COLORADO SUPREME COURT Ralph L. Carr Colorado Judicial Center 2 East 14th Avenue Denver, Colorado 80203	DATE FILED: August 5, 2024 3:59 PM FILING ID: 4CB1E26D39462 CASE NUMBER: 2024SA206
District Court, Boulder County Hon. Robert R. Gunning Case No. 2018CV30349	
In re: **Petitioner/Defendant:** EXXONMOBIL CORPORATION, **v.** **Respondents/Plaintiffs:** BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY and CITY OF BOULDER.	▲ COURT USE ONLY Case No: 2024SA206
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BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR ORDER TO SHOW CAUSE PURSUANT TO C.A.R. 21

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with all requirements of C.A.R. 21(k), C.A.R. 28, C.A.R. 29, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, I certify that:

The motion complies with the length specified in C.A.R. 29(d). It contains 3,256 words.

I acknowledge that this brief may be stricken if it fails to comply with any of the requirements of these Rules.

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community. Indeed, the Chamber has twice participated as an *amicus curiae* in this litigation. *See Suncor Energy (U.S.A.) Inc. v. Bd. of Cnty. Comm'rs of Boulder Cnty.*, No. 21-1550 (U.S.); *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, No. 19-1330 (10th Cir.).

The Chamber has a strong interest in legal and policy issues relating to climate change. The global climate is changing, and human activities contribute to these changes. There is much common ground on which all sides could come together to address climate change with policies that are practical, flexible, predictable, and durable. The Chamber believes that durable climate policy must be made by Congress, which should encourage both innovation and investment to ensure significant emissions reductions and avoid economic harm for businesses,

consumers, and disadvantaged communities. *See, e.g.*, Press Release, Sen. Sheldon Whitehouse, *New Bipartisan, Bicameral Proposal Targets Industrial Emissions for Reduction* (July 25, 2019) (reporting the Chamber's support for the bipartisan Clean Industrial Technology Act).[1] U.S. climate policy should recognize the urgent need for action, while maintaining the national and international competitiveness of U.S. industry and ensuring consistency with free enterprise and free trade principles. *See* U.S. Chamber of Commerce, *The Chamber's Climate Position: 'Inaction is Not an Option'* (Oct. 27, 2021).[2] Governmental policies aimed at achieving these goals should not be made by the courts, much less by a patchwork of actions under state law.

U.S. Supreme Court precedent teaches that cases in which a uniform federal policy is necessary must be decided under federal law. Where such uniquely federal interests arise, the relevant legal questions often intersect with the interests of many of the Chamber's members, who rely on the predictability and uniformity of federal policy. This case presents an example of a court veering from U.S. Supreme Court precedent and allowing a claim about global emissions—for which no State can claim a superior tie or interest—to be decided by a single State's law.

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[1] https://www.whitehouse.senate.gov/news/release/new-bipartisan-bicameral-proposal-targets-industrial-emissions-for-reduction.

[2] https://www.uschamber.com/climate-change/the-chambers-climate-position-inaction-is-not-an-option.

The Chamber has an interest in ensuring that claims for which a uniform federal standard is necessary, because of their interstate or international aspects, are governed by federal law.

ARGUMENT

I. This dispute must be governed by federal law, as remedies for climate change cannot be subject to fifty different state regimes.

In its modern form, "federal common law addresses 'subjects within national legislative power where Congress has so directed' or where the basic scheme of the Constitution so demands." *Am. Elec. Power Co. v. Connecticut ("AEP")*, 564 U.S. 410, 421 (2011) (quoting Henry J. Friendly, *In Praise of* Erie*—and of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 408, 421-22 (1964)). In particular, federal common law must govern when "there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism." *Illinois v. City of Milwaukee ("Milwaukee I")*, 406 U.S. 91, 105 n.6 (1972). "In these instances, our federal system does not permit the controversy to be resolved under state law . . . because the interstate or international nature of the controversy makes it inappropriate for state law to control." *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981).

