No. 22O158

IN THE

# Supreme Court of the United States

STATE OF ALABAMA, ET AL,

*Plaintiffs*,

v.

STATE OF CALIFORNIA, STATE OF CONNECTICUT, STATE OF MINNESOTA, STATE OF NEW JERSEY, AND STATE OF RHODE ISLAND

**Motion for Leave to File Bill of Complaint**

## BRIEF OF AMERICAN FREE ENTERPRISE CHAMBER OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS


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## INTEREST OF *AMICUS CURIAE*[1]

Formed in 2022, the American Free Enterprise Chamber of Commerce ("AmFree") is an entity organized under section 501(c)(6) of the Internal Revenue Code that represents hard-working entrepreneurs and businesses across broad sectors of the economy. AmFree's members are vitally interested in U.S. energy security and the continued viability of our commercial republic.

AmFree launched the Center for Legal Action ("CLA") to represent these interests in court. CLA is spearheaded by former U.S. Attorney General Bill Barr. Under Attorney General Barr's leadership, the Department of Justice argued that federal law exclusively governs transboundary emissions claims. The contrary view of California, Connecticut, Minnesota, New Jersey, and Rhode Island threatens the energy security of the United States, and, therefore, our national sovereignty.

## SUMMARY OF ARGUMENT

The States of California, Connecticut, Minnesota, New Jersey, and Rhode Island ("Defendant States") seek to control energy policy around the country. In their view, they have the power through home-state tort suits to impose ruinous liability on private energy companies for their operations, conduct, and speech far beyond state, and even national, borders. Even worse, Defendant States are targeting conduct and

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[1] *Amicus curiae* provided timely notice of intent to file this brief to all parties. No party's counsel authored this brief in whole or in part, and no person or entity other than *amicus* or its counsel made a monetary contribution intended to fund its preparation or submission.

speech that is not only lawful in other States, but conforms to, and is encouraged by the policies of, those States. Unsurprisingly, the Plaintiff States object to this interference with their sovereignty, as well as the obvious risk to the nation's hope for a coherent and robust energy policy. Since their only constitutional recourse in the face of this intrusion into their sovereignty is to file suit in this Court, the Court should grant the Plaintiff States leave to file their Bill of Complaint to resolve this interstate dispute.

*Amicus* writes to underscore two critical points.

1. The Court must exercise its original jurisdiction in cases like this one. When they joined the Union, States retained their sovereignty. At the same time, they also gave up the right to use traditional tools of statecraft to resolve their disputes with other States. But, as part of the bargain upon joining the Union, the States gained an alternative forum for peacefully resolving their interstate disputes: the Constitution expressly grants this Court original jurisdiction to decide disputes between States. And Congress has long made that jurisdiction exclusive, meaning the Plaintiff States have no alternative forum in which to bring their claims. If this Court declines jurisdiction, the Plaintiff States have no other feasible means to resolve their dispute with the Defendant States. That result would be concerning even for seemingly trivial matters. But where, as here, States seek to vindicate their core sovereign powers against intrusion by other States, it is intolerable. This Court cannot leave the Plaintiff States with no recourse where their sovereignty is threatened. For this reason alone, the Court should grant the motion.

2. Even setting aside the fundamental sovereignty interests involved, the stakes here could hardly be higher. If the Defendant States—plus likeminded states and localities—succeed in imposing on private energy firms an unwieldy patchwork of regulations via state-law tort suits, the burden on largely domestic privately owned energy companies would be enormous and potentially debilitating. Energy companies owned by foreign countries, on the other hand, would be largely impervious to liability, since foreign states can claim sovereign immunity. 28 U.S.C. § 1604. As a result, the United States could soon become dependent on energy companies owned by often-hostile foreign states to meet its energy needs. The Court's immediate review is needed to stop this grave threat to U.S. energy security. The Court should not be "willing to stand on the dock and wave goodbye as [the Defendant States] embark[] on this multiyear voyage of discovery." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 328 (2014).

The need for this Court to exercise its original jurisdiction is imperative given the implications of ever-multiplying state-law tort suits on state sovereignty and U.S. energy security. The Court should grant the motion and permit the Plaintiff States to file their Bill of Complaint.

## REASONS FOR GRANTING THE MOTION

### I. THIS CASE IMPLICATES A DISPUTE OVER STATES' CORE SOVEREIGN POWERS THAT CAN ONLY BE RESOLVED BY THIS COURT.

The Plaintiff States seek this Court's intervention to resolve a dispute that goes to the very heart of the Court's original and exclusive jurisdiction. Article III

gives this Court jurisdiction over all "controversies between two or more states" and provides for original jurisdiction "[i]n all cases . . . in which a State shall be Party." U.S. Const. art. III, § 2. Congress, in turn, has long made this Court's jurisdiction over interstate disputes "exclusive." 28 U.S.C. § 1251(a) ("The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States."). The availability of a forum to peaceably resolve disputes among the States is a lynchpin of our federal system, particularly in cases like this one, where core sovereign interests are at stake. That alone is more than enough to require the Court's intervention here.

