COLORADO SUPREME COURT Ralph L. Carr Colorado Judicial Center 2 East 14th Avenue Denver, CO 80203	DATE FILED October 9, 2024 8:48 AM FILING ID: AAA77FB8110D2 CASE NUMBER: 2024SA206
Original Proceeding: District Court, Boulder County Case No. 2018CV30349 Hon. Robert R. Gunning	▲ **COURT USE ONLY** ▲
In re: **Plaintiffs/Respondents:** BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY; BOARD OF COUNTY COMMISSIONERS OF SAN MIGUEL COUNTY; CITY OF BOULDER, **v.** **Defendants:** SUNCOR ENERGY (U.S.A.), INC.; SUNCOR ENERGY SALES, INC., SUNCOR ENERGY, INC. **Defendant/Petitioner:** EXXON MOBIL CORPORATION	Case No. 2024SA206
Attorney for Amici Curiae the American Association for Justice and Colorado Trial Lawyers Association: Nelson Boyle, Reg. No. 39525 5280 APPELLATE GROUP, a division of The Paul Wilkinson Law Firm LLC 999 Jasmine Street Denver, CO 80220 (303) 333-7285 Nelson@5280Appeals.com	

BRIEF OF *AMICI CURIAE* AMERICAN ASSOCIATION FOR JUSTICE AND COLORADO TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFFS/RESPONDENTS

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with all relevant requirements of C.A.R. 28, 29, 32, and 53(f)(1), including all formatting requirements set forth in these rules. Specifically, I attest that this brief contains 3,501 words, which is less than the word limit in C.A.R. 29(d) (4,750 words), including headings, quotations, and footnotes, but excluding the caption, certificate of compliance, table of contents, table of authorities, signature block, and certificate of service.

I acknowledge that this Court may strike this brief if it does not comply with any of the requirements of C.A.R. 28, 29, and 32.

/s/ *Nelson Boyle*

Nelson Boyle, Reg. No. 39525

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IDENTITY AND INTEREST OF *AMICI CURIAE*

The American Association for Justice (AAJ) is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. AAJ is the world's largest plaintiff trial bar, with members throughout the United States, Canada, and elsewhere. AAJ's members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions. For more than 78 years, AAJ has served as a leading advocate of the right of all Americans to seek legal recourse for wrongful injury.

The Colorado Trial Lawyers Association (CTLA) exists to promote and protect individual rights through the judicial process, advance advocacy skills, promote high ethical standards and professionalism, improve and protect the state's judicial system, safeguard and preserve the right to a civil jury trial, and promote the rule of law in Colorado by supporting a robust and independent judiciary. CTLA has over 1,000 member-attorneys advocating its goals.

CTLA and AAJ have a direct interest in the broad ramifications of the issues that are before this Court. In particular, *amici* are concerned

that Defendants[1] and their *amici* effectively seek to challenge the generally recognized underlying principle that tort actions are decided under the dictates of state law, arguing instead in favor of a broad and novel federal usurpation of state law. Their proposed federal preemption doctrine would not only have their intended result of eliminating all state law claims against them for the damages they have caused in Colorado but, by extension, eviscerating state jurisdiction for all manner of state tort claims when those claims relate to multi-state bad conduct of multinational or even national companies. CTLA and AAJ urge this Court to resist this challenge to the very fabric of our federalist system.

ARGUMENT

I. BECAUSE PLAINTIFFS SUFFERED HARMS IN COLORADO, THE APPROPRIATE AVENUE FOR REDRESS IS TO ALLOW THE DETERMINATION OF WHETHER THEY SHOULD RECOUP DAMAGES TO BE BEFORE COURTS OF THE STATE OF COLORADO.

Rather than proceeding under Colorado state law to seek a determination as to whether they owe damages for injury they have

[1] This brief is intended to respond to Exxon and its *amici*. To the extent that Exxon and its fellow Defendant, Suncor, share an identity of positions, this brief should be read to respond to both defendants. *Amici* do not, however, seek to address issues pertaining to Suncor that are not also issues placed by Exxon before this Court.

allegedly caused to the two political sub-divisions filing suit, Defendants request this determination using an alternative but unspecified federal common law. In doing so, Defendants do not point to any authorities specifically prescribing, creating, or applying any existing federal common-law claims brought by a political subdivision against a private actor for trespass, public or private nuisance, unjust enrichment, or civil conspiracy. Defendants cannot find support in any existing common law because it does not exist, and this Court should not invent such a claim for the pure benefit of these Defendants.

