No. 25-170

In the Supreme Court of the United States

SUNCOR ENERGY (U.S.A.) INC.; SUNCOR ENERGY SALES, INC.; EXXON MOBIL CORPORATION,

Petitioners,

v.

COUNTY COMMISSIONERS OF BOULDER COUNTY AND CITY OF BOULDER.

Respondents.

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

AMICI CURIAE BRIEF BY PROFESSOR RICHARD EPSTEIN AND PROFESSOR JOHN YOO IN SUPPORT OF PETITIONERS

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September 11, 2025

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IDENTITIES AND INTERESTS OF *AMICI CURIAE*[1]

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. Further, all counsel of record received timely notice of the intent to file the brief.

SUMMARY OF THE ARGUMENT

If the global and national climate is changing, then ***the Nation*** should decide how to address it. *See City of New York v. Chevron Corp.*, 993 F.3d 81, 91 (2d Cir. 2021) ("[T]he question before us is whether a nuisance suit seeking to recover damages for the harms caused by global greenhouse gas emissions may proceed under New York law. Our answer is simple: no.") (*New York*). Neither Boulder, Colorado, nor other state and local actors applying state and local common law and statutes can decide climate and energy policy for the entire Nation. *See* Pet. 4.

Yet despite the obvious conclusion to the important question of who gets to decide, the federal and state appellate courts ranging from the far eastern part of the Country to the far western part of the Country are deeply divided on the answer. From New York in the east, the United States Court of Appeals for the Second Circuit rejected local attempts to use common law claims to address alleged injuries supposedly arising from greenhouse gas emissions. *New York*, 993 F.3d at 91. But from the west, the Supreme Court of Hawaii said that the Second Circuit had relied on "flawed reasoning," and rejected the court of appeals' decision. *City & Cnty. of Honolulu v. Sunoco LP*, 537 P.3d 1173, 1196 (Haw. 2023) (*Hawaii*).

Amidst this conflict between Hawaii's court of last resort and the United States Court of Appeals for

the Second Circuit,[2] the petition comes to this Court arising from a case filed by Boulder, Colorado. In this case, Colorado's court of last resort followed the Hawaii Supreme Court's decision in conflict with the Second Circuit's, making this conflict on an important federal issue a great justification for the Court's review. *See* Rule 10(b).

But decades of federal common and statutory law, acknowledged, interpreted, and applied by this Court's precedents, require cutting off such claims at the pleading stage. The Colorado Supreme Court disagreed, which is a further justification for the Court's review. *See* Rule 10(c).

Going beyond the Question Presented, which focuses on this issue of preemption, *see* Pet. (I), *amici curiae* can help the Court further understand another good reason to stop cases like this one at the pleading stage. No matter how they try to mask their aims, Respondents want to ***misuse*** the settled laws of nuisance and misrepresentation against Petitioners in this case, and several others like it, to set nationwide climate policy, all in violation of sound tort principles.

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[2] The dispute is not just between these two courts, but among other courts too. For example, a trial court in Minnesota agreed with Hawaii's side in a case that is now on appeal at the state's intermediate appellate court; while two trial courts in Maryland took the Second Circuit's side in cases that are now on appeal to the state's court of last resort. The citations to these and other recent court decisions on this issue are in Argument § I.

At bottom, Respondents say that Petitioners "knew" their actions were altering the global climate, only to conceal the truth from consumers worldwide, and Respondents' conduct led to an increase in greenhouse gases, which raised temperatures globally. But there is no reason to think that Petitioners said anything to Respondents or other potential plaintiffs nationwide that anyone reasonably relied on to their detriment. There is thus no reason to let this case or any of the many copycat cases get past the pleadings stage.

The Court should grant the petition and reverse the Colorado Supreme Court, find that the claims in this case are preempted, and stop these and other state and local attempts to set national climate policy via flawed state-law tort theories.

ARGUMENT

I. The Decision Below Reflects the Divide Among Courts on The Preemption Issue.

The Board of County Commissioners of Boulder County and the City of Boulder—plaintiffs below and Respondents here—filed tort claims against Petitioners (which are energy companies) based on harms Respondents say that they or the State of Colorado, have allegedly suffered due to global climate change, and that these defendants in particular are *theoretically* at fault because they played some role in increasing the concentration of greenhouse gases somewhere in the global atmosphere, thereby playing

some part in global climate change. *See* Pet.App.25a–26.a (Samour, J., dissenting).

