Nos. 23-947, 23-952

In the Supreme Court of the United States

SUNOCO LP, ET AL.,
Petitioners,
v.
CITY AND COUNTY OF HONOLULU, HAWAII, ET AL.
Respondents.

SHELL PLC, FKA ROYAL DUTCH SHELL PLC, ET AL.,
Petitioners,
v.
CITY AND COUNTY OF HONOLULU, HAWAII, ET AL.
Respondents.

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

On Petitions for a Writ of Certiorari
to the Supreme Court of Hawaii

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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 $2.85 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 has grave concerns about this attempt to impose liability over sales of lawful, beneficial energy products essential to modern life through state law. As the Court found in *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011), climate litigation plainly implicates federal 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 Respondent and local 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 their ability to compete in the international marketplace.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is part of a coordinated, national litigation campaign over global climate change and an unapologetic effort to invoke illusory state law claims to circumvent this Court's ruling in *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011) (hereafter "*AEP*"). In *AEP*, the Court addressed an earlier wave of this litigation, holding unanimously that the litigation over the impact of greenhouse gas (GHG) emissions on the climate sound in the federal common law and Congress displaced such claims when it enacted the Clean Air Act. *See id.* at 424. The Ninth and Fifth Circuits then dismissed the climate suits pending in their courts, which were brought under federal and state law, respectively. *See Native Vil-*

lage 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.[2]

As this brief will show, strategists behind this litigation campaign developed the state law theories in this lawsuit in an effort to deliberately circumvent this Court's ruling in *AEP*. The lawyers involved said they were looking for ways to re-package the litigation so their lawsuits would achieve comparable national GHG emission goals as in *AEP*, but would appeal to parochial interests of state courts by invoking state law and seeking money for local constituencies. So, they re-cast the federal public nuisance claims against utilities in *AEP*, as state law public nuisance and other state claims against energy manufacturers along with others in the chain of commerce to defeat diversity removal to federal courts. Since 2017, some thirty of these suits have been filed in carefully chosen state and local jurisdictions around the country.

However, the state law packaging for these claims is solely a veneer; the allegations they raise sound in federal, not state law. For example, the lawsuits invoke state public nuisance theory and consumer protection acts, but the vast majority of conditions, actions and statements they claim violate their state's law exist or occurred outside of their borders. The actions and conditions Honolulu alleges caused their harm—the extraction, production, promotion, marketing and sale of energy and worldwide GHG emissions—are not subject to Hawaii law. As this Court established in *AEP*, these matters are of national

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

and international scope and, thus, are "meet for federal law governance." *AEP*, 564 U.S. at 422.

On the few occasions where federal courts have reached the substance of these claims, they have properly applied *AEP* and concluded that the claims arise under federal law. *See City of New York v. Chevron Corp.*, 993 F.3d 81, 91 (2d Cir. 2021); *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017 (N.D. Cal. 2018) (vacated pursuant to an order to remand the case to state court, *see* 960 F.3d 570 (9th Cir. 2020)). As the Second Circuit stated, the lawsuits seek to subject a handful of energy companies to state liability "for the effects of emissions made around the globe over the past several hundred years." *City of New York*, 993 F.3d at 92. It concluded this type of "sprawling case is simply beyond the limits" of state liability law, *id.*, echoing the Court's sentiment in *AEP* that climate litigation raises special "federal interests." *Id.* at 91. It stated these attempts at "[a]rtful pleading cannot transform the City's complaint into anything other than a suit over global greenhouse gas emissions." *Id.*

The Hawaii Supreme Court's ruling that Honolulu could pursue its climate change claims under state law directly conflicts with this federal jurisprudence. First, the ruling does not distinguish between acts occurring in Honolulu and those in other states and foreign countries. *See City and County of Honolulu v. Sunoco*, 537 P.3d 1173 (Haw. 2023). Second, it states even if federal law governs interstate and international emissions, Hawaii law could govern promotional and other activities around the world that Honolulu alleges led to some of those emissions. *See id.* at 1196. And third, it held that federal case law

no longer governs interstate GHG emissions because Congress displaced the federal common law in this area by delegating authority over interstate GHG emissions to the Environmental Protection Agency in the Clean Air Act. *See id.* at 1181. As a result, under the Hawaii Supreme Court's ruling, any state can impose its own liability law over acts leading to GHG emissions occurring in other states and countries.

