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 *AMICUS CURIAE* GOVERNMENT ACCOUNTABILITY & OVERSIGHT IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

Government Accountability & Oversight ("GAO") is a nonprofit organization incorporated under the laws of Wyoming, dedicated to transparency in government and the proper role of the federal judiciary. GAO files this brief in support of the Petitioners because it possesses unique information that this Court should consider, demonstrating the necessity of federal jurisdiction over a nationwide campaign of ostensibly local "climate" nuisance and/or consumer protection claims.[1]

As a nonprofit, GAO has no direct interest, financial or otherwise, in the outcome of the case, aside from its interest in good governance and advocating for the proper role of the federal judiciary. Because of its lack of a direct interest combined with its intimate and firsthand knowledge of the records illustrating the above-described concerns and how they inform the import of other information in the public domain, GAO is ideally situated to provide the Court with a perspective that is distinct and independent from that of the parties.

SUMMARY OF ARGUMENT

Government Accountability & Oversight ("GAO") files this brief because it possesses unique information demonstrating the necessity of federal jurisdiction over

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1. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

the claims at issue. Despite creative pleading, these claims were not born of any local grievance. Instead, they were advanced as part of a coordinated, vexatious nationwide litigation campaign in which states and municipalities sued over lawful commerce (commerce inevitably occurring outside the plaintiffs' own borders) seeking to extract what one state official euphemistically called a "sustainable funding stream."[2] That stunning admission is among the information GAO has obtained in which the campaign's principals confessed to using the courts for improper purposes. In short, this litigation and its companion suits represent nothing less than a campaign to impose the equivalent of taxation and dictate energy policy through the courts. They seek to impose tax-equivalents and attain policy impacts of nationwide scope through litigation precisely because their desired policies have been rejected through the proper political process. The time has come to settle the jurisdictional question once and for all.

ARGUMENT

The Colorado Supreme Court opinion in this matter readily acknowledges in its first sentence that "this case presents substantial issues of global import." *Cnty. Comm'rs of Boulder Cnty v. Suncor Energy USA, Inc. (In re Cnty. Comm'rs of Boulder Cnty)*, 2025 CO 21, ¶ 1, 586 P.3d 161. The dissenting justices more properly phrase the point in noting that the issues at hand implicate "uniquely federal interests." *Id*. at ¶ 73, 586 P.3d 161 (dissent) (citations omitted).

GAO and other nonprofits have obtained information confirming that this suit, which is one component part of

2. *See infra* at nn. 20–24.

a national, coordinated campaign asserting state-court causes of action seeking to effectively steer domestic energy and environmental policy and/or raise revenues outside the appropriate, political process, is properly sited before the federal courts. These public records reveal more plainly than ever that this suit and others like it represent an attempt to obtain through the judiciary what the political branches have declined to provide. These political goals include energy regulation and the imposition of taxes that plaintiffs have despaired of obtaining through the democratic process.

GAO notes that this lawsuit was listed in a document styled as an "Amendment to Confidentiality Agreement Regarding Participation in Climate Change Public Nuisance Litigation" among at least fourteen (14) ideologically aligned state attorneys general, which originated in November 2019.[3]

That secrecy pact claims that

> "[t]he parties . . . have an interest in or are counsel for entities that have an interest in one or more cases brought, or that will be brought, in state court or U.S. District Court,

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3. Another group, for which amicus GAO provided legal representation on open records requests (including through undersigned counsel during a prior GAO organization as a professional corporation) obtained the original Agreement and Amendment from, *inter alia*, under several states' public records laws. The original Agreement was dated Apr. 25, 2018. The 2019 amended version including the instant matter, below, may be found at https://climatelitigationwatch.org/wp-content/uploads/2021/01/Climate-Change-Public-Nuisance-Litigation-CIA-Amendment.pdf.

> or appealed to state or federal courts of appeal, including the highest state appellate court or the U.S. Supreme Court, in which various entities have filed or will file actions against fossil fuel producers for remedies, including abatement of a public nuisance, due to present and future harm related to climate change. Together, these cases are referred to herein as the "Litigation." The Litigation includes, but may not be limited to . . . *Board of County Commissioners of Boulder County, et al., v. Suncor Energy, et al., No. 19-1330 (10th Cir.).*"

Those plaintiffs' secrecy pact sets forth its objective: "The Parties to this Agreement have a common interest in ensuring the proper application of the federal and/or state common law of public nuisance arising from the effects of climate change, including sea level rise."[4] To quote the dissent below, "'There is no federal general common law.'" *Id.* at ¶ 82, 586 P.3d at 161, citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). However, federal courts have developed common law in limited, specialized areas involving "uniquely federal interests" that "are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988), *citing Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (internal citations omitted).

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4. Available at https://climatelitigationwatch.org/wp-content/uploads/2021/01/Climate-Change-Public-Nuisance-Litigation-CIA.pdf.

Those "climate" plaintiffs' first generation of suits brought under a common law theory kept losing in federal court. Rather than giving up or changing tack, the "climate" plaintiffs simply rebranded and relocated their claims (while operating under the same purported common interest agreement, and still seeking nuisance-style damages). The campaign freely converted from raising federal common law nuisance claims[5] to state nuisance claims[6] and later purportedly local, consumer protection claims[7] (still seeking nuisance remedies). As an email sent by the law firm representing most of these plaintiffs to a prospective funder of this "contingency fee" campaign acknowledged, "[o]ur co-counsel—the lawyers for these public entities—are exceptionally creative and dedicated."[8]

Other public records obtained by GAO document efforts by members of the plaintiffs' legal team to recruit other governmental entities to join their campaign, acknowledging the view that state courts simply are the

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5. *See*, *e.g.*, *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009), *rev'd on other grounds*, 564 U.S. 410 (2011).

6. *See*, *e.g.*, *Cnty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal. 2018); *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017 (N.D. Cal. 2018).

7. *See*, *e.g.*, *Minnesota v. Am. Petroleum Inst.*, No. 20-cv-1636 (D. Minn. filed Jun. 24, 2020); *District of Columbia v. ExxonMobil Corp.*, No. 2020 CA 002892 B (D.C. Super. Ct. filed Jun. 25, 2020).

