NEW JERSEY
CIVIL JUSTICE
INSTITUTE

MEMORANDUM

TO: Senate Budget and Appropriations Committee

FROM: Elissa Frank, President

SUBJECT: Senate Bill 3545

DATE: January 8, 2026

The New Jersey Civil Justice Institute ("NJCJI") provides this memorandum to express its concerns to the Senate Environment and Energy Committee ("Committee") regarding Senate Bill 3545 ("S3545"), which seeks to impose liability on certain fossil fuel companies for damages allegedly caused by climate change. By way of background, NJCJI is a nonprofit, nonpartisan coalition of New Jersey's largest employers, trade associations, and professional organizations. NJCJI advocates for a fair, predictable, and efficient civil justice system in New Jersey, which is an essential ingredient for continued capital investment, innovation, and job creation in the state.

By way of background, S3545 seeks to impose retroactive liability against a handful of New Jersey fossil fuel businesses for damages caused by climate change to the State of New Jersey, and to establish a program for the collection of compensatory payments. S3545 targets so-called "responsible parties" which are entities or successors in interest to entities that engaged in the trade or business of petroleum extraction and refining between January 1, 1995, and the year the bill becomes effective. The bill further narrows responsible parties to petroleum extraction and refining businesses that are responsible for more than one billion metric tons of greenhouse gas emissions during the relevant time period, and which have paid New Jersey sales taxes. S3545 provides that each responsible party is strictly liable to the State and its residents for damages caused by climate change and empowers the State Treasurer to develop the means for assessing those damages. In turn, the Department of Environmental Protection is tasked with calculating the proportional share of damages attributable to each responsible party based on publicly available fossil fuel volume data, and for collecting compensatory payments from those entities. Those compensatory payments, in turn, would be deposited into the "Climate Superfund Cost Recovery Program Fund" to be used for climate change resiliency projects.

S3545 is legally deficient in several respects, and thus, it will be subject to a host of legal challenges that will take years, if not decades, for our courts to address. First, given that it seeks to regulate greenhouse gas emissions, S3545 conflicts with the federal Clean Air Act ("CAA"), 42 U.S.C.S. § 7401, and is subject to preemption challenges. The CAA provides for a comprehensive, federal statutory scheme for the regulation of atmospheric pollutants, including

greenhouse gases, and empowers the United States Environmental Protection Agency to act as the primary regulatory of domestic emissions. To the extent that S3545 seeks to regulate fossil fuel companies for greenhouse gas emissions that occurred outside of New Jersey, , pursuant to the Supremacy Clause of the United States Constitution, the bill is displaced by federal law and therefore preempted.

Second, S3545 runs afoul of the Constitution's prohibition against the retroactive imposition of civil penalties and liability as provided for by the Due Process Clause of the Fourteenth Amendment. The Due Process Clause bars states from retroactively imposing civil liability for previously permitted activities unless the allegedly responsibly party could have reasonably expected that it would be subject to future, retrospective regulation. Said differently, the Due Process Clause protects the settled expectations of parties from retroactive penalties and liability. In that vein, the Due Process Clause prohibits the enforcement of retroactive legislation that is deemed arbitrary and irrational. Here, both our federal and state governments have, for decades, permitted and encouraged the petroleum industry to extract and refine fossil fuels as part of national and state energy policies. Despite our governments' active support for these industries, S3545 seeks to impose retroactive liability on fossil fuel businesses for activities that touch upon nearly every aspect of our modern economy. Worse still, despite the pervasive use of fossil fuels and greenhouse gas emissions across the globe, S3545 arbitrarily and irrationally targets a narrow subset New Jersey fossil fuel business, while simultaneously failing to hold a host of international and foreign greenhouse gas emitters to account. For these reasons, S3545 imposes retroactive and disproportionate liability on businesses in contravention of the Fourteenth Amendment's due process guarantee.

Third, and finally, S3545 unduly burdens interstate commerce and thus violates the Commerce Clause of the United States Constitution. The Commerce Clause restricts the power of states to take actions that affect national and international commerce and broadly prohibits states from regulating interstate economic activity unless that activity is closely tied to the interests of the regulating state. Here, S3545 applies to the petroleum extraction and refining activities of any "responsible party" without regard to whether those activities took place inside or outside of New Jersey. As a result, S3545 is susceptible to challenges on the basis that it unconstitutionally burdens interstate commerce.

