No. 25-170

IN THE
Supreme Court of the United States

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

v.

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

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

BRIEF OF FORMER STATE SOLICITORS GENERAL AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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This brief is filed by **O.H. Skinner** and **Brunn (Beau) Roysden**, the two most recent former Arizona Solicitors General, who served from 2019 to 2022 and recently wrote about public nuisance litigation for the Harvard JLPP.[2] As former state solicitors general who regularly litigate, advise, and speak on the topic of intrusions into state sovereignty, Amici have a unique perspective. And Amici have a clear exhortation: the Court should establish that public nuisance cannot be used to reach beyond a state's territorial jurisdiction for any subject matter (not just emissions), lest overbroad public nuisance litigation continue to haunt our state courts like a demon in search of a host.

SUMMARY OF ARGUMENT

The type of public nuisance case that is before the Court will be pressed in different state courts until either proponents accomplish their policy goals (in areas ranging from climate to plastics to cars to guns) or the Court soundly rejects the misuse of public nuisance claims that this case typifies. It is therefore imperative for the Court to stop the use of public nuisance as an ideological, cross-border battering ram, and limit state-law public nuisance litigation to local nuisances.

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[1] Pursuant to Rule 37.6, undersigned affirms that no counsel for a party authored this brief in whole or part and the only monetary contributions toward this brief were by undersigned counsel.

[2] O.H. Skinner & Brunn Roysden, *The Next Big States' Rights Case Might Not Be What You Think*, Harv. J.L. & Pub. Pol'y Per Curiam (May 27, 2024), https://journals.law.harvard.edu/jlpp/the-next-big-states-rights-case-might-not-be-what-you-think/.

This case stems from a decade-long campaign of climate-change-centered public nuisance litigation in state courts across multiple jurisdictions.[3] This state-by-state litigation campaign is supported by donor-backed ideological infrastructure of scale and sophistication, ranging from a donor-backed law firm to a persuasion machine that reached all the way into the activities of the Federal Judicial Center and other entities meant to serve as non-partisan educational vehicles for the judiciary.

These lawsuits continue, despite some jurisdictions rejecting their claims, in large measure because the supporting infrastructure has already been built at great expense by left-wing donors and the prize is too big for proponents to forgo chancing at. Make no mistake, even if public nuisance climate claims fail in Maryland and elsewhere under state law, the robust infrastructure that was built over the past decade or more to support these types of public nuisance claims will continue in the absence of an equal and opposite force from this Court.

Said differently, these public nuisance claims will hunt for welcoming jurisdictions—like a demon in search of a host—until either the cases accomplish their proponents' ideological goals (through judgment or settlement) or the Court provides a clear rebuke in a case like this.

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[3] *See, e.g., County of San Mateo v. Chevron Corp.*, No. 17CIV03222 (Cal. Super. Ct. filed July 17, 2017); *Rhode Island v. Chevron Corp.*, No. PC-2018-4716 (R.I. Super. Ct. filed July 2, 2018).

ARGUMENT

The modern public nuisance litigation machine that produced this case and others like it was summoned into being by activists, academics, and trial lawyers who saw an opportunity to accomplish through novel legal means what they could not accomplish through traditional, democratic processes. The result is a litigation apparatus that threatens to force millions of Americans into a different lifestyle thanks to activist-initiated state-court lawsuits.

The structural durability of this apparatus means that setbacks in one jurisdiction or another just send the public nuisance litigation demon searching for a new host—a new jurisdiction open to taking the claims for a spin—because it just takes a tiny handful of wins (through either final judgement or settlement) for the activists to prevail in their ideological mission, whereas defendants must essentially run the table across the nation to preserve the free-market status quo in their industry.

That is why it is important for the Court to rebuke the use of public nuisance in this case—taking seriously the persuasive briefing as to equal sovereignty and territorial jurisdiction that will be before it—and provide the clear statements that lower courts need in order to slay the demon and clearly foreclose the use of ideological public nuisance lawsuits to reach beyond the territorial jurisdiction of a forum state and change the products available to Americans elsewhere in the country.