8. Jul. 19, 2017 email from Sher Edling LLP's Chuck Savitt to Dan Emmett, forwarded by Emmett on Jul. 22, 2017 to UCLA Law faculty and administrators, released Apr. 21, 2022, available at https://climatelitigationwatch.org/wp-content/uploads/2022/12/SherEdling-recruting-Emett-then-Carlson-recruting-Sabin.pdf.

"more advantageous venue for these cases."[9] Notably, the same release of public records that produced that particular email also shows that Boulder counsel Marco Simons first approached the Fort Lauderdale, Florida Mayor's office in July 2018 with the express goal of bringing lawsuits against fossil fuel companies to pay for alleged climate change damages. Mr. Simons was accompanied by attorneys Victor Sher and Matthew Edling,[10] who are "responsible for most climate litigation in the United States."[11] Emails show that their firm receives charitable foundation financing for its work in sums so large, according to Internal Revenue Service filings, that it is implausible it is not for the entirety of the united litigation campaign. In short, each constituent case within this campaign is part of a whole (*infra*).

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9. *See*, *e.g.*, email from a recruiter for plaintiffs' counsel in most of these matters, Sher Edling, LLP, named Seth Platt to the Mayor of Fort Lauderdale, Florida, at https://climatelitigationwatch.org/wp-content/uploads/2019/09/GsPlatt-responds-to-Ft-Lauderdale-signaling-Judge-Alsup-opinion-is-too-much-for-them.pdf.

10. *See* emails at https://climatelitigationwatch.org/wp-content/uploads/2026/05/July-27-2018-thread-re-SherEdling-presentation-and-CA-dismissal.pdf. *See also* schedule showing Simons presentation, available at https://climatelitigationwatch.org/wp-content/uploads/2026/05/LSN-ERI-IGSD-meetings-Ft-Lauderdale.pdf. Simons approached that prospective plaintiff as General Counsel for a group recruiting "climate" plaintiffs called EarthRights International on behalf of the group that was an early organizer of this litigation campaign, The Institute for Governance & Sustainable Development (IGSD).

11. Heather Mac Donald, "The Climate Litigation Swindle," City Journal, Spring 2026, https://www.city-journal.org/article/climate-fossil-fuel-energy-lawsuits.

A member of the "climate" plaintiffs' team admitted their desire to pursue claims of state jurisdiction after U.S. District Judge William Alsup dismissed the City of Oakland's "climate nuisance" suit against many of the same defendants in June 2018.[12] Then, UCLA law professor and also consultant to Sher Edling, LLP (lead counsel in most of these cases) Ann Carlson[13] also signaled the change of course. Her opinion was that the plaintiffs' chances for recovery are much better in state *fora*.[14]

Now, other public records further reveal the coordinated national campaign, showing that these suits which claim to be a series of unrelated state actions have in fact, throughout, been quietly underwritten as a single body of work by private funders, to the tune of so far approximately $20 million dollars of "charitable grants" to (at minimum) the Sher Edling firm driving this campaign.[15] This is despite the execution of generous

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12. *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017 (N.D. Cal. 2018).

13. Ms. Carlson's disclosures to the University of California at Los Angeles regarding her outside employment with Plaintiff's counsel Sher Edling can be found at https://climatelitigationwatch.org/wp-content/uploads/2021/03/Carlson-reporting-forms-Responsive-Documents-20-8525.pdf. These records were released under California's Public Records Act.

14. Mark Kaufman, "Judge tosses out climate suit against big oil, but it's not the end for these kinds of cases," mashable.com, Jun. 26, 2018, https://web.archive.org/web/20180906191240/https://mashable.com/article/climate-change-lawsuit-big-oil-tossed-out/.

15. *See*, *e.g.*, Letter from Rep. Jim Jordan, Chairman, House Comm. on the Judiciary, to Vic Sher, Partner, Sher Edling LLP (Apr. 28, 2026) (citations omitted), https://judiciary.house.gov/sites/

"contingency fee" agreements the promised remuneration, and terms of which suggest to the reader that they represent *the* compensation for the cases, even though plaintiffs' counsel apparently are not taking the risk that a contingency agreement assumes or implies (see *infra*).

Public records leave little doubt that this campaign seeks two impermissible objectives.

First, the municipal plaintiffs seek to use state courts to impose federal energy, environmental, and tax policy as a substitute for the political process that has denied them their desired policies.

Second, all such plaintiffs pretextually seek revenue-raising through the courts rather than through the proper legislative means which, as one other plaintiff in this coordinated campaign, and counsel for the very plaintiffs in this case below, have both admitted is politically unattainable.

These facts demand that this Court resolve the jurisdictional question once and for all.

I. THE CONSTITUTIONAL STRUCTURE DEMANDS FEDERAL JURISDICTION OVER CLAIMS OF NATIONAL SCOPE

After losing in federal court, the plaintiffs in this coordinated litigation campaign have labored mightily to keep their cases in state court. The reason is not hard to

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evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/2026-04-28-jdj-dei-to-sher-edling-sher-re-eli.pdf.

discern. State courts offer what plaintiffs evidently regard as a friendlier forum for claims that also face immediate and fatal obstacles in federal court. But the Constitution does not permit litigants to circumvent federal jurisdiction merely by dressing up inherently national claims in state-law clothing.

Under 28 U.S.C. § 1331, federal district courts possess "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." The removal statute, 28 U.S.C. § 1441(a), permits defendants to remove to federal court any civil action "of which the district courts of the United States have original jurisdiction." These statutory provisions exist precisely for cases like this one, where claims necessarily implicate federal law, federal policy, and the federal regulatory structure. Leaving such claims to state courts would produce the kind of jurisdictional chaos that Congress sought to prevent.

Consider what these claims actually seek. The plaintiffs ask state courts to impose tort (or now, failure-to-warn) liability for the production and sale of fossil fuels—products whose extraction, transportation, refinement, and sale are comprehensively regulated under federal law, including their combustion under Clean Air Act, 42 U.S.C. § 7401 *et seq.* This Court has already held that the Clean Air Act displaces federal common law claims seeking to limit greenhouse gas emissions. *American Electric Power v. Connecticut*, 564 U.S. 410, 424 (2011). The notion that state common law can accomplish what federal common law cannot (imposing nationwide regulation of the same emissions through a patchwork of state court judgments) defies both logic and the constitutional structure.