### A. This Court's Exclusive, Original Jurisdiction Is Required to Peacefully Resolve Substantial Interstate Disputes.

Original jurisdiction over interstate disputes was granted to this Court for a reason. As this Court explained in 1838, such disputes involve "two states of this Union, sovereign within their respective boundaries, save that portion of power which they have granted to the federal government, and foreign to each other for all but federal purposes." *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 720 (1838). That is, "the States entered the federal system with their sovereignty intact," such that no other forum but this one is competent to resolve disputes among the States. *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 779 (1991); *see also* The Federalist No. 39 (Madison) (noting that the Constitution "leaves to the several States a residuary and inviolable sovereignty").

This facet of our constitutional design was essential for the Union to function. While States maintained their sovereignty upon joining the Union, they also surrendered their right to "the diplomatic settlement of controversies between sovereigns and a possible resort to force." *North Dakota v. Minnesota*, 263 U.S. 365, 372-73 (1923). In the absence of these traditional tools of foreign policy, the Framers recognized that providing some other means of "determining causes between two States" was "essential to the peace of the Union." The Federalist No. 80 (A. Hamilton). The Framers well understood that "[s]ome such tribunal is clearly essential to prevent an appeal to the sword and a dissolution of the compact." The Federalist No. 39 (Madison). As early as 1793, this Court agreed, acknowledging that "domestic tranquillity requires, that the contentions of States should be peaceably terminated by a common judicatory." *Chisholm v. Georgia*, 2 U.S. 419, 475, (1793); *see also* 3 Joseph Story, Commentaries on the Constitution of the United States § 1632, p. 501 (1833) (same). The Framers entrusted the Supreme Court to discharge this weighty responsibility. U.S. Const. art. III, § 2.

In light of these principles, it is questionable, at best, whether this Court can properly decline to hear a suit brought by one State (or group of States) against another. *See, e.g., Texas v. California*, 141 S. Ct. 1469 (2021) (Alito, J., joined by Thomas, J., dissenting from denial of motion for leave to file complaint); *Nebraska v. Colorado*, 577 U.S. 1211 (2016) (Thomas, J., joined by Alito, J., dissenting from denial of motion for leave to file complaint). Neither the Constitution nor 28 U.S.C. § 1251(a) appear to grant discretion, and the

usual rule is that a federal court's "obligation to hear and decide cases within its jurisdiction is 'virtually unflagging.'" *Texas v. California*, 141 S. Ct. at 1469 (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)).

But even if this Court's review were discretionary, the Court has long recognized suits "by a state for an injury to it in its capacity of quasi sovereign" as falling within the core of its power over interstate disputes. *North Dakota v. Minnesota*, 263 U.S. at 373. Such cases have precisely the "seriousness and dignity" the Court seeks when choosing to exercise its original jurisdiction. *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992) (quotation omitted). Our federal system contemplates that States sacrifice some part of their sovereignty to the national government, but they never agreed to cede sovereignty to their sister States. Federalism thus "requires that . . . States [be accorded] the respect and dignity due them as residuary sovereigns." *Alden v. Maine*, 527 U.S. 706, 709 (1999). This Court cannot force the States to tolerate intrusions into their sovereignty on the ground that the issue is not serious or lacks dignity; the dignity of the States as sovereigns is always serious.

### B. The Dispute In This Case Squarely Implicates State Sovereignty.

"A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003). By the same token, no State "can enforce its own policy upon the other[s]." *Kansas v.*

*Colorado*, 206 U.S. 46, 95 (1907). Each State can exercise its police powers only "upon persons and property within the limits of its own territory." *Hoyt v. Sprague*, 103 U.S. 613, 630 (1880); *see also Bonaparte v. Appeal Tax Ct. of Baltimore*, 104 U.S. 592, 594 (1881) ("No State can legislate except with reference to its own jurisdiction.").

Yet, here, the Defendant States are sidestepping these limitations on their sovereignty by seeking to use state-law tort suits to impose liability for conduct taking place within other States and around the world. The Defendant States do not purport to be able to trace any of the alleged climate-change-related harms they seek to redress to emissions or conduct specifically within their boundaries. Nor do they claim that climate-related harms can be abated by private energy companies altering their conduct solely within Defendant-State boundaries. To the contrary, their ambitions are global—to superintend interstate and even international conduct in order to "change the atmosphere around the world." *Massachusetts v. E.P.A.*, 549 U.S. 497, 541 (2007) (Roberts, J., dissenting). Necessarily, then, the Defendant States seek to legislate beyond their borders, an approach that our Constitution cannot tolerate.

