No. 158, Original

In the Supreme Court of the United States

ALABAMA, ET AL.,

Plaintiffs,

v.

CALIFORNIA, ET AL.

On Motion for Leave to File Bill of Complaint

BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PLAINTIFFS' MOTION TO FILE BILL OF COMPLAINT

Michael A. Tilghman II
THE NAM LEGAL CENTER
733 10th Street, N.W.
Suite 700
Washington, D.C. 20001

Philip S. Goldberg
Counsel of Record
SHOOK, HARDY & BACON L.L.P.
1800 K Street, N.W., 1000
Washington, D.C. 20006
(202) 783-8400
pgoldberg@shb.com

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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 13 million men and women, contributes $2.89 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 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 infrastructures to deal with the impacts of climate change has become an international imperative.

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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.

The NAM shares Plaintiffs' concerns about the attempt by some states to impose, through their own state laws, liability over the production, promotion, and sales of lawful, beneficial energy products in other jurisdictions. As the Court found in *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011), climate litigation plainly implicates federal law and complex policymaking. State law claims, no matter how artfully pleaded, against the energy sector 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 some of its members 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.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Bill of Complaint asks the Supreme Court to examine the constitutional validity of a litigation campaign where some states are using their own courts and liability laws to impose their preferred legal and public policy agendas over climate change by regulating and effectively taxing greenhouse gas ("GHG") emissions in other states, including from activities that are fully lawful in those states. This litigation has become highly contentious, both within and among the states, with courts reaching different conclusions as to the viability and reach of these state law claims. This Court's intervention is needed to resolve this constitutional dispute.

Climate change is one of the most important public policy issues that Congress, federal agencies and international bodies have been studying and developing policies on for decades. The issue is not specific to any locality, state, or country. GHGs emanate from any number of lawful activities around the world. Developing a working majority to enact legislation and binding treaties to address these concerns has proven challenging, both within the United States and internationally. For instance, some elected leaders have focused their efforts on shifting energy sources or imposing penalties on carbon use, where others have prioritized policies that can spur innovative ways to produce and use energy so people have access to affordable energy that is sustainable for both people and the planet. In the United States, there are significant differences among the states as to which path should be chosen.[2]

Frustration that Congress, the Environmental Protection Agency (EPA), and international bodies have not curtailed oil and gas use, imposed a carbon penalty, or adopted other policies preferred by some states is boiling over into the courts—and it has before. Twenty years ago, several states—including Connecticut, New Jersey, and Rhode Island named here—sued the country's major utilities seeking to regulate their GHG emissions. *See American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011) (hereafter "*AEP*"). In *AEP*, this Court addressed that wave of climate litigation by unanimously dismissing

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[2] *See* Charlie Melancon, *Bipartisan Action, Not Litigation, Is Key to Solving Climate Change*, Power, Apr. 19, 2021 ("What may work in New England or the West Coast may not work in Louisiana.").

the claims. The Court explained that litigation over the impact of GHG emissions on the climate are of national scope, are "meet for federal law governance," and that "borrowing the law of a particular State would be inappropriate." *Id*. at 422.

The climate litigation at issue in this Bill of Complaint is no different. These lawsuits may *look* different from *AEP*, but they have the same effect: penalizing certain types of energy by imposing costs only on their use—not just in their states, but in every state and country. This litigation strategy includes appealing to parochial interests of state courts by invoking state law and seeking money for local constituencies. But, the vast majority of actions they claim violate their laws—the extraction, production, promotion, marketing and sale of energy and worldwide GHG emissions—occurred or are occurring outside their borders and are not subject to their legal regimes.

The result, as this Court cautioned against in *AEP*, has been a patchwork of "ad hoc, case-by-case" rulings. 546 U.S. at 428. On one hand, the Second Circuit, applying *AEP*, held these "sprawling" cases are "beyond the limits" of state law and "[a]rtful pleading cannot transform" them "into anything other than a suit over global greenhouse gas emissions." *City of New York v. Chevron Corp.*, 993 F.3d 81, 91 (2d Cir. 2021). A Delaware court, following the Second Circuit, limited Delaware's case to only emissions in that state, holding 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). And a Baltimore court dismissed its climate case entirely: "The Con-

stitution's federal structure does not allow the application of state law" to these claims. *Mayor and City Council of Baltimore v. BP P.L.C.*, No. 24-C-18-004219 (Md. Cir. Ct. July 10, 2024).

