

Nos. 25-170

In the Supreme Court of the United States

SUNCOR ENERGY (U.S.A.) INC. ET AL.,
Petitioners,

v.

COUNTY COMMISSIONERS OF BOULDER COUNTY, ET AL.
Respondents.

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

On Petition for a Writ of Certiorari
to the Supreme Court of Colorado

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INTEREST OF *AMICUS CURIAE*¹

Amicus curiae, the National Association of Manufacturers (“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 \$2.9 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 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 one of the most important public policy issues of our time, and the NAM 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 infrastructures to deal with the impacts of climate change has become an international imperative.

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.

The NAM has grave concerns about Boulder’s and similar state and local governments’ attempts to impose state law liability over the worldwide production, sale, and promotion of energy products. As the Court found in *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011), climate litigation implicates federal law and complex policymaking. State law claims, no matter how pleaded, cannot achieve these goals and are not the appropriate mechanism for deciding these critical national issues. For these reasons, the NAM has a substantial interest in attempts by Respondent and local governments to subject its members to unprincipled state liability for harms associated with climate change and impose these costs on American manufacturers generally, particularly when doing so will not meaningfully address climate change and will harm their ability to compete in the international marketplace.

INTRODUCTION AND SUMMARY OF ARGUMENT

This lawsuit is part of a coordinated, national litigation campaign over global climate change that is invoking state liability law to impose a worldwide penalty on the sale of fuels sold by certain entities. These claims have been filed in chosen jurisdictions, packaged to appeal to parochial interests of state courts by invoking state law and seeking money for local constituencies, and target companies the plaintiffs want to blame for global climate change. Some courts, led by the U.S. Court of Appeals for the Second Circuit, have held that no state law has this reach. Others, including the Colorado Supreme Court, have welcomed this litigation. The split is deep and significant.

Of additional importance, this case—and the litigation generally—is 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 already addressed litigation over climate change, holding unanimously that lawsuits over impacts of greenhouse gas (“GHG”) emissions on the climate “require federal law governance” because of the interstate and international nature of GHGs. *Id.* at 422. It also held Congress displaced any federal claims in enacting the Clean Air Act and delegating governance over GHGs to the Environmental Protection Agency (“EPA”). *See id.* at 424. Given the clarity of this ruling, the Ninth and Fifth Circuits dismissed climate suits in their courts even though the cases were brought under state and federal legal theories, named different types of energy companies, and sought other remedies including damages and abatement. *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; there was no “parallel track” of tort litigation. *AEP*, 564 U.S. at 425.²

Nevertheless, since 2017, the City and County of Boulder are among three-dozen local and state governments that have filed comparable climate-related claims. The lawsuits have been reframed to *look* different from *AEP* but have the same national effect. They invoke state laws, target other aspects of the fuel industry, and name various combinations of companies—all to find courts that will not apply *AEP* to

² The Court reaffirmed *AEP* in *West Virginia v. Environmental Prot. Agency*, 597 U.S. 697, 730-31 (2022); *see also id.* at 771 (Kagan, J., dissenting).

dismiss the claims. The inescapable fact, though, is that regardless of how the claims are packaged, the overwhelming majority of activities causing climate change cannot be subjected to any one state’s liability law. These activities have taken place around the world for more than two hundred years. The Colorado Supreme Court recognized this fact but allowed the claims to proceed anyway.

In doing so, the Colorado Supreme Court acknowledged it was directly contradicting the Second Circuit’s holding in New York City’s climate case. *See City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021). There, the Second Circuit held climate litigation presents a “sprawling case [that] is simply beyond the limits” of state liability law. *Id.* at 92. It also saw through the post-*AEP* veneer, stating, “[a]rtful pleading cannot transform the City’s complaint into anything other than a suit over global greenhouse gas emissions.” *Id.* And, this Court already held in *AEP* that when it comes to GHG emissions, “borrowing the law of a particular State would be inappropriate.” *AEP*, 564 U.S. at 422. No state can reach outside its boundaries to determine the rights and responsibilities for global climate change, including who is to blame and how much they should have to pay. Indeed, twenty U.S. states have filed briefs *opposing* this litigation campaign because it infringes on their state’s sovereignty and hampers their ability to make decisions about these issues within their borders.³

This litigation campaign is highly divisive. With comparable lawsuits proliferating around the country,

³ *See* Bill of Complaint, *Alabama v. California*, No. 158 (Original) (U.S., filed May 22, 2024).

the Court should not wait any longer before intervening to reinforce that state law cannot govern claims over global GHG emissions, irrespective of which activities leading to GHG emissions are targeted and where in the world they took place. For these reasons, as detailed below, *amicus* respectfully requests that the Court grant the Petition.

