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| COLORADO SUPREME COURT<br>Ralph L. Carr Colorado<br>Judicial Center<br>2 East 14th Avenue<br>Denver, Colorado 80203 | |
| District Court, Boulder County<br>Hon. Robert R. Gunning<br>Case No. 2018CV30349 | ▲**COURT USE ONLY**▲ |
| **In re:**<br>**Petitioner/Defendant:**<br>EXXONMOBIL CORPORATION<br>**v.**<br>**Respondents/Plaintiffs**:<br>BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY and<br>CITY OF BOULDER. | Case No. _____ |
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**PETITION FOR ORDER TO SHOW CAUSE PURSUANT TO C.A.R. 21**

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of Colorado Appellate Rules 21, 28, and 32.

This brief complies with Rule 28(g):

- It contains 9,418 words.

This brief complies with Rule 21(d)(2):

- It contains the following in separately titled subsections: (A) the identity of the petitioner and of the proposed respondents, together with their party status in the underlying proceeding; (B) the identity of the court or other underlying tribunal, the case name and case number in the underlying proceeding, and identification of any other related proceeding; (C) the identity of the persons or entities against whom relief is sought; (D) the ruling, action, or failure to act complained of and the relief being sought; (E) the reasons why no other adequate remedy is available; (F) the issues presented; (G) the facts necessary to understand the issues presented; (H) argument and points of authority explaining why a rule to show cause should be issued and why the relief requested should be granted; and (I) a list of supporting documents, or an explanation of why supporting documents are not available.

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

*/s/ Colin G. Harris*
Colin G. Harris (#18215)

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## INTRODUCTION

The Board of County Commissioners of Boulder County and the City of Boulder ("Respondents") seek to use this lawsuit to impose liability on select energy companies for a wide range of alleged local impacts of global climate change. Respondents allege they have been harmed by decades of worldwide greenhouse gas ("GHG") emissions due to the production, promotion, and sale of fossil fuels throughout the world. Respondents do not limit their claims to fossil fuels extracted, marketed, or used in Colorado. Instead, Respondents attempt to expand the reach of Colorado tort law to govern the alleged local impacts of global climate change. They seek to impose liability for this worldwide phenomenon on a select few of the many companies operating in these industries: ExxonMobil Corporation ("ExxonMobil" or "Petitioner"), Suncor Energy, Inc. ("Suncor Canada"), Suncor Energy (U.S.A.) Inc. ("Suncor U.S.A."), and Suncor Energy Sales, Inc. ("Suncor Sales") (together with Suncor Canada and Suncor USA, "Suncor"). Respondents' claims are premised on alleged production, promotion, and sale by these select companies of lawful products that play a crucial role in virtually every sector of the global economy.

The exercise of personal jurisdiction over ExxonMobil is unconstitutional, and claims implicating interstate and international conduct cannot be governed by

state law. Nevertheless, the District Court sustained Respondents' claims, concluding that (1) personal jurisdiction could be exercised over Petitioner consistent with due process; and (2) Respondents' claims seeking relief for global climate change could be adjudicated under state law. These rulings were erroneous and should be reversed.

This case implicates federal statutory, regulatory, and constitutional concerns, threatens to upset bedrock federal-state divisions of responsibility, and has significant potential implications for the global economy, international relations, and America's national security. For nearly fifty years, the federal government has aimed to achieve energy independence by decreasing the nation's reliance on oil imports, including by opening federal lands and coastal areas to promote fossil fuel extraction, establishing strategic petroleum reserves, and contracting with energy companies to develop those resources. During this period, the federal government also has enacted and promulgated environmental statutes and regulations designed to strike a balance between promoting economic independence, safeguarding national security, and protecting the environment. American foreign policy has furthered these multiple objectives in part by negotiating international frameworks with foreign governments to address climate change. Notwithstanding the national and international implications of these issues, the District Court improperly

concluded that Respondents' claims could proceed under Colorado law. This decision was wrong for at least two reasons.

*First*, federalism and due process prohibit Respondents from asserting claims against Petitioner in Colorado for the alleged injuries they claim to have suffered, and expect to suffer, from worldwide GHG emissions and the global complexities of geophysical cause and effect that constitute climate change. Such limits on personal jurisdiction emerge from well-settled legal principles, including those recently articulated by the United States Supreme Court in *Ford Motor Co.* v. *Montana Eighth Judicial District Court*, 592 U.S. 351 (2021). Respondents' claims should have been dismissed because the exercise of personal jurisdiction over Petitioner for these claims is unconstitutional.

*Second*, under well-settled legal principles, claims that implicate interstate and international conduct impacting the world economy and environment are governed by federal, not state, law. Longstanding United States Supreme Court precedent instructs that claims based on GHG emissions can only be governed by federal law. For these reasons and more, in assessing the merits of analogous claims, the United States Court of Appeals for the Second Circuit squarely held that such claims could not be asserted under state law. *See City of New York* v. *Chevron Corp.*, 993 F.3d

81 (2d Cir. 2021). Respondents' claims should have been dismissed for similar reasons.

Despite this established law, the District Court improperly sustained Respondents' claims. The District Court wrongly concluded that specific personal jurisdiction existed over ExxonMobil because it misapplied *Ford Motor* and permitted Respondents' claims to proceed on a theory that the District Court otherwise recognized was "insufficient to confer specific jurisdiction." Ex. 1 at 30, 35. And the District Court wrongly concluded that Respondents' claims could be governed by state law because it failed to apply the longstanding precedent that claims related to climate change must be governed by federal law. For the reasons detailed below, the Court should issue a rule to show cause why the relief requested in this Petition should not be granted.

## IDENTITY OF PETITIONER AND PROPOSED RESPONDENTS

The Petitioner, ExxonMobil, is one of the three Defendants in the underlying proceeding. The Respondents, the Board of County Commissioners of Boulder County and the City of Boulder, are Plaintiffs in the underlying proceeding.

## IDENTITY OF COURT AND CASE

The court below is the Boulder County District Court, Division 2, 20th Judicial District, Colorado, the Honorable Robert R. Gunning presiding. The

underlying proceeding is captioned *Board of County Commissioners of Boulder County and the City of Boulder* v. *Suncor Energy (U.S.A.) Inc.*, *Suncor Energy Sales Inc.*, *Suncor Energy Inc.*, *and Exxon Mobil Corp.*, Case No. 2018CV30349.

A related proceeding is pending before the Denver County District Court, Division 466, 2nd Judicial District, Colorado, the Honorable Mark T. Bailey presiding. The proceeding is captioned *Board of County Commissioners of San Miguel County* v. *Suncor Energy (U.S.A.) Inc.*, *Suncor Energy Sales Inc.*, *Suncor Energy Inc.*, *and Exxon Mobil Corp.*, Case No. 2021CV150.

## IDENTITY OF ENTITIES AGAINST WHOM RELIEF IS SOUGHT

The entities against whom relief is sought are the Board of County Commissioners of Boulder County and the City of Boulder.