Conversely, two state courts have issued rulings allowing such cases to proceed, ruling their states' laws can impose liability on out-of-state GHG emissions, as well as on the production, sale, and promotion of fuels they claim have exacerbated emissions. In conflict with the Second Circuit, the Supreme Court of Hawaii concluded the lawsuits do not "seek to regulate emissions and does not seek damages for interstate emissions." *City and County of Honolulu v. Sunoco*, 537 P.3d 1173, 1181 (Haw. 2023). A Colorado court similarly found the claims do not directly "regulate or enjoin GHG emissions." *Board of County Commissioners of Boulder County; City of Boulder v. Suncor Energy (USA), Inc.*, No. 2018-CV-30349 (June 21, 2024). With some 30 similar cases filed in hand-chosen states, allowing this patchwork of rulings to percolate for the next several years can cause major rifts among the states and constitutional damage.

For these reasons, as detailed below, *amicus* requests that the Court grant the motion for leave to file the Bill of Complaint and determine that state law claims asserted in the climate cases at issue in the Complaint violate constitutional bounds of state authority and are preempted by the Clean Air Act. Otherwise, states will have a playbook for using their courts and state liability laws to usurp federal law and impose their legal and public policy preferences on other states—not just on climate change, but many national issues beyond their authority.

ARGUMENT

I. THE COURT SHOULD NOT ALLOW STATES TO CIRCUMVENT ITS RULING IN *AMERICAN ELECTRIC POWER* THAT CLIMATE CHANGE CLAIMS INVOKE A "SPECIAL FEDERAL INTEREST"

When states filed the first wave of climate lawsuits, it was uncontroverted that the litigation would regulate the energy industry and limit GHG emissions from fossil fuels, not just in states where the claims were brought, but all states. Regardless of whether the remedy was injunctive relief or damages, the impact would be the same: penalizing the use of fuels these States believed should be disfavored. *See, e.g.*, Symposium, *The Use of Civil Litigation as a Tool for Regulating Climate Change*, Val. U. Sch. of L., Feb. 18, 2011; *Compare* James R. May, *Civil Litigation as Tool for Regulating Climate Change: An Introduction*, 46 Val.U. L. Rev. 357 (2012) (advocating for judicial intervention) *with* Victor E. Schwartz, et al., *Does the Judiciary Have the Tools for Regulating Greenhouse Gas Emissions*, 446 Val. U. L. Rev. 369 (2012) (opposing judicial intervention).

The state attorneys general and other entities bringing the cases fully embraced the regulatory effect of the litigation. For example, the Connecticut Attorney at the time stated the lawsuit against *AEP* "began with a lump in the throat, a gut feeling, emotion, that CO_2 pollution and global warming were problems that needed to be addressed. They were urgent and immediate and needed some kind of action, and it wasn't coming from the federal government." Symposium, *The Role of State Attorneys General in National Environmental Policy*, 30 Colum. J. Envtl.

L. 335, 339 (2005). Echoed the then-Maine Attorney General: "It's a shame that we're here, here we are trying to sue [companies] . . . because the federal government is being inactive." *Id.*[3] To this end, when the Second Circuit initially allowed *AEP* to proceed, it too expressed its frustration that Congress and the agencies had not yet imposed binding emission caps. *See AEP,* 582 F.3d at 381-88 (noting federal policies required "research, planning and strategizing technology development, assessments, and monitoring, but no real action to abate emissions"). The court stated that States had a viable claim "until" GHG emissions are capped. *Id.* at 388.[4]

In addition to *AEP*, three other major climate lawsuits were filed between 2004 and 2008; each tested variations of this 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 many of the oil and gas producers named in cases at issue here for damages re-

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[3] *See also* Mark Schleifstein, *Global Warming Suit Gets Go-Ahead*, Times-Picayune, Oct. 17, 2009 (quoting the lead plaintiffs' attorney in *Comer* that his "primary goal was to say [to defendants] you are at risk within the legal system and you should be cooperating with Congress, the White House and the Kyoto Protocol").

[4] The Second Circuit Judge who authored the opinion later conceded: "You really don't want a district judge supervising your relief in all of this stuff" but "[t]o the extent there is out there . . . some opportunity to pursue or continue to pursue a nuisance action, that may help in a political sense." *Key Judge Downplays Prospects for Successful Climate Change Suits*, Clean Air Report, Vol. 21 Iss. 5, Mar. 2, 2010.

lated to rising sea levels.[5] 696 F.3d 849 (9th Cir. 2012). In *Comer v. Murphy Oil USA, Inc*., Mississippi residents filed a class action against the same types of companies for costs associated with Hurricane Katrina. *See* 718 F.3d 460 (5th Cir. 2013).

