No. 22-523

IN THE

# Supreme Court of the United States

SUNOCO LP, ET AL.,

*Petitioners*,

v.

CITY AND COUNTY OF HONOLULU, HAWAII, ET AL.,

*Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

## BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONERS


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## INTEREST OF *AMICUS CURIAE*[1]

*Amicus curiae* is the National Association of Manufacturers ("NAM"). The NAM is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12.9 million men and women, contributes $2.77 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than half of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.[2]

The NAM is dedicated to manufacturing safe, innovative and sustainable products that provide essential benefits to consumers while protecting human health and the environment. Climate change is one of the most important public policy issues of our time, and the NAM fully supports national efforts to address climate change and improve public health through appropriate laws and regulations. Developing new technologies to reduce greenhouse gas emissions, make energy more efficient, and modify infra-

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief. The parties received timely notice of the intent of *amicus curiae* to file this brief, and provided blanket consent to the filing of briefs of *amici curiae*.

[2] To learn more about the NAM, including its Board members, please see https://www.nam.org/about/ and https://www.nam.org/about/board-of-directors/.

structures to deal with the impacts of climate change has become an international imperative.

The NAM has grave concerns about this attempt to create liability over sales of lawful, beneficial energy products essential to modern life through state law. As the Court found in *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011), climate litigation plainly implicates federal questions and complex policymaking. State tort suits against the energy sector cannot achieve these public policy objectives, and state courts are not the appropriate forums to decide these critical national issues. For these reasons, the NAM has a substantial interest in attempts by Respondents and other local governments to subject its members to unprincipled state liability for harms associated with climate change.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This case is part of a coordinated, national litigation campaign over global climate change and an unapologetic effort to circumvent this Court's ruling in *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011) (hereafter "*AEP*"). In *AEP*, the Court addressed an earlier wave of this climate litigation campaign. It held unanimously that the climate claims there sounded in the federal common law and that Congress displaced any such claims when it enacted the Clean Air Act. *See id.* at 424. The Ninth and Fifth Circuits then dismissed versions of the climate suits pending in their courts. *See Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849

(9th Cir. 2012) and *Comer v. Murphy Oil USA, Inc.*, 718 F.3d 460 (5th Cir. 2013). The law was settled.[3]

As this brief will show, strategists behind this litigation campaign then began developing ideas for circumventing the Court's ruling. Lawyers involved in this effort said they were looking for ways to repackage the litigation so their new lawsuits would achieve comparable national goals as *AEP*, but would appear different and appeal to parochial interests of local courts to provide money to local constituencies. So, they re-cast the federal public nuisance claims for injunctive relief against the utilities in *AEP* as state public nuisance lawsuits for state or local abatement funds against energy manufacturers, among several other state law claims. Since 2017, more than two dozen of these lawsuits have been filed in carefully chosen state jurisdictions around the country.

On the few occasions where federal courts have reached the substance of these claims, the federal courts properly applied *AEP* and concluded that the claims arise under federal common law and are displaced. *See City of New York v. Chevron Corp.*, 993 F.3d 81, 91 (2d Cir. 2021); *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017 (N.D. Cal. 2018) (vacated pursuant to an order to remand the case to state court, *see* 960 F.3d 570 (9th Cir. 2020)). What has become clear is that the state law packaging for these claims is solely a veneer. As the Second Circuit stated, the lawsuits seek to subject a handful of energy companies to state liability "for the effects of emissions made around the globe over the past several

[3] The Court reaffirmed *AEP* in *West Virginia v. Environmental Prot. Agency*. *See* 142 S. Ct. 2587, 2613 (2022); *see also id.* at 2636 (Kagan, J., dissenting).

hundred years." *City of New York*, 993 F.3d at 92. It concluded that "[s]uch a sprawling case is simply beyond the limits of state tort law," *id.,* echoing this Court's statement in *AEP* that this litigation raises issues of "special federal interest." 564 U.S. at 424.