Decades of federal common and statutory law acknowledged, interpreted, and applied by this Court's precedents, say that the courts below should have preempted Respondents' ability to get such claims past the pleading stage. Nevertheless, on this topic of whether plaintiffs can get tort claims for supposed climate change injuries past the pleadings, there is now a deep divide among courts across the Country.

But a federal appellate court took on this iteration of such claims specifically in the context of a motion to dismiss per Fed. R. Civ. P. 12(b)(1) and (6). That was the United States District Court for the Second Circuit in *New York*. Back in 2018, New York City sued energy companies in federal court, asserting causes of action for public nuisance, private nuisance, and trespass under New York law stemming from the same types of activities underlying the allegations in this case. *New York*, 993 F.3d at 88. The defendants filed Fed. R. Civ. P. 12(b) motions to dismiss, which the district court granted generally on preemption grounds. *Id.* at 88–89.

That posed to the Second Circuit the same question at issue here: should a court dismiss such state tort claims geared to address global climate issues as preempted by federal law? The answer there was yes, and the Second Circuit had no problem saying so clearly: federal law preempts Respondents'

claims. *See New York*, 993 F.3d at 91. The court saw right through New York City's attempt to avoid the obvious preemption by dressing its claims up as state-law torts—that is, as a purely local issue. Yes, New York City had engaged in "artful pleading," but such "[a]rtful pleading cannot transform the City's complaint into anything other than a suit over global greenhouse gas emissions." *Id.* at 91. The court explained further:

> Stripped to its essence, then, the question before us is whether a nuisance suit seeking to recover damages for the harms caused by global greenhouse gas emissions may proceed under New York law. Our answer is simple: no. . . .
>
> To state the obvious, the City does not seek to hold the Producers liable for the effects of emissions released in New York, or even in New York's neighboring states. Instead, the City intends to hold the Producers liable, under New York law, for the effects of emissions made around the globe over the past several hundred years. In other words, the City requests damages for the cumulative impact of conduct occurring simultaneously across just about every jurisdiction on the planet.

> Such a sprawling case is simply beyond the limits of state law.

Id. at 91–92. Given such a logical, strong statement by a United States court of appeals on this important federal question, one might expect later federal courts and state courts of last resort to follow suit.

But local governments have found ways to skirt the Second Circuit's reasoning. State and local governments have filed slightly revised (but otherwise copycat) suits around the Country, but in state courts rather than federal courts.

The first state court of last resort to reach a decision was the Hawaii Supreme Court, which decided that the Second Circuit had relied on "flawed reasoning" in its *New York* decision. *Hawaii*, 537 P.3d at 1196. The Hawaii Supreme Court invented a legal fiction: while it is true that federal common law preempted state common law claims like the plaintiffs' claims in that case, the preemption evaporated once Congress enacted the Clean Air Act. *Id.* at 1198. This aspect of the court's decision directly contradicted the Second Circuit's decision about the effect of the Clean Air Act on preemption of common law claims. *New York*, 993 F.3d at 98–99. The Second Circuit thoroughly considered the argument and concluded that such evaporation of preemption—allowing previously preempted state-tort claims to "snap back into action"—was "too strange to seriously contemplate." *Id.*

Here, Colorado's court of last resort has followed Hawaii down this "strange" and illogical path, further rejecting the Second Circuit on this important federal question. Pet.App.13a, 15a–16a. The Court should step in now. *See* Rule 10(b).

This dispute is not limited to a conflict between a New York federal court and the state courts of Colorado and Hawaii. Many states are currently considering whether to bring similar cases. This case presents the Court with the opportunity to explain that federal law preempts Respondents' state law claims and prevent further waste of legal and judicial resources. *See, e.g.*, *Minnesota v. Am. Petroleum Inst.*, A25-407 (Minn. Ct. App. Sept. 10, 2025) (setting argument on anti-SLAPP issues for motions to dismiss in Minnesota); *Mayor & City Council of Baltimore v. B.P. P.L.C.*, SCM-REG-0011-2025 (Md. Aug. 25, 2025) (setting argument on nuisance and representation issues in Maryland); *City of Charleston v. Brabham Oil Co.*, 2020-CP-10-03975 (S.C. Ct. of Common Pleas Aug. 6, 2025) (granting motion to dismiss misrepresentation claims for failure to state a claim); *California v. Exxon Mobil Corp.*, Case No. S288664 (Cal. Feb. 11, 2025) (denying review of jurisdiction issues).

