18-2188

United States Court of Appeals for the Second Circuit

CITY OF NEW YORK,

Plaintiff-Appellant,

v.

CHEVRON CORPORATION, CONOCOPHILLIPS, EXXON MOBIL CORPORATION, ROYAL DUTCH SHELL PLC, and BP P.L.C.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

WASHINGTON LEGAL FOUNDATION'S *AMICUS CURIAE* BRIEF SUPPORTING DEFENDANTS-APPELLEES

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Amicus curiae Washington Legal Foundation certifies under Fed. R. App. P. 26.1 that it has no parent company, and that no publicly held company owns stock in it.

February 14, 2019

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INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters in all fifty states. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It appears often as *amicus curiae* in important tort cases. See, e.g., *Am. Elec. Power Co., Inc. v. Conn.*, 564 U.S. 410 (2011).

The City of New York ("the City") says that it is not asking a court "to dictate any regulation of pollution." (Appellant's Br. 2.) It strains to depict this case as a straightforward and compact dispute. Whether it admits it or not, however, the City seeks both to direct national public policy and to instigate a tort-law revolution. It asks the Court to upset the balance that the federal government has struck, over the course of decades, between energy production, economic growth, and environmental stewardship; and to hold five parties responsible for the conduct of billions of people, over hundreds of years, across the globe. The vast annals of the common law can furnish no example of a tort suit reaching for such scope and sway.

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[*] No party's counsel authored any part of this brief. No one, apart from WLF and its counsel, contributed money intended to fund the brief's preparation or submission. All parties have consented to the brief's being filed.

There are many reasons to reject the City's call for judicial central planning. One—the focus of this brief—is that the City seeks to evade or discard an ancient, and crucially important, element of tort law: proximate cause. Proximate cause ensures that a close connection exists between the conduct of the defendant and the harm to the plaintiff. It ensures that courts adhere to the judicial function, resolving discrete and tractable disputes rather than trying to manage wider social ills. It ensures that the people themselves, through their representatives, make the nation's major policy decisions.

The problems the City faces are almost certainly real, but the courts should not trample on the common law—and on democracy—to try to address them. Judicial intervention, WLF believes, would carry the Third Branch beyond both its competency and its proper role in our republic.

STATEMENT OF THE CASE

I. OIL.

In the early 1800s the world was a dark place, just as it had always been. When the sun went down, you went to bed. The main source of artificial light, candlelight, was both expensive and weak.

Candles "were also dangerous: forget to snuff your candle and you could be incinerated in a ball of fire." Alan Greenspan & Adrian Wooldridge, *Capitalism in America: A History* 432 (2018).

"Productivity improvements" at the dawn of the republic were "limited by the speed that horses could run or ships could sail." Greenspan & Wooldridge, supra, at 18. Even by the mid-nineteenth century, "the country still bore the traces of the old world of subsistence. Cities contained as many animals as people, not just horses but also cows, pigs, and chickens." *Id.* at 91.

Then, in the second half of the 1800s, the Industrial Revolution accelerated. At the center of this transformation was the United States economy, and at the center of the United States economy was oil. The "nation's rise was propelled, in no small way, by its immense natural-resource wealth"—"starting with oil." Bhu Srinivasan, *Americana: A 400-Year History of American Capitalism* 151 (2017).

Oil peeled back the darkness. The development in the 1860s of "viable [oil] drilling technique[s]" made "basic, cheap lighting possible for millions of Americans." Srinivasan, supra, at 151. "From 1880 to 1920," therefore, "the amount of oil refined every year jumped from

26 million barrels to 442 million." Greenspan & Woodridge, supra, at 102. This in turn led to "an astonishing decline in the price of kerosene paid by consumers from 1860 to 1900." *Id.* "Unlike the spermaceti candles of decades prior, sometimes wrapped in tissue paper fit for jewelry, cheap tin cans filled with kerosene now allowed the common man to light his home." Srinivasan, supra, at 161.

