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.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF *AMICUS CURIAE* ENERGY POLICY ADVOCATES IN SUPPORT OF THE PETITIONERS FILED BY CONSENT OF ALL PARTIES

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INTEREST OF *AMICUS CURIAE*[1]

Energy Policy Advocates ("EPA") is a nonprofit organization incorporated under the laws of Washington State, dedicated to bringing transparency to the actions of government. As part of that project, EPA has obtained emails and handwritten and typewritten notes under public records requests, which records on their face confess to the driving factor behind this litigation and similar litigation and inform the inquiry into federal versus state jurisdiction in this booming class of "climate nuisance" litigation filed in state courts. These records EPA obtained prompted it to file its first *amicus* brief in the U.S. Court of Appeals for the First Circuit, where removal of another among the growing number of "climate nuisance" lawsuits filed by governmental entities seeking billions of dollars from private parties is pending.[2] That brief revealed two sets of notes each purporting, independently, to record the assertion by an official with the governmental plaintiff in that case, the State of Rhode Island, that the litigation seeks to obtain a "sustainable funding stream" to underwrite that State's spending ambitions,

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[1] Pursuant to Rule 37.6, counsel for *Amicus* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than *Amici* or their counsel made a monetary contribution intended to fund the brief's preparation or submission. All parties' counsel of record received notice regarding the filing of this brief on April 27, 2020. This brief is filed by consent of all parties. Petitioners filed a blanket consent for all such briefs on April 13, 2020. Respondent provided its written consent via email on April 29, 2020.

[2] See *State of Rhode Island v. Shell Oil Products Co., LLC, et al.*, Case No. 19-1818 (1st Cir.). Leave for EPA to file as *amicus curiae* granted on March 26, 2020

after the State's legislature declined to provide the desired funds. Rhode Island's confession was made at a meeting attended by "cabinet"-level representatives of numerous state governments from across the nation, including a representative from Maryland, and emphasized the desire to proceed in state courts.[3] In that First Circuit litigation, numerous parties rely upon the Fourth Circuit's decision in the instant matter, and parties to the First Circuit litigation addressed the Fourth Circuit's opinion below in letters of supplemental authority pursuant to Fed. R. App. Pro. 28(j). Because EPA has obtained records confessing the rationale behind the veritable tsunami of state-court "climate nuisance" lawsuits such as the one now before this Court, and affirming the plaintiffs' emphasis among peers and other potential governmental plaintiff-recruits on using state courts for these actions with national policy implications and avoiding the federal court system, EPA is keenly interested in this case and asks this Court to grant certiorari to address the proper relationship between the state and federal court systems.

SUMMARY OF ARGUMENT

As important as climate policy is to both state and federal governments, equally and arguably more important is the principle that the courts' role is not to make policy judgments. This Court held in *American Electric Power v. Connecticut*, 131 S. Ct. 2527, 2539,

[3] A full list of attendees prepared by the organizers and obtained under Colorado law is available at https://govoversight.org/wp-content/uploads/2020/01/Fulsome-list-of-participants.png.

564 U.S. 410, 426 (2011) that "the federal courts would have no warrant to employ the federal common law of nuisance to upset" federal primacy in climate regulatory policy. But rather than heed the *American Electric Power* opinion's warnings that federal policy decisions are to be made by Congress or by federal agencies exercising properly delegated authority, certain litigants have instead attempted to end run that holding by seeking to create policy in state, rather than federal, courts. While federal courts are courts of limited jurisdiction, in this matter the decision below is based upon a series of cases that have eviscerated the jurisdiction of federal courts, even when important federal interests are at stake. This is in conflict with the decisions of other Circuits, congressional action taken since these Fourth Circuit precedents were adopted, and this Court's own rulings. Allowing the opinion below to stand will cause mischief in state courts across the nation. Recently obtained public records provide strong impetus to acknowledge, as a formal matter, that this "climate nuisance" litigation campaign is an impermissible use of the state courts, just as this Court previously held it was an impermissible use of the federal courts. This Court should prevent litigants from seeking the most favorable forum to obtain political and policy ends by judicial means.

