, which began more than 30 years ago, led to the adoption of
 16 the United Nations Framework Convention on Climate Change (“UNFCCC”) in 1988, which
 17 established the Intergovernmental Panel on Climate Change (“IPCC”). Compl. ¶ 87. *See*
 18 UNFCCC, *Status of Ratification of the Convention*, <http://bit.ly/1ujgxQ3>. Noting that global
 19 warming was “a common concern of humankind,” the UNFCCC “[a]cknowledg[ed] that the
 20 global nature of climate change calls for the widest possible cooperation by all countries and
 21 their participation in an effective and appropriate international response.” UNFCCC Recitals,
 22 <http://bit.ly/1BQK8Wg>. The United States Senate ratified the Convention in 1992.

23 The United States has also acted at the national level to address global warming while
 24 balancing important economic and social interests. As early as 1978, Congress established a
 25 “national climate program” to improve the country’s understanding of global warming through
 26 enhanced research, information collection and dissemination, and international cooperation.
 27 *See* Nat’l Climate Program Act of 1978, 15 U.S.C. § 2901 *et seq.* Following this, in the
 28 Global Climate Protection Act of 1987, Congress recognized the uniquely international

1 character of global warming and directed the Secretary of State to coordinate U.S. negotiations
2 on the issue. *See* 15 U.S.C. § 2901(5); *see also* 15 U.S.C. § 2952(a).²

3 The Clean Air Act, which is the primary federal statute governing emission standards,
4 established a comprehensive scheme to promote and balance multiple objectives, deploying
5 resources to “protect and enhance the quality of the Nation’s air resources, so as to promote
6 the public health and welfare and the productive capacity of its population.” 42 U.S.C.
7 § 7401(b)(1). Congress authorized the Environmental Protection Agency (“EPA”) to regulate
8 air pollutants like greenhouse gas emissions, and EPA has exercised this authority on its own
9 and with other agencies.³ *Id.* § 7601. Other laws, like the Energy Policy Act of 2005 and the
10 Energy Independence and Security Act of 2007, sought further reductions of greenhouse gas
11 emissions at the national level. *See* 42 U.S.C. § 13389(c)(1); 42 U.S.C. § 17001 *et seq.*

12 Reflecting the complex tradeoffs inherent in national energy and security policy, the
13 political branches of the U.S. Government have always balanced environmental regulations
14 with economic and social interests. For example, the U.S. Senate unanimously adopted a
15 resolution urging the President not to sign the Kyoto Protocol if it would result in serious harm
16 to the U.S. economy or did not do enough to regulate other countries’ emissions. *See* S. Res.
17 98, 105th Cong. (1997).⁴ More recently, President Trump cited similar economic concerns
18 when he announced his intent to withdraw the U.S. from the Paris Agreement, shortly after
19 which he reaffirmed the importance of fossil fuels to the American economy and the country’s
20 dedication to encouraging fossil fuel production. *See* Michael D. Shear, *Trump Will Withdraw*
21 *U.S. From Paris Climate Agreement*, N.Y. Times (June 1, 2017), <http://nyti.ms/2wNImI7>;

22 ² Congress has revisited the issue of global warming several times. For example, the Global Change Research
23 Act of 1990 established a research program for global climate issues, 15 U.S.C. § 2921, directed the President to
24 establish a research program to “improve understanding of global change,” *id.* § 2933, and provided for regular
25 scientific assessments that “analyze[] current trends in global change,” *id.* § 2936(3). Congress later directed the
26 Secretary of Energy to conduct assessments related to greenhouse gases and report to Congress. Energy Policy
27 Act of 1992, Pub. L. No. 102-486, § 1604, 106 Stat. 2776, 3002 (codified at 42 U.S.C. § 13384 *et seq.*).

28 ³ Indeed, a “national program” addressing greenhouse gas emissions from vehicles “was developed jointly by
EPA and the National Highway Traffic Safety Administration.” *See* U.S. Env’tl Prot. Agency, Regulations for
Greenhouse Gas Emissions from Passenger Cars and Trucks, <http://bit.ly/2EWvcKK>.

⁴ Congress then enacted a series of laws effectively barring EPA from implementing the Protocol in the absence
of Senate ratification. *See* Pub. L. No. 105-276, 112 Stat. 2461, 2496 (1998); Pub. L. No. 106-74, 113 Stat. 1047,
1080 (1999); Pub. L. No. 106-377, 114 Stat. 1441, 1441A-41 (2000).

1 Remarks by President Trump at the Unleashing American Energy Event (June 29, 2017),
 2 <http://bit.ly/2El7yWU>. And state governments—including Washington—recognize the
 3 importance of fossil fuels to their citizens and economies, joining the federal government in
 4 authorizing and encouraging the production of those fuels within their jurisdictions. *See, e.g.*,
 5 Wash. Rev. Code § 78.52.001 (declaring it “in the public interest” to “promote the exploration,
 6 development, production, and utilization of oil and gas in the state”); *id.* § 78.52.330
 7 (provision “[t]o assist in the development of oil and gas in this state”); *id.* § 79.14.020
 8 (authorizing public lands to be leased “for the purpose of prospecting for, developing, and
 9 producing oil, gas, or other hydrocarbon substances”); *see also* Wash. Admin. Code § 332-12-
 10 220; *id.* § 332-12-260; 42 U.S.C. § 13401; 42 U.S.C. § 15927; 30 U.S.C. § 21a.

11 **B. Plaintiff Seeks to Hold Five Energy Producers Solely Liable for Global Warming**

12 According to Plaintiff, global greenhouse gas emissions “since the dawn of the
 13 Industrial Revolution” have contributed to global warming in the form of increased “global
 14 average temperature.” Compl. ¶¶ 94, 99(c). Plaintiff claims Defendants are the “five largest,
 15 investor-owned producers of fossil fuels in the world,”⁵ and alleges that they “are collectively
 16 responsible, through their production, marketing, and sale of fossil fuels, for over 11% of all
 17 the carbon and methane pollution from industrial sources that has accumulated in the
 18 atmosphere since the dawn of the Industrial Revolution.” *Id.* ¶ 99(b)-(c).

19 Climate scientists have warned about the risk of global warming since the 1950s, *id.*
 20 ¶¶ 79–96, and Plaintiff alleges that Defendants have “maintained scientific staffs for decades
 21 who have kept track of the climate science,” *id.* ¶ 92. *See id.* ¶¶ 100–109. Plaintiff alleges that
 22 notwithstanding this alleged knowledge, Defendants “promoted fossil fuel use in massive
 23 quantities through affirmative advertising for fossil fuels and downplaying global warming
 24 risks.” *Id.* ¶ 110. According to Plaintiff, this advertising “encouraged fossil fuel
 25 consumption” by third parties. *Id.* Plaintiff further contends that Defendants engaged in a
 26 public relations “campaign” to “downplay[] the harms and risks of global warming” and “help

27 _____
 28 ⁵ Plaintiff ignores corporate separateness and improperly aggregates the activities of each Defendant’s
 subsidiaries and affiliates. *See Ranza v. Nike, Inc.*, 793 F.3d 1059, 1070–71 (9th Cir. 2015).

1 Defendants continue to produce fossil fuels and sell their products on a massive scale.” *Id.* ¶
 2 111. Plaintiff alleges that this “campaign” was largely carried on by lobbying organizations,
 3 including the American Petroleum Institute and the Global Climate Coalition. *Id.* ¶¶ 111–115.

4 Although Plaintiff does not claim Defendants have violated any laws, it alleges that
 5 Defendants’ lawful worldwide conduct, including lobbying and other First Amendment-
 6 protected activities, renders them liable for nuisance and trespass under state law because
 7 “King County will incur severe climate change injuries” sometime in the future. Compl. Part
 8 VII; *id.* ¶¶ 133–155. Plaintiff seeks, *inter alia*, compensatory damages for “the costs of actions
 9 King County has already taken, is currently taking, and needs to take to protect King County
 10 infrastructure or property,” and “an abatement fund remedy to be paid for by Defendants to
 11 provide for infrastructure, costs of studying and planning, and other costs in King County
 12 necessary for King County to adapt to global warming impacts.” *Id.* Relief Requested A–B.

13 III. LEGAL STANDARD

14 A complaint must “contain sufficient factual matter, accepted as true, to ‘state a claim
 15 to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). After
 16 stripping away any “legal conclusions” and “conclusory statements,” the Court, relying on its
 17 “judicial experience and common sense,” *id.* at 678–79, must dismiss if the remaining
 18 allegations fail to “raise a right to relief above the speculative level,” *Bell Atl. Corp. v.*
 19 *Twombly*, 550 U.S. 544, 545 (2007). Dismissal is also appropriate if the claims are barred as a
 20 matter of law, such as where they are displaced or preempted by federal law, *AEP*, 564 U.S. at
 21 423; infringe on the executive’s foreign affairs power, *Garamendi*, 539 U.S. at 429; are barred
 22 by the Constitution, *BMW of N. Am. v. Gore*, 517 U.S. 559, 571, 585 (1996); or are non-
 23 justiciable, *Saldana v. Occidental Petroleum Corp.*, 774 F.3d 544, 545 (9th Cir. 2014).

24 IV. ARGUMENT

25 “No plaintiff has ever succeeded in bringing a nuisance claim based on global
 26 warming.” *City of Oakland*, 2018 WL 3109726, at *4. In *City of Oakland*, Judge Alsup
 27 dismissed nearly identical claims brought against the same five Defendants by municipalities
 28 represented by the same private attorneys. As here, the plaintiffs’ “theory rest[ed] on the

1 sweeping proposition that otherwise lawful and everyday sales of fossil fuels, combined with
 2 an awareness that greenhouse gas emissions lead to increased global temperatures, constitute a
 3 public nuisance.” *City of Oakland*, 2018 WL 3109726 at *4. That theory, “breathtaking” in
 4 scope, “would reach the sale of fossil fuels anywhere in the world, including all past and
 5 otherwise lawful sales, where the seller knew that the combustion of fossil fuels contributed to
 6 the phenomenon of global warming.” *Id.* Less than a month later, Judge Keenan reached the
 7 same conclusion in *City of New York*. There, the court acknowledged that “Congress has
 8 expressly delegated to the EPA the determination as to what constitutes a reasonable amount
 9 of greenhouse gas emission under the Clean Air Act,” such that the statute “displaces the
 10 City’s claims.” 2018 WL 3475470, at *5. Judge Keenan cautioned against judicial
 11 intervention where, as here, the “claims implicate countless foreign governments and their
 12 laws and policies,” and are “the subject of international agreements.” *Id.* at *7.

13 Because Plaintiff’s theory of liability has no basis in federal or state law, is barred by
 14 numerous constitutional doctrines, and presents political questions inappropriate for judicial
 15 resolution, this Court should dismiss.

16 **A. Plaintiff’s Claims Arise Under Federal Common Law and Should Be Dismissed**

17 Plaintiff’s Complaint is premised on the theory that Washington law governs tort
 18 claims based on global warming. But as the Supreme Court and the Ninth Circuit have held,
 19 claims aimed at the interstate and international effects of greenhouse gas emissions arise under
 20 *federal* law. In denying a motion to remand nearly identical claims, Judge Alsup held that
 21 claims addressing “the national and international geophysical phenomenon of global warming
 22 . . . are necessarily governed by federal common law.” *California v. BP P.L.C.*, 2018 WL
 23 1064293, at *2 (N.D. Cal. Feb. 27, 2018) (“BP”).⁶ And Judge Keenan likewise held in *City of*

24 ⁶ Although another California district court remanded similar global warming claims, it did so based on the
 25 misapprehension that the displacement of federal common-law remedies—which is a *merits* issue that arises *after*
 26 the court recognizes that federal common law governs (and thus gives rise to federal-question jurisdiction)—
 27 somehow eliminates federal jurisdiction and leaves only state law to govern the case. *County of San Mateo v.*
 28 *Chevron Corp.*, 2018 WL 1414774, at *1–3 (N.D. Cal. Mar. 16, 2018); *id.* at *3 (agreeing that comparable
 “claims raise national and perhaps global questions”). But as both *City of Oakland*, 2018 WL 3109726, at *9, and
City of New York, 2018 WL 3475470, at *6, recognized, such reasoning is erroneous because the applicability of
 displacement on the merits does not change the fact that global warming tort claims can only be *governed* by
 federal common law.

