No. 25-170

In the Supreme Court of the United States

SUNCOR ENERGY (U.S.A.) INC., ET AL., *Petitioners,*

v.

COUNTY COMMISSIONERS OF BOULDER COUNTY, ET AL.

On Writ of Certiorari to
the Supreme Court of Colorado

BRIEF OF *AMICUS CURIAE* PROTECT THE FIRST FOUNDATION SUPPORTING PETITIONERS AND REVERSAL

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MAY 21, 2026

QUESTIONS PRESENTED

1. Whether federal law precludes state-law claims seeking relief for injuries allegedly caused by the effects of interstate and international greenhouse-gas emissions on the global climate.

2. Whether this court has statutory and Article III jurisdiction to hear this case.

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INTRODUCTION, SUMMARY, AND INTEREST OF *AMICUS CURIAE*[1]

This case is about more than federal preemption, climate change, or fossil fuels. It is about whether the First Amendment still protects the right of all Americans—including those who produce and sell the energy that powers our economy—to speak and petition on matters of urgent public concern. While Respondents seek to impose billions of dollars in tort liability on Petitioners for extracting, refining, or selling fossil fuels, they also seek to punish what Petitioners *said* about those activities and their effect on climate change—in public statements, through advertisements, and while petitioning.

But those efforts are foreclosed by the First Amendment. Through their speech, Petitioners contributed to the national debate over climate science and the Nation's energy policy. By treating protected expression as a tortious cause of distant future harms, Respondents would convert the courtroom into a forum for punishing one side of an ongoing scientific controversy. Whatever the merits of the questions presented, constitutional-avoidance principles should lead this Court to hold that the First Amendment forbids Respondents' theories.

After all, as this Court has recognized, "climate change" is a "sensitive political topic[]" "of profound value and concern to the public." *Janus* v. *American*

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[1] This brief was not authored in whole or in part by counsel for any party and no person or entity other than *amicus curiae*, its members or counsel, has made a monetary contribution toward the brief's preparation or submission.

Fed'n of State, Cnty., & Mun. Emps., 585 U.S. 878, 913-914 (2018) (cleaned up). Speech *about* climate change thus "occupies the highest rung of the hierarchy of First Amendment values and merits special protection." *Ibid.* (cleaned up). Accordingly, for Respondents' theories to prevail, this Court would have to deprive Petitioners' speech of the "special" protection to which it is entitled.

This case is particularly troubling to *amicus* Protect the First Foundation (PT1)—a nonprofit, nonpartisan organization that advocates for protecting First Amendment rights. That is because Respondents' novel tort theories seek to punish, and thereby chill, core political and commercial expression and association on this important issue. While Petitioners have shown (at 21-47) that Respondents' claims are federally preempted, PT1 writes separately to highlight the additional threat Respondents' theories pose to Petitioners' protected speech, petitioning activities, and association—including advocacy both to government officials and to the public: Allowing Respondents' theories to proceed would undermine a core function of public debate, as illustrated by examples of scientists who successfully challenged—often at great personal and professional risk—then-prevailing scientific dogmas. As with these earlier scientists, if opponents of popular viewpoints on issues like climate change are silenced or punished for their views, that will stunt scientific advancement. And it will harm efforts to improve our understanding of the natural world and to formulate sound policy responses to natural phenomena.

The decision below should be reversed.

STATEMENT

Petitioners produce and sell "fossil fuels around the world." Pet.5. Respondents brought a host of state-law claims against Petitioners, all of which turn on the allegation that Petitioners furthered the "unchecked production, promotion, refining, marketing and sale of fossil fuels" throughout the world and thereby "led to unchecked fossil fuel use" and increased "the concentration of greenhouse gases * * * in the atmosphere." J.A.3, ¶7. They then claimed that increased greenhouse gases have caused "global average temperatures" to rise, J.A.37, ¶134, leading to "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-off, reduced snowpack, and drought" in Colorado. J.A.39, ¶140.

Petitioners moved to dismiss, claiming that Respondents impermissibly sought to punish them for having "taken or supported positions" on climate change "that are contrary to" Respondents' views. Defs.' Dist. Ct. Mot. to Dismiss 20. The district court rejected that defense on the dubious premise that Petitioners' misleading "commercial" speech is not protected. App.114a. And since Respondents "allege that the speech in question was misleading," to the district court, that ended the inquiry. *Ibid.*

The Colorado Supreme Court did not address the First Amendment.