As set forth in more detail below, S3545 will likely be subject to a number of viable statutory and constitutional challenges. These challenges will have to be resolved in our state's courts and will likely result in decades of litigation. The dramatic expansion of unwarranted retroactive liability imposed by S3545 on businesses and the resultant litigation will place unnecessary stress on our civil justice system and consume judicial resources. In light of the foregoing, NJCJI respectfully urges the Committee to vote against S3545.

I. S3545 is Preempted Under Federal Law

S3545 will be challenged in court on the basis that the CAA preempts it. "It is a bedrock rule . . . that federal law preempts state law when the two conflict." Glacier Nw., Inc. v. Int'l B'hood of Teamsters Loc. Union No., 174, 598 U.S. 771, 776 (2023) Moreover, "[w]hen we deal with air and water in their ambient or interstate aspects," the United States Supreme Court has found that

"[e]nvironmental protection is undoubtedly an area within national legislative power." Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 421 (2011) (internal quotation marks omitted).

Indeed, Congress exercised that power when it enacted the CAA, which was "designed to safeguard our precious air resources," through a statutory scheme that "regulates pollution-generating emissions from both stationary sources, such as factories and powerplants, and moving sources such as cars, trucks, and aircrafts." City of New York v. Chevron Corp., 993 F.3d 81, 87 (2d Cir. 2021). The CAA "is an intricate regulatory regime intended to protect and enhance the quality of the [n]ation's air resources so as to promote the public health and welfare and the productive capacity of its population." Ibid. To further the CAA's goal of protecting the environment, Congress established the United States Environmental Protection Agency ("EPA") "to implement programs to regulate pollution from both mobile and stationary sources under the [CAA] and other related statutes, a role which was later interpreted to include the regulation of carbon dioxide and other greenhouse gases." Ibid. Indeed, "to say [the Clean Air Act's] regulatory and permitting regime is comprehensive would be an understatement." North Carolina ex rel. Cooper v. Tenn. Valley Auth., 615 F.3d 291 (4th Cir. 2010).

Critically, the United States Supreme Court has previously held that the CAA unambiguously delegated to the EPA the authority to regulate and control greenhouse gas emissions, see Massachusetts v. EPA, 549 U.S. 497, 528-29 (2007), and the EPA has exercised that authority to promulgate comprehensive regulations for greenhouse gas emissions in the oil and gas sectors, see 89 Fed. Reg. 16,280 (Mar. 6. 2024). For instance, the EPA can regulate the downstream sale of petroleum fuels, as well as emissions from industrial sources, power plants, cars, trucks, planes, and even lawnmowers. See 42 U.S.C. §§ 7545(o), 7521, 7550(2), 7550 (10), 7571. By contrast, nothing in the CAA suggests that individual states have the power to regulate out-of-state greenhouse gas emissions. See Chevron, 993 F.3d at 99. Rather, the CAA "anoints the EPA as the 'primary regulatory of [domestic] greenhouse gas emissions," while giving each, individual state limited authority to determine "how best to achieve EPA emissions standards within its domain." Ibid. As such, "states are not granted unfettered discretion to impose any environmental regulations they choose, anywhere they choose." Ibid. Rather, individual states may enforce standards only within their own territory, subject to EPA's role as primary regulator. In short, the CAA as well as the EPA's regulatory efforts, represent Congress's plenary authority to control interstate emissions, and states play a cooperative, but limited role in enforcing emissions standards.

Here, S3545 seeks to impose strict liability on a handful of New Jersey fossil fuel businesses for greenhouse gas emissions without regard to whether those emissions occurred inside or outside of the State. S3545 applies to any fossil fuel extraction or refining business that produced more than one billion metric tons of greenhouse gases and was required to pay New Jersey sales taxes. Moreover, S3545 makes no distinction between emissions that occurred within the State versus out-of-state emissions. Such a sweeping effort to regulate emissions across state lines is a textbook example of overreach into areas regulated by the federal government. Indeed, "[f]or over a century, a mostly unbroken string of cases has applied federal law to disputes involving interstate air . . . pollution." Id. at 92. "This is because such quarrels often implicate two federal interests that are incompatible with the application of state law: (i) the 'overriding . . . need for a uniform rule of decision' on matters influencing national energy and environmental policy, and (ii) 'basic interests of federalism.'" Ibid. at 91-92 (quoting Illinois v. City of Milwaukee, 406 U.S. 91, 105 n.6 (1972)). Here, S3545 directly

impacts both of these federal interests because it imposes liability for, and seeks compensatory payments based on, out-of-state emissions. As a result, S3545 will be subject to strong preemption challenges, which will have to be litigated in our State's civil justice system.