ARGUMENT

I. THE FOURTH CIRCUIT'S DECISION CONTRADICTS RECENT JURISPRUDENCE AND LEGISLATION. THIS COURT SHOULD GRANT CERTIORARI TO ENFORCE ITS OWN PRECEDENTS AND CONGRESSIONAL INTENT

The decision below, designated for publication and with the potential to shape or confuse the law for years to come, is based on a series of precedents unique to the Fourth Circuit, many of which contradict more recent holdings of this Court and even statutory changes enacted by Congress. The Fourth Circuit's reliance on its own, idiosyncratic precedents led to a result that is in conflict with the holdings of numerous other courts and which will, if allowed to stand, result in mischief across the nation.

The Fourth Circuit's decision below, while published only this year, has its foundations in a holding from the 1970s that has been adrift in changing legal seas since then, and was implicitly swamped by a holding of this Court twenty years ago. That Fourth Circuit opinion, *Noel v. McCain*, 538 F.2d 633 (4th Cir. 1976), held that remand orders are essentially unreviewable unless they raise very narrow statutory grounds. *Stare decisis* is an important legal principle, but in this case the Fourth Circuit's adherence to its own precedents rather than those of this Court was misplaced.

The Fourth Circuit's decision below acknowledges that this Court subsequently interpreted the same

statutory language differently in *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996). More recently, the Seventh Circuit reached a contrary conclusion about the reviewability of district court orders to remand in *Lu Junhong v. Boeing Co.*, 792 F.3d 805, 810–13 (7th Cir. 2015). Even assuming, *arguendo*, that the Fourth Circuit properly decided the *Noel* case in 1976, continued reliance on *Noel* is no longer appropriate.

It isn't just precedent that has changed since the Fourth Circuit issued its opinion in *Noel*. Relevant statutory law has also changed: the Removal Clarification Act of 2011, Pub. L. No. 112-51, 125 Stat. 545, clarified Congressional intent for federal courts to "clarify and improve certain provisions relating to the removal of litigation against Federal officers or agencies to Federal courts."

The Fourth Circuit's decision below (hereinafter "*Baltimore*"), is based on foundations that Congress, other federal courts, and this Court have steadily eroded since the Fourth Circuit issued the authority on which *Baltimore* rests. This Court, the Seventh Circuit, and Congress itself have all spoken more recently. The innovative legal theories brought by the Plaintiffs in this case further highlight the need to decide the matter based on current law. This Court should take the opportunity to apply the Removal Clarification Act and resolve the split in the circuits that the *Baltimore* opinion below aggravates.

II. IF THE DECISION BELOW STANDS, FEDERAL COURTS WILL BE UNABLE TO PREVENT FEDERAL POLICIES FROM BEING UNDERMINED AT THE STATE LEVEL

This suit is but one of many similar suits being filed all over the country. More than a dozen U.S. cities, states and counties including the State of Rhode Island, City and County of Boulder (CO), City and County of Honolulu (HI), City of New York (NY), Marin, San Mateo and Santa Cruz Counties (CA), the cities of Imperial Beach, Oakland, Richmond, San Francisco, San Mateo, and Santa Cruz (CA), and King County (WA), among others have filed similar claims against similar and generally the same defendants alleging similar causes of action which allegedly arise under state law. As at least one court has previously noted, multi-front litigation raises important concerns about the motivations of litigants. *Chevron Corp. v. Donziger*, 974 F.Supp.2d 362, 475 (S.D.N.Y. 2014) ("The point of the multi-front strategy thus was to leverage the expense, risks, and burden to [defendant] of defending itself in multiple jurisdictions to achieve a swift recovery, most likely by precipitating a settlement."), later upheld at *Chevron Corp. v. Donziger*, 833 F.3d 74 (2d Cir. 2016), *cert. denied at* 137 S. Ct. 2268 (2017).

This explosion in such cases filed in state court seeks many hundreds of billions of dollars from private parties, and seeks to enlist the defendants as advocates in pressing for the plaintiffs' and their partners' desired federal policies. Records obtained by *Amicus*

also show the attempt to use the litigation to obtain governmental revenues after that failed through the appropriate, political process (see, *infra*). Affirming the impropriety of this use of the courts as well as the ardent campaign by state and municipal plaintiffs to keep the matters away from the federal court and exclusively before state courts, EPA has obtained emails and handwritten and typewritten notes under public records requests, further discussed below, that illustrate the danger of allowing state courts to interfere in this way in lawful interstate commerce conducted under the auspices of the federal government. Key among these public records are two sets of notes each purporting, independently, to record the assertion by a senior State of Rhode Island official that the objective of its litigation was to obtain a "sustainable funding stream" for the State's spending ambitions, in the face of a legislature that does not share the executive's priorities.