ARGUMENT

I. Allowing Broad State Tort Law to Punish Corporate Speech Impermissibly Burdens Constitutionally Protected Activity.

Petitioner's preemption theories provide an independent reason to reverse the decision below. See Pet. Br. 21-47. But this Court should also reverse as a matter of constitutional avoidance because of the First Amendment harms that would inevitably arise from allowing Boulder County's viewpoint-, content-, and speaker-discriminatory state-law tort claims to proceed.

A. The First Amendment presumptively forbids discrimination against content, viewpoints, or classes of speakers.

The First Amendment expressly forbids the government from taking any actions that "abridg[e] the freedom of speech." U.S. Const. amend. I.

1. And one "core postulate of free speech law" is that the "government may not discriminate against speech based on the ideas or opinions it conveys." *Iancu* v. *Brunetti*, 588 U.S. 388, 393 (2019).

Such unlawful discrimination can come in many forms. Often, governments will try to "regulate speech based on its substantive content or the message it conveys." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). Other times, the government engages in an "all the more blatant" "violation of the First Amendment" by "target[ing] not subject matter, but particular views taken by speakers on a subject." *Id.* at 829. Such "[v]iewpoint

discrimination" is "presumptively unconstitutional" because it represents a particularly "egregious form of content discrimination." *Id.* at 829-830.

But the First Amendment also forbids less blatant forms of discrimination. For example, this Court treats government action as impermissibly content-based if it imposes "[s]peech restrictions based on the identity of the speaker." *Citizens United* v. *FEC*, 558 U.S. 310, 340 (2010). Speaker-based restrictions, after all, "are all too often simply a means to control content." *Ibid.*

Given the blurriness of the line between speaker- and content-based discrimination, the Court has held that the "First Amendment protects speech and speaker, and the ideas that flow from each." *Id.* at 341. This makes sense. The public too has a "right and privilege to determine for itself what speech and speakers are worthy of consideration." *Ibid.*

Further, as Justice Gorsuch has explained, "the First Amendment does its real work in giving voice to those a majority would silence." *Barr* v. *American Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610, 649-650 (2020) (Gorsuch, J., concurring in the judgment in part and dissenting in part). That is because "a constitutional right would hardly be needed to protect popular speakers" or—for that matter—popular opinions. *Id.* at 649-650. Rather than allow the government to discriminate against unpopular speakers for the message they convey, this Court has held that "speaker-based laws demand strict scrutiny when they reflect the Government's preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say)."

Turner Broad. Sys., Inc. v. *FCC*, 512 U.S. 622, 658 (1994).

2. This Court's caselaw abounds with examples of unconstitutional governmental attempts to "favor one speaker over another" based on the message she conveys. *Rosenberger*, 515 U.S. at 828 (citing *Members of City Council of L.A.* v. *Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)). In *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), for example, the Court invalidated an expenditure limit "designed to ensure that the political speech of the wealthy not drown out the speech of others"—an aim necessarily "concerned with the communicative impact of the regulated speech." *Turner Broad. Sys.,* 512 U.S. at 658 (discussing *Buckley*). Similarly, in *Sorrell* v. *IMS Health Inc.*, the Court invalidated a Vermont law that "restrict[ed] the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors" "for marketing purposes" by pharmaceutical manufacturers. 564 U.S. 552, 557 (2011). The Court found that the law facially "burden[ed] disfavored speech by disfavored speakers" because it disfavored both "marketing, that is, speech with a particular content" and "specific speakers, namely pharmaceutical manufacturers." *Id.* at 564. And in *Thomas* v. *Collins*, the Court held that "employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty" just as much as "the employees' converse right." 323 U.S. 516, 537-538 (1945).

As explained next, these precedents make quick work of Respondents' state-law tort theories since they

embody precisely these forbidden forms of discrimination.

B. Respondents' state-law tort theories would make fossil fuel manufacturers liable because of who they are and the disfavored messages they convey.

As to those: Respondents argued in opposing certiorari that their claims are "based on two distinct theories of liability." BIO 3. The first challenges Petitioners' advertising, which Respondents claim, "misled the public about the impacts of climate change and the role" that "fossil fuel products have played in exacerbating those impacts." *Ibid.* (quoting App.3a). The second challenges Petitioners "promoting," "marketing[,] and selling fossil fuels." *Ibid.* (quoting App.2a).

