SUPREME COURT, STATE OF COLORADO Ralph L. Carr Colorado Judicial Center 2 East 14th Avenue Denver, CO 90203	
District Court, Boulder County Hon. Robert R. Gunning Case No. 2018CV30349	**▲COURT USE ONLY ▲**
In re: **Plaintiffs:** County Commissioners of Boulder County and City of Boulder, v. **Defendants:** Suncor Energy USA, Inc.; Suncor Energy Sales, Inc.; Suncor Energy Inc; and Exxon Mobil Corporation.	**Supreme Court Case No. 2024SA000206**

Attorneys for Amici Curiae

William E. Trachman, Atty. Reg. No. 45684
Ivan L. London, Atty. Reg. No. 44491
MOUNTAIN STATES LEGAL FOUNDATION
2596 S. Lewis Way
Lakewood, CO 80227
Phone: (303) 292-2021
Email: wtrachman@mslegal.org
ilondon@mslegal.org

AMICI CURIAE BRIEF OF PROFESSOR RICHARD EPSTEIN, PROFESSOR JOHN YOO, AND MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF DEFENDANTS/PETITIONERS

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of Colorado Rules of Appellate Procedure (C.A.R.) 28(g), 29, and 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that the brief complies with C.A.R. 29(d), because it contains 4,662 words, less than the allotted 4,750 words, or half the length of the parties' principal briefs. *See* C.A.R. 28 (setting maximum length at 9,500 words). The brief complies with the content and form requirements set forth in C.A.R. 29(c). I acknowledge that the brief may be stricken if it does not comply with any of the requirements of the C.A.R.

/s/ William E. Trachman
William E. Trachman

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Amici curiae submit this brief in Support of Defendants/Petitioners (Defendants), and against Plaintiffs/Respondents County Commissioners of Boulder County and City of Boulder (together here, Plaintiffs).

IDENTITIES AND INTERESTS OF *AMICI CURIAE*

Professor Richard Epstein is the Laurence A. Tisch Professor of Law at New York University. He is also the James Parker Hall Distinguished Service Professor Emeritus of Law and a Senior Lecturer at the University of Chicago Law School. Professor Epstein is one of the foremost scholars in the United States on tort law, and he maintains a unique interest in ensuring that courts appropriately apply tort and public-nuisance doctrine.

Professor John Yoo is the Emanuel S. Heller Professor of Law at the University of California at Berkeley and Faculty Director of its Law & Public Policy Program. He maintains a unique interest and expertise in ensuring that courts appropriately apply tort principles appropriately.

Mountain States Legal Foundation is a non-profit public interest law firm based in Colorado. Since its creation in 1977, Mountain States' attorneys have been active in litigation before this Court regarding the proper interpretation and application of constitutional, statutory, and regulatory provisions. *See*, *e.g.*, *Masterpiece Cakeshop, Inc. v. Scardina*, No. 2023SC00116, 2023 WL 11841877 (Dec. 15, 2023) (brief of *amici curiae* in support of petitioners); *Clark v. People of*

Colorado, No. 22SC313, 2024 WL 3284574 (Colo. 2024) (*amicus* brief of MSLF filed July 18, 2023); *Knipp v. Tri Cty. Health*, No. 2022SC000647, 2022 WL 17586338 (Colo. Dec. 12, 2022) (granting MSLF leave to participate as *amicus* on petition for certiorari) (certiorari denied).

Mountain States is focused on protecting property rights and economic liberty, and generally litigates against efforts to expand the "administrative state." Consistent with that focus, Mountain States has recently represented clients arguing against letting a small group of unelected, "local" actors set nationwide "climate policy" that will hurt property rights. *See Diamond Alternative Energy, LLC v. EPA*, 24-7 (U.S. Aug. 7, 2024), Br. of *Amici Curia*e Tex. Royalty Council & Am. Royalty Council in Supp. of Pet. for Cert.[1]

SUMMARY OF THE ARGUMENT

If climate change is inflicting harmful effects nationwide, then ***the Nation*** should decide how to address it. *See City of New York v. Chevron Corp.*, 993 F.3d 81, 91 (2d Cir. 2021) ("[T]he question before us is whether a nuisance suit seeking to recover damages for the harms caused by global greenhouse gas emissions may proceed under New York law. Our answer is simple: no."). No matter how they mask their aims, Plaintiffs want to set nationwide climate policy in violation of federal law

[1] https://www.supremecourt.gov/DocketPDF/24/24-7/321866/20240807142720039_24-7%20Amicus%20Brief.pdf (last visited Sept. 13, 2024).

and sound tort principles.