All of these lawsuits—as with today's climate litigation—were based on the same factual foundation: companies manufactured products or engaged in operations that contributed to GHG emissions; the accumulation of GHGs in the atmosphere over the past 150 years has caused the earth to warm; and this, in turn, has caused or will cause a change in weather patterns that has or will harm the state or local governments or their residents. As the permutations of climate lawsuits shows, these allegations are not particular to any company or industry; GHGs result from numerous natural and artificial activities, including the use of energy around the world since the Industrial Revolution. Thus, by choosing whom to sue, these States attempted to decide which companies, products, and services should be penalized for impacting the climate—regardless of where.

The Obama administration's Solicitor General, in in briefing this Court in *AEP*, explained 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). "Plaintiffs have elected to sue a handful of defendants from among an almost limitless ar-

[5] Also as with today's cases, the village alleged the energy producers were "substantial contributors to global warming" in part caused by "conspir[ing] to mislead the public about the science of global warming." *Kivalina, 696 F.3d* at 854.

ray 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 power plants in 20 states, *see id.*, the brief expressed "serious concerns" regarding the role of courts to make policy decisions on GHG emissions for the country, *id.* at 13.

As indicated, this Court in *AEP* made clear that this type of litigation raises issues of "special federal interest," *AEP*, 564 U.S. at 424, and "borrowing the law of a particular State would be inappropriate," *Id.* at 422. Federal 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)). It 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 further explained 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.

The clear take-away was that determining rights and responsibilities for interstate GHG emissions are among the "interests, powers, and relations of the Federal Government as to require uniform national disposition rather than diversified state rulings."

United States v. *Standard Oil Co. of Cal.*, 332 U.S. 301, 307 (1947).

For this reason, the remaining climate change suits were quickly dismissed, including those packaged similarly to the cases at issue today. In *Kivalina*, the Court appreciated that even though the theories pursued in that case differed from *AEP*, given the Supreme Court's broader 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 are the exact type of "transboundary pollution" claims the Constitution exclusively commits to federal law. *Id.* at 855. 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 that the state sought "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." *Gen. 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. Inherent in this Court's reasoning, the district court continued, is that any State "dissatisfied with the federal government's global warming policy determinations may exercise its 'procedural right' to advance

its interests through administrative channels." *Id.* at *16 (citing 42 U.S.C. § 7607).

The law was clear: the infirmities with this litigation do not depend on whether a case targets energy use, products, or promotion, seeks injunctive relief or monetary damages, or is brought under federal or state law. These types of cases raise the same constitutional, legal and public policy concerns this Court warned against in *AEP*.

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

Nevertheless, after *AEP*, the litigation was retooled based on the belief that courts still offered "the best current hope" for imposing this public policy agenda over 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.[6] In an effort to circumvent *AEP*, the new litigation was manufactured to look like traditional state law damages claims rather than asking a court to directly regulate emissions or put a price on carbon use. *See id.* at 13 (said one person: "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.").

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

To be clear, the state law damages theories in these cases are mere fig leaves. The Supreme Court has consistently held that tort damages "directly regulate" conduct the same way as legislation and regulations. *See, e.g., Riegel v. Medtronic, Inc.*, 552 U.S. 312, 325 (2008). A person subjected to liability 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). When plaintiffs in *Kivalina* argued *AEP* precludes only actions seeking to directly regulate emissions, the Ninth Circuit made clear "the type of remedy asserted is not relevant." 696 F. 3d at 857. The solution rests "in the hands of the legislative and executive branches." *Id.* at 858. Yet, starting in 2017, when some states once again were frustrated by the lack of progress on their preferred climate change agenda, the wave of climate litigation at issue in the Bill of Complaint was launched.

The climate suit filed by New York City was the first of these cases to be heard on the merits, and the Second Circuit saw through this 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." *Id.* at 91. The court explained it is immaterial whether the case is "styled as an action for injunctive relief against the Producers to stop them from producing fossil fuels, or an action for damages"; the litigation has "the same practical effect." *Id.* at 96. "Such a sprawling case is simply beyond the limits of state law." *Id.* at 92.