1 *New York* that “the City’s claims are governed by federal common law” because they “are
2 ultimately based on the ‘transboundary’ emission of greenhouse gases” and therefore “require
3 a uniform standard of decision.” 2018 WL 3475470, at *4. But Plaintiff is not entitled to
4 relief under federal common law because Congress has displaced global warming-based tort
5 claims and because Plaintiff’s claims are incompatible with federal common law principles.

6 **1. Federal common law governs global-warming based tort claims like Plaintiff’s**

7 Although “[t]here is no federal general common law,” *Erie R. Co. v. Tompkins*, 304
8 U.S. 64, 78 (1938), the Court has long recognized that there remain “some limited areas” in
9 which the governing legal rules will be supplied not by state law, but by “what has come to be
10 known as ‘federal common law.’” *Tex. Indus. Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630,
11 640 (1981). Where “the interstate or international nature of the controversy makes it
12 inappropriate for state law to control,” “our federal system does not permit the controversy to
13 be resolved under state law.” *Id.* at 641. Because such controversies implicate “uniquely
14 federal interests,” *Tex. Indus.*, 451 U.S. at 640, “the basic scheme of the Constitution . . .
15 demands” that federal common law apply, *AEP*, 564 U.S. at 421. Thus, “if federal common
16 law exists, it is because state law cannot be used.” *City of Milwaukee v. Illinois*, 451 U.S. 304,
17 313 n.7 (1981) (“*Milwaukee II*”).

18 “The control of interstate pollution” is one area in which federal common law has
19 historically governed. *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987). For example,
20 the Supreme Court has held that “regulation of interstate water pollution is a matter of federal,
21 not state, law,” and that nuisance claims involving interstate water and air pollution “should be
22 resolved by reference to federal common law.” *Id.* at 488; *see also Illinois v. City of*
23 *Milwaukee*, 406 U.S. 91, 103 (1972) (“*Milwaukee I*”) (“When we deal with air and water in
24 their ambient or interstate aspects, there is a federal common law.”). Courts “develop[ed]
25 federal common law” to resolve issues involving interstate pollution because in this area “there
26 exists a significant conflict” between “federal policy or interest and the use of state law.”
27 *Milwaukee II*, 451 U.S. at 313. The Court has thus repeatedly “approved federal common-law
28

1 suits brought by one State to abate pollution emanating from another State.” *AEP*, 564 U.S. at
2 421. “[T]he implicit corollary” of these rulings was that, because the nature of the dispute
3 required federal standards, “state common law was preempted.” *Ouellette*, 479 U.S. at 488.

4 The Supreme Court has held that, under this line of cases, claims asserting global-
5 warming-related injuries from emissions of greenhouse gases are governed by federal common
6 law. *See AEP*, 564 U.S. at 421–22. In *AEP*, eight States and various other plaintiffs sued five
7 electric utility companies, contending that “the defendants’ carbon-dioxide emissions” had
8 substantially contributed to global warming, thereby “creat[ing] a ‘substantial and
9 unreasonable interference with public rights,’ in violation of the federal common law of
10 interstate nuisance, or, in the alternative, of state tort law.” 564 U.S. at 418. The Supreme
11 Court, as a threshold matter, agreed with the plaintiffs and the Second Circuit that such claims
12 were necessarily governed by federal common law. *Id.* at 421 (“When we deal with air and
13 water in their ambient or interstate aspects, there is a federal common law.” (quoting
14 *Milwaukee I*, 406 U.S. at 103)). In reaching that conclusion, the Court emphasized that when
15 dealing with a global-warming tort claim, “borrowing the law of a particular State would be
16 inappropriate.” *AEP*, 564 U.S. at 422.

17 In *Kivalina*, a case brought by some of the same private attorneys as here and pleading
18 nearly identical global-warming-related tort claims, the Ninth Circuit followed *AEP* and held
19 that federal common law governed. 696 F.3d at 855–56. In *Kivalina*, as in this case, a local
20 government entity (an Alaskan village) asserted a public nuisance claim for damages to city
21 property and “critical infrastructure” as a result of “sea levels ris[ing]” and other climatic
22 impacts allegedly resulting from the defendant oil, coal, and electric companies’ “emissions of
23 large quantities of greenhouse gases.” *Id.* at 853–54. The village asserted this public nuisance
24 claim under federal common law and, in the alternative, state law. *Native Vill. of Kivalina v.*
25 *ExxonMobil Corp.*, 663 F. Supp. 2d 863, 869 (N.D. Cal. 2009), *aff’d*, 696 F.3d 849. The Ninth
26 Circuit began by addressing the parties’ “threshold” disagreement as to whether the plaintiff’s
27 claims arose under federal common law. 696 F.3d at 855. The Court held that, under *AEP*,

1 such a global-warming tort suit was the sort of “transboundary pollution suit[]” to which
 2 federal common law applied. *Id.* at 855–56.⁷

3 Under *AEP* and *Kivalina*, Plaintiff’s claims are governed by federal common law. *See*
 4 *AEP*, 564 U.S. at 421–22; *Kivalina*, 696 F.3d at 855–56. They are based on global fossil fuel
 5 production and the global emissions of countless nonparties—not conduct occurring
 6 exclusively, or even primarily, in King County. *See* Compl. ¶ 3. The scope of these claims,
 7 and the conduct on which they are based, demonstrates the “overriding federal interest in the
 8 need for a uniform rule of decision.” *Milwaukee I*, 406 U.S. at 105 n.6. Thus, notwithstanding
 9 the label Plaintiff puts on its claims, “the scope of the worldwide predicament” at issue
 10 “demands the most comprehensive view available, which in our American court system means
 11 our federal courts and our federal common law.” *BP*, 2018 WL 1064293 at *3; *see also City*
 12 *of New York*, 2018 WL 3475470 at *6 (because “these types of ‘interstate pollution’ claims
 13 arise under federal common law” and implicate “areas of federal concern that have been
 14 delegated to the Executive Branch as they require a uniform, national solution,” it would be
 15 “illogical” to think that they could be governed by state law).

16 The inherently federal nature of Plaintiff’s global-warming tort claims is not altered by
 17 the fact that Congress, in enacting the Clean Air Act, carved out a narrow enforcement role for
 18 the states. *See AEP*, 564 U.S. at 425 (citing 42 U.S.C. § 7411). Within a scheme established
 19 by Congress to address sources of interstate pollution, state common law can be applied to
 20 further limit a defendant’s emissions *only within that source state*, if at all; the existence of the
 21 federal statute “precludes a court from applying the law of an affected State against an out-of-
 22 state source.” *Ouellette*, 479 U.S. at 492–94. Because Plaintiff’s claims rely on an analysis of
 23 *global* emissions and production, not emissions or production occurring exclusively in
 24 Washington, those claims cannot be governed by Washington law. *See id.* at 496 (rejecting

25 _____
 26 ⁷ The plaintiffs in *Kivalina* and *AEP* alternatively asserted state-law claims, but those claims were not before the
 27 courts on appeal. *See Kivalina*, 696 F.3d at 855; *AEP*, 564 U.S. at 429. However, in view of those courts’
 28 holdings that federal common law governed the inherently interstate and international tort claims associated with
 global warming, and that application of a particular State’s law to such claims would be “inappropriate,” *AEP*,
 564 U.S. at 422, it is not surprising that, following the dismissal of their federal claims, the plaintiffs on remand
 in both cases did not attempt to pursue any such alternative theory that state law could be applied.

1 application of state law to out-of-state sources because it would result in “a variety of”
2 “‘vague’ and ‘indeterminate’” state common law “nuisance standards” and “[t]he application
3 of numerous States’ laws would only exacerbate the vagueness and resulting uncertainty”);
4 *AEP*, 564 U.S. at 422 (application of a particular State’s law would be “inappropriate”); *BP*,
5 2018 WL 1064293, at *3 (“A patchwork of fifty different answers to the same fundamental
6 global issue would be unworkable.”). In short, Plaintiff’s claims “must stand or fall under
7 federal common law.” *City of Oakland*, 2018 WL 3109726, at *9.

8 **2. Congress has displaced federal common law governing global warming based** 9 **tort claims through the Clean Air Act**

10 Although global warming claims necessarily arise under federal common law, *AEP* and
11 *Kivalina* held that any such cause of action fails to state a claim because Congress displaced
12 federal tort remedies by excluding them from the Clean Air Act’s regulatory scheme. *AEP*,
13 564 U.S. at 423–29; *Kivalina*, 696 F.3d at 856–58. Plaintiff’s claims fail for the same reason.

14 “[T]he right to assert a federal common law public nuisance claim has limits.”
15 *Kivalina*, 696 F.3d at 856. “Federal common law is a necessary expedient, and when Congress
16 addresses a question previously governed by a decision rested on federal common law the need
17 for such an unusual exercise of lawmaking by federal courts disappears.” *Milwaukee II*, 451
18 U.S. at 314; *see also id.* at 317 (“[W]e start with the assumption that it is for Congress, not
19 federal courts, to articulate the appropriate standards to be applied as a matter of federal law.”).
20 Accordingly, “federal common law does not provide a remedy” “when federal statutes directly
21 answer the federal question.” *Kivalina*, 696 F.3d at 856.

22 “The test for whether congressional legislation excludes the declaration of federal
23 common law is simply whether the statute speak[s] directly to [the] question at issue.” *AEP*,
24 564 U.S. at 424. In *AEP*, the Supreme Court recognized that Congress has spoken directly to
25 the issue of greenhouse gas emissions because they “qualify as air pollution subject to
26 regulation under the [Clean Air] Act.” *Id.* (citing *Massachusetts v. EPA*, 549 U.S. 497, 528–
27 29 (2007)). The Court thus held that “the Clean Air Act and the EPA actions it authorizes
28

1 displace any federal common law right to seek abatement of carbon-dioxide emissions from
2 fossil-fuel fired power plants.” *Id.* at 424; *see also Kivalina*, 696 F.3d at 857.

3 Attempting to distinguish its claims from *AEP* and *Kivalina*, Plaintiff disclaims any
4 attempt “to impose liability on Defendants for their direct emissions of greenhouse gases,”
5 Compl. ¶ 10, and asserts that its nuisance and trespass claims are predicated solely on
6 Defendants’ extraction and marketing activities, *id.* ¶¶ 97–99. But as in *AEP* and *Kivalina*,
7 Plaintiff claims that its injuries are due to global warming, which, it alleges, is caused by
8 excessive worldwide *emissions*. *Id.* ¶¶ 88–96. Indeed, the Complaint uses the term
9 “emissions” *60 times*. The fact that Plaintiff’s claims rest on a derivative theory of liability—
10 *i.e.*, that Defendants are liable for enabling *other persons*’ allegedly unreasonable and
11 excessive emissions—does not distinguish it from *AEP* or *Kivalina*. Indeed, in *Kivalina*, the
12 Ninth Circuit expressly held that the plaintiff’s derivative theory of indirect liability—based on
13 allegations that defendants had “conspir[ed] to mislead the public about the science of global
14 warming”—was “dependent upon the success” of the underlying public nuisance claim, and
15 therefore was governed by federal common law and displaced. 696 F.3d at 854, 858.

