No. 220158

IN THE

Supreme Court of the United States

ALABAMA, *et al.*,

Plaintiffs,

v.

CALIFORNIA, *et al.*,

Defendants.

ON MOTION FOR LEAVE TO FILE COMPLAINT

BRIEF OF *AMICUS CURIAE* JOHN YOO IN SUPPORT OF PLAINTIFFS

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INTEREST OF *AMICUS CURIAE*[1]

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INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, the State of Alabama and 18 other states have filed an original action before this Court against the States of California, Connecticut, Minnesota, New Jersey, and Rhode Island. The plaintiff states seek to prevent the defendant states from using their tort laws as a mechanism to regulate conduct within the plaintiff states. The defendant states are using their police powers to sanction energy companies for allegedly failing to disclose the harms from climate change when selling their products.

This Court should exercise its original jurisdiction for two reasons. First, this Court should use this case as an opportunity to re-examine its approach to original jurisdiction. Even though Congress has directed that

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1. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amicus and their counsel made a monetary contribution intended to fund the preparation or submission of the brief. The parties were given timely notice of the intent to file this brief.

this Court "shall have original and exclusive jurisdiction of all controversies between two or more States," 28 U.S.C. § 1251(a), this Court has claimed the discretion to decline such cases. This Court's practice runs contrary to the plain meaning of the relevant constitutional and statutory texts.

Second, this case raises important questions of the proper balance between state and federal power over which at least two U.S. Courts of Appeals and one state Supreme Court have split. These courts have divided over whether states can use tort law to sue the energy industry for harms caused by global warming. The defendant states are using their consumer protection laws to punish the energy industry for legal conduct related to the extraction, refinement, and sale of oil and gas. They have misconstrued this Court's holding in *American Electric Power v. Connecticut*, 564 U.S. 410, 422 (2011) ("*AEP*"), that the Clean Air Act pre-empts judge-made federal common law, to claim that state-made common law can fill in the gap. *AEP*, however, left open the question presented here. *AEP* observed that the lower court opinion it reviewed "did not reach the state-law claims because it held that federal common law governed." *AEP*, 564 U.S. at 429. "In light of our holding that the Clean Air Act displaces federal common law," this Court concluded, "the availability *vel non* of a state lawsuit depends, inter alia, on the preemptive effect of the federal Act." *Id. AEP* then remanded for further consideration of the issue.

Whether states may use their police powers to regulate energy companies for global warming has divided the lower courts. Compare *City of New York v. Chevron Corporation*, 993 F.3d 81 (2d Cir. 2021) (state

laws preempted) with *Mayor & City Council of Baltimore v. BP PLC.*, 31 F.4th 178 (4th Cir. 2022), cert. denied, 143 S. Ct. 1795 (2023). This Court can use its original jurisdiction here not just to settle a dispute between the states, but also to resolve confusion in the lower courts that can result in billions of dollars of unjustified penalties. This case is particularly worthy for the exercise of original jurisdiction because of the national importance of the underlying constitutional questions and its effect on the energy industry, one of the nation's largest economic sectors whose rapid decline could spell incredible hardship throughout the nation.

A petition for a writ of certiorari in *Sunoco LP v. City and County of Honolulu*, Nos. 23-947, 23-952, before this Court raises almost identical questions. If this Court were to exercise jurisdiction in this case, it could hold *City and County of Honolulu* pending the disposition of this case, grant *Honolulu* and hold this case, or hear them together. This Court can now resolve the division between the U.S. courts of appeals and a state supreme court, and between the plaintiff and defendant states in the case, by exercising original jurisdiction to resolve the question it left open thirteen years ago in *AEP*.

ARGUMENT

I. This Court Should Exercise Original Jurisdiction in All Cases Between States.

Both constitutional and statutory law require this Court to exercise its original jurisdiction in cases between states. Article III, Section 2 states that "[i]n all Cases . . . in which a State shall be Party, the supreme Court

shall have original jurisdiction." Congress executed the constitutional requirement in 28 U.S.C. § 1251(a) by mandating that this Court "shall have original and exclusive jurisdiction of all controversies between two or more States."

