No. 21-1752

In the United States Court of Appeals for the Eighth Circuit

STATE OF MINNESOTA, by its Attorney General Keith Ellison,

Plaintiff-Appellee,

v.

AMERICAN PETROLEUM INSTITUTE; EXXON MOBIL CORPORATION; EXXONMOBIL OIL CORPORATION; KOCH INDUSTRIES; FLINT HILLS RESOURCES LP; FLINT HILLS RESOURCES PINE BEND,

Defendants-Appellants.

Appeal from the United States District Court
for the District of Minnesota, No. 0:20-cv-01636-JRT.
The Honorable **John R. Tunheim**, Judge Presiding.

BRIEF OF *AMICUS CURIAE* ENERGY POLICY ADVOCATES IN SUPPORT OF DEFENDANTS-APPELLANTS ARGUING FOR REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Energy Policy Advocates certifies that it is a nonstock corporation organized under the laws of Washington State. It issues no stock, has no stockholders, and has no parent or subsidiary corporation.

Dated: June 23, 2021

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INTEREST OF *AMICUS CURIAE*

Energy Policy Advocates ("EPA") is a nonprofit organization incorporated under the laws of Washington State dedicated to bringing transparency to the actions of government. As part of that mission, EPA has obtained public records that illustrate the genesis of this litigation in Minnesota and similar litigation in other states. Because EPA has obtained records demonstrating the improper motives, improper use of public institutions toward these ends and the origins of the veritable tsunami of "climate nuisance" and, more lately, "failure to warn" state-court lawsuits, including the one now before this Court, EPA is keenly interested in this case and hopes this Court will take the opportunity to consider the record of what is transpiring and how it came about, toward addressing the proper relationship between the state and federal court systems.

Pursuant to Rule 29(a)(4)(E), counsel for *Amicus* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *Amicus* and/or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

POSITION OF THE PARTIES

Undersigned counsel requested consent of all parties to file this brief. Counsel for Minnesota replied that the state did not consent to the filing of this brief, but did not elaborate on the basis for the State's opposition. Counsel for

Appellants have consented to EPA's proposed filing pursuant to the concurrently filed Motion for Leave.

SUMMARY OF ARGUMENT

As important as climate policy is to both state and federal governments, equally and arguably more important is the principle that the Courts' role is not to make policy judgments. While federal courts are courts of limited jurisdiction, cases such as the instant one are demonstrably based on the desire of certain activists and parties to obtain national policy, among other improper uses of the judicial system (e.g., prospecting for "sustainable revenue streams" or "new revenue streams," see, *infra*). Such cases, therefore, are classic candidates for a resolution run federal courts.

Recently obtained public records from numerous public institutions, but most recently and possibly most importantly from the University of Minnesota, that the national effort of which this campaign is a part involves deep-pocketed advocacy interests using their resources to enlist local activist groups, faculty, and attorneys general to bring lawsuits in state courts against traditional "fossil fuel" energy companies, as well as others involved in energy production and transport, in order to impact national policy. These documents obtained under state open records laws reveal important details about the expanding, and arguably improper, deployment of attorneys general offices, public law schools tax-exempt advocacy

groups by or on behalf of donors in the climate litigation industry, including most glaringly in the instant case. As described by the plaintiffs 'own lawyers and advisors, these suits have been brought to impact public policy and to find new sources of revenue for activists and state budgets. As such, these suits belong in federal court. Further, these records also provide strong impetus to acknowledge, as a formal matter, that the" climate nuisance" and "failure to warn" litigation campaign that Minnesota and other states are engaged in (and indeed coordinating on) is an impermissible use of the courts, seeking the most favorable forum to obtain political ends by judicial means; when removed, these suits must remain in federal court; and, these suits should be dismissed for the same reasons that others in this campaign have been dismissed.

ARGUMENT

I. PUBLIC RECORDS AFFIRM THIS CASE BELONGS IN FEDERAL COURT

Thanks to Amicus's tenacious use of public-records laws, this litigation filed by the Attorney General of Minnesota has a now well-documented and very troubling origin. This origin also informs the conclusion that the suit cloaks what is a federal claim in a manufactured state-law cause of action, imported from New York City by the same organizer and financier of remarkably similar lawsuits, all

of which were quietly midwifed by outside attorneys working for the financier and provided to Minnesota, and other plaintiffs.

