No. 18-16663

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CITY OF OAKLAND, et al.,
Plaintiffs-Appellants,

v.

BP P.L.C., et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California
(Nos. 3:17-cv-06011, 3:17-cv-06012)

WASHINGTON LEGAL FOUNDATION'S *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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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); *City of New York v. Chevron Corp.*, No. 18-2188 (2d Cir., filed July 26, 2018).

While seeking untold billions of dollars for San Francisco and Oakland, the plaintiffs say that they bring "narrowly tailored" claims and that they are not asking a court "to regulate . . . greenhouse-gas emissions." (Appellants' Br. 4, 6, 8.) They strain to depict this case as a straightforward and compact dispute. Whether they admit it or not, however, the plaintiffs seek both to direct national public policy and to instigate a tort-law revolution. They ask the Court to upset the balance 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,

[*] 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.

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.

There are many reasons to reject the plaintiffs' call for judicial central planning. One—the focus of this brief—is that the plaintiffs seek 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 plaintiffs face 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.* "Global sea-level rise" from this climate change "could range from about one foot to more than eight feet by 2100." *Id.*

Like other coastal cities around the nation, San Francisco and Oakland likely face a "future of rising seas and increasingly violent storms." Goodell, supra, at 148. The expense of protecting the Bay Area from these forces could run to hundreds of billions of dollars. See, e.g., Rosanna Xia, *Destruction From Sea Level Rise in California Could Exceed Worst Wildfires and Earthquakes, New Research Shows*, L.A. Times, https://lat.ms/2DI72nQ (Mar. 13, 2019). The plaintiffs are right to take the threat posed by climate change seriously.

Unfortunately, however, the plaintiffs have joined the growing number of cities bringing novel public-nuisance lawsuits. There can be "no pretense" 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 plaintiffs are 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). They are complaining, rather, about global climate conditions and projections.

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

Trying to circumvent that ruling in favor of fossil-fuel *emitters*, the plaintiffs press their public-nuisance claims against five fossil-fuel *producers*. They seek to hold five companies jointly and severally liable for the expenses San Francisco and Oakland will incur "build[ing] sea

walls and other infrastructure" because of climate change. (Am. Compls. ¶8.) The district court dismissed the plaintiffs' complaints because (1) federal common law displaces the plaintiffs' state-law public-nuisance claim, (2) the Clean Air Act displaces any federal common-law public-nuisance 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. In addition, the court concluded that it lacked personal jurisdiction over four of the five defendants.

SUMMARY OF ARGUMENT

The district court correctly concluded that it lacked personal jurisdiction over most of the defendants, and that the plaintiffs' claims are displaced by the Clean Air Act and by the other branches' power over foreign policy. What's more, the plaintiffs face several other insurmountable obstacles to recovery. These obstacles—including the First Amendment and well-established limits on the tort of public nuisance—are discussed in Chevron's brief. (See Chevron Brief 52-57.) We write separately to throw more light on one of the biggest merits obstacles, a lack of proximate causation. (See *id.* at 59-60.)

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 plaintiffs cannot establish it. The path from John D. Rockefeller and his successors, on one side, to the present-day tides of the Bay Area, 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 plaintiffs' lawsuit. Jettisoning fundamental common-law rules violates due process. So does imposing massive liability retroactively. Relieving the plaintiffs of their 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 PLAINTIFFS 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).

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 plaintiffs sue the defendants for producing, marketing, and selling oil and natural gas. Yet it is the *burning* of fossil fuels that merely *contributes* to the climate change that in turn *contributes* to sea-

level rise in the Bay Area. The causal chain from the production, marketing, and sale of fossil fuels to the harm raised by the plaintiffs is long and riddled with imponderables.

While, or after, the defendants sell their products:

- Dozens of other large oil and natural-gas producers extract, refine, market, 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.
- 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., volcanoes—in the emergent system that is the climate.
- The climate creates local sea levels.

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

"The injury for which the plaintiffs seek 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 defendants' actions "from other potential causes" of sea-level rise in the Bay Area. *Cincinnati*, 863 F.3d at 480-81. This is why the proximate-cause requirement exists.

The plaintiffs want the Court to answer questions a court cannot answer. How much the defendants are responsible for the sea levels in and around the Bay Area 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 plaintiffs cannot establish proximate cause.

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

Loosening the proximate-cause requirement on the plaintiffs' 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 defendants proceed without 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 defendants 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.

When the political branches are presented with a systemic problem, they can collect data, study incentives, consider diverse

viewpoints, and then craft a systemic solution. When, by contrast, a court is presented with a systemic problem, it (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. Litigation, with its inherent limitations (and frightful expense), is no way to go about crafting major public policy.

This lawsuit illustrates the point. Were it 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.

Even if the court could somehow craft a serviceable approach to addressing the risks of climate change, that would not justify drastic judicial action. 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 many 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 plaintiffs, which accuse the defendants of creating "an existential threat to modern life" (Am.

Compls. ¶5), may well be fine with such an outcome. But hundreds of millions of citizens outside San Francisco and Oakland 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 focuses the judiciary on resolving disputes it is equipped, and sanctioned, to handle.

CONCLUSION

The judgment should be affirmed.

May 17, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify:

(i) That this brief complies with the type-volume limits of Fed. R. App. P. 29(a)(5) because it contains 3,488 words, excluding the parts exempted by Fed. R. App. P. 32(f).

(ii) That 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 using Microsoft Office Word 2010 and is set in 14-point Century Schoolbook font.

May 17, 2019

/s/ Corbin K. Barthold

CERTIFICATE OF SERVICE

I certify that on May 17, 2019, I filed and served the foregoing brief of Washington Legal Foundation via the CM/ECF system. All participants in the case are registered CM/ECF users.

/s/ Corbin K. Barthold