No. A25-_____

STATE OF MINNESOTA
IN COURT OF APPEALS

State of Minnesota, by its Attorney General, Keith Ellison,

Plaintiff-Respondent.

v.

American Petroleum Institute, Exxon Mobil Corporation, ExxonMobil Oil Corporation, Koch Industries, Inc., Flint Hills Resources LP, and Flint Hills Resources Pine Bend,

Defendants-Petitioners,

BRIEF OF *AMICUS CURIAE* PROFESSOR JOHN YOO IN SUPPORT OF GRANTING DISCRETIONARY REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

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 apply constitutional principles of federalism appropriately. And he submits this brief in Support of Defendants/Petitioners (together here, Defendants) and against Plaintiff/Respondent (here, Plaintiff) because he has actively considered state common-law tort issues and the interplay of federal regulatory preemption with state-law tort claims raised by the Defendants in their [Request for Discretionary Review], including recently where another State's highest court *did* grant such emergency interlocutory review. *See In re Exxonmobil v. Bd. of Cty. Comm'rs*, 2024SA000206 (Colo. Sept. 18, 2024), Amici Curiae Br. of Prof. R. Epstein, Prof. J. Yoo, and Mountain States Legal Foundation in Supp. of Defs./Pet'rs.[2]

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) (*New York*) ("[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."). Minnesota wants to set nationwide climate policy.

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than amicus curiae or his counsel made a monetary contribution to the preparation or submission of this brief.

[2] *See also id.* (Sept. 3, 2024), Order of the Ct. (granting amici curiae's motion for leave to file amicus brief); *id.* (July 29, 2024) Order and Rule to Show Cause (granting interlocutory review).

But federal law and sound tort principles prohibit that.

The federal appellate court to squarely address a motion to dismiss such claims on federal preemption grounds—the United States Court of Appeals for the Second Circuit—rejected attempts like Plaintiff's. *See New York*, 993 F.3d at 91. But the lower court here decided that it knew better—it "disagrees." Order 24. This Court should step in ***now*** to correct the error.

Plaintiff is trying to set nationwide climate policy despite U.S. Supreme Court precedent that forbids it. Congress preempted 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 Nation decides its climate policy, the Nation's choices—including deciding as a country *not* to act—will have nationwide effects. The Court should not let Minnesota make those decisions for the rest of this Nation. Nationwide policy addressing global changes in climate may not be directed by state tort lawsuits. The tail cannot wag the dog.

This Court should grant discretionary review of the lower court's denial of Defendants' motion to dismiss for at least two reasons. *First*, the lower court erroneously refused to recognize that federal law preempts Minnesota state law on the issue of climate policy despite *AEP*, 564 U.S. at 422–25, and despite *New York*, 993 F.3d at 91. *Second*, even in the case on which the lower court relies, *City & County of Honolulu v. Sunoco LP*, 537 P.3d 1173, 1185 (Haw. 2023) (*Honolulu*), the appellate court there *did* at least grant interlocutory review. *Id.*; *accord In re Exxonmobil v. Bd. of Cty. Comm'rs*, 2024SA000206 (Colo. July 29, 2024), Order and Rule to Show Cause. Accordingly, Professor Yoo

supports Defendants and respectfully asks this Court to grant discretionary review.

ARGUMENT

I. The lower court erred by denying preemption.

The lower court declined to find that federal law (including the CAA) preempts state tort lawsuits against multinational oil companies—and, here, a national industry group—for not warning consumers about the perils of greenhouse gas emissions. The lower court acknowledged that *New York* held that federal law including the CAA preempted state tort claims. But instead of applying that precedent, the lower court agreed with the Hawaii Supreme Court that federal law *did not* preempt state tort law.

Why? Because the lower court decided that this question is a matter of "framing." Order 21. But it's not a matter of framing; it is a matter of constitutional law and fairness. Plaintiff—"through the aggressive use of state-law tort suits"—is committing "serious constitutional violations." *See Alabama v. California*, 604 U.S. ___, slip op. at 1, 3 (Mar. 10, 2025) (Thomas, J., dissenting from the denial of motion for leave to file complaint). Federal preemption, applied to this case, prevents those serious constitutional violations.

Even if Minnesota's appellate courts might deepen the split of authority by ruling on Defendants' motion, this Court should accept review of this case now to address the preemption issues. 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 lower court allowed this state tort lawsuit to continue against Defendants because of various "alleged violations of Minnesota law respecting unfair, discriminatory, and other unlawful practices in business, commerce, or trade." Order 1. It upheld for now the questionable viability of Plaintiff's theory of liability, which rests on the absurd view that Defendants' emissions (in general) and statements (even more generally)—not in Minnesota but anywhere in the world—cause worldwide greenhouse gas emissions that raise worldwide temperatures, even if no Minnesotan was ever exposed to the emissions or supposed statements. Order 1–2. There is no way around it: the lower court has accepted the premise that the State can set *national* climate policy on *global* emissions, even if no Minnesotan suffered a concrete and individualized harm. *See id.*

But there is no set of facts which, if proven, could allow punishment under this State's tort law for actions allowed under federal law. Preemption in this sense works as a jurisdictional bar, not a merits question. *See AEP*, 564 U.S. at 426–27 (CAA lets States petition the EPA for rulemaking, and those States' redress is through the administrative process and then the federal courts); *see also Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 387–88 (1986) (preemption may be jurisdictional where a federal statute ousts state courts of jurisdiction).