I. This Case Arises From A Well-Funded Campaign To Reshape American Society Through Public Nuisance Litigation Over Climate And Many Other Ideological Issues

A crucial part of understanding the importance of this case for the Court and the country entails understanding the infrastructure that supports climate-related public nuisance litigation, the self-identified goals of the proponents of this litigation campaign, and the other products and industries that have been (and will continue to be) targeted by public nuisance litigation like this in the absence of conclusive action by the Court.

A. Donor-Backed Litigation Infrastructure Stands Behind These Cases

Though the Court must consider this case on its own merits, it should not ignore the plain facts surrounding the genesis of this genre of litigation, which lifted off in earnest a decade ago with financial and operational support from donor-side groups like the Rockefeller Family Foundation and others.

The Rockefeller Family Foundation's own digital history claims credit for funding each step in the modern public nuisance movement over climate change, from state attorney general investigations to private and local government litigation like the case here.[4]

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[4] *History of the Rockefeller Family Fund*, Rockefeller Family Fund, https://www.rffund.org/history (select "1999-Present Collaborating to Drive Social Change") (last visited May 19, 2026) (claiming credit for the Center for Climate Integrity and other

But there are still other donor-side entities that contributed to the modern climate-related public nuisance litigation movement. For example, the Institute For Governance & Sustainable Development ("IGSD") helped launch (and substantially fund) the Center of Climate Integrity ("CCI"),[5] which seeks to provide "legal support" to those who pursue litigation against the fossil fuel industry.[6]

Consistent with that "legal support" concept, IGSD has committed to pay outside counsel in municipal public nuisance suits, most notably in Hoboken, New Jersey, where IGSD committed to fund the city's lawyers when the city voted to file its climate-related public nuisance lawsuit in 2020.[7]

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initiatives that led "to dozens of public interest actions filed by states and municipalities against" the energy industry); *Our Work: Climate*, Rockefeller Family Fund, https://www.rffund.org/climate (last visited May 19, 2026) ("The project catalyzed dozens of lawsuits brought by states and municipalities against oil companies….").

[5] *Institute for Governance & Sustainable Development*, McArthur Foundation, https://www.macfound.org/grantee/institute-for-governance--sustainable-development-40447/ (last visited May 19, 2026).

[6] *See, e.g.*, Brief of Amici Curiae Robert Brulle et al. in Support of Plaintiff-Appellee and Affirmance at 4, *District of Columbia v. Exxon Mobil Corp.*, No. 22-7163 (D.C. Cir. Apr. 7, 2023), https://climateintegrity.org/uploads/media/Amici_Brulle_et_al_DC_Circuit_Brief_Support_Appellee.pdf

[7] *See* City of Hoboken, N.J., City Council Resolution No. 20-65, Resolution Authorizing the City to Enter into a Retainer Agreement with Sher Edling LLP (2020), available at https://eidclimate.org/wp-content/uploads/2020/09/20-65-Resolution-Author-

Direct donor funding of outside counsel for state and local governments is a core part of the litigation infrastructure in this space, well beyond Hoboken. Indeed, Congressional investigators have documented the millions in donor dollars flowing to Sher Edling, the firm behind as many as two-dozen of these cases on behalf of governmental clients, with Sher Edling admitting that its first lawsuits were filed with the support from a fund managed by the Resources Legacy Fund.[8]

Beyond funding the law firm most associated with initiating these cases for public clients, the donor-backed-infrastructure in this space has also helped

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izing-the-City-to-Enter-into-Retainer-Agreement.pdf; *see generally* Alliance for Consumers, *Public Nuisance Revealed: The Left-wing Plan to Reshape Our Society* at 65 (Mar. 2023), https://allianceforconsumers.org/wp-content/uploads/2023/03/AFC-Public-Nuisance-Report-Final.pdf.