## RULINGS COMPLAINED OF AND RELIEF SOUGHT

Petitioner seeks review of the June 21, 2024 District Court Order denying ExxonMobil's motion to dismiss for lack of personal jurisdiction and denying in part Defendants' motion to dismiss for failure to state a claim. *See* Ex. 1. In the June 21, 2024 Order, the District Court concluded that it could properly exercise specific personal jurisdiction over ExxonMobil, *id.* at 19–25, and that Respondents' state law claims were not preempted by federal law, *id.* at 36–53. Petitioner requests that these erroneous rulings be reversed.

## REASONS WHY NO OTHER ADEQUATE REMEDY IS AVAILABLE

The Colorado Constitution and Colorado Appellate Rule 21 vest this Court with authority to review cases on the merits as original proceedings. *People* v. *Null*, 233 P.3d 670, 675 (Colo. 2010). The Court exercises this authority "when no other adequate remedy is available," C.A.R. 21(a)(2), or "when a petition raises 'issues of significant public importance that [it] ha[s] not yet considered,'" *People In Interest of B.B.A.M.*, 453 P.3d 1161, 1166 (Colo. 2019) (quoting *Wesp* v. *Everson*, 33 P.3d 191, 194 (Colo. 2001)).

As to the specific personal jurisdiction ruling reached below, no other adequate remedy is available. Absent review by the Court, "defendants would be forced to litigate their case in Colorado and would be able to seek relief only after they have shouldered the very burden that they now challenge as improper." *State ex rel. Weiser* v. *JUUL Labs, Inc.*, 517 P.3d 682, 690 (Colo. 2022); *see also Goettman* v. *N. Fork Valley Rest.*, 176 P.3d 60, 64 (Colo. 2007). For that reason, the Court "often elect[s] to hear challenges to 'the exercise of personal jurisdiction by district courts over out-of-state defendants' because they 'raise the question whether it is unfair to force such a party to defend here at all.'" *Clean Energy Collective LLC* v. *Borrego Solar Sys., Inc.*, 394 P.3d 1114, 1116 (Colo. 2017)

(quoting *Magill* v. *Ford Motor Co.*, 379 P.3d 1033, 1036 (Colo. 2016)); *see also* *Keefe* v. *Kirschenbaum & Kirschenbaum, P.C.*, 40 P.3d 1267, 1270 (Colo. 2002).

The District Court's personal jurisdiction decision also raises issues "of significant public importance," *B.B.A.M.*, 453 P.3d at 1166, that this Court has not previously considered. This Court has never opined on whether a Colorado tribunal may exercise personal jurisdiction over an out-of-state defendant for its alleged contributions to interstate and international GHG emissions that are not traceable to conduct in Colorado. ExxonMobil's Petition therefore "not only concerns the rights of the parties in this case but also affects the rights of future litigants." *Magill*, 379 P.3d at 1036. If a Colorado tribunal can assert jurisdiction over ExxonMobil on the basis of the alleged local effects of global climate change, then the tribunal would have jurisdiction over countless others for alleged activities far beyond Colorado's borders.

The District Court's merits ruling on preemption reached below similarly raises issues of significant public importance that the Court has not yet considered. Respondents' lawsuit presents a question of extraordinary significance to the energy industry, the country, and the world. That question is whether federal law precludes the application of state law to claims seeking redress for alleged in-state injuries from the effects of interstate and international GHG emissions on the global climate.

As the fourth-largest oil-producing state in the country,[1] Colorado has a particular interest in the resolution of this question, especially since other state courts have already provided conflicting guidance on the matter. *Compare State ex rel. Jennings* v. *BP Am., Inc.*, 2024 WL 98888 (Del. Super. Ct. Jan. 9, 2024), *and Mayor & City Council of Baltimore* v. *BP P.L.C.*, No. 24-C-18-004219 (Md. Cir. Ct. July 10, 2024),[2] *with City and County of Honolulu* v. *Sunoco LP*, 537 P.3d 1173 (Haw. 2023). Energy companies that produce, sell, and market fossil fuels are facing dozens of lawsuits in state courts across the country seeking billions of dollars in damages for injuries allegedly caused by global climate change. In these cases, local governments such as Respondents seek damages allegedly attributable to defendants' conduct in other states and countries, and ultimately to impose liability on a select few energy companies for the consequences of worldwide GHG emissions, in stark conflict with the policies and priorities of the federal government and the basic principles of federalism. This lawsuit is one such case. Therefore, absent review by the Court, no adequate remedy is available.

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[1] *See Colorado State Energy Profile*, U.S. ENERGY INFORMATION ADMINISTRATION (June 20, 2024), https://www.eia.gov/state/print.php?sid=CO.

[2] Since *Mayor & City Council of Baltimore* v. *BP P.L.C.*, No. 24-C-18-004219 (Md. Cir. Ct. July 10, 2024), is not readily available electronically, it is included among the supporting documents as Exhibit 17.

## ISSUES PRESENTED

1. Whether a Colorado tribunal may exercise personal jurisdiction over an out-of-state defendant for its alleged contributions to interstate and international GHG emissions that are not traceable to conduct in Colorado.

2. Whether federal law precludes the application of state law to claims seeking redress for alleged in-state injuries from the effects of interstate and international GHG emissions on the global climate.

## FACTS NECESSARY TO UNDERSTAND THE ISSUES PRESENTED

Over the last half-century, the United States has sought to address climate change both nationally and internationally while balancing fundamental economic and social interests. For example, in 1978, Congress established a national climate program to improve the country's understanding of climate change through enhanced research, information collection and dissemination, and international cooperation. *See* 15 U.S.C. §§ 2901 *et seq*. In the Global Climate Protection Act of 1987, Congress recognized the uniquely international character of climate change and directed the Secretary of State to coordinate U.S. negotiations on this issue. *See* Pub. L. No. 100-204, 101 Stat. 1331, § 1103(c); *see also* 15 U.S.C. § 2901(5); *id.* § 2952(a). Congress's enactment of the Clean Air Act (the "CAA")—the primary federal statute governing emission standards—established a comprehensive

framework to promote and balance multiple objectives, deploying resources "to protect and enhance the quality of the Nation's air resources" and "promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1). Ultimately, Congress authorized the Environmental Protection Agency (the "EPA") to regulate air pollutants such as GHG emissions, and the EPA has exercised this authority on its own and with other agencies. *See id.* § 7601. Other laws, like the Energy Policy Act of 2005 and the Energy Independence and Security Act of 2007, sought further reductions of GHG emissions. *See id.* § 13389(c)(1); *id.* §§ 17001 *et seq.*

Reflecting the complex tradeoffs inherent in national energy policy, the federal political branches have sought to balance environmental regulation with economic and social interests. For example, in 1997, the U.S. Senate unanimously adopted a resolution urging the President not to sign the Kyoto Protocol if it would seriously harm the U.S. economy or did not sufficiently regulate other countries' emissions. *See* S. Res. 98, 105th Cong. (1997). Congress then enacted a series of laws effectively barring the EPA from implementing the Protocol absent Senate ratification. *See* Pub. L. No. 106-377, 114 Stat. 1441, 1441A-41 (2000); Pub. L. No. 106-74, 113 Stat. 1047, 1080 (1999); Pub. L. No. 105-276, 112 Stat. 2461, 2496 (1998).