Nevertheless, this Court has exercised discretion to decline original jurisdiction in interstate cases. It has briefly explained that original jurisdiction is "obligatory only in appropriate cases" and has called for its "sparing use." *Illinois v. Milwaukee,* 406 U.S. 91, 93-94 (1972). *See also Wyoming v. Oklahoma*, 502 U.S. 437, 450 (1992); *Maryland v. Louisiana*, 451 U.S. 725, 739 (1981); *Arizona v. New Mexico*, 425 U.S. 794, 796 (1976). This Court has explained that interstate disputes may require "special competence" that it lacks and that its primary function is as an appellate tribunal. *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 497-98 (1971). For these reasons, this Court has found that Section 1251(a) provides it "with substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court." *Texas v. New Mexico*, 462 U.S. 554, 570 (1983). These 50-year-old cases, however, explained their invocation of discretion in all-too-brief passages without significant explanation.

Closer analysis suggests that the Court has no discretion to decline original jurisdiction cases. First, the Framers believed that the original jurisdiction of the Supreme Court was an important function of "the judicial authority of the Union." Federalist No. 80, at 411 (Alexander Hamilton) (George W. Carey & James McClellan eds. 2001). Hamilton observed that it "scarcely ... admit[s] of controversy" that federal jurisdiction should

extend to "all those [cases] which involve the PEACE of the CONFEDERACY, whether they relate to the intercourse between the United States and foreign nations, or to that between the states themselves." *Id.* Indeed, Hamilton argued that jurisdiction over interstate disputes was equal in importance to those between the United States and foreign nations, which could give rise to foreign policy disputes and even war. He observed that beyond border disputes, "bickerings and animosities may spring up among the members of the union." *Id.* at 413. Hamilton reminded his readers of the "fraudulent laws which have been passed in too many of the states" and "that the spirit which produced them, will assume new shapes that could not be foreseen, nor specifically provided against." Hence, the Constitution provided for judicial jurisdiction in disputes between states. "Whatever practices may have a tendency to disturb the harmony of the states," Hamilton concluded, "are proper objects of federal superintendence and control." *Id.*

Precedents that allow this Court to deny original jurisdiction in interstate disputes are at odds with the Founders' understanding of the proper judicial role. Declining jurisdiction also refuses to honor the intentions of Congress. Congress has clearly granted the courts discretion over some founts of jurisdiction. Section 1254(1) of Title 28 grants this Court discretion over appeals from the federal circuit courts by stating that their decisions "may be reviewed" through a writ of certiorari. Section 1257(a) uses the identical language to grant this Court discretion to issue writs of certiorari for appeals from the state supreme courts. But Congress chose not to employ this phrase in vesting interstate disputes in the original jurisdiction of this Court. Instead, Section 1251(a) made

the jurisdiction mandatory and exclusive. Congress's use of "shall have original and exclusive jurisdiction" for interstate disputes rather than "may be reviewed," as it does for certiorari jurisdiction, plainly mandates that this Court must hear all disputes between states.

The exclusive nature of this Court's jurisdiction over interstate disputes bolsters this reading of Section 1251(a). At first, this Court read the statute to allow it to decline jurisdiction only in nonexclusive cases, such as cases between a state and citizens of another state. *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992). It did not include disputes between states in its claim to discretion until *Arizona v. New Mexico*, 425 U.S. 794 (1976). Reading the statute in this manner could prevents states from accessing any forum at all for their disputes. As this Court held in *Mississippi v. Louisiana*, 506 U.S. 73 (1992), Section 1251(a)'s use of "exclusive" deprives the lower federal courts of jurisdiction over disputes between states. If this Court exercises its discretion to refuse to hear an interstate case, it effectively deprives the states of any judicial forum in which to seek relief. Even if this Court finds that original jurisdiction would not be "appropriate" under *Illinois v. Milwaukee,* 406 U.S. 91, 93-94 (1972), it should still grant review in this case to re-examine its precedents on this question, which contradict the grants of jurisdiction in both the Constitution and statute.