Newly released emails illustrate how this lawsuit came to be: Activists financed and prepared a memorandum, arranged for and ghost co-written by outside parties, on which Minnesota Attorney General Keith Ellison based his June 2020 "climate" lawsuit against fossil fuel companies.[1] These emails show that a New York donor enlisted a local, Minnesota activist group for this task to recruit faculty to use their public institution in support of the campaign, working with lawyers provided for by the donor, who edited and ghost co-wrote the (official, University) memorandum to the Attorney General seeking this litigation and outlining what suit the AG should bring, which authors were of course not acknowledged given this would preclude the use of University of Minnesota letterhead and representation of the product as faculty scholarship.[2]

That donor — Rockefeller Family Fund — which with this group of lawyers it arranged to quietly advise this and other such lawsuits — Center for Climate Integrity — provided the Minnesota advocacy group's director with pleadings to help prepare him prior to "making initial calls" to enlist University law faculty in

[1] *See generally* Government Accountability & Oversight, P.C., "Private Funders, Public Institutions: 'Climate' Litigation and a Crisis of Integrity" (May 18, 2021), available at: https://climatelitigationwatch.org/wp-content/uploads/2021/05/GAO-EPA-CCI-RFF-Climate-Paper.pdf

[2] *Id*. at pp. 5-14.

"this project."[3] The activist, Michael Nobel and his organization called "Fresh Energy,""" only accepted a modest amount of money" at the outset, because he did not "want to launch any big effort unless [Ellison] wants to do it."[4] The local activist Noble in turn engaged Ellison transition team members, including another Minnesota Law faculty member, Prentiss Cox, who, public records show, then began using an Office of the Attorney General email account to correspond on, *inter alia*, this matter despite having no publicly acknowledged position with the AG's Office; Noble arranged for a different University of Minnesota Law professor, Alexandra Klass, to work with "lawyers advising the Rockefeller family fund [sic]" so as to learn "what is needed" in the memo to Minnesota's AG urging him to file this lawsuit.[5] The professor then produced a memo with these outside lawyers Center for Climate Integrity but placed on Minnesota letterhead as the scholarship of the professor and four research-assistant students.[6]

Emails show RFF recruited Fresh Energy Director Michael Noble and approached him about the idea to file a climate suit in state court almost immediately after Ellison was elected in November 2018.[7] Noble later excitedly boasted on a Zoom call, which was soon posted on YouTube, that his group had

[3] *Id*. at pp. 5-6.
[4] *Id*. at p. 6.
[5] *Id*.
[6] *Id*. at p. 11.
[7] *Id*. at p. 5.

been approached by CCI.[8] Public record productions, from both the University of Minnesota Law School and Ellison's Office, affirm that in fact RFF's Director Lee Wasserman approached Noble and provided him with sample pleadings Wasserman apparently hoped would be replicated in a suit brought by Minnesota.[9] Then, Fresh Energy recruited Attorney General Ellison's transition team, as well as Minnesota Law School faculty, to help produce, pitch and, more importantly, sign a memo making the case to Ellison.

Noble orchestrated this by email and text message, including forwarding Wasserman's email in which he gave Noble "materials" for him to "check[] out before you make initial calls."[10] In that same thread involving the forwarded Wasserman email Noble opined, about Ellison, that "the politics of the day will give him cover" for filing the requested lawsuit.[11] Despite that optimism, Noble also confided to Law School Professor Alexandra Klass, that Fresh Energy "only accepted a modest amount of money because I don't want to launch any big effort unless he wants to do it."[12] Emails show that the four law students listed as co-authors on the memo to Ellison were paid by Fresh Energy, with the payment very

[8] *Id*. at pp. 5, 12, and 27 n. 120.
[9] *Id*. at p. 5.
[10] *Id*. at pp. 5-6.
[11] *Id*. at p. 8.
[12] *Id*. at p. 6.

intentionally run through the University, on the grounds that "there shouldn't be Fresh Energy funding [of] law students direct."[13]

On April 19, 2019, Fresh Energy sent Ellison a legal memo on University of Minnesota letterhead dated April 2, 2019 and titled "Potential Lawsuit against Fossil Fuel Companies for Minnesota Climate Change Damages."[14] Nearly fifty pages in length, the memo encourages lawsuits against energy companies (and specifically suggests inclusion of "a subsidiary of Koch Industries (Flint Hills Resources) [which] owns the Pine Bend Refinery in Rosemount, Minnesota.").[15]