One archetypal area in which the basic scheme of the Constitution requires a federal rule concerns "the environmental rights of a State against improper impairment by sources outside its domain." *Milwaukee I*, 406 U.S. at 107 n.9

(citation omitted). In such cases, the U.S. Supreme Court has held, "[f]ederal common law and not the varying common law of the individual States is . . . necessary" to provide a "uniform standard" for such disputes. *Id.* (citation omitted). Thus, "[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law." *AEP*, 564 U.S. at 421 (quoting *Milwaukee I*, 406 U.S. at 103). As the Supreme Court has explained, where a lawsuit presses claims for liability arising from cross-border greenhouse gas emissions, "borrowing the law of a particular State would be inappropriate." *Id.* at 422.

A straightforward application of these precedents dictates that the present dispute must be governed by federal law. Climate change is a global phenomenon. Greenhouse gas emissions are released into the Earth's atmosphere from all over the world, and their effects are just as global. As the Supreme Court observed, "[g]reenhouse gases once emitted 'become well mixed in the atmosphere,' 74 Fed. Reg. 66514; emissions in New Jersey may contribute no more to flooding in New York than emissions in China." *AEP*, 564 U.S. at 422.

The Amended Complaint in this case does not mince words about the scope of its allegations. It repeatedly states that it seeks to hold the oil companies responsible for their worldwide "fossil fuel products" that "release CO2 and other GHGs *into the atmosphere*, and contribute to changes *in the planet's climate*,

including in the climate of Colorado." Ex. 2 ¶¶ 70, 85 (emphases added); *id.* ¶ 123 (alleging that "the emission of GHGs into the atmosphere . . . has increased the concentration of those gases in the atmosphere, trapping heat in the climate system, and warming the planet."); *id.* ¶ 383 ("Exxon is one of the largest sources of GHG emissions both globally and historically."); *id.* ¶ 399 ("Suncor is one of the largest sources of GHG emissions both globally and historically."). By plaintiffs' own admissions, both the emissions and the harms alleged (*and* the atmospheric phenomena that are indispensable causal links between the emissions and the harms), as set forth in the Amended Complaint, span the entire globe. Therefore, "the interstate or international nature of the controversy makes it inappropriate for state law to control." *Tex. Indus.*, 451 U.S. at 641; *AEP*, 564 U.S. at 422 (explaining that "borrowing the law of a particular State would be inappropriate" in a nuisance suit brought by local governments for greenhouse gas emissions).

The Second Circuit reached precisely this conclusion in a case presenting purported state-law claims that are very similar to the claims at issue in this case. In *City of New York v. Chevron Corp.*, the Second Circuit confronted the question "whether a nuisance suit seeking to recover damages for the harms caused by global greenhouse gas emissions may proceed under New York law." 993 F.3d 81, 91 (2d Cir. 2021). The court's "answer is simple: 'no.'" *Id.* The Second Circuit reasoned that federal common law governs in this area, leaving no role for state

law, because this "is an interstate matter raising significant federalism concerns," in no small part due to the fact that "a substantial damages award like the one requested by the City would effectively regulate the [defendants'] behavior far beyond New York's borders." *Id.* at 92. "Such a sprawling case is simply beyond the limits of state law." *Id.*

The necessity of a uniform federal approach in mitigating climate change is accentuated by the difficult policy choices inherent in balancing the United States' environmental and energy needs. There are important trade-offs to consider, all of which have enormous consequences. As the Supreme Court has 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. Along with the environmental benefit potentially achievable, our Nation's energy needs and the possibility of economic disruption must weigh in the balance.

AEP, 564 U.S. at 427.

The federal government has been grappling with this dilemma for decades. Congress undoubtedly takes national energy needs very seriously, including by providing for oil and gas production. *E.g.*, 43 U.S.C. § 1802(1) ("establish[ing] policies and procedures for managing the oil and natural gas resources of the Outer Continental Shelf . . . to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a

favorable balance of payments in world trade"). In 1992, the United States joined the United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 107. In that treaty, the signatories agreed that they "shall . . . [t]ake climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions, and employ appropriate methods . . . *formulated and determined nationally, with a view to minimizing adverse effects on the economy, on public health and on the quality of the environment*, of projects or measures undertaken by them to mitigate or adapt to climate change." Art. 4(1)(f) (emphasis added).

