

No. 25-170

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**In the  
Supreme Court of the United States**

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

v.

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

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*ON WRIT OF CERTIORARI  
TO THE SUPREME COURT OF COLORADO*

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**BRIEF OF JENNIFER HERNANDEZ  
AS *AMICUS CURIAE*  
IN SUPPORT OF PETITIONERS**

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**INTEREST OF THE AMICUS CURIAE<sup>1</sup>**

Jennifer Hernandez is a California attorney who has practiced environmental, land use, and civil rights law for over four decades. She is a Senior Fellow at the Breakthrough Institute, a non-partisan environmental research center, and serves as a member of the Breakthrough Institute's Board of Directors. Ms. Hernandez has also served as an Adjunct Professor of Law at the University of Southern California Gould School of Law, teaching Environmental Justice. She has also served as a fellow of the Center for Demographics & Policy Research at Chapman University, for which she authored three research briefs regarding California climate policy and civil rights, and has taught environmental law and land use classes at Stanford and Hastings law schools. She has served on non-profit boards dedicated to environmental and civil rights advocacy, including serving for twenty-three years on the board of the California League of Conservation Voters, where she was a persistent voice calling attention to the disparate racial and economic impacts of many of California's environmental and climate policy choices on communities of color.

Ms. Hernandez has received numerous civil rights awards for her work overcoming environmentalist opposition to housing and other

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<sup>1</sup> Counsel for amicus curiae timely provided notice to all parties of intent to file this brief. No party's counsel authored this brief in whole or in part, and no person or entity other than amica or counsel made a monetary contribution intended to fund its preparation or submission.

projects needed and supported by minority communities. She is the daughter and granddaughter of steelworkers from Pittsburg, California, an industrial community on the San Francisco Bay Area with a significant Latino and Black workforce, and her personal and professional experience has given her a unique vantage point on the intersection of environmental regulation and racial equity.

Ms. Hernandez files this brief to bring to the Court's attention the grave civil rights and economic justice consequences that flow from unchecked state-law climate litigation. Her extensive published research demonstrates that climate policies pursued without federal oversight or uniformity inflict disproportionate harm on Black, Latino, and lower-income communities — the very populations that proponents of such policies claim to protect. This Court's resolution of the federal preemption question presented in this case has profound implications for racial equity, housing affordability, energy costs, and economic opportunity for millions of Americans of color.

### **SUMMARY OF ARGUMENT**

This case presents the question whether federal law precludes state-law claims seeking relief for injuries allegedly caused by the effects of interstate and international greenhouse-gas emissions on the global climate. Amicus respectfully urges this Court to hold that it does. While the legal arguments for federal preemption are thoroughly briefed by Petitioners, amicus writes to illuminate a dimension of this case that has received insufficient attention:

the devastating civil rights and economic justice consequences that would follow from permitting a patchwork of state-law climate tort regimes to regulate, through litigation, the nation's energy economy.

Amica has spent over four decades documenting how state-level climate policies — even those adopted with avowedly progressive intentions — systematically harm Black, Latino, and lower-income communities. In California, climate mandates have funneled new housing into the most expensive urban locations, replicating historical patterns of racist redlining and pricing communities of color out of homeownership — the single most important pathway to middle-class wealth in America. Vehicle miles traveled (“VMT”) reduction mandates demand that Californians drive far fewer miles than during the COVID-19 lockdown<sup>2</sup> Yet even as vehicular emissions continue to decrease and essential workers must be physically present to do their jobs (and be paid), these mandates have added tens of thousands of dollars to the cost of new homes, while existing, wealthier, and whiter homeowners living in far more expensive neighborhoods closer to jobs (or not needing to physically be present at work at all as members of the “keyboard economy”) receive a climate pass.<sup>3</sup> Black and Latino households already pay

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<sup>2</sup> Jennifer Hernandez & Lauren Teixeira, *Time to Reset California's Climate Leadership*, Breakthrough Inst. (Jan. 6, 2025), <https://thebreakthrough.org/journal/no-20-spring-2024/time-to-reset-californias-climate-leadership>.