The Second Circuit Court of Appeals put the point with admirable clarity in *City of New York v. Chevron Corp.*, 993 F.3d 81, 85–86 (2d Cir. 2021), when it explained that "[s]uch a sprawling case is simply beyond the limits of state law" because any damages award "would effectively regulate the Producers' behavior far beyond New York's borders." That observation applies with equal force here. As one veteran legal commentator has aptly observed, these cases represent what may be the "stupidest litigations in the country,"[16] precisely because they attempt to use state tort law to regulate a global atmospheric phenomenon with zero chance of any measurable impact on the climate.

The principle announced in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), that "[i]t is emphatically the province and duty of the judicial department to say what the law is," necessarily implies that federal courts must exercise jurisdiction over claims that implicate federal law. Where, as here, the claims seek to regulate conduct that is the subject of comprehensive federal legislation, the federal judiciary has not merely the power but the obligation to adjudicate those claims. To allow fifty different state courts to impose conflicting obligations on energy producers operating under federal regulatory frameworks would make a mockery of the Supremacy Clause.

The separation of powers concerns are equally compelling. In *Youngstown Sheet & Tube Co. v. Sawyer*,

16. Francis Menton, "'Stupidest Litigation' Update," Manhattan Contrarian, Sept. 2, 2025, https://www.manhattancontrarian.com/blog/2025-9-2-stupidest-litigation-update.

343 U.S. 579 (1952), this Court held that the President could not seize the nation's steel mills even in the midst of a wartime emergency, because any authority for such an action belonged to Congress. Justice Jackson's celebrated concurrence made clear that the separation of powers exists to protect liberty itself, and that no branch of government may arrogate to itself the powers committed to another. *Id.* at 635 (Jackson, J., concurring).

The climate litigation campaign at issue here represents a comparable assault on the separation of powers, but from an even more unlikely direction. Here, state and municipal executives are attempting to use the judiciary to impose what amounts to a carbon (dioxide) tax and to dictate national energy policy. As Boulder's own counsel has candidly admitted, this litigation is designed to function as "an indirect carbon tax"[17] because Congress is unlikely to enact one. The plaintiffs have despaired of obtaining their preferred policies through the legislative process at both the state and federal level, and have turned instead to the state courts to make federal policy.

This is precisely the kind of end-run around the democratic process that the separation of powers was designed to prevent. If Congress has declined to impose a carbon tax or otherwise the policies that "climate" plaintiffs seek to attain, state court judges in Boulder, Colorado cannot impose them through the pretext of a nuisance, consumer-protection, or any other claim or name. If state legislatures have declined to fund their executives' spending ambitions through new energy taxes, those executives cannot achieve the same result through

17. *See infra.* at p. 13.

tort or "failure to warn" litigation. The judiciary is not a substitute legislature, and litigation is not a substitute for the democratic process.

Federal jurisdiction under §§ 1331 and 1441 exists to ensure that claims of inherently national scope (claims that, as this Court recognized in *AEP*, necessarily implicate "uniquely federal interests") are adjudicated by courts with the authority and competence to address them. This Court should hold that these claims raise federal questions and belong in federal court.

II. RECORDS AND PUBLIC STATEMENTS DEMONSTRATE THIS CASE IS AN ATTEMPT TO USE THE STATE COURTS TO IMPOSE NATIONAL POLICY OUTCOMES.

The municipal plaintiffs seek to use state courts to dictate federal energy and tax policy. One of the most brazen admissions comes from Boulder's own counsel, David Bookbinder:

> "Essentially, the 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 . . . I'd prefer an actual carbon tax, but if we can't get one of those, and I don't think anyone on this panel would agree [sic] Congress is likely to take on climate change anytime soon—so this is a rather convoluted way to achieve the goals of a carbon tax. The

> people who use the products pay for the damage that they cause."[18]

Similarly, two sets of meeting notes from two independent notetakers, both later released under public records laws, further emphasize that that is what this proceeding truly represents. These documents each purport to record a Rhode Island cabinet-level official expressly acknowledging among peers (representatives of fifteen state governments) and also funders and activist-foundation representatives that that state's participation in this litigation campaign is formed by its belief that the state's General "Assembly [is led by] very conservative leadership—doesn't care about env't," leaving the state's executive branch "looking for sustainable funding stream" for its spending ambitions. Both sets of notes reflect that these lawsuits are filed in "State court against oil and gas" companies because of elected officials' "Priority—sustainable funding stream," to underwrite more government spending with revenue that the executive failed to convince the voters' elected representatives to provide through the ordinary process of taxation because, apparently, they are too conservative.

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18. Video available at "Can State Courts Set Global Climate Policy?," Federalist Society, Oct. 8, 2025, https://fedsoc.org/events/can-state-courts-set-global-climate-policy. *See also*, *e.g.*, Mulder, *Lawyer Behind Colorado Climate Suit Says the Quiet Part Out Loud: Litigation Is a Tax on Oil Companies and Consumers*, National Review (October 20, 2025), https://www.nationalreview.com/news/lawyer-behind-colorado-climate-suit-says-the-quiet-part-out-loud-litigation-is-a-tax-on-oil-companies-and-consumers/.

These confessions appear in public records obtained from Colorado State University by GAO then-client Energy Policy Advocates, pertaining to a two-day meeting in July 2019 hosted by the Rockefeller Brothers Fund ("RBF").[19] This meeting was held at the Rockefeller family mansion at Pocantico, New York, and was titled "Accelerating State Action on Climate Change." Records include numerous emails, agendas and attachments including a set of handwritten notes prepared by attendee Carla Frisch of the Rocky Mountain Institute ("RMI"), and a second, corroborating set of typewritten notes taken by attendee Katie McCormack of the Energy Foundation.[20]

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19. RBF grants to Boulder counsel who filed the suit below also appeared to be tied to its litigation. *See*, *e.g.*, Lea Giotto, "Contradictions Mount as Lawyer for Colorado Climate Lawsuits Struggles to Defend His Role," Energy in Depth, Aug. 15, 2018, https://eidclimate.org/contradictions-mount-as-lawyer-for-colorado-climate-lawsuits-struggles-to-defend-his-role/.