Indeed, Congress has recently crafted major legislation intended to achieve the twin goals of reducing greenhouse gas emissions *and* stimulating the economy. In the Inflation Reduction Act of 2022, for example, the term "greenhouse gas" appears no fewer than 147 times. Pub. L. No. 117-169, 136 Stat. 1818 (2022). That term appears another 39 times in the Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021). And, of course, by enacting the Clean Air Act, Congress has designated the Environmental Protection Agency (EPA) "as primary regulator of greenhouse gas emissions." *AEP*, 564 U.S. at 428.

To allow each of the fifty States—let alone each of the thousands of municipalities—to impose their own preferred policy solutions to this global issue, with each of these governments naturally focused on *local* rather than national

benefit, would create a plainly "irrational system of regulation" that "would lead to chaotic confrontation between sovereign states." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 496-97 (1987) (citation omitted). As the Second Circuit correctly concluded, allowing state-law suits in this area to proceed, thereby "subjecting" companies' "global operations to a welter of different states' laws," "would further risk upsetting the careful balance that has been struck between the prevention of global warming, a project that necessarily requires national standards and global participation, on the one hand, and energy production, economic growth, foreign policy, and national security, on the other." *City of New York*, 993 F.3d at 93. In short, this is a case in which "there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism." *Milwaukee I*, 406 U.S. at 105 n.6. Federal law must therefore control.

II. The District Court's contrary reasoning cannot withstand scrutiny.

The District Court resisted this straightforward conclusion, listing "no less than five independent reasons" why federal common law preemption should not apply here. Ex. 1 at 41. None of those reasons holds water.

1. The District Court first asserted that, because the Supreme Court held in *AEP* that "the federal common law that once governed interstate pollution damages and abatement suits was displaced by the [Clean Air Act]," the fifty states

are now free to impose their own regulatory schemes so long as they are not preempted by the Clean Air Act itself. Ex. 1 at 41-43.

That conclusion does not follow. The question in *AEP* was which *federal* actor—Congress or the courts—should craft the relevant federal law, and the Supreme Court answered that question on the assumption that *federal* law must control the suit over greenhouse gas emissions. *See AEP*, 564 U.S. at 423-24 (explaining that "it is primarily the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest"). That Congress displaced federal common law simply means that the *federal courts* are no longer in the business of formulating federal standards; it in no way eliminates or undermines the overriding federal interest in the dispute, much less throws open the door for the courts of the fifty different states to engage in their own piecemeal resolution of these distinctly federal issues under a variety of competing and conflicting state and local laws. As the Second Circuit aptly observed, "state law does not suddenly become presumptively competent to address issues that demand a unified federal standard simply because Congress saw fit to displace a federal court-made standard with a legislative one." *City of New York*, 993 F.3d at 98. "Such an outcome is too strange to seriously contemplate." *Id.* at 98-99.

The District Court's conclusion appeared driven by its concern that "[w]ithout a federal statutory remedy, federal common law remedy, or state law

remedy, plaintiffs are left without legal recourse." Ex. 1 at 42. But in this context, the choice of a remedy lies with Congress (which has, in fact, repeatedly taken action to address climate change), not with the fifty States. This reasoning—that a remedy must exist somewhere, therefore it must exist under state law—is antithetical to our federal system. In *AEP*, for example, the Supreme Court held that federal common law relating to climate change was displaced regardless of the availability of any judicial remedy for such claims. That did not matter. Rather, "[t]he critical point is that Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from powerplants," *AEP*, 564 U.S. at 426; *see id.* ("Indeed, were EPA to decline to regulate carbon-dioxide emissions altogether at the conclusion of its . . . rulemaking, the federal courts would have no warrant to employ the federal common law of nuisance to upset the Agency's expert determination."). States and municipalities may urge Congress and EPA to act as they see fit, but a perceived inaction (or failure to enact preferred policies or remedies) on the federal level does not give state courts license to usurp that prerogative.

