No. 19-1818

**UNITED STATES COURT OF APPEALS**
**FOR THE FIRST CIRCUIT**

STATE OF RHODE ISLAND,

*Plaintiff – Appellee*,

v.

SHELL OIL PRODUCTS COMPANY, LLC; CHEVRON CORP.; CHEVRON USA, INC.; EXXONMOBIL CORP.; BP, PLC; BP AMERICA, INC.; BP PRODUCTS NORTH AMERICA, INC.; ROYAL DUTCH SHELL PLC; MOTIVA ENTERPRISES, LLC; CITGO PETROLEUM CORP.; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66; MARATHON OIL COMPANY; MARATHON OIL CORPORATION; MARATHON PETROLEUM CORP.; MARATHON PETROLEUM COMPANY, LP; SPEEDWAY, LLC; HESS CORP.; LUKOIL PAN AMERICAS LLC; and DOES 1-100,

*Defendants – Appellants*,

GETTY PETROLEUM MARKETING, INC.,

*Defendant*.

Appeal from the United States District Court
for the District of Rhode Island, No. 1:18-cv-00395-WES-LDA
The Honorable William E. Smith

# PLAINTIFF–APPELLEE'S RESPONSE TO AMICUS CURIAE BRIEF OF ENERGY POLICY ADVOCATES

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## INTRODUCTION

None of the arguments in Amicus curiae Environmental Policy Advocates' ("Amicus") brief have anything to do with the substance of this appeal: whether Defendants-Appellants were entitled to remove this action from state to federal court. Amicus has offered a brief filled with inflammatory, baseless speculation that Plaintiff-Appellee the State of Rhode Island ("State") initiated this case for improper purposes. The Court should disregard it.

First, amici are not entitled to submit new evidence or argument on appeal absent exceptional circumstances, and there is no extraordinary need for Amicus's irrelevant new information, which would not come close to admissibility even in the trial court. Second, even if the Court had an exceptional basis to consider Amicus's documentary submissions, Amicus's conspiratorial interpretation has no foundation whatever. To the extent Amicus's accusations merit a response from the State, the State denies them. Third, even if the Court were to accept Amicus's arguments at face value, they have no relevance to either the scope of this Court's appellate jurisdiction or the district court's decision to remand this case to Rhode Island state court. Amicus's gesture toward the federal officer removal statute does not address any of the necessary elements of federal officer removal, and is fundamentally flawed. The Court should simply disregard Amicus's brief.

## ARGUMENT

### I. The Documents on Which Amicus Relies Are Unverified, Out-of-Context, Nested Hearsay That Cannot Be Attributed to the State.

The documents Amicus has introduced provide an object lesson in why out-of-court statements offered to prove the truth of the matter asserted in the statement—what the Federal Rules of Evidence define as hearsay—are carefully limited, and why the centuries-old rule against hearsay retains vitality. *See* Fed. R. Evid. 801, 802. The documents contain none of the indicia of trustworthiness that can justify deviating from the rule against hearsay under the specific exceptions enumerated in the Rules of Evidence or otherwise, and Amicus's outlandish interpretation of them highlights why such statements are inadmissible. In any case, amici are generally not permitted to introduce any new issues or even admissible evidence into a pending appeal, and Amicus's documents are no exception.

#### A. Amici Are Not Entitled to Introduce New Evidence and Expand the Appellate Record as Amicus Seeks to Do Here.

It is axiomatic that "this Court may not consider arguments or evidence not presented to the district court," absent exceptional circumstances. *United States v. Font-Ramirez*, 944 F.2d 42, 46 (1st Cir. 1991); *see also* Fed. R. App. P. 10(a) (describing the composition of the record on appeal). The same rule applies to amici: "In the absence of exceptional circumstances, amici curiae may not expand the scope of an appeal to implicate issues not presented by the parties to the district court."