ARGUMENT

I. THE COURT SHOULD NOT ALLOW STATES TO CIRCUMVENT ITS RULING IN *AEP* THAT CLIMATE CHANGE CLAIMS INVOKE A “SPECIAL FEDERAL INTEREST”

AEP was the first major case seeking to impose liability over GHG emissions and climate change. The targets for the litigation were utilities that generated electricity for much of America. Three lawsuits followed, each testing other ways climate litigation could be framed. In *California v. General Motors Corp.*, California sued auto manufacturers for making products that emit GHGs. *See* No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007). In *Kivalina*, a village sued oil and gas producers for damages related to rising sea levels. *See* 696 F.3d at 849. 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*, Mississippi residents filed a class action against energy producers for Hurricane Katrina losses, arguing defendants caused emissions that made the hurricane more intense. *See* 718 F.3d at 460.

The underpinnings of all four cases are the same as those here: climate change is caused by GHG emissions, including global fuel use. *See AEP*, 564 U.S. at 416. The emissions have accumulated in the atmosphere for more than 150 years and have caused impacts on the Earth. The defendants are in violation of federal or state liability law based on the way they are contributing to GHG emissions through their products, operations, or other activities. *See id.* at 418 (pleading state tort law in the alternative). Therefore, the defendants are responsible for climate change and its impacts, and the governments are entitled to the remedies under their chosen causes of action. *See id.*

In *AEP*, the Obama administration’s brief to the Court underscored the legal deficiencies with allowing any entity to be liable for climate change, explaining that claims over GHG emissions are inherently subjective and unprincipled. It stated that there are “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). The “[p]laintiffs 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 [the] 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 is “impossible to consider the sort of focused and more geographically proximate effects” characteristic of U.S. liability law. *Id.* at 17.

This Court then unanimously held that Congress, in enacting the Clean Air Act, displaced any federal common law cause of action, thereby extinguishing

the viability of these GHG claims. Its reasoning demonstrates why claims, including those here, over global climate change cannot be adjudicated under any state’s law. First, as the Court held in *United States v. Standard Oil Co. of California*, certain claims invoke the “interests, powers and relations of the Federal Government as to require uniform national disposition rather than diversified state rulings.” 332 U.S. 301, 307 (1947). And, in *Illinois v. City of Milwaukee*, it stated that “air and water in their ambient or interstate aspects” are among those areas of law where “the basic scheme of the Constitution” demands that they are governed by federal law. 406 U.S. 91, 103 (1972). Accordingly, the Court stated in *AEP*, determining rights and responsibilities for interstate and international GHG emissions are inherently matters of “special federal interest.” 564 U.S. at 424.

Second, the Court expressed concern about allowing judges to make determinations and impose remedies over these national public policy matters given the institutional limitations on the tools judges have available to them. *See id.* at 428. To adjudicate these claims, courts would have to regulate GHG emissions from defendants’ products and conduct “by judicial decree” and on an “ad hoc, case-by-case” basis. *Id.* at 427, 428. “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. Courts do not have the ability to weigh these extrajudicial factors; they can decide only legal disputes on the evidence presented.

Given the Court’s clear direction against this type of litigation on legal and policy grounds, courts dismissed the remaining climate cases. In *Kivalina*, the Ninth Circuit stated that even though the parties, theories of liability, and remedies differed from *AEP*, given the Court’s broad message against climate liability, “it would be incongruous to allow [such litigation] to be revived in another form.” 696 F.3d at 857. It appreciated that climate suits are the type of “trans-boundary 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 were preempted. *See* 839 F. Supp. 2d 849 (S.D. Miss. 2012).

Thus, the law is clear: claims over GHG emissions and climate change are governed exclusively by federal law and the Clean Air Act. The Court should grant the Petition so Boulder cannot skirt this jurisprudence merely by painting these federal public policy matters with a state liability law brush.

II. REPACKAGING CLAIMS FROM *AEP* DOES NOT CHANGE THE FACT THAT TODAY’S CLIMATE LITIGATION SEEKS TO REGULATE INTERSTATE AND IN- TERNATIONAL EMISSIONS

After *AEP*, the climate litigation campaign was retooled to *appear* different from *AEP* but have the same effect of regulating interstate and international GHG emissions from the use of certain fuels. *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 28.⁴ Rather than asking a court to directly regulate emissions or put a price on carbon, the campaign would ask for state tort damages and statutory penalties. *See id.* at 13 (“Even if your ultimate goal [is] to shut down a company, you still might be wise to start out by asking for compensation for injured parties.”).