2. The District Court next reasoned that "the Local Governments' claims do not seek to regulate or enjoin GHG emissions" and, "[t]herefore, the former federal common law pertaining to transboundary pollution, even if it still existed, would not preempt the Local Governments' claims here." Ex. 1 at 43. That is

simply incorrect. While Respondents may not seek to enjoin greenhouse gas emissions, they certainly do seek to regulate such emissions. This suit is, at least in part, a suit "for damages allegedly caused by climate change." *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 1248 (10th Cir. 2022). And, as the Supreme Court has repeatedly held, "'regulation can be effectively exerted through an award of damages,' and 'the obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.'" *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 637 (2012) (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)); *see also City of New York*, 993 F.3d at 92 (same conclusion in analogous climate suit); *Minnesota v. Am. Petroleum Inst.*, 63 F.4th 703, 719 (8th Cir. 2023) (Stras, J., concurring) (recognizing that analogous climate suit sought "to change the companies' behavior on a global scale").

The District Court suggested that the lawsuit is in fact "about production, sales, and misleading marketing" rather than "regulating emissions." Ex. 1 at 39. That contention misses the point. The Amended Complaint explicitly seeks damages for climate change itself, requesting "that Defendants help remediate the harm caused by their intentional, reckless and negligent conduct, specifically by paying their share of the costs Plaintiffs have incurred and will incur because of Defendants' contribution to alteration of the climate." Ex. 2 ¶ 6. The gravamen of

the dispute is the oil companies' alleged responsibility for climate change, which is undisputedly caused by greenhouse gas emissions. That dispute must be governed by federal law, for the reasons given above. *See* pp. 3-8, *supra*.

It makes no difference that the plaintiffs have framed this dispute as arising, in part, from misleading marketing relating to climate change, just as it would make no difference if a dispute between two States regarding interstate air or water pollution also happened to involve allegations of misleading statements, breach of contract, or any other alleged violation of federal or state law. It is "the interstate or international *nature of the controversy* [that] makes it inappropriate for state law to control," *Tex. Indus.*, 451 U.S. at 641 (emphasis added), not the precise causes of action pleaded. Here, the allegedly misleading marketing is *about climate change*—specifically, what the oil companies "told the rest of the world" about it. Ex. 2 ¶ 372. And the Amended Complaint plainly alleges that "Suncor and Exxon produced, promoted, refined, marketed and sold massive and increasing amounts of fossil fuels" and thereby "caused billions of tons of excess CO2 emissions and contributed to the dangerous and inexorable rise in atmospheric CO2." *Id.* ¶ 376.

3. The District Court's third and fourth reasons for rejecting federal common law preemption are related: the court believed that it would need to invent "new federal common law" and that there is no "uniquely federal interest to justify the invocation of federal common law." Ex. 1 at 44. But as discussed

above, that reasoning cannot be squared with U.S. Supreme Court precedent like *AEP* or with the overriding need for a uniform federal approach to balancing national (and, indeed, global) environmental and energy demands. *See* pp. 4-8, *supra*. If that is not a uniquely federal interest, then it is unclear what is. Nobody has asked the Colorado courts to develop a new federal common law rule within that area of uniquely federal interest; the point is that this *is* an area of uniquely federal interest, in which a state is not free to develop *its own* common law—whether Congress has left the development of the relevant federal rule to the federal courts or has kept that prerogative for itself.

4. Finally, the District Court claimed that there is no "significant conflict between federal interests and Colorado law." Ex. 1 at 45. But the conflict is direct and overwhelming. Indeed, this litigation is an attempt by two municipalities in a single state "to set national energy policy through its own consumer-protection laws," which "would 'effectively override . . . the policy choices made by' the federal government and other states." *Minnesota*, 63 F.4th at 719 (Stras, J., concurring) (quoting *Ouellette*, 479 U.S. at 495).

* * * * *

The federal government is tasked with addressing the climate-related impacts arising from greenhouse gas emissions in a manner that comports with national energy policy, giving due weight to relevant economic, environmental,

foreign-policy, and national-security considerations. *See AEP*, 564 U.S. at 427; *City of New York*, 993 F.3d at 93. The sensitive choices that bear upon interstate and international emissions require a uniform approach at the federal level, not the disparate efforts of fifty states and thousands of municipalities—each acting primarily in its own interests and answerable only to its local constituencies. Our federal system does not permit fifty different states to deploy their laws to govern this inherently interstate area.

CONCLUSION

This Court should grant the relief requested in the second issue of the Petition for Order to Show Cause and hold that Respondents' claims cannot proceed under state law.

Respectfully submitted,

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Dated: August 5, 2024

CERTIFICATE OF SERVICE

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