Both sets of notes record that official as emphasizing the use of state courts to obtain this funding denied them by the legislature. Other records, also noted, *infra*, record the plaintiff's legal counsel's team, at least some of whom also represent the Mayor and City Council of Baltimore in this litigation,[4] lobbying governmental officials to join the campaign emphasizing the strategy of advancing this cause in the "more advantageous venue for these cases," which plaintiffs confess is to be had in state courts.

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[4] The California law firm Sher Edling LLP represents both the State of Rhode Island in the First Circuit and the Mayor and City Council of Baltimore in the Fourth Circuit.

These public records obtained through state open records laws by *Amicus* EPA represent a Rhode Island "cabinet"-level official confiding to peers that the State's elected representatives are insufficiently moved by the plaintiff's requests to enact laws raising the revenues the State's executive desires; and that it is thus "looking for [a] sustainable funding stream," having been reduced to "suing big oil" for its "Priority – sustainable funding stream." Notably, both sets of notes capture the State of Rhode Island as having emphasized the "state court" aspect of its plan.

These records, representing a similarly-situated plaintiff's confession, as recorded identically by two by others in the comfort of a presumably candid and off-the-record private meeting with peers and funders of "climate" activism, leave little doubt that this growing wave of state court "climate nuisance" litigation seeks at least two impermissible objectives. First, this type of litigation seeks to use (state) courts to effectively create federal energy and environmental policy. Second, in addition to using litigation as a stand-in for the political process that has denied state and municipal plaintiffs their desired policies, it seeks to use litigation to raise revenues having been denied them where revenues would properly be raised, which again is by the political process.

These public records provide strong impetus to acknowledge, as a formal matter, that this "climate nuisance" litigation campaign is an impermissible use of the courts, seeking the most favorable forum to obtain political ends by judicial means; that when filed

they must remain in federal court; and that they should be dismissed for the same reasons.

III. PUBLIC RECORDS OBTAINED BY PROPOSED *AMICUS CURIAE* AFFIRM THIS CASE BELONGS IN FEDERAL COURT

Amicus EPA has obtained public records from Colorado State University's Center for a New Energy Economy ("CNEE") under the Colorado Open Records Act ("CORA"). Those records have now been brought to the attention of the First Circuit in related litigation, and are proper subject for judicial notice by this Court. See Fed. Rule Evid. 201(b)(2). The records pertain to a two-day meeting in July 2019 hosted by the Rockefeller Brothers Fund ("RBF") at the Rockefeller family mansion at Pocantico, NY. They include numerous emails, agendas and other materials. Most pertinent, they also include a set of handwritten notes and a second, corroborating set of typewritten notes. According to the public records themselves, the former was prepared by attendee Carla Frisch of the Rocky Mountain Institute ("RMI"), and the latter by attendee Katie McCormack of the Energy Foundation.[5]

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[5] These are available, respectively, at https://climatelitigationwatch.org/wp-content/uploads/2020/03/Carla-Frisch-handwritten-notes-EPA_CORA1505.pdf and https://climatelitigationwatch.org/wp-content/uploads/2020/03/EF-Katie-McCormack-typed-notes-EPA_CORA1542.pdf. These documents are identified in an August 20, 2019 email from CNEE's Patrick Cummins transmitting them to RBF's Michael Northrop, Subject: meeting highlights, available at https://climatelitigationwatch.org/wp-content/uploads/2020/03/

This was a private event, styled "Accelerating State Action on Climate Change," if hosted as a forum for policy activists and a major funder to coordinate with senior public employees, e.g., a governor's chief of staff and department secretaries and their cabinet equivalents from fifteen states. These states included First Circuit Plaintiff the State of Rhode Island, represented by its Director of the Department of Environmental Management, Janet Coit.[6]

These notes purport to contemporaneously record the comments of Director Coit discussing Rhode Island's entry in this litigation campaign, among peers. One passage in each set of notes, attributed to Director Coit and replicated almost verbatim in both, is particularly striking and relevant, affirming two points that have become obvious and which should inform key decisions confronting the judiciary in this "climate nuisance" litigation campaign.