Plaintiffs are trying to set nationwide climate-change policy, despite U.S. Supreme Court precedent that forbids them. Congress displaced local attempts to address nationwide climate issues in the Clean Air Act (CAA). *See American Electric Power v. Connecticut*, 564 U.S. 410, 422–23 (2011) (*AEP*). As the United States decides how to address climate change, the choices—including deciding as a country *not* to act—will have nationwide effects. The Court should not let Plaintiffs (or, respectfully, the trial court) make those decisions for the rest of the Country. Nationwide climate change is not a question of local tort law.

Plaintiffs assert that Defendants knew that their fossil fuels were altering the climate, but "concealed and misrepresented the truth to their consumers in Colorado and elsewhere," to reap billions in profits. *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.), Inc.*, No. 2018CV30349, 2024 WL 3204275, *3 (Colo. Dist. Ct. June 21, 2024). Plaintiffs further claim that Defendants' conduct led to an increase in greenhouse gases, which raised temperatures in Colorado by 2 degrees Fahrenheit, and resulted in "loss of snowpack, precipitation changes, worsened air quality, and insect and disease outbreaks." *Id.* at *2. The trial court held that Plaintiffs could move to trial on an unprecedented public-nuisance theory.

That was error. This Court should reverse the trial court for two reasons. *First*, the trial court erred in refusing to recognize that federal law preempts Colorado state

law on the issue of aerial pollution that contributes to climate change. The trial court held that Colorado state law could apply in this case despite *AEP*, 564 U.S. at 422–23, which held that the Clean Air Act preempts judge-made federal common law causes of action. *Id.* at 425. *Second*, the trial court is allowing unprecedented—and unmoored—tort theories of misrepresentation, concealment, and nondisclosure.

ARGUMENT

I. The trial court erred by denying preemption under the CAA and federal constitutional law.

The trial court declined to find that federal law (including the CAA) preempts state tort lawsuits against multinational oil companies for not warning consumers about the perils of greenhouse gas emissions. As the trial court acknowledged, the U.S. Court of Appeals for the Second Circuit found such a claim to be preempted by both federal common law and the Clean Air Act. *City of New York*, 993 F.3d at 91. But instead of applying that persuasive precedent, the trial court agreed with the U.S. Court of Appeals for the Fourth Circuit, *Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178, 217 (4th Cir. 2022), and the Hawaii Supreme Court, *City and Cnty. of Honolulu v. Sunoco LP*, 537 P.3d 1173 (Haw. 2023), *cert. petition docketed*, No. 23-947 (U.S. Mar. 1, 2024), that federal law did not preempt state tort law.

Although it will deepen the split of authority, this Court should reverse the trial court. The U.S. Supreme Court has recognized that the sale and consumption of fossil fuels in any single state do not generate a sufficiently large temperature change

to produce a rise in sea levels in any given jurisdiction. "Greenhouse gases once emitted 'become well mixed in the atmosphere.'" *AEP*, 564 U.S. at 422 (quoting Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,514 (Dec. 15, 2009)). Nevertheless, the trial court upheld the application of the state torts of public nuisance, private nuisance, strict liability failure to warn, negligent failure to warn, and trespass—in novel forms—against Defendants in their sale of fuel products in the state. It adopted Plaintiffs' erroneous general theory of tort liability, which rests on the view that worldwide greenhouse gas emissions raise worldwide temperatures, which purportedly cause weather changes that allegedly harm Boulder.

In rejecting a lawsuit brought by the City of New York and other states against major emitters of carbon dioxide, the U.S. Supreme Court said that "emissions in [New York or] New Jersey may contribute no more to flooding in New York than emissions in China," *id*. (citations omitted). Plaintiffs' claims here parallel those rejected by the U.S. Supreme Court and by the Second Circuit.

The trial court erred in misunderstanding and refusing to apply *AEP* and *City of New York*. It concluded instead that federal law does not preempt Plaintiffs' state tort law claim because the CAA had "displaced" federal common law. *Comm'rs of Boulder Cty.*, 2024 WL 3204275, *21. While pre-CAA federal common law had allowed states to sue each other over air and water pollution, *AEP* held that the CAA

displaced that law because it already "provides a means to seek limits on emissions of carbon dioxide from domestic power plants." 564 U.S. at 425. Unfortunately, the trial court misread *AEP* to mean that the CAA's displacement of a judicially-created federal common law cause of action somehow allowed states to manufacture their own novel common law actions. *Id.* at 46.