The United States illuminated not just itself but the world. Much of the kerosene Standard Oil produced in the late nineteenth century was exported. In Europe light went from something precious to something ubiquitous. In Britain, for example, the cost of a million lumen hours of light dropped from around £9,400 in 1800 to around £230 in 1900 (and to around £3 in 2000). Max Roser, *Light*, Our World in Data, https://perma.cc/4BVV-P4QZ (2019).

And oil provided much more than light. It "became the nation's primary source of energy: as gasoline and diesel for cars, fuel oil for industry, heating oil for homes." Greenspan & Woodridge, supra, at 102-03. All this energy helped drive "America's takeoff into self-reinforcing [economic] growth." *Id.* at 92. All the economic growth, in turn, opened the way for better lives for millions of immigrants. "In the

1880s alone," convinced that "America was the land of opportunity," "5.3 million people moved to the United States." *Id.* at 95. Oil also promoted autonomy. It enabled Americans to "live in far-flung suburbs because filling their cars was cheap." *Id.* at 103. It empowered average people to leave multi-tenant buildings and move into their own houses; to "choose space over proximity." *Id.*

"More than any other country," in short, "America was built on cheap oil." Greenspan & Wooldridge, supra, at 103. "The age of the robber barons laid the foundations of the age of the common man: an age in which almost every aspect of life for ordinary people became massively—and sometimes unrecognizably—better." *Id.* at 427.

The United States remains a leading innovator of oil and natural gas production. In the development of fracking, for instance, the "oil industry saw one of the most surprising revolutions of the second half of the twentieth century." Greenspan & Wooldridge, supra, at 356-57. "Shale beds now produce more than half of America's natural gas and oil . . . compared with just 1 percent in 2000." *Id.* at 357. Thanks to fracking, the United States is on the cusp of becoming a net energy exporter for the first time in more than sixty years. Robert Rapier, *The*

U.S. is Set to Become a Major Net Energy Exporter, Forbes.com, https://perma.cc/T2CV-ZAW5 (Jan. 27, 2019).

"U.S. presidents have for decades sought to make America energy independent." Tom DiChristopher, *Trump Wants America to be 'Energy Dominant.' Here's What That Means*, CNBC.com, https://perma.cc/C3XZ-EFCL (June 28, 2017). The modern oil and natural-gas renaissance has, therefore, enjoyed bipartisan political support. A report issued by the Obama administration, for example, applauds the fact that the recent increase in oil and natural-gas production has "made a significant contribution to GDP growth and job creation." The White House, *New Report: The All-of-the-Above Energy Strategy as a Path to Sustainable Economic Growth*, https://perma.cc/KR8M-2NYN (May 29, 2014). "Increased domestic oil production," the report notes, "reduce[s] the vulnerability of the U.S. economy to oil price shocks stemming from international supply disruptions." *Id.*

II. WATER.

"Rising and falling seas" are "one of the ancient rhythms" of our four-billion-year-old planet. Jeff Goodell, *The Water Will Come: Rising Seas, Sinking Cities, and the Remaking of the Civilized World* 10 (2017).

"What's different today," it appears, "is that humans are interfering with this natural rhythm by heating up the planet and melting the vast ice sheets of Greenland and Antarctica." *Id.* at 10. "Global sea-level rise" from this climate change "could range from about one foot to more than eight feet by 2100." *Id.*

The City likely faces a "future of rising seas and increasingly violent storms." Goodell, supra, at 148. It might, in fact, see an atypical amount of sea-level rise along its waterfront. During the last ice age, the land in what is now the City sat on the edge of a massive ice sheet. The ice depressed the land under it, but pushed the land next to it upward. According to some scientists, that "peripheral bulge" is now subsiding, causing parts of the City to sink. See Robert Kopp, et al., *Probabilistic 21st and 22nd Century Sea-Level Projections at a Global Network of Tide Gauge Sites* at sec. 3.4, https://perma.cc/S6J2-T4BY (June 13, 2014).

