**No. 19-1189**

In the Supreme Court of the United States

BP P.L.C., ET AL.,

*Petitioners*,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE,

*Respondent*.

# BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit


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## INTEREST OF *AMICUS CURIAE*[1]

The National Association of Manufacturers (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 $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters 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 United States.

Over the past decade, manufacturers have reduced the carbon footprint of our products by 21 percent while increasing our value to the economy by 18 percent, and the reductions are continuing. The NAM is committed to protecting the environment and to environmental sustainability, and fully supports national efforts to address climate change and improve public health through appropriate laws and regulations. The NAM has grave concerns, however, about the attempt here to circumvent the political

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity, other than *amicus curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief. The parties received timely notice of the intent of *amicus curiae* to file this brief. Petitioners filed a blanket consent to the filing of amicus briefs, and Respondents provided written consent to the filing of this brief.

branches and traditional liability law to create categorical liability for lawful, beneficial energy products essential to modern life.

Accordingly, the NAM has a substantial interest in attempts by local governments—here, the Mayor and City Council of Baltimore—to subject energy manufacturers to unprincipled liability for harms that a community alleges are associated with climate change. Climate change is one of the most important public policy issues of our time, and one that plainly implicates federal questions and policymaking. As this Court made clear in unanimously dismissing *Am. Elec. Power v. Connecticut*, 564 U.S. 410 (2011), the public policies implicated by these cases are "within national legislative power" and Congress and the EPA are "better equipped to do the job than individual district judges issuing ad hoc, case-by-case" decisions. *Id.* at 421, 428.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This case is part of a new wave of highly-coordinated lawsuits born out of political frustration that Congress and the administration have not done more to adopt specific policies to address climate change. This particular lawsuit seeks to use state tort law to regulate the national production and sale of energy products that have been essential to modern life since the industrial revolution. *Amicus* appreciates that due to climate change, developing new technologies that can reduce greenhouse gas (GHG) emissions and make energy more efficient and environmentally friendly has become an international imperative. As this Court explained in *Am. Elec. Power v. Connecticut*, however, the public policy deci-

sions needed to achieve these goals "cannot be prescribed in a vacuum" of tort litigation. 564 U.S. 410, 427 (2011) (hereafter "*AEP*"). Nevertheless, this suit and others like it seek to draw the courts into the position of establishing national public policy affecting carbon emissions in such a way that would result in a parallel, potentially conflicting regulatory structure on the sale and use of fossil fuels.

As detailed below, after the Court's ruling in *AEP*, the litigants that comprise this nationwide campaign began developing strategies for presenting new lawsuits that could achieve comparable national regulatory goals, but would appear different to some courts than *AEP*. In 2017, they started teaming with local governments to file nearly identical state-based lawsuits in carefully chosen jurisdictions around the country. This case is one of these lawsuits. Each complaint asserts that Defendants' promotion and sale of oil, gas or other carbon energy is a public nuisance or violates another state common law tort or statute. These cases, however, rely on the same faulty legal foundations this Court rejected in *AEP*: the subject matter and remedies they seek are inherently national and legislative in nature. Two federal district courts have already determined that lawsuits like these lack any legal distinction with *AEP*. However, by filing their claims in multiple jurisdictions, the organizers of this litigation are seeking to increase the odds a court will allow one of the cases to proceed, which they believe will be further increased if they can avoid the federal courts.

Given the national nature and implications of this litigation, the defendants properly removed each case to the federal judiciary. In response to the two dis-

missals, the Second and Ninth Circuits are assessing the merits as well as the remand issues presented in the Petition. The Fourth Circuit here decided to remand the cases to state court. The Tenth and First Circuits are still hearing the jurisdictional questions. Other cases, as in Hawaii, are still being filed.

As the Court clearly appreciated in *AEP* after the Second Circuit initially allowed that case to proceed, climate public policy issues inherent to these cases are of major national significance. Climate tort litigation undermines the careful balance best struck in the political branches when setting national environmental policy. These public policy decisions are based on a multitude of factors including energy independence, the stability of the electric grid, and affordability for families and businesses across the country, in addition to climate change. Such decisions should not be driven by individual judges in individual courtrooms in individual states based solely on a narrow set of climate allegations.

