MATTHEW J. PLATKIN, ATTORNEY GENERAL OF THE STATE OF NEW JERSEY; NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION; AND CARI FAIS, DIRECTOR OF THE NEW JERSEY DIVISION OF CONSUMER AFFAIRS, PLAINTIFFS-APPELLANTS, v. EXXON MOBIL CORPORATION; EXXONMOBIL OIL CORPORATION; BP P.L.C.; BP AMERICA INC.; CHEVRON CORPORATION; CHEVRON U.S.A. INC.; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66; PHILLIPS 66 COMPANY; SHELL PLC; SHELL OIL COMPANY; AND AMERICAN PETROLEUM INSTITUTE, DEFENDANTS-RESPONDENTS.	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NUMBER: A-1641-24 CIVIL ACTION ON APPEAL FROM AN ORDER OF THE SUPERIOR COURT OF NEW JERSEY, CIVIL DIVISION Trial Docket No. MER-L-1797-22 Sat Below: Hon. Douglas H. Hurd, PJ. Cv.

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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PRELIMINARY STATEMENT

The State's lawsuit is fundamentally about global climate change—a cross-border, multinational problem that requires a cross-border, multinational solution. The law of a single state, or an order from a single state court, simply cannot address the effects on every state and every nation from greenhouse gas emissions crossing interstate and international borders. Any possible solution can be achieved only on a national and international basis, through federal law and the federal government acting on behalf of the United States as a whole. The need for a uniform federal standard in cases concerning cross-border emissions is why the U.S. Supreme Court has long recognized that federal common law applies to disputes about "air and water in their ambient or interstate aspects." *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972) ("*Milwaukee I*") (citation omitted). Congress may displace federal common law by statute, which then serves as the exclusive source of remedies for the claim; if Congress displaces federal common law but provides no private remedy, then there is none. Whether the federal law governing these matters is common law or statutory law, the point is that *federal* law governs—there is no room for a single state's law to govern.

The Superior Court understood that. The court recognized that cases about transboundary pollution, because of their interstate and international

nature, must be governed by uniform laws, not by disjointed state-law regimes. It recognized that what the State really seeks is to hold Defendants responsible for the effects of global climate change, and it saw through the State's attempts to frame this case as one solely about allegedly misleading advertising. The Court realized that writing a state-law rule could interfere with the federal government's careful balancing of environmental goals, on the one hand, and the energy and economic needs of the entire nation, on the other. The Superior Court also understood that congressional displacement of federal common law through the Clean Air Act (CAA) does not open the door to letting state law rules govern in an exclusively federal area demanding a uniform solution.

Reversing the Superior Court would hinder, rather than help, efforts to address global climate change. The Chamber supports effective action to address climate change and believes that durable climate policy must be made by Congress, which should encourage both innovation and investment to ensure significant emissions reductions and avoid economic harm for businesses, consumers, and disadvantaged communities. Policies aimed at achieving these goals should not be made by the courts, much less by a patchwork of actions under state law, which would do more harm than good. That is the case here. The Court should affirm the Superior Court's dismissal.

ARGUMENT

POINT I
FEDERAL LAW EXCLUSIVELY GOVERNS THIS DISPUTE OVER GLOBAL GREENHOUSE GAS EMISSIONS.

A. Disputes about cross-border emissions are governed by federal law because of their interstate and international nature.

The Superior Court correctly recognized that federal law controls cross-border disputes. Matters involving air pollution are a classic example, for which greenhouse gas emissions are no exception.

Federal law—and where there is no federal statute, federal common law—must govern when "there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism." *Milwaukee I*, 406 U.S. at 105 n.6. "In these instances, our federal system does not permit the controversy to be resolved under state law ... because the interstate or international nature of the controversy makes it inappropriate for state law to control." *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981).

Under this framework, and absent congressional action, federal common law controls cross-border disputes implicating the interests of multiple

sovereigns. Such disputes include those over interstate water rights,[1] tribal land rights,[2] interstate air carrier liability,[3] interstate disputes over intangible property,[4] and foreign relations.[5] These types of cross-border disputes concern "the conflicting rights of States or our relations with foreign nations," and so implicate basic principles of federalism, *Tex. Indus.*, 451 U.S. at 641, or otherwise call for a uniform federal rule, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426-27 & n.25 (1964). In such cases, state law cannot apply because "local law will not be sufficiently sensitive to federal concerns, it is not likely to be uniform across state lines, and it will develop at various rates of speed in different states." 19 Wright & Miller, Fed. Prac. & Proc. Juris. § 4514 (3d ed. 2022). So, unless Congress enacts a uniform federal standard, federal common law must fill the gap. In its modern form, "federal common law addresses 'subjects within national legislative power where Congress has so

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[1] *Hinderlider v. La Plata & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938); *Kansas v. Colorado*, 206 U.S. 46, 95 (1907).

