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.; EXXON MOBIL 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 U.S. District Court
for the District of Rhode Island, No. 1:18-cv-00395-WES-LDA
(The Honorable William E. Smith)

MOTION OF NATIONAL ASSOCIATION OF MANUFACTURERS, ENERGY MARKETERS OF AMERICA, AND NATIONAL ASSOCIATION OF CONVENIENCE STORES TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF APPELLANTS AND REVERSAL

Linda E. Kelly
Patrick Hedren
Erica Klenicki
MANUFACTURERS' CENTER FOR LEGAL ACTION
733 10th Street, N.W., Suite 700
Washington, D.C. 20001
(202) 637-3000
Of Counsel for the National Association of Manufacturers

Philip S. Goldberg
(Counsel of Record)
Christopher E. Appel
SHOOK HARDY & BACON L.L.P.
1800 K Street, N.W., Suite 1000
Washington, D.C. 20006
(202) 783-8400
pgoldberg@shb.com
Attorneys for Amici Curiae

Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, the National Association of Manufacturers ("NAM"), Energy Marketers of America ("EMA"), and National Association of Convenience Stores ("NACS") request permission to file the accompanying *amici curiae* brief in support of the Appellants. All parties consent to the filing of the attached brief.

The NAM is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.33 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than two-thirds of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the U.S.

EMA is a federation of 47 state and regional trade associations representing energy marketers throughout the United States. Energy marketers represent a vital link in the motor and heating fuels distribution chain. EMA members supply 80 percent of all finished motor and heating fuel products sold nationwide including renewable hydrocarbon biofuels, gasoline, diesel fuel, biofuels, heating fuel, jet fuel, kerosene, racing fuel and lubricating oils. Moreover, energy marketers represented by EMA own and operate approximately 60,000 retail motor fuel

stations nationwide and supply heating fuel to more than 5 million homes and businesses.

The NACS is an international trade association representing the convenience industry with more than 1,500 retail and another 1,500 supplier companies as members, the majority of whom are based in the United States. The convenience industry represents about 80 percent of retail sales of motor fuels purchased across the U.S. The industry as a whole employed about 2.34 million workers and generated more than $548.2 billion in total sales in 2020, representing nearly 3 percent of U.S. gross domestic product. In fact, the industry processes more than 160 million transactions every single day. More than 60 percent of the 150,000 convenience stores in the U.S. are single store operators.

Amici have a substantial interest in attempts by local governments—here, the State of Rhode Island—to subject their members to unprincipled state liability for harms a community alleges are associated with climate change. Climate change is one of the most important public policy issues of our time, and one, as the U.S. Supreme Court found in *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011), that plainly implicates federal questions and complex policymaking. *Amici* submit the accompanying brief to use their broad perspective to educate the Court about the uniquely federal interests implicated and about how this case is part of a

coordinated, national litigation campaign over global climate change and the national debate as to how to mitigate impacts of energy use.

CONCLUSION

For these reasons, *amici* respectfully request the Court grant leave to file the attached brief.

Respectfully submitted,

/s/ Philip S. Goldberg
Philip S. Goldberg (Counsel of Record)
Christopher E. Appel
SHOOK HARDY & BACON L.L.P.
1800 K Street NW, Suite 1000
Washington, D.C. 20006
Telephone: (202) 783-8400
Fax: (202) 783-4211
pgoldberg@shb.com

Linda E. Kelly
Patrick Hedren
Erica Klenicki
MANUFACTURERS' CENTER
FOR LEGAL ACTION
733 10th Street, N.W., Suite 700
Washington, D.C. 20001
(202) 637-3000
Of Counsel for the National Association of Manufacturers

Dated: August 4, 2021

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Fed. R. App. P. 27(d)(2)(A), excluding parts exempted by Fed. R. App. P. 32(f), because it contains 493 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2016 in 14 point Times New Roman font for text and footnotes.

Dated: August 4, 2021

/s/ Philip S. Goldberg
Philip S. Goldberg

CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit using the Court's CM/ECF system.