Neither the lower court nor Plaintiff is painting on a blank canvas. Two courts have squarely addressed motions to dismiss such baseless, unconstitutional claims. The Second Circuit unequivocally denied aggressive use of state-law tort suits, *New York*, 993 F.3d at 91, while Hawaii erroneously went the other way. *See Honolulu*, 537 P.3d 1173, 1207

(Haw. 2023).

The lower court erred in misunderstanding and refusing to apply *AEP* and *New York* and choosing instead to adopt the reasoning in *Honolulu*. It concluded that even though federal common law would preempt Plaintiff's claims, the CAA had in turn displaced federal common law and resultingly had somehow, unintentionally ***negated*** the preemptive effect of federal law on these issues. Order 23–27. But how? The lower court never explains how a federal law that steps into the shoes of federal common law somehow negates the common law's preemptive effect. *See id.*

The Second Circuit had no such difficulty. To begin, the court did not have to deal with removal-jurisdiction precedent. Rather, addressing dismissal squarely, it was "free to consider the . . . preemption defense on its own terms." *New York*, 993 F.3d at 81. From there, the court acknowledged the preemption/displacement two-step. *Id.* at 95. It concluded, "[f]or many of the same reasons that federal common law preempts state law, the Clean Air Act displaces federal common law claims concerned with domestic greenhouse gas emissions." *Id.* And in a lengthy analysis, *id.* at 95–97, the court elegantly explained: "the [Plaintiff's] claims, if successful, would operate as a *de facto* regulation on greenhouse gas emissions." *Id.* at 96. That was what the plaintiff was ***really*** trying to do in *New York*, and that is what Minnesota is ***really*** trying to do in this case. Minnesota's artful dodges through novel state-tort pleading do not avoid what the court saw clearly. *Contra* Order 24–27; *Honolulu*, 537 P.3d at 1198–99.

The lower court should have read the CAA's preemption of federal common law as also preempting state-law tort suits. *AEP* does not let state law snap back into place "simply

because Congress saw fit to displace a federal court-made standard with a legislative one." *New York*, 993 F.3d at 98. The CAA made the EPA the "primary regulator of [domestic] greenhouse gas emissions," *id.* at 99, and it left to the states ***only*** the power to regulate ***internal*** emissions sources, not those from other states, *id*. at 100.

This Court can clarify that states cannot "utilize state tort law to hold multinational oil companies liable for the damages caused by global greenhouse gas emissions." *New York*, 993 F.3d at 85. Decades of federal precedent, including *Illinois v. City of Milwaukee*, 406 U.S. 91, 102–03, 102 n.3 (1972), recognize that federal law must govern here. 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, and the CAA steps into that preemptive effect. *Contra* Order 23–24.

The Framers of the Constitution wisely crafted a balanced system that prevents a single state from setting nationwide policy, which the Supreme Court has applied and the Second Circuit persuasively extended to a case like this one. Federal law preempts Plaintiff's claims in this case, and the lower court's failure to so hold enables "serious constitutional violations" that this Court should immediately address and rectify. *See Alabama*, 604 U.S. ___, slip op. at 3.

II. Other courts have granted interlocutory review in these circumstances.

There is also practical importance in the Court granting review: Defendants should be allowed into this Court's doors before the lower court's decision can do too much

constitutional damage (and other damage, such as grueling years and exorbitant expenditures in discovery). *See* Request for Discretionary Review]. Even the appellate court that has most strongly disagreed with *New York*, the Hawaii Supreme Court, nevertheless agreed that interlocutory review in a context as important as this one was appropriate:

> Here, the causes of action . . . seem new due to the unprecedented allegations involving causes and effects of fossil fuels and climate change. . . . Defendants timely filed their joint notice of interlocutory appeal . . . . This court subsequently granted Plaintiffs' application for transfer from the Intermediate Court of Appeals.

Honolulu, 537 P.3d at 1185. In Hawaii, the same urgent circumstances present here led the State's highest court to reach down and transfer an interlocutory appeal *up* from the initial appellate court. *Id.*

Similarly, in a case still pending in Colorado, the State's highest court accepted interlocutory review and has heard oral argument appealing a trial court's denial of dismissal. *In re Exxonmobil v. Bd. of Cty. Comm'rs*, 2024SA000206 (Colo. July 29, 2024), Order and Rule to Show Cause.

The damage of the lower court's error will be astronomical. It will be "process as punishment." The U.S. Supreme Court has persuasively explained that regardless of the standard applied to a motion to dismiss, one essential reason for weeding out frivolous claims like Minnesota's at this stage is "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007). Minnesota cannot use an incorrect lower-court decision as a bargaining

chip to steer national energy policy. But that is all Minnesota has going for it. The Court should step in and review the important legal questions presented by this case now.

CONCLUSION

Given the "serious constitutional violations" at the heart of this case, *see Alabama*, 604 U.S. ___, slip op. at 3 (Thomas, J., dissenting), *amicus curiae* supports Defendants' request and respectfully asks this Court to grant discretionary review.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 129 and 132.01, subds. 1 and 3, was produced with a proportional 13-point font, Times New Roman, is filed in Portable Document Format ("pdf") and contains 2,101 words, including all footnotes and headings, but excluding the caption, tables, and signature block, as reported by the word-processing software.

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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that this document is being filed and served on all counsel of record for all parties via the Minnesota appellate court electronic filing system.

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