*Richardson v. Ala. State Bd. of Educ.*, 935 F.2d 1240, 1247 (11th Cir. 1991). Even more basically, "in the absence of exceptional circumstances, amicus curiae is not entitled to introduce additional evidence." *Wiggins Bros. v. Dep't of Energy*, 667 F.2d 77, 83 (Temp. Emer. Ct. App. 1981).

Here, there is no basis for Amicus to inject new arguments or evidence after all district court proceedings have ended and the parties' merits briefing in this Court is complete. Amicus has submitted what it claims are notes taken during a two-day conference held in 2019 that a Rhode Island state employee apparently attended, which Amicus claims it obtained through a request under the Colorado Open Records Act, Colo. Rev. Stat. § 24-72-201 *et seq.*, directed at a research center housed at Colorado State University. Corrected Amicus Brief of Energy Policy Advocates (Mar. 26, 2020), at 3 ("Br."). Amicus has not requested that the Court take judicial notice of the notes, nor could it. The "facts" therein clearly are not "generally known within the trial court's territorial jurisdiction" and cannot "be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Among other reasons, Amicus has not provided a copy of the record request or the University's response, and it is impossible to determine when Amicus obtained the documents, or how and why the University obtained and retained them since they do not relate to the University in any way. The documents are not even authenticated, let alone judicially noticeable.

The documents are clearly inadmissible hearsay, and are indeed nested hearsay since they purport to record the statements of another declarant. *See* Fed. R. Evid. 801(c), 805. Neither the notes nor the statements they purport to record are party admissions because, among other reasons, the State has not "manifested that it adopted or believed [them] to be true," and they were not "made by a person whom the party authorized to make a statement on the subject." Fed. R. Evid. 801(d)(2). Neither layer of the nested hearsay is subject to any hearsay exception, *see* Fed. R. Evid. 803 & 804, and there is no reason to presume otherwise. Amicus does not argue that any exception applies. Amicus does not argue that the notes are especially trustworthy or that anyone has relied on them in any way, except to state that Amicus "has no reason to doubt their veracity or accuracy." Br. at 4. That is insufficient overcome the rule against hearsay.

Fundamentally, even before turning to the substance of the documents that are the entirety of Amicus's purported aid to the Court, the documents are procedurally and substantively deficient. Amicus make no serious argument to the contrary. The documents, and the inferences Amicus draws from them, are not before the Court on any justifiable basis, and the Court should accord them no value.

### B. Amicus's Proposed Submission Illustrates Why There Are Rules Against Hearsay.

Amicus's proffered interpretation of its improper documentary submissions—that it somehow suggests the State brought the underlying lawsuit for nefarious

reasons—presents a clear example why hearsay has been handled with suspicion for centuries. Amicus asks the Court to consider a few notes that allegedly capture two individuals' understanding of a third individuals' statements during a wide-ranging discussion among a dozen or so participants, and from those notes deduce improper motives and conduct on the part of a fourth entity, the State of Rhode Island. *See* Br. at 4–7. It is impossible to ascertain what any of the declarants meant to convey or what they believed, or how they were interpreted in context, and would be patently unfair and prejudicial to attribute any of those statements, whatever they mean, to the State. Amicus's "evidence" has no value.

## II. None of Amicus's Arguments Are Relevant to Any Issue Before the Court.

Even if the new documents Amicus has submitted appeared at all to stand for what Amicus says they mean, they would still be of no use to the Court because they do not speak to any question presented in this appeal.

The only question within this Court's appellate jurisdiction is whether the district court properly rejected Defendants-Appellants' attempt to remove pursuant to the federal officer removal statute, 28 U.S.C. § 1442. *See* Plaintiff-Appellee's Response Brief (Dec. 26, 2019), at 6–11; 28 U.S.C. § 1447(d). Amicus appears not to contest that position, since the only legal theory it addresses in its brief is the "historic concern about state court bias" underlying the federal officer removal statute. *See* Br. at 9 (quoting *Savoie v. Huntington Ingalls, Inc.*, 817 F.3d 457, 461

(5th Cir. 2016); *see also* Motion for Leave to File Amicus Brief on Behalf of Energy Policy Advocates in Support of Defendants-Appellants (Mar. 10), at 3, ¶ 3; Br. at ii, 9–10. There is no argument or discussion of any of the seven other bases for removal that Defendants-Appellants alleged below, and therefore the only issue Amicus could assist with is whether federal officer removal was proper.