16 Not surprisingly, all three federal district courts to have addressed the issue have
17 concluded that global warming claims against fossil fuel producers are legally
18 indistinguishable from the emissions claims dismissed in *AEP* and *Kivalina*. In *San Mateo*,
19 the court held that “*Kivalina* stands for the proposition that federal common law is not just
20 displaced when it comes to claims against domestic sources of emissions but also when it
21 comes to claims against energy producers’ contributions to global warming and rising sea
22 levels. Put another way, [*AEP*] did not confine its holding about the displacement of federal
23 common law to particular sources of emissions, and *Kivalina* did not apply [*AEP*] in such a
24 limited way.” *San Mateo*, 2018 WL 1414774, at *1. The court thus held that the plaintiffs’
25 claims were completely displaced. In *City of Oakland*, the court likewise rejected the
26 plaintiffs’ proposed “distinction” between claims based on the defendant’s “own emissions of
27 greenhouse gases” and claims based on the defendant’s “sale of fossil fuels to those who
28 eventually burn the fuel”: “If an oil producer cannot be sued under the federal common law

1 for [its] own emissions, *a fortiori* [it] cannot be sued for someone else’s.” 2018 WL 3109726,
 2 at *6.⁸ The court in *City of New York* reached the same result, emphasizing that “the City
 3 alleges that its climate-change related injuries are the direct result of the *emission* of
 4 greenhouse gases from the combustion of Defendants’ fossil fuels, and not the production and
 5 sale of those fossil fuels.” 2018 WL 3475470, at *5.

6 The incompatibility of Plaintiff’s claims with the Clean Air Act is highlighted by the
 7 fact that Plaintiff would have to prove, *inter alia*, that the greenhouse gas emissions for which
 8 it seeks to hold Defendants responsible created an “*unreasonable* interference with a right
 9 common to the general public.” *Milwaukee II*, 451 U.S. at 348 (emphasis added).
 10 “[A]djudication of Plaintiff’s claim” would thus “require the Court to balance the competing
 11 interests of reducing global warming emissions and the interests of advancing and preserving
 12 economic and industrial development” dependent on fossil fuels. *California v. Gen. Motors*
 13 *Corp.*, 2007 WL 2726871, at *8, 15 (N.D. Cal. Sept. 17, 2007). In short, even though Plaintiff
 14 “fixate[s] on an earlier moment in the train of industry, the earlier moment of production and
 15 sale of fossil fuels, not their combustion,” *BP*, 2018 WL 1064293, at *4, Plaintiff’s global-
 16 warming-based tort claims necessarily implicate the reasonableness of greenhouse gas
 17 emissions. Because Congress has “designated an expert agency, here, EPA, as best suited to
 18 serve as primary regulator of greenhouse gas emissions,” Plaintiff’s claims “cannot be
 19 reconciled with the decisionmaking scheme Congress enacted.” *AEP*, 564 U.S. at 428–29.

20 **3. Congress has displaced any federal common law nuisance claim based on the**
 21 **domestic production of fossil fuels**

22 Even framed as a case only about oil and gas *production*, Plaintiff’s claims are

23
 24 ⁸ In *City of Oakland*, the court declined to dismiss solely on displacement grounds because it concluded that the
 25 plaintiffs’ claims “add[ed] another dimension not addressed in *AEP* or *Kivalina*, namely that the conduct and
 26 emissions contributing to the nuisance arise *outside* the United States, although their ill effects reach *within* the
 27 United States.” 2018 WL 3109726 at *6. Because the Clean Air Act does not regulate overseas emissions, the
 28 court concluded that it “did not necessarily displace plaintiffs’ federal common law claims.” *Id.* The court
 nevertheless held that plaintiffs’ claims were “foreclosed by the need for federal courts to defer to the legislative
 and executive branches when it comes to such international problems[.]” *Id.* Thus, even if Plaintiff’s claims
 here are only displaced to the extent they are based on conduct leading to domestic emissions—over which the
 EPA has regulatory authority—their remaining claims are not viable under federal common law to the extent
 they are based on conduct leading to overseas emissions. *See infra* IV.A.5.

1 displaced by numerous statutes that speak “directly” to the reasonableness of that conduct.

- 2 • The Energy Policy Act of 1992 provides that “[i]t is the goal of the United States in
3 carrying out energy supply and energy conservation research and development . . . to
4 strengthen national energy security by reducing dependence on imported oil.” 42 U.S.C.
5 § 13401. The statute directs the Secretary of Energy “to increase the recoverability of
6 domestic oil resources,” *id.* § 13411(a), and to investigate “oil shale extraction and
7 conversion” in order “to produce domestic supplies of liquid fuels from oil shale,” *id.*
8 § 13412. It authorizes a research center to “improve the efficiency of petroleum recovery,”
9 “increase ultimate petroleum recovery,” and “delay the abandonment of resources” in
10 certain parts of the United States. *Id.* § 13415(b)–(c).
- 11 • The Energy Policy Act of 2005 declared it “the policy of the United States that . . . oil
12 shale, tar sands, and other unconventional fuels are strategically important domestic
13 resources that should be developed to reduce the growing dependence of the United States
14 on politically and economically unstable sources of foreign oil imports,” 42 U.S.C.
15 § 15927, and offered financial incentives to fossil fuel producers to increase domestic
16 fossil fuel production. *See, e.g.*, 42 U.S.C. §§ 15903, 15904, 15909(a), 15910(a)(2)(B).
- 17 • The Mining and Minerals Policy Act of 1970 proclaimed that “it is the continuing policy of
18 the Federal Government in the national interest to foster and encourage . . . economic
19 development of domestic mineral resources, reserves, and reclamation of metals and
20 minerals to help assure satisfaction of industrial, security and environmental needs.” 30
21 U.S.C. § 21a.
- 22 • The Coastal Zone Management Act of 1972 explained that “expanded energy activity”
23 would further the “national objective of attaining a greater degree of energy self-
24 sufficiency.” 16 U.S.C. § 1451(j).
- 25 • The Federal Land Policy and Management Act of 1976 stated that “it is the policy of the
26 United States that . . . the public lands be managed in a manner which recognizes the
27 Nation’s need for domestic sources of minerals . . . from the public lands.” 43 U.S.C.
28 § 1701(a)(12).
- And the federal tax code has a number of provisions that subsidize the extraction and
refining activities of fossil fuel companies to encourage production and use. *See, e.g.*, 26
U.S.C. §§ 263(c), 613A(c)(1), and 617.

There can be no doubt that these statutes “speak[] directly to [the] question” at issue
here, *AEP*, 564 U.S. at 424—namely, whether fossil fuel production itself is unreasonable
given the potential threat of global warming-related harms.⁹ Whereas Plaintiff alleges that
Defendants’ production of fossil fuels has created an “unreasonable” interference with public
rights, Compl. ¶ 161, historically “the problem wasn’t too much oil, but too little, and our
national policy emphasized the urgency of reducing dependence on foreign oil.” *See City of*

⁹ These statutes would not necessarily displace all state law claims related to oil production. For example, a
producer could be held liable for spilling oil on its neighbor’s property during the course of production—the
referenced statutes say nothing about *that* conduct. But here Plaintiff has alleged that fossil-fuel production *itself*
is a nuisance.

1 *Oakland*, 2018 WL 3109726, at *6; *id.* (“In our industrialized and modern society, we needed
2 (and still need) oil and gas to fuel power plants, vehicles, planes, trains, ships, equipment,
3 homes and factories. Our industrial revolution and our modern nation, . . . have been fueled by
4 fossil fuels.”). Congress has clearly (and repeatedly) stated that fossil fuels are not a public
5 nuisance, but a public necessity, and “the court [is] not free to ‘supplement’ Congress’ answer
6 [such] that [these statutes] become[] meaningless.” *Mobil Oil Corp. v. Higginbotham*, 436
7 U.S. 618, 625 (1978). Accordingly, Plaintiff’s federal common law claims are displaced.

8 **4. Congress has displaced any federal common law nuisance claim based on**
9 **“promotion” of lawful products**

10 Plaintiff also describes its public nuisance claim as aimed at Defendants’ promotion
11 and marketing activities, *see, e.g.*, Compl ¶¶ 5–7, 110–132, but any theory of public nuisance
12 based on misleading “promotion” of a lawful product has been displaced because numerous
13 federal statutes “speak directly” to the issue of misleading advertising.

14 Since the Federal Trade Commission Act was implemented in 1914, “unfair or
15 deceptive acts or practices in or affecting commerce” have been “unlawful.” 15 U.S.C.
16 § 45(a)(1). The Federal Trade Commission has interpreted this Act to prohibit
17 “misrepresent[ing], directly or by implication, that a product, package, or service offers a
18 general environmental benefit.” 16 C.F.R. § 260.4(a). More recently, Congress has enacted
19 two laws that speak directly to misrepresentation in the promotion of fossil fuels. The Energy
20 Policy Act of 2005 states that “[i]t shall be unlawful for any entity, directly or indirectly, to use
21 or employ, in connection with the purchase or sale of natural gas . . . any manipulative or
22 deceptive device or contrivance.” 15 U.S.C. § 717c-1. And the Energy Independence and
23 Security Act of 2007 makes it “unlawful for any person, directly or indirectly, to use or
24 employ, in connection with the purchase or sale of crude oil[,] gasoline or petroleum distillates
25 at wholesale, any manipulative or deceptive device or contrivance.” 42 U.S.C. § 17301. The
26 Act’s implementing regulations expressly outlaw “the making of any untrue statement of
27 material fact . . . that operates or would operate as a fraud or deceit upon any person,” as well
28 as “[i]ntentionally fail[ing] to state a material fact that under the circumstances renders a

1 statement made by such person misleading.” 16 C.F.R. § 317.3. These laws speak directly to
 2 Plaintiff’s claim that Defendants have misrepresented the environmental impacts of fossil
 3 fuels, and thus displace Plaintiff’s federal common law cause of action.¹⁰

4 In short, whether Plaintiff’s nuisance claims are based on domestic emissions,
 5 production, or promotion, they are squarely displaced by statute and must be dismissed.

6 **5. Alternatively, Plaintiff has failed to plead a viable federal common law claim**

7 Even if Congress had not displaced the relevant federal common law, Plaintiff has
 8 failed to state a claim that complies with federal common law standards. Federal common law
 9 has never been extended to the sort of expansive derivative theory of liability that Plaintiff
 10 asserts here. There is no precedent for applying tort liability against producers of lawful
 11 products at lawful levels merely because consumers happen to create pollution while *using*
 12 those products.¹¹ *See AEP*, 564 U.S. at 422 (“Nor have we ever held that a State may sue to
 13 abate any and all manner of pollution originating outside its borders.”). As Plaintiff’s counsel
 14 admitted in parallel California proceedings, “[a]pplying federal common law to producer-
 15 based cases would extend the scope of federal nuisance law well beyond its original
 16 justification.” *BP*, No. 17-cv-06011, ECF No. 81 at 9. Nor is there any precedent under
 17 federal common law to recognize a cause of action for tort injuries based on conduct occurring
 18 *overseas*. To the contrary, “there are sound reasons why regulation of the worldwide problem
 19 of global warming should be determined by our political branches, not by our judiciary.” *City*
 20 *of Oakland*, 2018 WL 3109726, at *9.

21 The Supreme Court’s recent decision in *Jesner v. Arab Bank*, 138 S. Ct. 1386 (2018),
 22 cautions against Plaintiff’s proposed expansion of federal common law remedies. In *Jesner*,
 23 the plaintiffs sued the defendant under the Alien Tort Statute (“ATS”), alleging that the bank
 24

25 ¹⁰ To the extent Plaintiff’s claims are based on alleged misstatements to shareholders or the SEC, *see, e.g.*,
 26 Compl. ¶¶ 122, 127–132, they are displaced by the securities laws, which comprehensively regulate corporate
 27 communications with investors and regulators. *See* 15 U.S.C. § 77a *et seq.*; *id.* § 78a *et seq.*; 17 C.F.R.
 28 § 240.10b-5.

¹¹ Indeed, the attenuated causal chain from Defendants’ production and promotion of fossil fuels to global
 warming and the related sea-level rise and other harms alleged by Plaintiff, dependent on the intervening acts of
billions of third parties, defeats proximate causation under federal common law.

