No. 22O158

In the Supreme Court of the United States

STATE OF ALABAMA, ET AL.,
Plaintiffs,
v.

STATE OF CALIFORNIA, ET AL.,
Defendants.

On Motion for Leave to File Bill of Complaint

BRIEF OF AMICUS CURIAE CONSUMERS' RESEARCH, INC. IN SUPPORT OF MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae Consumers' Research, Inc., is an independent, educational 501(c)(3) nonprofit organization whose mission is to increase consumers' knowledge and understanding of relevant issues, policies, products, and services and to promote the freedom to act on that knowledge and understanding. Consumers' Research, https://consumersresearch.org/. Consumers' Research represents the interests of household consumers in all areas of consumer spending, including energy costs.

Consumers' Research is one of America's oldest consumer protection organizations. Since 1929, it has been asking the foundational question: Who — or what — best serves consumer wellbeing? Consumers' Research, *History*, https://consumersresearch.org/history/. In their book *100,000,000 Guinea Pigs*, founders Frederick J. Schlink and Arthur Kallet wrote about a need to provide "the consumer some manner of defense against" the shortcomings of the 1930s-era consumer education. *Id.* For decades, Schlink continued this pursuit at the helm of Consumers' Research. In 1981, newly appointed editor M. Stanton Evans helped guide Consumers' Research through its expansion from a product-focused organization to one that also considers the effects that laws, regulations, and government

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[1] Pursuant to Rule 37.2, the undersigned certifies that counsel for Plaintiffs and Defendants was provided and received notice of intent to file this amicus brief on July 14, 2024, and consented to that notice as being sufficient.

Pursuant to Rule 37.6, the undersigned certifies that no party's counsel authored this brief in whole or in part, and only amicus made a monetary contribution to this brief's preparation and submission.

programs have on consumers. Consumers' Research, *M. Stanton Evans*, https://consumersresearch.org/m-stanton-evans/.

Consumers' Research continues that legacy today by educating on pro-consumer policies and issues. This case between Plaintiff and Defendant States is of particular importance to Consumers' Research because of the *necessary* role that energy plays in all aspects of consumption, and the reduced supply and higher prices for energy costs that that would befall consumers if certain states were allowed to use their state courts to impose huge fines and conduct changes on energy companies for selling fossil-fuel-based energy products in other states.

SUMMARY OF ARGUMENT

In a twist on an old slogan, Defendant States have decided to "Think Globally, Sue Locally." But in doing so they have "violate[d] fundamental principles that are protected by one or more constitutional provisions or by the very structure of the federal system that the Constitution created." *See Mallory v. Norfolk S. Ry. Co.,* 600 U.S. 122, 150 (2023) (Alito, J., concurring in part). To stop these violations, Plaintiff States have brought a complaint in this Court that raises critically important issues, and this Court should grant leave to file it.

The Complaint contains three counts, which allege constitutional and statutory violations relating to horizontal separation of powers, exclusive federal authority over interstate emissions, and the Commerce Clause, as well as a fourth count for declaratory relief. *See* Bill of Complaint ¶¶ 85–99. Consumers' Research respectfully urges the Court to grant Plaintiffs' Motion as to all of these counts, and

it files this brief to elaborate on considerations that are particularly relevant to the Commerce Clause.

Defendant States' climate suits violate the Commerce Clause for multiple reasons. In addition to improperly regulating extraterritorially (which is itself sufficient to violate the Constitution), the suits impose burdens on interstate commerce that are clearly excessive in relation to the putative local benefits. *See, e.g.*, *South Dakota v. Wayfair*, 585 U.S. 162, 173 (2018) (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). This fact is powerful evidence of both an improper discriminatory motive against out-of-state energy sources and a violation of the *Pike* balancing test, even if Defendant States' actions were considered facially non-discriminatory. *See Pike*, 397 U.S. at 142. And the stark imbalance between interstate burdens and local benefits is a recurring issue affecting states, as certain states and localities unlawfully attempt to leverage their jurisdiction or geography to hamper or even destroy the economic viability of critical resources (fossil fuels) that consumers throughout the country depend on every day. *See, e.g.*, *Montana v. City of Portland*, No. 3:23-cv-00219-YY, 2024 WL 3326230, at *1–2 (D. Or. July 5, 2024) (suit by Montana against the City of Portland over city-enacted limits on bulk fossil fuel terminals).

