No. 23-168

In the Supreme Court of the United States

AMERICAN PETROLEUM INSTITUTE, ET AL.,
Petitioners,

v.

MINNESOTA,

Respondent.

BRIEF OF *AMICUS CURIAE* AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF PETITIONER

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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INTEREST OF *AMICUS CURIAE*[1]

The American Tort Reform Association (ATRA) is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than three decades, ATRA has filed *amicus* briefs in cases involving important liability issues. ATRA is concerned with state and local government attempts to expand tort law to shift costs associated with responding to climate change. Such efforts are the latest attempt to subject industries that provide lawful products to unprincipled liability for societal problems regardless of fault, the cause of the harm, whether elements of the claim are met, or even whether liability will actually address the issue.

INTRODUCTION AND SUMMARY OF ARGUMENT

A popular Netflix gameshow asks contestants, who are creative, skillful bakers, to attempt to trick celebrity judges by disguising a cake to look like an ordinary object – a sneaker, a cheeseburger, or handbag – and then presenting the cake among the real objects. The judges are then asked, "Is it cake?" After they respond, the host puts a knife into the selected item to find out if it is, in fact, cake. The ques-

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* affirm 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. Counsel of record for all parties received timely notice of the intention to file this brief.

tion presented to this Court in this Petition is similar: "Is it a tort (or state consumer protection claim)?"

Here, the "bakers" are private plaintiffs' attorneys, retained by a state government, that have artfully crafted a complaint to resemble state law claims when the lawsuit transparently seeks to set national environmental and economic policy that this Court has ruled is a matter of federal common law. The State has affixed tort law labels alleging failure to warn and common law fraud, and alleged violations of state consumer protection laws in an action that claims energy producers' production, sale, and marketing of fossil fuels increased greenhouse-gas emissions and contributed to global climate change, harming Minnesota residents. In the lower courts, this tactic succeeded. The district court remanded the case, and Eighth Circuit affirmed, hesitantly finding that since the complaint alleges only state law claims, i.e., it looks like a tort, the federal judiciary lacks jurisdiction. But the lower courts failed to take the needed final step: probing whether the complaint alleges claims that are truly state law or raises issues of federal common law.

This Petition presents the Court with a threshold issue that arises in many similar lawsuits brought by state and local governments. That issue is whether skillful lawyers can, through artful pleading, have cases with national implications decided by state court judges on the basis of state law, dodging a more neutral federal forum that would apply federal common law.

Amicus curiae submits this brief to provide the Court with relevant context on state climate change

litigation. First, the brief demonstrates that these cases do not allege ordinary state law claims, but represent a continuing attempt to expand tort and consumer law beyond their traditional purposes and constraints. Federal law, applied by federal courts under the jurisdiction granted by 28 U.S.C. § 1331, should govern matters of national environmental policy. Second, the brief shows that state and local climate change cases are pursued as part of a coordinated effort to impose environmental policy through the courts. With broad, nationwide regulatory goals in mind, advocacy groups and foundations financially support these cases from their inception through litigation. The means by which these cases are developed, litigated, and funded further suggests that these claims should be governed by federal law applied by federal courts.

This Court should grant the Petition to ensure that cases attempting to impose liability for harms caused by global climate change are decided in federal court based on federal law.

ARGUMENT

I. Global Climate Change is Not Traditional State Tort or Consumer Law

This Court should grant the Petition to indicate that in this and similar cases alleging that a business's or industry's activities contributed to climate change, federal common law governs, even if the complaint characterizes its claims as arising under state law.

Litigation over whether changes in global climate patterns, to which widespread use of fossil fuels may have contributed, caused property damage or led to

other economic costs in a particular state bears no resemblance to a traditional state common law "tort." Nor is the important issue of climate change a matter of state consumer law governing representations in the sale of products and services. Rather, claims seeking redress for costs allegedly incurred as a result of interstate pollution implicate an "overriding federal interest in the need for a uniform rule of decision" that can be determined through federal common law. *Illinois v. Milwaukee*, 406 U.S. 91, 105 n.6 (1972). "[B]orrowing the law of a particular state would be inappropriate" for resolving this national issue. *See American Elec. Power v. Connecticut*, 564 U.S. 410, 422 (2011).