II. The CAA And Federal Law Preempt Respondents' Claims.

The Colorado Supreme Court's decision on the important federal question of preemption conflicts with relevant decisions of this Court. The sale and

consumption of fossil fuels in any single state does not generate a sufficiently large temperature change to produce a rise in sea levels anywhere, let alone in any given jurisdiction. "Greenhouse gases once emitted 'become well mixed in the atmosphere.'" *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 422 (2011) (*AEP*). This reason alone is sufficient for the Court to hold that the Colorado courts cannot let Respondents advance their torts—in novel forms—against Petitioners for their production, marketing, and sale of fuels.

This erroneous approach to tort liability—which rests on an assumption that worldwide greenhouse gas emissions necessarily and directly raise worldwide temperatures, and thus purportedly cause weather changes that allegedly harm Colorado, even if limited to Boulder County, Colorado—doesn't warrant further consideration, much less discovery and full-blown trials.

Before *New York*, this Court had already rejected a lawsuit brought by New York City and several states against major emitters of carbon dioxide, saying that "emissions in [New York or] New Jersey may contribute no more to flooding in New York than emissions in China." *AEP*, 564 U.S. at 422. The Court went on to reject the plaintiffs' claims. *Id.* at 424. The claims in these cases parallel those rejected by the Court.

The Colorado Supreme Court acknowledged *AEP*, Pet.App.10a, but danced around it, Pet.App.13a,

15a–16a, 19a–20a (most directly in ¶ 57). Yet the court below was simply wrong: federal law preempts Colorado tort claims based on a two-step analysis. First, federal common law preempted state-level common law claims. And then the CAA displaced that federal common law and stepped into its shoes—also preempting local tort claims. *AEP* does not let local tort laws snap back into place "simply because Congress saw fit to displace a federal court-made standard with a legislative one." *New York*, 993 F.3d at 98. Rather, the CAA made EPA the "primary regulator of [domestic] greenhouse gas emissions," *id.* at 99, and it left to the states ***only*** the power to regulate internal emissions sources, *id.* at 100.

This Court should grant the petition for certiorari and agree with the Second Circuit that states cannot "utilize state tort law to hold multinational oil companies liable for the damages caused by global greenhouse gas emissions." *New York*, 993 F.3d at 85.

Explaining further, while *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), denied the existence of a *general* federal common law, it affirmed the existence of a *specialized* federal common law where national concerns are paramount. In *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), the Court held that interstate water disputes are "a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive." *Id.* at 110. Any other rule would let

states give priority to their own laws. Justice William O. Douglas expressed the same view in *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943), which applied federal common law to commercial paper to avoid "making identical transactions subject to the vagaries of the laws of the several states." And 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)).

The Court's precedents, including *Illinois v. City of Milwaukee*, 406 U.S. 91, 102–03, 102 n.3 (1972), recognize that federal common law must preempt. Interstate pollution presents an "overriding . . . need for a uniform rule of decision" because states have conflicting self-interests, energy production and pollution are nationwide in scope, and the basic interests of federalism are involved. *Id*. at 105 n.6.

At the second step, the CAA displaces or preempts any claims for trans-boundary pollution provided by federal common law or state law: "We hold that the Clean Air Act and 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. *AEP* did not hold that the CAA revived state causes of

action that earlier federal law had preempted.[3] *AEP* does not let federal regulators intrude into state affairs. Rather, confirming the CAA's preemptive effect prevents the extraterritorial application of Colorado tort law on people outside Colorado. Properly concerned with the tension between federal and state authority, the Framers of the Constitution crafted a balanced system that prevents a single state from regulating a nationwide industry.