The heavy burdens on interstate commerce from Defendant States' actions (if allowed to continue) have been well documented in a recent cost-benefit study, which suggests that the "central estimate" of the costs of implementing the net zero transition globally is 3.8–5.6% of gross domestic product (GDP) by the start of the next century, and the actual costs are likely to be even higher. *See* Part I(B), *infra*. These huge costs over coming decades also severely undercut one of

Defendant States' central premises—that fossil fuel companies have been engaged in a conspiracy to prevent alternatives from coming online. If these new technologies require tens of trillions of dollars in spending to implement, it is fanciful to claim that 1) they would have feasibly been used decades ago but for fossil fuel companies' actions to continue selling their own products, and 2) the only viable energy technologies at the time (fossil fuels) constituted a public nuisance. In fact, the federal government has authorized trillions in tax credits, showing the massive cost. *See* Ryan Sweezey, *The indefinite Inflation Reduction Act: will tax credits for renewables be around for decades?*, https://www.woodmac.com/news/opinion/IRA-tax-credits-for-renewables/.

The putative local benefits from holding energy companies liable (both financial and environmental) suffer from critical problems that render them minimal. This amicus brief focuses on two. The first is the claimed benefit of reducing financial harm to companies and institutions from so-called physical and transition risk. This claim is far overblown, as demonstrated by a recent Federal Reserve bank stress test that shows, even under extreme scenarios, the probability of default on loans increasing by only half a percentage point or less. In contrast, federal bank stress tests involving *true* financial stresses, such as a severe recession, have resulted in probabilities of default jumping by 20 to 40 times that amount or more, leading to hundreds of billions in losses. *See* Part I(C)(1), *infra*. This additional risk does not rise to the level of materiality for the studied banks, and therefore mitigating this risk is a minimal benefit.

Second, as to claimed environmental benefits, the ineffectiveness of a few states' policies in reducing

overall global warming necessarily defeats any claimed benefits. Emissions reductions are more than offset by China and India's continued emissions. And countries have a massive gap between pledges and reality, dwarfing any overall emissions reductions that would result from Defendants forcing fossil fuel companies to pay huge fines and otherwise implement conduct changes. *See* Part I(C)(2), *infra*. In fact, the Deputy U.S. Secretary of Energy was unable to say in Senate testimony if spending *$50 trillion* for the United States to become carbon neutral by 2050 would have any particular effect on reducing world temperatures. Instead, he argued that even though the United States only represents a small fraction of global emissions, "every country around the world needs to get its act together." *See* Part I(C)(2), *infra*.

In sum, this case warrants an exercise of the Court's original jurisdiction. The Court regularly exercises such jurisdiction to hear controversies between states over access to limited resources, particularly in the water context. *See, e.g.*, *Mississippi v. Tennessee*, 595 U.S. 15 (2021); *Florida v. Georgia*, 592 U.S. 433 (2021). Here, Plaintiffs complain that Defendants are using state-court lawsuits to directly regulate and improperly limit their access and their citizens' access to an equally important and necessary resource—fossil fuels. This Court concluded in another original jurisdiction case sounding in the Commerce Clause that regulations implicating "a natural resource of great value primarily carried into other States for use" presented a case of sufficient "seriousness and dignity" to warrant exercise of original jurisdiction. *Wyoming v. Oklahoma*, 502 U.S. 437, 451, 453–54 (1992). So too here. This Court should grant Plaintiffs' Motion.

ARGUMENT

I. The Clearly Excessive Burdens on Interstate Commerce Compared to the Local Benefits Support Plaintiffs' Commerce Clause Claim

A. The Court May Consider Burdens and Benefits as Part of Its Commerce Clause Analysis and Whether to Hear This Case

Plaintiff States' Complaint identifies multiple constitutional violations inherent in Defendant States' use of state-court lawsuits to fine or fundamentally transform the fossil fuel industry, including a significant and serious violation of the Commerce Clause. *See* U.S. Const. art. I, § 8, cl. 3. As Plaintiffs explain, "[t]his is not a case where the state laws at issue have mere 'ripple effects beyond their borders.'" Plaintiffs' Brief in Support of Motion for Leave to File Bill of Complaint at 22 (quoting *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 390 (2023)). Thus, while not required to find a violation, the Court may consider whether "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits," *Pike*, 397 U.S. at 142, as both an additional basis to rule for Plaintiffs and to ascertain the seriousness and dignity of Plaintiffs' claims.