Instead, the trial court should have read the CAA's preemption of federal common law as also extinguishing state law causes of action. As the Second Circuit found, *AEP* does not authorize state law to snap back into place "simply because Congress saw fit to displace a federal court-made standard with a legislative one." *City of New York*, 993 F.3d at 98. Rather, *AEP* recognized that the CAA made the EPA the "primary regulator of [domestic] greenhouse gas emissions," *id.* at 99 (citing *AEP*, 564 U.S. at 428), and that it left to the states ***only*** the power to regulate internal emissions sources, not those from other states, *id*. at 100 (citing *AEP*, 564 U.S. at 422).

This Court can clarify that, as the Second Circuit correctly held, states cannot "utilize state tort law to hold multinational oil companies liable for the damages caused by global greenhouse gas emissions." *City of New York*, 993 F.3d at 85. While *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), denied the existence of a *general* federal common law, it also affirmed the existence of a *specialized* federal common law where national concerns are paramount. And *Hinderlider v. La Plata*

River & Cherry Creek Ditch Co., 304 U.S. 92 (1938), decided on the same day as *Erie*, held that interstate water disputes are "a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive." *Id.* at 110. This holding is logical because, in the absence of a federal common-law rule, the states in a dispute would presumably give priority to their own laws. Justice William O. Douglas expressed the same view in *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943) (applying federal common law to deal with commercial paper to avoid "making identical transactions subject to the vagaries of the laws of the several states."). And as Judge Henry Friendly observed, "'[e]nvironmental protection is undoubtedly an area 'within national legislative power,' one in which federal courts may fill in 'statutory interstices,' and, if necessary, even 'fashion federal law.'" *AEP*, 564 U.S. at 421 (quoting Henry Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 421–22 (1964)).

Indeed, almost a century of U.S. Supreme Court precedent, including *Illinois v. City of Milwaukee*, 406 U.S. 91, 102–03, 102 n.3 (1972), recognizes that federal common law must govern here. As the U.S. Supreme Court observed, interstate pollution presents an "overriding . . . need for a uniform rule of decision" because states have conflicting self-interests, energy production and pollution are nationwide in scope, and the basic interests of federalism are involved. *Id*. at 105 n.6. The federal common law as it existed before the CAA would have preempted the state tort claims

in this case.

This Court should find that the CAA displaces any cause of action for trans-boundary pollution provided by either federal common law or state law. As *AEP* declared: "We hold that the Clean Air Act and the EPA actions it authorizes displace any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired powerplants." *AEP*, 564 U.S. at 424. *AEP* did not find that the CAA revived the state causes of action that earlier federal law had preempted. *AEP*'s conclusion that the CAA preempts judge-made federal causes of action applies with even greater force to state-made causes of action. "The critical point is that Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from powerplants; the delegation displaces federal common law." *AEP*, 564 U.S. at 426.

The lower ***federal*** courts are part of a unified judicial system that can correct deviations from established tort doctrine under a well-established body of federal law. By contrast, the state courts are autonomous and can develop tort law subject only to a weak set of constitutional constraints. State tort law can create higher levels of undesirable variation, as shown by the unprecedented tort theory adopted by the trial court in this case.

Adoption of *AEP*'s rule, moreover, would not unconstitutionally intrude into internal state affairs. Instead, reversing the trial court would prevent the

extraterritorial application of state law from governing the behavior of the hundreds of millions outside Colorado. Properly concerned with the tension between federal and state authority, the Framers of the Constitution wisely crafted a balanced system that prevents a single state from regulating a nationwide industry. Applying *AEP*'s rule serves the interests of federalism by keeping orderly relations among the states, while reserving to the federal government control over interstate pollution and nationwide industry.

II. Plaintiffs have not pleaded the elements for a cause of action in public nuisance or misrepresentation under Colorado law.