The court continued: "For over a century, 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 therefore '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.* There also is "a real risk that subjecting the Producers' global operations to a welter of different states' laws could undermine important federal policy choices." *Id.* at 93.

Over the past year, motions to dismiss in several of the climate cases being heard in state courts around the country have started to be decided, leading to a significant split in authority. In Delaware, the court concurred with the Second Circuit's ruling, holding Delaware cannot sue fossil fuel producers for emissions outside of Delaware. *Delaware ex rel. Jennings v. BP America Inc.*, 2024 WL 98888 (Del. Super. Ct. Jan. 9, 2024). Specifically, the court held that federal law "preempts state law to the extent a state attempts to regulate air pollution originating in other states." *Id.* at *10. The court explained that a suit "seeking 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. It also noted today's climate cases include "many of the same allegations" as in *Kivalina*. *Id.* at *19.

In Baltimore's lawsuit, after it was remanded following this Court's review of a federal officer removal issue, the state court aligned itself with the Second Circuit and Delaware. *See Mayor and City Council of Baltimore v. BP P.L.C.*, No. 24-C-18-004219, at *10 (noting the split in state court rulings: "courts across the country have differed on the issue as to whether federal law preempts state claims on global emissions."). It echoed the Second Circuit that the complaint, while "artful" is "not sustainable." *Id.* It held it is immaterial whether the claims seek to directly penalize emitters, as in *AEP*, or seek damages, as here. *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. "State law cannot provide a remedy to claims involving foreign emissions." *Id*. at *14.

The Hawaii Supreme Court's ruling, which also is before this Court pending a petition for certiorari, directly conflicts with these opinions. *See Shell v. City and County of Honolulu, Hawaii*, No. 23-952. The Hawaii court asserted the litigation "does not seek to regulate emissions and does not seek damages for interstate emissions," and only "concerns torts committed in Hawai'i that caused alleged injuries in Hawai'i." *City and County of Honolulu v. Sunoco*, 537 P.3d at 1181. It stated that although interstate emissions is "a link in the causal chain," it is "irrelevant" where those emissions originated because the alleged tortious conduct—marketing claims—do not emit GHGs. *Id*. at 1207. Thus, the court paid no heed to the fact that the city based its claims on the impact

of global GHG emissions.[7] Under this ruling, any state can impose its own liability law over acts leading to GHG emissions in other states. *See* Jennifer Hijazi, *Oil Giants Fight Climate Deception Suit at Hawaii Supreme Court,* Bloomberg Law, Aug. 18, 2023 (reporting the city argued at oral argument that it could "apply Hawaii law to conduct in every jurisdiction in the United States.").

A Colorado state court concurred with the Hawaii Supreme Court, setting aside the Second Circuit ruling as improperly framing the issues. It asserted that because plaintiffs' "claims 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 the 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; it also referred to the national energy and security policy raised as "abstract." *Id*. at 44.

In Minnesota, even though the appeal related to removal issues, a concurrence captured this debate:

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[7] The Second Circuit stated in response to similar arguments, "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. Otherwise, plaintiffs need only find one aspect in the chain of interstate emissions they claim violated state law and impose liability on the transboundary emissions. 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.

"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). Judge Stras then noted Minnesota and other states are waging this federal policy dispute "through the surrogate of a private party as the defendant." *Id*. at 719.

It is now clear that the ad-hoc approach to establishing liability over GHG emissions the Court warned about in *AEP* has arrived. Given this split of authority and the ability of any state to bring such a climate lawsuit against any company or group of companies, it is critical for the Court to provide constitutional guidance now and not wait years for the litigation to percolate back up to this Court. Under the constitution and Clean Air Act, merely invoking state law labels cannot turn production, sale, promotion, and use of fossil fuels into state liability events.

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

In addition to the regulatory impact this litigation will have across state borders, these lawsuits would allow states to effectively tax consumers in other states and direct those funds to pay for infrastructure projects in their own states, unbridled by the checks and balances of Congress's legislative process. Such litigation raises constitutional concerns that go to the core of each state's authority.

