

No. 25-170

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**In the Supreme Court of the United States**

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SUNCOR ENERGY (U.S.A.) INC., ET AL.,  
*Petitioners,*

v.

COUNTY COMMISSIONERS OF BOULDER COUNTY, ET AL.  
*Respondents.*

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On Petition for a Writ of Certiorari  
to the Supreme Court of Colorado

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

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**INTEREST OF *AMICUS CURIAE*<sup>1</sup>**

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 asked contestants, who were creative, skillful bakers, to attempt to trick celebrity judges by disguising a cake to look like an ordinary object – a sneaker, a cheeseburger, or a handbag – and then presenting the cake among the real objects. The host would then ask the judges, “Is it cake?” After their response, the host puts a knife into the selected item to find out if it is, in fact, cake.

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<sup>1</sup> 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.

The question presented to this Court in this Petition is similar: “Is it a tort” governed by state law?

Here, the “bakers” are private plaintiffs’ attorneys, retained by local government entities, that have artfully crafted a complaint to resemble state tort law claims when the lawsuit transparently seeks to set national environmental and economic policy that this Court has ruled is a matter of federal law. The government entities in this case, County Commissioners of Boulder County and City of Boulder, have affixed an assortment of tort law labels to an action that claims energy producers’ production, refinement, marketing, and sale of fossil fuels increased greenhouse-gas emissions and contributed to global climate change. They allege that these changes have increased the potential for a wide range of harms, ranging from more frequent wildfires to drought. In the Colorado Supreme Court, this tactic succeeded. A divided court found that since the complaint alleges state law claims, i.e., it looks like a tort, a state court could decide the climate change-related claims based on state law. *See County Comm’rs of Boulder County v. Suncor Energy USA, Inc.*, No. 24SA206, 2025 WL 1363355, 2025 CO 21 (Colo. May 12, 2025). But the Colorado Supreme Court failed to take the needed final step: it did not adequately probe whether the complaint raises issues of interstate and international concern that are inherently matters of federal law.

This Petition presents the Court with an 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 based on state

law or whether federal law governs and bars such claims.

*Amicus curiae* submits this brief to provide the Court with relevant context on state and local climate change litigation. First, the brief demonstrates that these cases do not allege traditional state law claims, but represent a continuing attempt to expand tort law beyond its traditional purposes and constraints. Federal law exclusively governs such 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 are necessarily governed by federal law.

This Court should grant the Petition to ensure that cases attempting to impose liability for harms caused by global climate change are decided based on federal law. State law claims, in which cities or counties attempt to regulate emissions across the country or the world, are preempted.

## ARGUMENT

### **I. Global Climate Change is Not Traditional State Tort 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 global climate change, federal law governs, even if the com-

plaint 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.” 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 only through federal 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 state common-law 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)).

In fact, the Plaintiffs' theory of the case resembles the classic *Palsgraf* scenario, in which a man running for departing train was pushed by one railroad employee and pulled by another into the car, dropped a small package that contained fireworks onto the rails, triggering an explosion, with the resulting shock causing a scale at the opposite end of the platform to strike and injure the plaintiff. The court ruled that there was no actionable tort claim because the chain of events that led to the plaintiff's injury was too attenuated.

Here, the Plaintiffs' theory of the case is that energy producers "knowingly caused and contributed to the alteration of the climate by producing, promoting, refining, marketing and selling fossil fuels at levels that have caused and continue to cause climate change, while concealing and/or misrepresenting the dangers associated with fossil fuels' intended use." 2025 WL 1363355, at \*2 (quoting amended complaint). The city and county seek to hold the select businesses named as defendants financially responsible for costs to protect its property and residents from the impacts of climate change. *Id.*

This Rube-Goldberg machine-like tort claim then demands that the Defendants pay for a slew of costs attributed to global warming such as "costs associated with wildfire response, management, and mitigation; costs to repair and replace existing flood control and drainage measures and to repair flood damage; costs of managing and responding to increased drought conditions; and costs to repair physical damage to Boulder's buildings." *Id.* They seek dam-

ages not only for costs already incurred, but also costs they may incur in the future. *See id.* This chain of events, relying on a novel duty to the world, could not be more attenuated. These are not “traditional *state* law matters,” as the majority found. *Id.* at \*8 (emphasis in original).

The Colorado Supreme Court majority, parroting the complaint, noted that “Boulder does not, however, seek to enjoin any oil and gas operations or sales in Colorado or elsewhere. Nor does it seek to enforce emissions controls of any kind.” *Id.* at \*3; *cf.* Complaint and Jury Demand, *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.), Inc.* ¶ 476 (Boulder Dist. Ct., filed Apr. 17, 2018). But, as the Second Circuit recognized in a similar case, “[a]rtful pleading cannot transform the City’s complaint 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).

Certainly, there are property-related torts, though they have little in common with today’s climate change suits. For example, a traditional 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, does not fit climate change lawsuits. *See* Restatement (Second) of Torts § 821B (1979). Public nuisance claims are often associated with the obstruction of a public highway or a navigable stream, or the effects of criminal activity at a particular location on the surrounding area. *See id.* cmt. b. This remains true today. *See, e.g.,* Colo. Rev. Stat. §§ 16-13-303, 16-13-304, 16-13-305 (codifying certain public nuisances, including us-

ing a property for prostitution, gambling, drug sales; a property in which people congregate in a manner that disturbs the peace of residents in the vicinity or passersby on the public street or highway; or maintaining an illegal business on a property). Providing a legal, needed product—fuel—is not a public nuisance.

