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District Court, Boulder County
Hon. Robert R. Gunning
Case No. 2018CV30349

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In re:

Petitioner/Defendant

EXXONMOBIL CORPORATION

v.

Respondents/Plaintiffs:

BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY and CITY OF BOULDER

Supreme Court Case No. 2024SA000206

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BRIEF OF *AMICUS CURIAE*
NATIONAL ASSOCIATION OF MANUFACTURERS
IN SUPPORT OF PETITIONER/DEFENDANT

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limit set forth in C.A.R. 29(d):

_X_ It contains 4,651 words (does not exceed 4,750 words).

The *amicus* brief complies with the content and form requirements set forth in C.A.R. 29(c).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

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STATEMENT OF INTEREST

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 13 million men and women, contributes $2.87 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. 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 a major public policy issue, and the NAM fully supports national efforts to address climate change and improve public health through appropriate laws and regulations.

The NAM is concerned about this attempt to impose state law liability over the production, promotion, and sales of lawful, beneficial energy products. As the U.S. Supreme Court stated in *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011), climate litigation plainly implicates federal law and complex

policymaking. State claims, no matter how artfully pleaded, cannot achieve these goals and are not the appropriate vehicles to decide these critical national issues. For these reasons, the NAM has a substantial interest in attempts by state governments to subject energy manufacturers to unprincipled state liability for harms associated with climate change and impose these costs on American manufactures generally, particularly when doing so will not meaningfully address climate change and will harm manufacturers' ability to compete in the international marketplace.

ARGUMENT

Amicus applauds the Court for issuing an Order to Show Cause because the district court erroneously held below that local governments can impose liability for impacts of global climate change under state law. Determining liability for greenhouse gas (GHG) emissions and the impact that climate change is having, not just here, but around the globe, is beyond the scope of Colorado law. The United States Supreme Court made this clear in *American Electric Power Co. v. Connecticut,* 564 U.S. 410 (2011) (hereafter "*AEP*"). It stated that determinations courts must make in climate litigation are "meet for federal law governance," and that "borrowing the law of a particular State would be inappropriate." *Id*. at 422.

The legal issues here are the same as in *AEP*: can an entity be subject to liability for "contributing to global warming," which in turn, is causing local impacts

that are interfering with the rights of local communities? *Id*. at 418. As the Supreme Court explained in *AEP*, these issues are "of special federal interest." *Id*. at 424. Climate change is the result of a vast array of sources from around the world as part of modern life for 150 years. *See id.* at 416-18. The emission of GHGs and impacts of global climate change are not localized issues specific to any locality, state, or country—let alone any group of companies—that any state's law can govern.

Nevertheless, Plaintiffs are trying—though Colorado law—to determine the rights and responsibilities for climate change, namely which industries (and companies) are to blame for climate change and how much they should have to pay. No state law has this reach. The vast majority of actions at issue in this litigation—including the extraction, production, promotion, marketing, and sale of energy, worldwide GHG emissions, and public discourse on these issues—occurred outside of Colorado's borders and are not subject to Colorado law. Foisting Colorado law on actions entirely in other states (and countries) is not permitted under the U.S. Constitution. Only federal law can govern these cross-border disputes.

There are several reasons why. First, any determination the actions at issue in this litigation give rise to liability would have the effect of regulating actions wholly in other states. "[R]egulation can be effectively exerted through an award of damages, and the obligation to pay compensation can be, indeed is designed to be, a

potent method of government conduct and controlling policy." *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 637 (2012) (cleaned up). Second, states imposing the liability costs sought here would levy a penalty (judicial tax) on activities entirely in other states, directing that money to pay for their climate mitigation needs in their own jurisdictions. And, third, in naming these Defendants, Plaintiffs are making a subjective determination as to whom to blame for global climate change—a decision not subject to Colorado law. It is telling this case is one of thirty similar lawsuits filed in chosen jurisdictions around the nation, which about twenty states filed briefs opposing, including a recent Bill of Complaint in the U.S. Supreme Court, because of the adverse impact it would have on state sovereignty.[1]

Amicus, therefore, requests that the Court determine the state law liability claims here lay outside the bounds of Colorado's authority and, further, are preempted by the Clean Air Act. Determining how to address climate change—both its causes and impacts—is one of the most important issues that Congress, federal agencies, and international bodies have been working on for decades. These matters are beyond the reach of Colorado law.