Minnesota's effort took another curious twist when, on May 24, 2019, its Office of the Attorney General signed a Secondment Agreement for the first of two Bloomberg-financed "Special Assistant Attorney Generals," Peter Surdo.[16] Such Special Assistant Attorneys General are expressly provided to "advanc[e] progressive clean energy, climate change, and environmental legal positions."[17] In his application for these private lawyers, Minnesota Attorney General Ellison specifically cited his past efforts in pursuing Exxon Mobil, claiming that activities such as "supporting state-led efforts to investigate Exxon Mobil" were and would

[13] *Id*.
[14] *Id*. at p. 11.
[15] *Id*.
[16] *Id*. at p. 12.
[17] *Id*.

remain curtailed, barring provision of additional resources to his Office such as those on offer from the Bloomberg group.[18]

After the above-described machinations, on June 25, 2020, Minnesota Attorney General Keith Ellison filed suit against the American Petroleum Institute, Exxon Mobil Corporation, Koch Industries, Inc., and Koch subsidiaries Flint Hills Resources LP and Flint Hills Resources Pine Bend.[19] AG Ellison's climate lawsuit was signed not only by the state's usual counsel in the Attorney General's Office, however, but also by two lawyers provided and paid for and arranged to be placed in the AG's Office and at least ten others by Michael Bloomberg's private foundation for the purpose of advancing the "climate" agenda including through supporting these lawsuits.[20] Indeed, the instant suit was one of two dozen similar suits that have been filed all over the country.[21] Though the precise nature of claims made in these suits has evolved over time in response to judicial and other necessities of reality — from emphasizing "climate nuisance" to, in the face of setbacks in the federal courts, claiming the same claimed misbehavior is really the stuff of state consumer protection law — all such suits share as their basis the claim that defendant companies created and lied about a climate crisis.

[18] *Id*.
[19] *Id*. at p. 5.
[20] *Id*. at p. 12.
[21] *Id*. at p. 24 n. 58.

That history in turn helps explain why the outside interests (Rockefeller Family Fund) (RFF), which began several years ago by arranging for "climate nuisance litigation," employed the above-described model to orchestrate the instant lawsuit, brought about by local activists whom RFF engaged, who then arranged for local academics to manufacture a nominal state-law claim which they then lobbied the AG into filing.[22]

All of this raises numerous legal and ethical questions for taxpayers and local courts, but it also makes plain for this Court that this case, like other suits instigated by the private donor/coordinators, began with the desire of private donors to impact national policy.

Although it is understandable that activists and lobbyists who desire to impact national climate policy sought to enlist Minnesota's Attorney General in their cause, state courts cannot properly become the venue for national policy litigation. The records referenced above now provide documentary evidence to support the view that this case, like others in the wave of similar suits nationwide, was filed in an attempt to impact national energy and environmental policy. It should, therefore, be adjudicated in the federal courts.

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[22] *In re Exxon Mobil Corporation*, Cause No. 096-297222-B (Tarrant Co., Tex. Dist. Ct.), Findings of Fact and Conclusions of Law (April 24, 2018), available at https://eidclimate.org/wp-content/uploads/2018/07/Findings-Fact-Climate-Lawsuit-Conspiracy.pdf.

II. HISTORIC CONCERNS ABOUT STATE COURT BIAS ARE AMPLIFIED IN THIS CASE

A "historic concern about state court bias" is among the fundamental bases for removal jurisdiction. *Savoie v. Huntington Ingalls, Inc.*, 817 F.3d 457, 461 (5th Cir. 2016). The Supreme Court also recognizes bias as a concern justifying removal to federal court. "State-court proceedings may reflect 'local prejudice' against unpopular federal laws or federal officials." *Watson v. Philip Morris Cos.*, 551 U.S. 142, 150 (2007). Bias exists, as these opinions acknowledge, and there is no reasoned basis for declaring that such bias extends only to parties who are unpopular government officials. Indeed, the Supreme Court has cautioned against "narrow, grudging interpretation" of removal. *Willingham v. Morgan*, 395 U.S. 402, 407 (1969). Simply put, "[t]he removal statute is an incident of federal supremacy." *Murray v. Murray*, 621 F.2d 103, 106 (5th Cir. 1980).