Amicus respectfully requests the Court to grant the Petition for two reasons. First, it should resolve the circuit split the Petition identifies with the scope of appellate review of remand orders involving the federal officer removal statute. Second, as a matter of judicial efficiency, it should resolve the jurisdictional question of whether climate tort cases should be heard in state or federal court so these cases do not reach different outcomes in different circuits. Policy advocates should not be rewarded for filing claims in multiple jurisdictions when there is a Circuit split on key issues of appellate review. The federal judiciary should speak with a single voice and dissuade any such attempts at forum shopping.

## ARGUMENT

### I. THE COURT SHOULD GRANT THE PETITION TO DECIDE WHETHER LITIGATION SEEKING TO DRIVE NATIONAL ENERGY POLICY ON CLIMATE CHANGE CAN BE HEARD IN STATE COURT

This Court effectively ended the first wave of climate change tort litigation in 2011 when it unanimously ruled in *AEP* that the Clean Air Act displaced any federal common law claims over GHG emissions. *See* 564 U.S. at 425 (explaining there is "no room for a parallel track" of tort litigation because Congress delegated the authority to regulate GHG emissions to the Environmental Protection Agency). The Court, however, did not stop there. It explained the institutional deficiencies with judges deciding climate public policy issues, stressing that Congress and EPA are "better equipped to do the job" of making national energy policy decisions to account for climate change than "district judges issuing ad hoc, case-by-case" decisions. *Id.* at 421, 428.

After *AEP*, the two remaining climate change tort suits were quickly dismissed. The Ninth Circuit disposed of *Kivalina v. ExxonMobil Corp.*, where an Alaskan village sued many of the same companies as here for alleged damages related to rising sea levels. *See* 696 F.3d 849 (9th Cir. 2012). The court appreciated that even though the legal theories pursued in *Kivalina* differed slightly from *AEP*, given the Court's broader message, "it would be incongruous to allow [such litigation] to be revived in another form." 696 F.3d at 857. A federal judge then dismissed Mississippi homeowners' state law claims in *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 249 (S.D.

Miss. 2012) over property damage caused by Hurricane Katrina, finding *AEP* preempted those claims. A fourth case seeking to subject auto manufacturers to liability for making cars that emit GHGs had already been dismissed and was not revived. *See California v. General Motors Corp.*, C06-05755 MJJ, 2007 WL 2726871, at *14 (N.D. Cal. Sept. 17, 2007).

Undeterred, the advocacy groups and lawyers intent on using tort litigation to drive climate change public policy convened in La Jolla, California in 2012 to brainstorm on how to re-package the litigation in hopes of achieving success. *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 (discussing the "Workshop on Climate Accountability, Public Opinion, and Legal Strategies"). They discussed several strategies, including filing multiple lawsuits in multiple jurisdictions, hoping one case would reach discovery and put "pressure on the industry that could eventually lead to its support for legislative and regulatory responses to global warming." *Id*. They believed "the courts offer the best current hope for gaining the energy industry's cooperation in converting to renewable energy." *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).

The organizers' report on the 2012 La Jolla conference detailed their strategy for how to re-package this next round of litigation. They discussed "the merits of legal strategies that target major carbon emitters, such as utilities [as in *AEP*], versus those

that target carbon producers," as here. *Id.* at 12. They talked through various causes of action, "with suggestions ranging from lawsuits brought under public nuisance laws . . . to libel claims." *Id.* at 11. Some emphasized the advantage of making the cases look like traditional tort claims, rather than directly asking a court to regulate emissions or put a price on the use of carbon. *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 their claims under state legal theories in hopes of avoiding *AEP*'s displacement ruling. Finally, they discussed the importance of the public narrative and need to coordinate each facet of the climate litigation campaign. *See id.* at 27. Lawsuits following these tenets started in 2017.

Thus, the case at bar and the dozen or so other local government climate tort suits the energy industry has removed to the federal judiciary are parts of the same litigation campaign. *See generally* Manufacturers' Accountability Project, Beyond the Courtroom[2] (detailing the common funding and coordination of the litigation campaign). As here, the claims may be packaged under state tort law, but their goals, the nature of the litigation, and the remedies they seek are all inherently national. A reporter who follows this litigation observed this incongruity:

> State and local governments pursuing the litigation argue that the cases are not about controlling GHG emissions but instead about collecting damages

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

> from oil companies for the harms their products have already caused. But they also privately acknowledge that the suits are a tactic to pressure the industry to support future mitigation policies.