All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Philip S. Goldberg
Philip S. Goldberg

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AMICI CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS, ENERGY MARKETERS OF AMERICA, AND NATIONAL ASSOCIATION OF CONVENIENCE STORES IN SUPPORT OF APPELLANTS AND REVERSAL

Linda E. Kelly
Patrick Hedren
Erica Klenicki
MANUFACTURERS' CENTER FOR LEGAL ACTION
733 10th Street, N.W., Suite 700
Washington, D.C. 20001
(202) 637-3000
Of Counsel for the National Association of Manufacturers

Philip S. Goldberg
(Counsel of Record)
Christopher E. Appel
SHOOK HARDY & BACON L.L.P.
1800 K Street, N.W., Suite 1000
Washington, D.C. 20006
(202) 783-8400
pgoldberg@shb.com
Attorneys for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(a)(4)(A) of the Federal Rules of Appellate Procedure, counsel for *amici curiae* hereby state that the National Association of Manufacturers, Energy Marketers of America, and National Association of Convenience Stores have no parent corporations and have issued no stock.

Dated: August 4, 2021

/s/ Philip S. Goldberg
Philip S. Goldberg

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are the National Association of Manufacturers ("NAM"), Energy Marketers of America ("EMA"), and National Association of Convenience Stores ("NACS"). *Amici* are dedicated to the manufacturing and sale of safe, innovative and sustainable products that provide consumer benefits while protecting human health and the environment, and fully support national efforts to address climate change. They have a substantial interest in attempts by state and local governments—here, Rhode Island—to subject their members to unprincipled state liability for harms associated with climate change. Climate change is one of the most important public policy issues of our time, and one, as the U.S. Supreme Court found in *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011), that plainly implicates federal questions and complex policymaking.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case is part of a coordinated, national litigation campaign over global climate change and the debate as to how to mitigate impacts of modern energy use. *Amici* appreciate that developing new technologies to reduce greenhouse gas ("GHG") emissions, make energy more efficient, and modify infrastructure to deal

[1] The parties provided consent to the filing of *amicus curiae* briefs. No counsel for a party authored this brief in whole or in part; and no party, party's counsel, or other person or entity—other than *amicus curiae* or its counsel—contributed money intended to fund preparing or submitting the brief.

with the impacts of climate change has become an international imperative. State tort suits against the energy sector cannot achieve these objectives, and state courts are not the appropriate forums to decide these critical national issues.

In *Am. Elec. Power Co. v. Connecticut*, the U.S. Supreme Court addressed the first wave of this litigation campaign. 564 U.S. 410 (2011) (hereafter "*AEP*"). It unanimously held claims alleging harm from the effects of global climate change sound in federal common law and Congress displaced such claims when it enacted the Clean Air Act. *See id*. at 424. Soon after, the strategists behind the litigation campaign began developing ideas for trying to circumvent *AEP*. They looked for legal theories that would achieve comparable national goals, but *appear* different. The focal point of this effort, as here, is re-casting federal public nuisance claims for injunctive relief against the utilities in *AEP* as state public nuisance lawsuits for damages against energy manufacturers.

This case is one of two dozen nearly identical lawsuits filed since 2017 in carefully chosen states based on this same premise. Each complaint asserts that various defendants' production, promotion, and sale of oil, gas or other carbon energy is a public nuisance under state common law or violates another state law. To adjudicate the claims, though, the state courts must create new rules and standards governing the international production, sale, promotion, and use of fossil fuels. But

as this litigation campaign demonstrates, these lawsuits are not specific to any company or community. They are interstate and international in nature and scope.

Amici request the Court to determine that putative state-law claims alleging harm from global climate change are removable because they arise under federal law. As the Supreme Court explained in *AEP*, the climate change issues in these cases are of major national significance. The climate litigation campaign undermines important national energy objectives, including federal efforts on the climate, along with energy independence, the stability of the electric grid, and energy affordability. The Constitution requires these interstate questions to be decided in a federal forum.

ARGUMENT

I. ADJUDICATING ALLEGATIONS OVER EFFECTS OF GLOBAL CLIMATE CHANGE REQUIRES FEDERAL JURISDICTION

In *AEP*, the Supreme Court unequivocally stated that climate tort litigation raises issues of "special federal interest." 564 U.S. at 424. Before the Supreme Court ruled the Clean Air Act displaced any federal common law claims with respect to carbon emissions from fossil fuels, it explained that federal common law addresses subjects "where the basic scheme of the Constitution so demands," including "air and water in their ambient or interstate aspects." *Id.* at 422 (quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972)). This rule of law applies to the climate change claims here in equal force as it did in *AEP*.