Is a claim alleging economic losses from global climate change a tort? Tort law, of course, is most commonly associated with personal injury litigation. Tort claims most often stem from accidental injuries arising from automobile accidents, slip-and-falls, complications during medical treatment, or defective products. *See, e.g.*, Andreas Kuersten, *Introduction to Tort Law*, Congressional Research Service, No. IF11291 (2023). Unlike climate change litigation, negligence claims typically involve an injury to a specific person or person's property resulting from someone else's careless conduct. Traditional principles of tort law, such as duty and causation, confine the claim. As Justice Cardozo observed while sitting on the New York Court of Appeals, "Proof of negligence in the air, so to speak, will not do." *Palsgraf v Long Is. R.R. Co.*, 162 N.E. 99, 99 (N.Y. 1928) (quoting Frederick Pollock, The Law of Torts, at 455 (11th ed. 1920)).

Certainly, there are property-related torts, though they have little in common with today's climate change suits. Trespass, for example, typically involves a person intentionally entering the property of another. Restatement (Second) of Torts § 158 (1965); *see also Johnson v. Paynesville Farmers Union Coop. Oil Co.*, 817 N.W.2d 693, 705 (Minn. 2012) ("[T]respass claims address tangible invasions of the right to exclusive possession of land."). A trespass claim may also arise when a person places an object in the air, water, or ground "with knowledge that it will to a substantial certainty" enter the property of another. *See* Restatement (Second) of Torts § 158, Reporter's Notes, cmt. i. Applying this principle, there are some circumstances in which trespass claims may provide a remedy for environmental harms, such as flooding water directed from one property to another. *See Johnson,* 817 N.W.2d at 701. The Minnesota Supreme Court, however, has rejected an attempt to dilute the tort to permit a claim based on the mere invasion of "particulate matter." *Id.* at 703 (holding pesticide drift from one property to a neighboring field did adequately allege a trespass claim). There, the court observed the overbroad liability exposure that would result from abandoning the physical intrusion element of the tort. *See id.* at 703-04.

A public nuisance action, which provides a means for the government to require an owner to stop an unlawful activity on its property that interferes with public health, safety, or some other public right, similarly does not fit climate change lawsuits. Public nuisance claims are often associated with the effects of criminal activity at a particular location on the surrounding area. *See* Restatement (Second) of Torts

§ 821B cmt. b (1979). Several state supreme courts have rejected attempts to transform public nuisance law into an all-encompassing tort. *See, e.g.*, *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719 (Okla. 2021); *In re Lead Paint Litig.*, 924 A.2d 484, 501 (N.J. 2007). They have generally found that public nuisance law, which is rooted in land use, is not the means to address alleged external costs associated with the lawful manufacturing and selling of products. *See* Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Wash. L.J. 541, 552-61 (2006); *see also* Am. Tort Reform Ass'n, The Plaintiffs' Lawyer Quest for the Holy Grail: The Public Nuisance "Super Tort" (2020) (discussing the history of failed attempts to expand public nuisance law as a means of addressing broad societal problems and the more recent use of such claims to target climate change and other areas).

Minnesota's public nuisance law is consistent with these traditional common law principles and codified in a manner that does not permit unbridled expansion of the tort to extend to climate change litigation. *See* Minn. Stat. § 617.18 (enumerating activities constituting a nuisance subject to an abatement action); *see also* Minn. Stat. § 609.74 (defining the misdemeanor offense of public nuisance). It is likely that, for these reasons, Minnesota has not asserted trespass or public nuisance claims here and instead relies on more nebulous negligence claims and statutory consumer protection claims.

Consumer protection claims, however, are similarly ill fitted for climate change litigation. States adopted consumer protection statutes to provide a

means for ordinary consumers, or state attorneys general on their behalf, to address instances in which a business practice misleads the public when they purchase products and services. *See* Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 Kan. L. Rev. 1, 6 (2005). While these laws provide state attorneys general with broad authority to enjoin "unfair" or "deceptive" business practices, they often require such determinations to be guided by federal policy, such as guidance from the Federal Trade Commission, and, about two thirds of state consumer protection statutes exempt conduct that is regulated, permitted, approved, or authorized by government regulations. *See* Victor E. Schwartz, Cary Silverman & Christopher E. Appel, *"That's Unfair!" Says Who – The Government or Litigant?: Consumer Protection Claims Involving Regulated Conduct*, 47 Washburn L.J. 93, 102-09 (2007) (compiling state statutes). Minnesota's Deceptive Trade Practices Act, for example, specifically excludes "conduct in compliance with the orders or rules of, or a statute administered by, a federal, state, or local government agency." Minn. Stat. § 325D.46(1). While the Minnesota Consumer Fraud Act, relied upon in this instance, does not codify such an exemption, a presumption that the Act does not apply to conduct beyond Minnesota should preclude claims premised on global emissions. *See Johannessohn v. Polaris Indus., Inc.*, 450 F.Supp.3d 931, 961-62 (D. Minn. 2020).