Dawn Reeves, *As Climate Suits Keeps Issue Alive, Nuisance Cases Reach Key Venue Rulings*, Inside EPA, Jan. 6, 2020.[3] As other reports have uncovered, the organizers of this campaign are seeking to leverage the litigation for "creating scandal" that would "delegitimize" the companies in the political arena and make elected officials "disassociate themselves" from the industry. *Entire January Meeting agenda at RFF*, Washington Free Beacon, April 2016.[4]

Ultimately, their public policy goal is to penalize energy production and use—what they call imposing the "true cost" of fuels on consumers. Kirk Herbertson, *Oil Companies vs. Citizens: The Battle Begins Over Who Will Pay Climate Costs*, EarthRights, March 21, 2018. As fifteen state attorneys general explained in an *amicus* brief in one case, these remedies would know no state bounds: "Plaintiffs are attempting 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* (9th Cir. filed April 19, 2018).

Litigants are filing these suits in state courts because the organizers believe federal courts "are less

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[3] https://insideepa.com/outlook/climate-suits-keeps-issue-alive-nuisance-cases-reach-key-venue-rulings

[4] https://freebeacon.com/wp-content/uploads/2016/04/Entire-January-meeting-agenda-at-RFF-1-1.pdf.

favorable" to their claims. Mark Kaufman, *Judge Tosses Out Climate Suit Against Big Oil, But It's Not the End for These Kinds of Cases*, mashable.com, June 26, 2018 (quoting Prof. Carlson, an advisor to Plaintiff's counsel in these cases); *see also* Susanne Rust, *California Communities Suing Big Oil Over Climate Change Face a Key Hearing Wednesday*, Los Angeles Times, Feb. 5, 2020 (quoting Prof. Hecht, co-Executive Director of the Emmett Institute on Climate Change and the Environment at UCLA School of Law, as saying the California governments "are arguing to have their suits heard in California state courts, which compared to their federal counterparts, tend to be more favorable to 'nuisance' lawsuits").

As this Court made clear in *AEP*, setting national energy policy on climate change is "of special federal interest" and that "borrowing the law of a particular State would be inappropriate." *AEP*, 564 U.S. at 422-24. The Court should grant review here and ultimately find that this litigation is also of special federal interest and, therefore, not appropriate for the states. It should also decide that the federal officer removal statute does not create blinders preventing the Courts of Appeal from reaching these other important grounds for removal.

## II. THE COURT SHOULD GRANT THE PETITION TO RESOLVE THE CIRCUIT SPLIT ON REMAND ISSUES COMMON TO SEVERAL CLIMATE TORT CASES

The climate tort claims that are part of this litigation campaign are not like traditional property damage cases; they are not moored to any specific location, jurisdiction or circuit. The lawyers developing these cases have been actively recruiting locali-

ties around the country to allow them to file claims on their behalf in multiple state court jurisdictions. They have now filed some fifteen climate tort lawsuits, and none have been filed in the three Circuits—the Fifth, Sixth and Seventh Circuits—that would "allow appellate review of the *whole* order" when the removing defendant premised removal in part on the federal-officer removal statute, 28 U.S.C. § 1442. *See Lu Juhong v. Boeing Co.*, 792 F.3d 805, 811 (7th Cir. 2015). Rather, they have chosen the Fourth Circuit and other circuits that have no on-point rulings or will review only the federal officer removal issue and nothing else. Even still, their cases have resulted in highly divergent outcomes, which is why the Court's guidance is needed here.

As alluded to above, two of the district courts denied plaintiffs' remand motions and resolved the claims on the merits, dismissing them because they raised the same public policy concerns as in *AEP*. *See City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466 (S.D.N.Y. 2018); *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017 (N.D. Cal. 2018). In New York's case, which blames five energy manufacturers for the City's climate change injuries, Judge Keenan echoed the Court's statements in *AEP* that "the serious problems caused thereby are not for the judiciary to ameliorate. Global warming and solutions thereto must be addressed by the two other branches of government." 325 F. Supp. 3d at 474-75. He also observed during a hearing that the City's lawsuit was "hiding an emissions case in language meant to seem it was instead targeting the companies' production and sales operations." Larry Neumeister, *Judge*

*Shows Skepticism to New York Climate Change Lawsuit*, *Associated Press*, June 13, 2018.[5]