[2] *Cnty. of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 235-36 (1985).

[3] *Treiber & Straub, Inc. v. UPS, Inc*., 474 F.3d 379, 384 (7th Cir. 2007); *Sam L. Majors Jewelers v. ABX, Inc*., 117 F.3d 922, 926-29 (5th Cir. 1997).

[4] *Delaware v. Pennsylvania*, 598 U.S. 115, 128-30 (2023) (discussing federal common law rules for escheatment of money orders).

[5] *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 (1964); *Provincial Gov't of Marinduque v. Placer Dome, Inc.*, 582 F.3d 1083, 1088 (9th Cir. 2009); *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1233 (11th Cir. 2004).

directed' or where the basic scheme of the Constitution so demands." *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 421 (2011) ("*AEP*") (quoting Henry J. Friendly, *In Praise of* Erie*—and of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 408, 421-22 (1964)).

One area in which federal decisionmaking authority is particularly essential concerns "the environmental rights of a [s]tate against improper impairment by sources outside its domain." *Milwaukee I*, 406 U.S. at 107 n.9 (citation omitted); *see AEP*, 564 U.S. at 421 ("Environmental 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.'" (citation omitted)). In those types of cases, the Supreme Court has held, "[f]ederal common law and not the varying common law of the individual [s]tates is ... necessary" so that a "uniform standard" may apply. *Milwaukee I*, 406 U.S. at 107 n.9 (citation omitted). Thus, "[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law." *AEP*, 564 U.S. at 421 (quoting *Milwaukee I*, 406 U.S. at 103). As the Supreme Court has explained, where a lawsuit presses claims for liability arising from cross-border greenhouse gas emissions, "borrowing the law of a particular [s]tate would be inappropriate." *Id.* at 422.

In addition to the limits federalism places on the application of state law to a quintessentially national issue, the Due Process Clause limits each state's ability to regulate conduct in other states. "[T]here must be at least some minimal contact between a state and the regulated subject matter or transaction before the state can, consistent with the requirements of Due Process, exercise legislative jurisdiction." *Gerling Glob. Reins. Corp. v. Gallagher*, 267 F.3d 1228, 1237-38 (11th Cir. 2001); *Home Ins. Co. v. Dick*, 281 U.S. 397, 407-08 (1930). The due process question is not whether Defendants generally do business in the State, or have "minimum contacts" with it; it is whether there is a sufficient connection with the *transaction* the State seeks to regulate. *Gerling*, 267 F.3d at 1236, 1238.

B. The State's claims are fundamentally about cross-border emissions and therefore cannot be resolved under state common law.

The State does not disagree with the proposition that the Supreme Court has held that federal common law governs cases about cross-border pollution. Pb15. It instead contends that its claims can proceed despite that precedent because it asserts claims about Defendants' allegedly false advertising rather than their "direct emissions." Pb22-33. But the gravamen of the dispute and the source of the alleged injuries is Defendants' alleged responsibility for the effects of global climate change caused by greenhouse gas emissions stemming from cross-border contributors. The State's characterization of its causes of

action therefore does not change the fundamentally interstate and international nature of this case. So, federal law applies for the same reason it always has applied when harms from cross-border pollution are at issue: there is an overriding need for the applicable standard to be a uniform, federal standard.

1. The State says that its case is different, because its causes of action concern Defendants' alleged "misrepresentations" rather than cross-border pollution. Pb24. But that difference is not meaningful. The precise causes of action and their labels do not dictate whether state law can apply; the "interstate or international nature of the controversy" controls. *Tex. Indus.*, 451 U.S. at 641. And regardless of the claims and labels the State has selected, it is still seeking to impose liability on Defendants for the "consequences" of global climate change allegedly caused by their fossil fuel products. *E.g.*, Pa17-18 ¶ 7; Pa153-154 ¶ 233. Those consequences can occur only when fossil fuels are produced, used, and combusted, generating emissions that cross not only state lines, but international borders. *See City of New York v. Chevron Corp.*, 993 F.3d 81, 92-93 (2d Cir. 2021); *see also City of Hoboken v. Chevron Corp.*, 45 F.4th 699, 712 (3d Cir. 2022) (noting, in a similar case brought by state and local governments about climate change, that the harms are not "just about misrepresentations," but also derive from "trespasses and nuisances ... caused by burning fossil fuels and emitting carbon dioxide"). So, while the State says

it is "not seek[ing] to hold Defendants liable for their emissions 'emanating from another [s]tate,'" Pb24, that is wrong: the State is still seeking to hold Defendants liable for effects attributable to emissions emanating from myriad interstate and international sources—not emissions from a single state.