This Court must reject as incorrect Plaintiffs' common law tort claims for public nuisance. Plaintiffs plead an insufficient case of misrepresentation, as if it were a public-nuisance case, without actually pleading that Defendants have emitted a dangerous substance. But words and silences are not a form of nuisance, public or private. The standard definition of a public nuisance draws its inspiration from the private law of nuisance. Under § 822 of the Restatement (Second) of Torts, a private nuisance holds an actor "liable in an action for damages for a non-trespassory ***invasion*** of another's interest in the private use and enjoyment of land." Similarly, Section 821B(1) defines a public nuisance as "an unreasonable ***interference*** with a right common to the general public."

Throughout the historical evolution of the tort of public nuisance, issues of misrepresentation, concealment, and nondisclosure have been completely absent.

The most common invasions of a public right are blocking rights of ways, *see Anonymous, Y.B. Mich.*, 27 Hen. 8, f. 27, pl. 10 (King's Bench 1536), and discharging pollutants (such as 100,000 gallons of oil) into public waters, *see Burgess v. M/V Tamano*, 370 F. Supp. 247 (D. Me. 1973). The law has always "used the same definition of nuisance to cover both public and private nuisances," with the former used to reach damage to the public at large, instead of damages to neighboring property owners.

Plaintiffs claim massive damages, but do not explain their grounds for recovery. In the complaint, Plaintiffs do artfully *say* "invasion", but simply to aver that Defendants' "fossil fuel activities would cause and contribute to climate change and thus cause these invasions of Plaintiff's property." Am. Compl. ¶ 475. Plaintiffs do not say who committed these alleged invasions. The complaint does not assert that Defendants have, either singly or jointly, released or discharged any greenhouse gas, or any other pollutant, onto Colorado's land, air, or waters. Instead, unidentified third-party users of Defendants' products made the alleged "invasions," which would have to include Plaintiffs themselves and the residents of Boulder, Colorado. Without an allegation that Defendants themselves discharged pollutants, Plaintiffs have not alleged a public-nuisance tort against Defendants as a matter of law. At no point does the complaint aver that any of Defendants' sales of their products were "illegal" or "wrongful."

Knowing that they fail on traditional grounds, Plaintiffs invent a second tort claim that twists the traditional law of misrepresentation to justify damages for a set of massive, yet diffuse, harms. The Supreme Court of Hawaii recently blessed a similar maneuver. *City & Cnty. of Honolulu v. Sunoco LLP*, 537 P.3d 1173 (Haw. 2023). "Plaintiffs are relying on the same basic theory of liability to prove each of their claims, namely that Defendants' failures to disclose and deceptive promotion increased fossil fuel consumption, which—in turn—exacerbated the local impacts of climate change in Hawai`i." *Id.* at 1187. Similarly, Plaintiffs ***in this case*** plead vague counts of fraudulent misrepresentation and fraudulent concealment that have none of the recognized elements of these causes of action. Once the surplusage is stripped away, all that is left of Plaintiffs' claims is a bare assertion that Defendants sold their products in Colorado in a lawful and proper manner, which is also true of the local independent distributors and retailers of fuel products in the state.

Plaintiffs' complaint and the trial court's decision are replete with references to the misrepresentations and concealment that they allege are the source of liability. Misrepresentation and concealment cases both start with the proposition that the defendant has material information that is *not* known to the plaintiff, after which the defendant makes a false statement or omits a material fact relevant to the plaintiff. The plaintiff, to its detriment, then relies on the false statement or improper omission.

Section 9 of the Restatement (Third) of Torts states:

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

See Restatement (Third) of Torts: Liability for Economic Harm § 9. In this case, however, Plaintiffs fail on each count: to name the full class of proper defendants; to show causation; and to show justifiable reliance. As a result, this Court should reject Plaintiffs' second tort claim as a matter of law.

A. Plaintiffs Lack a Proper Defendant.

Plaintiffs single out two large oil company defendants, Exxon and Suncor. But they do not explain why they picked these two companies from all other fossil fuel producers worldwide, as well as the many dealers and retailers of fossil fuel products in Colorado. The complaint does not name any false statement made by Defendants to Colorado residents about fossil fuels. It does not explain that any misstatements or omissions reached the residents of Boulder over the period within which climate-change related harms allegedly occurred. Nor is this a case of concealment in the absence of a duty to disclose. The promotion of oil and gas does not resemble the health claims that tobacco companies made about their product. There is no evidence that other users of fossil fuels acted in concert with each other, or with their competitors when they made claims to the public—through advertisements—about price, mileage, additives, and services.