[8] *See* Memorandum from Republican Staff, S. Comm. on Commerce, Sci., & Transp., to Release, Re: *Investigation into the Funding of Sher Edling, LLP's Lawfare Against American Energy Companies and the Role of Former Nominee to Be NHTSA Administrator, Ann Carlson, in Those Efforts* at 7 (Oct. 7, 2024), https://freebeacon.com/wp-content/uploads/2024/10/2024.10.07-Sher-Edling-Memo.pdf; *see also* Letter from Sen. Ted Cruz, Ranking Member, S. Comm. on Commerce, Sci., & Transp. et al., to Sher Edling LLP (Sept. 25, 2023), https://www.commerce.senate.gov/wp-content/uploads/media/doc/2023.09.25%20Sen.%20Cruz%20and%20Chairman%20Comer%20Letter%20to%20Sher%20Edling.pdf; Kamden Mulder, *Leading Climate Lawfare Firm Accepts Millions in Donations from Left-Wing Dark Money Groups*, Nat'l Rev. (Dec. 21, 2025), https://www.nationalreview.com/news/leading-climate-lawfare-firm-accepts-millions-in-donations-from-left-wing-dark-money-groups/.

create and financially support non-profit entities that can initiate private lawsuits directly as plaintiffs or serve as counsel for public clients (the model being deployed in this very case). For example, both Earth-Rights International and The Niskanen Center receive substantial financial support from Rockefeller entities such as the Rockefeller Brothers Fund and the Rockefeller Family Foundation.[9] And Earth Island Institute—a major figure in bringing public nuisance claims against companies that use plastic packaging (Coca-Cola, Pepsi, Nestlé, etc.)—has received substantial financial support from the same Rockefeller network of entities as well as the Resources Legacy Fund and entities like the New Venture Fund.[10]

But the infrastructure does not just include law firms and plaintiff entities; there is also narrative support infrastructure that has been deployed. The recent controversy surrounding the Federal Judicial Center's Reference Manual on Scientific Evidence shows the full scale of this narrative infrastructure. As twenty-

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[9] EarthRights Int'l, *2024 Annual Report* 29 (2025), https://earthrights.org/wp-content/uploads/2025/07/2024-Annual-report-26June2025-online.pdf; *The Niskanen Center, Inc.*, Rockefeller Brothers Fund, https://www.rbf.org/grantees/niskanen-center-inc (last visited May 19, 2026).

[10] *See* I.R.S. Form 990, Resources Legacy Fund (2022), https://resourceslegacyfund.org/wp-content/uploads/2025/09/RLF-2022-IRS-Form-990.pdf; *Earth Island Institute*, Rockefeller Brothers Fund, https://www.rbf.org/grantees/earth-island-institute-inc (last visited May 19, 2026); *Earth Island Institute*, InfluenceWatch, https://www.influencewatch.org/non-profit/earth-island-institute/ (last visited May 19, 2026); *Resources Legacy Fund*, InfluenceWatch, https://www.influencewatch.org/non-profit/resources-legacy-fund/ (last visited May 19, 2026); .

two state attorneys general have noted, the climate change chapter within the Federal Judicial Center's Reference Manual on Scientific Evidence was co-authored by a climate-change advocate, who had written an amicus brief arguing that "the world needs to phase out fossil fuels as rapidly as possible." Letter from Mike Hilgers, Att'y Gen. of Neb., et al., to Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, et al. at 2 (Feb. 2, 2026), https://ago.nebraska.gov/sites/default/files/doc/Letter_5.pdf. The other co-author of the chapter argued that "it's absolutely critical that there be a global effort to do everything we can to dramatically draw down emissions." *Id.* at 3 (citation omitted). And a reviewer of the chapter is an attorney at Sher Edling. *Id.* Another reviewer of the chapter stated the intentions of this group of advocates plainly:

> Until and unless elections bring to power a president, a Congress, and local officials who will take the necessary measures, litigation is needed to inhibit those who will try to move backwards, spur on those with good intentions, help implement the policies set by wise Congresses past, and continue the quest for redress for victims.

