MATTHEW J. PLATKIN, ATTORNEY GENERAL OF THE STATE OF NEW JERSEY, et al., Plaintiff, v. EXXON MOBIL CORPORATION, et al., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION – MERCER COUNTY DOCKET NO. MER-L-1797-22 CIVIL ACTION CBLP ACTION

DEFENDANT AMERICAN PETROLEUM INSTITUTE'S BRIEF IN SUPPORT OF ITS MOTION TO DISMISS THE AMENDED COMPLAINT UNDER THE DISTRICT OF COLUMBIA'S ANTI-SLAPP STATUTE

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INTRODUCTION

Plaintiffs the Attorney General of New Jersey and two of its agencies (collectively, the "State") are targeting the American Petroleum Institute ("API") for expressing a viewpoint disfavored by the State in the policy debate over the costs and benefits of fossil fuels. The State's claims expressly and exclusively target API's advocacy on issues of public interest—it is the quintessential "Strategic Lawsuit Against Public Participation." But the First Amendment and New Jersey law forbid the State's attempt at censorship-by-lawsuit, so the State's claims have no chance of succeeding on the merits. Those claims thus cannot survive the District of Columbia's Anti-SLAPP statute, D.C. Code §§ 16-5501, *et seq.*, which applies to API, a D.C. domiciliary, under New Jersey's choice of law rules. The State's claims against API should be dismissed, and API should be awarded the fees incurred in defending against this lawsuit.[1]

ARGUMENT

The State's lengthy Complaint boils down to the basic assertion that API, because of its speech relating to climate change, must pay for alleged harms the State faces from climate change. That assertion directly implicates D.C.'s anti-SLAPP protections, which cover D.C. residents like API under New Jersey's choice of law framework. Because the State cannot carry its burden of showing it is likely to succeed on the merits of its claims, the Court should dismiss the State's claims and award API attorney's fees pursuant to Rule 4:6-2(e) and D.C. Code §§ 16-5504(a).

[1] API does not waive any right, defense, affirmative defense, or objection, including its objection to personal jurisdiction. API does not believe that a ruling on its anti-SLAPP motion before the Court rules on the Joint Motion to Dismiss for Lack of Personal Jurisdiction would result in waiver. *See Walker* v. *FedEx Office & Print Servs., Inc.*, 123 A.3d 160, 163 (D.C. 2015). If the Court disagrees, API respectfully asks the Court to address that jurisdictional motion first.

I. The District of Columbia's Anti-SLAPP statute applies to its domiciliary API.

New Jersey's choice of law rules require applying D.C.'s anti-SLAPP law to the State's claims against API. "When a civil action is brought in New Jersey, [New Jersey] courts apply New Jersey's choice-of-law rules in deciding whether this State's or another state's" law governs. *McCarrell v. Hoffmann-La Roche, Inc.*, 227 N.J. 569, 583 (2017) (citation omitted). "The first step in a conflicts analysis is to decide whether there is an actual conflict between the laws of the states with interests in the litigation." *Cont'l Ins. Co. v. Honeywell Int'l, Inc.*, 234 N.J. 23, 46 (2018) (citation omitted). "That is done by examining the substance of the potentially applicable laws to determine whether 'there is a distinction' between them." *P.V. ex rel. TV v. Camp Jaycee*, 197 N.J. 132, 143 (2008) (quoting *Lebegern v. Forman*, 471 F.3d 424, 430 (3d Cir. 2006)); *see also Cont'l*, 234 N.J. at 46 ("A conflict of law requires a 'substantive difference' between the laws of the interested states.") (citation omitted). "If there is a conflict, the second step requires courts to determine the state with the 'most significant connections with[ ] the issues raised or the parties and the transaction.'" *Highgate Hotels, L.P. v. Liberty Mut. Fire Ins. Co.*, No. A-0661-21, 2023 WL 3047460, at *3 (N.J. App. Div. Apr. 24, 2023) (citation omitted).[2]

At the inquiry's first step, New Jersey and D.C. law directly conflict. New Jersey has no anti-SLAPP statute,[3] and the District of Columbia does. That squarely presents a conflict. *See*,

[2] Under Rule 1:36-3, unpublished opinions do not constitute precedent and are not binding upon this Court. Nevertheless, Rule 1:36-3 ***does*** permit an unpublished opinion to be offered as secondary research, and a lower court may consider facts and analysis from an unpublished opinion if the court finds such analysis persuasive. *See, e.g., Nat'l Union Fire Ins. Co. of Pittsburgh v. Jeffers*, 381 N.J. Super. 13, 18-19 (App. Div. 2005) ("We agree with the analysis enunciated in [the unreported Appellate Division opinion relied upon by the defendant], find it persuasive, and reach the same conclusion here.").