Accordingly, the linchpin for this litigation campaign is the ability of the plaintiffs to avoid the federal judiciary. After the companies removed the cases to federal court, the plaintiffs proffered novel theories for tying the hands of federal courts and *requiring* them to remand the cases to state courts. First, the plaintiffs have asserted their claims, even if inherently federal, are un-removable *because* Congress exercised its authority over these federal issues and displaced the federal common law in this area. The Second Circuit called the notion that such federal action on federal issues can undo federal jurisdiction "too strange to seriously contemplate." *City of New York*, 993 F.3d at 98-99. Yet, the Ninth Circuit agreed with Respondents and held these claims are now viable under state law because the federal common law over climate change has been displaced.

This part of this appeal is the subject of several Petitions before the Court. *See Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238 (10th Cir. 2022), *petition for cert. filed*, July 8, 2022; *Mayor and City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178 (4th Cir. 2022), *petition for cert. filed*, Oct. 14, 2022; *County of San Mateo v. Chevron Corp.*, 32 F.4th 733 (9th Cir. 2022), *petition for cert. filed*, Nov. 22, 2022; and *Shell Oil Prods. Co., LLC v. Rhode Island*, 35 F.4th 44 (2022), *petition for cert. filed*, Dec. 2, 2022.

Second, Plaintiffs have argued that even though Petitioners have supplied the federal government with substantial quantities of specialized, non-commercial grade fuels under the direction and control of federal officers, removal is not proper under the federal officer removal statute. *See* 28 U.S.C. § 1442(a)(1). The Ninth Circuit denied the Petitioners' right to remove the case to federal court under this statute by issuing an unsupported interpretation of the statute that has been rejected by other Circuits, creating a circuit split on this issue.

Here, Petitioners plainly assert they are "person[s]" in a "civil action" "for or relating to" acts performed while "acting under" federal officers and "raise[d] a colorable federal defense"—which are the only requirements Congress and this Court have established for when the statute provides a right of removal. The Ninth Circuit added a new requirement: the federal defense must arise from Petitioners' federal duties. As other Circuits have recognized, constitutional and preemption defenses critical to giving proper effect to the federal officer removal statute—ensuring claims against those acting under the federal government are heard in federal court—would not meet this new standard. As the Third Circuit stated, "[w]hat matters is that a defense raises a federal question, not that a federal duty forms the defense." *In re Commonwealth's Motion to Appoint Counsel Against or Directed to Defender Ass'n of Philadelphia*, 790 F.3d 457, 473 (3d Cir. 2015).

This question has implications for every manufacturer and business that supplies goods and services for the federal government. This Petition is an im-

portant vehicle for resolving this recurring issue; it is not presented in the other climate-related Petitions.

For these reasons, *amicus* respectfully requests that the Court grant the Petition and vacate the order to remand these federal law issues to state court or, at least, hold the Petition pending a decision on the petitions in *Suncor Energy (U.S.A.) Inc. v. Board of County Commissioners of Boulder County*, No. 21-1550, and the other cases. With some two dozen climate cases pending, it is a matter of judicial efficiency that the Court resolve these federal law questions.

## ARGUMENT

### I. THE LOWER COURT'S RULING PROVIDES A PLAYBOOK FOR PEOPLE SEEKING TO ABROGATE FEDERAL AUTHORITY

The advocacy groups and lawyers behind this litigation campaign have explicitly stated that they developed the litigation strategy employed in this and the other climate cases to circumvent this Court's ruling in *AEP*. In 2012, after *AEP* was decided, they convened in California to brainstorm on how to repackage climate lawsuits in hopes of using the litigation to achieve their national policy priorities. Organizers of the conference published their discussions. *See Establishing Accountability for Climate Damages: Lessons from Tobacco Control, Summary of the Workshop on Climate Accountability, Public Opinion,*

*and Legal Strategies*, Union of Concerned Scientists & Climate Accountability Inst. (Oct. 2012).[4]