<sup>3</sup> See Jennifer Hernandez, Ctr. for Demographics & Pol'y, Chapman Univ., *California Getting in Its Own Way: In 2018, Housing Was Targeted in 60% of CEQA Lawsuits Against*

twenty to forty-three percent more of their household incomes on energy than white households, and over four million California households — thirty percent of the total — now experience energy poverty.<sup>4</sup> Hundreds of thousands of well-paying, often unionized energy sector jobs that disproportionately employ workers of color have been slated for elimination, with no credible plan to replace them.<sup>5</sup>

Amica describes this regime as “Green Jim Crow” — a set of policies championed by progressive advocates that, despite good intentions, enriches the privileged while devastating Black, Latino, and lower-income households. Allowing state-law climate tort litigation to proceed unchecked by federal preemption would deepen and extend these harms nationwide. Massive tort judgments or settlements against energy producers based on global emissions would raise energy costs, destroy jobs, and impose economic burdens that fall hardest on the communities least able to bear them — all without producing any measurable climate benefit.

The nation’s most successful environmental achievement — the ninety-nine percent reduction in new vehicle smog emissions under the Clean Air Act

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*Construction Projects* (Joel Kotkin ed., 2019), <https://www.newgeography.com/files/ca-getting-in-its-own-way%20-%20Kotkin%20and%20Hernandez.%2012-19.pdf>;

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<sup>4</sup> Hernandez, *Green Jim Crow*, *supra*, at 10.

<sup>5</sup> *Id.* at 9–10.

— was accomplished not through litigation-driven mandates or apocalyptic modeling, but through methodical, transparent, and technology-neutral federal regulation grounded in verifiable results and balanced against social and economic tradeoffs. That model, not a patchwork of state tort suits, should govern the nation’s response to climate change.

## ARGUMENT

### I. STATE-LAW CLIMATE TORT LITIGATION THREATENS TO REPLICATE THE DISPARATE RACIAL AND ECONOMIC HARMS OF STATE CLIMATE REGULATORY REGIMES

The question before this Court is a legal one: whether federal law precludes the state-law tort claims asserted by Respondents. But the practical consequences of permitting such claims to proceed underscore the legal analysis, because they bear directly on the structural and constitutional concerns that animate federal preemption doctrine. Amica respectfully submits that this Court should consider the real-world impact of state-law climate litigation on the nation's most vulnerable communities, and the devastating cost of allowing a single state or locality to project its detrimental policies beyond its borders.

State-law climate tort suits do not operate in a vacuum. They are the litigation counterpart to state regulatory climate mandates. Both seek to use state law to impose costs on the production and use of fossil fuels. Both claim environmental justification. And both, as Amica’s extensive published research

demonstrates, inflict disproportionate economic harm on communities of color.

### A. California’s Climate Policies Demonstrate How State-Level Climate Mandates Create a “Green Jim Crow” That Devastates Communities of Color

California provides the most compelling — and cautionary — example of what happens when state-level climate policy is pursued without adequate regard for its civil rights and economic justice consequences. As Amica has documented in extensive published research, California’s climate agenda has created what she calls a new “Green Jim Crow” era — a regime in which the state’s overwhelmingly white climate activists, underwritten by its overwhelmingly white billionaires, have demanded unprecedented action to remake the state’s economy and its communities in response to an asserted existential threat, one that they explicitly assert trumps all other concerns.<sup>6</sup> They do so, outrageously, in the name of

