

No. 18-16663

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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CITY OF OAKLAND, et al.,  
*Plaintiffs/Appellants,*

v.

B.P. p.l.c., et al.,  
*Defendants/Appellees.*

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Appeal from the United States District Court  
for the Northern District of California  
Nos. 3:17-cv-06011 and 3:17-cv-06012 (Hon. William H. Alsup)

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**MOTION BY THE UNITED STATES AS AMICUS CURIAE  
FOR A 14-DAY EXTENSION TO CONSIDER WHETHER  
TO FILE A BRIEF IN SUPPORT OF REHEARING**

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## **INTRODUCTION**

Pursuant to Federal Rule of Appellate Procedure 26(b) and to Ninth Circuit Rule 31-2.2(b), the United States respectfully requests that this Court extend the deadline to file a brief as amicus curiae in support of the petition for rehearing filed on July 8, 2020 by Appellees BP p.l.c., Chevron Corporation, ConocoPhillips, Exxon Mobil Corporation, and Royal Dutch Shell PLC (“Energy Companies”). An extension would allow the United States to consider whether to participate as amicus curiae in support of rehearing and to file a brief as appropriate. The United States has a strong interest in the issues raised by the petition for rehearing. Consideration of the issues raised by the petition, several of which the United States has not previously addressed, will require more time than the current deadline permits. Defendants do not oppose this request. The United States contacted counsel for the Plaintiffs Cities of Oakland and San Francisco (“Cities”), who have not responded as of the time of filing.

## **BACKGROUND**

The Cities sued in California state courts claiming violations of state nuisance law for climate-change related harms allegedly caused by the Energy Companies’ production and sale of fossil fuels. The Energy Companies removed to the District Court for the Northern District of California on multiple grounds, including that claims are removable because they arise under federal common law, because federal

law is a necessary element of the Cities' state-law claims (the "*Grable* exception"), and because federal law completely preempts the Cities' state-law claims. The district court denied the Cities' motion for remand on the grounds that their claims arose under federal common law. The Cities then amended their complaint to add a federal common-law claim of nuisance. The district court then invited the United States' amicus participation, but only on the question of whether federal common law should afford the relief requested. *See* ECF No. 118 (Mar. 1, 2018). The United States filed an amicus brief arguing only that any federal common-law claims were displaced by the Clean Air Act ("CAA") and by Congress's foreign affairs and foreign commerce powers. The district court subsequently dismissed the complaint, holding that the Cities' claims were displaced by the CAA and by the foreign affairs power. *See* ECF No. 283 (June 25, 2018). The Cities appealed the district court's orders denying remand and dismissing the complaint.

On appeal, the United States filed an amicus brief in support of the Energy Companies arguing (among other points) that subject-matter jurisdiction existed in the district court at the time it dismissed the complaint because of the Cities' amendment of their complaint to add federal common law claims, thereby waiving any objection to the district court's order denying remand. The United States has never addressed the other arguments that the Energy Companies presented in their petition for rehearing in support of removal.

On May 26, 2020, the panel issued a decision reversing the district court's determination that jurisdiction was appropriate in federal court because the claims properly arise under federal common law, and also determined that the Cities' claims are not subject to the *Grable* exception or completely preempted. The panel also held that the Cities had not waived their right to contest subject-matter jurisdiction. The panel remanded to the district court for consideration of the Energy Companies' other arguments in support of removal.

On July 8, 2020, after a one-month extension, the Energy Companies petitioned for both panel rehearing and rehearing en banc. The petition argues that the panel's decision created intra- and inter-circuit conflicts by not recognizing the Energy Companies' argument that removal is appropriate because the Cities' claims arise under federal common law, and by concluding that the Cities could continue to contest subject-matter jurisdiction after adding a federal common-law claim.

### **ARGUMENT**

Without extension, the deadline for an amicus curiae to file a brief in support of the Energy Companies' petition for rehearing would be July 20, 2020. *See* Fed. R. App. P. 29(b)(5); Cir. R. 29-2(e)(1); *cf.* Fed. R. App. P. 29(a)(2) (authorizing the United States to participate as amicus curiae "without the consent of the parties or leave of court"); Cir. R. 29-2(a) (same). Pursuant to Federal Rule of Appellate Procedure 26(b), the United States submits that the novel and complex nature of the

issues raised by the petition for rehearing constitutes good cause justifying an extension of the deadline to file as amicus curiae until August 3, 2020.