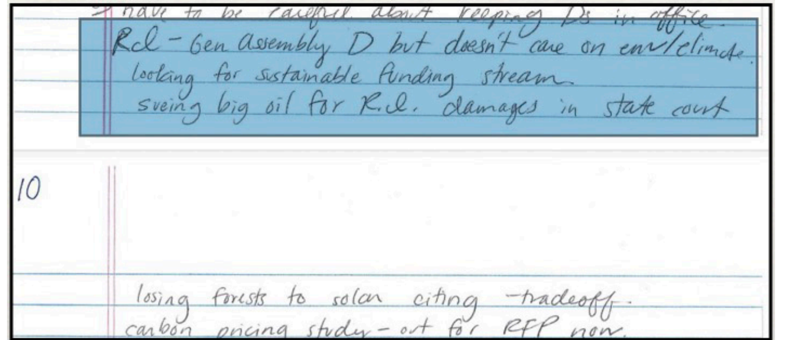
20. These notes are available, respectively, at https://climatelitigationwatch.org/wp-content/uploads/2020/03/Carla-Frisch-handwritten-notes-EPA_CORA1505.pdf and https://climatelitigationwatch.org/wp-content/uploads/2020/03/EF-Katie-McCormack-typed-notes-EPA_CORA1542.pdf. These documents are identified in an Aug. 20, 2019 email from Center for a New Energy Economy's Patrick Cummins to RBF's Michael Northrop. "RBF CNEE climate policy notes Jul 17 18.docx are Katie McCormack's notes; these appear to be produced as document EPA_CORA1542.pdf, derived from Ms. McCormack's transmittal email, in which she describes her notes as long (https://climatelitigationwatch.org/wp-content/uploads/2020/03/Katie-McCormack-notes-transmittal-email-EPA_CORA1516_Redacted.pdf), and 1542 consists of 18 pages of notes; "Xerox Scan_07222019155622.pdf" are Carla Frisch's handwritten notes (this was produced to Energy Policy Advocates as document EPA_CORA1505.pdf).

The 2019 RBF meeting was a forum for climate (not consumer protection) policy activists and a major funder to coordinate with senior public employees holding positions addressing climate, energy and environment (not consumer protection) policy.[21] These included department secretaries and their cabinet equivalents from fifteen states,[22] including Rhode Island, represented by its Department of Environmental Management Director, Janet Coit.

These meeting notes obtained by Energy Policy Advocates contemporaneously record the comments of Director Coit discussing among peers that state's own version of the lawsuit at issue here. One passage in each set of notes, both attributed to Coit and replicated almost verbatim in both, illustrates the use of these suits to force a policy change reserved to the legislature.

21. The agenda for the meeting is available at https://govoversight.org/wp-content/uploads/2020/01/Draft-Agenda-EPA_CORA0008-copy.pdf.

22. The participant list is available at https://climatelitigationwatch.org/wp-content/uploads/2020/03/List-of-Attendees-EPA_CORA1037.pdf.



have to be careful about keeping Ds in office
R.I. – Gen Assembly D but doesn't care on env/climate.
looking for sustainable funding stream.
sueing big oil for R.I. damages in state court

10

losing forests to solar citing – tradeoff.
carbon pricing study – out for RFP now.

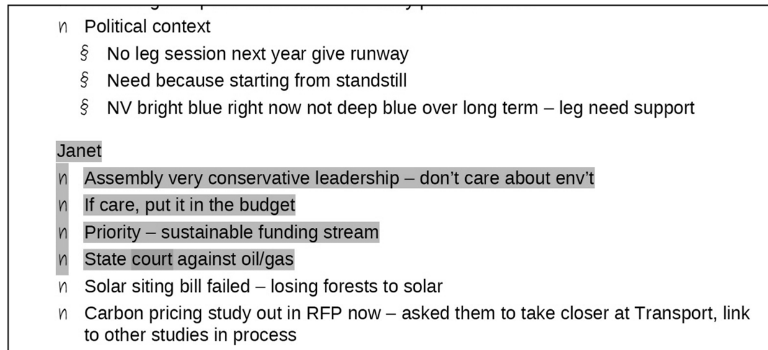
[23]

The first line of this public record attributes to Director Coit the position that Rhode Island's legislature is not persuaded of the claims set forth by the state which serve as the basis for its, and Boulder's, climate litigation. It appears to also reflect her administration's view of why the legislature has declined to directly obtain from the taxpayer the "sustainable funding stream" that plaintiffs in this class of "climate" litigation desire. These notes reflect the same sentiment confessed to by the City of Boulder counsel Mr. Bookbinder: that the government's entry in this climate litigation sweepstakes is apparently a product of the failure by advocates to obtain, or elected representatives to impose, certain policies including concomitant revenue measures. Thus, rather than work with the legislature to obtain such policies through the give and take of the legislative process, the state's executive branch elected to "look for [a] sustainable funding stream" by "suing big oil." Boulder's Bookbinder states precisely the same position, if couched in the slightly more direct

23. This image shows the native appearance of the record and therefore is significant independent of the text. *See supra* at n. 20, Ms. Frisch's notes.

language about the futility of obtaining the desired tax policy, itself a further confession to the improper use of the courts in this case (and its ilk).

The Energy Foundation's McCormack provided RBF with a typewritten set of her notes transcribing the proceedings which reads on this point almost verbatim to the recollection of Ms. Frisch.[24]



- Political context
  - No leg session next year give runway
  - Need because starting from standstill
  - NV bright blue right now not deep blue over long term – leg need support

Janet

- Assembly very conservative leadership – don't care about env't
- If care, put it in the budget
- Priority – sustainable funding stream
- State court against oil/gas
- Solar siting bill failed – losing forests to solar
- Carbon pricing study out in RFP now – asked them to take closer at Transport, link to other studies in process

These notes illustrate two troubling and related aspects of the recent epidemic of "climate" litigation, now channeled into state courts after the first generation of suits were displaced by this Court in *American Electric Power v. Connecticut*, 564 U.S. at 426 and a second generation of suits similarly failed. *See City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017 (N.D. Cal. 2018); *see also City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021). Specifically, these suits seek to use the (state) courts to stand in for (state and federal) policymakers first by asking the state courts to substitute their authority for

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24. This image shows the native appearance of the record and therefore is significantly independent of the text. *See* n. 20, Ms. McCormack's notes.

that of the political branches of government at both the state and federal level on matters of climate policy. Second, these suits seek billions of dollars in revenues, which would ordinarily be obtained through taxation enacted by legislators for distribution toward political uses and constituencies except, as Boulder's counsel admits, the political prospects for obtaining this taxation have dimmed to almost nonexistence.