1 facilitated certain terrorist acts committed abroad. Because the ATS is “strictly jurisdictional,”
2 *Jesner*, 138 S. Ct. at 1397, the statute is “read as having been enacted on the understanding
3 that the common law would provide a cause of action for [a] modest number of international
4 law violations,” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004). The question in *Jesner*
5 was whether the Court had “authority and discretion in an ATS suit to impose liability on a
6 corporation without a specific direction from Congress to do so.” *Id.* at 1394. The Court
7 answered “no,” stressing its “reluctance to extend judicially created private rights of action.”
8 *Id.* at 1402. Citing prior decisions limiting remedies in court-created *Bivens* actions, the Court
9 explained that “‘a decision to create a private right of action is one better left to legislative
10 judgment in the great majority of cases,’ . . . because ‘the Legislature is in the better position
11 to consider if the public interest would be served by imposing a new substantive legal
12 liability.’” *Id.* (citations omitted). The Court thus announced that “[i]f there are sound reasons
13 to think Congress might doubt the efficacy or necessity of a damages remedy, . . . courts must
14 refrain from creating a remedy in order to respect the role of Congress.” *Id.* (quoting *Ziglar v.*
15 *Abbasi*, 137 S. Ct. 1843, 1858 (2017)); *see also City of Oakland*, 2018 WL 3109726, at *6
16 (“One consideration weighing in favor of judicial caution is where ‘modern indications of
17 congressional understanding of the judicial role in the field have not affirmatively encouraged
18 greater judicial creativity.’”) (quoting *Sosa*, 542 U.S. at 728).

19 Here, there are many reasons why Plaintiff’s proposed damages remedy against fossil-
20 fuel producers contravenes congressional judgments and therefore fails under federal common
21 law. *First*, Plaintiff’s claim that Defendants should be held liable for producing “massive
22 amounts of fossil fuels,” Compl. ¶ 2, would “require a balancing of policy concerns—
23 including the harmful effects of greenhouse gas emissions, our industrialized society’s
24 dependence on fossil fuels, and national security.” *City of Oakland*, 2018 WL 3109726, at *6.
25 As the Court explained in *AEP*, “[t]he appropriate amount of regulation in any particular
26 greenhouse gas-producing sector cannot be prescribed in a vacuum: As with questions of
27 national or international policy, informed assessment of competing interests is required.

28 Along with the environmental benefit potentially achievable, our nation’s energy needs and the

1 possibility of economic disruption must weigh in the balance.” 564 U.S. at 427. But
 2 “questions of how to appropriately balance” the “worldwide negatives [of global warming]
 3 against the worldwide positives of the energy itself, and of how to allocate the pluses and
 4 minuses among the nations of the world, demand the expertise of our environmental agencies,
 5 our diplomats, our Executive, and at least the Senate.” *City of Oakland*, 2018 WL 3109726, at
 6 *7. “Nuisance suits in various United States judicial districts regarding conduct worldwide are
 7 far less likely to solve the problem” and “could interfere with reaching a worldwide
 8 consensus.” *Id.*; *see also City of New York*, 2018 WL 3475470, at *7 (“[T]he immense and
 9 complicated problem of global warming requires a comprehensive solution that weighs the
 10 global benefits of fossil fuels use with the gravity of the impending harms.”).

11 *Second*, Congress has expressly authorized and encouraged fossil-fuel extraction for
 12 decades, despite being aware of climate change. *See supra* Part IV.A.3. The Restatement
 13 (Second) of Torts, which federal courts have generally applied when dealing with interstate
 14 pollution,¹² states that even where “it would be a nuisance at common law, conduct that is
 15 fully authorized by statute, ordinance or administrative regulation does not subject the actor to
 16 tort liability.” Restatement § 821B cmt. f; *see also id.* cmt. e. Accordingly, “Courts
 17 traditionally have been reluctant to enjoin as a public nuisance activities which have been
 18 considered and specifically authorized by the government.” *North Carolina ex rel. Cooper v.*
 19 *Tenn. Valley Auth.*, 615 F.3d 291, 309 (4th Cir. 2010) (“*Cooper*”). “This is especially true
 20 ‘where the conduct sought to be enjoined implicates the technically complex area of
 21 environmental law.’” *Id.* Because Congress has made clear that oil and gas production is not
 22 a public nuisance, but rather a public necessity, the Court should decline Plaintiff’s invitation
 23 to create a damages remedy here. *See City of Oakland*, 2018 WL 3109726, at *6.

24 ¹² *See Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 328 (2d Cir. 2009), *rev’d on other grounds*, 564 U.S.
 25 410 (2011) (“[W]e apply the Restatement definition of public nuisance to the federal common law of
 26 nuisance[.]”); *Nat’l Sea Clammers Ass’n v. City of New York*, 616 F.2d 1222, 1234 (3d Cir. 1980), *vacated on*
 27 *other grounds, Middlesex Cty. Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1 (1981) (“[W]e are
 28 convinced that the Court would . . . look to the Restatement formulation as an appropriate source for a federal
 rule.”); *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1353 (Fed. Cir. 2001) (looking to
 Restatement for contours and scope of common law nuisance).

1 *Third*, Plaintiff’s requested relief—an abatement fund and damages based on
2 Defendants’ worldwide fossil-fuel extraction—“would effectively allow plaintiffs to govern
3 conduct and control energy policy on foreign soil[.]” *City of Oakland*, 2018 WL 3109726, at
4 *7. The federal common law of nuisance has never been held to authorize such an
5 extraterritorial cause of action based on foreign conduct, and “courts should be ‘particularly
6 wary of impinging on the discretion of the Legislative and Executive Branches in managing
7 foreign affairs.’” *Id.* (quoting *Sosa*, 542 U.S. at 727). Extending federal common law to
8 overseas fossil-fuel production would violate the “the ‘presumption’ that United States law
9 governs domestically but does not rule the world.” *Kiobel v. Royal Dutch Petroleum Co.*, 569
10 U.S. 108, 115 (2013). The Supreme Court regularly applies this “presumption” when
11 interpreting federal law because it “‘serves to protect against unintended clashes between our
12 laws and those of other nations which could result in international discord,’” and “helps ensure
13 that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign
14 policy consequences not clearly intended by the political branches.” *Id.* (citation omitted).
15 The “principles underlying the presumption” apply equally to federal common law claims,
16 because “‘the danger of unwarranted judicial interference in the conduct of foreign policy is
17 magnified’ where ‘the question is not what Congress has done but instead what courts may
18 do.’” *City of Oakland*, 2018 WL 3109726, at *7 (quoting *Kiobel*, 569 U.S. at 116). Thus,
19 before federal courts “run interference” in the “delicate field of international relations there
20 must be present the affirmative intention of the Congress clearly expressed.” *Benz v.*
21 *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 146–47 (1957).

22 Congress has expressed no such intention here, nor is it likely to do so given that
23 Plaintiff’s claims “undoubtedly implicate the interests of countless governments, both foreign
24 and domestic.” *City of Oakland*, 2018 WL 3109726, at *7. Indeed, “as the United States aptly
25 note[d]” in an amicus brief, “many foreign governments actively support the very activities
26 targeted by plaintiff[’s] claims.” *Id.* A substantial amount of Defendants’ overseas conduct is
27 undertaken pursuant to acts of foreign governments (e.g., granting extraction licenses and
28 leasing state-owned land), and foreign governments depend on revenues from Defendants’

1 production activities. Plaintiff’s proposed damages remedy disregards the admonition that
2 courts must exercise caution in interpreting federal common law, as “the political branches,
3 not the judiciary, have the responsibility and institutional capacity to weigh foreign-policy
4 concerns.” *Jesner*, 138 S. Ct. at 1403; *see also Kiobel*, 569 U.S. at 116 (noting that Congress
5 “alone has the facilities necessary to make fairly such an important policy decision where the
6 possibilities of international discord are so evident and retaliative action so certain”).

7 *Fourth*, in addition to its foreign policy implications, Plaintiff’s proposed global
8 warming tort would interfere with other states’ energy and environmental policies. *See infra*
9 IV.B.2. Federal common law should not be used to impose one state’s (or one municipality’s)
10 policy preferences on the rest of the country.

11 Although Plaintiff’s global warming tort claims are governed by federal common law,
12 the federal common law of nuisance does not provide a remedy for these claims. Accordingly,
13 the Court should dismiss the Complaint with prejudice.

14 **B. Plaintiff’s Claims Are Independently Barred by Numerous Federal Doctrines**

15 Regardless of whether Plaintiff’s claims arise under federal or state law, dismissal is
16 warranted because adjudication of these claims would interfere with the foreign affairs powers
17 of the political branches; because the relief Plaintiff seeks would violate the Commerce, Due
18 Process, and Takings Clauses; because the claims are preempted by federal law; and because
19 the claims are barred by the First Amendment.

20 **1. Plaintiff’s claims infringe on the federal foreign affairs power**

21 The Supreme Court has held that “state laws ‘must give way if they impair the
22 effective exercise of the Nation’s foreign policy.’” *Garamendi*, 539 U.S. at 419 (citation
23 omitted). In addition to invalidating state statutes, the foreign affairs doctrine bars state
24 common-law causes of action. *See In re Assicurazioni Generali, S.P.A.*, 592 F.3d 113, 115,
25 119–20 (2d Cir. 2010); *Mujica v. AirScan Inc.*, 771 F.3d 580, 620 (9th Cir. 2014) (Zilly, J.,
26 concurring in judgment in relevant part) (district court properly dismissed, under the foreign
27 affairs doctrine, California common-law claims based on conduct in Colombia). Plaintiff’s
28 claims would undermine the federal government’s foreign affairs powers by impairing the

1 President’s ability to negotiate and implement comprehensive international frameworks on
2 global warming. Indeed, “[to] litigate such an action for injuries from foreign greenhouse gas
3 emissions in federal court would severely infringe upon the foreign-policy decisions that are
4 squarely within the purview of the political branches of the U.S. Government.” *City of New*
5 *York*, 2018 WL 3475470, at *7.

6 “Global warming is already the subject of international agreements,” and “[t]he United
7 States is also engaged in active discussions with other countries as to whether and how climate
8 change should be addressed through a coordinated framework.” *City of Oakland*, 2018 WL
9 3109726, at *7. The United States has clearly stated its policy to seek multilateral reductions
10 in worldwide carbon emissions, and has used domestic emissions reductions as a bargaining
11 chip to extract similar commitments from other nations in negotiations. *See supra* I.A. Most
12 recently, President Trump announced his intent to withdraw from the Paris Agreement for,
13 among other reasons, what he determined to be its unfair impact on the American economy.¹³
14 *See id.* Plaintiff, apparently dissatisfied by these developments, is attempting to “employ[] a
15 different, state system of economic pressure” on the fossil fuel industry. *Garamendi*, 539 U.S.
16 at 423 (citation omitted). But “by seeking to impose damages for the [Defendants’] lawful
17 worldwide [fossil fuel extraction], Plaintiff’s nuisance claims sufficiently implicate the
18 political branches’ powers over . . . foreign policy.” *Gen. Motors*, 2007 WL 2726871, at *14;
19 *see also City of New York*, 2018 WL 3475470, at *7.

20 Moreover, because Plaintiff asks this Court to label Defendants’ worldwide conduct a
21 public nuisance, resolution of this case threatens to “undercut[] the President’s diplomatic
22 discretion and the choice he has made exercising it.” *Garamendi*, 539 U.S. at 423–24. In
23 *Garamendi* the Court invalidated California’s effort to encourage Holocaust reparations by
24 European insurance carriers based on “the likelihood that state legislation will produce . . .
25 more than incidental effect in conflict with express foreign policy of the National
26

27 ¹³ Underscoring the need for a uniform approach, President Trump also noted the Paris Agreement continues to be
28 evaluated, and that the government’s focus is on negotiating a “good deal for the U.S.” Graham Ruddick, *Donald Trump says US could re-enter Paris climate deal*, *The Guardian* (Jan. 28, 2018), <http://bit.ly/2niJfW>.