Each of these conclusions creates a split with the Second Circuit's ruling in *City of New York* and runs afoul of this Court's ruling in *AEP*. In particular, the Second Circuit called the notion that state claims over interstate GHG emissions suddenly became viable when Congress spoke to the federal law questions at issue "too strange to seriously contemplate." *City of New York*, 993 F.3d at 98-99. Allowing these claims to proceed would also flout this Court's sentiment in *AEP* that it is "fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator" of GHGs and that regulating these activities through "ad hoc, case-by-case" judicial rulings would be inappropriate. 546 U.S. at 428. As indicated, there are some thirty lawsuits around the country where local and state governments are seeking to impose their various states' laws to interstate and international GHG emissions, as well as to predicate acts far outside their borders.

In addition, the ruling below creates a playbook for using state courts to usurp federal law on climate change and many other federal issues. The exclusive federal nature of climate policy has been on display in recent years. State law rulings making the production, sale, promotion and use of oil and gas a liability-inducing event for the American, Canadian,

and European energy companies in these cases would directly contradict the federal government's efforts to encourage an increase in such fuel production to reduce costs and enhance America's and Europe's energy security given recent global conflicts.

For these reasons, as discussed in more detail below, *amicus* respectfully requests that the Court grant the Petition and ultimately determine that the state law claims asserted below are not viable.

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"

The Court should grant the Petition so that state courts cannot skirt this Court's jurisprudence by masking federal law issues with a state law veneer. In *AEP*, this Court made it clear that climate litigation raises issues of "special federal interest." *AEP*, 564 U.S. at 424. The Court explained that federal common law addresses subjects "where the basic scheme of the Constitution so demands," including "air and water in their ambient or interstate aspects." *Id.* at 422 (quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972)). This rule of law applies to the claims here in equal force as it did in *AEP*.

The factual foundation in *AEP* is the exact same as here: global climate change is caused by GHG emissions "naturally present in the atmosphere and . . . emitted by human activities," including the use of fossil fuels all over the world. *Id.* at 416. GHG emissions from fossil fuels have combined with other

global sources of GHGs and have accumulated in the earth's atmosphere for more than a century since the industrial revolution and are creating impacts on the earth. "By contributing to global warming, the plaintiffs asserted, the defendants' carbon-dioxide emissions created a 'substantial and unreasonable interference with public rights,' in violation of the federal common law of interstate nuisance, or in the alternative, of state tort law." *Id.* at 418. Here, the allegations are also that Petitioners contributed to global warming by causing or contributing to GHG emissions through the production, marketing, and sale of their fuels. In short, in both *AEP* and here, the heart of the plaintiffs' allegations is that the defendants contributed to global warming and should be subject to liability for doing so.

In *AEP*, the Court followed the two-step analysis from *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301 (1947), in dismissing the claims, holding that claims over global climate change cannot be adjudicated under state law. First, the Court determined the claims arose under federal common law and that "borrowing the law of a particular State would be inappropriate." *AEP*, 564 U.S. at 422. As *Standard Oil* instructs and affirmed in *AEP*, certain claims invoke the "interests, powers, and relations of the Federal Government as to require uniform national disposition rather than diversified state rulings." *Standard Oil*, 332 U.S. at 78. Determining rights and responsibilities for interstate GHG emissions and global climate change are among them. As the Court stated, the production, sale, promotion, and use of fossil fuels as well as global GHG emissions raise inherently interstate, federal questions, including over national security.

Second, and only after determining the claims arose under federal common law, did the Court hold Congress displaced through the Clean Air Act remedies that might be granted under federal common law. *See AEP*, 564 U.S. at 425. Any conclusion that the moment Congress spoke on this issue by enacting the CAA and making the EPA the governing authority over GHG emissions that Congress extinguished the federal nature of this case is nonsensical. Congress's decision to displace federal common law in favor of federal regulatory authority does not make GHG emissions any less of a federal issue. To the contrary, as in *AEP*, federal courts should assess whether the claims arise under federal common law before considering the impact of displacement. Any assertion that federal common law displacement turns inherently federal issues into state law matters is entirely misplaced and should be reviewed.