Indeed, the State's complaint repeatedly states that it seeks recovery for "injuries and damages due to the climate crisis." *E.g.*, Pa154-170 ¶ 235; Pa172 ¶ 234 (alleging "climate crisis-related injuries"); Pa172 ¶ 233 (similar). Those "climate crisis-related injuries," the State admits, stem from "greenhouse gas emissions [that] have been released into the atmosphere" by interstate and international actors and that have "comingle[d]" to cause global climate change. Pa150 ¶ 225; Pa176¶ 248. And ultimately, the State seeks to hold Defendants accountable for their alleged "contribut[ions] ... to the buildup of CO2 in the atmosphere that drives global warming." Pa17-18 ¶ 7. By the State's own admissions, then, both the emissions and the harms alleged (*and* the atmospheric phenomena that are indispensable causal links between the two) are not limited to New Jersey, but span the entire globe. Pa53-57 ¶¶ 39-48. That gives the present dispute an "interstate or international nature," which "makes it inappropriate for state law to control." *Tex. Indus.*, 451 U.S. at 641.

2. Once the State's claims are seen for what they are—an attempt to hold Defendants liable for the effects of global climate change—federal law must

apply. Given the "interstate [and] international nature" of both the causes and effects of climate change, applying "the law of a particular [s]tate would be inappropriate." *AEP*, 564 U.S. at 422; *Tex. Indus.*, 451 U.S. at 641. That is because combatting transboundary pollution demands a uniform standard that discordant state-law regimes cannot provide. *See supra*, pp. 3-5. The State never addresses the need for uniformity. And that omission is all the more stark when considering the difficult policy choices inherent in balancing the United States' environmental and economic goals, and how ceding control of those matters to fifty states' common-law rules—and those states' varied remedies—would upset the federal equilibrium.

Although the "contest" between curbing global warming and meeting national energy and economic needs is not "zero-sum," there are still important trade-offs. *City of New York*, 993 F.3d at 93. Selecting among them has far-reaching consequences. As the Supreme Court has explained:

> The appropriate amount of regulation in any particular greenhouse gas-producing sector cannot be prescribed in a vacuum: As with other questions of national or international policy, informed assessment of competing interests is required. Along with the environmental benefit potentially achievable, our Nation's energy needs and the possibility of economic disruption must weigh in the balance.

AEP, 564 U.S. at 427.

The federal government has been formulating and implementing national policy in this domain for decades. Congress has long legislated concerning national energy needs. *See, e.g.*, 43 U.S.C. § 1802(1) (statutory purposes include "establish[ing] policies and procedures for managing ... oil and natural gas resources ... to achieve national economic and energy policy goals"). So, too, has Congress legislated to address climate change. For example, Congress recently amended the CAA to further address the domestic sources of emissions causing global climate change. Inflation Reduction Act of 2022, Pub. L. No. 117-169, § 136, 136 Stat. 1818, 2073-74 (providing funding for "improving climate resiliency" and instructing EPA to "impose and collect a charge on methane emissions"). And the United States has long sought to ensure that actions related to climate change do not undercut economic growth; indeed, it signed a treaty nearly three decades ago committing to "employ appropriate methods" to address climate change, "*formulated and determined nationally*," that "minimiz[e] adverse effects on the economy." U.N. Framework Convention on Climate Change art. 4(1)(f), May 9, 1992, S. Treaty Doc. No. 102-38 (emphasis added).

To allow each of the fifty states to impose their own preferred policy solutions for climate change, with each state naturally focused on *local* rather than national or international impacts, would create a plainly "irrational system

of regulation" that "would lead to chaotic confrontation between sovereign[s]." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 496-97 (1987) (citation omitted); *see City of New York*, 993 F.3d at 93 ("states will invariably differ in their assessment of the proper balance between ... national and international objectives"). As the Second Circuit correctly concluded in a similar case, "subjecting" companies' "global operations to a welter of different states' laws" in this area could "upset[] the careful balance that has been struck between the prevention of global warming, a project that necessarily requires national standards and global participation, on the one hand, and energy production, economic growth, foreign policy, and national security, on the other." *City of New York*, 993 F.3d at 93. In short, this is an area in which "there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism." *Milwaukee I*, 406 U.S. at 105 n.6. Federal law must therefore control.