Sellers, distributors, and consumers handle, use, consume, and promote fossil fuel products in countless goods and services within Colorado without disclosing anything about carbon dioxide or global warming. These unnamed companies are in direct privity with their customers. They are better able than Defendants to communicate with their customers. Indeed, the list of other possible defendants goes far beyond the sellers of fossil fuel products to include the sellers of cars, trucks, and airplanes in Colorado and the many companies that supply natural gas and coal products either directly or through intermediates to Colorado residents. No doubt, Plaintiffs themselves have continued to use fossil fuels even after they initiated this lawsuit. Yet Plaintiffs did not sue ***themselves***, nor any local restaurants, recreational facilities, or transportation providers. They did not sue Colorado retailers of fossil fuels, which have a closer connection to the public than Defendants. By Plaintiffs' logic, however, these businesses' silences are illicit, and hence actionable, omissions.

Under the standard rules of joint and several liability, Defendants' alleged misrepresentations amount to a tiny fraction of those made by the thousands of firms that deal in some way with fossil fuels. Under the two prevailing rules for apportioning loss, Section 433A of the Restatement (Second) Torts and the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9613(f), there is a reasonable basis for division, here by market share, for any fraction of alleged misrepresentations supposedly made. The supposed

contribution of Defendants would be *de minimis*. On this ground alone this Court should reverse the trial court.

B. Plaintiffs Cannot Establish Causation.

In every tort case, the plaintiff must show that the actions attributed to the defendants has caused the specified harm. But here, the complaint does ***not*** charge Defendants with discharging carbon dioxide or other greenhouse gases in Colorado. Therefore, Plaintiffs must prove causation by showing that the alleged misrepresentations satisfy two conditions. *First*, if the requisite misstatements or omissions had not taken place, there would have been a lower level of consumption of fossil fuels. *Second*, without the increases in fuel-consumption levels, the alleged local adverse events would have been reduced or even eliminated.

The complaint alleges that Defendants' conduct caused increases "in extreme hot summer days and increases in minimum nighttime temperatures, precipitation changes, larger and more frequent wildfires, increased concentrations of ground-level ozone, higher transmission of viruses and disease from insects, altered streamflows, bark beetle outbreaks, ecosystem damage, forest die-oft reduced snowpack, and drought." Am. Compl. ¶ 140. But Plaintiffs cannot satisfy their burden by simply claiming adverse climate effects from temperature increases. They must first allege that increases in the consumption of fossil fuels were sufficient to produce changes in greenhouse gas levels. Then they must allege that the increases

in greenhouse gases would have produced the necessary temperature changes to cause the alleged adverse climate events. Plaintiffs cannot simply plead that the consequences of all weather-related changes can be laid at Defendants' doorsteps. *See* Am. Compl. ¶ 142 ("These changes have … and will continue to injure people.").

The trial court's opinion evades these key elements of a misrepresentation case with the bald observation that the complaint alleges that "activities" such as Defendants' sales and advertisements have contributed to "occurrences" such as fires, droughts, and beetle infestations. Yet this supposed causal chain consists of a series of missing links. It ignores the sequence of events that supposedly link Defendants' conduct to the possible damages. Plaintiffs refer to Defendants' fossil fuel *sales*, which include coal, natural gas, and gasoline. *See, e.g.*, Am. Compl. at ¶¶ 69-71. These different energy sources are distributed through different channels. Coal is often sold to industrial users; natural gas is used for heating and industrial purposes; gasoline is commonly sold at automobile service stations. Plaintiffs do not identify the different forms of communication that accompany each method of distribution, and they cannot show that the supposed forms of misinformation were *the sole sources* of greenhouse gases information to these various groups of buyers.

Take, for example, the sale of gasoline at service stations. If Defendants had revealed all allegedly true information about global warming, how much of a difference would it have made? There is no evidence that any effect on gasoline

consumption would have been more than trivial. Consumers would learn that reducing individual gasoline consumption might have an infinitesimal effect on global warming. They would have to balance this against the major changes in lifestyle that would occur if they could not drive to work or take their kids to school. Those sacrifices would loom too large for individuals to change major driving habits. Consumers and consumption levels are far more responsive to taxes and regulations that immediately affect prices. The same would be true with changes in gasoline production due to federal regulation. Changes in consumer behavior due to federal regulation of fossil fuels swamp any weak voluntary responses to new information about greenhouse gases.