They said that despite the Court's clear pronouncements, they still believed "the courts offer the best current hope" for imposing their national public policy agenda over fossil fuel emissions. *Id.* at 28. They discussed "the merits of legal strategies that target major carbon emitters, such as utilities [as in *AEP*], versus those that target carbon producers," as here. *Id.* at 12. They talked through causes of action, "with suggestions ranging from lawsuits brought under public nuisance laws," also as here, "to libel claims." *Id.* at 11. Given *AEP* in particular, they emphasized making the lawsuits look like traditional damages claims rather than directly asking a court to regulate emissions or put a price on carbon use. *See id.* at 13. As one person at the conference said, "Even if your ultimate goal might be to shut down a company, you still might be wise to start out by asking for compensation for injured parties." *Id.*

They also discussed "the importance of framing a compelling public narrative," including "naming [the] issue or campaign" in an effort to generate "outrage." *Id.* at 21, 28. At a follow-up session in 2016, they explained that "creating scandal" through lawsuits would also help "delegitimize" the companies politically. *Entire January Meeting Agenda at Rockefeller Family Foundation*, Wash. Free Beacon, Apr. 2016.[5]

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[4] https://www.ucsusa.org/sites/default/files/attach/2016/04/establishing-accountability-climate-change-damages-lessons-tobacco-control.pdf.

[5] https://freebeacon.com/wp-content/uploads/2016/04/Entire-January-meeting-agenda-at-RFF-1-1.pdf.

They have since tried to scandalize the fact that companies knew about potential risks of climate change—something widely known by governments around the world—and still produced fossil fuels to satisfy the energy needs of billions of people.

To name this effort, supporters have asserted some widespread "campaign of deception," but that narrative is undermined by the fact that the different lawsuits alleged that different combinations of companies were involved in this so-called conspiracy. Here, the City and County of Honolulu allege some 20 entities should be subject to liability for their climate change damages. In other cases, some government plaintiffs have named only one or two companies as being responsible, while others have named more than two dozen defendants, generally including local entities (here, Aloha Petroleum that operates gas stations in Hawaii) in an effort to keep the cases in state court. This ever-changing list of defendants in various aspects of the energy industry highlights the specious nature of this litigation.

Finally, they have partnered with state and local governments to file the claims. In the complaints, the governments assert that they are seeking only money to deal with local impacts of global climate change and often disclaim any attempt to regulate emissions—even though this Court has held that such liability is a form of regulation. *See, e.g.*, *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 637 (2012). Indeed, the lawsuits are being funded by organizations *because* the litigation raises inherent federal legal and energy issues. *See*, *e.g.*, City of Hoboken Press Release, *Hoboken Becomes First NJ City to Sue Big Oil Companies, American Petroleum Institute for*

*Climate Change Damages*, Sept. 2, 2020 (noting the legal fees would be paid by the Institute for Governance and Sustainable Development).[6]

Outside of court, the litigation's architects have acknowledged that the desired effect of this litigation is to penalize the worldwide production, promotion, sale and use of fossil fuels—what they call imposing the "true cost" of fuels on consumers. Kirk Herbertson, *Oil Companies vs. Citizens: The Battle Begins Over Who Will Pay Climate Costs*, EarthRights, Mar. 21, 2018. They want the litigation to force Americans into "cutting back" on fossil fuel use and energy manufacturers into raising their prices "so that if they are continuing to sell fossil fuels, that the cost of [climate change] would ultimately get priced into them." Julia Caulfield, *Local Lawsuits Asks Oil and Gas to Help Pay for Climate Change*, KOTO, Dec. 14, 2020.[7] They believe that because the "companies are agents of consumers . . . holding oil companies responsible *is* to hold oil consumers responsible." Jerry Taylor & David Bookbinder, *Oil Companies Should be Held Accountable for Climate Change*, Niskanen Center, Apr. 17, 2018.[8]

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[6] https://www.hobokennj.gov/news/hoboken-sues-exxon-mobil-american-petroleum-institute-big-oil-companies.

[7] https://coloradosun.com/2021/02/01/boulder-climate-lawsuit-opinion/.