Indeed, the lawyers and other advocates orchestrating this litigation have acknowledged outside of court that the desired effect of the litigation is to impose costs on consumers for the worldwide production, promotion, sale and use of fuel—what they call its “true cost.” Kirk Herbertson, *Oil Companies vs. Citizens: The Battle Begins Over Who Will Pay Climate Costs*, EarthRights Int’l, Mar. 21, 2018. They want to force energy companies to raise the price of fuel so “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, 2020.⁵ Some have referred to this dynamic as market force regulation. They believe “companies are agents of consumers,” so “holding oil companies responsible *is* to hold oil consumers responsible.” Jerry Taylor & David Bookbinder, *Oil Companies Should be Held*

⁴ <https://www.ucs.org/sites/default/files/attach/2016/04/establishing-accountability-climate-change-damages-lessons-tobacco-control.pdf>.

⁵ <https://coloradosun.com/2021/02/01/boulder-climate-lawsuit-opinion/>.

Accountable for Climate Change, Niskanen Ctr., Apr. 17, 2018.⁶

To mask these goals and make this litigation more politically palatable, they have partnered with state and local governments to seek this monetary penalty to deal with local impacts of climate change. The governments, as here, often disclaim any attempt to regulate or put costs on emissions; they say they just want money to deal with impacts of climate change in their jurisdictions. However, artful pleading and disclaimers cannot hide the true federal, public policy nature of this litigation. The lawsuits are being funded by national and international non-profits *because* the litigation would impact federal energy policy. *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 legal fees would be paid by the Institute for Governance and Sustainable Development).⁷

One jurist poignantly stated that the governments and backers of this litigation are waging what is truly a federal energy dispute “through the surrogate of a private party as the defendant.” *Minnesota v.*

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

⁷ <https://www.hobokennj.gov/news/hoboken-sues-exxon-mobil-american-petroleum-institute-big-oil-companies>.

American Petroleum Inst., 63 F.4th 703, 719 (8th Cir. 2023) (Stras, J., concurring). To be clear, this litigation seeks to use state law to penalize national energy use and direct money from energy consumers across the country to local governments, unbridled by the checks and balances of Congress’s legislative process. This Court has expressed concern that in these situations, some state courts “may reflect ‘local prejudice’ against unpopular federal laws” or defendants. *Watson v. Philip Morris Cos.*, 551 U.S. 142, 150 (2007).

In addition, the groups generating these lawsuits are engaging in political-style tactics to recruit local governments to bring these cases and to leverage the litigation to hinder the energy companies politically. See Lesley Clark, *Why Oil Companies Are Worried About Climate Lawsuits From Gas States*, E&E News, Nov. 7, 2023 (quoting a leader of this effort: “It’s no secret that we go around and talk to elected officials” about bringing these lawsuits and “look at the politics” in deciding whom to approach); see generally *Beyond the Courtroom*, Manufacturers’ Accountability Project (detailing this litigation campaign).⁸

Overall, three dozen of these suits have been filed in carefully chosen jurisdictions in an effort to “side-step federal courts and [U.S.] Supreme Court precedent” and convince local courts to help them advance their preferred public policy agenda by awarding money to state and local jurisdictions. Editorial, *Climate Lawsuits Take a Hit*, Wall St. J., May 17, 2021.

⁸ <https://mfgaccountabilityproject.org/beyond-the-courtroom>.

III. MERELY PASTING STATE LAW LABELS ON FEDERAL LAW CLAIMS SHOULD NOT BE A MEANS FOR USURPING FEDERAL AUTHORITY

The state-law liability theories in this litigation are mere fig leaves. Even though the global climate-related claims here have been reframed under state law, they present the same central concerns identified in *AEP*. Further, the Court’s concerns over institutional deficiencies with judges making federal public policy decisions on an ad hoc basis are magnified when individual state judges could reach different determinations without federal oversight or uniformity. Liability against whom for whom and how much would be unprincipled and would vary from court to court.