The disparate modes of distribution for coal and natural gas are also heavily subject to regulation. It is implausible that any communications by Defendants about their products would influence consumption. Increasing demand for Defendants' products in Colorado and worldwide has a far greater impact on consumption.

To successfully satisfy the causation requirement, Plaintiffs must also show that other variables *do not* account for the alleged harms. To take just one example, the condition of roads cannot easily be tied to alleged increases in temperatures over the last 40 years. Extreme frost that takes place in one year but not the next is hard to attribute to minor changes in greenhouse gas concentrations. Whether Plaintiffs have properly maintained and salted roads, whether the number and weight of the

cars and trucks have changed, and whether any storms or parasites have necessitated repairs will weigh on road conditions far more.

Taking another example, forest management policies rather than greenhouse gasses surely account far more than temperature change for beetle infestations and fire damage. The deadwood that now accumulates on public lands is tinder for massive fires. The extent of chronic mismanagement can vary widely over time, as shown by the sharp rise in fires that began when government strategies shifted from forest management to fire suppression.

Each allegation of an adverse event claimed to arise from misrepresentation during fossil fuel sales is both speculative and unsustainable. Plaintiffs' claim of irreversible damage requires a detailed and separate account of each element's chain of causation. They must clearly show the direct link between Defendants' statements accompanying sales of their products to the asserted physical damages. Plaintiffs cannot carry their burden if they cannot rule out other well-known causes that bring about the same alleged harms produced by greenhouse gas emissions.

C. Plaintiffs Cannot Establish Justifiable Reliance.

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

Defendants' alleged misrepresentations. Plaintiffs would need to identify a misrepresentation or concealment by Defendants that fossil fuels "do no harm to the environment." They offer no explanation why *these* Defendants, among thousands of other possible parties—including Plaintiffs—have a unique duty of disclosure to the public. But even if every statement uttered by Defendants were false, Plaintiffs could still not justifiably rely on their statements about climate change, considering the assertions from hundreds, if not thousands, of sources proclaiming the threat that greenhouse gases pose to the environment.

Plaintiffs cannot claim that Defendants withheld critical information about the effects of greenhouse gases. Intensive public knowledge and discussion of these issues already exists. Thus the United Nations' Intergovernmental Panel on Climate Change issued a 2021 report in a press release with these emphatic words: "Climate change is widespread, rapid, and intensifying, and some trends are now irreversible, at least during the present time frame." In the same press release, UN Secretary-General António Guterres declared that the IPCC's Working Group's report was nothing less than "a code red for humanity." "The alarm bells are deafening, and the evidence is irrefutable." Guterres continues to call publicly for a fossil fuel ban to avoid "an escalating crisis." To be sure, these statements are hyperbolic. And the solutions offered are not realistic. But whether his statements are true or false does not matter. What is critical is that Plaintiffs cannot plausibly allege that Defendants

kept them in the dark.

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

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

Here, Plaintiffs have filed generic allegations that they could repeat virtually verbatim, with a few name changes, against a broad universe of defendants. Every producer, user, and consumer of fossil fuels, and every entity in the supply chain in between, could become the next defendant in a suit for contributing to energy use,

which allegedly increases greenhouses gases, allegedly raises global temperatures, and then allegedly causes climate change, which in turn allegedly harms Boulder, Colorado.

Worse still, there are thousands of different counties throughout the United States, each of which could bring a copycat complaint that could plunge Defendants, or any of a thousand other firms, into the same morass. This Court should reverse the decision below for adopting limitless theories of tort liability.

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court.

/s/ William E. Trachman
William E. Trachman, Atty. Reg. No. 45684
Ivan L. London, Atty. Reg. No. 44491
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, CO 80227
Phone: (303) 292-2021
Fax: (877) 349-7074
wtrachman@mslegal.org

RICHARD A. EPSTEIN
16 Thomas Place
Norwalk, CT 06853
(773) 450-4476
raepstein43@gmail.com

JOHN YOO
1550 Tiburon Blvd. #G-503
Tiburon, CA 94920
(510) 600-3217
johncyoo@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of September 2024, I filed the foregoing ***Amici Curiae*** **Brief of Professor Richard Epstein, Professor John Yoo, and Mountain States Legal Foundation in Support of Defendants/Petitioners** with the Clerk of the Court, and that a copy of the foregoing was served upon all counsel of record via Colorado Court E-filing system (CCEF).

/s/ *William E. Trachman*
William E. Trachman