II. This Court Should Exercise Original Jurisdiction in this Case.

Even under existing precedent, this Court should still exercise its discretion to accept original jurisdiction here. This Court has identified two factors that govern

whether a case is "appropriate" for its exclusive original jurisdiction over inter-state disputes. *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992). First, it examines "the nature of the interest of the complaining States, focusing on the seriousness and dignity of the claim." *Id.* (quotations and citations omitted). *Mississippi* identifies as "a model case" a "dispute between States of such seriousness that it would amount to a *casus belli* if the States were fully sovereign." *Id.* (quoting *Texas v. New Mexico*, 462 U.S. 554, 571 n. 18 (1983)). Second, this Court asks about "the availability of an alternative forum in which the issue tendered can be resolved." *Id.*

In past cases, this Court has considered claims involving pollution across state borders to justify the exercise of original jurisdiction. As *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972), explains, this Court has long engaged in the "equitable apportionment" of waters running between more than one state "under the head of our original jurisdiction." *Id.* at 106. This exercise of jurisdiction, the *Illinois* Court observed, naturally leads to cases involving water pollution, which it has described as "a public nuisance." *Id.* at 106-07. Cases of interstate pollution are the kind of *casus belli* cases that the Court declared in *Mississippi* would justify the exercise of original jurisdiction. "It may be imagined that a nuisance might be created by a State upon a navigable river like the Danube, which would amount to a casus belli for a State lower down, unless removed." *Id.* at 107 (quoting *Missouri v. Illinois*, 200 U.S. 496, 520-21 (1906)). Justice Holmes, for example, declared in *Missouri* that "the jurisdiction and authority of this court to deal" with cases of water pollution between states "is not open to doubt." *Missouri*, 200 U.S. at 518.

This case falls well within the range of past cases of interstate pollution that justified the exercise of original jurisdiction. Plaintiff states here raise a claim based on defendant states' policies in response to alleged interstate air pollution. Justice Holmes's logic applies now as well as then, to air as well as to water. Defendant states are using their consumer protection laws to punish the companies located in the plaintiff states for conduct that allegedly generates air pollution that harms the defendants. This harm is broader in scope than pollution of a single river or lake by an upstream state. Here, the defendant states claim that the companies located in the plaintiff states have sufficiently polluted the air – outside its borders – to have raised global temperatures, which has led to higher seas and more turbulent weather. The seriousness and dignity of the plaintiff states' claim – involving as it does energy generation, air pollution, and global warming – significantly exceed the types of interstate pollution at issue in past cases where this Court has exercised its original jurisdiction.

The nature of the constitutional issues at stake in this dispute makes an even more compelling case for the exercise of original jurisdiction than a simple territorial dispute between adjacent states. This case involves issues of central importance: the balance between the police power of the states and the federal interest in the regulation of climate change and the national energy industry. The defendant states are using their authority over consumer protection to engage in extraterritorial regulation of one of the nation's most important industries. That they impose these rules in the name of responding to climate change, a policy issue that is national in scope, makes their extraterritorial purpose apparent.

States of course have the police power to protect their inhabitants. But they do not have the power to regulate extraterritorially. This Court has long recognized that a state's police power within its own territory necessarily implies that it cannot regulate activity in the territory of other states. In *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), for example, this Court struck down a New York law that prohibited the sale of milk that had been bought out of state at a price lower than the minimum New York price. "New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there," Justice Cardozo wrote for the majority. *Id.* at 521. "Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported," the Court further observed. *Id.* In *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986), the Court held that New York could not require liquor sellers to set prices equal to the lowest they set anywhere else in the country. "Economic protectionism is not limited to attempts to convey advantages to local merchants," Justice Marshall wrote for the Court. "It may include attempts to give local consumers and advantage over consumers in other States." *Id.* at 580. While the New York statute purported to control prices only within the state, the Court observed that the "practical effect" of the law was to regulate conduct occurring wholly in other states. *Id.* at 582-83.

States violate the Constitution when their laws have the practical effect of regulating conduct that occurs entirely outside their territory. Here, the defendant states are holding companies in the plaintiff states liable

for conduct that occurs wholly outside the defendant states' borders. If the inhabitants of the defendant states suffer a harm here, it is because of the global warming produced by the activities of energy companies that occur in other states. Indeed, as the Court observed in *AEP*, it is difficult if not impossible to identify any localized cause-and-effect between energy use and global warming. Defendant states seek to control energy company behavior outside their borders, regardless of the effect within their borders. This result is prohibited by the Constitution and its structural protections for federalism.