As Respondents recognize, climate change is an important national and international issue. *See* Ex. 2 ¶ 85 (GHG emissions "contribute to changes in the *planet's* climate" (emphasis added)); *id*. ¶ 134 (fossil fuels impact "*global* average temperatures" (emphasis added)). Yet rather than allow policymakers to continue addressing worldwide climate change while balancing social, economic, and diplomatic concerns, Respondents seek to litigate this global issue at home. They have sued ExxonMobil and Suncor in Boulder District Court, purportedly under Colorado law. Their lawsuit seeks to hold ExxonMobil and Suncor responsible for their global production and sale of products fundamental to the international economy, as well as for their statements (or lack thereof) made outside of Colorado on widely discussed and publicly debated global policy and economic issues. *See id.*

Respondents claim that ExxonMobil and Suncor should be held liable for alleged nuisance, trespass, and unjust enrichment, as well as for alleged violation of the Colorado Consumer Protection Act (the "CCPA") and civil conspiracy. *Id.* ¶¶ 444–530. According to Respondents, ExxonMobil and Suncor must "share" past and future projected climate change expenditures incurred in Colorado because these companies allegedly "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." *Id.* ¶ 5.

Respondents' claims are based on the alleged local effects of interstate and international economic activities that impact the global environment. Their alleged chain of causation is attenuated at best. Respondents allege that, "[s]ince the 1960s, unchecked production, promotion, refining, marketing, and sale of fossil fuels" has "led to unchecked fossil fuel use," which has "caused an unprecedented rapid rise in the concentration of [GHGs] in the atmosphere." *Id.* ¶ 7. Respondents further allege that GHGs "have rapidly accumulated in the atmosphere," *id.* ¶ 127, resulting in "warming [of] the atmosphere and oceans," *id.* ¶ 125, and "alteration of the climate," *id.* ¶¶ 127, including rising "global average temperatures," *id.* ¶ 134. According to Respondents, impacts of climate change in Colorado include "increases in extreme hot summer days and increases in minimum nighttime temperatures, precipitation changes, larger and more frequent wildfires, increased concentrations of ground-level ozone, higher transmission of viruses and disease from insects, altered streamflows, bark beetle outbreaks, ecosystem damage, forest die-off, reduced snowpack, and drought." *Id*. ¶ 140.

Respondents allege that ExxonMobil is "a New Jersey corporation headquartered in Texas" and a "multinational, vertically integrated, fossil fuel

company" that has "[h]istorically" supplied only "10 percent of global oil demand." *Id.* ¶¶ 72–73, 81. Respondents allege generically that ExxonMobil has "substantial contacts" with Colorado, and that ExxonMobil "promoted, promotes and plans to continue promoting fossil fuel use" in Colorado and participated in efforts to mislead consumers in the State about "the existence of climate change and the risks of fossil fuel use." *Id.* ¶¶ 106, 107, 111. However, Respondents do not identify a single specific statement by ExxonMobil that was directed to Colorado, and their allegations regarding ExxonMobil's promotion of fossil fuels are geographically unspecific and principally involve third parties. *See, e.g.*, *id.* ¶¶ 412–29. Respondents otherwise allege that ExxonMobil: (i) has, at various points, been registered to do business and designated an agent for service of process in Colorado, *see id.* ¶¶ 105, 113, 115–16, 119; (ii) produced a "substantial amount" of natural gas and crude oil in Colorado, has a related interest in land in the Piceance Basin region, and, at an unspecified time and location, produced an unspecified volume of coal in Colorado, *see id.* ¶¶ 107–08; (iii) sells fossil fuels in Colorado, in part, through agreements with retail distributors at "approximately 50 Exxon-branded gas stations in Colorado," *see id.* ¶ 107; (iv) "built a town in Garfield County, Colorado in connection with its Colony Oil Shale Project," *id.*; (v) "sought to develop and has continuing plans to develop unconventional fossil fuels in Colorado," *id.* ¶ 109; *see*

*also id.* ¶ 114; and (vi) through ExxonMobil's "production and transportation activities," "emitted substantial amounts of GHGs in Colorado," *id.* ¶ 110. Respondents' allegations do not relate ExxonMobil's alleged Colorado contacts to the claims asserted here.

On December 9, 2019, ExxonMobil moved to dismiss the Amended Complaint for lack of personal jurisdiction, Ex. 3, and failure to state a claim, Ex. 6. Suncor joined the motion to dismiss for failure to state a claim, *see id.*, and Suncor Canada filed a separate motion to dismiss for lack of personal jurisdiction, Ex. 9. Respondents opposed these motions, Exs. 4, 7, 10, and ExxonMobil, Suncor, and Suncor Canada filed replies, Exs. 5, 8, 11. In 2023, following the Supreme Court decision in *Ford Motor* and the Second Circuit holding in *City of New York*, the parties filed supplemental briefs, Exs. 12, 13, as well as responses to those briefs, Exs. 14, 15. The District Court held oral argument on the pending motions on February 1, 2024. *See* Ex. 16.

On June 21, 2024, the District Court denied ExxonMobil's motion to dismiss for lack of personal jurisdiction. Ex. 1 at 25. Although the District Court concluded that it could not exercise general personal jurisdiction over ExxonMobil or Suncor Canada because neither entity was at home in Colorado or otherwise consented to jurisdiction in the forum, *id.* at 9–16, 26–28, the District Court found that specific

personal jurisdiction existed over ExxonMobil, *id.* at 25. On the other hand, the District Court granted Suncor Canada's motion to dismiss for lack of personal jurisdiction, reasoning that the Amended Complaint identified no Colorado business activity conducted by Suncor Canada—a Canadian corporation headquartered in Canada that is not registered to do business in Colorado—and "the fact that the Local Governments are located in Colorado and suffer injuries from global climate change . . . is in and of itself insufficient to confer specific jurisdiction." *Id.* at 30, 35. The District Court recognized that Respondents' "injury-based theory of personal jurisdiction would conceivably confer jurisdiction on every court to exercise limitless jurisdiction over every entity and individual generating emissions in the world." *Id.* at 30–31. Nevertheless, the District Court concluded that it could exercise specific personal jurisdiction over ExxonMobil based on the same theory. *Id.* at 19–25.

As to the motion to dismiss for failure to state a claim, the District Court concluded that the CCPA claim was time-barred and did not meet the heightened pleading standard of Colorado Rule of Civil Procedure 9(b), noting in particular that "[i]t is unclear which representations, if any, were directed to Colorado," and dismissed that claim without prejudice. *Id.* at 65, 77–78. Otherwise, the District Court sustained Respondents' claims. *Id.* at 60–76, 79–80. The District Court

concluded that Respondents' claims could proceed under state law because, in its view, the CAA did not specifically preempt—and federal law did not otherwise govern—these causes of action. *Id.* at 36–53.