Amicus's sole position is that federal officer removal is intended to protect federal officers and their surrogates from "'local prejudice' against unpopular federal laws or federal officials," *Watson v. Philip Morris Cos.*, 551 U.S. 142, 150 (2007). In Amicus's view "there is no reasoned basis for declaring that such bias extends only to parties who are unpopular government officials." Br. at 10. Presumably, Amicus means that either "unpopular" corporations should be entitled to removal, or that cases where a state court might interpret federal law are removable. That position is wrong for multiple reasons.

First, the federal officer removal statute *already* applies "[w]here a private person acts as an assistant to a federal official in helping that official to enforce federal law," but "only if they were authorized to act with or for federal officers or agents in affirmatively executing duties under federal law." *Watson*, 551 U.S. at 151. To the extent Amicus argues removal under the statute should be available to private parties acting under federal officers, that is already the case—but Defendants here were not entitled to invoke it because they were not acting under a federal superior

and none of their allegedly tortious conduct was done "for or relating to" a federal duty. *See* Plaintiff-Appellee's Response Brief at 12–18; JA.434 (opinion of district court, finding "[n]o causal connection between any actions Defendants took while 'acting under' federal officers or agencies and the allegations supporting the State's claims").

Second, Amicus argues that the case should be removable because, by its reckoning, the State "hope[s]" the Rhode Island court system will be more likely to "overturn 'unpopular federal laws.'" Br. at 10–11. This is wrong on multiple fronts. The State has not asked that any federal law or standard be overturned, and its claims are not a collateral attack on any government regulation, as the State has explained extensively. *See, e.g.*, Plaintiff-Appellee's Response Brief at 31–35. Moreover, Amicus's argument is that the State's executive has been unable to persuade the *Rhode Island* legislature to adopt certain policies, but Amicus provides no explanation why that indicates bias against *federal* law or *federal* actors.

Third, even if every word of Amicus's arguments are taken as true—and they are not—they do not show that Rhode Island *courts* are biased in a way that would prejudice their ability to adjudicate federal law. To the contrary, state courts, as coequal judicial systems answerable to their own coequal sovereigns, "have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States" or involving interpretation of federal law. *Tafflin v.*

*Levitt*, 493 U.S. 455, 458 (1990); *see also Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 813 (1986) ("[T]he mere presence of a federal issue in a state cause of action does not automatically confer federal question jurisdiction."). Amicus's arguments do not augment or even relate to the historic reasons why Congress enacted the federal officer removal statute.

Finally, none of Amicus's arguments relate to any of the actual elements necessary for federal officer removal. Its arguments do not illuminate the questions whether any Defendant-Appellant was acting under a federal officer, whether their tortious conduct was done "for or relating to" any federal duty, or whether any Defendant has a valid federal defense to the State's claims. *See generally Mesa v. California*, 489 U.S. 121 (1989). Amicus's arguments and the documents it submitted are unsupported, irrelevant, and inflammatory. The Court should accord them no weight.

## CONCLUSION

Amicus's brief does nothing to assist the Court's adjudication of this appeal. The Court should disregard it.

Dated: April 2, 2020

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## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1) and the Court's Order of March 26, 2020, *see* Document No. 00117570542, the undersigned certifies that this brief complies with the applicable typeface, type-style, and type-volume limitations. This brief was prepared using a proportionally spaced type (Times New Roman, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 1,890 words. This certificate was prepared in reliance on the word-count function of the word-processing system used to prepare this brief.

Dated: April 2, 2020

/s/ *Victor M. Sher*
Victor M. Sher

## CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ *Victor M. Sher*
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