[8] A reporter who follows the litigation has observed the incongruity between the ways the cases are presented in and out of court: "State and local governments pursuing the litigation argue that the cases are not about controlling GHG emissions . . . But they also privately acknowledge that the suits are a tactic to pressure the industry." Dawn Reeves, *As Climate Suits Keeps Issue Alive, Nuisance Cases Reach Key Venue Rulings*, Inside

In addition, these groups are using political-style tactics to leverage the litigation to hinder the energy companies politically. *See generally Beyond the Courtroom*, Manufacturers' Accountability Project (detailing this litigation campaign).[9] Thus, unlike traditional state lawsuits, success here includes filing and maintaining state lawsuits that they can use for their national legal goals. Overall, about two dozen climate lawsuits have been filed since 2017.

At bottom, even though these lawsuits are packaged differently than *AEP* and invoke state law, they are similarly designed to drive federal law on climate change. By filing their claims in carefully chosen jurisdictions, they are seeking to convince local state courts to help them "side-step federal courts and Supreme Court precedent" and advance their preferred national and international agenda by awarding money to state and local jurisdictions. Editorial, *Climate Lawsuits Take a Hit*, Wall St. J., May 17, 2021.

## II. THE COURT SHOULD UPHOLD ITS RULING IN *AMERICAN ELECTRIC POWER* THAT CLIMATE CHANGE CLAIMS INVOKE FEDERAL COURT JURISDICTION

The Court should grant the Petition (or one of the other pending climate-related Petitions) to reinforce the principle that climate litigation raises issues of "special federal interest." *AEP*, 564 U.S. at 424. In *AEP*, the Court explained that federal common law

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EPA, Jan. 6, 2020, https://insideepa.com/outlook/climate-suits-keeps-issue-alive-nuisance-cases-reach-key-venue-rulings.

[9] https://mfgaccountabilityproject.org/beyond-the-courtroom.

addresses subjects "where the basic scheme of the Constitution so demands," including "air and water in their ambient or interstate aspects." *Id.* at 422 (quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972)). This rule of law applies to the claims here in equal force as it did in *AEP*.

The factual foundation in *AEP* is the same here: global climate change is caused by GHG emissions "naturally present in the atmosphere and . . . emitted by human activities," including the use of fossil fuels all over the world. *Id.* at 416. GHG emissions from fossil fuels have combined with other global sources of GHGs and have accumulated in the earth's atmosphere for more than a century since the industrial revolution and are creating impacts on the earth. "By contributing to global warming, the plaintiffs asserted, the defendants' carbon-dioxide emissions created a 'substantial and unreasonable interference with public rights,' in violation of the federal common law of interstate nuisance, or in the alternative, of state tort law." *Id.* at 418. Here, the allegations are also that Petitioners contributed to global warming by causing or contributing to GHG emissions through the production, marketing and sale of their fuels.

In *AEP*, the Court followed the two-step analysis from *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301 (1947) in dismissing the claims. First, the Court determined the claims arose under federal common law and that "borrowing the law of a particular State would be inappropriate." *AEP*, 564 U.S. at 422. As *Standard Oil* instructs and *AEP* affirmed, certain claims invoke the "interests, powers, and relations of the Federal Government as to require uniform national disposition rather than diversified

state rulings." *Standard Oil*, 332 U.S. at 78. Determining rights and responsibilities for global climate change is one of them. As the Court stated, the production, sale, promotion, and use of fossil fuels as well as global GHG emissions raise inherently federal questions, including over national security.

Second, and only after determining the claims arose under federal common law, did the Court hold that Congress displaced through the Clean Air Act remedies that might be granted under federal common law. *See AEP*, 564 U.S. at 425. Only the initial inquiry—whether the subject requires a uniform federal rule—goes to jurisdiction and is before this Court at this time. Any conclusion that *because* Congress spoke on this issue through the CAA and made the EPA the governing authority over GHG emissions that it somehow *undermines* the federal nature of this case is nonsensical and should be reviewed. Congress's decision to displace federal common law in favor of federal regulatory authority does not make GHG emissions any less of a federal issue.

At the time *AEP* was decided, two other climate cases were pending against the energy sector. An Alaskan village was suing many of the same energy producers as here under federal law for damages related to rising sea levels. *See Kivalina*, 696 F.3d at 849. In Mississippi, a purported class of homeowners sued a multitude of energy producers under state tort law for property damage from Hurricane Katrina. *See Comer*, 718 F.3d at 460. The allegations were that defendants, through their conduct and products, caused certain emissions which contributed to climate change and made the hurricane more intense. *See id.* These cases parallel the case here as the City

and County of Honolulu also allege the Petitioners' conduct and products caused certain emissions.