1 Government.” 539 U.S. at 420. Similarly, in *Crosby v. National Foreign Trade Council*, 530
 2 U.S. 363 (2000), the Court struck down a Massachusetts statute barring state entities from
 3 transacting with companies doing business in Burma—which was intended to spur that
 4 country to improve its human rights record. *Id.* at 366–70. The Court held that the statute
 5 violated the foreign affairs power because it “undermine[d] the President’s capacity . . . for
 6 effective diplomacy” by “compromis[ing] the very capacity of the President to speak for the
 7 Nation.” *Id.* at 381 (“the President’s effective voice” on matters of foreign affairs must not “be
 8 obscured by state or local action”).

9 Without question, Plaintiff’s claims “touch[] on foreign affairs.” *City of Oakland*,
 10 2018 WL 3109726, at *9. Because this “global warming nuisance tort would have an
 11 inextricable effect on . . . foreign policy” that would conflict with the federal government’s
 12 objectives, the claims must be dismissed. *Gen. Motors*, 2007 WL 2726871, at *14.

13 **2. Plaintiff’s claims are barred by the Commerce Clause**

14 Plaintiff’s claims should also be dismissed because they seek to impose Washington’s
 15 legal standards on out-of-state commercial activities. State regulation “that has the ‘practical
 16 effect’ of regulating commerce occurring wholly outside that State’s border is invalid under
 17 the Commerce Clause.” *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989); *see also Cotto Waxo*
 18 *Co. v. Williams*, 46 F.3d 790, 794 (8th Cir. 1995) (“[A] statute has extraterritorial reach when
 19 it necessarily requires out-of-state commerce to be conducted according to in-state terms.”).
 20 Extraterritorial regulation violates the Commerce Clause “whether or not the commerce has
 21 effects within the state.” *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989); *see also Sam Francis*
 22 *Found. v. Christies, Inc.*, 784 F.3d 1320, 1323 (9th Cir. 2015) (en banc) (extraterritorial
 23 regulation of commerce is *per se* unconstitutional); *Experience Hendrix, L.L.C. v.*
 24 *HendrixLicensing.com, LTD*, 766 F. Supp. 2d 1122, 1142 n.24 (W.D. Wash. 2011).

25 “The critical inquiry” in determining whether state regulation violates the Commerce
 26 Clause “is whether the practical effect of the regulation is to control conduct beyond the
 27 boundaries of the State.” *Healy*, 491 U.S. at 336. Here, Plaintiff requests damages and an
 28 “abatement fund remedy” for a nuisance Defendants allegedly caused by “produc[ing] massive

1 quantities of fossil fuels” around the world “for over a hundred years.” Compl. ¶ 97. It is
 2 well-established that “[t]he obligation to pay compensation can be, indeed is designed to be, a
 3 potent method of governing conduct and controlling policy.” *San Diego Bldg. Trades Council*
 4 *v. Garmon*, 359 U.S. 236, 247 (1959); *see also Kurns v. R.R. Friction Prods. Corp.*, 565 U.S.
 5 625, 637 (2012) (“[S]tate regulation can be . . . effectively exerted through an award of
 6 damages, and the obligation to pay compensation can be, indeed is designed to be, a potent
 7 method of governing conduct and controlling policy.”); *BMW*, 517 U.S. at 572 n.17 (“State
 8 power may be exercised as much by a jury’s application of a state rule of law in a civil lawsuit
 9 as by a statute.”). For this reason, the Supreme Court has held that “a state may not impos[e]
 10 economic sanctions on violators of its laws with the intent of changing tortfeasors’ lawful
 11 conduct in other States.” *Id.* at 572.

12 The Supreme Court has recognized that common-law environmental tort claims, in
 13 particular, can force a defendant to “change its methods of doing business and controlling
 14 pollution to avoid the threat of ongoing liability,” and that courts theoretically could “require
 15 the source to cease operations by ordering immediate abatement.” *Ouellette*, 479 U.S. at 495.
 16 Plaintiff’s tort claims, if successful, would require Defendants to change their conduct not just
 17 within Washington, but around the world, as its claims are based on Defendants’
 18 “cumulative,” “worldwide” contributions to the alleged nuisance. Compl. ¶ 9; *see also City of*
 19 *Oakland*, 2018 WL 3109726, at *4 (Plaintiff’s “breathhtaking[ly]” broad theory “would reach
 20 the sale of fossil fuels anywhere in the world”). In short, Plaintiff’s requested “relief would
 21 effectively allow plaintiff[] to govern conduct and control energy policy” in other states in
 22 violation of the Commerce Clause. *City of Oakland*, 2018 WL 3109726, at *7; *see also Healy*,
 23 491 U.S. at 336. Indeed, Plaintiff is asking this Court to impose what amounts to a carbon tax
 24 on out-of-state conduct, which the Commerce Clause plainly prohibits. *See W. Lynn*
 25 *Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994) (“Commerce Clause jurisprudence is not so
 26 rigid as to be controlled by the form by which a State erects barriers to commerce.”).

27 The Commerce Clause inquiry also requires courts to “consider[] how [the regulation]
 28 may interact with the legitimate regulatory regimes of other States[.] . . . [T]he Commerce

1 Clause protects against inconsistent legislation arising from the projection of one state
 2 regulatory regime into the jurisdiction of another State.” *Healy*, 491 U.S. at 336–37.
 3 Imposing penalties “based in large part on conduct that happened in other jurisdictions” would
 4 “infring[e] on the policy choices of other States,” *BMW*, 517 U.S. at 572–73, many of which
 5 depend on the extraction of petroleum resources for energy and economic security. King
 6 County may not use Washington law to “impose its own policy choice on neighboring states,”
 7 let alone on every state in the country. *Id.* at 571.

8 Where, as here, exercises of state power also burden foreign commerce, they are held
 9 to an even stricter standard under the Commerce Clause than those burdening only interstate
 10 commerce. *See, e.g., Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 311
 11 (1994) (“In the unique context of foreign commerce, a State’s power is further constrained
 12 because of the special need for federal uniformity.” (internal citations omitted)); *S.-Cent.*
 13 *Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984) (“It is a well-accepted rule that state
 14 restrictions burdening foreign commerce are subjected to a more rigorous and searching
 15 scrutiny.”). Plaintiff’s claims, which seek to “control energy policy on foreign soil” by
 16 labeling worldwide production of fossil fuels a nuisance, *City of Oakland*, 2018 WL 3109726,
 17 at *7, are thus barred by the Foreign Commerce Clause.

18 **3. Plaintiff’s claims are barred by the Due Process and Takings Clauses**

19 Plaintiff does not allege that Defendants violated *any* of federal or state law regulating
 20 the extraction, production, promotion, or sale of fossil fuels. Yet it seeks “hundreds of
 21 millions of dollars” to abate future harms, plus damages for alleged past harms, based on
 22 Defendants’ lawful economic activity and constitutionally protected lobbying activities across
 23 the country over the course of several decades. *See* Compl. ¶ 68 & Relief Requested.
 24 Imposing such massive extraterritorial and retroactive liability would constitute “a due process
 25 violation of the most basic sort.” *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978).

26 Due process forbids States from “punish[ing] a defendant for conduct that may have
 27 been lawful where it occurred.” *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 421
 28 (2003) (collecting cases). Nor may a State “impose economic sanctions on violators of its

1 laws with the intent of changing the tortfeasors’ lawful conduct in other States.” *BMW*, 517
 2 U.S. at 572–73 & n.19. Here, as in *City of Oakland*, the “challenged conduct is, as far as the
 3 complaints allege, lawful in every nation.” 2018 WL 3109726, at *7. Plaintiff is thus
 4 prohibited from seeking to punish Defendants for its fossil fuel extraction.

5 Similarly, due process prohibits states from imposing retroactive liability for lawful
 6 conduct. In *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), the Court invalidated a federal
 7 statute imposing retroactive liability on coal companies for the medical costs of former coal
 8 miners. Justice O’Connor, writing for a four-justice plurality, observed that the Coal Act was
 9 unconstitutional under the Takings Clause because it “improperly place[d] a severe,
 10 disproportionate, and extremely retroactive burden on Eastern.” *Id.* at 538; *see also id.* at 539,
 11 549 (Kennedy, J., concurring in the judgment and dissenting in part) (statute “must be
 12 invalidated as contrary to essential due process principles” because it created “liability for
 13 events which occurred 35 years ago” and had “a retroactive effect of unprecedented scope”).¹⁴
 14 Here, Plaintiff seeks to impose hundreds of millions of dollars of liability on Defendants based
 15 on conduct occurring over the past 100 years, even though that conduct was incontrovertibly
 16 lawful when it occurred (and still is today). *See* Compl. ¶ 97. Imposing such retroactive
 17 liability would be a grievous violation of due process. *See Stop the Beach Renourishment, Inc.*
 18 *v. Fla. Dep’t of Envtl. Prot.*, 560 U.S. 702, 714 (2010) (plurality) (“It would be absurd to allow
 19 a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat.”).

20 **4. Plaintiff’s claims are preempted by federal law**

21 State-law tort claims are preempted when they conflict with federal law or where
 22 Congress has occupied the field through legislation. *See Buckman Co. v. Plaintiffs’ Legal*
 23 *Comm.*, 531 U.S. 341, 348 (2001); *Brannan v. United Student Aid Funds, Inc.*, 94 F.3d 1260,
 24 1263 (9th Cir. 1996) (“Preemption [exists] where the state law stands as an obstacle to the

25 _____
 26 ¹⁴ Courts have held that *Eastern Enterprises* “stands for a clear principle: a liability that is severely retroactive,
 27 disruptive of settled expectations and wholly divorced from a party’s experience may not constitutionally be
 28 imposed.” *Me. Yankee Atomic Power Co. v. United States*, 44 Fed. Cl. 372, 378 (1999); *see also Franklin Cty.*
Convention Facilities Auth. v. Am. Premier Underwriters, 61 F. Supp. 2d 740, 743 (S.D. Ohio 1999); *Peterson v.*
Islamic Republic of Iran, 758 F.3d 185, 192 (2d Cir. 2014) (asking whether a challenged statute “impose[d]
 severe retroactive liability on a limited class of parties that could not have anticipated the liability”).

1 accomplishment and execution of the full objectives of Congress.”); *Transmission Agency of*
2 *N. California v. Sierra Pac. Power Co.*, 295 F.3d 918, 928 (9th Cir. 2002) (“Preemption of
3 state law is compelled whether Congress’ command is explicitly stated in the statute’s
4 language or implicitly contained in its structure and purpose.”). State-law tort claims are also
5 preempted where they implicate “‘uniquely federal interests’” that are “committed by the
6 Constitution and laws of the United States to federal control.” *Boyle v. United Tech. Corp.*,
7 487 U.S. 500, 504 (1988) (citations omitted). Plaintiff’s claims here are preempted for all
8 three reasons.

9 First, by enacting the Clean Air Act, Congress delegated to EPA broad authority over
10 whether and how to regulate carbon-dioxide emissions. *See AEP*, 564 U.S. at 427 (noting that
11 the Clean Air Act directs EPA to establish emissions standards for categories of stationary
12 sources that, “caus[e], or contribut[e] significantly to, air pollution which may reasonably be
13 anticipated to endanger public health or welfare”).

14 Second, any state-law damages award here would necessarily be premised on a finding
15 that Defendants’ production and promotion of energy resources was “unreasonable”—i.e., that
16 the harm to King County outweighed the social benefits of Defendants’ conduct. *Lakey v.*
17 *Puget Sound Energy, Inc.*, 176 Wash. 2d 909, 923 (2013) (“We determine the reasonableness
18 of a defendant’s conduct by weighing the harm to the aggrieved party against the social utility
19 of the activity.”). And the Court could not make *that* determination without concluding that
20 the resulting greenhouse gas emissions were unreasonable, for emissions are the *sine qua non*
21 of Plaintiff’s alleged injuries. But the Court is prohibited from making any determination
22 about the reasonable level of greenhouse gas emissions because “Congress has entrusted the
23 [EPA] with the responsibility for making these scientific judgments, and [this Court] must
24 respect both Congress’ decision and the Agency’s ability to rely on the expertise that it
25 develops.” *Lead Indus. Ass’n, Inc. v. EPA*, 647 F.2d 1130, 1146 (D.C. Cir. 1980).