1. Central to Respondents' theories is the repeated claim that Petitioners engaged in "unchecked fossil fuel activities"—a term that Respondents defined to include the "promotion" and "marketing" of fossil fuels—"without disclosing" or by downplaying what Respondents believe to be "the climate-altering dangers * * * associated with the use of fossil fuels." J.A.3, ¶7; J.A.5, ¶14; J.A.104-105, ¶¶407-411.

These theories are dripping with textbook speaker-based discrimination. Respondents have singled out Petitioners—fossil-fuel producers and sellers—and seek to impose on them special burdens that no other industry, environmental group, or renewable-energy advocate faces. Indeed, even other groups that engage in discussions about the effects of fossil fuels, such as climate-based non-profits, are

ignored. The reason is simple: Such groups espouse the correct view—at least to Respondents. Thus, the risk that speaker-based discrimination is just "a means to control content," *Citizens United*, 558 U.S. at 340, has materialized here.

The conclusion that Respondents seek to punish Petitioners because of who they are and the message they are promoting is unavoidable. While Respondents sheepishly disclaim any effort to "impose liability, restrain or interfere with [Petitioners'] ability to participate in public debates about climate change, or otherwise interfere with [Petitioners'] speech," J.A.139, ¶541, there can be no question that Respondents are, like the government in *Buckley*, primarily "concerned with the communicative impact" of Petitioners' speech. *Turner Broad. Sys.,* 512 U.S. at 658 (discussing *Buckley*).

Elsewhere in the Amended Complaint Respondents say as much. See J.A.1-139. They claim, for example, that Petitioners were so persuasive in their advocacy efforts that it caused "uncertainty in the minds of the American public" about whether fossil fuels caused climate change. J.A.111, ¶436. And that is the only reason for this case. If Petitioners *agreed* with Respondents that fossil fuels cause climate change, Respondents would not have brought this case at all. Respondents' theories, then, are infected with impermissible viewpoint discrimination too.

2. In short, while this Court can reject Respondents' theories for the reasons Petitioner identifies, it should do so with an eye towards the First Amendment harms that would follow if Respondents'

claims were to proceed. For decades, this Court has emphasized that the "inherent worth of * * * speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *First Nat'l Bank of Bos.* v. *Bellotti*, 435 U.S. 765, 777 (1978). And it has recognized that the First Amendment protects "the opportunity to persuade to action, not merely to describe facts." *Thomas*, 323 U.S. at 537.

The Court should do so again here. All that Petitioners sought to do through their speech is to promote a viewpoint that Respondents disfavor. And Respondents' efforts to retroactively declare the other side of this scientific and policy debate "misleading"—and therefore actionable—should be held foreclosed by the First Amendment.

II. Respondents' State-Law Tort Theories Punish Protected Petitioning Activities Directed at the Public and Their Representatives.

Since Respondents seek to punish Petitioners' efforts to influence public perception and public policy regarding fossil fuels, their theories should also be rejected for punishing core First Amendment-protected *petitioning* activities.

A. The Petition Clause protects efforts to influence the public and the government alike.

This Court has long recognized that, in our representative democracy, "the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives."

Eastern R.R. Presidents Conf. v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-138 (1961); accord *United Mine Workers of Am.* v. *Pennington*, 381 U.S. 657, 669-670 (1965). The "right of petition is one of the freedoms" that makes this possible. *Noerr*, 365 U.S. at 138.

1. Consistent with that protection, this Court has held that "mere attempts to influence the Legislative Branch for the passage of laws or the Executive Branch for their enforcement" are protected by the First Amendment's Petition Clause. *California Motor Transp. Co.* v. *Trucking Unltd.*, 404 U.S. 508, 510 (1972) (discussing *Noerr*). The Court later recognized that this doctrine—known as the *Noerr-Pennington* doctrine—extended "the right to petition" to "all departments of the Government," including to "administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government." *Ibid.*

But the Court has also recognized that the right to petition as applied in *Noerr-Pennington* extends to advocacy directed at the public. In *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, for example, the Court explained that "[a] publicity campaign directed at the general public, seeking legislation or executive action" also "enjoys * * * immunity." 486 U.S. 492, 499 (1988). This was nothing new. In *Noerr* itself, this Court refused to impose statutory liability both for the defendants' efforts to "obtain legislation," and for their efforts to alter "the goodwill of * * * the public generally." *Noerr*, 365 U.S. at 142. In so holding, the Court recognized that the petitioning right protects against liability for harms that come as an "incidental

effect of * * * an attempt * * * to influence legislation by a campaign of publicity." *Id.* at 143.