Instead, this Court should follow the lead of the Hawaii Supreme Court, which has already exercised its sovereignty to reach the conclusion that its political subdivisions can pursue damages through Hawaii state common-law claims against similar defendants for harms the defendants allegedly caused within the confines of Hawaii. *See City & Cnty. of Honolulu v. Sunoco LP*, 537 P.3d 1173, 1187 (Haw. 2023) (allowing suit similar to *this* case to proceed and rejecting the same arguments Defendants assert here). Additionally, the case law of other states consistently indicates that they, too, would exercise similar sovereignty and thereby reach the same conclusion. *See, e.g.*, *Bernhard*

v. Harrah's Club, 546 P.2d 719 (Cal. 1976) (applying California law because the state had a strong interest in its citizens being fully compensated by out-of-state tortfeasor that marketed to Californians); *Hoeller v. Riverside Resort Hotel*, 820 P.2d 316 (Ariz. App. 1991), *cert. denied* (Ariz. Dec. 3, 1991) (applying Arizona law because the state had a strong interest in its residents' recovery of full compensation from an out-of-state tortfeasor causing harm there) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 145, 146 (AM. L. INST. 1971)); *Blarney v. Brown*, 270 N.W.2d 884 (Minn. 1978), *cert. denied*, 444 U.S. 1070 (1980) (applying Minnesota common law to out-of-state tortfeasor).

This is because states have a "manifest interest" in both applying their own laws when their citizens are affected and in "providing [their] residents with a convenient forum for redressing injuries inflicted by out-of-state actors." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985). *See also Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 592 U.S. 351, 368 (2021) (quoting *Burger King*, 471 U.S. at 473). One core part of a state's exercise of its own sovereign authority is assigning tort liability and allowing those harmed within its borders to seek compensation against tortfeasors. *Silkwood v. Kerr McGee Corp.*, 464 U.S. 238, 248

(1984).

Here, Plaintiffs allege that Defendants committed torts that caused severe damages to Plaintiffs. "[T]orts involve wrongful conduct which a state seeks to deter, and against which it attempts to afford protection, by providing that a tortfeasor shall be liable for damages which are the proximate result of his tort." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984) (citation and quotation marks omitted). When harm is caused by others, common-law tort claims are brought to redress those harms and hold those who have caused them to account.

Common-law tort remedies act as a vehicle for achieving justice and righting wrongs since tort damages aim to accomplish multiple goals at their core, including restoring the status quo ante and encouraging socially beneficial behavior while deterring wrongful conduct. *See* RESTATEMENT (SECOND) OF TORTS § 901(c) (AM. L. INST. 1979); *Denver Publ. Co. v. Bueno*, 54 P.3d 893, 898 (Colo. 2002) ("Liability not only recompenses the wronged plaintiff, but also deters the socially wrongful conduct in the first place.").

Bringing a state tort claim, as Plaintiffs have done here, also serves the additional purpose of protecting against a would-be tortfeasor's harm

of persons and property. *Town of Alma v. AZCO Constr. Inc.*, 10 P.3d 1256, 1262 (Colo. 2000). Plaintiffs' first goal is "the cardinal principle of damages;" that is, to make them "whole" by compensating them with an amount of money equal to the losses suffered because of the tort. *Seaward Constr. Co. v. Bradley*, 817 P.2d 971, 975 (Colo. 1991) ("Compensatory damages . . . cover loss[es] caused by the negligence of another and are intended to make the injured party whole."). Colorado's common law typically favors allowing a jury to decide whether to hold a tortfeasor accountable and the measure of the damages to be assessed. *Higgs v. Dist. Ct.*, 713 P.2d 840, 860–63 (Colo. 1985) ("Absent an award so excessive or inadequate as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial, the jury's determination . . . is considered inviolate.") It is the province of the state court jury—upon a robust evaluation of the facts and thorough deliberation—to assess an award of damages by considering the true losses caused by a wrong.