A central purpose of the Constitution's prohibition on extraterritorial regulation is to prevent self-destructive protectionism and to weld the states into a single market. Defendant states' effort to regulate energy companies could easily trigger a spiral of economic retaliation. California, for example, has allowed its instrumentalities to sue out-of-state energy companies for allegedly selling oil and gas products without fully disclosing the costs of climate change. If this Court does not intervene, the plaintiff states could respond by suing industries located primarily in California. The 19 plaintiff states could bring their own consumer protection cases against the leading producers of agricultural commodities, such as California. The plaintiff states could argue that California exporters have failed to disclose that dairy, beef, or fresh fruit and vegetable farming contributes to climate change because of its intensive use of water, petroleum-based fertilizers, and combustion-engine machinery.

This Court should grant the plaintiff states leave to file in order to forestall extraterritorial regulation of the energy industry that could trigger retaliatory

protectionism. This is not to deny that states can consider climate change a problem. This case only asks that the Court intervene to prevent defendant states from imposing their policies on other un-consenting states.

This Court should also grant leave to file in this case in order to prevent the defendant states from interfering with national policies to address climate change. As this Court recognized in *AEP*, greenhouse gases and their impact on temperatures are not localized. Emissions rapidly intermix with other gases in the atmosphere as a matter of physical science, resulting in a cumulative effect on the environment. The sale and consumption of fossil fuels in any single state do not generate a sufficiently large temperature change to produce a rise in sea levels in any given jurisdiction. "Greenhouse gases once emitted 'become well mixed in the atmosphere,'" *AEP*, 564 U.S. at 422 (quoting Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,514 (Dec. 15, 2009)). In rejecting a lawsuit brought by the City of New York and other jurisdictions against major emitters of carbon dioxide, this Court stated that "emissions in [New York or] New Jersey may contribute no more to flooding in New York than emissions in China," *id.* (citations omitted). Because greenhouse gas emissions are necessarily and immediately national in effect, they therefore require a national solution.

Given the central economic importance of the energy industry, this Court must invoke its original jurisdiction to review the conduct of the defendant states. In 2021, the energy industry employed 7.8 million Americans; in

2022 employment rose to 8.1 million.[2] Americans last year spent $1.3 trillion on energy, which amounts to 5.7 percent of the Gross Domestic Product.[3] There are more than 11,000 utility-scale power plants located in every state that deliver electricity to the nation's power grid.[4] This Court should not allow defendant states to use their consumer protection laws to interfere with federal governance of the nation's energy production network.

Control of energy constitutes an important national security goal that not only supports economic independence and stability but also U.S. diplomacy and military capabilities. Oil and gas fuel the U.S. Armed Forces on the ground, in the air, and on the seas. Secure energy supplies allow the United States to project military power to defend our interests and to assist our allies. Domestic energy production frees the United States from economic coercion by other oil-producing states. If this Court were to allow defendant states to continue to use their police powers to regulate energy companies with impunity, states and localities could handicap an interstate industry critical to the nation's economy and security. This Court should not let this issue be decided by defaulting to the defendant states' misuse of their police powers. It should reject the defendant states' effort to regulate an interstate phenomenon with nationwide, indeed global, effects.

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2. United States Energy and Employment Report 2023, https://www.energy.gov/media/299601.

3. U.S. Energy Information Administration (EIA) (2023), State Energy Data System (SEDS) 1960-2021: Prices and Expenditures.

4. https://www.epa.gov/power-sector/electric-power-sector-basics#:~:text=Across%20the%20United%20States%2C%20over,how%20EPA's%20programs%20reduce%20emissions.

This Court has long recognized that the Constitution vests the conduct of foreign relations in the federal government alone. *See, e.g., Hines v. Davidowitz*, 312 U.S. 52, 63 (1941). It has pre-empted state laws that might interfere with federal foreign policy, even in the absence of a treaty. In *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), for example, this Court pre-empted a state law that imposed sanctions on Burmese-related goods because it conflicted with federal foreign policy toward Burma. This Court has further held that states cannot use their police powers to regulate areas that are the subject of diplomatic negotiations by the federal government. In *American Insurance Association v. Garamendi,* 539 U.S. 396 (2003), this Court held that the federal common law of foreign relations pre-empted a California law that required insurers to disclose information relating to pre-WWII insurance policies held by Swiss and German companies. The Court found that the state law conflicted with the Clinton administration's diplomatic efforts to achieve a settlement between the German government, the private financial institutions, and Holocaust survivors and their families.