26 The Supreme Court has “admonished against the ‘tolerat[ion]’ of ‘common-law suits
27 that have the potential to undermine [the federal] regulatory structure.’” *Cooper*, 615 F.3d at
28 303 (quoting *Ouellette*, 479 U.S. at 497). Plaintiff’s proposed solution to the important issue

1 of global warming—an avalanche of litigation based on overlapping application of every
2 State’s common law—presents a significant obstacle to the federal regulation of air pollution
3 because it would impose standards “whose content must await the uncertain twists and turns of
4 litigation,” which “will leave whole states and industries at sea and potentially expose them to
5 a welter of conflicting court orders across the country.” *Id.* at 301. This “could well lead to
6 increased air pollution,” and “[i]t is unlikely—to say the least—that Congress intended to
7 establish such a chaotic regulatory structure.” *Id.* at 302 (quoting *Ouellette*, 479 U.S. at 497).
8 Moreover, Plaintiff’s claims, which seek to label Defendants’ production activities a public
9 nuisance, would frustrate Congress’s objective of increasing fossil fuel extraction. *See, e.g.*,
10 42 U.S.C. §§ 13401, 13411, 13412, 13415, 15903, 15904, 15909, 15910.

11 Plaintiff’s claims also second-guess the balance that these same federal statutes strike
12 between promoting energy production and protecting the environment. *See, e.g.*, 42 U.S.C.
13 § 13389(c)(1) (calling for development of “national strategy” to deploy “greenhouse gas
14 intensity reducing technologies and practices”); 42 U.S.C. § 5801 (Congressional purpose to
15 “develop, and increase the efficiency and reliability of use of, all energy sources” while
16 protecting “environmental quality”); 30 U.S.C. § 21a (Congressional purpose to encourage
17 “economic development of domestic mineral resources” balanced with “environmental
18 needs”); 30 U.S.C. § 1201 (coal mining operations are “essential to the national interest” but
19 must be balanced by “cooperative effort[s] . . . to prevent or mitigate adverse environmental
20 effects”). Plaintiff’s claims are preempted because they interfere with this federal policy of
21 protecting the environment *and* promoting fossil-fuel extraction. *See Geier v. Am. Honda*
22 *Motor Co.*, 529 U.S. 861, 881 (2000) (tort claims preempted where they “would have
23 presented an obstacle to the variety and mix of devices that the federal regulation sought”);
24 *Gordon v. Virtumundo, Inc.*, 575 F.3d 1040, 1060 (9th Cir. 2009) (“conflict preemption” exists
25 where claims are an “obstacle to the accomplishment and execution of the full purposes and
26 objectives of Congress”).

27 Third, Plaintiff’s claims implicate “uniquely federal interests” “committed by the
28 Constitution and laws of the United States to federal control,” *Boyle*, 487 U.S. at 504,

1 including foreign relations and our nation’s energy and national security policies. *See supra*
2 IV.A.2–5, IV.B.1. Plaintiff’s claims are thus squarely preempted.

3 **5. Plaintiff’s claims are barred by the First Amendment**

4 Plaintiff seeks to hold Defendants liable for “affirmative[ly] advertising . . . fossil fuels
5 and downplaying global warming risks,” Compl. ¶ 110, as well as for funding scientific
6 research, “media attacks,” and a newspaper editorial, *id.* ¶¶ 111–132. But such speech is
7 constitutionally protected. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481–82 (1995)
8 (The First Amendment protects “the free flow of commercial information” (citation omitted));
9 *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011) (“A consumer’s concern for the free flow
10 of commercial speech often may be far keener than his concern for urgent political dialogue.”).

11 Plaintiff’s claims are also barred by the *Noerr-Pennington* doctrine, which immunizes
12 lobbying activity from civil liability. *See E. R. R. Presidents Conference v. Noerr Motor*
13 *Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965);
14 *see also White v. Lee*, 227 F.3d 1214, 1231 (9th Cir. 2000) (confirming that the doctrine
15 “applies equally in all context,” and not just antitrust). The doctrine precludes liability based
16 on “publicity campaign[s] directed at the general public, seeking legislation or executive
17 action, . . . even when the campaign employs unethical and deceptive methods.” *Allied Tube*
18 *& Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499–500 (1988).

19 Here, Plaintiff targets speech that is plainly protected by *Noerr-Pennington*. For
20 example, Plaintiff alleges that Defendants engaged in “large-scale, sophisticated advertising
21 and communications campaigns . . . to portray fossil fuels as environmentally responsible and
22 essential to human well-being.” Compl. ¶ 5. Plaintiff also alleges that Defendants have
23 “sponsored communications campaigns . . . to deny and discredit the mainstream scientific
24 consensus on global warming, downplay the risks of global warming, and even to launch
25 unfounded attacks on the integrity of leading climate scientists.” *Id.* ¶ 6. These
26 communications campaigns were allegedly directed by industry lobbying organizations,
27 including the Global Climate Coalition and the American Petroleum Institute. *Id.* ¶¶ 111–115.
28 Although Plaintiff asserts that the “purpose” of these communication campaigns was simply

1 “to increase sales and protect market share,” *id.* ¶ 7, the alleged conduct—taken as true—
2 describes an attempt to forestall regulation that would limit fossil fuel production. Indeed,
3 Plaintiff alleges that “[t]he campaign’s purpose and effect has been to help Defendants
4 *continue to produce fossil fuels* and sell their products on a massive scale.” *Id.* ¶ 104
5 (emphasis added); *see id.* ¶ 109 (alleging that one Defendant used “front groups to create
6 uncertainties about basic climate change science” to “bolster production of fossil fuels”). The
7 Complaint also describes Defendants’ alleged attempts to “discredit” and “undermine the
8 IPCC’s 1995 and 2001 conclusions[.]” *Id.* ¶ 118. The Intergovernmental Panel on Climate
9 Change (“IPCC”) was created to provide *governments* with information about climate change,
10 and any alleged criticism of “IPCC conclusions” would naturally have been directed towards
11 governments, not consumers. Plaintiff also targets quintessential lobbying activity when it
12 alleges that Defendants produced “reports” “making the case for the necessary role of fossil
13 fuels,” *id.* ¶ 130 and warning that “the costs of carbon dioxide reductions are ‘ultimately born
14 by consumers and taxpayers,’” *id.* ¶ 129. Arguments about the role of fossil fuels in national
15 energy policy are plainly directed to lawmakers and regulators who are deciding whether to
16 subsidize more expensive forms of energy.

17 Attempting to sidestep *Noerr-Pennington*, Plaintiff now disclaims any desire to impose
18 “liability for lobbying activity,” and asserts that “to the extent any particular promotional
19 activity might have had dual goals of both promoting a commercial product in the marketplace
20 and influencing policy, Plaintiff invokes such activities for the purpose of the former, not the
21 latter, and/or as evidence relevant to show Defendants’ knowledge of the dangerous nature of
22 their products.” Compl. ¶ 10. But that is not how the First Amendment works. “[E]xpression
23 on public issues ‘has always rested on the highest rung of the hierarchy of First Amendment
24 values,’” *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982) (citation omitted),
25 and where a defendant engages in such “constitutionally protected activity”—such as
26 advocating against regulation—the First Amendment prohibits liability based on that conduct
27 *even if* that conduct had dual purposes, *id.* at 916–17. Because Plaintiff’s claims turn, in part,
28 on speech immunized by *Noerr-Pennington*, they must be dismissed.

1 **C. The Amended Complaint Does Not Allege Viable State-Law Claims**

2 Even if Plaintiff’s claims arose under state law (they do not), and even if they were not
 3 defeated by numerous federal doctrines (they are), those claims would still fail. Most notably,
 4 Plaintiff has unclean hands to the extent it has contributed to, and benefited from, the injuries
 5 for which it seeks to hold Defendants liable. *See Retail Clerks Health & Welfare Tr. Funds v.*
 6 *Shopland Supermarket, Inc.*, 96 Wash. 2d 939, 949, 640 P.2d 1051, 1057 (1982) (“‘He who
 7 seeks equity must do equity,’ and ‘he who comes into equity must come with clean hands.’”);
 8 *see also City of New York*, 2018 WL 3475470, at *5 (“New York City . . . benefits from and
 9 participates in the use of fossil fuels as a source of power, and has done so for many
 10 decades.”). Moreover, Plaintiff cannot state a claim for relief under any of its state-law causes
 11 of action.

12 **1. Plaintiff fails to state a public nuisance claim.**

13 Washington law defines a nuisance as an “unreasonable interference with another’s use
 14 and enjoyment of property.” *Kitsap County v. Allstate Ins. Co.*, 136 Wash. 2d 567 (1998);
 15 Wash. Rev. Code § 7.48.120. Recognizing the potential for nuisance law to be interpreted
 16 overbroadly, the Washington legislature has sought to exercise “legislative control over public
 17 nuisance.” *Chelan Basin Conservancy v. GBI Holding Co.*, 194 Wash. App. 478, 492 (2016).
 18 Washington law thus “explicitly” provides that “[n]othing which is done or maintained under
 19 the express authority of a statute, can be deemed a nuisance.” *Id.* (quoting Wash. Rev. Code
 20 § 7.48.160); *see also Asche v. Bloomquist*, 132 Wash. App. 784 (2006) (permit issued in
 21 accordance with County’s zoning ordinance precluded public nuisance claim).

22 Plaintiff’s claims are precluded because Washington law explicitly authorizes the
 23 conduct targeted by Plaintiff’s claims—fossil-fuel production, promotion, and sale. The State
 24 has declared it “to be in the public interest to foster, encourage, and promote the exploration,
 25 development, production, and utilization of oil and gas in the state in such manner as will
 26 prevent waste,” and “to authorize and to provide for the operation and development of oil and
 27 gas properties in such manner as to assure that the maximum economic recovery of oil and gas
 28 may be obtained and the rights of owners thereof fully protected[.]” Wash. Rev. Code

1 § 78.52.001. “To assist in the development of oil and gas in this state and to further the
 2 purposes of this chapter,” Washington allows owners of separate properties to “operate” and
 3 “develop their land as a unit.” *Id.* § 78.52.330. And the State’s Department of Natural
 4 Resources “is authorized to lease public lands for the purpose of prospecting for, developing,
 5 and producing oil, gas, or other hydrocarbon substances.” *Id.* § 79.14.020; *see also* Wash.
 6 Admin. Code § 332-12-220 (authorizing the Commissioner of Public Lands to lease those
 7 lands for the purpose of oil and gas extraction); Wash. Admin. Code § 332-12-260 (requiring
 8 oil and gas lessees to “produce oil, gas or associated substances in paying quantities from the
 9 leased lands”). Even King County’s Comprehensive Plan includes “policies to preserve
 10 opportunities for mining and to assure extractive industries maintain environmental quality and
 11 minimize impacts to adjacent land uses.” King Co. Ordinance LU-18. The “goal” of these
 12 policies is “to facilitate the efficient utilization of *valuable* mineral, oil, and gas deposits when
 13 consistent with maintaining environmental quality and minimizing impacts.” *Id.* (emphasis
 14 added).