Also, the narrative of this litigation—that there is some widespread “campaign of deception”—is undermined by the litigation itself. The complaints recognize the U.S. Government’s knowledge of and public discourse over climate change starting in the 1960s and increasing in the past 40 years. And, the government plaintiffs name anywhere from one to dozens of defendants, including local entities in an effort to keep the cases in state court. Here, Boulder seeks to subject only two companies to liability for its climate change harms. This ever-changing list of defendants that engage in different aspects of the energy industry highlights the fact that imposing liability on any group of defendants that a city, state, or other local government chooses to name lacks any principled basis.

Federal courts were the first to assess the validity of this reframing, with the Second Circuit calling it 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. The court then relied on *AEP* and *Kivalina* to conclude that the specific allegations, legal theories, and remedies sought do not change the outcome because the claims still seek to impose liability for GHG emissions. *See id.* at 96.

The Second Circuit also explained that monetary remedies have “the same practical effect” of regulating interstate and international GHG emissions as the injunctive relief sought in *AEP*. *Id.* “[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.* Thus, claims seeking “damages for the cumulative impact of conduct occurring simultaneously across just about every jurisdiction on the planet,” are “simply beyond the limits of state law.” *Id.* at 92.

The Colorado Supreme Court, in a divided opinion, deepened the national split on this litigation, acknowledging that the Second Circuit and other state courts “have addressed similar questions [and] have reached differing conclusions.” 2025 CO 21, ¶24 (contrasting *City and County of Honolulu v. Sunoco LP*, 537 P.3d 1173 (Haw. 2023) with *City of New York*). The other state courts include those in Delaware, Maryland, New Jersey, New York, Pennsylvania, and South Carolina. *See Delaware ex rel. Jennings v. BP*

America Inc., 2024 WL 98888 (Del. Super. Ct. Jan. 9, 2024); *Mayor and City Council of Baltimore v. BP P.L.C.*, No. 24-C-18-004219 (Md. Cir. Ct. July 10, 2024); *City of Annapolis v. BP PLC*, No. C-020CV-21-250 (Md. Cir. Ct. Jan. 23, 2025); *Platkin v. Exxon Mobil Corp.*, No. 22-cv-06733 (RK)(JBD), 2023 WL 4086353 (D.N.J. June 20, 2023); *City of New York v. Exxon Mobil Corp.*, 2025 WL 209843 (N.Y. Sup. Ct. Jan. 14, 2025); *Bucks County v. BP P.L.C.*, No. 2024-01836 (Pa. Ct. Comm. Pleas May 16, 2025); *City of Charleston v. Brabham Oil Co.*, No. 2:20-cv-03579 (D.S.C. July 6, 2023).

In addition, more than half of the states have objected to these climate lawsuits. They have expressed their concerns that this litigation campaign endangers their rights to adopt “their own divergent policies” with respect to energy production and environmental protection. *Amicus Brief of Alabama and 25 Other States in Support of Petitioners, Suncor Energy (U.S.A.) Inc. v. Cnty. Commissioners of Boulder County*, No. 25-170 (U.S., filed Sept. 26, 2025). Twenty of them took the extraordinary step of filing a Bill of Complaint to stop this litigation campaign. *See Bill of Complaint, Alabama v. California*, No. 158 (Original) (U.S., filed May 22, 2024). And the current administration has filed lawsuits in Hawaii and Michigan to prevent their climate suits as “illegitimate impediments” to national energy policy. Alexa St. John, *Justice Department Sues Hawaii, Michigan, Vermont and New York Over State Climate Actions*, Assoc. Press, May 1, 2025 (quoting U.S. Attorney General Bondi).⁹

⁹ <https://apnews.com/article/trump-doj-climate-states-policy-lawsuits-a5228e1dd6348f09d2a70f460142531a>.

The Court should grant the Petition to settle this deep national split now, before more judicial resources are wasted. There is no need to allow the litigation to percolate further in the lower courts.

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

In allowing the reframing of this litigation, the Colorado Supreme Court's ruling has created multiple issues that this Court can address in this litigation. These issues, each of which would be dispositive, are significant, recurring, and divisive. And, they all speak to why these cases cannot arise under state law.

(1) The litigation seeks to turn federal interests related to GHG emissions into state law matters by reframing the case on an underlying conduct or product.

This issue goes to the heart of this litigation campaign. As discussed above, the Court in *AEP* made clear that determining matters related to GHG emissions is of special federal interest. *See* 564 U.S. at 424. So, plaintiffs here and in the other cases reframed their legal theories to target products and conduct that contribute to GHG emissions, not emissions themselves. The Supreme Court of Colorado joined the Supreme Court of Hawaii in accepting this reframing, asserting Boulder “has not brought an action against a pollution emitter to abate pollution. Rather, it seeks damages from *upstream producers for harms stemming from the production and sale of fossil fuels.*” 2025 CO 21, ¶50 (emphasis added).