At the time *AEP* was decided, two other climate cases were pending against the energy sector. An Alaskan village was suing many of the same energy producers as here under federal law for damages related to rising sea levels. *See Kivalina*, 696 F.3d at 849. Also as here, 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." *Id.* at 854. In Mississippi, a purported class of homeowners sued a multitude of energy producers under state tort law for property damage from Hurricane Katrina. *See Comer*, 718 F.3d at 460. The allegations were that defendants, through their conduct and products, caused certain emissions which contributed to climate change and made the hurricane more intense. *See id.* These cases parallel the case at bar as

Honolulu also alleges that the defendants' conduct and products caused or exacerbated GHG emissions.

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

Similarly, it does not matter where in the chain of causation the alleged violation of state law occurred. Here, the claim is that the defendants downplayed the impacts of their products on the climate. Regardless, when harm alleged in one state was caused by transboundary emissions from other states, federal law applies. As 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. Otherwise, plaintiffs need only find one aspect of the chain of interstate emissions that they can claim violated state law and impose liability on the transboundary emissions. Plaintiffs, though, 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.

The Court should grant the Petition because the ruling below conflicts with rulings in federal courts, including *AEP*, that claims over GHG emissions and climate change implicate uniquely federal interests and are governed by federal law. At the very least, the Court should determine whether local and state governments, along with state courts, can so readily evade this Court's jurisprudence as sought here.

II. THE LOWER COURT'S RULING PROVIDES A PLAYBOOK FOR PEOPLE SEEKING TO ABROGATE THIS COURT'S AUTHORITY

To be clear, the advocacy groups and lawyers behind this litigation campaign have explicitly stated that they developed the litigation strategy employed in this case to circumvent this Court's ruling in *AEP*. In 2012, the year after *AEP* was decided, they convened in California to brainstorm on how to repackage the litigation in hopes of using lawsuits to achieve their national policy priorities. Organizers of the conference published their discussions. *See Establishing Accountability for Climate Damages: Lessons from Tobacco Control, Summary of the Workshop on Climate Accountability, Public Opinion, and Legal Strategies*, Union of Concerned Scientists & Climate Accountability Inst. (Oct. 2012).[3]

They said that despite the Court's clear pronouncements in *AEP*, they still believed "the courts offer the best current hope" for imposing their national public policy agenda over global fossil fuel

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

emissions. *Id.* at 28. They discussed "the merits of legal strategies that target major carbon emitters, such as utilities [as in *AEP*], versus those that target carbon producers." *Id.* at 12. They talked through causes of action, "with suggestions ranging from lawsuits brought under public nuisance laws," "to libel claims." *Id.* at 11. Given *AEP* in particular, they emphasized making the lawsuits look like traditional damages claims rather than directly asking a court to regulate emissions or put a price on carbon use. *See id.* at 13. As one person at the conference said, "[e]ven if your ultimate goal might be to shut down a company, you still might be wise to start out by asking for compensation for injured parties." *Id.*

They also discussed "the importance of framing a compelling public narrative," including "naming [the] issue or campaign" in an effort to generate "outrage." *Id.* at 21, 28. At a follow-up session in 2016, they explained that "creating scandal" through lawsuits would also help "delegitimize" the companies politically. *Entire January Meeting Agenda at Rockefeller Family Foundation*, Wash. Free Beacon, Apr. 2016.[4] They have since tried to scandalize the fact that companies knew about potential risks of climate change—something widely known by governments around the world—and still produced fossil fuels.[5]

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

[5] The Hawaii Supreme Court ruling acknowledges that the knowledge they allege was not unique to the industry: "In 1965, President Lyndon B. Johnson's Scientific Advisory Committee warned of global warming and the catastrophic impacts that could result." *See* 537 P.3d at 1183.

To name the litigation, supporters asserted some widespread "campaign of deception" involving the many, often-changing companies named in the lawsuits. Here, Honolulu alleges fewer than a dozen entities, including Aloha Petroleum which runs gasoline and convenience stores in Hawaii, were involved in this clandestine scheme and, therefore, should be subject to liability for its climate damages. In other similar lawsuits around the country, the governments there have named anywhere from one or two defendants to several dozen companies, including, as here, local entities in an effort to keep the cases in state court. This ever-changing list of defendants in different aspects of the energy industry highlights the specious nature of this conspiracy-like narrative and the lack of any principled basis for liability.