15 Because fossil-fuel extraction has been expressly authorized, and even encouraged, by
 16 the State, Defendants’ conduct—the mere production/extraction of fossil fuels—cannot be a
 17 nuisance. *See Chelan Basin*, 194 Wash. App. at 489–93 (looking to the legislative intent
 18 underlying the Shoreline Management Act, and finding the Act extinguished nuisance claims
 19 for preexisting landfills).¹⁵ Even absent such specific authorization, Plaintiff has failed to
 20 plead an *unreasonable* interference with the enjoyment of land. Under Washington law, the
 21 “reasonableness of a defendant’s conduct” is determined by “weighing the harm to the
 22 aggrieved party against the social utility of the activity.” *Lakey*, 176 Wash. 2d at 923. Here
 23 Plaintiff has failed to allege *any* substantial injury. Rather, Plaintiff speculates about potential
 24 injuries from global warming that may or may not occur over the next 80 years. *See Compl.*

25 _____
 26 ¹⁵ Although a defendant can be held liable if its conduct “deviate[d] in some way from its initial authorization,”
 27 *Chelan Basin Conservancy*, 194 Wash. App. at 493, Plaintiff has not alleged any deviation here. Nor has Plaintiff
 28 alleged that Defendant’s authorized conduct occurred in “an inappropriate place,” or was conducted in an
 “improper manner.” *Kitsap County v. Kitsap Rifle and Revolver Club*, 184 Wash. App. 252, 277 (2014).
 Plaintiff’s claims attempt to control *whether* authorized conduct can occur at all, and Washington law does not
 (and cannot) sanction that view of nuisance.

1 ¶¶ 133–55.¹⁶ But “[t]o qualify for relief, [Plaintiff] must be able to point to more than a ‘mere
 2 danger of future harm, unaccompanied by present damage.’” *Brewer v. Lake Easton*
 3 *Homeowners Ass’n*, 2 Wash. App. 2d 770, 780–81 (2018) (quoting *Gazija v. Nicholas Jerns*
 4 *Co.*, 86 Wash. 2d 215, 219 (1975)). The Complaint contains exactly two paragraphs alleging
 5 actual—as opposed to speculative—injury to the County. Compl. ¶¶ 156–57. The first
 6 paragraph alleges only that some areas above the mean high tide line—*i.e.* areas that are
 7 occasionally inundated—are now subject to “regular inundation.” *Id.* ¶ 156. But “minor water
 8 intrusion” does not constitute “significant injury or appreciable harm.” *Grundy*, 151 Wash.
 9 App. at 568. And Plaintiff does not explain how the alleged change in inundation regularity is
 10 interfering with its “use and enjoyment” of its property, instead resorting, once again, to
 11 speculation about future harms. Compl. ¶ 156 (alleging that sea level rise will “grow worse”
 12 and that “eventually portions of coastal areas owned by the County may be continuously
 13 submerged”). The second paragraph asserts that the “harms” from global warming “include
 14 encroachments upon and interferences with the County’s property . . . , as well as injuries to
 15 public health[.]” *Id.* ¶ 157. But that is a legal conclusion—*i.e.*, a statement that Defendants
 16 have created a nuisance—that the Court need not accept as true. *Ashcroft*, 556 U.S. at 678.

17 On the other side of the scale is the “development of our modern world,” which has
 18 “literally been fueled by oil and coal,” *City of Oakland*, 2018 WL 3109726, at *5. Given the
 19 overwhelming disparity between Plaintiff’s alleged injuries and the incalculable benefits of
 20 fossil fuel extraction, Defendants’ conduct was clearly reasonable. Accordingly, Plaintiff has
 21 failed to state a nuisance claim that is “plausible on its face.” *Ashcroft* 556 U.S. at 678.¹⁷

22 _____
 23 ¹⁶ The Complaint includes 22 paragraphs discussing the “expected impacts” of global warming, Compl. ¶ 137, the
 24 “future coastal impacts” of sea level rise, *id.* ¶ 141, projected changes in ocean acidity, *id.* ¶ 142, “projected
 25 climate impacts” on King County, *id.* ¶ 143, and the “potential” health effects of global warming, *id.* ¶ 146.
 These alleged future harms are so nebulous that the County claims to need “additional study” to determine the
 scope of these impacts and how best to prepare for them. *Id.* ¶ 145; *see also id.* ¶ 150 (“King County must plan
 for and adapt to future harms[.]”).

26 ¹⁷ In *City of Oakland*, the plaintiffs contended that the judge “need not weigh or consider the social utility of
 27 defendant’s conduct,” because “global warming constitutes a nuisance as a matter of law.” 2018 WL 3109726, at
 28 *7. The court rejected that argument, holding that it could not “ignore the public benefits derived from
 defendants’ conduct in adjudicating plaintiffs’ claims.” *Id.* at *7–8 (citing Restatement (Second) of Torts
 §§ 821B, 826, and 829A). The Court dismissed the claims, holding that the “adjustment of conflicting pros and
 cons ought to be left to Congress or diplomacy.” *Id.*

1 The public nuisance claim also fails because Plaintiff seeks to apply Washington
 2 nuisance law extraterritorially. It is a “basic premise of our legal system” that “[a]bsent clearly
 3 expressed [legislative] intent to the contrary, . . . laws will be construed to have only domestic
 4 application.” *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2100 (2016) (citation
 5 omitted). Washington courts have embraced this presumption when applying State statutes.
 6 *See Grennan v. Crowley Marine Servs., Inc.*, 116 P.3d 1024, 1029 (Wash. Ct. App. 2005)
 7 (discussing the presumption against extraterritoriality). In its codification of the common law
 8 nuisance tort, the Washington legislature did not rebut this presumption, and “no court has
 9 ever sanctioned [the statute’s] extraterritorial application.” *Anderson v. Teck Metals, Ltd.*,
 10 2015 WL 59100, at *11 (E.D. Wash. Jan. 5, 2015) (finding that Washington’s nuisance statute
 11 did not apply to defendant’s “activities in Canada”).

12 Yet Plaintiff would have this Court apply Washington’s nuisance statute to
 13 Defendants’ worldwide “production and promotion of massive quantities of fossil fuels” over
 14 the last hundred years. And though Plaintiff asserts that each Defendant does business in
 15 Washington, nearly all of the conduct alleged in the Complaint occurs outside the State. *Id.*
 16 ¶ 99 (“Chevron, Exxon, BP, and ConocoPhillips produce significant amounts of fossil fuels
 17 from tar sands in Canada”); ¶ 31 (BP “sanctioned three exciting new [exploration] projects in
 18 Trinidad, India, and the Gulf of Mexico”); ¶ 39 (“BP also operates in Alaska”); ¶ 54 (Chevron
 19 “produces oil in Alaska”); ¶ 60 (“ConocoPhillips is Alaska’s largest oil producer”); ¶¶ 125,
 20 128 (detailing Defendants’ promotion of fossil fuels over the internet). Plaintiff alleges, in
 21 effect, that the worldwide production and promotion of fossil fuels have caused a nuisance
 22 admittedly global in scope: “Defendant[s have] increased the *global* temperature and
 23 contributed to sea level rise.” ¶ 97 (emphasis added). If Washington’s nuisance statute cannot
 24 reach activities just across the border in Canada, *see Teck*, it certainly cannot be applied to
 25 fossil-fuel production occurring around the world.

26 **2. Plaintiff fails to state a trespass claim**

27 Plaintiff’s failure to state a nuisance claim dooms its trespass claim, as “there is little
 28 remaining difference between trespass and nuisance.” *Gaines v. Pierce Cty.*, 66 Wash. App.

1 715, 719 (1992) (citing *Bradley v. Am. Smelting & Refining Co.*, 104 Wash. 2d 677, 684
 2 (1985)). “Both hinge on an invasion of plaintiff’s interest in property,” and “[t]he distinction
 3 between direct and indirect invasions has been abandoned.” *Id.* (citation omitted).

4 Plaintiff alleges that Defendants are liable for intentional trespass. Compl. ¶ 171.
 5 “Intentional trespass occurs only where there is: ‘(1) an invasion of property affecting an
 6 interest in exclusive possession, (2) an intentional act, (3) reasonable foreseeability that the act
 7 would disturb the plaintiff’s possessory interest, and (4) actual and substantial damages.’”
 8 *Grundy v. Brack Family Tr.*, 151 Wash. App. 557, 567–68 (2009) (citation omitted). Plaintiff
 9 cannot satisfy these elements.

10 As an initial matter, the Complaint fails to allege any invasion of Plaintiff’s property,
 11 much less actual and substantial damages. Rather, the Complaint speculates at length about
 12 *future* invasions that may occur as a result of global warming. *See* Compl. ¶¶ 133–155, and
 13 the damages that *are* alleged are legally insufficient, *see supra* IV.C.1. In *Grundy*, a property
 14 owner alleged that sea water was splashing onto her property because her neighbors raised the
 15 height of their bulkhead. 151 Wash. App. at 561. The plaintiff alleged that although “some
 16 wave splash entered [her] property during winter months before the [defendants] raised their
 17 bulkhead, the intensity and amount of the invasion from this splash increased after the
 18 [defendants’] bulkhead was raised.” *Id.* at 561. The court held that the fact that the
 19 defendant’s “seawall caused the water to enter Grundy’s property does not, without more,
 20 create liability for trespass,” because the defendant’s conduct did not “cause actual and
 21 substantial injury.” *Id.* at 570. The allegations of damages here are equally insubstantial.

22 The Complaint also fails to plausibly suggest that it was reasonably foreseeable that
 23 Defendants’ “intentional” acts—*i.e.*, producing fossil-fuels—would disturb Plaintiff’s
 24 possessory interest. *Brutsche v. City of Kent*, 164 Wash. 2d 664, 674 n.7 (2008). Although
 25 Plaintiff alleges that Defendants knew their conduct would lead to global warming, they do not
 26 (and could not) allege that Defendants were “substantially certain that the trespass would result
 27 from [their] intentional actions.” *Grundy*, 151 Wash. App. at 569 (citing *Brutche v. City of*
 28 *Kent*, 164 Wash. 2d 664, 674 n.7 (2008)). Even if Defendants were aware that the combustion

1 of fossil fuels contributes to global warming, they could not have known with “substantial
2 certainty that [the] particular consequence” alleged here—flooding in King County—would
3 “result from [their] act[s].” *Evarone v. Lease Crutcher Lewis*, 167 Wash. App. 1009 (2012);
4 *see also Bradley*, 104 Wash. 2d at 683 (a defendant will be held to have intended an act
5 “where a reasonable man in the defendant’s position would believe that *a particular result* was
6 substantially certain to follow”) (emphasis added). Plaintiff would apparently hold Defendants
7 liable based solely on their alleged knowledge that fossil-fuel combustion causes global
8 warming. But that “breathtaking” theory of liability “would reach the sale of fossil fuels
9 anywhere in the world, including all past and otherwise lawful sales, where the seller knew
10 that the combustion of fossil fuels contributed to the phenomenon of global warming.”
11 *Oakland*, 2007 WL 3109726, at *4.

12 The trespass claim also fails because Defendants’ conduct was “privileged.” *Matter of*
13 *Harvey*, 3 Wash. App. 2d 204, 216 (2018) (“Conduct that would otherwise constitute a
14 trespass is not a trespass if it is privileged.”) (citing Restatement (Second) of Torts § 158, cmt.
15 e). “A privilege may derive from the consent of the possessor or may be given by law because
16 of the purpose for which the actor acts.” *Id.* As discussed above, Defendants’ conduct is fully
17 authorized (and encouraged) by federal, state, and local law. *See supra* IV.A.3, IV.C.1.
18 Moreover, although Plaintiff alleges that it did not grant Defendants “permission” to engage in
19 the allegedly tortious conduct, Compl. ¶ 177, Plaintiff has purchased and used substantial
20 amounts of fossil fuels for decades to power its fleet of cars, schools, jails, courts, office
21 buildings, street lights, etc. And Plaintiff admits that the consequences of fossil-fuel
22 combustion have been publicly known for decades. *Id.* ¶¶ 79–96. Accordingly, accepting the
23 truth of Plaintiff’s factual allegations, Plaintiff has impliedly consented to the very conduct it
24 now targets—the production, marketing, and sale of “massive quantities of fossil fuels . . . all
25 with knowledge . . . that doing so would lead to climate change-related injuries.” *Id.* ¶ 177.
26 Plaintiff has thus failed to state a claim for trespass.