This case presents questions of federal law as to which the United States has a substantial interest. Domestically, the U.S. Environmental Protection Agency has primary responsibility, pursuant to a delegation from Congress, for administering certain programs under the CAA, including decisions involving the regulation of greenhouse gas emissions. Internationally, the Executive Branch engages in important and complex questions of diplomacy and foreign affairs relating to climate change. The United States has affirmed these interests by participating as amicus in the district court and in written and oral presentation before the panel. With leave of the Court, the United States respectfully seeks an extension to consider further amicus participation in support of the Energy Companies' recently filed petition for rehearing.

The United States has proceeded diligently to determine whether to participate as amicus curiae in this action. This case presents novel and complex issues as to the interpretation and application of the CAA, as well as other legal questions to which the United States has a substantial interest, including whether and how these claims are appropriately heard in federal court. The decision regarding whether to participate as amicus curiae at the petition for rehearing stage is made by the Solicitor General of the United States, *see* 28 C.F.R. § 0.21, and requires

consultation and coordination between the U.S. Department of Justice and interested client agencies. In addition to the waiver argument that the United States has previously presented to this Court, the panel decision and petition for rehearing also advance arguments that the United States is considering but has not previously addressed. Consequently, the coordination and decision-making needed will take more time than permitted by the current deadline of July 20, 2020.

For the foregoing reasons, the United States respectfully requests an additional 14 days to consider whether to participate as amicus curiae in support of the petition for rehearing. This time is necessary for the Office of the Solicitor General to complete this process and for undersigned counsel to complete preparation of a brief, if authorized. If the Solicitor General authorizes participation in support of the petition for rehearing, the United States will file any such brief by August 3, 2020.

Under Federal Rules of Appellate Procedure 40(a)(3) and 35(e), this Court will not ordinarily grant a petition for panel rehearing or rehearing en banc without giving the other side an opportunity to respond. *See also* Cir. R. 40-1 and 35-2. The requested 14-day extension should not materially delay this Court's decision on the petition. At the Court's discretion, it could also provide the Cities with an opportunity to respond to the petition as well as to any filing by the United States.

Defendants do not oppose this motion. Plaintiffs did not respond to the United States' request for their position prior to filing this motion.

### CONCLUSION

This Court should grant the United States a 14-day extension of the time to file any brief as amicus curiae in support of the Energy Companies' petition for rehearing.

Dated: July 13, 2020.

Respectfully submitted,

s/ Christine W. Ennis

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## CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(A) and Ninth Circuit Rule 29-2(c)(2) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this document contains 1,226 words.

2. This document 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) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

s/ Christine W. Ennis  
CHRISTINE W. ENNIS

Counsel for Amicus Curiae  
United States of America



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**DECLARATION BY CHRISTINE W. ENNIS IN SUPPORT OF  
MOTION OF UNITED STATES AS AMICUS CURIAE  
FOR A 14-DAY EXTENSION TO CONSIDER WHETHER  
TO FILE A BRIEF IN SUPPORT OF REHEARING**

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I, Christine W. Ennis, declare as follows:

1. I am attorney with the Environment and Natural Resources Division of the United States Department of Justice, and I represent the United States as amicus curiae in this action. I am competent to testify to the matters in this declaration, and if called to do so, could and would so testify.

2. On July 8, 2020, Defendants filed their Petition for Panel Rehearing and/or Rehearing En Banc.

3. Under Federal Rule of Appellate Procedure 29(b)(5) and Ninth Circuit Rule 29-2(e)(1), a brief by amicus curiae in support of the petition for rehearing is due on July 20, 2020.

4. The United States requests a 14-day extension of time in which to consider and file any amicus brief in support of the petition for rehearing, up to and including Monday, August 3, 2020.

5. There is good cause to extend the deadline for filing an amicus brief in support of a petition for rehearing. The petition for rehearing raises issues that are novel and complex. The United States' consideration of the issues raised by the petition, several of which the United States has not previously addressed, will require more time than the current deadline permits. The requested extension is necessary to allow for consultation and coordination with interested federal agencies and for the Office of the Solicitor General to determine whether to participate at this stage.

6. Undersigned counsel has exercised diligence and the United States will file any amicus brief in support of the petition for rehearing within the time requested.

7. Counsel for Defendants do not oppose this motion. Counsel for Plaintiffs were notified of this motion by e-mail on July 13, 2020 at approximately 12:30 PM EST. As of the time of filing, counsel for Plaintiffs had not responded.

8. The court reporter is not in default with regard to any designated transcripts.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on July 13, 2020 in Washington, D.C.

s/ Christine W. Ennis  
CHRISTINE W. ENNIS

Counsel for Amicus Curiae  
United States of America