3. The Due Process Clause's limits on extraterritorial regulation confirm the point. The State seeks to regulate transactions far beyond its borders, demanding that business practices and communications that occur elsewhere conform to New Jersey's preferred standards—or be penalized. That is exactly what the Supreme Court has held the Due Process Clause forbids: a State is "without power to affect the terms of contracts" made elsewhere and

performed entirely elsewhere. *Home Ins.*, 291 U.S. at 408; *see Gerling*, 267 F.3d at 1235-40; *accord John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178, 182-83 (1936) (legal significance of misrepresentation must be judged under the law of the State where the misrepresentation occurred). The State's theory goes well beyond the due process limits on its legislative jurisdiction.

POINT II
THE CLEAN AIR ACT'S DISPLACEMENT OF FEDERAL COMMON LAW DOES NOT GIVE LIFE TO THE STATE'S CLAIMS.

All but conceding that suits like this one have historically been governed by federal law, the State also argues that the CAA's displacement of federal common law means that state law can, for the first time, creep into the picture. Pb16-22. The State appeals to "first principles" and logic, *id.* at 20, but both logic and precedent refute the State's view—which would require courts to ignore that federal problems remain federal problems.

1. The State claims that it is illogical to have federal common law operate as a "zombie," alive for one purpose (ascertaining whether state law can apply), but dead for another (supplying the relevant federal standard). Pb20-21. But the State seeks to have the CAA act like Dr. Frankenstein—"infus[ing] a spark

of being into the lifeless thing" that is state law.[6] And only the State's approach leads to nonsensical results.

To be sure, when a federal statute displaces federal common law, it eliminates the causes of action or remedies previously available under court-made rules. *See, e.g.*, *City of Milwaukee v. Illinois*, 451 U.S. 304, 332 (1981) ("*Milwaukee II*") (observing that Congress's changes to the Clean Water Act (CWA) meant that "no federal common-law remedy was available"). But the State's position ignores the reality that the domain of cross-boundary air emissions is still one requiring a federal rule: its international nature implicates constitutional principles of federalism and requires a uniform standard. *Supra*, pp. 3-5. Thus, it is not that federal common law remains half alive when Congress displaces it. Rather, the principles that mark this area as one where federal law—and only federal law—must apply remain as robust as ever. *Texas Indus.*, 451 U.S. at 641 ("our federal system does not permit the controversy to be resolved under state law"). To adhere to those principles, and avoid the very same uniformity problems that necessitated federal common law, the displacing statutory scheme must supply the only available remedies. State law was incompetent to address the issue before congressional action, and it remains so

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[6] Mary Shelley, *Frankenstein* 58 (Penguin Classics rev. ed. 2003).

after it. *See, e.g.*, *Milwaukee II*, 451 U.S. at 313 n.7 ("[I]f federal common law exists, it is because state law cannot be used."). Nor can the mere displacement of a federal common law remedy authorize state extraterritorial regulation that violates due process. *See supra*, pp. 6, 11-12.

But as the State would have it, congressional attempts to supply a *uniform* federal standard by statute (with or without a private right of action) would bring to life the very same *disuniform* state-law rules that were, and remain, incompetent to address this national problem. That would be so even if that federal legislation were to "adopt[] verbatim a judge-made common law rule." *City of New York*, 993 F.3d at 98-99. Congress could enact statutes codifying the very same court-supplied rules governing interstate water rights, interstate air carrier liability, and interstate disputes over intangible property, *supra*, pp. 3-4, and under the State's view, state-law claims on those subjects would suddenly become viable, implicating the very same concerns initially prompting the formulation of a federal rule. *That* result is illogical. By contrast, there is nothing illogical about the Superior Court's recognition that federal problems remain federal problems, whether federal courts or Congress supplies the necessary uniform, federal standard to deal with them.

2. The State's logic also does not work with respect to its claim that, in undertaking a preemption analysis, separation of powers principles require

ignoring the interstate nature of the field in which the State is regulating. The courts that have held that state law remains preempted in this area, even after the CAA displaced any federal common law remedy, have correctly understood that it would make little sense to declare that our federal constitutional structure demands a uniform standard, only to turn around and "presumptively" allow fifty different sets of state laws to control. *See, e.g.*, *City of New York*, 993 F.3d at 98; *Mayor and City Council of Baltimore v. BP P.L.C.*, No. 24-C-18-004219, 2024 WL 3678699, at *7 (Md. Cir. Ct., Balt. City, July 10, 2024) ("if Congress ... does not provide a cause of action, state law is not presumptively competent to address this issue"). Nothing about those courts' straightforward approach "insulat[es] federal common law from the legislative authority of Congress." Pb20.