The City is right to take the threat posed by climate change seriously. The City, after all, is "responsible for nearly 10 percent of the US gross domestic product," yet it has "a lot of low areas, including . . . Lower Manhattan, which ha[s] been enlarged by landfill over the

years." Goodell, supra, at 148-49. "The amount of real estate at risk in New York is mind-boggling: 72,000 buildings worth over $129 billion stand in flood zones." *Id.* at 149.

As part of its climate-change policy, unfortunately, the City has taken to bringing public-nuisance lawsuits. There can be "no pretense," however, "that there is a nuisance" here "of the simple kind that was known to the older common law." *Missouri v. Illinois*, 200 U.S. 496, 522 (1906). The City is not seeking to abate the sort of "minor offenses involving public morals or the public welfare" that public-nuisance law traditionally addressed. Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741, 800-01 (Spring 2003). It is complaining about global climate conditions and projections.

In 2011, addressing a lawsuit the City and others brought against electric-power companies, the Supreme Court rejected the City's approach. The court concluded that the claims before it were displaced by Clean Air Act regulations. *Am. Elec. Power Co.*, 564 U.S. at 424.

The City has now tried again, this time in a lawsuit against five companies that produce and sell oil and natural gas. The City presses state-law claims for public nuisance, private nuisance, and trespass. It

seeks to hold the five companies joint and severally liable for the expenses the City incurs dealing with "the impacts of [the] climate change" being created by the emission of greenhouse gases since "the dawn of the Industrial Revolution." (Dkt 80 ¶3 & *ad damnum*.) The district court dismissed the City's complaint because (1) federal common law displaces the City's state-law claims, (2) the Clean Air Act displaces any federal common-law claim directed at domestic fossil-fuel emissions, and (3) any federal common-law claim directed at foreign emissions interferes with the separation of powers and the nation's foreign policy.

SUMMARY OF ARGUMENT

The district court correctly concluded that the City's claims are displaced by the Clean Air Act and by the other branches' power over foreign policy. What's more, the City faces many other insurmountable obstacles to recovery. These obstacles—including the Commerce Clause, the Takings Clause, and the *in pari delicto* doctrine—are comprehensively discussed in the appellees' brief. We write separately to throw more light on one the biggest merits obstacles, a lack of proximate causation.

To recover in tort, a plaintiff must establish a direct connection between the defendant's conduct and his injury. This is the abiding tort element of proximate cause. The City cannot establish it. The path from John D. Rockefeller and his successors, on one side, to the tides and temperatures of twenty-first century New York, on the other, is too long, too winding, and too tangled to support liability.

The Court should not relax the proximate-cause standard to accommodate the City's lawsuit. Jettisoning fundamental common-law rules violates due process. So does imposing massive liability retroactively. Relieving the City of its obligation to establish proximate causation would do both.

Further, requiring proximate causation properly constrains the judicial role. If a court may impose liability on a party only remotely connected to a social harm, avenues open for making sweeping choices from the bench about who should have to spend how much on what problems. These kinds of choices are not part of the judicial function. The legislature and executive are better equipped to gather scattered information, to develop and harness expertise, to collect and use resources, and to balance competing societal values. Of equal

importance, they are the branches of government invested with the democratic legitimacy that must underlie the crafting of public policy.

ARGUMENT

I. THE CITY CANNOT ESTABLISH PROXIMATE CAUSATION.

Proximate cause is an element of every tort. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 132 (2014). It is an integral part of both federal and New York common law. (See Appellees' Br. 34-35, 40-48.)

A proximate cause is "a cause which, in a direct sequence unbroken by any new independent cause, produces the injury complained of." *Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris Inc.*, 241 F.3d 696, 707 (9th Cir. 2001). Under "the usual common law rule of proximate cause," a plaintiff must establish that the defendant's conduct is "the first link in the chain of causation." *United Food & Comm. Workers v. Philip Morris Inc.*, 223 F.3d 1271, 1273 (11th Cir. 2000). At the very least, though, "some direct relation" must connect "the injury and the injurious conduct." *Cincinnati v. Deutsche Bank Nat'l Trust Co.*, 863 F.3d 474, 480 (6th Cir. 2017).