In this suit, Minnesota is effectively engaged in a campaign through the courts to overturn "unpopular federal laws" or to seek climate remedies that have never been authorized by the legislative branch of either the state or federal governments. Rather than recognizing the U.S. Constitution and federal laws as supreme, governmental "climate nuisance" plaintiffs are applying "narrow, grudging" interpretation of the removal statute to seek to overturn federal law through imposing ostensible tort liability in state courts.

It is hard to imagine a more striking case where fear of state court bias could be a concern than is presented in the instant matter. Stated otherwise and even more affirmatively, the *hope* for state court bias is demonstrably at play in the instant matter, as shown in records obtained by Proposed *Amicus* Energy Policy Advocates through public records laws.

As documented, *supra*, by records produced by Minnesota's AG and the state's flagship University in response to open records requests, the instant case began when New York-based donors and attorneys began lobbying the University fo Minnesota, and eventually Keith Ellison, to file this suit in state court.[23] This eager desire by out-of-state interests to obtain ostensibly Minnesotan relief in Minnesota courts might seem remarkable, if not for the history of climate litigation efforts that have been addressed in the proper, federal *fora*. For example, and again turning to documents obtained through open records laws, consider the description by a member of the State's outside legal counsel's own team. In June 2018, U.S. District Judge William Alsup dismissed the City of Oakland's "climate nuisance" suit against at least one of the current defendants and others.[24] At the time, Minnesota's outside counsel in this suit nominally about enforcing Minnesota

[23] Government Accountability & Oversight, P.C., Private Funders, Public Institutions: Climate Litigation and a Crisis of Integrity" (May 18, 2021), p. 3.

[24] *City of Oakland, et al., v. BP P.L.C., et al*., Case 3:17-cv-06011-WHA (N.D. Calif.), Order Granting Motion to Dismiss Amended Complaints, Dkt. 283.

consumer protection laws, California's Sher Edling, LLP, was working with lobbyists hired to assist with recruiting more governmental plaintiffs.[25] One of

[25] The web is somewhat involved. G. Seth Platt is one of the network's consultants, engaged to help lobby Florida municipalities to file suit similar to the State's. At the time of the correspondence cited herein, Platt was a registered lobbyist for the Institute for Governance & Sustainable Development (IGSD)(www.igsd.org) (see searchable index of lobbying registrations at ftlweb01app.azurewebsites.us/Ethicstrac/Lobbyists.aspx). Platt worked with IGSD and others pitching municipalities to file "climate nuisance" litigation against energy interests, with Rhode Island's counsel Sher Edling.

In the wake of Rhode Island's initial (state) Superior Court filing, on July 27, 2018 Fort Lauderdale Interim City Attorney Alain Boileau wrote Mayor Dean Trantalis, copying other aides, in pertinent part:

> "Mayor…I had a positive meeting yesterday with Marco Simons, Esquire of the EarthRights International Group, Matt Edling, Esquire, Vic Sher, Esquire, of SherEdling, and Jorge Mursuli [IGSD]." See https://climatelitigationwatch.org/wp-content/uploads/2020/03/Boileau-explains-to-Mayor-his-mtg-w-Sher-Edling.pdf

That same day, Boileau wrote the same parties: "I suggested they prepare a presentation for the commission. They just need a target date." See https://climatelitigationwatch.org/wp-content/uploads/2020/03/Boileau-explains-to-Mayor-his-mtg-w-Sher-Edling.pdf

When that presentation was arranged, Mr. Mursuli wrote to Mayda Pineda of Fort Lauderdale's government "to include additional co-counsel on the phone during our face-to-face meeting with Mr. Boileau.

> They are:
> Vic Sher 415/595-9969
> Matt Edling 415/531-1829
> Please let me know if patching them into our meeting is doable. Again, thanks very much."
> https://climatelitigationwatch.org/wp-content/uploads/2020/03/Mursuli-seeks-inclusion-ofSherEdling-in-pitching-FTL-litigation.pdf

Mr. Mursuli then wrote Lizardo Corandao of Fort Lauderdale's government seeking to ensure that Sher Edling participation on the pitch call "is doable". See https://climatelitigationwatch.org/wp-content/uploads/2020/03/Mursuli-seeks-inclusion-ofSherEdling-in-pitching-FTL-litigation-II.pdf

these lobbyists, hired to recruit Fort Lauderdale, Florida, to file suit, passed along a note of encouragement to Fort Lauderdale officials, whose counsel had expressed concern over that latest failure. This lobbyist/recruiter G. Seth Platt flatly stated (or forwarded an email stating) the team's position that state courts are the "more advantageous venue for these cases."