[3] New Jersey recently enacted an Anti-SLAPP statute, but the effective date renders that statute inapplicable to this matter. *See* Senate Bill, No. 2802 ("This act shall take effect on the 30th day after enactment and shall apply to a civil action filed or cause of action asserted in a civil action on or after the effective date.").

e.g., *Miller v. Samsung Elecs. Am., Inc.*, No. CIV.A. 14-4076, 2015 WL 3965608, at *12 (D.N.J. June 29, 2015) ("Because Florida does not have a statute that is comparable to the TCCWNA, an actual conflict exists between Florida and New Jersey law regarding this claim.").

New Jersey common law also conflicts with the D.C. anti-SLAPP law. The New Jersey Supreme Court has recognized a "common law cause of action for malicious use of process, although a disfavored one, [as] a viable response to a SLAPP suit[.]" *LoBiondo v. Schwartz*, 199 N.J. 62, 72 (2009). "[T]he required elements of the tort [are] the filing of a complaint, without probable cause, that was actuated by malice, that terminated in favor of the party now seeking relief, and that caused the party now seeking relief to suffer a special grievance[.]" *Id.* D.C.'s broad anti-SLAPP law, in contrast, covers a "special motion to dismiss *any* claim arising from an act in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5502(a) (emphasis added). So among other conflicts, if New Jersey common law applied, API would need to show that the State's claims were "actuated by malice," whereas under the D.C. anti-SLAPP law, API need only show that the claims arise from API's activities in furtherance of its advocacy efforts.

Because there is an actual conflict, the law of the state with the most significant relationship to the claim applies. D.C. has the most significant relationship here under the Restatement (Second) of Conflicts. *Camp Jaycee*, 197 N.J. 132 (adopting test). The Restatement lays out the factors and contacts relevant to determining the applicable law, which should be "evaluated according to their relative importance with respect to the particular issue"—here, which anti-SLAPP law should apply. Restatement (Second) of Conflicts § 145(2); *see also id.* § 6. The overwhelming weight of authority holds the determinative Restatement factors in the anti-SLAPP context are where the speech occurred and the domicile of the speaker; the other Restatement

factors are irrelevant in the anti-SLAPP context. *See, e.g.*, *Diamond Ranch Acad., Inc. v. Filer*, 117 F. Supp. 3d 1313, 1323 (D. Utah 2015) (applying California anti-SLAPP statute to defamation lawsuit in Utah "because [the defendant] is a resident of California, [and] it is logical to conclude that the website [with the statements at issue] was created in California and that at least a portion of the statements on the website were posted in California").

Given that "[t]he purpose behind an anti-SLAPP law is to encourage the exercise of free speech, . . . the place where the allegedly tortious speech took place and the domicile of the speaker are central to the choice-of-law analysis on this issue." *Chi v. Loyola Univ. Med. Ctr.*, 787 F. Supp. 2d 797, 803 (N.D. Ill. 2011); *see O'Gara v. Binkley*, 384 F. Supp. 3d 674, 682 (N.D. Tex. 2019) ("[I]n the anti-SLAPP context, courts typically consider the place where the allegedly tortious conduct occurred and the speaker's domicile in determining what state's law to apply."). Indeed, courts frequently give the speaker's domicile controlling weight. *See, e.g.*, *GOLO, LLC v. Higher Health Network, LLC*, No.: 3:18-cv-2434, 2019 WL 446251, at *13 (S.D. Cal. Feb. 5, 2019) (applying California anti-SLAPP law to suit originally filed in Pennsylvania against California speaker "because of a state's acute interest in protecting the speech of its own citizens"); *Underground Sols., Inc. v. Palermo*, 41 F. Supp. 3d 720, 726 (N.D. Ill. 2014) (applying Tennessee anti-SLAPP law to Illinois suit against Tennessee defendant based on "the importance of a speaker's domicile in a court's decision on which state's anti-SLAPP law to apply").

These dispositive factors show that D.C. has the most significant relationship to the claim. API is domiciled in the District of Columbia. *See* Compl. ¶ 30(a) (alleging API "is a nonprofit corporation based in the District of Columbia"); Restatement (Second) of Conflicts § 145(2)(c) (treating domicile as equivalent to "place of incorporation and place of business"). The State bases its claims against API entirely on a handful of public policy campaigns that API broadcast

nationwide on television, radio, and the internet. Compl. ¶¶ 196-200. Given that API is "based in" D.C., the Complaint necessarily alleges that API broadcasts these advertisements from D.C., meaning the alleged misconduct occurred in D.C. rather than in New Jersey (or any other state). *Id.* ¶ 24 (a). D.C. thus has the strongest interest in having its anti-SLAPP law apply to (and protect) its own citizen's conduct in D.C. *See* Restatement (Second) of Conflicts § 6 ("the relative interests" of the states is relevant choice of law consideration). New Jersey's choice of law rules therefore require applying D.C.'s anti-SLAPP law in this action.