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<sup>6</sup> See, e.g., Hernandez, *Green Jim Crow*, *supra*; David Friedman & Jennifer Hernandez, Ctr. for Demographics & Pol’y, Chapman Univ., *California, Greenhouse Gas Regulation and Climate Change* (Joel Kotkin ed., 2015), <https://www.newgeography.com/files/California%20GHG%20Regulation%20Final.pdf>; David Friedman & Jennifer Hernandez, Ctr. for Demographics & Pol’y, Chapman Univ., *California, Greenhouse Gas Regulation and Climate Change* (Joel Kotkin ed., 2018), <https://www.newgeography.com/files/California%20GHG%20Regulation%20Final.pdf>; Jennifer Hernandez, David Friedman & Stephanie DeHerrera, *In the Name of the Environment*, Holland & Knight (Aug. 1, 2015), [https://issuu.com/hollandknight/docs/ceqa\\_litigation\\_abuseissu](https://issuu.com/hollandknight/docs/ceqa_litigation_abuseissu) u/1; Jennifer Hernandez, *California Environmental Quality Act*

protecting so-called “frontline communities” — meaning low-income communities of color — even though the primary factor that makes those communities vulnerable is their poverty, and even as those ostensibly advocating for actions to address the problem also push for climate mandates that are demonstrably making those communities poorer and more vulnerable.

The results are stark. In 2019, nearly sixty percent of California households earning over \$150,000 per year were white; only eighteen percent were Latino or Black. About forty-four percent of all Black and Latino households earned less than \$35,000 per year, near or below poverty levels in high-cost California.<sup>7</sup> And of the roughly fifty-four percent

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*Lawsuits and California’s Housing Crisis*, 24 *Hastings Env’t L.J.* 21 (2018), [https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=1032&context=hastings\\_environmental\\_law\\_journal](https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=1032&context=hastings_environmental_law_journal); Jennifer Hernandez, *In the Name of the Environment Part III: CEQA, Housing, and the Rule of Law*, 26 *Chap. L. Rev.* 57 (2022), [https://www.chapmanlawreview.com/wp-content/uploads/2023/05/clr\\_26-1-57-hernandez.pdf](https://www.chapmanlawreview.com/wp-content/uploads/2023/05/clr_26-1-57-hernandez.pdf); Jennifer Hernandez, *California’s Administrative Power Grab Hurts Californians, Does Nothing for Climate*, Breakthrough Inst. (Aug. 2022), <https://thebreakthrough.org/journal/no-17-summer-2022/californias-administrative-power-grab-hurts-californians-does-nothing-for-climate>; Hernandez & Teixeira, *Time to Reset*, *supra*; Jennifer Hernandez, *Abundance for Whom?*, Breakthrough Inst. (Apr. 2025), <https://thebreakthrough.org/issues/energy/abundance-for-who>; Jennifer Hernandez, *This California Law Will Make Housing More Expensive: A Hidden Climate Fee Punishes Families for Needing a Car*, *City J.* (Apr. 2026), <https://www.cityjournal.org/article/california-climate-change-fee-housing-cars>.

<sup>7</sup> Hernandez, *Green Jim Crow*, *supra*, at 4.

of all California renters paying housing costs exceeding thirty percent of household income, the traditional definition of housing unaffordability, nearly seventy percent of them are people of color.<sup>8</sup>

Wealth disparities by race are even larger than income disparities. The U.S. Census Bureau has found that homeowners have 88.6 times the median net wealth of renting households — a median net wealth of \$269,100 compared with just \$3,036 for renters.<sup>9</sup> In 2019, sixty-three percent of all white California households were homeowners, but just forty-four percent of Latino and thirty-six percent of Black California households owned homes.<sup>10</sup> Housing equity makes up nearly sixty percent of the total net worth of minority homeowners compared with forty-three percent of white homeowner wealth. Black, Latino, and other historically disadvantaged groups rely on mortgage payments to build wealth through homeownership; there is little to no excess cash available to buy stocks, bonds, and other assets.<sup>11</sup>

California's climate agenda, Amica has shown, was constructed by white climate activists and donors, implemented by white governors and technocrats, in response to a crisis constructed by white scientists.<sup>12</sup> The state's exclusively white, wealthy, climate-centric governors — and the leadership of the California Air Resources Board (CARB) — have designed the state's climate agenda

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 13.

to a historically unmatched extent through executive fiat in lieu of democratic legislation.<sup>13</sup> State-law climate tort litigation would replicate this dynamic on a national scale, empowering state attorneys general and private plaintiffs to reshape the nation's energy economy through courtroom proceedings rather than the transparent, democratically accountable federal regulatory process.