Outside of the courtroom, the advocates have openly acknowledged that the desired effect of this litigation is to penalize the worldwide production, promotion, sale and use of fossil fuels—what they call imposing the "true cost" of fuels on consumers. Kirk Herbertson, *Oil Companies vs. Citizens: The Battle Begins Over Who Will Pay Climate Costs*, EarthRights, Mar. 21, 2018. They have said that they want to use the litigation to force energy companies to raise the price of fossil fuels "so that if they are continuing to sell fossil fuels, that the cost of [climate change] would ultimately get priced into them." Julia Caulfield, *Local Lawsuits Asks Oil and Gas to Help Pay for Climate Change*, KOTO, Dec. 14, 2020.[6] They believe that because the "companies are agents of consumers . . . holding oil companies re-

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

sponsible *is* to hold oil consumers responsible." Jerry Taylor & David Bookbinder, *Oil Companies Should be Held Accountable for Climate Change*, Niskanen Center, Apr. 17, 2018.[7]

In an effort to mask this goal, the advocates chose to partner with state and local governments seeking money to deal with local impacts of global climate change. These governments often disclaim any attempt to regulate emissions, but artful pleading and disclaimers cannot mask the true federal nature of this litigation. The lawsuits are being funded by nonprofit organizations *because* the litigation raises inherent federal legal and energy issues. *See*, *e.g.*, City of Hoboken Press Release, *Hoboken Becomes First NJ City to Sue Big Oil Companies, American Petroleum Institute for Climate Change Damages*, Sept. 2, 2020 (noting legal fees would be paid by the Institute for Governance and Sustainable Development).[8] As one jurist stated, the governments and backers are waging this federal policy dispute "through the surrogate of a private party as the defendant." *Minnesota v. American Petroleum Inst.*, 63 F.4th 703 (8th Cir. 2022) 719-20 (Stras, J., concurring).

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[7] 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.

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

Thus, the purpose of this litigation is to use state liability law to penalize national energy use and direct money from consumers across the country to local governments unbridled by the checks and balances of Congress's legislative process. In addition, these groups are using political-style tactics to encourage and recruit local governments to bring these cases and to leverage the litigation to hinder 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).[9] Unlike traditional state lawsuits, success here includes filing and maintaining state lawsuits they can use for their national goals, which underscores the need for the Court to grant the Petition.

In the Minnesota case, for example, after the lawsuit was announced, the Center for Climate Integrity and Fresh Energy publicly said they "put this idea in front of [the] Attorney General." *Minnesota is Suing Climate Polluters: Why, How and What's Next?*, Fresh Energy, July 1, 2020.[10] They also said that two Assistant Attorneys General reportedly hired and paid by the State Energy & Environment Impact Center at the New York University School of Law to work in the Attorney General's office and bring these

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

[10] https://www.youtube.com/watch?v=2MqX14GTm-o&t=90s.

types of lawsuits[11] "have basically been working on this full-time over [a] few months." *Id.* The government was simply a vehicle for the group's efforts to wage this national litigation campaign. In Hawaii, public events were held to encourage Honolulu and other governments to bring these lawsuits. *See Media Advisory: UH Law School Is Co-organizer of Climate Change Event at State Capitol*, May 2, 2019.[12]

Overall, more than two dozen of these lawsuits have been filed since 2017 in carefully chosen jurisdictions in an effort to "side-step federal courts and Supreme Court precedent" and convince local state courts to help them advance their preferred national and international policy agenda by awarding money to state and local jurisdictions. Editorial, *Climate Lawsuits Take a Hit*, Wall St. J., May 17, 2021. If this gambit is successful, it will give activists a road map for using state liability law to drive a wide variety of federal legal and public policy matters irrespective of decisions made in Congress or this Court.

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

The state law theories in this litigation have proven to be mere fig leaves. The theory of harm is not moored to any plaintiff, defendant, or jurisdiction, as the permutations of the cases show. And, the chain of causation, as the Court observed in *AEP*, is

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[11] *See* John O'Brien, *Minnesota AG Sued for Info on Employees Who Are Climate Change Activists Paid by Bloomberg*, Legal Newsline, July 14, 2020.