Judge Alsup in Oakland's case, which also blames the same five companies for climate change injuries there, made similar observations: "The scope of plaintiffs' theory is breathtaking. It would reach the sale of fossil fuels anywhere in the world." *City of Oakland*, 325 F. Supp at 1022. The remedy plaintiffs seek "would effectively allow plaintiffs to govern conduct and control energy policy on foreign soil." *Id.* at 1026. "Nuisance suits in various United States judicial districts regarding conduct worldwide are far less likely to solve the problem and, indeed, could interfere with reaching a worldwide consensus. . . . The problem deserves a solution on a more vast scale than can be supplied by a district judge or jury in a public nuisance case." *Id.* at 1026, 1029. These cases have been appealed and are before the Second and Ninth Circuits, respectively. *See City of New York v. BP P.L.C.*, No. 18-2188 (2nd Cir.); *City of Oakland v. BP P.L.C.*, No. 18-16663 (9th Cir.).

The other cases, as with the case at bar, are at the early procedural stage of determining whether the cases are to be heard in federal or state court. Three California localities—San Mateo, Imperial Beach and Marin County—each named more than twenty energy producers as being responsible for their climate change damages and had their cases consolidated for procedural motions. *See* Notice of Removal, *Cty. of San Mateo v. Chevron*, No. 17-cv-04929, No. 17-cv-04934 and No. 17-cv-04935 (N.D. Cal. filed July 17, 2017). The District Court granted

[5] https://apnews.com/dda1f33e613f450bae3b8802032bc449.

the consolidated motion for remand, acknowledging "these state law claims raise national and perhaps global questions" but not finding they met the specific requirements for removal. *Cty. of San Mateo v. Chevron*, No. 17-cv-04929 (N.D. Cal. Mar. 16, 2018). The appeal of the remand order was heard by the Ninth Circuit on the same day as the Oakland case.

In Colorado, several local governments named only two energy manufacturers as being liable for all of their climate change harms, demonstrating the highly political nature of deciding whom to sue in these cases. *See Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, 405 F. Supp. 3d 947 (D. Colo. Sept. 5, 2019). The District Court granted the plaintiffs' motion to remand the case to Colorado state court based on the well-pleaded complaint rule, irrespective of the inherent national nature of the claims and remedies. *See id.* at 962-63. This case is currently pending in the Tenth Circuit. *Bd. of Cty. Comm'rs of Boulder Ct. v. Suncor Energy (U.S.A.) Inc.*, No. 19-1330 (10th Cir.).

A similar case against about a dozen energy producers is pending in the First Circuit, as a Federal District Court in *Rhode Island v. Chevron Corp.*, also granted a motion for remand. The District Court there stated that it refused to "peek beneath the purported state-law façade of the State's public nuisance claim [to] see the claim for what it would need to be to have a chance at viability." 393 F. Supp. 3d 142, 148 (D. R.I. July 22, 2019). This case is pending in the First Circuit. *See Rhode Island v. Shell Oil Prods. Co., LLC*, No. 19-1818 (1st Cir.).

*King Cty. v. BP P.L.C.*, has already been stayed pending a decision by the Ninth Circuit in *City of*

*Oakland v. BP P.L.C.* *See* Order Granting Partially Unopposed Motion to Stay Proceedings, No. C18-758-RSL (W.D. Wash. Oct. 17, 2018). The court found that "[i]t is unlikely that a stay would result in any significant damage or cause any hardship to any party." *Id.* at 2. It also found the cases to be "materially identical" to Oakland's case. *Id.* In the past few weeks, additional climate lawsuits were filed by the Cities of Honolulu and announced by Maui. *See* Complaint, *City and Cty. of Honolulu v. Sunoco LP*, No. 1CCV-20-0000380 (Haw. Cir. Ct. filed Mar. 9, 2020); *Maui Council Unanimously Backs Mayor's Request to Sue Big Oil*, Maui Now, Feb. 21, 2020.

All of these lawsuits raise the same jurisdictional issues as the Petition: whether claims alleging that energy manufacturers can be subject to liability for harms caused by climate change should be heard in federal or state court. They should receive the same treatment regardless of where in the federal judiciary they are heard. Otherwise, as here, litigants that are not tied to specific jurisdictions, could take advantage of circuit splits and choose the forums they believe most advantageous to them. By granting the Petition, the Court can resolve the circuit split related to the federal officer removal statute, decide the remand issues common to all these claims, and reduce the opportunities for such forum shopping.