[1] *See* Bill of Complaint, Alabama v. California, No. 158 (Original) (U.S., filed May 22, 2024).

I. SUPREME COURT JURISPRUDENCE MAKES CLEAR THAT LITIGATION OVER HARM FROM GLOBAL CLIMATE CHANGE ARISES UNDER FEDERAL LAW

When *AEP* was filed in 2004, it was the first major case seeking to impose liability over climate change. Three other lawsuits followed, each testing variations of climate litigation. In *California v. General Motors Corp.*, the state sued auto manufacturers for making products that emit GHGs. *See* No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007). In *Native Village of Kivalina v. ExxonMobil Corp.*, a village sued oil and gas producers for damages related to rising sea levels. *See* 696 F.3d 849 (9th Cir. 2012). As here, the village alleged the defendants were "substantial contributors to global warming" in part caused by "conspir[ing] to mislead the public about the science of global warming." *Id.* at 854. In *Comer v. Murphy Oil USA, Inc.*, Mississippi residents filed a class action against oil and gas producers for costs associated with Hurricane Katrina. *See* 718 F.3d 460 (5th Cir. 2013). They similarly alleged the defendants' conduct and products caused emissions that contributed to climate change, there making the hurricane more intense. *See id.*

The underpinnings of these cases were the same and echo those 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. *AEP*, 564 U.S. 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 causing or contributing to GHG emissions through their products and operations, "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.

The Obama administration's Solicitor General, who sought dismissal of *AEP*, submitted a brief before the U.S. Supreme Court explaining the inherent shortcomings with this litigation, namely there would be "almost unimaginably broad categories of both potential plaintiffs and potential defendants." Brief for the Tennessee Valley Authority, American Electric Power Co. v. Connecticut, No. 10-174 (U.S., filed Jan. 31, 2011). "Plaintiffs have elected to sue a handful of defendants from among an almost limitless array of entities that emit greenhouse gases. Moreover, the types of injuries that plaintiffs seek to redress, even if concrete, could potentially be suffered by virtually any landowner, and to an extent, by virtually every person." *Id*. at 15. 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. Noting six states had sued entities operating in twenty

states, the brief expressed "serious concerns" regarding the role of courts to make policy decisions on GHG emissions for the country. *Id*. at 13.

The Supreme Court agreed, unanimously dismissing *AEP*. Important to the case here, the Court followed the two-step analysis from *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301 (1947), as to why claims over global climate change cannot be adjudicated under state law. First, it determined the claims arose under federal common law. *See AEP*, 564 U.S. at 422. The Court explained that federal common law 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)). As *Standard Oil* instructs and affirmed in *AEP*, 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 307. Determining rights and responsibilities for interstate GHG emissions and climate change are among them.

Second, and only after determining the claims arose under federal common law, did the Court hold Congress displaced through the Clean Air Act remedies that might be granted under federal common law. *See AEP*, 564 U.S. at 425. The Court also recognized that any court adjudicating such a claim would end up regulating defendants' products or conduct "by judicial decree." *Id.* at 425, 427. The Court

stated that the "appropriate amount of regulation in any particular greenhouse gas-producing sector cannot be prescribed in a vacuum: as with other questions of national or international policy, informed assessment of competing interests is required." *Id.* at 427. Finally, it explained the institutional deficiencies with courts being enmeshed in the climate change debate, regardless of legal doctrine.