After *AEP*, both cases were dismissed. As the Ninth Circuit explained, even though the legal theories in *Kivalina* differed slightly from *AEP*, given the Court's message, "it would be incongruous to allow [such litigation] to be revived in another form." *Kivalina*, 696 F.3d at 857. Climate suits alleging harm from GHG emissions across the country and globe are exactly the sort of "transboundary pollution" claims the Constitution exclusively commits to federal law. *Id.* at 855. This is true regardless of how the suits are packaged—over energy use or products, by public or private plaintiffs, under federal or state law, or for injunctive relief, abatement, or damages.

Despite this uniform approach about a decade ago, several Circuits in this round of climate cases have inverted the Court's ruling in *AEP* in affirming the remand orders. They have held that federal jurisdiction is no longer required *because* the Court ruled in *AEP* that federal common law "ceases to exist" in this area. *Mayor and City Council of Baltimore*, 31 F.4th at 204; *see also Board of County Commissioners of Boulder County*, 25 F.4th at 1260.

The Court should grant the Petition because the ruling here conflicts with its ruling in *AEP* that claims over the effects of climate change implicate uniquely federal interests and are governed by federal law. It also should not allow local governments to turn *AEP*'s displacement ruling on its head by using it here as the primary rationale for trying to *circumvent* federal jurisdiction on climate cases.

## III. THE COURT SHOULD ENSURE THAT ENTITIES ACTING UNDER FEDERAL OFFICERS HAVE PROPER ACCESS TO FEDERAL COURTS

The Court should also grant the Petition to give proper effect to the federal officer removal statute. Here, Petitioners showed they were acting under federal officers in producing and supplying highly specialized, non-commercial grade fuels for the military, operating the Strategic Petroleum Reserve, and operating the federal Elk Hills oil reserve under the Navy's supervision, among other things. *See* Pet. at 9. With respect to the provision of specialized fuels to the military and support for certain wartime efforts, the Ninth Circuit denied Petitioners' right to remove these claims to federal court by heightening one of the elements for removal. Rather than requiring only the assertion of a colorable federal defense, it added that the defense must also arise out of defendants' official duties. *See City and County of Honolulu v. Sunoco LP*, 39 F.4th 1101, 1110 (9th Cir. 2022).

This limitation as to which federal defenses can trigger the federal officer removal statute, even when the defendant is acting under a federal officer, is unfounded and undermines the statute's purpose. As this Court has stated in previous cases, lawsuits "against federal officers may be removed despite the nonfederal cast of the complaint; the federal-question element is met if the defense depends on federal law." *Jefferson Cnty. v. Acker*, 527 U.S. 423, 431 (1999). "[I]t is the raising of a federal question in the officer's removal petition that constitutes the federal law under which the action against the federal officer arises for Art. III purposes." *Id.*; *see also Mesa v. Cal-*

*ifornia*, 489 U.S. 121, 128 (1989) (upholding "the constitutionality of the federal officer removal statute precisely because the statute predicated removal on the presence of a federal defense").

Here, the Ninth Circuit misconstrued a statement this Court made in *Arizona v. Manypenny*, 451 U.S. 232 (1981) in justifying this departure from previous law. The Court observed that "[h]istorically," the federal officer removal statute "was meant to ensure a federal forum in any case where a federal official is entitled to raise a defense arising out of his official duties." In making this remark, the Court did not hold, or even suggest, that the federal defense *must* arise out of a federal duty.

The statute already requires the claims at issue to be "for or relating to any act under color of [federal] office." 28 U.S.C. § 1442(a)(1). As this Court has explained, these elements are to be treated separately: "To qualify for removal, an officer of the federal courts must both raise a colorable federal defense and establish that the suit is 'for [a]n act under color of office.'" *Acker*, 527 U.S. at 431 (cleaned up). Imposing this requirement on the defenses wrongly collapses the defense inquiry into the conduct requirement. *See In re Commonwealth*, 790 F.3d at 470. Yet, the Ninth Circuit did not provide any rationale for restricting the federal defenses element.