And states cannot use 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), for example, the Court held that federal common law of foreign relations preempted a California law that required insurers to disclose information relating to pre-WWII insurance policies held by foreign companies. The Supreme Court found that the state law conflicted with President Clinton's diplomatic efforts to achieve a settlement between the German

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[3] Of course, Congress and the Executive Branch can change their minds on greenhouse gas emissions. In 2011, this Court wrote: "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. Today, it is uncertain whether the major questions doctrine allows EPA to make that decision with such broad authority suggested in 2011. *See W. Virginia v. EPA*, 597 U.S. 697, 723–24 (2022) (EPA still needs "clear congressional authorization" for the regulatory power it claims).

government, the private financial institutions, and Holocaust survivors and their families.

Foreign policy interests are present in this case. We have entered into international agreements designed to regulate greenhouse gas emissions and we take part 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, June 13, 1992, 31 ILM 874 (1992). Yet Respondents try to impose a damages sanction on Petitioners for the very conduct, based on the same theory of harm, that is the focus of these national diplomatic efforts.

III. Respondents Cannot Plead Their Tort Claims.

The Court should also grant certiorari to for the bigger-picture reason that Respondents' cannot even state valid claims—and in that way send a message to other courts that in copycat cases, the plaintiffs repeatedly fail to plead intelligible tort claims. Here, for example, Respondents say they have misrepresentation claims, but they plead those

supposed claims as a public nuisance case while failing to allege a physical invasion. It's nonsense.[4]

Even if this Court were to entertain such sleight of hand, it must find that the alleged facts cannot support a public nuisance claim. The standard definition of a public nuisance draws its inspiration from the private law of nuisance. Under § 822 of the Restatement (Second) of Torts, a private nuisance holds an actor "liable in an action for damages for a non-trespassory ***invasion*** of another's interest in the private use and enjoyment of land"; and § 821B(1) defines a public nuisance as "an unreasonable ***interference*** with a right common to the general public." Throughout the evolution of public nuisance, courts never included issues of misrepresentation, concealment, and nondisclosure. The most common invasions of a public right are blocking rights of ways, *Anonymous, Y.B. Mich.*, 27 Hen. 8, f. 27, pl. 10 (King's Bench 1536), or discharging 100,000 gallons of oil into public waters, *Burgess v. M/V Tamano*, 370 F. Supp. 247 (D. Me. 1973). The law has always "used the same definition of nuisance to cover both public and private nuisances," with the former used to reach damage to

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[4] Just last month, a trial court in South Carolina saw such claims roughly the same way: "For the reasons below, the Court grants Defendants' motions and dismisses Plaintiff's Complaint with prejudice. . . . [A]lthough Plaintiff's claims purport to be about deception, they are premised on, and seek redress for, the effects of greenhouse gas emissions." *City of Charleston v. Brabham Oil Co.*, 2020-CP-10-03975 (S.C. Ct. of Common Pleas Aug. 6, 2025), at 2, and cited *supra*, for a different purpose.

the public at large, instead of damages to neighboring property owners. Richard A. Epstein, *The Private Law Connections to Public Nuisance Law: Some Realism About Today's Intellectual Nominalism*, 17 J.L. Econ. & Pol'y 282, 283 (2022).

Respondents do artfully say "invasion," but simply to aver that Petitioners' "fossil fuel activities would cause and contribute to climate change and thus cause these invasions of Plaintiff's property." Am. Compl. ¶ 475 (this document is in the Appendix to Petitioners' (here) Petition for Order to Show Cause Pursuant at C.A.C. 21, which they filed at the Colorado Supreme Court on July 16, 2024, at Ex. 2 p. 192 of 810). Respondents do not say *who* committed these alleged invasions or that Petitioners have released or discharged any greenhouse gas onto Colorado's land, air, or waters. Instead, unidentified third-party users of Petitioners' products made the alleged "invasions," which would have to include Respondents themselves and Boulder's residents.

So Respondents invent a new claim that twists the traditional law of misrepresentation. The Supreme Court of Hawaii blessed a similar maneuver. *Hawaii*, 537 P.3d at 1187. But Respondents pled vague counts of fraudulent misrepresentation and fraudulent concealment that have none of the misrepresentation elements. Once the surplusage is stripped away, all that stays is a bare assertion that Petitioners sold products in a lawful and proper manner.