The factual predicate is the same here: global climate change is caused by GHGs that are "naturally present in the atmosphere and . . . also emitted by human activities," including the use of fossil fuels. *Id.* at 416. These GHGs combined with other global GHG sources and have accumulated in the atmosphere for more than a century since the industrial revolution. "By contributing to global warming, the plaintiffs asserted, the defendants' carbon-dioxide emissions created a 'substantial and unreasonable interference with public rights,' in violation of the federal common law or interstate nuisance, or in the alternative, of state tort law." *Id.* at 418.

In *AEP*, the Supreme Court followed the two-step analysis from *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301 (1947) in dismissing the claims. First, it determined the claims arose under federal common law and that "borrowing the law of a particular State would be inappropriate." *AEP*, 564 U.S. at 422 (stating the claims are "meet for federal law governance"). There are certain claims that invoke the "interests, powers, and relations of the Federal Government as to require uniform national disposition rather than diversified state rulings." *Standard Oil*, 332 U.S. at 307. Determining rights and responsibilities for global climate change is one of them. Second, and only then, did the Supreme Court hold that Congress displaced remedies that might be granted under federal common law through the Clean Air Act. *See AEP*, 564 U.S. at 425. Only the initial inquiry—whether the subject requires a uniform federal rule—goes to jurisdiction and is before this Court at this time.

When the Supreme Court decided *AEP*, two other climate tort cases were pending. An Alaskan village was suing many of the same energy producers as here under federal law for damages related to sea level rise. *See Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012). In Mississippi, homeowners sued energy producers under state law for property damage from Hurricane Katrina. *See Comer v. Murphy Oil USA, Inc.*, 718 F.3d 460 (5th Cir. 2013). The allegations were the defendants' products caused climate change, which caused the hurricane to be more intense. *See id.* Thus, these cases have direct parallels to the case at bar.

After *AEP*, both cases were dismissed. As the Ninth Circuit explained, even though the legal theories in *Kivalina* differed slightly from *AEP*, given the Supreme Court's message, "it would be incongruous to allow [such litigation] to be revived in another form." *Kivalina*, 696 F.3d at 857. Climate suits alleging harm from emissions across the globe are exactly the sort of "transboundary pollution" claims the Constitution exclusively committed to federal law. *Id.* at 855. For years the law has been clear: regardless of how the claims were packaged—whether over energy use or products, by public or private plaintiffs, under federal or state law, or for injunctive relief or damages—litigation alleging harms from effects of global climate change implicates uniquely federal interests.

II. THIS CASE IS PART OF A LITIGATION CAMPAIGN TO HAVE STATE COURTS UNDERMINE THE U.S. SUPREME COURT'S JURISPRUDENCE ON CLIMATE LAWSUITS

Strategists behind this litigation campaign were undeterred. They convened in California to brainstorm on how to re-package the litigation once again in hopes of achieving their own national priorities. *See* Findings of Fact and Conclusions of Law, *In re ExxonMobil Corp.*, No. 096-297222-18 (Tex. Dist. Ct.–Tarrant Cty. Apr. 24, 2018), at 3. They decided to file multiple lawsuits, try to "side-step federal courts and Supreme Court precedent," and convince state courts to help them advance their national agenda. Editorial, *Climate Lawsuits Take a Hit*, Wall St. J., May 17, 2021.

Organizers of the conference published their discussions. *See Establishing Accountability for Climate Damages: Lessons from Tobacco Control, Summary of the Workshop on Climate Accountability, Public Opinion, and Legal Strategies*, Union of Concerned Scientists & Climate Accountability Institute (Oct. 2012). Despite *AEP*, they said "the courts offer the best current hope" for imposing their national public policy agenda over fossil fuel emissions. *Id.* at 28. They discussed "the merits of legal strategies that target major carbon emitters, such as utilities [as in *AEP*], versus those that target carbon producers." *Id*. at 12. And they talked through various causes of action, "with suggestions ranging from lawsuits brought under public nuisance laws," such as the one here, "to libel claims." *Id.* at 11.