This statement directly conflicts with the Ninth Circuit's ruling in *Kivalina* and the Second Circuit in

City of New York that imposing liability against upstream producers is a difference without a legal distinction. The Second Circuit explained: “focus[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.” *City of New York*, 993 F.3d at 91, 97. Plaintiffs cannot “have it both ways”: “disavowing any intent to address emissions” while “identifying such emissions as the singular source” of the harm they allege. *Id.* at 91.

If this reframing is allowed, plaintiffs could sue over the GHG emissions through the back door. As here, they would seek liability for climate change by targeting some aspect of the defendants’ products or conduct that they claim exacerbated GHG emissions. The Court should grant review to clarify that allegations based on harms caused by GHG emissions arise under federal law.

(2) The litigation seeks to regulate through monetary liability what this Court has held cannot be regulated through injunctive relief.

The Court should also grant the Petition to determine whether changing the remedy sought from injunctive relief to monetary recovery creates a legal distinction allowing states to impose liability over federal law issues. In *AEP*, the Court held that determining appropriate GHG emissions is a regulatory, not liability matter. There, the states sought injunctive relief over GHG emissions; here Boulder seeks money over GHG emissions. The Colorado Supreme Court allowed this distinction: “Boulder does not, however, seek to enjoin any oil and gas operations or sales in Colorado or elsewhere. Nor does it seek to enforce emissions controls of any kind.” 2025 CO 21, ¶10.

This Court, however, has long held that monetary liability is a form of regulation; it is “a potent method of governing conduct and controlling policy.” *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959). A core tenet of liability is to define conduct that is unlawful, require defendants to compensate those harmed by that unlawful conduct, and instruct defendants and others not to engage in any such 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.

Instead, as discussed above, the goal and effect of this litigation is to use liability to reduce emissions. They want to force “companies to raise the price of the energy they don’t like, like fossil fuel energy, [and] 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. Some people may consider increasing costs of these fuels the appropriate climate policy, but it is not the role of state courts to impose it. Deciding whether to impose these costs, how much, and where the money should be spent involves the same type of “complex balancing” of competing interests this Court identified in *AEP*, including energy affordability, economic impacts of raising energy costs, and national energy security, among others. 564 U.S. at 427. The Court should grant the Petition to settle this dispute.

(3) *This litigation violates constitutional limits on state authority by allowing each state to govern, and impose liability on, out-of-state GHG emissions and conduct wherever they occur in the world.*

Boulder is seeking to impose Colorado liability law on Defendants’ production, promotion, sale and use of energy wherever in the world they took place—even though the vast majority of conduct it alleges caused its injuries occurred outside of Colorado, has no nexus to Colorado, and is not subject to Colorado law. There is no escaping the fact that global climate change is not the result of emissions from Defendants’ products in Colorado. The U.S. Constitution does not permit a state to govern, let alone impose liability on, conduct or products in other states and countries without such a nexus. That is why interstate pollution cases either require the application of the *source state law* or arise under federal law and are decided in federal courts. By allowing Boulder’s claims to target products that led to GHG emissions—not the emissions themselves—the Colorado Supreme Court is refusing to be constrained by its constitutional boundaries.

These limits are so clear that President Biden’s Solicitor General, who opposed *certiorari* in Honolulu’s climate case, appreciated that these climate-related claims may ultimately be foreclosed by the U.S. Constitution “to the extent they are based on emissions or other conduct outside of” the state. Brief for the United States as Amicus Curiae, *Sunoco LP v. City and County of Honolulu*, Nos. 23-947, 23-952, 2024 WL 5095299, at *7 (U.S., filed Dec. 10, 2024). She specified that “the Interstate and Foreign Commerce Clause, the Due Process Clause, and federal constitutional structure” may bar such claims. *Id.* at *13.

For this reason, a Delaware court limited that state’s climate change case to only those emissions in Delaware. *See Delaware ex rel. Jennings*, 2024 WL 98888, at *9. In a telling response, Delaware moved

for partial final judgment, stating it had no interest in litigating a case based “solely [on] in-state emissions.” Pl.’s Mot. For Entry of Partial Judgment Pursuant to Rule 54(b), *Delaware v. BP Am., Inc.*, C.A. No. N20-C-09-097 (Del. Super. Ct. Oct. 21, 2024). The State affirmed that it was seeking relief for conduct that “occurred in and outside of Delaware and that increased emissions in and outside of Delaware.” *Id.*

The Court should grant the Petition to resolve this dispute over whether each state can impose its “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 was Michigan Attorney General from 2011-2019). Allowing the Colorado ruling to stand would result in “a chaotic mix of state approaches [that] 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.