## ARGUMENT AND AUTHORITY

The District Court fundamentally erred in two ways. First, the District Court wrongly concluded that specific personal jurisdiction existed over ExxonMobil. The District Court did so by misapplying *Ford Motor* and permitting Respondents' claims to proceed on a theory that the District Court itself recognized "would conceivably confer jurisdiction on every court to exercise limitless jurisdiction over every entity and individual generating emissions in the world." *Id.* at 30–31. Second, the District Court erroneously concluded that Respondents' claims could proceed under state law. In doing so, the District Court failed to apply the longstanding and controlling precedent that claims related to interstate and international emissions, such as those related to climate change, must be governed by federal law. For these reasons, the specific personal jurisdiction and preemption rulings reached below must be reversed.

### I. The District Court Wrongly Concluded That Specific Personal Jurisdiction Existed

A plaintiff seeking to invoke a Colorado court's jurisdiction over a non-resident defendant must comply with Colorado's long-arm statute and constitutional

due process. *See Keefe*, 40 P.3d at 1270–72. "Because Colorado's long-arm statute confers on courts 'the maximum jurisdiction permitted by the due process clauses of the United States and Colorado constitutions,' a plaintiff's ability to establish jurisdiction over a non-resident defendant necessarily depends on whether a Colorado court's exercise of that jurisdiction comports with due process." *JUUL Labs*, 517 P.3d at 690 (quoting *Align Corp.* v. *Boustred*, 421 P.3d 163, 167 (Colo. 2017)); *see* Colo. Rev. Stat. § 13-1-124. Thus, Colorado courts look to federal rules and decisions for guidance. *See, e.g.*, *Archangel Diamond Corp.* v. *Lukoil*, 123 P.3d 1187, 1194 (Colo. 2005).

There are two forms of personal jurisdiction: "general" and "specific." *Bristol-Myers Squibb Co.* v. *Superior Court*, 582 U.S. 255, 262 (2017) (quoting *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 564 U.S. 915, 919 (2011)). For general jurisdiction to be exercised, a defendant corporation must be "at home" in the state. *Magill*, 379 P.3d at 1037 (quoting *Daimler AG* v. *Bauman*, 571 U.S. 117, 127 (2014)). For specific jurisdiction, "a non-resident defendant must have 'purposefully directed' its activities at residents of the forum state and the plaintiff's injuries must 'arise out of or relate to' the defendant's forum-related activities." *JUUL Labs*, 517 P.3d at 691 (quoting *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 472 (1985)).

Here, the District Court concluded that general jurisdiction could not be established, but that it could exercise specific jurisdiction over ExxonMobil. Ex. 1 at 16, 25. In so concluding, the District Court did not properly apply the specific jurisdiction requirement that a plaintiff's injuries must arise out of or relate to a defendant's forum-related activities. Relying principally on the Supreme Court's decision in *Ford Motor*, the District Court highlighted ExxonMobil's alleged "extensive" contacts with Colorado, *id.* at 22, but failed to take account of the attenuated relationship between those alleged contacts and Respondents' claimed injuries. As such, the District Court misapplied the central holding of *Ford Motor*.

In *Ford Motor*, two individual consumers sued Ford in Montana and Minnesota, asserting product liability claims stemming from allegedly defective automobiles that Ford initially manufactured and sold elsewhere, but that were later used and malfunctioned in the forum States. 592 U.S. at 354–55. The Supreme Court concluded that, for purposes of specific jurisdiction, the plaintiffs' alleged injuries in Montana and Minnesota were sufficiently related to Ford's sales and marketing activities for the same model vehicles in the forum States. *Id*. at 363–66. Indeed, "[t]he plaintiffs' injuries[] at least arguably . . . were caused by[] the sale of the defective cars" in the forum. *Id.* at 377 (Gorsuch, J., concurring). The Supreme Court held that specific jurisdiction could exist where "a company like Ford serves

a market for a product in a State and *that* product causes injury *in the State*," *id.* at 355 (emphasis added), because "the product malfunctions there," *id.* at 363. *Ford Motor* thus conditioned the exercise of specific jurisdiction for in-state injuries on the *in-state* use and malfunction of the *same* product that was marketed in the forum. The Supreme Court was careful to warn that its holding "does not mean anything goes," as due process must "adequately protect defendants foreign to a forum." *Id.* at 362.

In reaching its conclusions in *Ford Motor*, the Supreme Court relied heavily on its prior decision in *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980), where it reasoned that, if a "manufacturer or distributor" makes "efforts . . . to serve, directly or indirectly, the market for its product" in certain States, "it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise *has there been the source of injury* to its owner or to others." *Ford Motor*, 592 U.S. at 363 (quoting *World-Wide Volkswagen*, 444 U.S. at 297) (emphasis added). Here, neither the events giving rise to Respondents' claims, nor Respondents' alleged injuries, resulted from—or relate to—the use and malfunction of fossil fuels *in the forum*. *See id.* at 354–55. And even if Respondents could allege that ExxonMobil's fossil fuel products were both used in and malfunctioned in

Colorado (which they cannot),[3] jurisdiction could exist only for claims for injuries allegedly related to that use and malfunction *in Colorado*. *See, e.g.*, *id.* at 361–363. But Respondents' claims are not so limited. Instead, Respondents seek sweeping, indeterminate damages for alleged injuries purportedly resulting from the combined effects of the combustion of fossil fuels and accumulation of GHG emissions *worldwide* by ExxonMobil, Respondents themselves, and countless others.

Indeed, even taking as true Respondents' allegations that ExxonMobil produced, sold, transported, franchised, and advertised fossil fuels in Colorado, *see, e.g.*, Ex. 2 ¶¶ 74–80, 107–22, 412–29, these activities had no more than an attenuated relationship to Respondents' alleged injuries, which are based on the alleged *local* effects of *global* conduct that allegedly caused or contributed to climate change.[4]

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[3] The products at issue did not malfunction at all. The release of carbon emissions is inherent in the combustion of fossil fuels by end users.

[4] The District Court assumed that ExxonMobil purposefully directed its activities at Colorado because ExxonMobil supposedly "acknowledged" as much in its motion to dismiss. Ex. 1. at 20. The opposite is true. In support of its motion to dismiss for lack of personal jurisdiction, ExxonMobil pointed out that many allegations regarding its Colorado contacts merely concerned its subsidiaries and that yet other allegations were geographically unspecific and principally concerned third parties. Ex. 3 at 12; Ex. 5 at 9–10, 14; *see also* Ex. 2 ¶¶ 107, 111–21, 412–29. ExxonMobil also pointed out that personal jurisdiction could not be based on its subsidiaries' forum contacts absent a "veil-piercing" analysis, which is necessary to impute a subsidiary's conduct to a parent. Ex. 3 at 12; Ex. 5 at 14; *see also Griffith*, 381 P.3d at 312–13; *Meeks* v. *SSC Colo. Springs Colonial Columns Operating Co.*, 380 P.3d 126, 128–29 (Colo. 2016).