Demonstrating a clear Circuit split, the Third and Seventh Circuits have held just the opposite: "the fact that duty-based defenses are the most common defenses does not make them the only permissible ones." *In re Commonwealth*, 790 F.3d at 473; *Baker v. Atl. Richfield Co.*, 962 F.3d 937, 942 n.1 (7th Cir. 2020) (favorably citing the Third Circuit decision). As

the Third Circuit explained, "[w]hat matters is that a defense raises a federal question, not that a federal duty forms the defense." *Id.* at 473. It concluded that the statute "is to be 'broadly construed' in favor of a federal forum." *Id.* at 466–67; *accord Caver v. Cen. Ala. Elec. Coop.*, 845 F.3d 1135, 1146 (11th Cir. 2017) (similarly referring to the "lenient colorable federal defense requirement for removal").

This Court's jurisprudence suggests the broader application is the correct one because the "statute's 'basic' purpose is to protect the Federal Government from the interference with its 'operations' that would ensue were a State able, for example, to" prosecute claims in state court against "'officers and agents' of the Federal Government 'acting . . . within the scope of their authority.'" *Watson v. Philip Morris Cos.*, 551 U.S. 142, 150 (2007) (quoting *Willingham v. Morgan*, 395 U.S. 402, 406 (1969)). Without removal, "[s]tate-court proceedings may reflect 'local prejudice' against unpopular federal laws or federal officials." *Id.* at 150 (quoting *Maryland v. Soper (No. 1)*, 270 U.S. 9, 32 (1926)). "For these reasons, this Court has held that the right of removal is absolute for conduct performed under color of federal office, and has insisted that the policy favoring removal 'should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1).'" *Manypenny*, 451 U.S. at 242 (quoting *Willingham*, 395 U.S. at 407).

As Congress has stated, it is against the federal interest for the private sector to have a state-based disincentive from answering federal officers' calls for services and products, particularly when it comes to

national security.[10] America's manufacturers, energy producers, and other entities must be willing to provide the federal government with their products and services—including the specialized jet fuels supplied here, the naval vessels supplied in *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286 (5th Cir. 2020) (en banc), or the chemical weapons supplied in *Issacson v. Dow Chemical Co.*, 517 F.3d 129 (2d Cir. 2008)—not refuse to provide them out of fear of local reprisal. Importantly, applying the federal officer removal statute does not absolve any defendant of any wrongdoing; it solely ensures local claims against them will be adjudicated by federal authorities. *See Acker*, 527 U.S. at 431 ("[O]ne of the most important reasons for removal" is "to have the validity of the [federal defense] tried in a federal court.").

These dynamics that the federal officer removal statute was intended to prevent are certainly at risk here. As indicated, this litigation campaign was crafted as an attempt to avoid federal courts. Private foundations and lawyers teamed with local and state governments to file cases in a multitude of state courts. Each lawsuit seeks to bring private, out-of-state money into a local community, with public officials asserting the litigation is an important piece for addressing a significant global challenge. In Maryland, when asked about the legal shortcomings of climate lawsuits, Annapolis officials expressed unusual confidence that "the Maryland courts will get us

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[10] The statute is "meant 'to ensure that any individual drawn into a State legal proceeding based on that individual's status as a Federal officer has the right to remove.'" *In re Commonwealth*, 790 F.3d at 467 (quoting H.R.Rep. No. 112-16, pt. 1 (2011), as reprinted in 2011 U.S.C.C.A.N. 420, 420).

there." Brooks Dubose, *Annapolis Sues 26 Oil and Gas Companies for their Role in Contributing to Climate Change*, Cap. Gazette, Feb. 23, 2021.[11]

The Court should grant the Petition to make clear that state courts are not positioned to be arbiters of who, if anyone, is to be legally accountable for global climate change—particularly when the entities being sued were acting under the direction of federal officers and have colorable federal defenses.