Even if these asserted tort and consumer claims are viable under state law, this Court has held that actions alleging claims involving "air and water in their ambient or interstate aspects," including global climate change, are governed by federal common law.

American Elec. Power, 564 U.S. at 421 (quoting *Milwaukee*, 406 U.S. at 103).

In sum, claims alleging property damage or financial losses from changes in global weather patterns are not traditional matters of state "tort" or "consumer" law. These lawsuits attempt to set national public policy and environmental regulation through state law claims – regulation through litigation. The Court should grant the Petition to assure that federal courts decide such actions based on federal law, even if the claims are artfully pled in state law terms.

II. The Development, Funding, and Litigation of Climate Change Lawsuits Brought by State and Local Governments Further Demonstrates Their Interstate Nature

The method by which these state and local government climate change lawsuits are developed, filed, and litigated also indicates that they are not ordinary state tort law or consumer claims. These lawsuits are supported by organizations that have as their objective advancing a national agenda and they litigated by lawyers who are subsidized by foundations with similar goals.

After this Court's decision in *American Electric Power Co. v. Connecticut*, lawyers, activists, and funders joined in La Jolla, California in 2012 to brainstorm new litigation strategies. *See generally* Seth Shulman, Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Summary of the Workshop on Climate Accountability, Public Opinion, and Legal Strategies 11 (Union of Concerned Scientist and Climate Accountability

Inst., Oct. 2012). The "ultimate goal" of at least some participants was to "shut down" the coal, gas, and oil industries. *Id*. at 13. To the extent participants identified a role for Congress, it was aid their state-based litigation efforts. Participants suggested using Congress's subpoena power to obtain internal documents from companies that could be used in litigation and employing committee hearings to turn public opinion against the defendants. *See id.* at 11, 21, 28.

Since that time, activists and attorneys have given private briefings to state attorneys general, urging state officials to initiate climate change-related investigations of energy producers. *See, e.g.*, Terry Wade, *U.S. Prosecutors Met With Climate Groups as Exxon Probes Expanded*, Reuters, Apr. 15, 2016. There are now at least twenty pending climate change lawsuits filed by states and political subdivisions. *See* Bruce Gil, *U.S. Cities and States Are Suing Big Oil Over Climate Change. Here's What the Claims Say and Where They Stand*, Frontline, PBS, Aug. 1, 2022. The lawsuits generally seek to make the energy industry cover costs that governments have spent on climate-resiliency projects in response to rising sea levels and more frequent and intense storms. *See id.* They single out a select group of businesses and ignore the collective contributions to climate change by the rest of the world.

Since 2017, some state attorneys general have deputized outside-funded "fellows" to develop climate change litigation.[2] Often named special assistant at-

[2] *See* State Energy & Environmental Impact Center, NYU School of Law, Fellows Program, https:// stateimpactcenter.org/about/fellows-program (last visited Sept. 5, 2023).

torneys general (SAAGs), their salaries and benefits are not covered by the state, as other government attorneys. Rather, a grant from Bloomberg Philanthropies to the New York University School of Law State Energy and Environmental Impact Center (SEEIC) compensates these attorneys. *See id.* A condition of receiving a fellow—which is offered through an application to any attorney general who is interested in having his or her staff supplemented at no cost to the state—is that the attorney general designate the fellow "to advancing clean energy, climate, and environmental matters of *regional or national importance*."[3] At least ten state attorneys general have received Bloomberg-funded SAAGs. *See* Lesley Clark, *State AGs Rebuked for 'Soliciting Billionaires' in Climate Cases*, E&E News by Politico, June 3, 2022. Minnesota has reportedly received two of these fellows. *See* Christin Nielsen, *AG Ellison Exceeded Authority By Hiring Privately Funded Lawyers to Sue Big Oil, Critic Says*, Legal Newsline, Apr. 13, 2021. When Minnesota filed the instant lawsuit, two privately-funded fellows were listed as representing the state on the complaint. *See* Collin Anderson, *Keith Ellison Moves to Shield Records on Controversial Legal Scheme*, Free Beacon, July 12, 2021.[4]

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[3] State Energy & Environmental Impact Center, NYU School of Law, Fellows Program, How to Hire an NYU Law Fellow - AG Offices, https://stateimpactcenter.org/about/fellows-program/hire (last visited Sept. 18, 2023) (emphasis added).