National foreign policy interests, of equal or greater importance, are present here. The executive branch has entered into international agreements designed to regulate greenhouse gas emissions and continues to participate in international negotiations to identify areas for cooperation between nations. *See, e.g.,* Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104; Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 2303 U.N.T.S. 162; Rio Declaration on Environment and Development, Jun. 13, 1992, 31 ILM

874 (1992). Defendant states attempt to impose a damages sanction on energy companies located in the plaintiff states for the very conduct, based on the same theory of harm, that is the focus of these national diplomatic efforts. The potential interference with federal foreign policy further justifies the exercise of original jurisdiction by this Court.

Lastly, this Court should exercise original jurisdiction here because the defendant states are proceeding under a mistaken understanding of federal law. First, they exaggerate their right to engage in extraterritorial regulation. They seek to use consumer protection laws to impose sanctions on an industry that not only conducts the majority of its activities outside of their territory, but also generates its effects – greenhouse gases – at a national, rather than state level. The sale and consumption of fossil fuels in any single state, however, do not generate a sufficiently large temperature change to produce a rise in sea levels in any given jurisdiction. *AEP*, 564 U.S. at 422.

Second, the defendant states refuse to accept that federal law (including the Clean Air Act) preempts state tort lawsuits against multinational energy companies for failing to warn consumers about greenhouse gas emissions. The defendant states' theory of tort liability rests on the view that worldwide greenhouse gas emissions raise worldwide temperatures, which then purportedly cause, among other things, the seas to rise to levels that allegedly cause harm within their borders. The U.S. Court of Appeals for the Second Circuit has rejected this theory. *City of New York v. Chevron Corporation*, 993 F.3d 81 (2d Cir. 2021). *City of New York* held that federal law preempts state tort law that regulates air emissions

caused by the use of oil and gas for energy production. In a recent decision that exemplifies the view of the defendant states, however, the Supreme Court of Hawaii upheld the application of the state torts of public nuisance, private nuisance, strict liability failure to warn, negligent failure to warn, and trespass against oil companies in their sale of fuel products in the state. *City & Cnty. of Honolulu v. Sunoco LP*, 537 P.3d 1173, 1181 (Haw. 2023). The Hawaii Supreme Court concluded: "This suit does not seek to regulate emissions and does not seek damages for interstate emissions. Rather, Plaintiffs' complaint 'clearly seeks to challenge the promotion and sale of fossil-fuel products without warning and abetted by a sophisticated disinformation campaign.'" *Id.* (quoting *Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178, 233 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 1795 (2023)). The Hawaii Supreme Court several times quotes from, and directly relies upon, the Fourth Circuit's opinion in *Mayor & City Council of Baltimore v. BP PLC.*, 31 F.4th 178 (4th Cir. 2022), *cert. denied,* 143 S. Ct. 1795 (2023), which is in conflict with the Second Circuit in *Chevron*. *See, e.g.*, *City & Cnty. of Honolulu*, 537 P.3d at 1198 (following the Fourth Circuit).

Defendant states' view of federal preemption, however, is mistaken. They have argued that federal law does not preempt their state tort law because the Clean Air Act ("CAA") had "displaced" federal common law. *City & Cnty. of Honolulu*, 537 P.3d at 1195. While pre-CAA federal common law had allowed states to sue each other to abate air and water pollution, *AEP* held that the CAA displaced that law because it already "provides a means to seek limits on emissions of carbon dioxide from domestic power plants." 564 U.S. at 425. Unfortunately, the Hawaii