**B. Climate Housing Mandates Replicate Historic Patterns of Racist Redlining and Destroy the Primary Pathway to Wealth for Minority Households**

Among the most devastating consequences of state climate policy is its impact on housing. California's climate mandates have funneled new housing construction into the most expensive urban infill locations, replicating historical patterns of racist redlining and pricing communities of color out of homeownership. As explained in *Green Jim Crow*, this climate-induced infill- and transit-served housing policy requires high density rental apartments into the same neighborhoods that were "redlined" – mortgages were unavailable – during the Jim Crow era, while imposing new obstacles and costs to building homes in leafier, less dense, whiter and wealthier neighborhoods.<sup>14</sup> The predictable result is displacement of less wealthy and disproportionately minority families from newly-desirable urban neighborhoods. The resulting patterns of segregation by race and income in bastions of activism, like the

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 7.

San Francisco Bay Area, are worse than those in the 1960s, as documented by UC Berkeley's Othering and Belonging Institute in a series of reports beginning in 2018.<sup>15</sup>

In January 2021, the median California home cost nearly \$700,000, up twenty-one percent from the prior year, and required an annual income of \$122,800 to qualify for a mortgage. Based on that measure, only twenty percent of Latino and Black California households — half the national rate — could qualify to buy a house in the state, compared with forty percent of white households.<sup>16</sup> In the jobs-rich western Bay Area counties, median homes cost \$1.3 to \$1.65 million, and homes are unaffordable for ninety-two percent of Black, eighty-five percent of Latino, and seventy-eight percent of Asian households compared with thirty-five percent of white households.<sup>17</sup>

Climate-driven housing policy concentrates new housing in low-income communities of color near transit, where older buildings are razed and replaced by higher-cost units, further decreasing the availability of affordable living and driving gentrification.<sup>18</sup> San Francisco, Oakland, and Los Angeles — all epicenters of California's progressive

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<sup>15</sup> See Stephen Menendian & Samir Gambhir, UC Berkeley Othering & Belonging Inst., *Racial Segregation in the San Francisco Bay Area* (2018), <https://belonging.berkeley.edu/racial-segregation-san-francisco-bay-area-part-1>.

<sup>16</sup> Hernandez, *Green Jim Crow*, *supra*, at 5.

<sup>17</sup> *Id.*

<sup>18</sup> Order of Federal District Judge David Carter, *quoted in* Hernandez, *Green Jim Crow*, *supra*, at 6.

elites — boast shiny new residential towers alongside soaring homelessness rates and declining minority populations.<sup>19</sup> Because high-density urban housing units are so expensive to build, rents for even the smallest new studio apartment are often more than median monthly mortgage costs, and the few households of color that can pay such rents build no equity over time. Most are displaced to increasingly concentrated pockets of poverty in urban locations or to outer suburbs from which they must commute for hours each day.<sup>20</sup>

As a federal district judge observed in ordering Los Angeles to house tens of thousands of unhoused residents, nearly half of newly constructed housing units in Los Angeles between 2012 and 2019 were in lower-income communities, yet ninety percent of the new construction during that period was unaffordable to working-class tenants.<sup>21</sup>

These consequences are not incidental to California’s climate policy; they are its direct product. If state-law climate tort litigation — such as the case before this Court, along with the scores of similar lawsuits across the country brought by other states

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<sup>19</sup> *Id.* at 5.