The proceedings below are replete with references to the misrepresentations and concealment. But misrepresentation and concealment cases start with the proposition that the defendant has material information that is *not* known to the plaintiff, after which the defendant makes a false statement to the plaintiff or omits to say a relevant material fact. The plaintiff, to its detriment, then relies on the false statement or improper omission.

The Restatement explains:

> One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from acting, is subject to liability for economic loss caused by the other's justifiable reliance on the misrepresentation.

See Restatement (Third) of Torts: Liability for Economic Harm § 9. Respondents fail on each element: to name the full class of proper defendants; to show causation; and to show justifiable reliance. As a result, this Court should tell other courts to reject the statement-based claims as a matter of law.

And before getting into each of those three failures, it is worth shading them as trial court judge in Baltimore City did in a related case: "Baltimore seeks compensatory and punitive damages, disgorgement of profits, civil penalties under the

MCPA, and equitable relief. . . . [But t]he explanation by Baltimore 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." *Mayor & City Council of Baltimore v. BP P.L.C.*, 24-C-15-004219 (Circuit Ct. for Baltimore City July 10, 2024), at p. 11 (also available in the appendix filed at the Maryland Supreme Court in case SCM-REG-0011-2025 at p. E.11). Judge Brown's point is obviously correct. This Court should consider what's really going on around the Nation. Courts cannot allow plaintiffs like Respondents to manipulate state tort laws of misrepresentation and nuisance to get from Petitioners and similarly situated defendants the same damages as if they were the actual polluters—all while denying that this has anything to do with any actual pollution.

A. Respondents lack a proper defendant.

Respondents single out large energy defendants, but they do not explain why they picked these companies from all other fossil fuel producers or the many dealers and retailers of fossil fuel products in Colorado. The complaint does not name any false statement made by Petitioners to Colorado residents about fossil fuels. It does not explain that any misstatements or omissions reached Boulder residents within the relevant time. Nor is this a case of concealment in the absence of a duty to disclose. The promotion of oil and gas does not resemble the

health claims that tobacco companies made about their product. They don't say that Respondents told the public—through advertisements—about price, mileage, additives, and services.

Sellers, distributors, and consumers handle, use, consume, and promote fossil fuel products in countless goods and services within Colorado without mentioning carbon dioxide or global warming. And on Respondents' theory, the list of other possible defendants goes far beyond the sellers of fossil fuel products to include the sellers of cars, trucks, and airplanes in Colorado and the many companies that supply natural gas and coal products to Colorado residents. Respondents continue their own use of fossil fuels even after they filed this lawsuit, and they have information on whatever they consider to be the scope and importance of global warming. Yet Respondents did not sue ***themselves***.

Under the standard rules of joint and several liability, the alleged misrepresentations amount to a tiny fraction of those made by the thousands of firms that deal in some way with fossil fuels but generate no emissions. Under the two prevailing rules for apportioning loss, § 433A of the Restatement (Second) Torts and the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9613(f), there must be a reasonable basis for division, here by market share, for any fraction of alleged misrepresentations made. Petitioners' supposed contributions would be *de minimis*. On this

ground alone, this Court should affirm the trial courts.

B. There is no materiality or causation.

In every tort case, a plaintiff must show that the actions attributed to the defendant has caused the specified harm. But here, the complaint does not do that. Therefore, Respondents must prove causation by showing that the alleged misrepresentations satisfy two conditions.

First, if the requisite misstatements or omissions had not taken place, there would have been a lower level of consumption of fossil fuels. And *second*, without the increases in fuel-consumption levels, the alleged local adverse events would have been reduced or even eliminated.

But how could Respondents here or so many other copycat plaintiffs maintain their claims when they and the public at large knew as much or more about global warming as Petitioners? Respondents do not meaningfully allege that as to increases in fuel-consumption levels. At most, they say that Petitioners' supposed ***misrepresentations*** caused 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-oft reduced snowpack,

and drought." *In re Exxonmobil v. Bd. of Cty. Comm'rs*, 2024SA000206 (Colo. July 16, 2024), App. to Pet. for Order to Show Cause Pursuant to C.A.R. 21, at Ex. 2, pp. 118–19 of 810 (presenting the Amended Complaint and Jury Demand ¶ 140).