That is because climate change is a *worldwide* phenomenon that "depend[s] on a global complex of geophysical cause and effect involving all nations of the planet." *See City of Oakland* v. *B.P. P.L.C.*, 2018 WL 3609055, at *3 (July 27, 2018).[5] "[T]here is no realistic possibility of tracing any particular alleged effect of global warming to any particular emissions by any specific person, entity, [or] group at any particular point in time." *Native Vill. of Kivalina* v. *ExxonMobil Corp.*, 663 F. Supp. 2d 865, 880 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012). Because "greenhouse gases once emitted become well mixed in the atmosphere," emissions from a particular state contribute no more to the effects of climate change in that state than emissions from anywhere else in the world. *City of New York*, 993 F.3d at 92 (quoting *Am. Elec. Power Co.* v. *Connecticut* ("*AEP*"), 564 U.S. 410, 422 (2011)) (cleaned up). Thus, Respondents' alleged injuries in Colorado could not have resulted from the *in-state* use, let alone malfunction, of the *same* fossil fuel products that ExxonMobil allegedly marketed in the State. *See Ford Motor*, 592 U.S. at 355, 363. The connection, if any, between ExxonMobil's in-state conduct and Respondents' claims involved the intervening activities of countless actors

[5] The District Court incorrectly found that *Oakland*, 2018 WL 3609055, was abrogated by *City of Oakland* v. *B.P. P.L.C.*, 969 F.3d 895 (9th Cir. 2020). In that case, however, the Ninth Circuit explicitly declined to reach the personal jurisdiction ruling of the lower court. *Oakland*, 969 F.3d at 911 n.13.

across the globe over at least a century that allegedly contributed to climate change through a complex geophysical web of cause and effect. ExxonMobil's alleged Colorado contacts, therefore, did not have—and could not have had—the requisite "substantial connection" to Respondents' alleged injuries in the Colorado, and Respondents' assertion of its claims was not reasonably foreseeable to ExxonMobil.[6] *Keefe*, 40 P.3d at 1271 (Colo. 2002) (quoting *Burger King Corp.*, 471 U.S. at 475); *see also Archangel*, 123 P.3d at 1194.

In concluding that it could exercise personal jurisdiction over ExxonMobil, the District Court emphasized that Petitioner's alleged Colorado contacts were "more extensive than Ford's contacts with Montana." Ex. 1 at 21; *see also id.* at 22. But voluminous forum contacts are not a sufficient basis for the exercise of specific personal jurisdiction. Due process does not permit a "sliding scale approach to specific jurisdiction" where "the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim."

[6] These standards are in line with *Ford Motor*'s admonition that "real limits" be placed on personal jurisdiction. 592 U.S. at 362. Indeed, following *Ford Motor*, courts applying the "relatedness" component of specific jurisdiction have demanded a "close connection" between a defendant's forum contacts and a plaintiff's alleged injuries. *Yamashita* v. *LG Chem, Ltd.*, 62 F.4th 496, 506 (9th Cir. 2023) (collecting cases); *see also Johnson* v. *TheHuffingtonPost.com, Inc.*, 21 F.4th 314, 320–21 (5th Cir. 2021); *Bernhardt* v. *Islamic Republic of Iran*, 47 F.4th 856, 866 (D.C. Cir. 2022); *Vapotherm Inc.* v. *Santiago*, 38 F.4th 252, 261 (1st Cir. 2022).

*Bristol-Myers Squibb*, 582 U.S. at 260 (internal quotation marks omitted). The Supreme Court has squarely rejected that approach as a "loose and spurious form of general jurisdiction." *Id.* at 264. Rather, no matter how extensive the forum activities, Respondents' claims still must arise from or relate to those alleged contacts. *See id.* at 265. And irrespective of the extent of ExxonMobil's alleged activities in Colorado, there is only an attenuated relationship between those alleged contacts and the local effects of global climate change, which result from the actions of billions of individuals and entities far beyond Colorado's borders. *See supra* at 20–22. It is not possible—much less plausible—that ExxonMobil's activities in Colorado could *alone* have caused Respondents' alleged injuries in Colorado; those local injuries necessarily resulted from the global activities of countless other actors. *See supra* at 20–22. By way of contrast, Ford's contacts with Minnesota and Montana could *alone* have caused the plaintiffs' injuries in those States. *See Ford Motor*, 592 U.S. at 366–67. Properly applied, then, the holding of *Ford Motor* does not support the exercise of specific personal jurisdiction over Petitioner; it forecloses it.[7]

[7] The District Court's reliance on *Honolulu*, *see* Ex. 1 at 24–25, is misplaced. The Hawaii Supreme Court's decision in that case was based on the same misapplication of *Ford Motor* as the District Court's decision here. In *Honolulu*, the Hawaii Supreme Court evaluated analogous claims and concluded that specific personal jurisdiction existed because "the alleged injury-causing products (oil and gas) were

In misapplying *Ford Motor*, the District Court not only failed to address the missing nexus between Petitioner's alleged contacts and Respondents' alleged injuries, but also failed to adequately address the underlying constitutional concerns that motivated the Supreme Court's decision. *See Ford Motor*, 592 U.S. at 360 ("These rules derive from and reflect two sets of values—treating defendants fairly and protecting 'interstate federalism.'"). Unlike the defendant in *Ford Motor*, ExxonMobil did not have "clear notice" that it could be subject to jurisdiction in Colorado for the alleged local effects of its activities across the globe over many decades, and the "relationship among the defendant, the forum, and the litigation" was no stronger in Colorado than in any other state. *See id.* at 368 (internal quotation marks omitted). If Colorado could assert jurisdiction over ExxonMobil on the basis of the alleged local effects of global climate change, then each state would have the power to regulate similar defendants far beyond its borders, resulting in the imposition of conflicting obligations on defendants. Fairness and federalism cannot

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marketed and sold in the forum state." 537 P.3d at 1191. But again, mere in-state marketing and sale of a product is insufficient to confer specific personal jurisdiction over similar conduct that took place outside of the state; there must be a substantial connection between that in-state conduct and the plaintiff's claims. *See supra* at 20. Here, there is no such substantial connection because Respondents' alleged injuries indisputably resulted almost entirely from conduct outside of Colorado. *See supra* at 19–22.

countenance such a result.[8] *See Bristol-Myers Squibb*, 582 U.S. at 263; *World-Wide Volkswagen*, 444 U.S. at 292.

The District Court's misapplication of *Ford Motor* is further exemplified by its inconsistent application of the Supreme Court's decision in assessing whether it could properly exercise specific jurisdiction over ExxonMobil and Suncor Canada.