Given the ruling's clarity, courts dismissed the remaining climate cases. In *Kivalina*, the court stated even though the theories pursued differed from *AEP*, given the Supreme Court's broad message, "it would be incongruous to allow [such litigation] to be revived in another form." 696 F.3d at 857. It specifically appreciated that climate suits alleging harm from GHG emissions, as here, are the exact type of "transboundary pollution" claims the Constitution exclusively commits to federal law. *Id*. at 855. This is true regardless of how the suits are framed—over energy use or products, by public or private plaintiffs, under federal or state law, or for injunctive relief, abatement, or damages. In *Comer*, a judge held that under *AEP* the state law claims in that case were preempted. 839 F. Supp. 2d 249 (S.D. Miss. 2012).

In California's case, the court took notice of the interstate dynamics at issue in these cases, observing California seeks "to impose damages on a much larger and unprecedented scale by grounding the claim in pollution originating both within, and well beyond, the borders of the State of California." *General Motors Corp.*, 2007

WL 2726871, at *22. In explaining the constitutional concerns with this proposition, the court quoted from *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497, 519 (2007): "When a State enters the Union, it surrenders certain sovereign prerogatives. Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions. . . . These sovereign prerogatives are now lodged in the Federal Government." *Id.* at *15. Thus, the law was and is still clear: claims over GHG emissions and climate change are governed by federal law.

II. FEDERAL AND STATE COURTS HAVE DETERMINED THAT TODAY'S CLIMATE LITIGATION ARE ALSO GOVERNED BY FEDERAL LAW

After *AEP*, the litigation was re-tooled. It was redesigned to appear different from *AEP*, but have the same effect of regulating interstate and international fossil fuel emissions. *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), at 28.[2] Rather than asking a court to directly regulate emissions or put a price on carbon, though, they decided to ask for damages. *See id.* at 13 ("Even if your ultimate goal [is] to shut down a company, you still

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

might be wise to start out by asking for compensation for injured parties.”). As a result, the claims were fashioned under state tort and consumer protection law.

Federal courts were the first to assess the validity of these repackaged claims. They concluded that because the claims seek to impose liability for GHG emissions, they arise under federal law and *AEP* applies. *See, e.g.*, *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)). The Second Circuit found the re-framing to state law to be a false-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. It is immaterial whether the case is “styled as” an action for injunctive relief or damages; the litigation has “the same practical effect.” *Id.* at 96. Subjecting energy companies to liability “for the effects of emissions made around the globe over the past several hundred years” is “simply beyond the limits of state law.” *Id.* at 92.

The Second Circuit also explained the constitutional deficiencies with these claims: “a mostly unbroken string of cases has applied federal law to disputes

involving interstate air or water pollution." *Id.* at 91. That is because "a substantial damages award like the one requested by the City would effectively regulate the Producers' behavior far beyond New York's borders." *Id.* at 92. "Any actions the Producers take to mitigate their liability, then, must undoubtedly take effect across every state (and country). And all without asking what the laws of those other states (or countries) require." *Id*. Because it "'implicat[es] the conflicting rights of [s]tates [and] our relations with foreign nations,' this case poses the quintessential example of when federal common law is most needed." *Id.* Subjecting global energy operations to "a welter of different states' laws" would undermine federal policies. *Id.* at 93.

State courts, in response to motions to dismiss in several other climate cases, have followed the Second Circuit's reasoning. In Delaware, the court held Delaware cannot sue fossil fuel producers for emissions outside of Delaware because federal law "preempts state law to the extent a state attempts to regulate air pollution originating in other states." *Delaware ex rel. Jennings v. BP America Inc.*, 2024 WL 98888, at *10 (Del. Super. Ct. Jan. 9, 2024). "[S]eeking damages for injuries resulting from out-of-state or global emissions and interstate pollution" is "beyond the limits of [state] common law." *Id.* at *9. The court hearing Baltimore's case echoed that the claims are "artful" but "not sustainable." *Mayor and City Council of*

Baltimore v. BP P.L.C., No. 24-C-18-004219, at *10 (Md. Cir. Ct. July 10, 2024). It stated it is immaterial whether claims seek to directly regulate emitters, as in *AEP*, or seek damages, as here. *See id*. at *11. Either way, "the Constitutional federal structure does not allow the application of state law to claims like those presented by Baltimore." *Id.* "Global pollution-based complaints were never intended by Congress to be handled by individual states." *Id*. at *12.