Given *AEP*, they emphasized making the lawsuits look like traditional damages claims rather than directly asking a court to regulate emissions or to put a price on carbon use. *See id.* at 13. As one participant said, "Even if your ultimate goal might be to shut down a company, you still might be wise to start out by asking for compensation for injured parties." *Id.* They also decided to pursue claims under state law and discussed "the importance of framing a compelling public narrative," including "naming [the] issue or campaign" to generate "outrage." *Id.* at 21, 28.[2] At a follow up session in 2016, they explained that "creating scandal" through lawsuits would also help "delegitimize" the companies politically. *See Entire January Meeting Agenda at Rockefeller Family Foundation*, Wash. Free Beacon, Apr. 2016.

Lawsuits following these tenets were filed starting in 2017. As discussed above, they are meant to look different from *AEP* by targeting energy producers, invoking state laws, and seeking abatement and damages. To name the litigation crusade, supporters asserted some widespread "campaign of deception" involving the many, various companies named in the lawsuits. *See, e.g.*, Complaint, *City of Charleston v. Brabham Oil Co., Inc.*, No. 2020-CP-10 (S.C. Ct. Comm. Pleas Sept. 9, 2020) (using the phrase 23 times). This lawsuit names nearly two dozen

[2] As one advocate said, "sea walls and repairing roads won't do anything to fix our global climate system, but it will drain the profits of the fossil fuel companies." *Atmospheric Recovery Litigation: Making the Fossil Fuel Companies Pay for Cleaning up the Atmosphere*, YouTube, May 23, 2018.

companies, others name only one or two, whereas some name upwards of thirty, including local companies to try to keep cases in state court. This ever-changing list of companies alleged to have participated in this so-called "campaign of deception" highlights the specious nature of the narrative.

Supporters of this litigation campaign have used political-style tactics, both to drive the litigation and to leverage the litigation to achieve their true, extrajudicial goals. They have taken out advertisements and billboards blaming energy companies for climate change and urging public officials to file lawsuits, as well as hosted symposiums and press conferences to generate media attention. *See generally* Beyond the Courtroom, Manufacturers' Accountability Project[3] (detailing this litigation campaign). Thus, unlike traditional state tort suits, success here includes merely filing and maintaining state suits they can use for national policy goals.

III. CLAIMS ALLEGING HARMS FROM CLIMATE CHANGE PRESENT UNIQUELY FEDERAL INTERESTS

The state law theories in this litigation are mere fig leaves. Unlike traditional local property damage cases, the theory of harm here is not moored to any plaintiff, defendant, location or jurisdiction. As the Second Circuit stated in response to a similar lawsuit by the City of New York, "we are told that this is merely a local spat about the City's eroding shoreline, which will have no appreciable effect on national

[3] https://mfgaccountabilityproject.org/beyond-the-courtroom.

energy or environmental policy. We disagree. Artful pleading cannot transform the City's complaint into anything other than a suit over global greenhouse gas emissions." *City of New York v. Chevron Corp.*, 993 F.3d 81, 91 (2d Cir. 2021).

As the Second Circuit explained, merely referencing state claims and asking for compensation does not make these federal matters suddenly suitable for state courts. This litigation, the court stated, seeks to subject energy manufacturers to state tort liability "for the effects of emissions made around the globe over the past several hundred years," which includes "conduct occurring simultaneously across just about every jurisdiction on the planet." *Id.* at 92. "Such a sprawling case is simply beyond the limits of state tort law." *Id.* Thus, as the Second Circuit did, this Court should consider the substance of the claims, not merely the labels the complaint uses.

Since *AEP*, state public nuisance has been the tort of choice for climate suits because its "vague" sounding terms are often misunderstood. *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981). Architects of this effort have bemoaned their fifty-year failure to transform public nuisance into a tool for industry liability. *See* Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 Ecol. L.Q. 755, 838 (2001). The allure of such a theory is understandable: the suits are funded by outside counsel, promise funding for local projects, and target particular products. But they are unfounded, and courts have been skeptical of them. *See, e.g.*, *North Carolina v. Tennessee Valley Auth.*, 615 F.3d

291 (4th Cir. 2010); *see also* Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741 (2003) (discussing cases).

In these cases, masking federal issues under state public nuisance law does not stand up to minimal scrutiny. The accumulation of GHGs in the atmosphere, global warming-induced sea level rise around the world, and the international promotion and sale of fossil fuels all exist far outside any local government's authority. Also, as counsel acknowledged in a sister case, their "campaign of deception" narrative is only a "plus factor" and not required for their liability theory. *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1022 (N.D. Cal. 2018).