<sup>20</sup> *Id.*

<sup>21</sup> *See LA All. for Hum. Rts. v. City of Los Angeles*, 2021 WL 1546235, at \*18 (C.D. Cal. Apr. 20, 2021), *vacated and remanded sub nom. LA All. for Hum. Rts. v. Cnty. of Los Angeles*, 14 F.4th 947 (9th Cir. 2021) (“A report by a coalition of housing, social justice, and environmental groups found that nearly half of newly constructed units in Los Angeles between 2012 to 2019 were in lower-income communities. Yet 90% of the new construction during that period is unaffordable to working-class tenants in Los Angeles.”).

and localities in and outside California — proceeds and results in massive judgments against energy companies based on their global operations and the energy sources our country and residents depend on to fuel the vast majority of manufacturing, defense, transportation, heating, cooling, and electricity production (every night and for every still or cloudy day), California will have effectively forced its massively costly climate regime onto the rest of the country. And those costs will inevitably be passed through to consumers and workers everywhere, exacerbating the housing crisis, and deepening the racial wealth gap and housing segregation.

California’s climate leaders openly acknowledge the racially discriminatory impacts of their plans. California’s blueprint of climate change mandates is the “Scoping Plan for Achieving Carbon Neutrality,” which was unanimously approved by CARB in 2022.

The Scoping Plan itself expressly acknowledges: “Total income for households that make less than \$100,000 per year are estimated to decline by \$5.3 billion dollars, while the total income for households that make more than \$100,000 per year will increase by \$5.3 billion under the Scoping Plan Scenario.”<sup>22</sup> In the paragraph that immediately follows, CARB admits to the racist effect of its intentional climate policy choices:

In addition to income level, there is likely to be an impact to California personal income

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<sup>22</sup> Cal. Air Res. Bd., *2022 Scoping Plan for Achieving Carbon Neutrality* 125 (2022), <https://ww2.arb.ca.gov/sites/default/files/2023-04/2022-sp.pdf>.

that varies based on race/ethnicity. . . . As shown in Table 3-2, households in lower income groups are anticipated to see negative impacts, while households in higher income groups are anticipated to see positive impacts from the Scoping Plan Scenario in both 2035 and 2045. Because more than 60% of households in the race/ethnicity categories of Hispanic, Black alone, Native Hawaiian (HI) or Pacific Islander, American Indian or Alaskan Native, Other, and Two or More make less than \$100,000 per year, these populations generally are likely to experience reduced income. White and Asian households will generally experience both increased and decreased income because [they] are distributed more evenly across income groups.<sup>23</sup>

Knowingly adopting a climate regulatory regime that expressly, and thus intentionally, causes disparate economic harm to racial minorities is unlawful. The Scoping Plan also includes an anti-driving mandate, discussed in subpart C below, which CARB's appointed transportation expert deemed "fairyland territory," even though essential workers and those who drive longer distances because they cannot afford to live in CARB-prescribed high cost "infill" rental apartments, further intentionally harms racial minorities.

Notwithstanding these intentional acts to disproportionately burden Black and Latino

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<sup>23</sup> *Id.* at 126.

Californians, the CARB voted to approve the Scoping Plan just a few months later.

### **C. VMT Reduction Mandates Impose Hidden Taxes on Homeownership that Fall Hardest on Families of Color**

The connection between climate policy and housing unaffordability is further demonstrated by the anti-car, anti-driving VMT reduction regime that California has imposed on new housing construction. Under the California Environmental Quality Act (CEQA), as amended by Assembly Bill 130 in 2025, state and local agencies are authorized to impose “mitigation” costs and obligations on new home constructions to “mitigate” the future estimated miles driven by unknown future residents, visitors and vendors.<sup>24</sup> This VMT “mitigation” mandate, effectively another climate cost mandate on cars and pickup trucks regardless of fuel type or emissions (and applicable even to electric vehicles), again disproportionately burdens lower and middle income residents. These are the same residents who are already staggering from living with the nation’s highest housing prices, highest gasoline prices, and highest (tied with one other state) poverty rate in the nation.