These RBF meeting notes echo a comment made to *The Nation* magazine by a plaintiffs' lawyer credited with inventing this class of litigation, Matt Pawa.

> "[I]t's clear that too many lawmakers have abdicated, thus the pressure to tackle the climate issue through existing regulations like the Clean Air Act, and through the courts. 'I've been hearing for twelve years or more that legislation is right around the corner that's going to solve the global-warming problem, and that litigation is too long, difficult, and arduous a path,' said Matthew Pawa, a climate attorney. 'Legislation is going nowhere, so litigation could potentially play an important role.'"[25]

This Court must confront these affirmations by Boulder's Bookbinder and Rhode Island's Coit that this wave of state court "climate" litigation is a grab for policy change and very specifically for revenues, things that are

25. Zoe Carpenter, "The Government May Already Have the Law It Needs to Beat Big Oil," *The Nation*, Jul. 15, 2015, https://www.thenation.com/article/archive/the-government-may-already-have-the-law-it-needs-to-beat-big-oil/.

properly attained through the political process.[26] This litigation promises to erode the separation of powers as courts, rather than legislators, are used to raise revenues for the executive branch to spend.

But documentation about the genesis of state-level climate suits continues to emerge. Examples in subsequent years include the Event Proposal from when recruiters hosted a 2021 event with Oregon Attorney General Ellen Rosenblum, obtained under the state's open records law, which began, "Context: Given increasing pressure on local and state budgets in the face of a global health pandemic, it is increasingly important to identify new streams of revenue."[27] In 2023, an "unlisted" YouTube video recording of a session to recruit the New Jersey municipality of Maplewood[28] to the campaign revealed

26. Another lawyer behind some of the earlier suits boasted that suits have "the potential really to bring down the fossil fuel companies" while dreaming of a "massive settlement." Geoff Dembicki, "Meet the Lawyer Trying to Make Big Oil Pay for Climate Change," Vice.com, Dec. 22, 2017, https://www.vice.com/en/article/meet-the-lawyer-trying-to-make-big-oil-pay-for-climate-change/.

27. Records available at https://climatelitigationwatch.org/climate-litigation-confessional-yes-it-really-is-about-finding-new-streams-of-revenue/.

28. This same video reveals not only the relevant caution that "It's important that these cases stay in state court," but also the odd sales pitch of "The lawyers only get paid if and when there is a successful settlement of judgement at the end." Paid out of the municipality's sum, sure, but the more accurate assertion would be paid *again*. https://climatelitigationwatch.org/cunning-or-clueless-climate-recruiter-pitch-the-plaintiffs-lawyers-only-get-paid-when-there-is-a-successful-settlement/. The National

a jovial discussion of how much money the lawsuit could bring in which could be then spent on projects that lawmakers had been unable to fund, citing specifically to electric vehicle charging stations.[29]

The U.S. Chamber of Commerce addressed the drive, through these suits, for more governmental revenue without adopting the necessary direct taxes which carry with them political accountability, in a 2019 report entitled *Mitigating Municipality Litigation: Scope and Solutions*. That report highlighted:

- "For instance, local government leaders may eye the prospect of significant recoveries as a means of making up for budget shortfalls."
- "Large settlements like those produced in the tobacco litigation are alluring to municipalities facing budget constraints."
- "Severe, persistent municipal budget constraints have coincided with the rise of municipal litigation against opioid manufacturers as local governments

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Association of Manufacturers has similarly argued that, "The towns and lawyers have said that this litigation is solely about money. The towns want funding for local projects, and their lawyers are working on a contingency fee basis, which means they aren't paid if they don't win." Manufacturers' Accountability Project, "Beyond the Courtroom: Climate Liability Litigation in the United States," p. 2, https://mfgaccountabilityproject.org/wp-content/uploads/2019/06/MAP-Beyond-the-Courtroom-Chapter-One.pdf. We know this recruiting pitch is not the case, see, *infra*.

29. Video and records available at https://climatelitigationwatch.org/another-window-into-the-climate-litigation-world/.

are promised large recoveries with no risk to municipal budgets by contingency fee trial lawyers."

- "Conclusion: A convergence of factors is propelling municipalities to file affirmative lawsuits against corporate entities. There is the 'push' factor: municipalities face historic budgetary constraints and a public inundated with news reports on the opioid crisis, rising sea levels, and data breaches. And there is the 'pull' of potential multimillion dollar settlements and low-cost, contingency fee trial lawyers. As a consequence, municipalities are pivoting to the courts by the thousands."[30]

Records have since proved these theses correct. Boulder's attempted use of the courts to attain revenue and other policy ends that have eluded it through legislation or regulation, like Rhode Island's, *et al.*, is improper, but the attempt also informs a conclusion that these cases belong in federal court.

Even if the plaintiffs' motivation to obtain and influence policy were not itself an improper use of the courts, the proponents of this climate litigation have also been consistent about the litigants' motive to use the pressure of vexatious multi-jurisdictional (indeed, nationwide) lawfare to coerce opponents to capitulate and support legislative change that they would otherwise oppose. An email from a Boulder official obtained by Energy Policy

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30. Mitigating Municipality Litigation: Scope and Solutions, U.S. Chamber Institute for Legal Reform, Mar. 2019, https://instituteforlegalreform.com/research/mitigating-municipality-litigation-scope-and-solutions/ at p. 1, 6, 7 and 18.

Advocates stated that "the pressure of litigation could also lead companies . . . to work with lawmakers on a deal."[31] That further suggests that this matter, like other suits, was launched to try and satisfy elected officials' desire to succeed in revenue-raising and other failed policy changes.[32] Another Boulder official is on record describing its companion suit to the instant matter as one way to "drive more fundamental systems change," and "the use of the legal system in pushing for larger systems-level change."[33] One of Boulder's attorneys, Marco Simons, acknowledges these lawsuits seek what an interviewer summarized as a "secondary aim," to "also shift behavior," "Whether that's cutting back on the harmful activities, and/or to raise the price of the products."[34]

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31. Jan. 5, 2018 email from Boulder Chief Sustainability & Resilience officer Jonathan Koehn to Alex Burness of the Boulder Daily Camera, Subject: RE: Follow-up to council discussion. Available at https://climatelitigationwatch.org/boulder-official-climate-litigation-is-tool-to-make-industry-bend-a-knee/.