## IV. MERELY PASTING STATE LAW LABELS ON FEDERAL LAW CLAIMS SHOULD NOT BE A MEANS FOR EVADING FEDERAL SCRUTINY

The Court should not allow the use of labels to turn the global production, sale, promotion and use of fossil fuels into state law claims without federal scrutiny. As the Court has appreciated, "[w]hat matters is the crux—or, in legal speak, the gravamen—of the plaintiff's complaint, setting aside any attempts at artful pleading." *Fry ex rel. E.F. v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 755 (2017); *see also Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 475 (1998). The crux of this litigation is federal.

The state law theories invoked in this litigation are mere fig leaves. The various permutations of the cases clearly demonstrate that none of the theories of harm are moored to any plaintiff, defendant, or jurisdiction. The chain of causation, as the Court observed in *AEP*, is anything but local. In fact, the pre-

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[11] https://www.capitalgazette.com/maryland/annapolis/ac-cn-annapolis-fossil-fuels-lawsuit-20210222-20210223-vs2ff7eiibfgje6fvjwticys2i-story.html.

dictions of the Obama administration in *AEP* have been born out. The Solicitor General, in opposing that lawsuit, cautioned there would be "almost unimaginably broad categories of both potential plaintiffs and potential defendants." Brief for the Tennessee Valley Authority, *AEP* at 15 (filed Jan. 31, 2011). It would be "impossible to consider the sort of focused and more geographically proximate effects that were characteristic of traditional nuisance suits." *Id.* at 17.

In a lawsuit similar to the one here, the Second Circuit saw through the claim's state law veneer: "we are told that this is merely a local spat about the City's eroding shoreline, which will have no appreciable effect on national energy or environmental policy. We disagree. Artful pleading cannot transform the City's complaint into anything other than a suit over global greenhouse gas emissions." *City of New York*, 993 F.3d at 91. The same is true here; referencing state claims and asking for compensation—the purposeful packaging of these suits—does not make federal matters of global climate change suddenly suitable for state courts. "Such a sprawling case is simply beyond the limits of state tort law." *Id.* at 92.

To this end, in the climate case brought by San Francisco and Oakland, the district judge initially denied the remand motion and dismissed the claims on the merits for the same reasons: "Their theory rests on the sweeping proposition that otherwise lawful and everyday sales of fossil fuels, combined with an awareness that greenhouse gas emissions lead to increased global temperatures, constitute a public nuisance." *City of Oakland*, 325 F. Supp. 3d at 1022. It attempts to "reach the sale of fossil fuels anywhere in the world." *Id.* The fact that the ruling was vacat-

ed when the district judge's order denying remand was overturned *underscores* the reason the Court should grant the Petition and instruct the circuits to consider the federal substance and impact of the claims, not just their state law labels.

## V. THE COURT SHOULD AFFIRM THAT CLAIMS ALLEGING HARM FROM CLIMATE CHANGE RAISE UNIQUELY FEDERAL INTERESTS

Finally, as recent events have demonstrated, subjecting selected American, Canadian and European energy manufacturers to liability for global climate change would interfere with exclusive federal interests, including over national security. At the heart of these claims is the notion that America should reduce the production of fossil fuels because of the impact these fuels are having on the climate. *See City of New York*, 993 F.3d at 93 ("If the Producers want to avoid all liability, then their only solution would be to cease global production altogether."). Some may consider this to be a sensible solution, but it is not the role of state courts to force such a transition.

For starters, state governments do not control the global fuel market, so forcing a reduction in oil production by a few private companies would not reduce GHG emissions. As the *New York Times* reported, many of these companies are already "slowing down production as they switch to renewable energy. . . . But that doesn't mean the world will have less oil." Clifford Krauss, *As Western Oil Giants Cut Production, State-Owned Companies Step Up*, N.Y. Times,

Oct. 14, 2021.[12] "[S]tate-owned oil companies in the Middle East, North Africa and Latin America are taking advantage of the cutbacks . . . by cranking up their production." *Id.* "This massive shift could . . . make America more dependent on [OPEC], authoritarian leaders and politically unstable countries . . . that are not under as much pressure to reduce emissions." *Id.* "[T]he United States and Europe could become more vulnerable to the political turmoil in those countries and to the whims of their rulers"—and Russian President Vladimir Putin "uses his country's vast natural gas reserves as a cudgel." *Id.*