Notwithstanding the fact that new houses don’t drive, and people drive because that is the only practical transportation mode available for the vast majority of residents, California’s climate zealots

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<sup>24</sup> Cal. Pub. Res. Code § 21080.44(b)(1)(A).

wantonly impose costly new mandates. They do so even though California contributes less than one percent of global greenhouse gas emissions, and only one year of catastrophically mismanaged forests results in more greenhouse gas emissions than 18 years of mandated greenhouse gas reductions from regulatory mandates. According to the Coalition for Affordable, Reliable, and Equitable Housing, VMT mitigation fees could reach a twenty-year total of \$324,000 per home or apartment — roughly \$16,000 per year, or \$1,350 per month.<sup>25</sup>

The burdens of this climate policy regime that tort plaintiffs seek to impose do not just ape California's racially discriminatory climate policy choices, they expand them by placing the cost burdens disproportionately on middle-income households seeking market-rate housing. California climate laws and CEQA automatically treat housing restricted to low-income residents as generating lower per-capita VMT. This means that median-income households pursuing homeownership must pay substantial VMT mitigation fees that subsidize affordable apartments elsewhere. The law also exempts from VMT mitigation fees any housing built within half a mile of high-frequency transit stops, most of which run through the state's most expensive urban areas, where even midrise apartment projects often require

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<sup>25</sup> Coal. for Affordable, Reliable, & Equitable Hous., *Broad Coalition of over 100 Social Justice, Housing and Business Leaders Urge Legislature to Repeal New VMT Housing Tax* (Aug. 26, 2025), <https://careabouthousing.org/broad-coalition-of-over-100-social-justice-housing-and-business-leaders-urge-legislature-to-repeal-new-vmt-housing-tax/>.

rents well above \$3,000 per month.<sup>26</sup> The result is a policy framework that favors costly urban rental housing while penalizing more attainable homeownership housing built in the communities where most Californians actually live and work.

This VMT policy will not meaningfully affect the global climate, and neither will these haphazard tort lawsuits. Again, California produces less than one percent of global greenhouse gas emissions, and some recent wildfire seasons have each wiped out the equivalent of nearly two decades of emission reductions achieved in the state through costly regulations.<sup>27</sup> Meanwhile, California’s own climate agencies fail to acknowledge that migration out of the state — often driven by housing costs — pushes households into regions with much higher per-capita greenhouse gas emissions.<sup>28</sup> Under the state’s climate accounting rules, those departures count as climate “successes” because the emissions occur beyond California’s borders, although that conveniently doesn’t stop the state from suing over them later.

The VMT regime illustrates a pattern that would be replicated and projected by state-law climate tort litigation: the imposition of climate-related costs through state mechanisms that disproportionately burden lower-income and minority households while providing no measurable climate benefit.

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<sup>26</sup> See Cal. Code Regs. tit. 14, § 15064.3(b)(1).

<sup>27</sup> Hernandez, *This California Law Will Make Housing More Expensive*, *supra*.

<sup>28</sup> Hernandez, *California Environmental Quality Act Lawsuits and California’s Housing Crisis*, *supra*, at 55, 57.

This Court has never countenanced the intentional infliction of racially disparate cost burdens of this magnitude. It should not further empower these same actors with unfettered access to unlimited state tort lawsuits seeking to impose cost and liability burdens on essential products that will knowingly and intentionally create higher and far less affordable cost burdens on racial minorities.

## II. UNREGULATED STATE CLIMATE LITIGATION THREATENS THE ENERGY SECTOR JOBS AND AFFORDABLE ENERGY ON WHICH COMMUNITIES OF COLOR DISPROPORTIONATELY DEPEND

State-law climate tort suits, if permitted to proceed, also seek to impose potentially ruinous liability on energy producers. The economic consequences would be borne not by the affluent white climate activists and plaintiffs' attorneys who drive such litigation, but by the workers and consumers who depend on affordable energy — which are again, as demonstrated in California, disproportionately and intentionally inflicted on communities of color.

The energy sector provides over 152,100 direct and 213,860 indirect and induced jobs in California that pay higher wages and benefits for individuals with lower levels of education.<sup>29</sup> This workforce is ethnically and racially diverse, and about sixty-three percent of all employees have less than a bachelor's degree.<sup>30</sup> Another 3.9 million California jobs — 16.5

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<sup>29</sup> Hernandez, *Green Jim Crow*, *supra*, at 10.