1 **3. Plaintiff’s allegations fail to plausibly suggest that Defendants proximately**
 2 **caused the alleged injuries**

3 To prevail on a public nuisance or trespass claim in Washington, a plaintiff must
 4 establish that the defendant’s alleged misconduct was the “proximate cause” of the plaintiff’s
 5 injuries. *Re v. Tenney*, 56 Wash. App. 394, 398 (1989). “Washington law recognizes two
 6 elements to proximate cause: Cause in fact and legal causation.” *Hartley v. State*, 103
 7 Wash. 2d 768, 777–78 (1985). “Cause in fact refers to the ‘but for’ consequences of an act—
 8 the physical connection between an act and injury.” *Id.* at 778. “If an event would have
 9 occurred regardless of a defendant’s conduct, that conduct is not the proximate cause of the
 10 plaintiff’s injury.” *Davis v. Globe Mach. Mfg. Co., Inc.*, 102 Wash. 2d 68, 74 (1984). “Legal
 11 causation, on the other hand, rests on policy considerations as to how far the consequences of
 12 defendant’s acts should extend.” *Id.* It “focuses on whether the connection between the
 13 defendant’s act and the result is too remote or inconsequential to impose liability.” *Garcia v.*
 14 *State, Dep’t of Transp.*, 161 Wash. App. 1, 15 (2011) (citing *Hartley*, 103 Wash. 2d at 778–
 15 79). Plaintiff has not alleged facts plausibly supporting either element.

16 With respect to cause in fact, Plaintiff does not allege that its alleged injuries from sea
 17 rise would not have occurred if any Defendant had altered its behavior and stopped producing
 18 fossil fuel products, reduced production, or warned the public about the possible risks. Nor
 19 could it, as the “undifferentiated nature of greenhouse gas emissions from all global sources
 20 and their worldwide accumulation over long periods of time . . . make[] clear that there is no
 21 realistic possibility of tracing any particular alleged effect of global warming to any particular
 22 [action] by any specific person, entity, [or] group at any particular point in time.” *Kivalina*,
 23 663 F. Supp. 2d at 880; *see also Amigos Bravos v. U.S. Bureau of Land Mgmt.*, 816 F. Supp.
 24 2d 1118, 1135 (D.N.M. 2011) (“[C]limate change is dependent on an unknowable multitude of
 25 [greenhouse gas] sources and sinks, and it is impossible to say with any certainty that
 26 Plaintiffs’ alleged injuries were the result of any particular action or actions by Defendants.”).

27 Even if Defendants’ productions were considered cumulatively, the allegations fail to
 28 demonstrate that Plaintiff’s injuries would not have arisen but for Defendants’ conduct.

1 Plaintiff concedes that nearly 90% of emissions from industrial sources are *not* attributable to
2 Defendants. Compl. ¶ 99(c). Although Plaintiff asserts that Defendants are “five of the ten
3 largest producers” of fossil fuels, *id.* ¶ 97, they have not sued the third, fifth, seventh, eighth,
4 or tenth largest producers, nor any one of the thousands of smaller producers that supply the
5 vast majority of the world’s fossil fuels. These unnamed producers—many of which are
6 OPEC members that have voluntarily *limited* their production for decades—would almost
7 certainly have increased production to meet worldwide demand for fossil fuels had Defendants
8 decreased their extraction and production activities. Accordingly, Plaintiff has not alleged
9 (and cannot prove) that worldwide emissions would have been materially lower—and thus that
10 global warming would not have occurred or that sea levels would not have risen—but for
11 Defendants’ conduct. *See Gaines*, 66 Wash. App. at 722–23 (“Cause in fact is not established
12 if plaintiff’s injury would have occurred without defendant’s breach of duty”); *cf. Sierra Club*
13 *v. U.S. Def. Energy Support Ctr.*, 2011 WL 3321296, at *5 (E.D. Va. July 29, 2011) (plaintiff
14 failed to show that “if there had been a reduction in the amount of greenhouse gases emitted by
15 producers of fuel from oil sands crude, those reductions would not have been offset by
16 increased emissions elsewhere on the planet”).

17 The Court should also dismiss Plaintiff’s claims because Defendants’ conduct is too
18 “remote and insubstantial to impose liability.” *Garcia*, 161 Wash. App. at 15; *see also*
19 *Benefiel v. Exxon Corp.*, 959 F.2d 805, 807 (9th Cir. 1992) (affirming dismissal where alleged
20 damages were “remote and derivative” and defendants’ conduct “did not directly cause any
21 injury” to the plaintiffs). The Ninth Circuit affirmed dismissal of Washington-law public
22 nuisance claims alleging increased healthcare costs from tobacco sales, on the ground that the
23 alleged damages were too remote from the alleged misconduct and initial injury. *Ass’n of*
24 *Washington Public Hosp. Districts v. Philip Morris Inc.*, 241 F.3d 696, 706–07 (9th Cir.
25 2001). Washington law requires dismissal here as well.

26 Plaintiff’s global warming claims are “dependent on a series of events far removed
27 both in space and time from the Defendants’” alleged misconduct. *Kivalina*, 663 F. Supp. 2d
28 at 881. Indeed, Plaintiff seeks to hold Defendants accountable for conduct that allegedly

1 began in *the mid Nineteenth Century*. See Compl. ¶ 99(b). Moreover, Plaintiff’s alleged
2 injuries have arisen (or will arise) only because countless intervening users, including Plaintiff
3 itself, combusted fossil fuels for transportation, electricity, or heat, and the greenhouse gases
4 those users emitted mixed with the aggregated emissions of billions of other users from around
5 the world for many decades to increase the concentration of greenhouse gases in the
6 atmosphere. Plaintiff’s claims thus flout the “uniformly accepted principle[] of tort law” that
7 the plaintiff must “prove more than that the defendant’s action triggered a series of other
8 events that led to the alleged injury.” *Benefiel*, 959 F.2d at 807; see also *Comer v. Murphy Oil*
9 *USA, Inc.*, 839 F. Supp. 2d 849, 868 (S.D. Miss. 2012) (the “assertion that [defendants’]
10 emissions combined over a period of decades or centuries with other natural and man-made
11 gases to cause or strengthen a hurricane and damage personal property is precisely the type of
12 remote, improbable, and extraordinary occurrence that is excluded from liability.”); *Amigos*
13 *Bravos*, 816 F. Supp. 2d at 1136; *Sierra Club*, 2011 WL 3321296, at *5; *Kivalina*, 696 F.3d at
14 868 (Pro, J., concurring).

15 **4. No remedy is available**

16 “The relief for nuisance may be either damages or injunction.” *Asche v. Bloomquist*,
17 132 Wash. App. 784, 800 (2006). Plaintiff has not requested injunctive relief, and it is not
18 entitled to damages because it has not alleged any actual injury. See *supra* IV.C.1–2.

19 Plaintiff alternatively seeks “hundreds of millions of dollars” for an abatement fund
20 that will ostensibly be used to pay for infrastructure projects—such as drainage pipes, culverts,
21 bridges, roads, and waste treatment plants—to mitigate the impacts of rising seas and heavier
22 rains. Compl. ¶¶ 145, 168. Plaintiff also wants Defendants to subsidize public health services,
23 community clinics, and “surveillance systems,” which will allegedly be needed to address the
24 future impacts of global warming. *Id.* ¶ 146–147. But Plaintiff’s request for an “abatement
25 fund” has no basis in Washington law. Indeed, a search for the term “abatement fund” in
26 Washington cases returns exactly zero results. It would be inappropriate for this Court, sitting
27 in diversity, to create a new remedy that has never been recognized by any Washington court.
28

D. Plaintiff's Claims Violate the Separation of Powers

Plaintiff asks this Court to decide whether the extraction and production of fossil fuels worldwide is “unreasonable” given its alleged connection to global warming and the potential that such warming will lead to future harms. But the judgment they seek is not within “the proper—and properly limited—role of the courts in a democratic society.” *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006). Absent legislative authorization, courts are “without competence” to address matters “of high policy,” such as global warming, *Diamond v. Chakrabarty*, 447 U.S. 303, 317–18 (1980), and they lack authority to “formulate national policies or develop standards for matters not legal in nature,” *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986). Matters of global concern, such as rising seas allegedly caused by worldwide emissions, are “committed by the Constitution to the political departments of the Federal Government.” *United States v. Pink*, 315 U.S. 203, 222–23 (1942). For this reason, “the political branches have ... made foreign policy determinations regarding the United States’ role in the international concern about global warming.” *Gen. Motors*, 2007 WL 2726871, at *14; *see also City of Oakland*, 2007 WL 3109726, at *7 (“The 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.”); *City of New York*, 2018 WL 347570, at *6–7. Accordingly, as several courts have recognized, global warming-based tort claims cannot be adjudicated without dragging the Court “into precisely the geopolitical debate more properly assigned to the coordinate branches.” *Gen. Motors*, 2007 WL 2726871, at *10; *see also Kivalina*, 663 F. Supp. 2d at 876–77; *Comer*, 839 F. Supp. 2d at 865.¹⁸

¹⁸ For several decades, Congress has engaged in robust debate about the potential harms of global warming and the economic and political consequences of regulating greenhouse gases. *The National Climate Program Act: Hearing Before the Subcomm. on the Env’t & the Atmosphere of the H. Comm. on Sci. & Tech.*, 94th Cong. 29 (1976); *Global Warming: Hearing Before the Subcomm. on Toxic Substances & Envtl. Oversight of the S. Comm. on Env’t & Pub. Works*, 99th Cong. 2 (1985); *Ozone Depletion, the Greenhouse Effect, and Climate Change: Hearings Before the Subcomm. on Envtl. Pollution of the S. Comm. on Env’t & Pub. Works*, 99th Cong. (1986); *Global Climate Change: Hearings Before the S. Comm. on Energy & Nat. Res.*, 102d Cong. 208 (1992); *Energy Policy Act of 2005: Hearings Before the Subcomm. on Energy & Air Quality of the H. Comm. on Energy & Commerce*, 109th Cong. (2005); Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009). The EPA has similarly balanced the costs and benefits of regulating greenhouse gases. *See Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards*, 75 Fed. Reg. 25,324 (May 7, 2010); 2017–2025 Model Year

1 The claims are also ill-suited for judicial resolution because, unlike Congress, which
 2 may weigh competing policy interests, courts “must be governed by *standard*, by *rule*.” *Vieth*
 3 *v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality). But as courts have recognized, global-
 4 warming-related tort “claims require a balancing of policy concerns—including the harmful
 5 effects of greenhouse gas emissions, our industrialized society’s dependence on fossil fuels,
 6 and national security,” *City of Oakland*, 2018 WL 3109726, at *6—and there are no judicial
 7 standards to make that assessment. See *Kivalina*, 663 F. Supp. 2d at 874–75; *Gen. Motors*,
 8 2007 WL 2726871, at *15.

9 There is also no “manageable method of discerning the entities that are creating and
 10 contributing to the alleged nuisance” because “there are multiple worldwide sources of
 11 atmospheric warming across myriad industries and multiple countries.” *Gen. Motors*, 2007
 12 WL 2726871, at *15. And regarding remedies, there is no “guidance” for “determining who
 13 should bear the costs associated with the global climate change that admittedly result from
 14 multiple sources around the globe.” *Id.*; *Oakland*, 2007 WL 3109726, at *5 (“Having reaped
 15 the benefit of [the] historic progress” made possible by fossil fuels, “would it really be fair to
 16 now ignore our own responsibility in the use of fossil fuels and place the blame for global
 17 warming on those who supplied what we demanded?”). Accordingly, “the allocation of
 18 fault—and cost—of global warming is a matter appropriately left for determination by the
 19 executive or legislative branch.” *Kivalina*, 663 F. Supp. 2d at 877.

20 V. CONCLUSION

21 For the foregoing reasons, Plaintiff’s claims should be dismissed with prejudice.

22 DATED this 27th day of July, 2018.
 23
 24
 25
 26
 27

28 Light-Duty Vehicle GHG Emissions and CAFE Standards: Supplemental Notice of Intent, 76 Fed. Reg. 48,758
 (Aug. 9, 2011).

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CERTIFICATE OF SERVICE

I hereby certify that on the date below, I caused the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of the filing to all counsel of record.

DATED: July 27, 2018

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