Id. at 4 (citation omitted).

B. These Donor-Backed Public Nuisance Cases Are Wholly Unlike Traditional Commercial Litigation

Given the lengths that climate advocates have gone to directly finance the key law firm on this issue, bolster non-profits that can serve as plaintiffs and

counsel, and disseminate their messaging into supposedly neutral channels (including governmental channels), it is clear that this whole public nuisance litigation campaign over climate change is motivated by ideological goals and donor agendas, and the cases will not behave like traditional commercial litigation.

Indeed, David Bookbinder, the former Director of Law and Policy at the Environmental Integrity Project, explained that the purpose of imposing tort liability on energy companies is to functionally achieve the same economic outcome as imposing a carbon tax, which Congress has wisely refused to enact. Mr. Bookbinder has stated,

> Essentially tort liability is an indirect carbon tax. You sue an oil company; an oil company is liable. The oil company then passes that liability on to the people who are buying its products. In some sense, it is the most efficient way. The people who buy those products are now going to be paying for the cost imposed by those products.

Can State Courts Set Global Climate Policy? at 33:00, The Federalist Society, YouTube (Oct. 10, 2025), https://www.youtube.com/watch?v=1wyxaE4TC-A. Mr. Bookbinder has also spoken positively about the lawsuits forcing the energy industry into bankruptcy. *See* Ed Whelan, *'Every Defendant [Oil Company] Declares Bankruptcy'*, Nat'l Rev.: Bench Memos (Oct. 20, 2025), https://www.nationalreview.com/bench-memos/every-defendant-oil-company-declares-bankruptcy/.

With that in mind, it is unreasonable to expect these cases to respond to judicial setbacks in an economically rational way. While a normal commercial litigant might seek settlement in the face of increasing judicial odds, this type of lawsuit is seeking something different than a negotiated monetary outcome. To the contrary, the infrastructure behind these lawsuits, backed with donor dollars, knows that a string of state court defeats does not remove the potential for a handful of multi-billion-dollar state court wins to unlock the carbon tax or bankruptcy outcomes that appear to be so desired by proponents.

C. The Targets Of Extraterritorial Public Nuisance Litigation Go Well Beyond Energy Companies And Include Everything From Cars To Guns To Plastic Straws

The public nuisance problems that are presented by this case are "especially acute," Petitioner's Br. at 28, because the alleged nuisance is global climate change, which implicates boundless aspects of the economy. But it is important to note that any public nuisance litigation over lawful products sold across national or international borders implicates many of the same concerns because such litigation allows one jurisdiction to "effectively regulate" beyond its territorial borders. Pet.App.25a (Samour, J., dissenting).

Alliance for Consumers has well identified the truly widespread nature of public nuisance litigation like that seen in this case.[11] One of the most notable targets outside of climate change litigation is single-

[11] Alliance for Consumers, supra note 7, at 5.

use plastics, including bottles, straws, and packaging; for example, Earth Island filed a lawsuit in 2020 in California against major companies such as Coca-Cola and Nestle seeking damages to fund the cleanup of plastics on beaches and elsewhere.[12] Another area is firearms, where certain states and officials have attempted to expressly open firearms manufacturers to claims of public nuisance.[13] And a third area is automakers, as cities have sued under public nuisance for the design of automobiles, including the theory that a higher proportion of car thefts involving certain makes of car within an overall decreasing number of car thefts in the municipality constitutes a public nuisance. *In re: Kia Hyundai Vehicle Theft Litig.*, No. 8:22-ML-03052-JVS-KES, 2026 WL 1040362, at *4 (C.D. Cal. Mar. 23, 2026).