The records show RMI's Frisch recorded Director Coit speaking to this litigation as shown in the below

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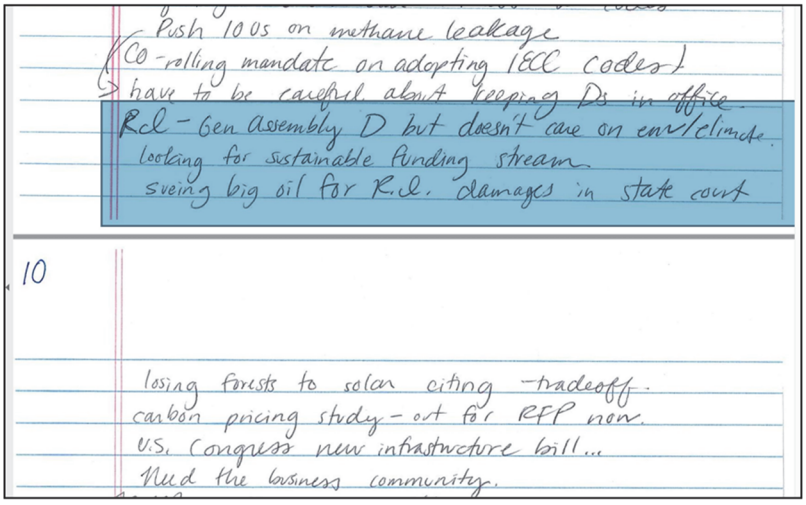
Edited-notes-transmittal-email-CSU-suggests-Snail-mail-probably-covered-EPA_CORA1481_Redacted.pdf. "RBF CNEE climate policy notes Jul 17 18.docx" are Katie McCormack's notes (Energy Foundation); these appear to be produced as document EPA_CORA1542.pdf, derived from Ms. McCormick's transmittal email being 1541, in which she describes her notes as long, and 1542 consists of 18 pages of notes; "Xerox Scan_07222019155622.pdf" are Carla Frisch's handwritten notes (this was produced as document EPA_CORA1505.pdf).

[6] The participant list is available at https://climatelitigationwatch.org/wp-content/uploads/2020/03/List-of-Attendees-EPA_CORA1037.pdf.

excerpted image (Ms. Frisch's notes are available in full at https://climatelitigationwatch.org/wp-content/uploads/2020/03/Carla-Frisch-handwritten-notes-EPA_CORA1505.pdf). Ms. Frisch recorded Director Coit as saying, about this suit:

> RI – Gen Assembly D but doesn't care on env/climate
> looking for sustainable funding stream
> suing big oil for RI damages in state court



The first line-item attributes to Director Coit the position that the Rhode Island legislature is not persuaded of the claims set forth by the State in its litigation. This reluctance to politically impose the revenue-raising measures (taxes) necessary for such funding streams is inherently shared among all "climate nuisance" plaintiffs. The excerpt appears to also reflect Director Coit's view of why the Rhode Island legislature has thereby declined to obtain from the taxpayer,

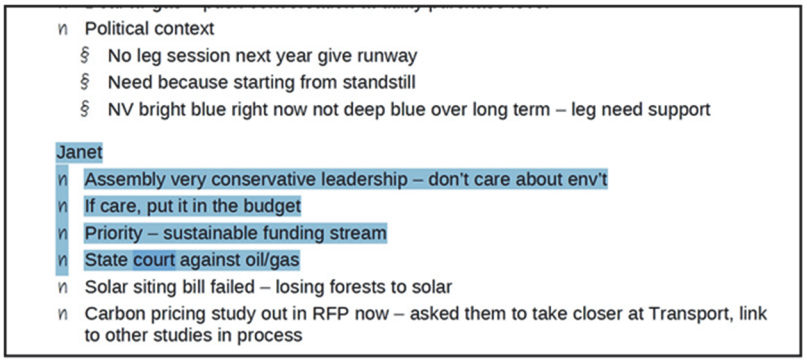
and then appropriate to the State, the revenue streams that governmental Plaintiff Rhode Island desires.