Even worse, Defendant States' aims extend to speech as well. The Defendant States (and other states and localities bringing similar claims) have frequently attempted to frame their actions in terms of marketing and promotion in a bid to avoid the preemptive force of federal law, including the Clean Air Act. Of course, some courts have rejected the emphasis on speech as "artful pleading" designed to obscure plaintiffs' emissions-based theory of liability.

*See Mayor and City Council of Baltimore v. BP P.L.C.*, No. 24-C-18-004219 (Md. Cir. Ct. July 10, 2024); *City of New York v. Chevron Corp.*, 993 F.3d 81, 91 (2d Cir. 2021). Nevertheless, the framing reveals a clear intent by some States to regulate speech beyond their borders, in violation of their sister States' sovereignty. Just as each State has the authority to determine the conduct it will permit within its borders, each State is entitled to make its own decisions concerning marketing within its borders. Each State is also free to stake out its own position on questions of public importance. *See, e.g.*, *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009) ("A government entity has the right to 'speak for itself'" and "to select the views that it wants to express.") (citation omitted). As a result, within the bounds of the First Amendment, States may decide for themselves how far private energy companies can go in promoting their products, or what warnings those companies must provide in connection with their products. States may also decide what kind of energy policy should reign within their borders. After all, the Constitution preserves the "power of the state, sometimes termed its police power . . . to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity." *Barbier v. Connolly*, 113 U.S. 27, 31 (1884).

Different states frequently reach different conclusions about the policies that will promote these goals. Within the broad limits of the federal Constitution, "the state legislatures have constitutional authority to experiment," and in doing so, "they are entitled to their own standard of the public welfare." *Day-Brite Lighting Inc. v. Missouri*,

342 U.S. 421, 423 (1952). Allowing one State to impose its vision of the public welfare on the rest of the nation via state-law tort suits thus runs directly afoul of our federal system.

* * *

Even if the Court doubted the importance of the subject matter of a given dispute—and as discussed below, the subject matter of *this* dispute has national implications—these structural considerations would merit the exercise of the Court's original jurisdiction. For these reasons alone, the Court should grant the Motion.

## II. THE SUBSTANCE OF THE DISPUTE IS EXTRAORDINARILY IMPORTANT.

Even setting aside the Plaintiff States' sovereign interests, the stakes of the States' dispute here demand this Court's intervention. The Plaintiff States detail many of the risks posed by the Defendant States' efforts "to dictate the future of the American energy industry . . . by imposing ruinous liability and coercive remedies on energy companies through state tort actions governed by state law in state court." Bill of Complaint ¶ 1. But the importance of this case is far greater than even the Plaintiff States let on.

To start, the Defendant States are far from alone in their attempts to use local lawsuits to impose their vision of climate policy on the country. Dozens of likeminded States and localities have brought similar lawsuits, many represented by the same outside counsel.[2] Under the theories of these cases, the only

[2] *See, e.g.*, *Delaware v. BP Am. Inc.*, 578 F. Supp. 3d 618 (D. Del. 2022) (remanding to Delaware state court); *Vermont v. Exxon*

limit to the number of such suits is the number of state and local governments willing to serve as plaintiffs.

Even if only a small number of these cases succeed, the potential monetary liability alone could be ruinous to the defendant energy companies. These companies also face the risk of oppressive and potentially contradictory injunctive relief. The combined result would be a patchwork of regulation via tort judgments that "violates the most elemental aspect of the rule of law: that legal duties must be sufficiently predictable to guide those to whom they apply." Thomas W. Merrill, *The New Public Nuisance: Illegitimate and Dysfunctional*, 132 Yale L.J.F. 985, 987-88 (2023).