Federal judges have seen through these attempts to mischaracterize the federal nature of this litigation. For example, Judge Keenan, who dismissed New York City's climate lawsuit, observed the City's claims were "trying to dress a wolf up in sheep's clothing" by "hiding an emissions case." Larry Neumeister, *Judge Shows Skepticism to New York Climate Change Lawsuit*, Assoc. Press, June 13, 2018. This is the context in which the Supreme Court, in *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532 (2021), remanded these cases for further review.

Plaintiffs should not be able to avoid federal scrutiny by painting federal claims with a state law brush. The Supreme Court has appreciated that state court proceedings "may reflect 'local prejudice' against unpopular federal laws" or defendants. *Watson v. Philip Morris Cos.*, 551 U.S. 142, 150 (2007). Indeed,

Annapolis officials in announcing their climate suit expressed unusual confidence "the Maryland courts will get us there." Brooks Dubose, *Annapolis Sues 26 Oil and Gas Companies for their Role in Contributing to Climate Change*, Cap. Gazette, Feb. 23, 2021. Hometown recoveries would be highly inappropriate here. State courts are not positioned to decide who, if anyone, is to be legally accountable for climate change, how energy policies should change to address it, and how local mitigation projects should be funded.

IV. THE COURT SHOULD MAINTAIN THE INTEGRITY OF THE FEDERAL-STATE DUAL COURT SYSTEM

This Court should not permit Rhode Island to mask its attempt to regulate national GHG emissions and the worldwide production of fossil fuels by "artfully" pleading claims under state tort law. *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 475 (1998). Outside of court, the State has already admitted the true goal of this litigation is to impose its own energy policies on the rest of the country. In the press release announcing the suit, the Governor said the litigation is about "standing up together against the Trump Administration's actions." Press Release, *Rhode Island Attorney General Kilmartin Files Lawsuit Against Fossil Fuel Companies for Costs and Consequences of Climate Change*, Office of the Attorney General, July 2, 2018.

A reporter following the litigation has observed this incongruity nationally, writing: the governments say "the cases are not about controlling GHG emissions . . . But they also privately acknowledge that the suits are a tactic to

pressure the industry." Dawn Reeves, *As Climate Suits Keeps Issue Alive, Nuisance Cases Reach Key Venue Rulings*, Inside EPA, Jan. 6, 2020. However, such legal strong-arming could undermine federal efforts to reach America's climate goals by tying the hands of federal leaders. They also could hurt efforts by other states. More than fifteen state attorneys general have objected to this litigation because Rhode Island and other governments are using it to "export their preferred environmental policies and their corresponding economic effects to other states." *Amicus* Brief of Indiana and Fourteen Other States in Support of Dismissal, *City of Oakland v. BP*, No. 18-1663 (9th Cir. filed Apr. 19, 2018).

What these attorneys general understand is that despite Rhode Island's rhetoric, when courts impose liability the impact is to regulate conduct. As the Second Circuit observed: "If the Producers want to avoid all liability, then their only solution would be to cease global production altogether." *City of New York*, 993 F.3d at 93. However, a state court, wielding state common law, cannot decide whether to stop the sale of fossil fuels across the nation. Lawsuits alleging that energy manufacturers can be subject to untold liability for local harms caused by global climate change should not be the result of state-by-state ad hoc rulings. Only uniform federal law can supply the uniform governing standards that can be applied here.

CONCLUSION

For these reasons, the Court should reverse the district court's remand order.

Respectfully submitted,

/s/ Philip S. Goldberg

Philip S. Goldberg (Counsel of Record)
Christopher E. Appel
SHOOK HARDY & BACON L.L.P.
1800 K Street NW, Suite 1000
Washington, D.C. 20006
Telephone: (202) 783-8400
Fax: (202) 783-4211
pgoldberg@shb.com

Linda E. Kelly
Patrick Hedren
Erica Klenicki
MANUFACTURERS' CENTER
FOR LEGAL ACTION
733 10th Street, N.W., Suite 700
Washington, D.C. 20001
(202) 637-3000
Of Counsel for the National Association of Manufacturers

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