This entry on its face represents a senior official confessing that Rhode Island's climate litigation, essentially identical to that in the Baltimore case below, is in fact a product of Rhode Island's elected representatives lacking enthusiasm for politically enacting certain policies, including revenue measures, thus leaving the state "looking for [a] sustainable funding stream," and so "suing big oil." This characterizes all such governmental plaintiffs and suits including the matter in the Fourth Circuit case which is the subject of the Petition in this matter.

Fortunately, we can be confident that Ms. Frisch did not mishear Director Coit. The Energy Foundation's Katie McCormack provided RBF with a typewritten set of her own notes transcribing the proceedings. To this Court's further benefit, Ms. McCormack's typewritten transcription of Director Coit's commentary reads almost verbatim as Ms. Frisch's.

Ms. McCormack recorded Director Coit as saying:

* Assembly very conservative leadership – don't care about env't
* If care, put it in the budget
* Priority – sustainable funding stream
* State court against oil/gas



- Political context
  - No leg session next year give runway
  - Need because starting from standstill
  - NV bright blue right now not deep blue over long term – leg need support

Janet

- Assembly very conservative leadership – don't care about env't
- If care, put it in the budget
- Priority – sustainable funding stream
- State court against oil/gas
- Solar siting bill failed – losing forests to solar
- Carbon pricing study out in RFP now – asked them to take closer at Transport, link to other studies in process

These notes on their face both affirm two realities that have become inescapable in recent years about this epidemic of "climate nuisance" litigation, all channeled into state courts (after the first generation of suits floundered in federal court, and ultimately were terminated by this Court in *American Electric Power v. Connecticut*, 131 S. Ct. 2527, 2539, 564 U.S. 410, 426 (2011)).[7] That is that these suits seek to use the courts to stand in for policymakers on two fronts. First, these suits ask the courts to substitute their authority for that of the political branches of government on matters of policy. Second, these suits seek billions of dollars in revenues, again the province of the political branches, for distribution toward political uses and constituencies.

On that first count of policymaking through the courts, the RBF meeting notes ratify a comment made to The Nation magazine by the plaintiffs' tort lawyer credited with inventing this wave of litigation, Matt

[7] See, e.g., *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F.Supp.2d 863 (N.D. Cal. 2009), *upheld at* 696 F.3d 849 (9th Cir. 2012).

Pawa. The magazine wrote, "At the end of his speech, Senator [Sheldon] Whitehouse [of Rhode Island] reminded his colleagues of their 'legislative responsibility to address climate change.' But it's clear that too many lawmakers have abdicated, thus the pressure to tackle the climate issue through existing regulations like the Clean Air Act, and through the courts. 'I've been hearing for twelve years or more that legislation is right around the corner that's going to solve the global-warming problem, and that litigation is too long, difficult, and arduous a path,' said Matthew Pawa, a climate attorney. 'Legislation is going nowhere, so litigation could potentially play an important role.' "[8]

Such use of the courts is of course improper but also informs a conclusion that these cases, when brought, belong in federal court, as well as that they should be dismissed for reasons including the inherently obvious, and now repeatedly confessed, purpose.

The second conclusion affirmed by these twice-sourced assertions by the First Circuit plaintiffs is that this type of litigation is a grab for revenues, which again must properly be pursued through the political process. This is related to the first, in that, like policy, such revenue-raising measures must be enacted by the voters' elected representatives or approved directly by voters. Instead, with the desire for more "funding streams" being yet another way the political process

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[8] Zoe Carpenter, *The Government May Already Have the Law It Needs to Beat Big Oil*, The Nation (July 15, 2015), https://www.thenation.com/article/the-government-may-already-have-the-law-it-needs-to-beat-big-oil/.

has failed such plaintiffs, we see them circumventing that process through this litigation campaign.

That the desire for more governmental revenue, without adopting the necessary direct taxes for which there can be a political price to pay, was behind such litigation was suggested by the U.S. Chamber of Commerce in a 2019 report entitled "Mitigating Municipality Litigation: Scope and Solutions," published by the Chamber's Institute for Legal Reform. That report highlighted:

* "For instance, local government leaders may eye the prospect of significant recoveries as a means of making up for budget shortfalls."