Neither the factual uniqueness of a claim, nor a conflict with the laws of another state, pose an impediment to a state's exercise of jurisdiction over out-of-state actors that have caused damages within the

confines of a state. Moreover, if damages occur to a political subdivision within a state, state common law can readily adjust. As one court has noted, "the common law is not static"—it meets and adapts to the challenges encountered from societal changes, including the advent of new inventions or products and the effects of pollution. *State v. Schenectady Chems., Inc.*, 459 N.Y.S.2d 971 (Sup. Ct. 1983).[2]

Further, there is no bar to a state's jurisdiction under its own laws merely because the activity that caused the harm happened elsewhere. *See Young v. Masci*, 289 U.S. 253, 258–59 (1933). Sections 6, 145, and 171 of the Second Restatement "embody the rule Colorado follows." *AE, Inc. v. Goodyear Tire & Rubber Co.*, 168 P.3d 507, 510 (Colo. 2007). *See also Wood Bros. Homes, Inc. v. Walker Adjustment Bureau*, 601 P.2d 1369, 1372 (Colo. 1979). Most particularly, Colorado has adopted the Second Restatement's "most significant relationship" test for conflict of laws inquiries in "all areas of multistate tort controversies," *First Nat. Bank*

[2] For example, state tort law has adapted and expanded to meet the challenge of the "Love Canal" debacle. *See* Noah Star, *State Courts Decide State Torts: Judicial Federalism & the Costs of Climate Change a Comment on* City of Oakland v. BP PLC *(9th Cir. 2020)*, 45 Harv. Env't L. Rev. 195, 197 (2021) (discussing *Schenectady Chems.*).

v. Rostek, 514 P.2d 314, 320 (Colo. 1973) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (AM. L. INST. 1969)). Under this guidance, Plaintiffs' action is appropriately governed by the dictates of Colorado law.

Therefore, this Court should follow long-ago established Colorado precedent and conclude that Defendants should have foreseen and expected that Colorado would apply its most significant relationship choice of law analysis. The only proper conclusion to reach is that Plaintiffs can pursue their Colorado common law claims by applying the elements of sections 6 and 145 of the Second Restatement, which favor applying Colorado law to these claims.

In any case, since Defendants chose not to address Colorado conflict of law precedent, the Court should conclude that Defendants waived or forfeited the chance to do so. *Johnson v. People*, 524 P.3d 36, 41 (Colo. 2023) (stating that waiver is a voluntary and "intentional relinquishment of a known right or privilege," while forfeiture is "the failure to make the timely assertion of a right") (citations omitted); *People v. Rediger*, 416 P.3d 893, 902 (Colo. 2018) ("Waiver is accomplished by intent, but forfeiture comes about through neglect."); *Hamer v. Neighborhood Hous.*

Servs., 583 U.S. 17, 19 (2017) (holding that a failure to *properly* raise a non-jurisdictional rule results in forfeiture).

In sum, in our federalist system, plaintiffs routinely use state tort law to vindicate rights and seek monetary damages for the redress of harms caused by national and multinational companies. This case is no different.

II. DEFENDANTS' FLAILING EFFORTS TO UPEND THE CONSTITUTION AND CREATE UNIQUE BASES TO PREEMPT STATE JURISDICTION FOR INJURIES THAT OCCURRED WITHIN THE STATE OF COLORADO SHOULD NOT BE COUNTENANCED.

Defendants and their *amici* raise novel arguments urging a generalized and nonspecific federal common law that swallows up state tort and quasi-contract claims. Essentially, Defendants argue for a broad holding that in any situation where a federal foreign policy or other federal policy could or might (someday) exist, states are preempted from allowing their citizens and local governments to proceed with state law claims for damages which occurred within a state. Such a federal common law does not exist.

Even theoretically, this type of broad federal preemption has been discussed and then rejected by multiple commentators who routinely

have written that there cannot be federal preemption of state common law claims such as those in this case.[3]

Nevertheless, in support of their unique position, Defendants posit that the relevant Colorado common-law claims differ in some unspecified ways from similar common-law claims in other states. As such, Defendants argue that these claims brought in Colorado should be preempted. Yet, Defendants address neither how this is so; nor, for that matter, why this is important to this Court's determination. In arguing this unique basis for federal preemption, Defendants do not highlight the particular elements of the Colorado claims nor any other states' claims. Instead, Defendants baldly claim that chaos will ensue if Colorado and every other state allows their own state laws or common-law claims to