The City is suing the appellees because they "produced, marketed, and sold" oil and natural gas. (Dkt. 80 ¶1.) Yet it is the *burning* of fossil fuels that merely *contributes* to the climate change that in turn *contributes* to erosion, flooding, and health problems in the City. The causal chain from the production and sale of fossil fuels to the harm raised by the City is long and riddled with imponderables.

While, or after, the appellees sell their products:

- Dozens of other large oil and natural-gas producers extract, refine, and sell the same products.
- Thousands of companies design, build, and set the fuel efficiency of countless machines that burn fossil fuels.
- Billions of people decide how long they leave their air conditioners, heaters, and lights on; how often and how far they drive or fly; and how much attention they pay to the source of the energy they use.
- Greenhouse gases emitted from machines collect in the atmosphere. Emissions today join emissions that have been collecting for hundreds of years—"since the dawn of the Industrial Revolution." (Dkt. 80 ¶3.)

- Greenhouse gases from other sources—e.g., the world's billion cows—also collect in the atmosphere.
- Greenhouse gases combine with the many other recondite forces—e.g., the receding peripheral bulges of primeval ice sheets—in the emergent system that is the climate.
- The climate creates local temperatures and sea levels.

There is no "direct relation" here of the sort that can support a finding of proximate cause.

"The injury for which [the City] seek[s] compensation is remote indeed, the chain of causation long, . . . and the damages wickedly hard to calculate." *Int'l Broth. of Teamsters v. Philip Morris Inc.*, 196 F.3d 818, 825 (7th Cir. 1999). It would be "nearly impossible," in fact, to "disaggregate" the appellees' actions "from other potential causes" of sea-level or temperature rise in the City. *Cincinnati*, 863 F.3d at 480-81. This is why the proximate-cause requirement exists.

The City wants the Court to answer questions a court cannot answer. How much the appellees are responsible for the sea levels around, or the temperatures in, the City might make for an interesting philosophical debate; but it is not the stuff of a legal dispute. "'For want

of a nail, a kingdom was lost' is a commentary on fate, not the statement of a major cause of action against a blacksmith." *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 287 (1992) (Scalia, J., concurring).

The City cannot establish proximate cause.

II. THE COURT SHOULD NOT RELAX OR DISTORT THE PROXIMATE-CAUSE REQUIREMENT.

Loosening the proximate-cause requirement on the City's behalf would be both unlawful and unwise. It would both violate the Due Process Clause and carry the courts far outside their station.

A. Relaxing The Proximate-Cause Requirement Would Violate Due Process.

Letting a lawsuit against the appellees proceed absent the required proximate cause would violate due process in at least two ways:

1. The elimination "of a well-established common-law protection against arbitrary deprivations of property" presumptively "violate[s] the Due Process Clause." *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 430 (1994). The proximate-cause requirement is just such a "well-established common-law protection." "For centuries, it has been a well established principle of the common law, that in all cases of loss, we are

to attribute it to the proximate cause, and not to any remote cause." *Lexmark*, 572 U.S. at 132 (quoting *Waters v. Merchants' Louisville Ins. Co.*, 11 Pet. 213, 223 (1837)); see also *Holmes*, 503 U.S. at 287 (Scalia, J.).

2. "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 573 n.19 (1996). The appellees engaged in the lawful production of oil and natural gas. To punish them now for that activity would require discarding the proximate-cause rule and, thus, imposing liability retroactively. That a court may not do—not without violating due process. See *E. Enter. v. Apfel*, 524 U.S. 498, 547-50 (1998) (Kennedy, J., concurring in the judgment and dissenting in part) ("Both stability of investment and confidence in the constitutional system . . . are secured by due process restrictions against severe retroactive legislation.").

B. Relaxing The Proximate-Cause Requirement Would Carry The Courts Far Beyond Their Proper Role.

If a court may redistribute resources without regard to proximate cause, it becomes a vehicle for overseeing public policy. This is not a role any judge should embrace.