Justice Alito recently stated that a "State's assertion of jurisdiction over lawsuits with no real connection to the State may violate fundamental principles that are protected by one or more constitutional provisions or by the very structure of the federal system that the Constitution created." *Mallory*, 600 U.S. at 150 (Alito, J., concurring in part). He further recognized that "the so-called dormant Commerce Clause" is one such "appropriate home for

these principles." *Id.* This reasoning is applicable to Defendants' state-court lawsuits, which are aimed at fundamentally transforming the national fossil fuel industry, so that "a small gas station in rural Alabama could owe damages to the people of Minnesota simply for selling a gallon of gas." Plaintiffs' Brief in Support of Motion for Leave to File Bill of Complaint at 2. If these suits are successful, Defendant States will be directly regulating extraterritorially, so that consumers across the country will no longer have access to affordable and reliable fossil fuels that are fundamental to everyday life.

Defendant States' actions are also an improper end-run around Congress, as they try to use their state courts to implement policies that Congress has long considered and wisely refused to adopt. This Court has stated that "a regulation in restraint of commerce among the States … is a usurpation of the power conferred by the Constitution upon the Congress." *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 344 (2008) (quoting *Walling v. Michigan*, 116 U.S. 446, 455 (1886)). Defendants' exercise of state judicial power squarely implicates the Commerce Clause for this reason as well.

The Commerce Clause is implicated here for another equally important reason: by targeting fossil fuels as a public nuisance, Defendant States' lawsuits also implicate interstate transportation. Trains, planes, cars, trucks, and boats all require fossil fuels to operate. And, for example, the net zero aviation standards for transport include steep reductions to "reduce passenger aviation demand" and require replacing regional flights and keeping air travel for business purposes and long-haul flights for leisure at 2019 levels. International Energy Agency, *Net Zero by*

2050 at 69, 88 (2021), https://iea.blob.core.windows.net/assets/deebef5d-0c34-4539-9d0c-10b13d840027/NetZeroby2050-ARoadmapfortheGlobalEnergySector_CORR.pdf. In *National Pork Producers Council v. Ross*, multiple Justices agreed that "cases associated with [*Pike*] have expressed special concern with certain state regulation of the instrumentalities of interstate transportation," 598 U.S. at 380 (plurality), or, stated differently, those cases "implicating the 'instrumentalities of interstate transportation.'" *Id.* at 395 (Roberts, C.J., joined by Alito, Kavanaugh, and Jackson, JJ., concurring in part and dissenting in part) (quoting plurality opinion at 379 n.2). Although this circumstance is not necessary for *Pike* balancing to apply, the fact that it does exist here further shows the importance of the Commerce Clause claim presented in the Plaintiff States' Complaint.

Finally, the *Pike* balancing test was not otherwise abrogated in *Ross*. A majority of the Court reiterated that *Pike* balancing is appropriate for claims alleging a substantial burden on interstate commerce under the dormant Commerce Clause. *See id.* at 391–93 (Sotomayor, J., joined by Kagan, J., concurring in part), 394–403 (Roberts, C.J., joined by Alito, Kavanaugh, and Jackson, JJ., concurring in part and dissenting in part). Further, a majority of the Justices in *Ross* agreed that it is indeed "possible to balance benefits and burdens under the approach set forth in *Pike*," and that "even nondiscriminatory burdens on commerce may be struck down on a showing that those burdens clearly outweigh the benefits of a state or local practice." *Id.* at 395–97 (Roberts, C.J., joined by Alito, Kavanaugh, and Jackson, JJ., concurring in part and dissenting in part) (quoting *Davis*, 553 U.S.

at 353); *see also Edgar v. MITE Corp.*, 457 U.S. 624, 643–46 (1982) (weighing benefits and burdens under *Pike*, and holding that, "even when a state statute regulates interstate commerce indirectly, the burden imposed on that commerce must not be excessive in relation to the local interests served by the statute").

For all of these reasons, the Court may consider the burdens on interstate commerce and purported local benefits as part of analyzing both the merits of the Commerce Clause claim and the seriousness and dignity of this claim for purposes of exercising its original jurisdiction.

B. Defendants' Actions Will Impose Heavy Burdens on Interstate Commerce, As Shown by a Recent Cost-Benefit Study

The policy choice of net-zero emissions by 2050 will cost significant amounts of money measured as a percentage of global gross domestic product (GDP), which is strong evidence of a heavy burden on interstate commerce. And this is an important measure of the costs resulting from Defendants' actions, because "[t]here is one global atmosphere, and there is no way to trace a particular molecule of gas in the atmosphere to its source or pinpoint its local effects." Plaintiffs' Bill of Complaint ¶ 8.