<sup>30</sup> *Id.*

percent of total state employment — rely on purchases from or use products sold by energy producers within California, including chemical, machinery, and metal products manufacturing, wholesale trade, utilities, and transportation, as well as professional, scientific, and technical services.<sup>31</sup> Most of these sectors also provide higher-paying jobs for workers of color, often in more affordable areas of the state. These jobs are also at risk from the forced elimination of the in-state energy sector.<sup>32</sup>

California climate advocates have utterly failed to provide a convincing explanation for how workers of color employed in existing energy and energy-dependent sectors will support their families once these industries are gone. Suggestions that “green employment” will replace job losses in the fossil fuel sector are not credible. Even the Washington Post has conceded that rapid growth in the wind and solar industries over the next decade could plausibly replace at most twenty percent of the workforce of the coal industry alone.<sup>33</sup> And leading unions now agree. “[C]areer opportunities for renewables are nowhere near what they are in gas and oil,” North America’s Building Trades Unions concluded after conducting two studies of the industry.<sup>34</sup>

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> See Glenn Kessler, *Kerry's Misleading Framing of Potential Solar and Wind Jobs*, Wash. Post (Jan. 29, 2021), <https://www.washingtonpost.com/politics/2021/01/29/kerrys-misleading-framing-potential-solar-wind-jobs/>.

<sup>34</sup> Hernandez, *Green Jim Crow*, *supra*, at 10.

The energy cost dimension is equally alarming. Black and Latino households are already forced to pay from twenty to forty-three percent more of their household incomes on energy than white households. A household energy cost of more than six percent of total income is considered the measure of energy poverty. In 2020, over four million households in California — thirty percent of the total — experienced energy poverty, and over two million households were forced to pay ten to twenty-seven percent of their total income for home energy.<sup>35</sup> Between 2011 and 2020, the state’s home energy affordability gap rose by sixty-six percent, while falling by ten percent in the rest of the nation. California has the highest electricity and highest gasoline costs in the nation, with electricity prices fifty percent higher than the national average.<sup>36</sup>

Massive tort liability imposed on energy companies through state-law climate litigation would further drive up these costs. Every dollar extracted from energy producers through climate tort judgments is a dollar that will ultimately be borne by consumers through higher energy prices, by workers through lost jobs, or by communities through reduced economic activity. Epidemiological studies show that poverty and unemployment increase the risk of major illness and premature mortality at substantially higher rates than the environmental harms that climate litigants claim to address. The result would be a regime that elevates the litigation priorities of

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

affluent communities above the survival needs of society's most vulnerable.

### **III. FEDERAL PREEMPTION PROVIDES A NECESSARY SAFEGUARD AGAINST THE DISPARATE RACIAL AND ECONOMIC HARMS OF A PATCHWORK OF STATE CLIMATE TORT REGIMES**

The civil rights and economic justice consequences documented above provide powerful pragmatic support for the legal conclusion that federal law precludes state-law climate tort claims. A patchwork of state tort regimes — each imposing its own vision of climate liability on energy producers whose operations and products cross every state and national boundary — would create precisely the kind of regulatory chaos and territorial overreach that federal preemption doctrine is designed to prevent.

Climate change is, by definition, a global phenomenon driven by worldwide emissions that have accumulated over more than a century. No single state, no single tort suit, and no single judgment can meaningfully alter global atmospheric greenhouse gas concentrations. But such suits can — and would — impose staggering costs on energy producers, costs that would cascade through the economy in the form of higher energy prices, reduced employment, and diminished economic opportunity for the communities that can least afford it.