32. Jan. 5, 2018 email from Boulder Chief Sustainability & Resilience Officer Jonathan Koehn to Alex Burness of the Boulder Daily Camera. Available at https://climatelitigationwatch.org/boulder-official-climate-litigation-is-tool-to-make-industry-bend-a-knee/, https://climatelitigationwatch.org/wp-content/uploads/2022/12/Boulder-corresp-w-Daily-Camera-and-confession.pdf.

33. William Allison, "Boulder Officials: Actually, Our Climate Lawsuit Is About Driving 'Systems-Level Change,'" RealClear Energy, Jul. 16, 2021, https://www.realclearenergy.org/2021/07/16/boulder_officials_actually_our_climate_lawsuit_is_about_driving_systems-level_change_785683.html.

34. Telluride Joins Lawsuit Seeking to Force Energy Companies to Offset Climate Change, KSUT.org, Dec. 18, 2020, https://www.ksut.org/news/2020-12-18/telluride-joins-lawsuit-seeking-to-force-energy-companies-to-offset-climate-change.

GAO also draws this Court's attention to the telling slide in a presentation at a 2012 organizational meeting for this litigation campaign attended by activists and, e.g., the aforementioned attorney Pawa. Released by the University of Oregon under that state's open records law, an advisor to the litigation campaign named Rick Heede counseled participants of the objective: "Bring selected carbon majors to the table, then what?"[35]

Questions and discussion

- Does attribution of emissions to carbon producers have relevance to
  - climate accountability,
  - public opinion,
  - legal strategies,
  - or policy?
- Leverage points with each, & limitations?
- Flaws in the methodology or objectives?
- Bring selected carbon majors to the table, then what?
- Suggestions for next steps

The summary of the event featured other tells, such as "Our focus ought to be to bring as many of these people back to the table and motivate them to act. We need to somehow promote a debate among different parts of legislature to get this happening." *Id.*

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35. Records available at https://climatelitigationwatch.org/wp-content/uploads/2019/03/Oregon-Wood-Combined-Files-Redacted.pdf.

These records are but a small sample of the growing body of evidence that the courts are being exploited to balance municipal/state budgets, to erode the separation of power between branches of state governments, and to force policy outcomes that both state and federal legislators have declined to make. This has been the goal from the start. Former Connecticut Attorney General Richard Blumenthal said as much about *American Electric Power v. Connecticut*, 564 U.S. at 410. "My hope is that the court case will provide a powerful incentive for polluters to be reasonable and come to the table . . . We're trying to compel measures that will stem global warming regardless of what happens in the legislature."[36]

This Court cannot sanction the use of state courts to force policy change that is the province of legislatures. The problem is particularly acute when state courts are being asked to create what is effectively federal energy and environment policy. This Court should be especially zealous in protecting federal policies and legislation from being forced by actions taken in various state court systems.

This Court should reverse the judgment below and declare that federal jurisdiction attaches to these suits.

36. Editorial, "The New Climate Litigation," *Wall Street Journal*, Dec. 28, 2009, https://www.wsj.com/articles/SB10001424052748703478704574612150621257422.

III. NEW INFORMATION FURTHER SUPPORTS THE LAWSUIT'S COORDINATED NATIONAL CAMPAIGN BELONGS IN FEDERAL COURT.

There is more. Public records show that the "contingency fee" arrangements in this litigation are a mirage—obscuring both the true purpose and the true funding of these suits. This includes documentation that the common financing of the lawyers filing these suits has been obscured. This funding includes over $16 million dollars to just one firm from just one source, New Venture Fund[37] (which is at least the second such funding source to the firm[38]), despite the lawsuits all being nominally the subject of generous "contingency fee" agreements which by their terms strongly suggest they are *the* compensation for the work.[39] This Court should not blind itself to this unsavory reality.

37. *See* n. 15, *supra*.

38. *See*, *e.g.*, Joe Schoffstall, Thomas Catenacci, "Group Leo DiCaprio funneled grants through to fund climate lawsuits moved to largest US dark money network," FoxNews.com, October 21, 2022, https://www.foxnews.com/politics/group-leo-dicaprio-funneled-grants-fund-climate-lawsuits-moved-largest-us-dark-money-network. *See also*, *e.g.*, Michael I. Krauss "Using Charitable Funds to Subsidize 'Legislation Through Litigation,'" Forbes, July 28, 2020, https://www.forbes.com/sites/michaelkrauss/2020/07/28/using-charitable-funds-to-subsidize-legislation-through-litigation/; Mandi Risko, "Recently Obtained Contracts Show NJ, Chicago Plan to Pay Millions to Dark-Money Backed Law Firm," Energy in Depth, July 23, 2024, https://eidclimate.org/recently-obtained-contracts-show-nj-chicago-plan-to-pay-millions-to-dark-money-backed-law-firm/.

39. Counsel for governmental plaintiffs gain admission to the local courts *Pro Hac Vice*, in all of which jurisdictions the local rules apply including, where applicable, the local equivalent of Model Rules of Prof'l Conduct r. 1.8(f), "A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client gives informed consent."

The charitable foundations underwriting a nationwide campaign of governmental "climate" litigation give away their true goals because they fundraise with charitable contributions dedicated to achieving *policy* aims. One of these, Resources Legacy Fund ("RLF") plainly stated, "We are a 501(c)(3) nonprofit organization that partners with leaders in philanthropy, communities, government, science, and business to promote smart policies and secure equitable public funding for the environment, climate change resilience, and healthy communities."[40]

Coincident with the advent of these climate lawsuits, RLF began reporting in its annual Internal Revenue Service ("IRS") filings "charitable grants" of millions of dollars to the Sher Edling firm. Each year RLF declared an environmental purpose for these gifts. Other records

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40. https://web.archive.org/web/20220122220408/https://resourceslegacyfund.org/our-cause-values/. *See also*, "A fiscally sponsored project of New Venture Fund, the Collective Action Fund for Accountability, Resilience, and Adaptation [which] makes charitable grants that enable cities, counties, and states hard hit by climate change to file high-impact climate damage and deception lawsuits represented by expert counsel." Available at https://web.archive.org/web/20230610145924/https://hewlett.org/grants/new-venture-fund-for-the-collective-action-fund-for-accountability-resilience-and-adaptation/. *See also*, Robert Stilson, "The Activist Side Third-Party Litigation Support," Capital Research Center, Nov. 1, 2023, https://www.influencewatch.org/app/uploads/2021/02/MacArthur-Foundation-Grants-to-New-Venture-Fund.-02.25.21.pdf. "This award supports NVF's Collaborative Action Fund for Accountability, Resilience, and Adaptation (CAF), which supports precedent-setting lawsuits to hold major corporations accountable for costs associated with the effects on climate of their pollutants. The award renews support for legal processes associated with a variety of lawsuits filed in support of states, counties and cities affected by climate change."