But Respondents cannot satisfy their pleading burden on tort claims by simply claiming vague adverse climate effects from temperature increases, as if this were a poorly pled *res ipsa loquitor* case. It's not. They must allege that increased consumption of fossil fuels attributable to nonspecific representations by ***these*** Respondents were both material and sufficient to produce changes in consumption levels. Then they must allege that these supposed increases would have produced the necessary temperature changes to cause the alleged adverse climate events. Respondents cannot simply plead that the consequences of ***all*** weather-related changes must be laid at Petitioners' doorsteps because of their general marketing activities.

Rightly understood, this supposed causal chain has missing links. It ignores the sequence of events that would theoretically—never mind actually—link Petitioners' conduct to the possible damages, given that Petitioners' fossil fuel *sales* include coal, natural gas, and gasoline. These different energy sources are distributed through different channels. Coal is often sold to industrial users; natural gas is used for heating and industrial purposes; gasoline is commonly sold at automobile service stations.

Respondents do not identify the different forms of improper communications that accompany each method of distribution, and they cannot show that the supposed forms of misinformation were material and sole sources of greenhouse gases information to whatever hypothetical groups of buyers.

Take, for example, the sale of gasoline at service stations. If Petitioners had revealed all allegedly true information about global warming, Respondents do not explain the difference it would have made by individual drivers, all of whom have been bombarded with claims about the dangers of greenhouse cases for years on end. Consumers *might* believe that reducing their individual gasoline consumption might have only an infinitesimal effect on global warming. They would then have to balance this against the major changes in lifestyle that would occur if they could not drive to work or take their kids to school.

Those sacrifices would loom too large for individuals to change major driving habits. Consumers and consumption levels are far more responsive to taxes and regulations that immediately affect prices. Changes in consumer behavior due to federal regulation of fossil fuels swamp any weak voluntary responses to new information about greenhouse gases. The disparate modes of distribution for coal and natural gas are also heavily subject to regulation. It is ***implausible*** that any communications by Petitioners about their products

would influence consumption. The increasing demand for Respondents' products in Colorado and worldwide has a far greater impact on consumption than anything Respondents supposedly said.

Respondents must also show that other variables *do not* account for the alleged environmental harms. Thus, in the Pacific Palisades, for decades it has been well understood that rainy seasons would produce new green growth that would in a following dry year create kindling for the huge fires that followed—global temperature changes had nothing to do with those fires. Instead, "two 'extraordinarily' wet winters in 2023 and 2024 were followed by a dry period starting in February 2024." This was well understood when the fires started.[5]

Taking the point further, forest management policies, rather than greenhouse gasses, surely matter more than temperature changes with respect to forest beetle infestations and fires. The extent of chronic mismanagement can vary widely over time, as shown by the sharp rise in fires that began when government strategies shifted from forest management to fire suppression. Similarly, the deterioration in road conditions will depend far more on whether cities and counties have properly kept and salted roads, the change in the number and weight of cars and trucks,

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[5] Julia Jacobo, *This is the worst fire the Pacific Palisades has ever seen, experts say* (Jan. 10, 2025), https://abcnews.go.com/US/worst-fire-pacific-palisades-experts/story?id=117507457, last visited July 9, 2025.

and whether any storms or parasites have necessitated repairs.

The theory that global consequences attach to both local sales campaigns and to the alleged nondisclosure of research activities over the last fifty or more years creates an open ticket to collect tens of billions of dollars, not only in Boulder, but also worldwide. Yet each allegation of an adverse event claimed to arise from misrepresentation during fossil fuel sales is both speculative and unsustainable. The claims of irreversible damage require a detailed and separate account of each element in the chain of causation. So given the more stringent pleading requirements of *Bell Atlantic, Co. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), Respondents failed to explain the direct link between Petitioners' supposed statements, which maybe accompanied the sales of their products, to the asserted physical damages. But they cannot carry their pleading burden if they cannot rule out other well-known causes—poor forest management etc.—that bring about the same alleged harms produced by greenhouse gas emissions.