An article titled "Costs and Benefits of the Paris Climate Targets" concludes that the "central estimate of the costs of climate policy … is 3.8–5.6% of GDP in 2100." Richard S.J. Tol, *Costs and Benefits of the Paris Climate Targets*, 14 Climate Change Economics (2023), https://www.worldscientific.com/doi/10.1142/S2010007823400031. However, the article notes that this estimate "unrealistically assum[es] least-cost implementation," meaning that the likely costs are

higher. *Id.* The article notes that "*actual* climate policy is far more expensive than what is typically assumed in models." *Id.* It also notes that "[e]ven simple policy imperfections, such as a failure to equate carbon prices between countries, would readily double the costs of climate policy." *Id.*

The *Costs and Benefits* article further concludes that, in contrast, the "central estimate of the *benefits* of climate policy, unrealistically assuming high no-policy emissions and constant vulnerability, is 2.8–3.2% of GDP." *Id.* (emphasis added). Another calculation of benefits puts the benefits at "1.8% of GDP for the 2°C target and 2.2% for the 1.5°C target." *Id.* Both of these calculations show benefits that are well below the most optimistic calculations of costs.

Another study looks specifically at increases in farm operating costs and annual grocery bills for consumers from net-zero policies. This report concludes that complying with net-zero emissions policies and corporate ESG reporting requirements will increase prices of farm input, and "[f]armers will see costs rise by at least 34 percent." Trevor W. Lewis & M. Ankith Reddy, *Net-Zero Climate-Control Policies Will Fail the Farm* at 3 (Feb. 7, 2024), https://www.buckeyeinstitute.org/library/docLib/2024-02-07-Net-Zero-Climate-Control-Policies-Will-Fail-the-Farm-policy-report.pdf. The study further concludes that "[p]ricing in food's carbon emissions will increase an American family of four's household grocery bills $1,330 per year." *Id.*

In sum, burdens on interstate commerce of this magnitude (and the need to balance those burdens against benefits from different policy choices) are strong evidence that Defendant States' actions

implicate heavy burdens on interstate commerce that are the domain of Congress. *See Davis*, 553 U.S. at 344; *Walling*, 116 U.S. at 455.

C. The Local Benefits to Defendants (Both Financial and Environmental) From Imposing Net Zero At the State Level Are Minimal

The putative local benefits (both financial and environmental) from imposing civil liability on energy companies for selling their products over the past decades also suffer from critical problems that render them minimal.

1. The Biden Administration's Recent Bank Stress Test Shows That Financial Benefits Are Overblown

Environmental activists have long argued that climate risk is a form of financial risk, which could inflict significant economic harm on businesses if not addressed through an orderly transition. *See, e.g.*, BlackRock, *A Fundamental Reshaping of Finance*, https://www.blackrock.com/americas-offshore/en/larry-fink-ceo-letter (Larry Fink proclaiming that "climate risk is investment risk"); Financial Stability Board, *Climate-Related Risks*, https://www.fsb.org/work-of-the-fsb/financial-innovation-and-structural-change/climate-related-risks/ (Financial Stability Board stating that "[c]limate-related risks are far-reaching and differ from other risks to financial stability"). A recent stress test by the Federal Reserve, however, has shown that financial benefits from implementing net zero policies and financial risks from not doing so are both much smaller than activists have speculated.

The Federal Reserve recently created scenarios through which certain banks must simulate "physical" and "transition" climate risks, which could then purportedly justify government climate actions. For "physical risk," major banks were required to simulate the effect of a once-in-two-centuries-sized hurricane smashing into the heavily populated northeast United States *with no insurance coverage available* to pay for the damage. Federal Reserve, *Pilot Climate Scenario Analysis Exercise – Participant Instructions* (Jan. 2023), https://www.federalreserve.gov/publications/files/csa-instructions-20230117.pdf at 13–14. For "transition risk," the government demanded a simulation in which "stringent climate policies are introduced *immediately*," without any chance for banks to prepare for such policies, along with rapidly rising carbon prices. *Id.* at 23 (emphasis added).