II. The District of Columbia's Anti-SLAPP statute bars the State's claims against API.

D.C.'s anti-SLAPP statute, D.C. Code § 16-5502(a), authorizes filing "a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest." Once the movant makes a *prima facie* showing that the claim arises from such an act, the burden shifts to the plaintiff to show that its claim is likely to succeed on the merits.[4] *Id.* § 16-5502(b). API easily carries its burden here, but the State cannot do the same. This Court should thus grant API's special motion to dismiss.

A. The State's claims arise from speech protected by the D.C. Anti-SLAPP Act.

The State's claims against API focus entirely on API's "act[s] in furtherance of its rights of advocacy on issues of public interest." *Id.* § 16-5502(a). The anti-SLAPP law broadly defines "acts" to include a "written or oral statement" made publicly "in connection with an issue of public interest" as well as "[a]ny other expression or expressive conduct that involves . . . communicating views to members of the public in connection with an issue of public interest." *Id.* § 16-5501(1). In turn, "issues of public interest should be liberally interpreted." *Saudi Am. Pub. Relations.*

[4] For purposes of this Motion, API does not address the sufficiency of the State's evidence to show a likelihood of success on the merits. Rather, dismissal is required because the State's claims fail as a matter of law even assuming the truth of the allegations.

Affairs Comm. V. Inst. For Gulf Affairs, 242 A.3d 602, 611 (D.C. 2020). The term encompasses "matter[s] of public significance" such as "health or safety; environmental, economic, or community well-being" but does not include "private interests." *Id.* § 16-5501(3); *Close It! Title Servs., Inc. v. Nadel*, 248 A.3d 132, 142-44 (D.C. 2021) (personal dispute over missing funds not an issue of public interest).

The State's claims stem directly from API's public speech on issues of immense public significance—namely, the debate over the benefits of fossil fuels and the risks posed by global climate change. The State premises its claims on messages API communicated to the American public, through varying mediums, commenting on the environment, community well-being, and the role of oil and gas products in both. The Complaint targets, for example, a 2017 API public policy campaign entitled "Natural Gas Works for New Jersey," in which API described natural gas as "clean energy." Compl. ¶ 30(e). The Complaint also points to API's "Power Past Impossible" campaign that "told Americans that the petroleum industry could help them 'live better lives.'" *Id.* ¶ 196. And the Complaint faults API's internet messaging describing "Creating climate solutions and essential energy" and "Four Ways Energy Companies Are Protecting Land and Wildlife"—public commentary on "health or safety" and the environment. *Id.* ¶ 198.

All the conduct the State uses to support its claims against API thus qualifies as "acts" through which API furthered its rights of advocacy on issues of public interest. Indeed, courts rightly "acknowledg[e] that environmental harm is a matter of public interest for the purposes of anti-SLAPP," as are "global warming" and "climate change."[5] *Resolute Forest Prods., Inc. v.*

[5] Enacted in 2011, D.C.'s anti-SLAPP statute is relatively new, and few cases have interpreted it. But the statute is similar to California's law, which has a far more robust body of anti-SLAPP caselaw, so the D.C. Court of Appeals looks to "California" precedent when applying D.C.'s "similar" statute. *Am. Studies Ass'n v. Bronner*, 259 A.3d 728, 746 (D.C. 2021); *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1236 n.30 & n.32 (D.C. 2016) (similar).

Greenpeace Int'l, 302 F. Supp. 3d 1005, 1026 (N.D. Cal. 2017); *see Bikkina v. Mahadevan*, 193 Cal. Rptr. 3d 499, 509-10 (Cal. Ct. App. 2015). Yet, the State asserts that the State and its residents will be harmed by the effects of global climate change because of API's public speech about global climate change and related issues. *See, e.g.*, Compl. ¶ 117 (alleging API and co-defendants "mounted a deceptive public campaign in order to continue wrongfully promoting and marketing their fossil fuel products, despite their knowledge and the growing national and scientific consensus about the hazards of doing so."). It is hard to imagine a matter of greater public significance. API thus carries its burden to establish a *prima facie* case under the D.C. anti-SLAPP statute.