released in public records litigation confirm that these contributions finance the states' and municipalities' climate litigation in various iterations.[41]

The expenditures are apparently managed by the grantor.[42] Sher Edling, LLP, is the law firm that has filed the overwhelming majority of these "climate" lawsuits against the same and similarly situated defendants since 2017 and, as shown above, has a relationship of some sort with Boulder's counsel Simons. In its IRS Form 990 for the year 2017, RLF listed a charitable grant to Sher Edling, LLP in the amount of $432,129 for "Land or Marine Conservation."[43] RLF's 2018 990 reported a $1,319,625 charitable grant to Sher Edling, LLP, this time claiming a

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41. Regardless of whether this reflects any intention to obscure the group's financing of these suits out of concern over particular rules of professional conduct such as the Model Rules of Prof'l Conduct r. 1.8(f) (*supra*), public records confirm that these monies paid by RLF of between $5.25 million and $7.65 million to Sher Edling over the first four years of filing these suits, from the year litigation first commenced through 2020, were to bring this and those other lawsuits.

42. In Form I (Part IV, Supplemental Information) for additional explanation RLF reports (CAPS in original), "RLF GRANTS INCLUDE REQUIREMENTS FOR PERIODIC REPORTS RECONCILING GRANT ACTIVITIES, PROGRESS, AND OUTCOMES WITH GRANT OBJECTIVES, AS WELL AS A RECONCILIATION OF GRANT EXPENDITURES WITH THE PROPOSAL BUDGET. IN ADDITION, STAFF MAINTAINS CONTACT WITH GRANTEES AND PERIODICALLY CONDUCTS FIELD VISITS FOR SIGNIFICANT PROJECTS."

43. https://web.archive.org/web/20200714055358/https://resourceslegacyfund.org/wp-content/uploads/2018/11/RLF_990_2017.pdf, Schedule I, Part II.

different purpose, of "Advancing Healthy Communities."[44] RLF's 2019 990 reported $1,110,000 in a charitable grant to Sher Edling, LLP, that time for another stated environmental purpose, "Land or Marine Conservation Promotion of Education and/or Healthy Communities."[45] RLF's 2020 990, released in 2022, reported a $2,394,000 charitable grant to Sher Edling, LLP, this time for the same stated environmental purpose as a previous year, "Land or Marine Conservation Promotion of Education and/or Healthy Communities."[46]

Further details subsequently emerged. In late April 2022, Government Accountability & Oversight obtained records in California Public Records Act litigation against the University of California. Among these were correspondence from Sher Edling, LLP, to a prospective donor asking if that individual could support the firm's climate nuisance lawsuits, the first entries in this sweepstakes which at the time of this correspondence had just been filed. The email confirmed that the contingent fee litigation was actually being privately underwritten through something the firm's representative called the

44. https://web.archive.org/web/20200714060106/https://resourceslegacyfund.org/wp-content/uploads/2020/03/RLF-IRS-Final-990-12.31.18-Public-Copy-4829-6612-8044.pdf.

45. https://web.archive.org/web/20210516221411/https://resourceslegacyfund.org/wp-content/uploads/2021/02/RLF-Public-Copy-IRS-Form-990-12.31.19-4824-7483-1056.pdf.

46. https://projects.propublica.org/nonprofits/organizations/954703838/202220459349302702/full.

"Collective Action Fund."[47] Specifically, Sher Edling's Chuck Savitt wrote on July 19, 2017, in pertinent part:

> "Dear Dan, Wanted to let you know that we filed the first three law suits supported by the Collective Action Fund on Monday. These precedent setting cases call on 37 of the world's leading fossil fuel companies to take responsibility for the devastating damage sea level rise—caused by their greenhouse gas emissions—is having on coastal communities. The suits were filed in California Superior Court on behalf of the City of Imperial Beach and the Counties of Marin and San Mateo. . . . We will keep you up to date as the cases move forward and as we file additional cases. Da[n], can we find a time to continue our conversation about your possible support for the project? And it would be great to have you meet Vic Sher."[48]

The recipient, Dan Emmett, forwarded this email to the University of California at Los Angeles ("UCLA") School of Law. Mr. Emmett wrote, *inter alia*, "Chuck Savitt who is heading this new organization behind the lawsuits has been seeking our support. Terry Tamminen

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47. Collective Action Fund for Accountability, Resilience and Adaptation, a fund that at the time of DiCaprio's 2017 donation was managed by the Resources Legacy Fund (RLF). *See*, *e.g.*, Stilson, n. 39, *supra*, "The Collective Action Fund was originally a project of the 501(c)(3) Resources Legacy Fund, but sometime around 2020 it shifted to the New Venture Fund—the largest constituent member of the massive left-of-center political nonprofit network managed by Arabella Advisors."

48. *See* n. 8.

in his new role with the DiCaprio Foundation has been a key supporter. I don't know how realistic this approach is from a practical and legal point of view though I respect the good intentions and the message. I am wondering what you or any of your group thinks about the viability of this approach and these suits? Or if you know Vic Sher."[49] Prof. Ann Carlson wrote back, *inter alia*, "I am serving—along with Terry—on a committee advising the Plaintiffs' lawyers so I definitely have thoughts about this. Generally I think it's high-quality litigation but with a very uncertain outcome given its novelty."[50]

In February 2018, Carlson wrote again to Emmett asking, "Do you think Andy [Sabin] would have any interest in helping to finance the nuisance litigation? I was on a call with the lawyers today (Vic Sher and team) and continue to be very impressed with them. Would you be willing to reach out to him or do you think it would be OK if I did? Or we could jointly?" *Id.* Emmett replied to Carlson in pertinent part, "You can tell [Sabin] Terry's organization and I are both serious supporters."[51]

A search of the Wayback Machine (Archive.org) reveals that, months before, "Terry"—Tamminen, the then-chief executive officer of one organization channeling money to the lawsuits, the Leonardo DiCaprio Foundation—acknowledged that his group's "grant" to

49. *See* correspondence at https://climatelitigationwatch.org/wp-content/uploads/2022/12/SherEdling-recruting-Emett-then-Carlson-recruting-Sabin.pdf.