In correctly holding that personal jurisdiction did not exist over Suncor Canada, the District Court recognized that there must be "a substantial nexus between the Local Governments' claims and Suncor Canada's activities in Colorado." Ex. 1 at 29 (discussing *Ford Motor*, 592 U.S. at 359, and *Archangel*, 123 P.3d at 1194). In considering whether this standard had been met as to Suncor Canada, the District Court observed that "the Amended Complaint does not identify

[8] The Court of Appeals' decision in *Etchieson* v. *Central Purchasing, LLC*, 232 P.3d 301 (Colo. App. 2010), *see* Ex. 1 at 22, does not support a different result. In that case, the Colorado Court of Appeals held that a manufacturer was subject to specific jurisdiction for selling products in the forum even though a different model of the product injured plaintiff. *Etchieson*, 232 P.3d at 308. Here, Respondents' claims concern undifferentiated worldwide conduct going back decades that allegedly contributed to global effects that cannot be linked to the use of any specific product in Colorado. *See supra* at 19–22. In any event, *Etchieson* pre-dated *Ford Motor*, which relied on the fact that the defendant advertised, sold, and serviced the *same* car models that allegedly injured plaintiffs in the forum states. 592 U.S. at 365; *see also Bristol-Myers*, 582 U.S. at 265 ("'[A] defendant's relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction.'").

any Colorado business activity conducted by Suncor Canada itself," nor does it allege "that Suncor Canada expressly aimed the harm at Colorado." *Id.* at 30. The District Court therefore concluded that no substantial nexus could be established because "the fact that [Respondents] are located in Colorado and suffer injuries from global climate change . . . *is in and of itself insufficient to confer specific jurisdiction* over Suncor Canada." *Id.* at 30 (emphasis added). The District Court further recognized that "[t]his injury-based theory of personal jurisdiction would conceivably confer jurisdiction on every court to exercise limitless jurisdiction over every entity and individual generating emissions in the world." *Id.* at 30–31.

However, in assessing the claims against Petitioner, the District Court relied principally on Petitioner's alleged "extensive" contacts with the forum. *Id.* at 22. The District Court failed to address Petitioner's argument that those alleged contacts, no matter how extensive, necessarily lack any substantial nexus to Respondents' alleged injuries in light of the nature of the claims, which are premised on interstate and international emissions and the undifferentiated conduct of billions of people and entities around the globe. *See* Ex. 12 at 9–10. Relatedly, the District Court misconstrued Petitioner's argument below as being premised on the notion that Petitioner is "too big to be sued in Colorado." Ex. 1 at 22. Petitioner never made that argument. Instead, Petitioner's argument is that it cannot be lawfully subject to

specific personal jurisdiction in Colorado for claims premised on the purported local effects of global climate change resulting from the aggregated conduct of countless actors outside Colorado. *See* Ex. 12 at 9–10. As with Suncor Canada, specific personal jurisdiction cannot be exercised over ExxonMobil in Colorado for these claims.

## II. The District Court Erroneously Concluded That Respondents' Claims Could Proceed under State Law

For decades, the Supreme Court "has recognized the need and authority in some limited areas to formulate what has come to be known as 'federal common law.'" *Tex. Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981). These areas "are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts." *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 504 (1988).

One area where federal common law historically applied is in cases "deal[ing] with air and water in their ambient or interstate aspects." *Illinois* v. *City of Milwaukee* ("*Milwaukee I*"), 406 U.S. 91, 103 (1972); *see also Int'l Paper Co.* v. *Ouellette*, 479 U.S. 481, 490 (1987). Such cases include lawsuits involving interstate and international GHG emissions. *See AEP*, 564 U.S. at 421; *see also Native Vill. of Kivalina* v. *ExxonMobil Corp.*, 696 F.3d 849, 853–54 (9th Cir. 2012).

That is because claims concerning interstate and international GHG emissions implicate federal interests in setting national and international energy, environmental, and security policies, such as balancing "what amount of carbon-dioxide emissions is unreasonable" given what is "practical, feasible, and economically viable." *AEP*, 564 U.S. at 421–22, 427–28; *see also California* v. *Gen. Motors Corp.*, 2007 WL 2726871, at *9 (N.D. Cal. Sept. 17, 2007). Applying federal law to claims based on interstate GHG emissions is necessary to ensure a uniform standard of decision on these global issues. *See Milwaukee I*, 406 U.S. at 105 n.6; *Ouellette*, 479 U.S. at 495–96.

The Supreme Court has also held that the CAA and its implementing regulations "displace any federal common-law right" to impose liability for interstate GHG emissions. *AEP*, 564 U.S. at 424; *see also Kivalina*, 696 F.3d at 857. Nevertheless, where "federal common law exists, it is because state law cannot be used," *City of Milwaukee* v. *Illinois* ("*Milwaukee II*"), 451 U.S. 304, 313 n.7 (1981), and displacement by federal statute does "nothing to undermine that result," *Illinois* v. *City of Milwaukee* ("*Milwaukee III*"), 731 F.2d 403, 410 (7th Cir. 1984). In other words, claims based on interstate GHG emissions cannot proceed under state law, even if federal common law was subsequently displaced by the CAA. *City of New York*, 993 F.3d at 98. That these areas were once the province of federal common

law merely confirms that these are areas of uniquely federal interest as to which "state law cannot be used." *Milwaukee II*, 451 U.S. at 313 n.7.

State law is likewise incompetent to address claims involving international GHG emissions. "Our system of government . . . imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." *Zschernig* v. *Miller*, 389 U.S. 429, 442–43 (1968) (Stewart, J., concurring) (internal quotation marks omitted); *see also Am. Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 418 (2003). No state may dictate the federal government's "relationships with other members of the international community." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 425 (1964). Thus, "[state] regulations must give way if they impair the effective exercise of the Nation's foreign policy," *Zschernig*, 389 U.S. at 440, and "state action with more than incidental effect on foreign affairs is preempted, even absent any affirmative federal activity in the subject area of the state law, and hence without any showing of conflict," *Garamendi*, 539 U.S. at 418. Put simply, foreign affairs "must be treated exclusively as an aspect of federal law." *Sabbatino*, 376 U.S. at 425. For this reason, only federal law can apply to claims based on international GHG emissions, as "foreign policy concerns foreclose" the application of state law to such claims. *City of New York*, 993 F.3d at 101.

In resolving essentially the same claims as those asserted here, the Second Circuit recently addressed the interplay between federal common law, the CAA, and claims involving interstate and international GHG emissions. In *City of New York*, New York City sued various fossil fuel producers over the alleged effects of climate change in the City. 993 F.3d at 86. Among other things, New York City alleged that "the Producers," including ExxonMobil, "have known for decades that their fossil fuel products pose a severe risk to the planet's climate," and that "despite that knowledge, the Producers downplayed the risks and continued to sell massive quantities of fossil fuels, which has caused and will continue to cause significant changes to the City's climate and landscape." *Id.* at 86–87. On review of the motion to dismiss, the Second Circuit concluded that federal common law governed claims involving interstate and international GHG emissions and that the CAA displaced federal common law to the extent such claims concerned domestic emissions.[9] *Id.* at 91, 95. Critically, the Second Circuit held that the CAA's displacement of the relevant federal common law *did not mean that state law could govern the City's*

[9] The Second Circuit concluded that federal common law continued to govern claims that concerned foreign emissions, but that such claims could not proceed because "federal courts must proceed cautiously when venturing into the international arena so as to avoid unintentionally stepping on the toes of the political branches." 993 F.3d at 100–02 (citing *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108, 116 (2013), and *Jesner* v. *Arab Bank, PLC*, 138 S. Ct. 1386, 1403 (2018)).