In response to systemic problems, the political branches can collect data, study incentives, consider diverse viewpoints, and then craft systemic solutions. When, by contrast, a court is presented with a systemic problem—and a case typically presents at most just one—that court (or a jury) can do no more than hear from a few witnesses, a few experts, and a few lawyers, and then impose remedies limited to the parties in the lawsuit.

If this lawsuit were to proceed, the trial court could not, at the close of evidence, conclude that what's really needed is a carbon tax, or more investment in green energy, or new forms of public transportation. The court would be presented with one course, and one course only, for addressing climate change: holding five energy companies strictly liable for all of it, and then ordering them to pay billions of dollars in damages. Even on its own terms, moreover, the one option presented is hopelessly incomplete. Countless other major producers and emitters of fossil fuels are conspicuous in their absence. Making companies pay for negative externalities is not irrational; but litigation, with its inherent limitations (and frightful expense), is no way to go about it.

The Court is not only being presented just one option; it is being presented just one problem. But a court cannot know whether it is wise, notwithstanding the many other problems facing society (including the problem of maintaining economic growth), to divert resources to the one problem before it. A court that creates a radical new tort rule to address a problem acts in defiance of its many policy blind spots. "The omnipresence of unintended consequences" of public policy "can be attributed, in large part, to the absence of relevant information." Cass R. Sunstein, *The Cost-Benefit Revolution* 79 (2018). Yet "the decisions that follow adjudication, involving a small number of parties," often "turn out to be inadequately informed." *Id.* at 86. The political branches are better able to "collect dispersed knowledge" and "bring it to bear on official choices." *Id.* at 88.

True enough, companies faced with arbitrary and unpredictable liability might just "continue making and selling their wares, offering 'tort insurance' to those who are injured." *Carroll v. Otis Elevator, Co.*, 896 F.2d 210, 217 (7th Cir. 1990) (Easterbrook, J., concurring). But they are far more likely to try to pass their expenses on to their customers (in this instance, ultimately, almost everyone). And if that does not

work—if "the judgment bill becomes too high"—they will simply throw up their hands and leave the market. *Id.* The City, which accuses the appellees of doing "nearly all they c[an] to create [an] existential threat" (Dkt. 80 ¶2), may well be fine with such an outcome. But hundreds of millions of citizens outside the City are entitled to a say in the United States' energy policy. And in any case, as should by now be clear, "it is no part of the judicial function" to "decree a sudden *ex post* shift in the financial consequences of selling a consumer product by attaching what would amount to a regressive excise tax." *Int'l Broth. of Teamsters*, 196 F.3d at 825.

Finally, there is the problem of authority. The heroic model of common-law innovation is—or certainly should be—over. Judges can no longer justify creating law by claiming merely to "discover" it; we recognize "the uncomfortable relationship of common-law lawmaking to democracy." Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 10 (1997). "Law in the sense in which courts speak of it today does not exist without some definite authority behind it." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (quoting *Black & White Taxicab v. Brown & Yellow Taxicab*, 276 U.S. 518, 533-34 (1928) (Holmes, J.,

dissenting)). Make no mistake—there is *no* authority permitting judges to transform the common law into a tool for settling public-policy disputes of the highest order.

A court is not equipped to grasp the many factors at play outside the confines of the case at hand. Nor is it authorized to ignore this deficit on its way to imposing expansive and radically novel tort liability. Fortunately the proximate-cause requirement confines the judiciary to resolving disputes it is equipped, and sanctioned, to handle.

CONCLUSION

The judgment should be affirmed.

February 14, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

This brief complies with the type-volume limits of Fed. R. App. P. 29(a)(5) and Local Rule 29.1(c) because it contains 3,597 words, excluding the parts exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced serif typeface using Microsoft Office Word 2010 in 14-point font.

February 14, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of February, 2019, a true and correct copy of the foregoing brief was filed and served on all registered counsel through the Court's CM/ECF system.

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