As Amica has documented, California's experience shows that even well-intentioned state climate policies produce deeply regressive outcomes

when pursued without adequate regard for their civil rights and economic consequences.<sup>37</sup> The state's climate agenda has produced record levels of inequality, and housing segregation has returned to a degree not seen since – and worse than what existed – in the early 1960s.<sup>38</sup> Climate-friendly San Francisco leaders were themselves stunned when regional planning agencies proposed “smart growth” plans that forced hundreds of thousands of high-cost, high-density housing units into the region's few remaining legacy minority communities. “It's Black and brown families that get displaced” by bunching dense new apartments near transit to cut greenhouse gas emissions, one San Francisco County supervisor told the San Francisco Chronicle. “We have seen this show before.”<sup>39</sup>

State-law climate tort litigation would replicate and export these dynamics in a more dangerous form. Unlike regulatory mandates, which at least go through some form of rulemaking or legislative process, tort judgments are imposed by individual courts applying an individual state's laws to the operations of national and multinational energy companies. There is no mechanism in state tort law for assessing the disparate racial and economic impact of climate-motivated judgments. There is no requirement that plaintiffs demonstrate their claims will produce measurable climate benefits. And there is no safeguard against the cascading economic harms

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<sup>37</sup> See generally Hernandez, *Green Jim Crow*, *supra*.

<sup>38</sup> Hernandez, *Green Jim Crow*, *supra*, at 4; Menendian & Gambhir, *supra*.

<sup>39</sup> Hernandez, *Green Jim Crow*, *supra*, at 9.

that would fall on communities of color who depend on affordable energy and energy-sector employment.

Federal preemption provides that safeguard. It prevents one locality from imposing its harmful policies on the rest of the country and the world, and ensures that the nation's response to climate change is channeled through federal institutions with the authority, the expertise, and the democratic accountability to balance environmental goals against the equally compelling imperatives of racial equity, economic justice, and affordable energy.<sup>40</sup>

#### **IV. ENVIRONMENTAL REGULATION THAT HARMS RATHER THAN HELPS DISADVANTAGED COMMUNITIES BETRAYS THE LESSONS OF THE NATION'S MOST SUCCESSFUL ENVIRONMENTAL ACHIEVEMENTS**

The irony of state-law climate tort litigation is that it betrays the very model of environmental regulation that produced America's greatest environmental success. The Clean Air Act's war on smog stands as proof that environmental protection and economic opportunity for communities of color need not be in conflict. Between 1970 and 2017,

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<sup>40</sup> Federal preemption of state law is commonplace. Preemption is a product of the Supremacy Clause of the United States Constitution, which provides that the Constitution, federal laws, and treaties "shall be the supreme Law of the Land . . . any thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. From this constitutional command flows the principle that state laws that interfere with or are contrary to federal law must yield. *See, e.g., La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368 (1986).

according to the U.S. Environmental Protection Agency, aggregate national emissions of the six common pollutants dropped an average of seventy-three percent while gross domestic product grew by 324 percent. New cars, SUVs, and pickup trucks became ninety-nine percent cleaner than they were in 1970.<sup>41</sup>

California achieved these remarkable environmental accomplishments even as it grew to become the sixth-largest economy in the world. The state did this by developing affordable and effective strategies to combat smog, where regulators continually experimented with and evaluated real-world outcomes and competing approaches for cleaning the air through technological innovations and practices, balanced with the need for continued economic growth.<sup>42</sup> Importantly, smog programs were altered when they were credibly linked with disproportionate burdens on communities of color.<sup>43</sup>

This model — methodical, transparent, technology-neutral, grounded in verifiable results, and respectful of civil rights — is the antithesis of state-law climate tort litigation. Tort suits are adversarial, not collaborative. They produce judgments, not technological solutions. They impose costs without regard to who bears them. They proceed without the systematic assessment of racial and economic equity that federal regulation can and should provide.

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<sup>41</sup> Hernandez, *Green Jim Crow*, *supra*, at 15.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

Before imposing costly mandates on the energy sector — whether through regulation or litigation — policymakers and courts must be required to demonstrate, with verifiable outcome data, that proposed rules or judgments will produce measurable health or environmental benefits, and that those benefits justify the financial burdens they impose on lower-income households. We cannot continue to allow the abstract environmental priorities of a privileged few to dominate policy in ways that knowingly harm our poorest and most historically disadvantaged communities.

**CONCLUSION**

For the foregoing reasons, this Court should hold that federal law precludes the state-law climate claims asserted by Respondents.

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