2. At first, the *Noerr-Pennington* doctrine applied largely in the antitrust space to afford companies immunity from antitrust suits challenging those companies' lobbying of government officials as anticompetitive. *Allied Tube*, 486 U.S. at 499-500. But this Court has since expanded the doctrine beyond antitrust suits to grant more general "immun[ity] from statutory liability for" all manner of "petitioning conduct" including conduct "outside the antitrust field." *Sosa* v. *DIRECTV, Inc.*, 437 F.3d 923, 929-930 (9th Cir. 2006) (citing *Bill Johnson's Rests., Inc.* v. *NLRB*, 461 U.S. 731, 741-744 (1983)). In *Bill Johnson's Restaurants*, for example, the Court, "sensitive to the[] First Amendment values" that undergird *Noerr-Pennington* in the antitrust context, also looked to them "in construing the" National Labor Relations Act. 461 U.S. at 741. On that basis the Court held that an ongoing "well-founded" state lawsuit could not be challenged as an unfair labor practice. *Id.* at 743. And in *BE&K Construction Co.* v. *NLRB*, the Court rejected a standard of the National Labor Relations Board that would have covered "all reasonably based but unsuccessful suits filed with a retaliatory purpose" because, the Court held, it violated the right to petition. 536 U.S. 516, 536-537 (2002).

Through these decisions, the Court has also made clear that the Petition Clause's protections are values neutral. That is why, as the Court has explained, the right to petition "cannot properly be made to depend upon" the petitioner's "intent." *Noerr*, 365 U.S. at 139.

For example, in the antitrust context, the Court has explained that a company can have an "anticompetitive purpose" in petitioning—a purpose that would violate the Sherman Act in any other circumstance—and still avoid liability precisely because the act involves petitioning. *Id.* at 139-140; see also *Pennington*, 381 U.S. at 669. Indeed, petitioning activity is protected "even when" a petitioning "campaign employs unethical and deceptive methods." *Allied Tube*, 486 U.S. at 499-500.

And regardless of methodology, as explained above, this important First Amendment protection includes petitioning *both* the government itself and the public.

B. Petitioners' speech involves efforts to influence the public and the government.

These same foundational principles bar Respondent's first theory of liability since it attacks Petitioners' efforts to influence the government both directly and through coordinated publicity campaigns.

Indeed, as previously explained, Respondents argued before this Court that their first "distinct theor[y] of liability" is that Petitioners' "'advertising'" "'misled the public.'" BIO 3 (quoting App.3a). And their second theory is much the same, as it challenges Petitioners' "marketing" and "promoting" their products. *Ibid.* (quoting App.2a). Both theories are thus based on the underlying claim that Petitioners "acted to thwart public awareness," J.A.106-107, ¶418,

tried to undermine "support for the Kyoto Protocol,"[2] J.A.108, ¶424, and generally opposed government regulation of "fossil fuel activities," J.A.112, ¶443. These are protected activities. Merely calling them the advertising, marketing, and promotion of products changes nothing. All manner of otherwise-protected *Noerr*-type petitioning could be described the same way.

Worse still, Respondents explicitly connect Petitioners' publicity campaign to the outcomes of legislative debates and the public's "uncertainty" about the "existence and causes of climate change." J.A.111, ¶436. To define the scope of the alleged harm, Respondents allege that Petitioners' campaign "thwart[ed] attempts to prevent and mitigate the climate change harms" and led to "years of inaction" on fossil fuel regulation. J.A.112, ¶443; J.A.111. Thus, part of the harm, as Respondents see it, is that Petitioners' public-facing arguments were persuasive. J.A.111-112, ¶¶436-442.

Permitting *successful* advocacy to the public and its representatives to serve as a basis of liability would turn the *Noerr-Pennington* doctrine's "sensitiv[ity] to * * * First Amendment values" on its head. *Bill Johnson's Rests.*, 461 U.S. at 741. Petitioners' right to publicly campaign for less regulation of fossil fuels cannot be undermined by the fact that Respondents

[2] The Kyoto Protocol claims to "commit[] industrialized countries * * * to limit and reduce greenhouse gases * * * emissions in accordance with agreed individual targets." *The Kyoto Protocol*, United Nations Climate Change, https://tinyurl.com/ycxss22d (last visited May 17, 2026).

disagree with Petitioners' characterization or critiques of the "scientific consensus." J.A.110, ¶435.[3]

Moreover, Respondents' representatives and others had ample opportunities and their own First Amendment rights to challenge such speech and to petition with counter-speech. Under the First Amendment, "the remedy to be applied is more speech, not enforced silence." See *Whitney* v. *California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), *overruled by Brandenburg* v. *Ohio*, 395 U.S. 444 (1969).