[12] https://manoa.hawaii.edu/news/article.php?aId=9945.

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

The California Superior Court made a similar observation in determining which venue should hear cases filed there: "If ever there were litigations that could be described as truly global in scope, they are these. . . . Regardless of which government entities have brought these lawsuits, the interests potentially affected by the issues in these cases apply equally well to populations of San Francisco County, Contra Costa County, or indeed any other county, state, or nation on the face of the Earth. These are not lawsuits with a local focus or local stakes." *California v. ExxonMobil Corp.,* No. CGC-23-609134, Not. of Entry of Order Granting Pet. for Coordination, Ex. 1, Ex. A, at 12 (Cal. Super. Feb. 07, 2024) (citing *Fuel Industry Climate Cases, JCCP 5310*, Tentative Ruling (Cal. Super. Jan. 25, 2024)).

Under these theories, any local government could bring one of these lawsuits and pursue money damages from any number of companies or industries to pay the government's "past and future costs of climate-proofing its infrastructure and property." *City of New York*, 993 F.3d at 88. Liability against whom for whom and how much would be unprincipled and would undoubtedly vary from court to court.

As alluded to above, the Second Circuit in response to New York City's climate lawsuit, 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 same is true here; referencing state claims and asking for compensation and state law penalties does not make federal matters related to interstate GHG emissions and global climate change suddenly suitable for state courts. "Such a sprawling case is simply beyond the limits" of state liability law. *Id.* at 92.

The concurrence in the Minnesota case captured this point well: "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." *American Petroleum Inst.*, 63 F.4th at 717 (Stras, J., concurring). The federal judge hearing the climate case by San Francisco and Oakland made the same observation when he initially dismissed the claims on the merits: "Their theory rests on the sweeping proposition that otherwise lawful and everyday sales of fossil fuels, combined with an awareness that greenhouse gas emissions lead to increased global temperatures, constitute a public nuisance." *City of Oakland*, 325 F. Supp. 3d at 1022. It attempts to "reach the sale of fossil fuels anywhere in the world." *Id.* The fact that this ruling was vacated when the district judge's order denying remand was

overturned *underscores* the reason this Court should grant the Petition. Merely invoking state law labels does not turn the production, sale, promotion and use of fossil fuels into state law liability events.

Otherwise, state courts "may reflect 'local prejudice' against unpopular federal laws" or defendants, which as indicated was part of the calculus for reframing the litigation as state law claims. *Watson v. Philip Morris Cos.*, 551 U.S. 142, 150 (2007). These dynamics are certainly at risk here, as the desired effect of these lawsuits is to bring private, out-of-state money to the communities where the courts reside. In Maryland, when asked about the legal shortcomings of climate lawsuits, Annapolis officials expressed confidence that "the Maryland courts will get us there." Brooks Dubose, *Annapolis Sues 26 Oil and Gas Companies for their Role in Contributing to Climate Change*, Cap. Gazette, Feb. 23, 2021.[13]

There is no doubt that if any state court allows a hometown recovery, there will be a race to state courthouses across the nation to file more climate cases. State courts are not positioned to be arbiters of who, if anyone, is to be legally accountable for global climate change.

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

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

Finally, using state law to subjecting a few American, Canadian, and European energy manufacturers to liability for global GHG emissions would directly interfere with exclusive federal interests, as this Court explained in *AEP*. At the heart of these claims is the notion that America should increase the price and reduce the production of fossil fuels because of the impact these fuels are having on the climate. *See City of New York*, 993 F.3d at 93 ("If the Producers want to avoid all liability, then their only solution would be to cease global production altogether."). Some may consider this to be a sensible solution to climate change, but it is not the role of state courts to impose these changes.