B. The State cannot establish a likelihood of success on the merits of its claim.

The State cannot carry its burden of showing it is likely to succeed on its claims. When a court grants a motion to dismiss "because no relief can be granted on a claim as a matter of law, the plaintiff cannot show a likelihood of success on the merits of that claim for the purposes of the anti-SLAPP motion." *Am. Studies Ass'n*, 259 A.3d at 741; *see* New Jersey Court Rule 4:5-2 ("A complaint may be dismissed for failure to state a claim if it fails 'to articulate a legal basis entitling plaintiff to relief.'"). As API's Motion to Dismiss and Defendants' Joint Motion to Dismiss lay out in greater detail, which arguments this Motion fully incorporates, the State lacks viable claims against API.

All of the State's claims against API violate API's First Amendment rights. The State targets API's fully protected noncommercial speech on a matter of immense public importance. And it does so because of that speech's content. Yet the State cannot justify that content-based discrimination with any compelling state interest, nor is its request for extraordinarily broad relief narrowly tailored to any such interest. *See Bruni v. City of Pittsburgh*, 941 F.3d 73, 83-84 (3d Cir. 2019) (content-based restrictions are subject to strict scrutiny); *see also Madsen v. Women's*

Health Ctr., Inc., 512 U.S. 753, 763 (1994) ("The government may not regulate [speech] based on hostility—or favoritism—towards the underlying message expressed.") (citation omitted); *see also* API Mot. Dismiss, at 7-9. And even if API's speech were commercial—it is not—the State's effort to impose content- and viewpoint-based restrictions on that speech remains impermissible and unjustified. *See* API's Mot. Dismiss, at 9-12. The State's claims also violate API's protected petitioning activity and therefore fail as a matter of law under the *Noerr-Pennington* doctrine. *See Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 56 (1993); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 670 (1965); *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961); *see also* API's Mot. Dismiss, at 13-14. The State's negligence claim additionally violates API's First Amendment rights because the alleged duty, if applied to API, would either require API to self-censor its speech or coerce API to state the opposing side on a hotly contested policy debate. API's Mot. Dismiss, at 14-15.

Moreover, its claims are preempted by federal law because the State seeks to regulate the national (indeed, international) issue of global climate change. State law cannot constitutionally apply to such an interstate dispute. *See City of New York v. Chevron Corp.*, 993 F.3d 81, 91 (2d Cir. 2021); *see also* Defs. Joint Mot. Dismiss, at 9-20. The State's claims against API also fail for the many other reasons discussed in Defendants' Joint Motion to Dismiss. *See generally* Defs. Joint Mot. Dismiss.

The State's claims likewise fail as a matter of pleading. The NJCFA only covers alleged deceptive practices made "in connection with the sale or advertisement of any merchandise or real estate." N.J.S.A. § 56:8-2. But none of the statements on which the State premises its claims were connected to the "sale or advertisement" of any particular good or product that API sold. Indeed, API does not sell fossil fuels anywhere, let alone in New Jersey. The Complaint alleges that API's

members sell fossil fuels, but such an attenuated relationship to any consumer or merchandise (none of them API's) does not suffice under the NJCFA. *See, e.g., Joaquin v. Lonstein Law Office, P.C.*, No. CV158194MASDEA, 2017 WL 2784708, at *1 (D.N.J. June 27, 2017) (dismissing NJCFA claim, where "Defendants' allegedly fraudulent attempts to collect for unpaid subscription fees were conducted on *behalf of a third party*—DIRECTV—and did not involve the sale of merchandise to Plaintiff.") (emphasis added); *Boyko v. Am. Int'l Grp., Inc.*, No. CIV. 08-2214 RBK/JS, 2009 WL 5194431, at *4 (D.N.J. Dec. 23, 2009) (explaining that NJCFA did not apply to defendant's activity "*on behalf of a third party* who might have sold merchandise" because that activity "is not itself a sale of merchandise.") (emphasis added); *see also* API's Mot. Dismiss, at 3-5.

The State's claims against API thus create a paradigmatic strategic lawsuit against public participation that lacks any showing of a likelihood of success.

C. API is entitled to fees incurred in defending against this lawsuit.

Because API should prevail on its special motion to dismiss, it should also receive attorney's fees. This "court may award a moving party who prevails, in whole or in part, on a motion brought under § 16-5502 or § 16-5503 the costs of litigation, including reasonable attorney fees." D.C. Code § 16-5504(a). Given the costly and time-consuming efforts that API has incurred, not only in defending against this lawsuit but also in preparing this Anti-SLAPP motion, API moves for an award of fees. If this Court grants API's Special Motion to Dismiss, API will file a separate motion setting forth the fees and costs incurred.

CONCLUSION

For these reasons, the Court should grant API's Motion, strike and/or dismiss the State's claims against API, and award API the attorney's fees incurred in defending against this litigation and drafting this Motion.

Respectfully submitted,

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