## III. THE COURT SHOULD GRANT THE PETITION AS A MATTER OF JUDICIAL EFFICIENCY

Finally, the Petition should be granted because it would be a waste of judicial resources for Plaintiffs to start discovery or have a state trial when this case—and the others like it—will likely be resolved in the

federal courts. In *AEP*, the Court made clear that the legal policy decisions governing this type of litigation involve national legislative issues, not tort remedies in accordance with state or federal law. The Court has the opportunity to affirm its position here and avoid years of potentially protracted, expensive litigation designed to achieve an extrajudicial purpose and that is highly unlikely to succeed in the courts.

As the Court found in *AEP*, setting climate change public policy is solely "within national legislative power" because, "as with other questions of national or international policy, informed assessment of competing interests is required." 564 U.S. at 427. The Court described this issue as one of institutional competency—not merely displacement of federal common law—stating judges "lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order." *Id.* at 428. They "are confined by a record comprising the evidence the parties present," and "may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators in the States where the defendants are located." *Id.* Also, they cannot weigh any "environmental benefit potentially achievable [against] our Nation's energy needs and the possibility of economic disruption." *Id.* at 427.

Judges applying state common law suffer from these same disadvantages and are no better situated to make these national energy policies than judges applying federal law. To this end, the Court already stated these public policies are "of special federal interest" and that "borrowing the law of a particular

State would be inappropriate." *Id.* at 422-24. Further, in oral argument, Justice Kennedy identified the legal awkwardness of having only a federal cause of action before the Court, saying "[i]t would be very odd" or illogical for state courts to set national caps on GHG emissions when federal courts are barred from doing so. Transcript of Oral Argument, *Am. Elec. Power v. Connecticut*, 564 U.S. 410 (2011), at 32. Of significant concern here is that state courts "may reflect 'local prejudice' against unpopular federal laws" or defendants. *Watson v. Philip Morris Cos.*, 551 U.S. 142, 150 (2007); *accord Savoie v. Huntington Ingalls, Inc.*, 817 F.3d 457, 461 (5th Cir. 2016) (observing the "historic concern about state court bias" in officer removal statute cases).

Accordingly, federal positive law, not state judge-made law, governs the complex national energy issues here. The different ways that plaintiffs have packaged these lawsuits, namely seeking abatement or money damages instead of injunctive relief, do not cure these institutional deficiencies. To the contrary, the Court has consistently held that tort damages "directly regulate" conduct the same as legislation and regulation. *See, e.g., Riegel v. Medtronic, Inc.*, 552 U.S. 312, 325 (2008) ("tort duties of care" under state law "directly regulate" a defendant's conduct). A person subjected to liability must change the offending conduct to avoid liability, just as it must to comply with statutes and regulations. *See Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005) (finding state tort liability imposes state law requirements). Such outcomes cannot be entirely divorced from the complaints under the well-pleaded complaint rule.

Finally, Plaintiff's proposed remedy underscores the parochial nature of this litigation: it seeks to impose a penalty on energy production, but only on these Defendants and only on their products regardless of fault or causation. Further, this penalty would be assessed irrespective of the ability of families and businesses to pay more for their energy needs, the impact on the U.S. economy and energy independence, or the other imperative factors Congress and federal agencies must consider when presented with such public policy choices. Thus, this type of sweeping public policy raises the very competing interests the Court warned against in *AEP*.

To be sure, granting the Petition and assigning it to federal courts is not surrendering to climate change. Rather it places the debate where it must be considered: Congress and the federal agencies. The best way to address climate change concerns and impacts is for Congress, federal agencies, and local governments to work with America's manufacturers on policies and new technologies that reduce emissions. *See* Ross Eisenberg, *Forget the Green New Deal. Let's Get to Work on a Real Climate Bill*, Politico, Mar. 27, 2019.[6] Innovation and collaboration, not litigation, remain the proven ways America has always brought about the type of society-wide technological advancement needed to address this global challenge.

Allowing this case to proceed in state court will undermine such efforts to meaningfully address climate change. The production and use of oil and gas are hardly public nuisances. They are essential to

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[6] https://www.politico.com/magazine/story/2019/03/27/green-new-deal-climate-bill-226239.

modern life, and their risks and externalities must continue to be managed and reduced. Only Congress and federal agencies can balance these interests, assign responsibility, and allocate funding in light of the broad public welfare considerations at issue.

## CONCLUSION

For these reasons, *amicus curiae* respectfully request that this Court grant the Petition.

Respectfully submitted,

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