For starters, state governments do not control the global fuel market, so forcing a reduction in western oil production would not reduce GHG emissions. As the *New York Times* reported, many of these companies are already "slowing down production as they switch to renewable energy. . . . But that doesn't mean the world will have less oil." Clifford Krauss, *As Western Oil Giants Cut Production, State-Owned Companies Step Up*, N.Y. Times, Oct. 14, 2021.[14] "[S]tate-owned oil companies in the Middle East, North Africa and Latin America are taking advantage of the cutbacks . . . by cranking up their production." *Id.* "This massive shift could . . . make

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

America more dependent on [OPEC], authoritarian leaders and politically unstable countries . . . that are not under as much pressure to reduce emissions." *Id.* "[T]he United States and Europe could become more vulnerable to the political turmoil in those countries and to the whims of their rulers"—and Russian President Vladimir Putin "uses his country's vast natural gas reserves as a cudgel." *Id.*

In response to the Ukrainian invasion, the Biden administration took measures that would be directly contradicted by these state lawsuits. Specifically, it released oil from the nation's strategic reserves, urged American energy manufacturers to *increase* their production of oil, tried to decrease energy prices, and invested in new energy technology. *See* Zack Colman & Ben Lefebvre, *Biden To Tap Oil Reserves, Press Oil Sector To Hike Production*, Politico, Mar. 31, 2022.[15] These decisions to increase production were made with full knowledge of climate change risks, including to Honolulu. Further, state court rulings to curtail fossil fuel production, make fuels more expensive, and hinder innovation would conflict with this national security response.

In addition, this litigation raises federalism concerns. As demonstrated in the oral argument below, the city is seeking "to apply Hawaii law to conduct in every jurisdiction in the United States." Jennifer Hijazi, *Oil Giants Fight Climate Deception Suit at Hawaii Supreme Court,* Bloomberg Law, Aug. 18, 2023. Each local and state government bringing a climate lawsuit is seeking to independently dictate consumer

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

protection liability for communications companies had with consumers, lawmakers and others entirely outside of their borders—even in each other's jurisdictions—regardless of whether those states would find the communications fully lawful. Under the American system of constitutional federalism, as well as the Clean Air Act, these states and localities are not allowed to impose their state's law on activities that took place entirely in other jurisdictions.

A Delaware court made this observation in limiting that state's climate change case against fossil fuel producers to only those emissions in Delaware. The court held that 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). 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. The Hawaii Supreme Court decision directly conflicts with this ruling, as that is exactly what the Hawaii court authorized in this case.

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

To pay for any award in this case, people and businesses in every state would have to pay higher energy prices to fund projects in Honolulu, even though their communities may have comparable needs. As one New Jersey coastal leader said in response to a lawsuit from Hoboken, New Jersey: "Hoboken is sticking the rest of us with the bill" as the litigation "will make it much more expensive for us to put gas in our cars and turn on our lights." Michael Thulen, *Why Hoboken's Climate Change Lawsuit Is Bad for New Jersey*, NJBiz, Oct. 11, 2021 (Thulen served as President of the Point Pleasant Borough Council).[16] There are less harmful ways to address impacts of climate change that do not have the downsides associated with this litigation. Federal and state programs have already made funds available that can provide local relief now.

Only uniform federal law supplies the standards that can be applied here. Yet, there are some thirty climate suits pending around the country, with organizers actively recruiting more lawsuits. In just the past year, California and Multnomah County, Oregon each filed lawsuits seeking tens of billions of dollars for climate mitigation from energy companies based on many of these same theories. *See, e.g.*, Ryan Fonseca, *California Is Suing Big Oil, Accusing Them of Climate Change 'Deception,'* L.A. Times, Sept. 18, 2023; Editorial, *Multnomah County's Lawsuit Filing Does Not Count as Governance*, The Oregonian, June 25, 2023 ("While filing a lawsuit against Big Oil may scratch a populist itch, this isn't the kind of governance residents need."). Within the past few weeks,

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

the City of Chicago and Bucks County, Pennsylvania filed similar lawsuits. *See* Brett Chase, *Chicago Sues Five Giant Oil Companies, Accusing Them of Climate Change Destruction, Fraud*, Chicago Sun-Times, Feb. 20, 2024; Robert Moran, *Bucks County Sues Big Oil Companies for Severe Weather Blamed on Climate Change*, The Philadelphia Inquirer, Mar. 25, 2024.

Lawsuits alleging energy manufacturers can be subject to untold liability for harms stemming from global climate change should not be the result of political decisions by municipal, county or state officials on whether and whom to sue for climate change, as well as ad hoc case-by-case rulings in local courts. Also, as a matter of judicial efficiency, it is important for the Court to provide guidance now, as proceedings have already begun in state courts around the country and more suits are being filed.

* * *

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

CONCLUSION

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

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