C. Respondents have no justifiable reliance.

American law distinguishes between *speaking* falsely *t*o someone and actively *deceiving* someone. It is not possible to deceive a person who knows the true facts, because that knowledge precludes any justifiable reliance on the defendant's statements or

omissions. Here, Respondents did not identify anyone who can show actual reliance on Petitioners' supposed misrepresentations. They had to point to a misrepresentation or concealment ***by Petitioners*** that fossil fuels "do no harm to the environment." They offered no explanation as to why *these* defendants (Petitioners), among thousands of other possible parties, including Respondents themselves, had a unique duty of disclosure to the public. But even if every statement uttered by Petitioners were false, Respondents could still not justifiably rely on the supposed statements about climate change. Hundreds, if not thousands, of sources proclaim the threat that greenhouse gases pose to the environment.

Respondents cannot claim that these defendants withheld critical information about the effects of greenhouse gases. Intensive public knowledge and discussion of these issues already exists. Thus the United Nations' Intergovernmental Panel on Climate Change issued a 2021 report in a press release that had these emphatic words: "Climate change is widespread, rapid, and intensifying, and some trends are now irreversible, at least during the present time frame."[6] In the same press release, UN Secretary-General António Guterres declared that the IPCC's Working Group's report was nothing less than "a code red for humanity." "The alarm bells are

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[6] United Nations, *IPCC report: 'Code red' for human driven global heating, warns UN chief* (Aug. 9, 2021), https://news.un.org/en/story/2021/08/1097362, last visited July 9, 2025.

deafening, and the evidence is irrefutable." Guterres continues to call publicly for a fossil fuel ban to avoid "an escalating crisis."

Websites such as Carbon Monitor[7] give exhaustive updates on all issues carbon. Just recently, James Gustave Speth published his recent book, *They Knew*.[8] Mr. Speth has been actively involved in climate work since his days as a high-level official in the President Carter Administration. And who is "they"? It is ***not*** Petitioners. No, as the subtitle says it is "The US Federal Government's Fifty-Year Role in Causing the Climate Crisis."

One can agree or disagree with any of these studies, but what Respondents cannot show or even allege is that in this world teeming with information, Petitioners' supposed silence has led to changes in fossil fuel consumption, let alone to changes in temperature. Every court should take judicial notice that public statements from a multitude of public and private sources make it impossible to conceive of Petitioners or the other similarly situated defendants nationwide playing a decisive role in the public creation and transmission of carbon-related information. Respondents cannot sufficiently allege that Petitioners by some devious schemes supposedly

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[7] https://carbonmonitor.org/, last visited July 9, 2025.

[8] https://mitpress.mit.edu/9780262545099/they-knew/, last visited July 9, 2025.

were able to keep the public in the dark.

The law of fraud rests on the rule that a defendant cannot keep secret *private* information in its commercial dealings with others. The minimum condition to prove a fraud case is *asymmetric* information between the two parties. The defendants must know something that the plaintiffs do not. A leading illustration is the English case, *Derry v. Peek*, L. R. 14 App. Cas. 337 (1889). There, the fatal misrepresentation was that defendants had "the right to use steam or mechanical motive power instead of horses" to run their trams along the public way, even though they had secured such authorization for only part of that way. *Id.* at 347. The concealment of that vital information hurt the plaintiffs' investment prospects. The plaintiffs, who had no independent source of information, relied on the defendants.

This case raises the opposite prospect. It bears similarity to the situation condemned nearly 100 years ago by Justice Benjamin Cardozo, in a case involving financial fraud undetected by accountants, against imposing "a liability in an indeterminate amount for an indeterminate time to an indeterminate class." *Ultramares Corp. v. Touche*, 174 N.E. 441, 444 (N.Y. 1931).

Here, Respondents have filed generic allegations that anyone could repeat virtually verbatim, with a few name changes, against a broad universe of defendants. Every producer, user, and consumer of fossil fuels, and every entity in the supply

chain in between, could become the next defendant in a suit for contributing to energy use, which allegedly increases greenhouses gases, allegedly raises global temperatures, and then allegedly causes climate change, which in turn maybe harms Colorado somewhere, maybe including Boulder County—along with every other state in the Union. Hundreds of cities and counties could bring copycat complaints that could plunge these defendants, or any of a thousand other firms, into the same morass. The Court should take this case and reverse the decisions below, and should reject such limitless theories of tort liability.

CONCLUSION

For these reasons, the Court should grant the request for certiorari.

Respectfully submitted,

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