* "Large settlements like those produced in the tobacco litigation are alluring to municipalities facing budget constraints."

* "Severe, persistent municipal budget constraints have coincided with the rise of municipal litigation against opioid manufacturers as local governments are promised large recoveries with no risk to municipal budgets by contingency fee trial lawyers."

* "Conclusion

  A convergence of factors is propelling municipalities to file affirmative lawsuits against corporate entities.

  There is the 'push' factor: municipalities face historic budgetary constraints and a public inundated with news reports on the opioid crisis, rising sea levels, and data breaches. And

> there is the 'pull' of potential multimillion-dollar settlements and low-cost, contingency fee trial lawyers. As a consequence, municipalities are pivoting to the courts by the thousands."[9]

The National Association of Manufacturers' Center for Legal Action has similarly argued that, "The towns and lawyers have said that this litigation is solely about money. The towns want funding for local projects, and their lawyers are working on a contingency fee basis, which means they aren't paid if they don't win."[10]

The records EPA has obtained now provide documentary evidence to support these concerns that the courts are being exploited to balance municipal/state budgets and make policy decisions that legislators have declined to make.

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[9] United States Chamber of Commerce, "Mitigating Municipality Litigation: Scope and Solutions," U.S. Chamber Institute for Legal Reform, March 2019, https://www.instituteforlegalreform.com/uploads/sites/1/Mitigating-Municipality-Litigation-2019-Research.pdf, at p. 1, 6, 7 and 18, respectively.

[10] Manufacturers' Accountability Project, "Beyond the Courtroom: Climate Liability Litigation in the United States," p. 2, https://mfgaccountabilityproject.org/wp-content/uploads/2019/06/MAP-Beyond-the-Courtroom-Chapter-One.pdf

IV. HISTORIC CONCERNS ABOUT STATE COURT BIAS ARE AMPLIFIED IN CASES OF THIS TYPE, SUCH THAT FEDERAL COURTS SHOULD STEP IN TO PROTECT FEDERAL INTERESTS

A "historic concern about state court bias" is the underlying basis allowing for federal officer removal. *Savoie v. Huntington Ingalls, Inc.*, 817 F.3d 457, 461 (5th Cir. 2016). The Supreme Court also recognizes bias as a concern justifying removal to federal court. "State-court proceedings may reflect 'local prejudice' against unpopular federal laws or federal officials." *Watson v. Philip Morris Cos.*, 551 U.S. 142, 150 (2007). Bias exists, as these opinions acknowledge, and there is no rational basis for declaring that such bias extends only to parties who are unpopular government officials. Indeed, this Court has cautioned against "narrow, grudging interpretation" of federal officer removal. *Willingham v. Morgan*, 395 U.S. 402, 407 (1969). Simply put, "[t]he removal statute is an incident of federal supremacy." *Murray v. Murray*, 621 F.2d 103, 106 (5th Cir. 1980).

States and municipalities are engaged in a campaign through the courts to overturn "unpopular federal laws." Rather than recognizing the Constitution and federal laws as supreme, governmental "climate nuisance" plaintiffs are applying "narrow, grudging" interpretation of the removal statute to seek to overturn federal law through imposing ostensible tort liability in state courts.

It is hard to imagine a more striking case where fear of state court bias could be a concern than is presented in the instant matter and similar cases unfolding across the nation. Stated otherwise and even more affirmatively, the *hope* for state court bias is demonstrably at play in these cases, as shown in other records obtained by *Amicus* EPA through public records laws.

As documented, *supra*, by its own admission the State of Rhode Island is pursuing its litigation to obtain a "sustainable funding stream" for its officials' spending ambitions, having failed to convince the voters' elected representatives to provide one. Rhode Island's circumstance in this respect differs not at all from all such plaintiffs including in *Baltimore*. Both sets of notes discussed, *supra*, specify Director Coit's emphasis on seeking this "sustainable funding stream" in "state court." All such plaintiffs are now moving Heaven and earth to keep these matters out of the clutches of federal jurisdiction.