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[3] In any event, if Respondents are suggesting that there is consensus on whether specific companies' actions can cause specific weather events or phenomena in particular places, their claims are greatly exaggerated. The Intergovernmental Panel on Climate Change (IPCC), the United Nations body for assessing the science related to climate change, has synthesized and reviewed the science to identify the human influence on climate-impact drivers (CID)—weather phenomena—and concluded that it has "low confidence" that there is any human influence—one way or another—on many such CIDs. See IPCC, *Climate Change Information for Regional Impact and for Risk Assessment, in* Climate Change 2021: The Physical Science Basis 1856 & tbl. 12.12 (2021), https://tinyurl.com/mwu2p673. Roger Pielke, Jr., a Senior Fellow at the American Enterprise Institute and a professor emeritus at the University of Colorado Boulder whose work IPCC regularly cites, recently examined IPCC's discussion in its 2021 report in detail. See Amicus Brief of Roger Pielke, Jr. at 14-24, *Lighthiser* v. *Trump*, No. 25-6714 (9th Cir. Mar. 5, 2026), ECF No. 77. Guided by IPCC's findings, Pielke concluded that it was not "scientifically plausible to connect a small marginal change in emissions" from support for fossil fuels "to weather events and outcomes experienced by a single individual." *Id.* at 16. Given IPCC's "low confidence" about the human influence on multiple CIDs, the same conclusion would follow for a single city or a single county like Respondents.

In a free society, in short, regulated individuals and other entities must be able to advocate for their interests. *Noerr*, 365 U.S. at 137-138. Respondents' attempts to hold Petitioners liable for seeking to persuade the public and government officials would flout these foundational principles and cannot be squared with the protections of the Petition Clause any more than they can be squared with the First Amendment's protections of speech.

III. Allowing Respondents' State-Law Claims Would Produce Absurd and Dangerous Results That Would Undermine Democratic Debate and Scientific Progress.

Beyond violating multiple provisions of the First Amendment, Respondents' theories would also undermine a core function and benefit of the First Amendment. Any government enforcement of supposed "consensus" on matters of science, economics, or any other subject undermines not only free speech, but also intellectual progress, by enforcing orthodoxy and penalizing contrarian thought and speakers who dare to challenge prevailing views.

A. History shows that our understanding of the natural world often entails reversal of previously settled views.

Even a cursory look through history shows that scientific understanding is not static; "it evolves and always has." *Chiles* v. *Salazar*, 146 S. Ct. 1010, 1029 (2026). This is by design. As this Court has recognized, "[s]cientific conclusions are subject to perpetual revision." *Daubert* v. *Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993). Indeed, the "scientific project"

only works when it is subjected to "broad and wide-ranging consideration of a multitude of hypotheses." *Ibid.* This means that "open debate is an essential part" of the process. *Id.* at 596. And this open debate produces real fruit. As Justice Alito has recognized, debate sometimes leads to "changes adopted by professional associations" being subsequently "rescinded" considering new arguments and data. *Hall* v. *Florida*, 572 U.S. 701, 732 (2014) (Alito, J., dissenting).

1. History is full of such examples. In an era when most ascribed to "miasma theory," or the belief that "disease was caused by bad air coming out of rotting organic matter," Dr. Ignaz Semmelweis pressed a different view.[4] He showed that when a healthcare professional in the process of delivering a baby simply washed her hands with a chlorinated lime solution before delivery, maternal deaths plummeted.[5] But Dr. Semmelweis's work was rejected by the broader scientific community because of its "inclination to adhere to established norms and resist new ideas that challenge them," a phenomenon now called—in his honor—the "Semmelweis reflex."[6]

As Judge Ho has recognized, "[a] similar fate befell Joseph Lister." *Whole Woman's Health* v. *Paxton*, 10 F.4th 430, 466 (5th Cir. 2021) (Ho, J., concurring), *overruled by Dobbs* v. *Jackson Women's*

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[4] Nistha R. Dash et al., *Dr. Ignaz Phillip Semmelweis: The Unrecognized Pioneer of Aseptic Practices*, 16 Cureus e68350, 1 (2024), https://tinyurl.com/4ks4bd9f.