50. *Id.*

51. *Id.*

"**The Collective Action Fund** [was] to support precedent-setting legal actions to hold major corporations in the fossil fuel industry liable for the effects of climate change pollution," due to "a lack of political leadership" to enact the desired policies.[52] That Fund then made those "charitable grants" to plaintiffs' counsel totaling millions of dollars, which increased in amount as the number of suits filed also increased (and were modified to be consumer protection suits to improve the chances of attaining state-court jurisdiction).

In July 2020, a law professor at George Mason University School of Law took notice of these payments in the context of another (by this time) "consumer protection" climate lawsuit against oil companies by Sher Edling, LLP, on behalf of the District of Columbia. Professor Michael Krauss's commentary raised serious tax and public policy consequences should this suspicion bear out (as it now has with the release of additional public records).[53]

Subsequently, RLF's 2020 990 added an entry for the first time listing Sher Edling, LLP as an independent contractor, indeed by that time its "highest compensated independent contractor," with fees paid in an amount identical to the "charitable grant for Land or Marine

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52. Press release, "Leonardo DiCaprio Foundation awards $20 million in environmental grants," (**bold** and RLF parenthetical in original), https://web.archive.org/web/20171002192851/https://www.leonardodicaprio.org/leonardo-dicaprio-foundation-awards-20-million-in-environmental-grants/.

53. Michael I. Krauss "Using Charitable Funds to Subsidize 'Legislation Through Litigation,'" Forbes, July 28, 2020, https://www.forbes.com/sites/michaelkrauss/2020/07/28/using-charitable-funds-to-subsidize-legislation-through-litigation/.

Conservation Promotion of Education and/or Healthy Communities" for that year, $2,394,000. Remarkably, this entry was for "Consulting." This brought the total sent to the law firm for just that most recent year to $4,788,000.

After these contributions received widespread media coverage, RLF's payments to the climate-plaintiffs' firm Sher Edling included only another $55,575 in 2021 (for "LAND OR MARINE CONSERVATION, PROMOTION OF EDUCATION AND/OR HEALTHY COMMUNITIES"), and the funding mechanism appears to have shifted to New Venture Fund.[54]

GAO and other groups have previously sought any public records submitted to these governmental plaintiffs by their law firm reflecting any such disclosures about this extant financing, for which the plaintiffs nonetheless promised extremely generous "contingency fees" to file these lawsuits. For example, Energy Policy Advocates obtained the package filed by Minnesota Attorney General Keith Ellison in an application seeking approval

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54. *See*, *e.g.*, "The Collective Action Fund, a secretive group that does not maintain a website, has since shifted its fiscal sponsorship to the New Venture Fund, a nonprofit incubator at a billion-dollar dark money network managed by Arabella Advisors consulting firm, Fox News Digital has discovered." Schoffstall, Catenacci, "Group Leo DiCaprio funneled grants through to fund climate lawsuits moved to largest US dark money network," FoxNews.com, October 21, 2022. *See also* Andrew Kerr & Chuck Ross, "Same Game, Different Name: 'Radioactive' Arabella Advisors Announces Rebrand to 'Sunflower Services' as Prominent Donors Flee," Wash. Free Beacon (Nov. 18, 2025), https://freebeacon.com/democrats/same-game-different-name-radioactive-arabella-advisors-announces-rebrand-to-sunflower-services-as-prominent-donors-flee/.

from the Minnesota Legislative Advisory Commission for the contract engaging Sher Edling, LLP.[55] These records contain no disclosure that the firm is being compensated for the litigation by a party other than the client, which promised the firm "16.67% of the first $150 million recovered, and 7.5% for any portion greater than $150 million."[56] In fact, the agreements generally and these supporting Minnesota records specifically all on their face suggest that this contingency fee, to be paid out of alleged taxpayer damages, is *the* compensation for the representation although it plainly is not. The public record reveals no reason to believe that that Office of the Attorney General informed the Legislative Advisory Commission that it had any knowledge prior to signing that agreement that the law firm was already being paid substantial sums by a private foundation to file these lawsuits, raising the question whether it knew and failed to report this disclosure, or the disclosure was not made. To date, records indicate that only one governmental plaintiff, Anne Arundel County, Maryland, has any records reflecting possible knowledge of this funding arrangement. Although the County will not release the email in question which references RLF, it describes the email in an affidavit as being dated eight weeks before the

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55. Available at https://govoversight.org/wp-content/uploads/2021/01/AGO-LAC.pdf.

56. *Id.*, reflecting $25 million of the first $100 million, 15% of the next $50 million, "plus seven and one-half percent (7.5%) of the amount of the Net Monetary Recovery greater than one hundred fifty million dollars ($150,000,000)." (San Francisco City and County) https://climatelitigationwatch.org/wp-content/uploads/2018/12/SF-CC-2018-11-20-Legal-Services-Agreement-SF-SE-AB-FINAL-EXECUTED.pdf.

County filed its version of the instant suit.[57] A redacted version of the email ordered to be released by a state court shows only that the plaintiff did discuss RLF in March 2021, contemporaneous with the County's consideration of its own April 2021 version of these suits.[58]

Other governmental climate plaintiffs asked by GAO and its then-client Energy Policy Advocates have all indicated they have no records mentioning Resources Legacy Fund. This information further demonstrates that a vexatious multi-front litigation campaign of which the instant suit is a part is in fact a national, coordinated campaign that belongs in federal court.

57. Letter from Anne Arundel County available here, https://climatelitigationwatch.org/wp-content/uploads/2022/12/Letter-to-R.-Schilling-MPIA-Response-00367084xA76A4.pdf. Affidavit available here, https://climatelitigationwatch.org/wp-content/uploads/2026/04/Exhibit-B-Affidavit-of-Custodian-00374196xA76A4.pdf.

58. Email available at https://climatelitigationwatch.org/more-on-the-mysterious-email-about-hollywoods-backdoor-funding-of-government-climate-litigation/.

CONCLUSION

For the foregoing reasons, Government Accountability & Oversight respectfully urges this Court to reverse the judgment of the Colorado Supreme Court and hold that federal jurisdiction attaches to these claims.

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