The implications of this full spectrum public nuisance campaign are immense. What comes to the Court today as a lawsuit about energy producers and global climate change will tomorrow involve construction, or mining, or manufacturing, or plastics, or AI computing, or any other industry that arguably influences climate change (for which there is effectively no

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[12] Complaint, *Earth Island Inst. v. Crystal Geyser Water Co.*, No. 20CIV01213 (Cal. Super. Ct. Feb. 26, 2020), https://www.earthisland.org/images/uploads/suits/2020-02-26_Earth_Island_Complaint_FILED.PDF.

[13] Complaint, *City of Buffalo v. Smith & Wesson Brands, Inc.*, No. 815602/2022. (N.Y. Sup. Ct. Dec. 20, 2022), https://www.courtlistener.com/docket/66767689/the-city-of-buffalo-v-smith-wesson-brands-inc/; Complaint, *City of Rochester v. Smith & Wesson Brands, Inc.*, No. E2022010581 (N.Y. Sup. Ct. Dec. 21, 2022), https://www.courtlistener.com/docket/66767690/the-city-of-rochester-v-smith-wesson-brands-inc/.

limiting principle), or is otherwise on the front lines of a cultural battle. Unchecked, this campaign will make it so that decisions about the American economy won't be made in the halls of Congress or state legislatures; they will be dictated in local courthouses.

II. Only The Court Conclusively Stepping In Can Stop This Runaway Train

Only this Court can vanquish the public nuisance demon that is currently searching about for state court hosts. This problem is not one that can be solved through piecemeal victories at the state level; prevailing against extraterritorial public nuisance efforts in one state only means the demon will move to another. And that is doubly true because the nuisances being targeted by ideological actors are not localized—litigants do not point to a specific pigsty in their neighborhood to justify a lawsuit. Instead, they rely on identification of a nationwide (or worldwide) problem that is essentially everywhere, at all times.

Because there is no territorial limitation to the reach of these suits, those who are targeted by this type of public nuisance litigation must run the table; a single loss to the public nuisance plaintiffs can have the same impact as losing everywhere, given the dollars involved and the nature of the relief sought.

And these cases aren't stopping of their own accord. To confirm this, look no further than the post-certiorari activity in Hawaii, where similar cases to the case before the Court are pending. There, the state courts have denied stays and the parties are pressing forward with discovery into the very matters at issue

here, even as briefing progresses in the Court in this case. *City & County of Honolulu v. Sunoco LP*, No. 1CCV-20-0000380 (Haw. Cir. Ct. May 6, 2026) (denying defendants' motion to stay discovery). These Hawaii proceedings are an instructive example of what the future of litigation in this space might look like in the absence of a clear rebuke from this Court. Despite the staggering breadth of pending discovery in Hawaii—spanning 75 years of documents, hundreds of depositions of Defendants, and an "unlimited" number of third-party depositions before the end of fact discovery in October 2027—the court there asserted that "the eventual outcome of the *Boulder* appeal is too uncertain to justify a stay" and concluded it would be "prudent to continue to move forward with discovery until, if and when, it is ever clear that discovery in this case will be unnecessary." *Id.* at 4, 6.[14]

The Hawaii courts' refusal to grant a stay shows that this Court cannot rely on soft signals to stop ideological, extraterritorial public nuisance litigation in state courts across this country.