II. S3545 Violates the Due Process Clause of the Fourteenth Amendment

In addition to preemption challenges, S3545 violates the federal due process rights of the fossil fuel businesses it seeks to regulate. Critically, the Fourteenth Amendment both protects the settled expectations of individuals and entities from unjust, retroactive legislation and bars enforcement of retrospective legislation that are arbitrary and irrational. Here, by seeking to extract compensatory payments from only a small subset of fossil fuel businesses—while simultaneously ignoring international and foreign greenhouse gas emitters—for activities that the federal and state governments permitted and actively encouraged for decades, S3545 invites due process challenges.

"Deeply rooted in our jurisprudence," is a "presumption against retroactive legislation." Landgraf v. Usi Film Prods., 511 U.S. 244, 265 (1994). "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." Ibid. "In a free, dynamic society, creativity in . . . commercial . . . endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions." Id. at 265-66. "The Due Process Clause . . . protects the interests in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause may not suffice to warrant its retroactive application." Id. at 266. Ultimately, "retroactive statutes raise particular concerns," because "[t]he Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." Ibid.

At its core, our Constitution's prohibition against retroactive legislation requires courts to consider "whether [a] new provision attaches new legal consequences to events completed before its enactment," and that analysis is guided by "familiar considerations of fair notice, reasonable reliance, and settled expectations." Id. at 269-70. Undergirding the protection against unjust retroactive legislation is the requirement that "legislative acts adjusting the burdens and benefits of economic life" not be "arbitrary and irrational." Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976). Indeed, "retrospective aspects of legislation . . . must meet the test of due process," and therefore must not operate in an arbitrary and irrational fashion. Id. at 17. In that vein, retroactive legislation will pass constitutional muster only if two conditions are satisfied: "(1) [the Legislature] reasonably concluded that the party subjected to retroactive obligations benefited from activity that contributed to a societal problem, and liability is not disproportionately imposed on that party; and (2) the imposition of retroactive liability would not be contrary to that party's reasonable expectations." Commonwealth Edison Co. v. United States, 271 F.3d 1327, 1346 (Fed. Cir. 2001).

Here, the settled expectations of the subset of fossil fuel businesses penalized under S3545, as well as the disproportionate liability imposed on those same entities, renders the bill subject to strong

due process challenges. For roughly a century, our national and state governments have not only permitted, but strongly encouraged, the extraction and refining of fossil fuels. In turn, fossil fuel businesses across the country have invested untold trillions of dollars into petroleum extraction and refining facilities. As a result of this active encouragement by our government, fossil fuels remain critical to the United States' energy system, providing for approximately eighty percent of the United States energy needs and supporting over twelve-million American jobs.[1] Moreover, from 2012 to 2025, the oil and natural gas industries are projected to provide roughly $1.6 trillion in federal and state tax revenues, which in turn support the maintenance of schools, hospitals, and public infrastructure nationwide. Due to national policies encouraging the exploitation of petroleum resources, American consumers save an estimated $203 billion annually due to the abundance of cheap energy. Indeed, in 2019, domestic oil and natural gas production lowered the United States trade deficit by approximately $305 billion. Given the federal and state governments' historic encouragement of domestic petroleum industries in the United States, as well as the critical role those industries now play in our economy, it cannot be said that the reasonable expectations of the parties' inure towards the imposition of retroactive liability. Simply put, the United States has spent a century encouraging the fossil fuel industry to extract and refine petroleum products, and now imposing retroactive liability on a handful of New Jersey fossil fuel businesses runs contrary to the settled expectations of those enterprises.

Further compounding this issue is the disproportionate nature of the liability that S3545 seeks to impose. Here, S3545 specifically targets only a small subset of alleged greenhouse gas emitters, namely businesses that extract or refine crude oil and paid sales taxes in New Jersey, while imposing no liability on other major sources of greenhouse gases. However, greenhouse gas emissions are a global concern, with greenhouse gas emitters spread throughout the entire planet and representing innumerable industries. To put it into perspective, recent estimates place United States greenhouse gas emissions at roughly 9.8 percent of the world's total, with New Jersey accounting for approximately 0.17 percent of global emissions. By contrast, the remainder of the world's nations are responsible for roughly 90 percent of all global greenhouse gas emissions.