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"* (Mar. 2025) (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).

Another example is trespass, which typically involves a person intentionally entering the property of another. *See* Restatement (Second) of Torts § 158 (1965). 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 id.*, 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 when toxic chemicals migrate from one property to invade the property of another. *See, e.g., Hoery v. United States*, 64 P.3d 214, 222 (Colo. 2003). That type of intentional invasion, traceable to the act of a specific person or business, however, is not present here.

Colorado courts do not appear to have diluted the tort to allow a trespass claim here, where neither a person nor a substance released by that person has entered a property. *See id.* at 218 (“The elements for the tort of trespass are a physical intrusion upon the property of another without the proper permission from the person legally entitled to possession of that property.”); *see also Public Service Co. of Colorado v. Van Wyk*, 27 P.3d 377, 390-91 (Colo. 2001) (holding a claim alleging that noise, radiation, and electromagnetic fields from electrical lines did not constitute a trespass on adjacent properties because the plaintiffs failed to allege tangible intrusions on their property or specific physical damage to their property resulting from the intangible, intentional intrusions).

The Colorado Supreme Court’s decision does not assess the viability of any of the alleged state law claims. It simply lists them and observes that these torts are matters of state law that implicate state law interests. *See* 2025 WL 1363355, at \*2-3, \*8. That is true in the abstract, but it does not mean they are viable claims for addressing global climate change. In fact, when the Colorado government pursued a similarly novel action against an e-cigarette manufacturer, the trial court dismissed the public nuisance claim and the Colorado Supreme Court found that its courts lacked personal jurisdiction

over the company because the complaint described only nationwide marketing, not intentional actions aimed at Colorado. *See State ex rel. Weiser v. JUUL Labs, Inc.*, 517 P.3d 682, 686, 695 (Colo. 2022).

Even if some of the Plaintiffs’ asserted tort 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 law. *American Elec. Power*, 564 U.S. at 421 (quoting *Milwaukee*, 406 U.S. at 103). The alternative, as the dissenting Colorado Supreme Court justices observed, is “regulatory chaos” in which numerous local governments impose a “patchwork of standards” that are “not capable of effectively addressing interstate air pollution,” 2025 WL 1363355, at \*13, \*22 (Samour, J., joined by Boatright, J., dissenting).

In sum, claims alleging property damage or financial losses from changes in global weather patterns are not traditional matters of state tort 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 such actions are governed by 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 claims. These lawsuits are supported by organizations that have as their objective advancing a national agenda and they are 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 to 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 government officials, urging them 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 more than two dozen pending climate change lawsuits filed by states and political subdivisions. *See* Karen Zraick, *Supreme Court Clears a Path for Climate Lawsuits to Proceed*, N.Y. Times, Jan. 13,

2025. 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.

The coordinated, national nature of many of these lawsuits continues as most are litigated by private law firms, rather than through a government's publicly-funded attorneys. One firm, for example, advertises that it represents seven states, the District of Columbia, sixteen cities and counties, and two tribes in climate change litigation. *See* Sher Edling LLP, Climate Damage and Deception, <https://www.sheredling.com/cases/climate-cases/> (last visited Aug. 15, 2025). In fact, government attorneys in one state recently sued their own attorney general, alleging he illegally retained this law firm and another outside firm, rather than use civil service attorneys, to pursue climate change litigation. *See* Leslie Clark, *California AG is Sued by His Office's Lawyers for Outsourcing Climate Case*, E&E News by Politico, June 20, 2025.

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. With eyes on a massive settlement, these law firms could receive tens or hundreds of millions of dollars. In at least one instance, outside attorneys are paid hourly at rates as high as \$1,241 per hour. *See* Clark, *supra* (discussing California's contracts with two law firms).

Outside advocacy groups have subsidized 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., New Venture Fund, <https://macfound-corp-live-bypass.cphostaccess.com/grantee/new-venture-fund-43535/> (last visited Aug. 15, 2025) (reporting two \$3 million grants to CAF in 2020 and 2023 to “enable cities, counties, and states hard hit by climate change to file high-impact climate damage and deception lawsuits represented by expert counsel”). Other foundations, in turn, contribute to CAF to support the litigation efforts.

Some have raised concern with arrangements 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* Thomas Catenacci, *Leonardo DiCaprio Funneled Grants Through Dark Money Group to Fund Climate Nuisance Lawsuits, Emails Show*, Fox News, Aug. 15, 2022.

In this instance, the city and county are pursuing the litigation through attorneys associated with non-profit organizations including EarthRights International “who are working on a *pro bono* basis . . . assisted by private law firms” that stand to recover one fifth of any award. *See* Boulder County, Climate Lawsuit, Communities File Lawsuit Against Oil Giants for Climate Change Costs, <https://bouldercounty.gov/climate/impacts/climate->

lawsuit/#1523979824052-ce8d917c-eb3a (last visited Aug. 15, 2025).

In sum, the development, funding, and litigation of the climate change lawsuits is a further reason to be skeptical that these claims are matters of traditional state tort law, rather than part of a 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 state tort law labels.

### CONCLUSION

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 tort litigation.

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

Respectfully submitted,

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