[5] *Id.* at 3.

[6] *Id.* at 4.

Health Org., 597 U.S. 215 (2022). Contemporaries responded to Lister, who challenged the prevailing view of disease when he claimed that germs were the cause of post-surgery infections, with "fierce opposition, even mockery." *Ibid.* Of course, we now know that he was right. But imagine if Semmelweis or Lister had been sued for the supposed adverse consequences of challenging scientific consensus and creating uncertainty regarding the dangers of "miasma."

Other examples abound. For example, "stress and lifestyle" were long thought to be the main drivers behind peptic ulcers.[7] Things changed when Australian researchers Dr. Barry J. Marshall and Dr. J. Robin Warren "went against conventional wisdom" and "challenged prevailing dogmas" by conducting experiments that ultimately proved that *Helicobacter pylori*, a bacteria, primarily caused peptic ulcers.[8]

Still other examples arise outside the medical context. Although we now know, for example, that the earth is round, "[f]ar back in ancient times, *everybody* thought the earth was flat * * * because it looks flat."[9] And while every elementary school student today learns that the Earth rotates around the sun, that correct understanding was once so controversial that

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[7] Les Lang, *Gastroenterology News: Barry Marshall 2005 Nobel Laureate in Medicine and Physiology*, 129 Gastroenterology 1813 (2005).

[8] *Id.* at 1813-1814.

[9] Isaac Asimov, *How Did We Find Out the Earth Is Round* 9 (1972) (emphasis added), https://tinyurl.com/479s3ae9.

"Galileo was put on trial" simply for defending it.[10] The legal persecution of Galileo for his unorthodox speech and ideas likely delayed the spread and acceptance of what we now understand to be a more accurate astronomical view of the earth and sun.

2. Changes in scientific understanding often have legal consequences too. Perhaps most famously, the Court in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), looked to "modern authority" rather than to "psychological knowledge at the time of *Plessy* v. *Ferguson*" to conclude that "[s]eparate educational facilities are inherently unequal." *Id.* at 494-495. Similarly, in *Chiles*, the Court explained that "[n]ot long ago, many medical experts and organizations, including the American Psychiatric Association, considered homosexuality a mental disorder." *Chiles*, 146 S. Ct. at 1028. But in *Obergefell* v. *Hodges*, this Court looked to modern science to conclude that "psychiatrists and others" now understand "sexual orientation [to be] both a normal expression of human sexuality and immutable." 576 U.S. 644, 661 (2015). Similarly, while the Court in *Stanford* v. *Kentucky* found it "absurd" to think that a person under 18 was not "mature enough to understand that murdering another human being is profoundly wrong," 492 U.S. 361, 374 (1989), it later looked to "developments in psychology and brain science" showing "fundamental differences between juvenile and adult minds" to abrogate *Stanford*. *Graham* v. *Florida*, 560 U.S. 48, 68

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[10] Fed. Jud. Ctr., *Reference Manual on Scientific Evidence* 68 (2000).

(2010) (discussing, *inter alia*, *Roper* v. *Simmons*, 543 U.S. 551 (2005)).

3. These cases show that courts too benefit from robust scientific debate. This is true even though, as Justice Sotomayor has recognized, "science" at times "evolves slowly rather than in conclusive bursts." *McCrory* v. *Alabama*, 144 S. Ct. 2483, 2486 (2024) (Sotomayor, J., respecting the denial of certiorari).

The fact that science is slow to evolve only strengthens the dangers inherent in silencing debate based on current consensus. A theory may be universally accepted not because it is correct, but because it is the best understanding currently available.[11] As Justice Robert Jackson once recognized, progress, including scientific progress, "generally begins in skepticism about accepted truths." *American Commc'ns Ass'n, C.I.O.* v. *Douds*, 339 U.S. 382, 442 (1950) (Jackson, J., concurring and dissenting, each in part). Thus, for scientific progress to occur, everyone, including corporations, "must dare to doubt what a * * * majority may most passionately assert." *Ibid.* As Justice Holmes recognized, "time has upset many fighting faiths," and "the ultimate good desired is better reached by free trade in ideas" since the "best test of truth is the power of the thought to get itself accepted in the competition of the market."