*claims*. State law claims cannot "snap back into action" following the CAA's displacement, the Second Circuit explained, because "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." *Id.* at 98. The Second Circuit thus followed the Supreme Court's longstanding precedent, holding that state law cannot apply to claims involving interstate or international GHG emissions. *Id.* at 95. State courts have followed suit, adopting this longstanding precedent to dismiss analogous claims under state law. *See Jennings*, 2024 WL 98888, at *8–9; *Baltimore*, No. 24-C-18-004219, slip op. at 10–19.

Rather than faithfully applying this longstanding precedent, the District Court improperly relied on an ordinary preemption analysis to determine whether the CAA specifically preempted Respondents' claims. Ex. 1 at 41–43, 46–53. But the ordinary presumption against preemption of state laws does not apply in the context of Respondents' climate change claims. That is because regulation of GHG emissions "is hardly a field which the States have traditionally occupied . . . such as to warrant a presumption against finding federal pre-emption of a state-law cause of action." *Buckman Co.* v. *Respondents' Legal Comm.*, 531 U.S. 341, 347–48 (2001). To the contrary, federal common law has traditionally governed claims involving

GHG emissions, and application of state law *always* remains inappropriate for such claims. *See Milwaukee II*, 451 U.S. at 313 n.7; *City of New York*, 993 F.3d at 98; *Milwaukee III*, 731 F.2d at 410. Thus, the relevant question after the displacement of federal common law is not whether the CAA specifically preempted Respondents' claims, but whether the federal statute authorizes the suit to proceed under state law. *See Ouellette*, 479 U.S. at 497 (analyzing whether the Clean Water Act "allow[ed] States" to impose effluent standards on their own point sources after the Clean Water Act displaced the federal common law); *see also Baltimore*, No. 24-C-18-004219, slip op. at 9–10, 14 (rejecting the plaintiff's argument that the CAA has to specifically preempt claims involving foreign emissions because "if Congress fails to act or does not provide a cause of action, state law is not presumptively competent to address this issue").

The District Court identified no provision of the CAA that could be interpreted to authorize application of state law to claims involving interstate or international GHG emissions. Instead, the District Court improperly cabined the longstanding precedent that federal law governs such claims to cases involving efforts by one state to abate or enjoin pollution from another state. Ex. 1 at 43. According to the District Court, Respondents' claims are governed by state law because they do not seek to regulate emissions as part of an interstate pollution dispute, but instead seek

compensation for Petitioner's global production and promotion of fossil fuels. *Id.* at 37–39, 43. The District Court's analysis was wrong for multiple reasons.

*First*, there is no basis for treating out-of-state pollution claims by municipalities against private parties differently than pollution disputes between two states for purposes of assessing preemption. Courts have repeatedly applied federal common law to suits in which neither a state nor the federal government was a party. *See, e.g.*, *Boyle*, 487 U.S. at 511; *Helfrich* v. *Blue Cross & Blue Shield Ass'n*, 804 F.3d 1090, 1095–1104 (10th Cir. 2015). Indeed, if anything, it is even more improper for two municipalities—in comparison to a state with sovereignty—to invoke state law in an effort to address issues stemming from interstate and international emission.

*Second*, the District Court erred in taking at face value Respondents' assertion that their claims do not seek to regulate interstate and international emissions. *See City of Boulder* v. *Pub. Serv. Co. of Colo.*, 420 P.3d 289, 294 (Colo. 2018) ("[W]e must look to the substance, not the form, of [the] complaint."). Respondents' allegations make clear that this is exactly what they seek to do. Respondents accuse ExxonMobil and Suncor, for example, of engaging in "unchecked production, promotion, refining, marketing and sale of fossil fuels," as well as "unabated" fossil-fuel activities, and warn that "[d]efendants plan to increase their fossil fuel activities

in the future." Ex. 2 ¶¶ 7, 408; *see also id.* ¶¶ 16, 323, 330, 346, 363, 376, 379. That Respondents seek substantial monetary relief only bolsters the conclusion that they seek to regulate interstate and international emissions.[10] *See id.* ¶¶ 531–40; *see also*

[10] At points, even the District Court decision appeared to recognize that Respondents target interstate and international emissions. *Compare* Ex. 1 at 43 ("Here, the Local Governments' claims do not seek to regulate or enjoin GHG emissions."); *with id.* at 5 ("The Local Governments allege that Colorado's climate has been altered. In particular, they assert that the combustion of fossil fuels has increased the atmospheric concentration of greenhouse gases ('GHGs'), mostly carbon dioxide, to levels unseen in human history."); *id.* at 64 ("Further, the alleged tortious activity, along with an ongoing increase in GHG emissions, is continuing to occur."); *and id.* at 73 ("The Amended Complaint alleges that fossil fuel combustion is responsible for the majority of emissions that have caused GHG concentrations to reach hazardous levels, thus implicitly acknowledging it is use of fossil fuels by third parties that has caused the alleged damage."). The District Court likewise appeared to recognize that Respondents' claims necessarily place the District Court in the position of a regulator under the guise of state tort law. *Compare id.* at 38 ("The Local Governments are not asking this Court to weigh the costs and benefits of fossil fuels nor revisit policy decisions made by the federal government for purposes of controlling or regulating emissions."); *with id.* at 55–56 ("To the extent the public nuisance claim requires a balancing of the social utility of the action with the harm caused by the action, this balancing is performed in any public nuisance action, and tort law provides the standards for the jury to apply."); *id.* at 69 ("To prevail on either the public or private nuisance claims, the Local Governments will be required to prove that the Energy Companies' conduct was unreasonable. . . . To do so, they must show that the gravity of the harm outweighs the utility of the actor's conduct, or that the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible."); *and id.* at 70–71 ("Under the nuisance principles set forth in the Restatement, if interference with property is found, the fact finder must determine whether it is reasonable for the Energy Companies to cause harm in the local communities without compensating the communities for the harms caused. . .

*City of New York*, 993 F.3d at 92. As the Supreme Court has long recognized, "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) (cleaned up) (quoting *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959)). Plainly, "[a]rtful pleading cannot transform the . . . complaint into anything other than a suit over global [GHG] emissions." *City of New York*, 993 F.3d at 91; *see also Baltimore*, No. 24-C-18-004219, slip op. at 11 ("The explanation by [Plaintiff] that it only seeks to address and hold Defendants accountable for a deceptive misinformation campaign is simply a way to get in the back door what they cannot get in the front door.").[11]

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. In determining the utility of conduct that causes the intentional invasion, the fact finder may consider the impracticability of preventing or avoiding the invasion.").