(4) The litigation is based on the illogical assertion that when Congress displaces a federal cause of action that would have governed an interstate dispute, a state may now impose its own law to that interstate dispute.

One of the most perplexing disputes permeating this litigation is the impact this Court’s ruling in *AEP*, that Congress displaced federal common law over interstate GHG emissions, has on the ability of states to impose their own law on out-of-state emissions.

In *AEP*, the Court held that climate litigation (like all interstate and international pollution cases) is governed by federal law and, if a cause of action is

allowed, the dispute would be determined by federal common law. However, the Court continued that when Congress gave the EPA the authority to make determinations with respect to interstate GHG emissions in the Clean Air Act, it displaced such federal causes of action. Plaintiffs' contention is that the Court's displacement ruling means that disputes over interstate GHG emissions, which required federal law governance and have been assigned to the EPA, can now suddenly be decided by any state.

The Second Circuit called this theory "too strange to seriously contemplate." *City of New York*, 993 F.3d at 99. It said this "position is difficult to square with the fact that federal common law governed this issue in the first place" because "where 'federal common law exists, it is because state law cannot be used.'" *Id.* at 98 (quoting *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 n.7 (1981)). "[S]tate law does not suddenly become presumptively competent to address issues because Congress saw fit to displace a federal court-made standard with a legislative one." *Id.* The Court should grant the Petition to settle this split in authority over this strained interpretation of state law jurisdiction.

(5) This litigation misinterprets AEP that the availability of a state lawsuit over GHG emissions depends on the "preemptive effect" of the Clean Air Act as discarding the constitutional limits that bar states from imposing their own laws on out-of-state emissions.

The Court should also grant the Petition to clarify its statement in *AEP* that the "availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect" of the Clean Air Act. 564 U.S. at 429. This statement has caused substantial confusion.

The Supreme Courts of Colorado and Hawaii, among others, have misread this statement to suggest that Congress must have preempted the application of their state’s law to out-of-state emissions in the Clean Air Act or such claims are now viable. These courts, though, ignore the parenthetical following this statement, which properly cabined the availability of state law in these cases to those potentially allowed by the U.S. Constitution. Specifically, the Court cited to *International Paper Co. v. Ouellette*, 479 U.S. 481, 489, 491, 497 (1987) for the proposition that courts should look to the federal statute to see if it precluded “aggrieved individuals from bringing a ‘nuisance claim pursuant to the law of the *source* State.’” *AEP*, 564 U.S. at 429 (emphasis in original). The Court in *AEP* did not, in any way, authorize applying Colorado law to GHG emissions in other states and countries.

Further, the dissent below states that “the appropriate inquiry with respect to the interstate aspect of Boulder’s claims is whether the CAA affirmatively authorizes” Colorado to apply its law to out-of-state emissions. 2025 CO 21, ¶78 (Samour, J., dissenting). When a question is “previously governed by federal common law,” state law “is permissible only to the extent authorized by federal statute.” *City of New York*, 993 F.3d at 99 (cleaned up). Here, the Clean Air Act permits only those actions brought under law of the *source* state and these cases do not proceed under this “slim reservoir of state common law.” *Id.* at 100.

Finally, the Court should not be dissuaded from granting the Petition based on the arguments made in *Honolulu* that the court lacks jurisdiction to review the decision below under 28 U.S.C. 1257(a)’s final judgment rule. This Court has jurisdiction for the

reasons stated in the Petition and Solicitor General’s brief. In addition, giving into this argument would allow the lawyers and advocates behind this litigation campaign to continue gaming the U.S. legal system. Their game plan is now clear. File cases in multiple states where they believe the legal climate is favorable to them, do not appeal their losses where they are not confident in the appellate courts (*see, e.g.*, the Second Circuit ruling, the second New York City case, and the trial court dismissal in Charleston), and argue this and other high courts have no jurisdiction over their wins so they can avoid meaningful review.

* * *

Ultimately, *amicus* believes the best way to address the impact of energy on the climate is for federal and local governments to work with manufacturers and others to develop 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.

CONCLUSION

For these reasons, *amicus curiae* respectfully requests that this Court grant the Petition and determine that the state law claims are not viable.

Respectfully submitted,

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