For one thing, Congress can always supply the federal standard to the exclusion of judicially crafted common law ones. *See Milwaukee II*, 451 U.S. at 316-17. Supplying a federal standard—a uniform one—*supports* prior judicial determinations that "state law cannot be used" to achieve uniformity. *See id*. at 313 n.7; *Illinois v. City of Milwaukee*, 731 F.2d 403, 410 (7th Cir. 1984). So, too, Congress can decide that a uniform federal standard is not needed by expressly permitting states to apply their own laws. *See Ouellette*, 479 U.S. at 497 (limited saving clause); *City of New York*, 993 F.3d at 99

("'resort[ing] to state law'" can be "'authorize[d]' by federal statute" (citation omitted)). In that way, Congress can "reverse a judicial declaration that a federal common law of decision preempts state law" (Pb20). But absent such express authorization, "[i]t would be extraordinary" to view Congress's adoption of a uniform regulatory structure as signifying a desire "to tolerate [state] common-law suits" that may "undermine" that uniformity, or to welcome the ensuing "chaotic confrontation" that would result from multiple states trying to apply whatever "vague" and "indeterminate" standards their courts may set. *Ouellette*, 479 U.S. at 496-97 & n.17 (citation omitted).

3. Finally, as to precedent, the State contends that the Supreme Court's decisions in *AEP* and *Ouellette* mean that the fifty states are free to impose their own regulatory schemes so long as they are not preempted by the CAA itself. Pb16-19. But neither decision supports this notion.

The question in *AEP* was which *federal* actor—Congress or the courts—should craft the relevant *federal* law. The Supreme Court answered that question assuming that *federal* law must control the suit over greenhouse gas emissions. *See AEP*, 564 U.S. at 423-24 (explaining that "it is primarily the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest"); *see also Milwaukee II*, 451 U.S. at 319 & n.14 ("considering which branch of the Federal Government is the source of federal law, not

whether that law pre-empts state law"). That Congress displaced federal common law simply means that the federal *courts* are no longer in the business of formulating federal standards. Congress's action in no way eliminates or undermines the overriding federal interest in the dispute; nor does it throw open the door for the courts of the fifty different states to tackle these distinctly federal issues using a variety of conflicting state and local laws.

Ouellette is even less helpful to the State. True enough, the Court there framed the inquiry as "whether the [CWA] pre-empt[ed]" state-law nuisance claims asserted against an interstate pollution source. 479 U.S. at 483. But contrary to the State's argument, the Court did not eschew consideration of why federal common law applied before Congress enacted that statute. Pb17. Instead, the Court considered *both* the comprehensive nature of the CWA *and* "that the control of interstate pollution is primarily a matter of federal law"—referring back to case law discussing federal common law's role in public nuisance suits concerning water pollution. *Ouellette*, 479 U.S. at 492 (citing *Milwaukee I*, 406 U.S. at 107); *see City of New York*, 993 F.3d at 99 n.10. *Ouellette*, like *AEP*, therefore does not support the notion that the overriding federal interest in avoiding piecemeal, state-by-state regulation of transboundary emissions evaporates upon enactment of a congressional standard.

* * * * *

In our constitutional system of divided responsibility, the federal government is tasked with addressing national questions like this one. Addressing the climate-related impacts arising from greenhouse gas emissions in a manner that comports with national energy policy, giving due weight to relevant economic, environmental, foreign-policy, and national-security considerations, is a quintessentially national job. *See AEP*, 564 U.S. at 427; *City of New York*, 993 F.3d at 93. The complex choices that bear upon interstate and international emissions require a uniform approach at the federal level, not the disconnected efforts of individual courts throughout the fifty states—each one being asked to award remedies to in-state plaintiffs that will necessarily cross state (and national) lines and collide with one another. Our federal system does not permit fifty different states to deploy their laws to govern this inherently interstate area. Congress decided to seek uniformity through the CAA rather than leave the matter to the federal courts. It did not thereby delegate the matter to *states* or to state law—which would pose the very same threat to uniformity that led the Supreme Court to recognize *federal* common law in this area.

CONCLUSION

This Court should affirm and hold that disparate state-law regimes cannot competently govern in an area where a uniform federal standard is needed, and

that congressional efforts to supply just such a standard do not somehow give life to state-law claims that have never been capable of addressing cases, like this one, concerning cross-border emissions.

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Respectfully submitted,

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