[11] The Maryland Circuit Court's decision in *Baltimore* and the Delaware Superior Court's decision in *Jennings* are instructive. In *Baltimore*, the Maryland Circuit Court rejected the plaintiff's contentions "that it does not seek to directly penalize emitters; that it seeks damages rather than abatement; and that its claims will not result in the regulation of global emissions." No. 24-C-18-004219, slip op. at 11. The Circuit Court found that, despite the plaintiff's "artful" pleading, its contentions did not align with "the goal of its complaint," which was "entirely about addressing the injuries of global climate change and seeking damages for such alleged injuries." *Id.* at 10–11. The Circuit Court thus dismissed the plaintiff's claims as "preempted by federal common law (and the CAA)." *Id.* at 12. Likewise, in *Jennings*, the Delaware Superior Court held that claims ostensibly predicated on allegedly misleading marketing but "seeking damages for injuries resulting from out-of-state

The District Court's flawed conclusion that state law can apply to Respondents' claims is based on a misapplication of inapposite federal cases considering the distinct issue whether federal courts have subject matter jurisdiction over those and similar claims. *See* Ex. 1 at 45–46. *Board of County Commissioners of Boulder County* v. *Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238 (10th Cir. 2022), for example, addressed the question of federal subject matter jurisdiction and had no occasion to elaborate on the appropriate preemption analysis. *City of Hoboken* v. *Chevron Corp.*, 45 F.4th 699 (3d Cir. 2022), *Mayor and City Council of Baltimore* v. *BP P.L.C.*, 31 F.4th 178 (4th Cir. 2022), *Minnesota* v. *American Petroleum Institute*, 63 F.4th 703 (8th Cir. 2023), and *County of San Mateo* v. *Chevron Corp.*, 32 F.4th 733 (9th Cir. 2022), similarly turned on the application of the well-pleaded complaint rule, or the notion that federal jurisdiction exists only when a federal question appears on the face of the plaintiff's complaint. *See Baltimore*, No. 24-C-18-004219, slip op. at 13–14 ("[T]he Fourth Circuit decision would not preclude this court from holding that Baltimore's claims would/could be preempted by federal law" because "the question before the Fourth Circuit was whether Defendants'

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or global greenhouse emissions and interstate pollution" are "preempted" by federal law and "beyond the limits of [state] common law." 2024 WL 98888 at *9. The Superior Court dismissed such claims and allowed to proceed only claims based on in-state emissions. *Id.* at *24.

preemption defenses could create federal question jurisdiction in light of the well-pleaded complaint rule."). And *Rhode Island* v. *Shell Oil Products Co., L.L.C.*, 35 F.4th 44 (1st Cir. 2022), held that claims did not arise under federal common law because the defendants failed to demonstrate the requisite conflict between federal interests and the application of state law. But here, Defendants need not satisfy the test for "creat[ing]" new federal common law, *Baltimore*, 31 F.4th at 202, because the Supreme Court has already held, in "a mostly unbroken string of cases" dating back "over a century," that federal common law governs "disputes involving interstate air or water pollution." *City of New York*, 993 F.3d at 91. Under this long line of cases, state law thus cannot govern Respondents' claims.[12]

[12] As with the personal jurisdiction analysis, the District Court's reliance on *Honolulu* in the preemption context, *see* Ex. 1 at 46–53, is misplaced because that decision was based on the same flawed analysis as the District Court decision. In *Honolulu*, the Hawaii Supreme Court held that, following the CAA's displacement of federal common law, it was required to analyze the "preemptive effect of only the CAA" and that, in any event, "federal common law . . . governed transboundary pollution abatement and damages suits, not . . . tortious marketing and failure to warn claims." 537 P.3d at 1195. But again, displacement of federal common law merely shifts the burden to the party contesting preemption to show that the CAA preserves the relevant state law cause of action, *see supra* at 28–29, 30–31, 31–32, and the mere framing of allegations in terms of marketing or failure to warn does nothing to upset the application of federal common law, *see supra* at 33–35. Moreover, the Hawaii Supreme Court's analysis was premised on the allegation that "the source of [p]laintiffs' alleged injury is [d]efendants' allegedly tortious marketing conduct, not pollution traveling from one state to another." *Honolulu*, 537 P.3d at 1201. Here, Respondents' claims are not limited to allegedly tortious marketing, but instead,

## CONCLUSION

For the reasons detailed above, Petitioner respectfully requests that the Court issue a rule to show cause why the relief requested in this Petition should not be granted.

expressly purport to encompass the mere production and sale of fossil fuel products. *See supra* at 33–35.

## LIST OF SUPPORTING DOCUMENTS

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| **Exhibit 1** | June 21, 2024 District Court Order |
| **Exhibit 2** | Amended Complaint |
| **Exhibit 3** | ExxonMobil's Brief in Support of Its Motion to Dismiss for Lack of Personal Jurisdiction |
| **Exhibit 4** | Respondents' Opposition to ExxonMobil's Motion to Dismiss for Lack of Personal Jurisdiction |
| **Exhibit 5** | ExxonMobil's Reply in Further Support of Its Motion to Dismiss for Lack of Personal Jurisdiction |
| **Exhibit 6** | ExxonMobil's and Suncor's Brief in Support of the Motion to Dismiss for Failure to State a Claim |
| **Exhibit 7** | Respondents' Opposition to the Motion to Dismiss for Failure to State a Claim |
| **Exhibit 8** | ExxonMobil's and Suncor's Reply in Further Support of the Motion to Dismiss for Failure to State a Claim |
| **Exhibit 9** | Suncor Canada's Brief in Support of Its Motion to Dismiss for Lack of Personal Jurisdiction |
| **Exhibit 10** | Respondents' Opposition to Suncor Canada's Motion to Dismiss for Lack of Personal Jurisdiction |
| **Exhibit 11** | Suncor Canada's Reply in Further Support of Its Motion to Dismiss for Lack of Personal Jurisdiction |

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| **Exhibit 12** | ExxonMobil's and Suncor's Supplemental Brief in Support of the Motion to Dismiss for Failure to State a Claim and ExxonMobil's Motion to Dismiss for Lack of Personal Jurisdiction |
| **Exhibit 13** | Respondents' Supplemental Brief in Opposition to the Motion to Dismiss for Failure to State a Claim and ExxonMobil's Motion to Dismiss for Lack of Personal Jurisdiction |
| **Exhibit 14** | Respondents' Response to ExxonMobil's and Suncor's Supplemental Brief |
| **Exhibit 15** | ExxonMobil's and Suncor's Response to Respondent's Supplemental Brief |
| **Exhibit 16** | Transcript of February 1, 2024 District Court Proceedings |
| **Exhibit 17** | *Mayor and City Council of Baltimore* v. *BP P.L.C.*, No. 24-C-18-004219 (Md. Cir. Ct. July 10, 2024) |

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## CERTIFICATE OF SERVICE

I certify that, on July 16, 2024, a true and correct copy of this **Petition for Rule to Show Cause Under Rule 21** was filed and served via the manner indicated below:

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| Clerk of the Boulder County District Court<br>The Honorable Robert R. Gunning<br>District Court Judge, Boulder County<br>1777 Sixth Street<br>Boulder, CO 80302 | ( ) First Class Mail<br>( ) Hand Delivery<br>( ) Overnight Delivery<br>(x) Colorado Courts E-Filing<br>( ) Email |
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*/s/ Paul D. Bryant*
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