[4] Unsurprisingly, this arrangement in which an outside group embeds staff in a state attorney general's office has raised significant controversy in Minnesota and other states. *See, e.g.*, Annette Meeks, Op-ed, *Agenda Dollars are Buying State Government Jobs*, Star Tribune, Jan. 27, 2021; *see also* Tyler Olson, *Bloomberg's 'Mercenaries': Billionaire Dem Funding Network of*

The coordinated, national nature of these lawsuits continues as most are litigated by the same private law firm – the firm representing Minnesota in this case – rather than through the government's publicly-funded attorneys. *See* Sher Edling LLP, Climate Damage and Deception, https://www.sheredling.com/cases/climate-cases/ (last visited Sept. 5, 2023) (listing representation of four states, the District of Columbia, and fifteen cities and counties in climate change litigation); *see also* Paul Gazelka, Op-ed, *Minnesota's Climate Lawsuit is a Dangerous Gambit*, Minn. Post, May 1, 2023 (observing that "[t]he Minnesota lawsuit is just one of more than two dozen carbon copy cases that national law firms and advocacy groups have orchestrated across the country."). State and local governments often retain the outside attorneys that bring these suits on a contingency-fee basis, adding a profit motive to the litigation. In this instance, for example, the San Francisco-based law firm representing Minnesota, retained as "special attorneys," are slated to receive 16.67% of the first $150 million of the state's recovery and 7.5% of any portion above that level. *See* State of Minnesota, Office of the Attorney General, Special Attorney Appointment, Exh. A: Fee Agreement ¶ 6 (Aug. 2020). With eyes on a massive settlement, the law firm could receive tens or hundreds of millions of dollars.

Climate Lawyers Inside State AG Offices, Fox News, Feb. 18, 2020; Am. Tort Reform Ass'n, The Advocacy Group Within: The Embedding of Outside Lawyers and Activists Within the Government (2019); Christopher C. Horner, Law Enforcement for Rent (Competitive Enterprise Inst. 2018); Editorial, *State AGs for Rent*, Wall St. J., Nov. 6, 2018.

While private law firms await a contingency fee, outside advocacy groups have subsidized the state and local climate change litigation. For example, the New Venture Fund's Collective Action Fund for Accountability, Resilience and Adaptation (CAF), has long funded climate litigation. *See* MacArthur Found., Grant Search, New Venture Fund (last visited Sept. 5, 2023) (reporting a $3 million grant to CAF in 2020 that "renews support for legal processes associated with a variety of lawsuits filed in support of states, counties and cities affected by climate change"). Other foundations, in turn, contribute to CAF to support the litigation efforts. For example, recent email correspondence revealed that a foundation associated with actor Leonardo DiCaprio is a "serious supporter" of Sher Edling's ongoing climate change litigation. *See* Thomas Catenacci, *Leonardo DiCaprio Funneled Grants Through Dark Money Group to Fund Climate Nuisance Lawsuits, Emails Show*, Fox News, Aug. 15, 2022. Some have raised concern with an arrangement in which tax-exempt groups funded through charitable donations back a private law firm, removing some risk involved in pursuing the litigation, when the law firm stands to later profit from a contingency fee should there be a settlement or judgment. *See id.*

In sum, the development, funding, and litigation of the climate change suits is a further reason to be skeptical that these claims are matters of state tort or consumer law, rather than part of a broad, coordinated attempt to set national environmental policy. This Court should grant certiorari to soundly reject efforts to trespass on the functions of Congress and the Executive Branch by bringing climate change lawsuits under false tort law and consumer labels.

CONCLUSION

Deciding these cases in neutral federal forum provides a basic safeguard to ensuring that states and localities, agenda-driven advocacy groups, and financially-interested private attorneys do not place their interests above that of the federal government. The claims alleged in this and similar lawsuits raise unique issues of environmental, energy, and economic policy that impact all Americans. Ultimately, efforts to address climate change require national and global solutions, developed through legitimate democratic means, rather than faux state-based litigation.

For these reasons, *amicus curiae* respectfully request that this Court grant the Petition.

Respectfully submitted,

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