In response to the Ukrainian invasion, the administration has taken measures that would be directly contradicted by these state claims. President Biden has released oil from the nation's strategic reserves, urged American energy manufacturers to *increase* their production of oil, tried to decrease energy prices, and invested in new energy technology. *See* Zack Colman & Ben Lefebvre, *Biden To Tap Oil Reserves, Press Oil Sector To Hike Production*, Politico, Mar. 31, 2022.[13] State court rulings to curtail fossil fuel production, make fuels more expensive, and hinder innovation would conflict with this strategic national security response. As Admiral (Retired) Michel Mullen put it, energy security is "one of the first things we think about, before we deploy another soldier, before we build another ship or plane, and before we buy or fill another rucksack." *Mullen: Military Has*

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[12] https://www.nytimes.com/2021/10/14/business/energy-environment/oil-production-state-owned-companies.html.

[13] https://www.politico.com/news/2022/03/31/biden-to-tap-oil-reserves-use-wartime-powers-to-limit-fuel-shocks-00022020.

*'Strategic Imperative' to Save Resources*, Office of Sec. of Defense Public Affairs, Oct. 13, 2010.[14]

In addition, this litigation raises federalism concerns. More than fifteen state attorneys general have objected to this litigation because the state and local governments are using it to "export their preferred environmental policies and their corresponding economic effects to other states." *Amicus* Brief of Indiana and Fourteen Other States in Support of Dismissal, *City of Oakland v. BP*, No. 18-1663 (9th Cir. filed Apr. 19, 2018). It also would hurt efforts by other communities to address climate impacts in their own jurisdictions by draining their resources.

To pay for any award in this case, people and businesses in every state would have to pay higher energy prices for projects in Honolulu, even though their communities may have comparable needs. As one New Jersey coastal leader said in response to a lawsuit from Hoboken, New Jersey: "Hoboken is sticking the rest of us with the bill" as the litigation "will make it much more expensive for us to put gas in our cars and turn on our lights." Michael Thulen, *Why Hoboken's Climate Change Lawsuit Is Bad for New Jersey*, NJBiz, Oct. 11, 2021 (Thulen served as President of the Point Pleasant Borough Council).[15]

There are less harmful ways to address impacts of climate change that do not have the downsides associated with this litigation. Federal and state programs have already made funds available that can provide local relief now.

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[14] https://www.dvidshub.net/news/58040/mullen-military-has-strategic-imperative-save-resources.

[15] https://njbiz.com/opinion-wrong-course/.

The Court should grant this or one of the other climate-related Petitions. Only uniform federal law supplies the standards that can be applied here. Yet, there are some two dozen climate suits pending around the country, with organizers actively recruiting more lawsuits. Lawsuits alleging energy manufacturers can be subject to untold liability for harms stemming from global climate change should not be the result of state-by-state ad hoc rulings. As a matter of judicial efficiency, the Court should provide guidance before these proceedings begin in state courts and more lawsuits are filed.

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Ultimately, *amicus* believes the best way to address the impact that energy use is having on the climate is for Congress, federal agencies, and local governments to work with manufacturers and other businesses on developing public policies and technologies that can reduce emissions and mitigate damages. *See* Ross Eisenberg, *Forget the Green New Deal. Let's Get to Work on a Real Climate Bill*, Politico, Mar. 27, 2019. The challenge facing society is to affordably and reliably provide this energy while mitigating its climate impacts. It is not to blame providers for selling the energy that people need to heat and cool their homes, fuel their cars, build schools, places of worship and workplaces, and turn on lights.

## CONCLUSION

For these reasons, *amicus curiae* respectfully requests that this Court grant the Petition and vacate the order to remand these federal issues to state court or, at the very least, hold the Petition pending a decision on the petitions in *Suncor Energy (U.S.A.)*

*Inc. v. Board of County Commissioners of Boulder County*, No. 21-1550 and the other petitions.

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