[11] Respondents here, for example, based their claims in part on a "high emissions scenario" known as Representative Concentration Pathways 8.5. See J.A.38, ¶137 & n.14. But the IPCC is now retiring that protocol as "implausible." See Brady Dennis, *Scientists now say this worst-case climate scenario is 'implausible.' Here's what it means.*, Wash. Post (May 19, 2026, 5:00 AM EDT), https://tinyurl.com/4cev58r8.

Abrams v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

B. Using the courts to impose liability on commercial entities that challenge current scientific understandings would dangerously impede scientific progress.

By treating Petitioners' public advocacy as tortious "misinformation" simply because it conflicts with what Respondents understand to be the current prevailing view, see J.A.109, ¶428, Respondents' claims would impede genuine scientific progress.

1. Respondents argue, for example, that Petitioners "acted through a cadre of claimed climate scientists, who they paid, directly or indirectly, to cast doubt on climate science." *Id.* ¶429. And they allege that Petitioners "routinely referenced the work" of those who challenged the view that fossil fuels cause global warming "when casting doubt on and/or trying to undermine public recognition of the scientific consensus around climate change." J.A.110, ¶435. Relying on these other scientists, Respondents claimed, led to "uncertainty in the minds of the American public" about the causes of climate change. J.A.111, ¶436.

But many of these activities that serve as the predicate for Respondents' tort theories took place at a time when even the Environmental Protection Agency recognized that "[t]he science of climate change [wa]s extraordinarily complex[,] * * * still evolving," and plagued by "important uncertainties" about "the factors that may affect future climate

change and how it should be addressed." *Massachusetts* v. *EPA*, 549 U.S. 497, 554 (2007) (Scalia, J., dissenting) (quoting 68 Fed. Reg. 52930). Indeed, Respondents claim that Petitioners have known for decades—as early, perhaps, as the 1960s—that "fossil fuel use would result in likely catastrophic changes to the climate." J.A.85, ¶329. But that cannot be right. By 2001, even the EPA—no friend to fossil fuels—still claimed that "a [causal] linkage between the buildup of [GHGs] in the atmosphere and the observed climate changes during the 20th century cannot be unequivocally established." *Massachusetts* v. *EPA*, 549 U.S. at 553 (Scalia, J., dissenting) (quoting Nat'l Rsch. Council, *Climate Change Science: An Analysis of Some Key Questions* 17 (2001)).

2. Respondents' claims thus necessarily ask the courts to put their thumbs on the scale on one side of an ongoing debate. Yet if history teaches anything, it is that today's consensus may be tomorrow's cautionary tale. As the many examples above show, imposing massive financial liability on those who dare to challenge the current orthodoxy would distort and impoverish public discourse and make scientific progress grind to a halt. Very few scientists will challenge a prevailing view if doing so is actionable.

Moreover, the adverse consequences of a regime that would allow the courts to impose such liability extend beyond any single industry. For example, if Respondents prevail here, pharmaceutical companies, agricultural producers, and technology firms whose public positions on issues involving emerging science run contrary to prevailing understandings would all

be at risk—even if the prevailing understanding is wrong.

And there is no reason such suits would be limited to scientific contrarians: Those who challenge economic, social, or other orthodoxies could also be sued for the supposed downstream externalities of their advocacy. Worse, allowing such suits could allow competing and opposing tort suits by those on both sides of controversial issues.

The result would be a marketplace of ideas in which judges and juries decide what scientific or other viewpoints could be safely voiced without existential risk. This Court should not allow state tort law to become a backdoor mechanism for enforcing scientific orthodoxy at the expense of scientific advancement.

CONCLUSION

The First Amendment dangers of allowing Respondents' suit to proceed counsel strongly in favor of a ruling for Petitioners. As Justice Alito has rightly recognized, "[p]oliticians, journalists, academics, and ordinary Americans discuss and debate various aspects of climate change daily—its causes, extent, urgency, consequences, and the appropriate policies for addressing it." *National Rev., Inc.* v. *Mann*, 589 U.S. 1088, 1093 (2019) (Alito, J., dissenting from the denial of certiorari). Moreover, "[t]he core purpose of the constitutional protection of freedom of expression is to ensure that all opinions on such issues have a chance to be heard and considered"—even if they come from fossil fuel companies. *Ibid.* Because Respondents' claims would effectively silence one side of the debate, this Court should reverse the decision below.

Respectfully submitted,

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MAY 21, 2026