Mr. Platt then quotes then-UCLA Law professor and also then-consultant to Sher Edling,[26] Ann Carlson, linking in the email to an article quoting her further on this belief that, for whatever reasons, plaintiffs' chances for recovery are much better in state *fora*.[27] And just last year a *Los Angeles Times* news article quoted

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EPA has obtained other emails showing Rhode Island, through Special Assistant Attorney General Greg Schultz, referring Sher Edling to Connecticut's Office of Attorney General for similar purposes. See https://climatelitigationwatch.org/wp-content/uploads/2020/03/Pawa-SherEdling-chronology.pdf.

[26] Matt Dempsey, "UCLA Professor's Role In Climate Litigation Raises Transparency Questions," Western Wire, November 27, 2018, https://westernwire.net/ucla-professors-role-in-climate-litigation-raises-transparency-questions/

[27] "" [U.S. District Judge William Alsup's] decision is irrelevant from a legal perspective, 'Carlson said, as long as these cases stay in state courts. Federal courts, like Alsup's, are less favorable to lawsuits like San Francisco and Oakland's, which contend that fossils fuel companies are liable for damages because they've created a public "nuisance," said Carlson." Mark Kaufman, "Judge tosses out climate suit against big oil, but it's not the end for these kinds of cases," mashable.com, June 26, 2018, https://mashable.com/article/climate-change-lawsuit-big-oil-tossed-out/

Carlson's colleague and also apparently consultant for plaintiffs' counsel, Sean Hecht, on this topic of state courts being "more favorable to 'nuisance' lawsuits."[28]

The Plaintiff's effort to hide what were previously admitted to be federal claims, and an effort to impose federal policy, is deliberate and should not be indulged further. This Court should remain in an unbiased federal forum, where national policy matters can be addressed without the spectre of state court bias.

CONCLUSION

This suit began when New York financier-activists took a sudden interest in then-newly elected Attorney General Keith Ellison filing some form of the "climate" litigation that the financier-activists had been underwriting and facilitating for several years, first as "climate nuisance" suits but, after setbacks in federal courts, more recently as consumer protection lawsuits. Proposed *Amicus Curiae* Energy Policy Advocates respectfully requests this Court consider the

[28]" Two separate coalitions of California local governments are arguing to have their suits heard in California state courts, which compared to their federal counterparts, tend to be more favorable to "nuisance" lawsuits. …"There is a lot at stake in this appeal," said Sean Hecht, co-executive director of the Emmett Institute on Climate Change and the Environment at UCLA School of Law. "If the cases can move forward in state court, the courts are likely to take the plaintiffs ' claims seriously, and this may affect prospects for cases in other states as well." Hecht's environmental law clinic provided legal analysis for the plaintiffs in some of the cases." Susanne Rust, "California communities suing Big Oil over climate change face a key hearing Wednesday," *Los Angeles Times*, February 5, 2020, https://www.latimes.com/california/story/2020-02-05/california-counties-suing-oil-companies-over-climate-change-face-key-hearing-wednesday.

information detailing the now-exposed genesis of the instant matter, an improper use of the judiciary and other public institutions instigated by deeply troubling means, and conclude that this suit, like all such suits, belongs in federal court. Only the federal court system will be able to properly adjudicate the merits of this matter in an unbiased fashion, without prejudice against "unpopular federal laws" or "unpopular federal officials."

Dated: June 23, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5). This brief contains 3,245 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Office 365 ProPlus in fourteen (14) point Times New Roman font.

Dated: June 23, 2021

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CIRCUIT RULE 28A(h) CERTIFICATION

The undersigned hereby certifies that I have filed electronically, pursuant to Circuit Rule 28A(h), a version of the brief in non-scanned PDF format. I hereby certify that the file has been scanned for viruses and that it is virus-free.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 23, 2021, an electronic copy of the Brief of *Amicus Curiae* Energy Policy Advocates in Support of Defendants-Appellants was filed with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. The undersigned certifies that all participants in this case are registered CM/ECF users and that service of the Brief will be accomplished by the CM/ECF system.

Dated: June 23, 2021

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