Nevertheless, by its terms, S3545 imposes massive liability for harm attributable to climate change solely on a handful New Jersey fossil fuel businesses and, in calculating that liability, fails to account for greenhouse gas emissions generated by international and foreign emitters. Indeed, of the top ten carbon emitters between 1995 and 2022, six are foreign entities, with Saudi Aramco—the state-owned petroleum company of Saudi Arabia—being the top emitter. Nevertheless, this bill will do nothing to address those entities' greenhouse gas emissions, while shifting the liability for their conduct onto New Jersey fossil fuel businesses.

In sum, S3545 disproportionately places liability for damages caused by climate change on a handful of New Jersey fossil fuel business, while essentially immunizing international greenhouse gas emitters (some of which include the world's most brutal dictatorships and authoritarian regimes). No doubt, this disparate apportionment of liability, as well as the settled expectations of domestic fossil fuel companies, will strongly support due process challenges to the bill.

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[1] See "The Economic Benefit of Oil Gas," United States Department of Energy (2020), available at, https://www.energy.gov/articles/economic-impact-oil-and-gas.

III. S3545 Constitutes an Undue Burden on Interstate Commerce

S3545 unduly burdens interstate commerce by imposing liability on fossil fuel businesses for otherwise lawful, out-of-state commercial activities that cannot be traced to New Jersey. Here, while the bill only applies to fossil fuel extractors and refiners that are required to pay New Jersey sales tax, it does not limit their liability to extraction and refining activities within the State. Rather, S3545 applies to those businesses' activities everywhere, going back roughly thirty years. However, the Commerce Clause of the United States Constitution limits the authority of states to take actions that affect national and interstate commerce, and S3545 is therefore likely subject to challenges under the Commerce Clause.

It is now well established that "the 'Commerce Clause . . . precludes the application of a state statute to commerce that takes places wholly outside of the State's borders, whether or not the commerce has effects within the State.'" Healy v. Beer Inst., 491 U.S. 324, 336 (1989) (citing Edgar v. MITE Corp., 457 U.S. 624, 642-43 (1982); Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573, 581-83 (1986)). As such, "a state law that has the practical effect of regulating commerce occurring wholly outside the State's borders is invalid under the Commerce Clause." Id. at 332. In that vein, the United States Supreme Court has previously found that the imposition of liability can be construed as a means of regulating business's commercial activities, holding that the "obligation to pay compensation can be, indeed is designed to be, a potent methods of governing conduct and controlling policy." Kurns v. R.R. Friction Prods. Corp., 565 U.S. 625, 637 (2012); see also Exxon Shipping Co v. Baker, 554 U.S. 471, 493 (2008) (observing that certain damages for past conduct can be "aimed not at compensation but principally at retribution and deterring harmful conduct"). In sum, where a state seeks to control the conduct of entities through the imposition of liability based on out-of-state commercial activities, such legislation triggers Commerce Clause concerns.

Although S3545 applies to only fossil fuel businesses that are required to pay New Jersey sales tax, it imposes liability for any and all extraction and refining activities conducted by those businesses without regard to whether they transpired within the State. As a result, S3545 penalizes fossil fuel businesses for interstate commercial activities that are not traceable to New Jersey. Indeed, one of the reasons for this is that "[g]reenhouse gases once emitted become well mixed in the atmosphere; emissions in [one state] may contribute no more to flooding in [another state] than emissions in China." Am. Elec. Power Co, 564 U.S. at 422 (internal quotation marks omitted). Said differently, greenhouse gases do not remain in situ once emitted but become spread throughout the entire atmosphere. S3545 therefore penalizes a small subset of fossil fuel businesses for damages felt in New Jersey but based on conduct that transpired outside of the State (while simultaneously failing to impose liability on many international and foreign emitters). As such, opponents of the bill will argue that the goal of these penalties is to discourage otherwise lawful petroleum extraction and refining activities beyond New Jersey's borders in violation of the Commerce Clause's prohibition against undue burdens on interstate commerce.

Ultimately, it is highly likely that S3545 will be struck down by our State's courts. As set forth above, given the comprehensive nature of the CAA as well as the EPA's efforts to regulate greenhouse gas emissions, S3545 is preempted by federal law. Similarly, in light of its retroactive application as well as impact on interstate commerce, S3545 violates the Due Process Clause of the Fourteenth

Amendment and the Commerce Clause. These challenges must be addressed in the civil justice system and will embroil our courts in years—and potentially decades—of litigation. This litigation will place further burdens on our civil justice system and divert judicial resources away from private litigants attempting to vindicate their rights. As a result of these concerns, NJCJI respectfully urges the Committee to vote against S3545.