Other jurists have made similar observations at other stages of climate cases. In a venue ruling, a California court observed: "If ever there were litigations that could be described as truly global in scope, they are these. . . . Regardless of which government entities have brought these lawsuits, the interests potentially affected by the issues in these cases apply equally well to populations of San Francisco County, Contra Costa County, or indeed any other county, state, or nation on the face of the Earth. These are not lawsuits with a local focus or local stakes." *California v. ExxonMobil Corp.,* No. CGC-23-609134, Not. of Entry of Order Granting Pet. for Coordination, Ex. 1, Ex. A, at 12 (Cal. Super. Feb. 07, 2024) (citing *Fuel Industry Climate Cases, JCCP 5310*, Tentative Ruling (Cal. Super. Jan. 25, 2024)). In Minnesota, in a concurrence on an appeal over removal, a judge observed that "Minnesota purports to bring state-law consumer-protection claims against a group of energy companies. But its lawsuit takes aim at the production and sale of fossil

fuels worldwide. . . . There is no hiding the obvious, and Minnesota does not even try: it seeks a global remedy for a global issue." *Minnesota v. American Petroleum Inst.*, 63 F.4th 703, 717, 719-20 (8th Cir. 2022) (Stras, J., concurring).

III. PASTING STATE LAW LABELS ON FEDERAL LAW CLAIMS DOES NOT MAKE THESE CLAIMS SUITABLE FOR STATE LAW

The district court set aside all of these rulings. It stated the viability of climate litigation turns, not on the claims' substance, but on how one "frames" the litigation. It concluded because plaintiffs "do not seek to regulate or enjoin GHG emissions" directly, the jurisprudence the Second Circuit invokes "pertaining to transboundary pollution" does not apply. *Board of County Commissioners of Boulder County; City of Boulder*, No. 2018-CV-30349, at *43. It also held Plaintiffs "are not attempting to regulate the conduct of out-of-state pollution sources" and there is no "uniquely federal interest" requiring the application of federal law. *Id*. at *44. The Constitution, though, is not swayed by subjective framing, and the differences the court asserted from *AEP* are not legal distinctions allowing for different outcomes.

This case is about the impact of interstate and international GHG emissions. The court first asserts this case is not about GHG emissions, but imposing state law on conduct in the state. *See id.* at *38-40. The heart of Plaintiffs' claims, though, is that Defendants exacerbated global climate change through GHG

emissions from its conduct and products. Plaintiffs argue this litigation is about things Defendants did in producing, promoting and selling those products, but they cannot change the fact they seek to impose liability over the impact of that GHG emissions—not just from Defendants and not just in Colorado, but from everyone, everywhere over the past 150 years—are having on their communities.

Plaintiffs cannot "have it both ways": "disavowing any intent to address emissions" while "identifying such emissions as the singular source" of their harm. *City of New York*, 993 F.3d at 91. "[F]ocus[ing] on [an] 'earlier moment' in the global warming lifecycle" "cannot transform [the lawsuit] into anything other than a suit over global greenhouse gas emissions." *Id*. at 97. After all, the suits are funded by national groups *because* they raise 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 (identifying advocacy groups paying for the lawsuit).[3]

Liability regulates. The court wrongly concluded liability for compensation does not regulate. *See* Op. at *40. As the Supreme Court has long held, damages can be "a potent method of governing conduct and controlling policy." *San Diego Bldg.*

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

Trades Council v. Garmon, 359 U.S. 236, 247 (1959). A person must change the offending conduct to avoid liability, just as it must to comply with statutes and regulations. *See Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005). Plaintiffs in *Kivalina* argued this same point, and Ninth Circuit made clear "the type of remedy asserted is not relevant." 696 F. 3d at 857. The effect of the litigation is the same.