[3] *See, e.g.*, Jonathan H. Adler, *Displacement and Preemption of Climate Nuisance Claims*, 17 J.L. Econ. & Pol'y 217 (2022); Hank Herren, *Climate Torts Belong in a Number of Hands: Loosening the Federal Grip of Preemption, Administrative Control, and Dilatory Procedure*, 8 Oil & Gas, Nat. Resources & Energy J. 171 (2022); Katrina Resar Krasulova, *The Unlikely Renaissance of Federal Common Law in the Second Wave of Climate Change Litigation*, 13 Ariz. J. Env't L. & Pol'y 72 (2022); M. Logan Campbell, Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.) Inc.*: A Future for Climate Change Litigation?*, 47 Harv. Env't L. Rev. 605 (2023); Jillian Mayer, *Using State Law Before the Glaciers Thaw: Climate Torts After* BP v. Baltimore, 31 Am. U.J. Gender Soc. Pol'y & L. 225 (2023); Drew Tharp, *Fighting Over Forum: How State Common Law Public Nuisance Claims Will Shape the Future of Climate Change Litigation*, 56 Ind. L. Rev. 623 (2023); Recent Case, Mayor of Baltimore v. BP P.L.C.*, 31 F.4th 178 (4th Cir. 2022)*, 136 Harv. L. Rev. 1276 (2023).

stand for the redress of harm that they have caused within each respective state.

But what chaos would ensue? No chaos has ensued from the vast majority of products liability cases that have been adjudicated in different states throughout the nation under different state laws. Indeed, it is a universally accepted axiom of American jurisprudence that each state applies its own product liability law, and that manufacturers and suppliers can face divergent liability pursuant to the laws of each state.

And, if such claims differ between states, so what? There are abundant differences in the types of state law remedies that are available from state to state and how they affect private actors, such as manufacturers, producers, and suppliers of consumer goods and services. Since its inception, this country has embraced a federal system in which those differences are manifest due to the separate sovereignty of each state, rejecting the notion that there is a valid public policy purpose in avoiding any potential or purported difficulties inherent in having fifty states assert their own sovereignty—including by imposing their different tort laws on interstate and multinational manufacturers, producers, and suppliers of those goods.

The bottom line is that Defendants could foresee their choices causing injuries to municipalities in Colorado, and thus, could foresee being hailed into Colorado state court for tort damages claims under Colorado's laws. *See, e.g.*, *Ford Motor Co.*, 592 U.S. at 366–68 (holding that Ford had "clear notice" that it could be sued in Montana for harms it allegedly caused there because it actively marketed products within the state).

Additionally, Defendants and their *amici* reach for a second basis for federal preemption, arguing that state subdivisions cannot bring common-law tort and quasi-contract claims against fossil fuel producers because doing so would conflict with federal statutory authority, namely the Clean Air Act (CAA). This is incorrect. Congress's adoption of the CAA abrogated the federal common law to the extent that it occupied the field for air pollution claims brought by one State against another State. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011) ("AEP"). Thus, the CAA only displaced a federal common law premised on claims by **States**. *See Illinois v. Milwaukee*, 406 U.S. 91, 107 n.9 (1972). Clearly, a political subdivision is not a State for this purpose. *See id.* at 98. The Supreme Court has therefore **not** barred political subdivisions from

bringing state common law claims for money damages against companies like Defendants. *AEP*, 564 U.S. at 429 (leaving open the question of "the availability *vel non* of a state lawsuit," which "depends . . . on the preemptive effect of the [CAA]").

The CAA does not occupy the field here, nor does it bar damages claims by a *state subdivision* against a polluter for the damages the subdivision has suffered. If anything, rather than conflicting with the authority of the CAA, Plaintiffs' claims act to complement it.

Finally, Defendants and their *amici* voice what is essentially a political argument that does not even deserve legal consideration by this Court. They broadly complain that if the Court allows these claims to proceed, the resulting damages awards (if Plaintiffs prevail) could affect extraterritorial commerce. The U.S. Supreme Court has soundly rejected the notion of an "extraterritorial doctrine" that forbids enforcement of state laws that have "a practical effect of controlling commerce outside the state." *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 371–76 (2023). This includes the effects that a state's tort, environmental, and other laws may have on the national marketplace. *Id.* at 374–75. While "courts must sometimes referee disputes about where one State's

authority ends and another's begins," the Supreme Court has nevertheless recognized that "a feature of our constitutional order" is that "different communities . . . live with different local standards." *Id.* at 375. As the Supreme Court wrote further, the resolution of disputes over the reach of a state's power requires embracing the "principles of sovereignty and comity" espoused in our Constitution's structure. *Id.* at 376.