Central to the States' claims is that this litigation is needed to pay for climate mitigation in their jurisdictions. If this litigation succeeds, people and businesses in all states would pay higher energy prices to satisfy these awards. *See* Wayne Winegarden, *Fossil Fuel Lawsuits Are a Tax on Consumers*, Forbes, June 3, 2024. Indeed, attorneys bringing the cases have said that imposing this cost is intentional and intended to force energy companies to raise the price of oil and gas "so that if they are continuing to sell fossil fuels, that the cost of [climate change] would ultimately get priced into them."[8] Julia Caulfield, *Local Lawsuits Asks Oil and Gas to Help Pay for Climate Change*, KOTO, Dec. 14, 2020; Kirk Herbertson, *Oil Companies vs. Citizens: The Battle Begins Over Who Will Pay Climate Costs*, EarthRights, Mar. 21, 2018 (referring to this penalty as incorporating the "true cost" of the fuels). For them, "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.

"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. When imposed through litigation, this cost is assessed irrespective of the ability of families and businesses in those other states to pay more for their energy needs or the impact on their state's

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

economy—not to mention America's energy independence and other factors Congress and federal agencies consider when making energy policy. Also, these other states may have their own climate mitigation needs. As one New Jersey coastal 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 (Thulen served as President of the Point Pleasant Borough Council).[9]

Regardless of whether one views cost increases and emission limits as the preferred response to climate change, these public policy decisions "require action in Congress, not in the courts." Rick Boucher, *Meaningful Policy, Not Litigation, Is Best Path Forward on Climate*, Richmond Times-Dispatch, Mar. 27, 2021 (Boucher represented a Virginia district in Congress from 1983-2011). Congress can hold hearings and consider all relevant information in determining how such measures should be implemented, if at all. As members of Congress have explained, state-by-state differences have made such efforts difficult: "Each state powers its communities in different ways and has different priorities. . . . What may work in New England or the West Coast may not work in Louisiana." Charlie Melancon, *Bipartisan Action, Not Litigation, Is Key to Solving Climate Change*, Power, Apr. 19, 2021 (Melancon represented a Louisiana district in Congress from 2005-2011). Instead, Congress appropriated $41.8 billion to assist states with climate mitigation. *See* Demian Brady, *State and Local Government Lawsuits Targeting En-*

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

ergy Manufacturers Could Backfire on Taxpayers, Nat. Taxpayers Union Found., Apr. 29, 2024.

State courts are simply not positioned to be arbiters of who, if anyone, is to be legally accountable for global climate change. It is not the role of any state court to impose emission caps or effectively tax other states' citizens for their own gain. These state courts "may reflect 'local prejudice' against unpopular federal laws" or defendants. *Watson v. Philip Morris Cos.*, 551 U.S. 142, 150 (2007); *see also* Lesley Clark, *Why Oil Companies Are Worried About Climate Lawsuits From Gas States,* E&E News, Nov. 7, 2023 (quoting a leader of the litigation: "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). If any state court allows a hometown recovery, there will be a race to state courthouses across the nation to file climate cases.

The Court should grant the motion to clarify that states may impose rules only in their own states. It is a "different—and novel—sovereignty analysis when a state launches a lawsuit to impose liability for out-of-state activity and affirmatively demands changes to behavior outside the state under common law theories." 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). The danger is that each state will impose "their own climate standards" on other states, nullifying federal policy. 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). However, the constitution "requires

that 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.

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Balancing benefits of energy products with their externalities are public policy decisions requiring a careful weighing of the amount of emissions society will allow given the benefits of the activities. Policymakers have long understood that the public relies on oil, gas and the other energy sources at issue in this litigation for their health and well-being. *See* George Constable & Bob Somerville, *A Century of Innovation: Twenty Engineering Achievements That Transformed Our Lives* (Joseph Henry Press 2003) (calling the societal electrification the "greatest engineering achievement" of the past century). These energy sources provide electricity for homes and businesses, oil and gas for heating, and fuel for transportation. They also are the foundation for the economy, spurring technology and fueling manufacturing.

Ultimately, *amicus* believes the best way to address the impact such 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 miti-

gating its climate impacts, not to artfully plead lawsuits.

CONCLUSION

For these reasons, *amicus* respectfully requests that this Court grant the motion for leave to file the Bill of Complaint and the remedies requested.

Respectfully submitted,

Philip S. Goldberg
Counsel of Record
SHOOK, HARDY & BACON L.L.P.
1800 K Street, N.W., Suite 1000
Washington, D.C. 20006
(202) 783-8400
pgoldberg@shb.com

Michael A. Tilghman II
THE NAM LEGAL CENTER
733 10 Street, N.W., Suite 700
Washington, D.C. 20001

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