Because the litigation seeks to "impose liability for out-of-state activity and affirmatively demand[] changes to behavior outside the state under common law theories," it violates the Constitution. O.H. Skinner & Beau Roysden, *The Next Big States' Rights Case Might Not Be What you Think*, 6 Harv. J. of L. & Pub. Pol'y 1 (2024). Otherwise, each state can impose "their own climate standards" on other states. Bill Schuette, *Energy, Climate Policy Should be Guided by Federal Laws, Congress, Not a Chaotic Patchwork of State Laws*, Law.com, Apr. 25, 2024 (Schuette served as Michigan Attorney General from 2011-2019).

Liability penalizes. In a similar vein, the district court wrongly held that liability can be imposed on conduct that is fully lawful and has "great utility." Op. at *71. Not so. As indicated, liability penalizes unlawful conduct. Here, "[i]f the Producers want to avoid all liability, then their only solution would be to cease global production altogether." *City of New York*, 993 F.3d at 93. Determining whether lawful conduct should have an additional cost is a tax and the province of

legislatures. *See* Wayne Winegarden, *Fossil Fuel Lawsuits Are a Tax on Consumers*, Forbes, June 3, 2024. Here, this liability tax would be levied on consumers throughout Colorado and other states to fund Plaintiffs' infrastructure projects with no checks and balances.

Even Plaintiffs' attorneys here have acknowledged this cost is intentional and intended to force energy companies to raise prices so if they sell fossil fuels, "the cost" of climate change would "get priced into them." Julia Caulfield, *Local Lawsuits Asks Oil and Gas to Help Pay for Climate Change*, KOTO, Dec. 14, 2020; *accord* Kathleen Curry, *Climate Lawsuits Will Raise Cost of Energy*, Daily Sentinel, Apr. 17, 2022 (Curry served as speaker pro tem of the Colorado House of Representatives).[4] "They believe forcing companies to raise the price of the energy they don't like, like fossil fuel energy, will make it too expensive for people and businesses thus decreasing the amount used." Danielle Zanzalari, *Government Lawsuits Threaten Consumers' Pockets and Do Little to Help the Environment*, USA Today, Nov. 1, 2023.

Legislative direction is needed here; deciding whether to impose this cost, how much, and where the money should be spent involves many factors beyond the

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[4] https://www.gjsentinel.com/opinion/columns/climate-lawsuits-will-raise-cost-of-energy/article_56f9315a-bcce-11ec-b7ca-6f193b92a558.html.

disputes of these parties, including affordability for people and businesses, impacts on sectors of the economy, and the other communities' needs to pay for their own climate mitigation projects. As a New Jersey leader said, governments bringing these lawsuits are "sticking the rest of us with the bill." Michael Thulen, *Why Hoboken's Climate Change Lawsuit Is Bad for New Jersey*, NJBiz, Oct. 11, 2021.[5]

Federal common law governs interstate emissions. Here, the court uses a rhetorical sleight-of-hand. First, it acknowledges the Supreme Court in *AEP* "held that the plaintiffs' claims were governed by federal common law, but were displaced by the Clean Air Act, and therefore fail to state a claim." Op. at *41. But then, it asserts displacement of the federal common law here cannot mean this lawsuit fails to state a claim (as in *AEP*), but that federal common must no longer exist and these federal issues revert to the states. *See id.* The Second Circuit called this notion—that state claims became viable when Congress spoke to these federal law questions—"too strange to seriously contemplate." *City of New York*, 993 F.3d at 98-99.