This objective of suing to make federal policy in state courts is a thematic cousin of the drive to use the courts when legislatures fail to enact plaintiffs' desired policies, and is well-understood among the instant plaintiffs, Mayor and City Council of Baltimore, and by the legal teams for most similarly-situated government plaintiffs. That Rhode Island and the City of Baltimore share not only claims and legal strategies but legal counsel, whose recruiting team has emphasized to targeted governmental entities the desire to keep these matters in state court as the "more advantageous venue for these cases," given this Court's ruling in

American Electric Power, raises concerns that the climate nuisance plaintiffs also share the hope for state court biases in the campaign to eliminate budgetary shortfalls and otherwise make policy through tort litigation.

For example, and again turning to documents obtained through open records laws, we see that, after U.S. District Judge William Alsup dismissed the City of Oakland's "climate nuisance" suit against many of the same defendants in June 2018,[11] a lobbyist hired to assist with recruiting more governmental plaintiffs for Sher Edling[12] passed along a note of encouragement to

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[11] *City of Oakland, et al. v. BP P.L.C., et al*., N.D. Cal., Order Granting Motion to Dismiss Amended Complaints, Alsup, J., June 25, 2018, http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180625_docket-317-cv-06011_order-1.pdf.

[12] The legal/recruiting team is somewhat involved. G. Seth Platt is one of the network's consultants, engaged to help lobby Florida municipalities to file suit similar to the State's. At the time of the correspondence cited herein, Platt was a registered lobbyist for the Institute for Governance & Sustainable Development ("IGSD") (www.igsd.org) (see searchable index of lobbying registrations at ftlweb01app.azurewebsites.us/Ethicstrac/Lobbyists.aspx). Platt worked with IGSD and others pitching municipalities to file "climate nuisance" litigation against energy interests, with First Circuit and Fourth Circuit plaintiffs' counsel Sher Edling.

On July 27, 2018 Fort Lauderdale Interim City Attorney Alain Boileau wrote Mayor Dean Trantalis, copying other aides, in pertinent part:

> "Mayor . . . I had a positive meeting yesterday with Marco Simons, Esquire of the EarthRights International Group, Matt Edling, Esquire, Vic Sher, Esquire, of SherEdling [sic], and Jorge Mursuli [IGSD]." https://climatelitigationwatch.org/wp-content/uploads/

one prospective client whose counsel had expressed concern over that latest failure. While the email was seemingly written by legal counsel,[13] this lobbyist/

2020/03/Boileau-explains-to-Mayor-his-mtg-w-Sher-Edling.pdf.

That same day, Boileau again wrote the same parties: "I suggested they prepare a presentation for the commission. They just need a target date." https://climatelitigationwatch.org/wp-content/uploads/2020/03/Boileau-explains-to-Mayor-his-mtg-w-Sher-Edling.pdf

When that presentation was arranged, Mr. Mursuli wrote to Mayda Pineda of Fort Lauderdale's government "to include additional co-counsel on the phone during our face-to-face meeting with Mr. Boileau.

They are:

Vic Sher 415/595-9969

Matt Edling 415/531-1829

Please let me know if patching them into our meeting is doable. Again, thanks very much."

https://climatelitigationwatch.org/wp-content/uploads/2020/03/Mursuli-seeks-inclusion-ofSherEdling-in-pitching-FTL-litigation.pdf.

Mr. Mursuli then wrote Lizardo Corandao of Fort Lauderdale's government seeking to ensure that Sher Edling participation on the pitch call "is doable." https://climatelitigationwatch.org/wp-content/uploads/2020/03/Mursuli-seeks-inclusion-ofSherEdling-in-pitching-FTL-litigation-II.pdf.

EPA has obtained other emails showing Rhode Island, through Special Assistant Attorney General Greg Schultz, referring Sher Edling to Connecticut's Office of Attorney General for similar purposes. https://climatelitigationwatch.org/wp-content/uploads/2020/03/Pawa-SherEdling-chronology.pdf.