Under the terms of American federalism, the "Constitution requires a distinction between what is truly national and what is truly local." Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 Harv. L. Rev. 1833, 1899, 1899 n.349 (2001) (quoting *United States v. Morrison*, 120 S. Ct. 1740, 1754 (2000)). Federalism champions the Eleventh Amendment and limits the federal judicial power by promoting federal judicial restraint, keeping a clear demarcation between state and federal "adjudicative provinces," and ensuring appropriate "respect for the competence and responsibility of the state judiciaries." *Id.* at 1898–99 nn. 347, 349 (citations omitted). State courts' concerns are not the same, in part because a state court's decision only binds those within the state. *Id.* at 1901.

As the *Ross* Court explains, there is no overarching federal

constitutional nor common-law policy to strike down state laws or state common law when its application could affect the national marketplace. 568 U.S. at 380–83. Indeed, under our federalist system, multinational corporations are routinely subject to the laws (including the common law) of the states where what they have put into the stream of commerce has done harm. Defendants' premise otherwise is simply mistaken.

Moreover, Defendants never provide any details on how Plaintiffs prevailing here would meaningfully differ from, for example, a win by Honolulu under Hawaiian common law, or a win by any other city or town pursuant to their own states' common law. Nor do they say precisely what limits would be placed on the CAA. Far from failing to prove their underlying novel propositions, as a matter of jurisprudential policy, Defendants have actually waived or forfeited these arguments by neglecting to provide this Court with the necessary details. *See Johnson*, 524 P.3d at 41; *Rediger*, 416 P.3d at 902; *Hamer*, 583 U.S. at 19.

III. THE TENTH CIRCUIT WAS UNCONCERNED WITH DEFENDANTS' FEDERAL ISSUES BOGEYMAN.

Exxon claims Plaintiffs "aim to achieve through state law what they could not achieve in the federal legislative and regulatory process—namely a determination that [the Energy Companies'] activities are

unreasonable." *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 1267 (10th Cir. 2022) (brackets in original). But as the Tenth Circuit observed while affirming the remand of *this* case to the court below, "this is simply a description of our federalist system, not a reason to override state sovereignty." *Id.* "That state common law might provide redress for harm caused by certain private actors, and thereby create remedies unavailable to a plaintiff through the federal legislative or regulatory process, is entirely unremarkable." *Id.*

Here, Plaintiffs assert state law claims for nuisance, trespass, unjust enrichment, civil conspiracy, and consumer protection violations, all premised on Defendants' "knowing promotion and sale of fossil fuels at levels that allegedly caused damage in Colorado." *Id.* at 1267. And "the decision in this suit does not depend on the determination of any federal policy, order, or regulation that is directly drawn into question." *Id.*

The Tenth Circuit found it "difficult to comprehend how the suit's resolution could have controlling effect across the federal system regarding [foreign policy and national security] when the Energy Companies fail to adequately tether their 'national interest' argument to any specific federal law or laws." *Id.* at 1268. Rather, the Tenth Circuit

concluded, "the resolution of the Municipalities' state-law claims . . . is dependent on analyzing the fossil-fuel activities of the Energy Companies over a period of decades—and . . . dependent on establishing the damage to natural environment and property in Colorado due to climate change" so any federal issues implicated, are insubstantial. *Id.* at 1268–69. And even if federal issues are implicated as the case moves forward, the Tenth Circuit was unconcerned since Plaintiffs only pled state-law issues and those state-law issues will "still predominate." *Id.* at 1269.

CONCLUSION

For the reasons stated above, CTLA and AAJ urge this Court to dismiss its order to show cause outright or to discharge the order in an opinion consistent with the arguments above and the merits arguments presented by Plaintiffs.

Respectfully submitted on October 9, 2024.

/s/ *Nelson Boyle*

Nelson Boyle, Reg. No. 39525

Attorney for Amici Curiae
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CERTIFICATE OF SERVICE

I certify that on October 9, 2024, a true and correct copy of the above **Brief of *Amici Curiae* American Association for Justice and Colorado Trial Lawyers Association in Support of Plaintiffs/ Respondents** was filed with the Court and served via the Court E-Filing System upon all counsel of record.

Respectfully submitted,

/s/ *Jodi Currie*

Jodi Currie, Paralegal