Despite these attempts to make the climate risk as extreme as possible, the tests failed to demonstrate any significant effect. The probability of default on loans increased by only half a percentage point or less. Federal Reserve, *Summary of Participants' Risk-Management Practices and Estimates* (May 2024), https://www.federalreserve.gov/publications/files/csa-exercise-summary-20240509.pdf at 25, 33. In contrast, federal bank stress tests involving *true* financial stresses, such as a severe recession, have resulted in probabilities of default jumping by 20 to 40 times that amount or more, leading to hundreds of billions in losses. *See* Greg Hopper, Bank Policy Institute, *The Fed Pilot Climate Scenario Analysis Exercise: A Review* (May 22, 2024) https://bpi.com/the-fed-pilot-climate-scenario-analysis-exercise-a-review/; Federal Reserve, *2024*

Federal Reserve Stress Test Results (June 2024), https://www.federalreserve.gov/publications/files/2024-dfast-results-20240626.pdf at 18, 21.

In other words, the Federal Reserve's bank stress tests, despite using extreme scenarios, showed that climate risk is *not* a material financial risk and does *not* present a material threat to bank stability. Given the minimal financial risks, any financial benefit from limiting the effects of climate change likewise is relatively minimal.

2. Defendant States' Policies Will Do Nothing to Limit Increasing Emissions from Other Countries

The environmental benefits from States requiring companies to spend large amounts of money to reduce carbon emissions are also likely minimal because of the global nature of the problem and inaction of other countries.

First, the United States' share of global carbon emissions is only 13%. *See Kennedy Questions Turk, Hruby in Appropriations Subcommittee on Energy and Water* at 7:56, https://www.youtube.com/watch?v=8s_aVsNCpMg&t=1s. This is only a small minority of emissions that leaves 87% coming from other countries. In fact, the Deputy U.S. Secretary of Energy, when testifying before the Senate, was unable to say if spending *$50 trillion dollars* for the United States to become carbon neutral by 2050 would have any particular effect on reducing world temperatures. *Id.* at 7:51–9:07. Instead, he could only argue that the United States represents 13% of global emissions and "every country around the world needs to get its act together." *Id.*

Second, China and India's increased emissions are dwarfing emissions reductions by the United States. In 2023, China increased emissions by 565 million metric tons and India increased emissions by 190 million metric tons. International Energy Agency, *CO_2 Emissions in 2023* at 16–17 (Feb. 2024), https://iea.blob.core.windows.net/assets/33e2badc-b839-4c18-84ce-f6387b3c008f/CO2Emissionsin2023.pdf. The increase from those two countries completely outweighed the combined decreases across the rest of the world, which (as of December 2023) totaled a decrease of 419 million metric tons. *See* Seth Borenstein, *World Carbon Dioxide Emissions Increase Again, Driven by China, India, and Aviation*, AP, Dec. 4, 2023, https://apnews.com/article/carbon-dioxide-climate-change-china-india-aa25e5a4271aa45810c435280bb97879.

Third, there is also an "implementation gap" and "ambition gap" between the policies that have been enacted and pledged by various countries versus what would be required to achieve net zero by 2050. *See, e.g.*, BlackRock, *Managing the Net-Zero Transition*, https://www.blackrock.com/corporate/insights/blackrock-investment-institute/publications/net-zero-transition. A report issued in November 2023 by the United Nations Environment Programme and other organizations found that "[g]overnments, in aggregate, still plan to produce more than double the amount of fossil fuels in 2030 than would be consistent with limiting warming to 1.5^0 C." Stockholm Environment Institute et al., *The Production Gap: Phasing Down or Phasing Up? Top Fossil Fuel Producers Plan Even More Extraction Despite Climate Promises* 2 (2023), https://perma.cc/5ECS-YVZ8. And

the Climate Action Tracker finds that not a single country in the world is aligned with the 1.5^{0}C warming goal. Climate Action Tracker, *Countries*, https://climateactiontracker.org/countries/. In sum, the response (or lack thereof) from other countries shows that there will be no environmental benefit from Defendant States using their state courts to fine energy producers in the United States.

CONCLUSION

Defendant States are violating the Constitution by seeking to directly regulate global climate change in their state courts. Consumers across the country will be harmed by these actions, and Plaintiff States are right to bring an original action to defend their interests and their citizens' interests. For the foregoing reasons, Amicus Curiae Consumers' Research respectfully urges the Court to grant the Motion for Leave to File Bill of Complaint in this important matter.

Respectfully submitted,

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