[13] Lobbyist G. Seth Platt is not an attorney but "provides procurement and lobbying consultation services, research analysis, and marketing and media consultation." https://lsnpartners.com/staff/seth-platt/. Also, Platt's email relating an assessment of Judge Alsup's opinion begins in the Times Roman font, but the assessment that follows his introduction is written in Helvetica font.

recruiter G. Seth Platt flatly stated (or forwarded) the team's position that state courts are the "more advantageous venue for these cases."[14]

Mr. Platt then quotes UCLA Law professor and also consultant to plaintiff's counsel Sher Edling,[15] Ann Carlson, linking in his email to an article quoting Prof. Carlson further on this belief that, for whatever reasons, plaintiffs' chances for recovery are much better in state fora.[16] And in February a *Los Angeles Times*

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[14] https://climatelitigationwatch.org/wp-content/uploads/2020/03/GSPlatt-explains-seeks-to-encourage-Fort-Lauderdale-post-Judge-Alsop-Opinion.pdf. While recruiting Fort Lauderdale to file a climate nuisance action similar to the instant matter, Platt offered "context for Dean and Alain's consideration" in an email to Mayor Dean Trantalis, City Attorney Boileau, and Mayor's Chief of Staff Scott Wyman. This was specifically in response to U.S. District Judge Alsup's June 2018 opinion dismissing certain municipalities' "climate nuisance" litigation on the grounds that the courts were not the proper place to deal with such global issues.

In another email, City Attorney Alan Boileau writes to Mayor Trantalis, "The governmental plaintiffs are essentially pursuing liability through common law claims at a local level for a global (and not exclusively domestic) problem upon which the judiciary is taking the position that the issue has been and should be relegated to the executive and legislative branches. https://climatelitigationwatch.org/wp-content/uploads/2020/03/CLK_789_2018-Emails-2nd-FTL-Production.pdf.

[15] Matt Dempsey, "UCLA Professor's Role In Climate Litigation Raises Transparency Questions," Western Wire, November 27, 2018, https://westernwire.net/ucla-professors-role-in-climate-litigation-raises-transparency-questions/.

[16] "'[U.S. District Judge William Alsup's] decision is irrelevant from a legal perspective,' Carlson said, as long as these cases stay in state courts. Federal courts, like Alsup's, are less favorable to lawsuits like San Francisco and Oakland's, which contend that fossils fuel companies are liable for damages because

news article quoted Carlson's colleague and also apparently consultant for plaintiffs' counsel, Sean Hecht, on this topic of state courts being "more favorable to 'nuisance' lawsuits."[17]

CONCLUSION

These notes referenced above from the Rockefeller-hosted meeting in July 2019, as well as the team recruiting governmental "climate nuisance" plaintiffs to sue, provide strong impetus to confront traits of a "climate nuisance" litigation campaign, which include efforts to use the courts both as a grab for revenue and to obtain other desired policies that have eluded

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they've created a public 'nuisance,' said Carlson." 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, https://mashable.com/article/climate-change-lawsuit-big-oil-tossed-out/.

[17] "Two separate coalitions of California local 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. . . . "There is a lot at stake in this appeal," said Sean Hecht, co-executive director of the Emmett Institute on Climate Change and the Environment at UCLA School of Law. "If the cases can move forward in state court, the courts are likely to take the plaintiffs' claims seriously, and this may affect prospects for cases in other states as well." Hecht's environmental law clinic provided legal analysis for the plaintiffs in some of the cases." Susanne Rust, "California communities suing Big Oil over climate change face a key hearing Wednesday," *Los Angeles Times*, February 5, 2020, https://www.latimes.com/california/story/2020-02-05/california-counties-suing-oil-companies-over-climate-change-face-key-hearing-wednesday.

parties through the political process, seeking the most favorable forum for a court to stand in for the political process.

The decision below is designated for publication, and has the potential to cause innumerable harms if left to stand. First, it sends a message that the Federal Circuits can enforce their own aging precedents even after contrary decisions of this Court and amendments from the legislative branch of the federal government leave such decisions unsound. Second, the Fourth Circuit's decision sends a message that what this Court said in *American Electric Power* about the importance of keeping the judiciary out of the federal climate policymaking business is inapplicable to state judiciaries. Lastly, the decision of the Fourth Circuit leaves the door open for "multi-front" litigation and forum shopping that will increase costs for litigants and serve to coerce cash settlements rather than serve the ends of justice. This Court should grant certiorari to make clear that federal courts have jurisdiction over federal energy and environmental policy matters.

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Respectfully submitted,

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