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*Mobil Corp.*, No. 2:21-cv-260, 2024 WL 446086 (D. Vt. Feb. 6, 2024) (remanding to Vermont state court); *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31 (D. Mass 2020) (remanding to Massachusetts state court); *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021); *City & Cnty. of Honolulu v. Sunoco LP*, 153 Haw. 326 (2023); *City of Oakland v. BP PLC*, No. 22-16810, 2023 WL 8179286 (9th Cir. Nov. 27, 2023) (remanding to California state court); *Cnty. of San Mateo v. Chevron Corp.*, 32 F.4th 733 (9th Cir. 2022) (remanding to California state court); *City of Chicago v. BP P.L.C., et al.*, Case No. 2024CH01024 (Ill. Cir. Ct. filed Feb. 20, 2024); *Anne Arundel Cnty, Md. v. BP P.L.C., et al.*, 94 F.4th 343 (4th Cir. 2024) (remanding to Maryland state court); *City of Hoboken v. Chevron Corp.*, 45 F.4th 699 (3d Cir. 2022) (remanding to New Jersey state court); *City of Annapolis, Md. v. BP P.L.C.*, Case No. C-02-cv-21-000250 (Md. Cir. Ct. filed Feb. 22, 2021); *City of Charleston v. Brabham Oil Co.*, Case No. 2020-CP-1003975 (S.C. Ct. Com. Pl. filed Sept. 9., 2020); *Mayor and City Council of Baltimore v. BP P.L.C.*, No. 24-C-18-004219 (Md. Cir. Ct. July 10, 2024); *Bd. of Cnty. Commissioners of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238 (10th Cir. 2022) (remanding to Colorado state court); *Bucks Cnty. v. BP P.L.C., et al.*, Case No. 2024-01836-0000 (Pa. Ct. Com. Pl. filed Mar. 25, 2024); *Cnty. of Multnomah v. Exxon Mobil Corp., et al.*, Case No. 3:23-cv-01213, 2024 WL 2938473 (D. Or. June 10, 2024) (remanding to Oregon state court).

Without a definitive resolution from this Court regarding the viability of these suits, the very prospect of such monetary and injunctive relief risks endangering the nation's energy security by chilling the conduct of energy companies upon which our energy security depends.

What's more, there is a discernible pattern to these cases that will have serious and perverse implications for U.S. policy. All suits at issue are against *private* energy companies—typically, a group of the largest such companies with the deepest pockets, plus a small local company if needed to destroy complete diversity and avoid federal court. None involves energy companies owned by foreign states, which account for the "majority of the world's oil and gas, pumping out an estimated 85 million barrels of oil equivalent per day." Patrick R. P. Heller & David Mihalyi, Nat'l Res. Governance Inst., *Massive and Misunderstood: Data Driven Insights into National Oil Companies* 6 (Apr. 2019). Such companies control "up to 90 percent of global reserves." *Id.* If measured by the reserves they control, the 13 largest energy companies globally are owned and operated by governments. Ian Bremmer, *The Long Shadow of the Visible Hand*, Wall Street Journal (May 22, 2010). And their market influence is only growing, as private oil companies face mounting pressure from "ESG" investors and governments. Clifford Krauss, *As Western Oil Giants Cut Production, State-Owned Companies Step Up*, N.Y. Times (Nov. 4, 2021).

Unsurprisingly, given their market share, energy companies owned by foreign states account for an enormous quantity of greenhouse gases resulting from the eventual burning of their products downstream.

National and state-controlled oil companies account for nearly 40% of the world's emissions. David Fickling & Elaine He, *The Biggest Polluters Are Hiding in Plain Sight*, Bloomberg (Sept. 30, 2020). That is far more than the estimated 15% of emissions produced by the type of private, publicly-traded energy companies that have been the target of city and state actions under state law. *Id*.

Companies owned by foreign states are thus a significant part of the alleged problem. But they are not part of the Defendant States' litigation-driven solution. The reasons are obvious. Apart from personal jurisdiction and service hurdles, companies owned by foreign sovereigns could remove the cases to federal court. 28 U.S.C. § 1441(d). They are also presumably immune from suits for damages. *Id.* § 1604. If successful, suits brought by the Defendant States and like-minded states and localities would therefore create a perverse two-tiered system of regulation: a patchwork of judge-made rules and *de facto* carbon taxes for private energy companies, many of them domestic, and no corresponding burdens for energy companies owned by foreign sovereigns, many of them hostile.

The result would be disastrous. Demand for oil and gas will not go away. Oil and gas account for over two-thirds of primary energy consumption in the United States. Energy Info. Admin., *U.S. Energy Facts Explained*, https://perma.cc/LHD7-47YV (last updated Aug. 16, 2023). Despite political platitudes, this will not change soon, regardless of the type of litigation at issue here, which does nothing to address *demand* for energy.

But our sources of supply could change if these lawsuits move forward. By artificially biasing the market against private firms, and toward unaccountable companies owned by foreign states, the suits brought by states and localities across the country could make the U.S. captive to foreign countries, many of them hostile to U.S. interests, threatening our national security.

The grave energy security implications of these suits alone warrant this Court's immediate intervention. When combined with the need for resolution of the Plaintiff States' concerns about the Defendant States' interference with their sovereignty, the need for this Court's attention is undeniable.

## CONCLUSION

The Court should grant the motion.

JULY 23, 2024

Respectfully submitted,

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