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[14] A different judge of the same state trial court also denied a stay in *State of Hawaii v. BP P.L.C.*, No. 1CCV-25-0000717 (Haw. Cir. Ct. March 23, 2026), https://cdn.climatepolicyradar.org/navigator/USA/2025/state-of-hawaii-v-bp-p-l-c_ebad8d82da68ca49cb4b6e92f4530a07.pdf. On March 23, 2026, the Court issued an order denying Defendants' stay motion, reasoning that Plaintiffs faced "prejudice from further delay, including degradation and loss of evidence from aging witnesses and the continuation of alleged public harms," and brushing off Defendants' position as a "desire to avoid litigation costs or to await potentially favorable, but speculative, rulings in other cases." *Id.*

The unfortunate path ahead is clear, absent the Court taking this opportunity to address this set of public nuisance issues and lay down a marker for all of the state courts: cases will continue, in Hawaii, Colorado, and elsewhere; further petitions will come to the Court; and one of two outcomes will follow, either the ideological litigants behind extraterritorial public nuisance efforts will accomplish their goals in the absence of the Court speaking, or the Court will take a different case and deliver the blow to public nuisance that is called for in this case, right now.

III. Cabining Public Nuisance Is Consistent With The Court's Recent Jurisprudence.

Respondents here seek to use a common law tort designed to facilitate the removal of road obstructions and offensive smells to accomplish policy objectives on issues of nationwide/worldwide import, while sidestepping legislation and other traditional processes.

The Court has seen this before; activists have previously attempted to use "wafer-thin reed[s]" to justify the exercise of "sweeping power[s]" in areas of national concern. *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 594 U.S. 758, 765 (2021). The Court responded to this novel approach with the major questions doctrine, explaining that regulatory actions of "vast economic and political significance" must arise from clear legislative authorizations rather than the creativity of clever lawyers applied to heretofore minor statutory provisions. *Alabama Assn.*, 594 U. S. at 754 (internal citations and quotation marks omitted). Examples of the Court's invocation of the major questions

doctrine have included the COVID-19 eviction moratorium; *id.* at 764 (estimating an economic impact of approximately $50 billion); President Biden's student loan forgiveness plan, *Biden v. Nebraska*, 600 U.S. 477, 502 (2023) (estimating an economic impact of between $469 and $519 billion); and President Trump's emergency tariffs, *Learning Res., Inc. v. Trump*, 607 U.S. ----, 146 S. Ct. 628, 641 (2026) (crediting federal government's estimates that tariff revenue could be between $4 and $15 trillion).

In fact, the Court has previously faced an attempt to accomplish many of the same goals sought by the present case through dubious regulatory means—the Environmental Protection Agency's attempt to implement portions of the failed Clean Power Plan through novel regulation. In *West Virginia v. EPA*, the Court explained that EPA sought to "substantially restructure the American energy market" by citing to a newfound power in a vague statute that had never been used before in such a manner. 597 U.S. 697, 724 (2022). The Court struggled to define the massive breadth of EPA's claimed power, but it did not hesitate to find that such power could not reside in a "little-used backwater" of the law. *Id.* at 730.

What the federal government could not accomplish through regulation, local governments now seek to accomplish through the once-little-used backwater of public nuisance. The same structural and procedural problems that arise from sudden federal agency aggrandizement in the absence of clear statutory authority arise from the sudden aggrandizement of public nuisance by local governments in local courts.

If the Court does not step in and restore sanity, the pattern of activists increasingly turning to public nuisance litigation to advance nationwide issues where legislation and regulation have failed will continue. The Court can end this backdoor nationwide-regulation-by-judicial-fiat maneuver—the newest elephant in a mousehole—by simply following its reasoning from major-questions-doctrine cases and limiting public nuisance litigation to the local and intrastate problems they have historically been used to address.

CONCLUSION

These types of public nuisance cases—whether about climate change or guns or any other hot-button issue—will not stop being pressed in different state courts until either their proponents accomplish their policy goals or this Court soundly rejects the use of these claims in this manner. This is not traditional commercial litigation. This is lawfare designed to gain control of the national economy through state courts. It must be seen and addressed as such. And the Court can properly do that, and stay consistent with its recent precedent, by limiting the uses of extraterritorial public nuisance claims, slaying a demon that will otherwise roam through the state courts of our nation looking for a host to facilitate its ideological ends.

Respectfully submitted,

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