Supreme Court misread *AEP* to mean that the CAA's displacement of a judicially recognized federal common law cause of action allows states to bring their own common law actions. The Supreme Court of Hawaii, like the Fourth Circuit, relied upon *AEP* for the proposition that "whether the state law nuisance claims were preempted depended *only* on an analysis of the CAA because 'when Congress addresses a question previously governed by a decision rested on federal common law, . . . the need for such an unusual exercise of law-making by federal courts disappears.'" *City & Cnty. of Honolulu*, 537 P.3d at 1199 (quoting *AEP*, 564 U.S. at 423 (quoting *Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981)). The Second Circuit read *AEP* for the directly opposite proposition. It found that the CAA did not authorize state law to snap back into place "simply because Congress saw fit to displace a federal court-made standard with a legislative one." *City of New York*, 993 F.3d at 98. Rather, as the Second Circuit observed, *AEP* recognized that the CAA made the EPA the "primary regulator of [domestic] greenhouse gas emissions," *id.* at 99 (citing *AEP*, 564 U.S. at 428), and that it reserved to the states only the power to regulate internal emissions sources, not those from other states, *id.* at 100 (citing *AEP*, 564 U.S. at 422).

Defendant states are exercising their police power in a manner that deliberately reaches beyond their borders and, therefore, violates the rights not just of the plaintiff states, but also those of the federal government. As the Second Circuit found, states cannot "utilize state tort law to hold multinational oil companies liable for the damages caused by global greenhouse gas emissions." *City of New York*, 993 F.3d at 85. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), denied the existence of a general

federal common law, but also affirmed the existence of a specialized federal common law where national concerns are paramount. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), decided on the same day as *Erie*, held: "whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive." *Id.* at 110. This holding is logical as a matter of law and prudent as a matter of fact, because, in the absence of a federal common-law rule, the states in a dispute would presumably give priority to their own laws to ensure their own victory. As Judge Henry Friendly observed, "'[e]nvironmental protection is undoubtedly an area 'within national legislative power,' one in which federal courts may fill in 'statutory interstices,' and, if necessary, even 'fashion federal law.'" *AEP*, 564 U.S. at 421 (quoting Henry Friendly, *In Praise of* Erie—*And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 421-22 (1964)).

Indeed, almost a century of this Court's precedents recognize that federal common law should govern here. As this Court observed in *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972), interstate pollution presents an "overriding . . . need for a uniform rule of decision" because disputes would involve conflicting self-interested state decisions, energy production and pollution is nationwide in scope, and the basic interests of federalism. *Id.* at 105 n.6. The Second Circuit properly found that the CAA displaced any cause of action for trans-boundary pollution provided by the federal common law. It relied upon this Court's statement in *AEP*: "We hold that the Clean Air Act and the EPA actions it authorizes displace any federal common-

law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired powerplants." *AEP*, 564 U.S. at 424. This Court issued no ruling on whether the CAA revived state causes of action. The Second Circuit answered that remaining question by holding that the CAA also preempted state tort law over interstate air pollution. "For many of the same reasons that federal common law preempts state law, the Clean Air Act displaces federal common law claims concerned with domestic greenhouse gas emissions." *City of New York*, 993 F.3d at 95. It made no difference, the Second Circuit held, whether the state styled its tort action against the emissions from fossil fuels or against misrepresentations in the sale of fossil fuels. In both cases, the state sought improperly to hold defendants liable for the release of greenhouse gases and their harmful effects on the environment. *Id.* at 97.

AEP's conclusion that the CAA preempts judge-made federal causes of action for interstate air pollution applies with even greater force to state law causes of action. "The critical point is that Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from powerplants; the delegation displaces federal common law." *AEP*, 564 U.S. at 426. The lower federal courts are part of a unified judicial system headed by this Court, which can correct deviations from established tort doctrine under a well-established body of federal law. By contrast, the state courts are autonomous and can develop tort law subject only to a weak set of constitutional constraints. State tort law can create higher levels of variation, as shown by the unprecedented tort theory adopted by the Hawaii Supreme Court.

Extension of the rule of *AEP* to clarify the Clean Air Act's preemption of state tort law causes of action does not constitute an impermissible overreach of federal legal authority into internal state affairs. To the contrary, such an extension would preclude the extraterritorial application of state law to the behavior of millions of residents of other states who lack any representation in the states targeting the national energy industry. The Framers wisely crafted a balanced federal system that prevents a small group of states from surreptitiously regulating a nationwide industry. Exercising original jurisdiction in this case would serve the proper interests of federalism by maintaining orderly interstate relations while reserving to the federal government control over interstate pollution and nationwide industries.

CONCLUSION

For the foregoing reasons, this Court should grant the motion by plaintiff states for leave to file a bill of complaint.

Respectfully submitted,

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