As discussed above, in *AEP* the Supreme Court followed the two-step analysis from *Standard Oil*, holding the claims arose under federal common law and then the claims were displaced. *See AEP*, 564 U.S. at 422. The Constitution "requires that

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

some issues be available for Congress to claim as exclusively federal—lest a chaotic mix of state approaches risks interfering with an effective, unified process to solve the climate problems the plaintiffs seek to abate." Donald Kochan, *Supreme Court Should Prevent Flood of State Climate Change Torts*, Bloomberg Law, May 20, 2024.

Preemption means a claim is not viable. The court also ruled against preemption because doing so would give Plaintiffs no avenue to sue these Defendants for climate mitigation. Extinguishing claims is generally the purpose and effect of preemption, not a rationale against it. *See Riegel v. Medtronic, Inc.*, 552 U.S. 312, 324 (2008) (holding preemption extinguishes state common law claims). Whether these claims are preempted does not mean Plaintiffs have no means for such aid. Congress appropriated $41.8 billion for climate mitigation. *See* Demian Brady, *State and Local Government Lawsuits Targeting Energy Manufacturers Could Backfire on Taxpayers*, Nat. Taxpayers Union Found., Apr. 29, 2024 (finding only $9.2 billion has been obligated and only $223 million spent).

This case involves national policies. The court framed the national energy and security issues here "abstract," Op. at *44, directly conflicting with the Supreme Court's statement that liability over GHG emissions present "questions of national and international policy," including "our Nation's energy needs and the possibility

of economic disruption." *AEP*, 564 U.S. at 427. The concern is that if western companies alone reduce oil production, state-owned entities in the Middle East and elsewhere would "crank[] up" theirs, making "America more dependent on [OPEC], authoritarian leaders and politically unstable countries . . . that are not under as much pressure to reduce emissions." Clifford Krauss, *As Western Oil Giants Cut Production, State-Owned Companies Step Up*, N.Y. Times, Oct. 14, 2021.[6]

Local governments cannot avoid constitutional issues with state litigation. The court asserted the body of law barring states from regulating and penalizing activities in other states does not apply because this case involves local governments and private defendants, not states. *See* Op. at *43. The constitutional limits on state litigation authority necessarily apply to state subdivisions. *See Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 607-08 (1991) (stating the principle is "well settled" that local governments are "created as convenient agencies" of states and derive their powers from "the State as may be entrusted to them"). As Judge Stras observed in Minnesota's case, this litigation is a state battle "through the surrogate of a private party as the defendant." *Minnesota*, 63 F.4th at 719. The proliferation of local lawsuits such ruling would spur also is at odds with

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

the Supreme Court's concern of these issues being made on an "ad hoc, case-by-case" basis. *AEP*, 564 U.S. at 428.

Liability cannot be the result of subjective, political decision-making. Finally, the court erred in comparing climate change, which is the result of innumerable global sources for 150 years, to multiple tortfeasor cases, and concluding Plaintiffs need not prove Defendants are responsible for GHG emissions that caused their harms. *See* Op. at *68. This assertion underscores the subjective, political nature of this litigation. This lawsuit seeks to force only two entities to pay for climate damages, whereas the other climate suits name anywhere from one defendant to dozens. *See* Lesley Clark, *Why Oil Companies Are Worried About Climate Lawsuits From Gas States,* E&E News, Nov. 7, 2023 (quoting a climate litigation campaign leader: "It's no secret that we go around and talk to elected officials" and "look at the politics" in deciding whom to approach to bring these lawsuits.). This ever-changing list of defendants also highlights the specious nature of any "extravagant misinformation campaign." Op. at *39.

* * *

Ultimately, *amicus* believes the best way to address the impact 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, not to artfully plead lawsuits.

CONCLUSION

For these reasons, *amicus* requests that the Court conclude that the district court erroneously concluded that these climate claims could proceed under state law. Dated this 5th day of August 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of August, 2024, a true and correct copy of the foregoing Brief of *Amicus Curiae* National Association of Manufacturers was served via ICCES upon all counsel of record.

/s/ *Lisa Loveless*
Legal Administrative Assistant