No. 20-1089

Supreme Court of the United States

CHEVRON CORPORATION, ET AL.,
Petitioners,

v.

CITY OF OAKLAND, CALIFORNIA, ET AL.,
Respondents.

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

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

Linda E. Kelly
Patrick Hedren
Erica Klenicki
MANUFACTURERS' CENTER FOR LEGAL ACTION
733 10th Street, N.W.
Suite 700
Washington, D.C. 20001
(202) 637-3100

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

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae is the National Association of Manufacturers ("NAM"). 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 United States.

The NAM is dedicated to manufacturing safe, innovative and sustainable products that provide essential benefits to consumers while protecting human health and the environment, 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 create categorical liability for lawful, beneficial energy products essential to modern life through state tort law.

The NAM has a substantial interest in attempts by local governments—here, the Cities of Oakland

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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*, its members, or its 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, and provided written consent to the filing of this brief.

and San Francisco—to subject its 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 this 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 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. *Amicus* appreciates that developing new technologies to reduce greenhouse gas ("GHG") emissions, make energy more efficient, and modify infrastructures to deal 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 Court addressed the first wave of this litigation campaign. 564 U.S. 410 (2011) (hereafter "*AEP*"). It held unanimously that the climate claims there sounded in the federal common law and that Congress displaced any such claims when it enacted the Clean Air Act. *See id.* at 424. Soon after, the strategists behind this litigation campaign began developing ideas for trying to circumvent the Court's ruling. They were looking for legal theories that would achieve comparable national goals as *AEP*, but that might *appear* different from *AEP* to some courts. The focal point of this effort, as embodied here, has been to re-cast the feder-

al public nuisance claims for injunctive relief against the utilities in *AEP* as state public nuisance lawsuits for abatement against energy manufacturers.

This case—along with Baltimore's climate case already before this Court—is one of two dozen nearly identical lawsuits that have been filed since 2017 in carefully chosen states around the country. Each complaint asserts that the 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 tort or statute. In order to adjudicate the claims, though, the state courts would have to create new rules over the international production, sale, promotion, and use of fossil fuels. Thus, the allegations are federal in scope and not specific to any one company or community.

Accordingly, the defendants in these cases removed the cases to the federal judiciary. Here, the District Court carefully studied the legal and factual issues presented in the case and determined that the re-packaging of this litigation from *AEP* did not lead to a different result; it actually expanded the national and international scope of the challenged activities: "In light of *AEP*, plaintiffs shift their focus to sales of fossil fuels worldwide." *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1025 (N.D. Cal. 2018).

Amicus respectfully requests that the Court grant the Petition to determine whether putative state-law tort claims alleging harm from global climate change are removable because they arise under federal law. As the Court appreciated in *AEP*, the climate change issues in this case and others like it are of major national significance. Climate tort litigation undermines national energy objectives, including energy

independence, the stability of the electric grid, and affordability for families and businesses across the country, among others. Also, given the two dozen cases filed as part of this national litigation campaign, it is a matter of judicial efficiency that the Court resolve this jurisdictional question here.

ARGUMENT

I. THE COURT SHOULD GRANT THE PETITION BECAUSE CLIMATE CHANGE CASES REQUIRE FEDERAL COURT JURISDICTION

The Court should grant the Petition to reinforce the understanding from *AEP* that climate tort litigation raises issues of "special federal interest." 564 U.S. at 424.[2] In *AEP*, before ruling that the Clean Air Act displaced any federal common law claims with respect to carbon emissions from fossil fuels, the Court 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.

The factual predicate in *AEP* is the same as 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

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[2] *See*, *e.g.*, Tristan L. Duncan & Jonathan Massey, *AEP's Tipping Point: Implied Preemption of Climate-Change Common Law Claims,* Wash. Legal Found. No. 179 (2012) ("The Supreme Court held that the case presented a matter of such inherently federal interest that it was governed by federal law.").

many other sources of GHGs around the world and have accumulated in the earth's atmosphere for more than a century. "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 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. As *Standard Oil* instructs, 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." 332 U.S. at 78. Determining rights and responsibilities for global climate change is one of those uniquely federal issues. Second, and only then, did the Court hold Congress displaced remedies that might be granted under federal common law through the Clean Air Act. *See AEP*, 564 U.S. at 425. The claims failed on the merits, not lack of federal jurisdiction. Only the initial inquiry—whether the subject requires a uniform rule—goes to jurisdiction.

At the time, two other climate tort cases were pending against the energy sector. An Alaskan village was suing many of the same energy producers as here under federal law for damages related to rising sea levels. *See Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012). In Mississippi, a purported class of homeowners sued a

multitude of energy producers under state tort law for property damage from Hurricane Katrina. *See Comer v. Murphy Oil USA, Inc.*, 718 F.3d 460 (5th Cir. 2013). The allegations there were that the defendants' products caused climate change, which in turn caused the hurricane to be more intense. *See id.*

After *AEP*, both cases were dismissed. As the Ninth Circuit explained, even though the legal theories in *Kivalina* differed slightly from *AEP*, given the Court's message, "it would be incongruous to allow [such litigation] to be revived in another form." *Kivalina*, 696 F.3d at 857. Tort suits alleging harm from emissions across the country and globe are exactly the sort of "transboundary pollution" claims the Constitution exclusively commits to federal law. *Id.* at 855. As of 2012, the law appeared clear. Climate litigation targeting private actors were inherently federal in nature, regardless of how the claims were packaged—over energy use or products, by public or private plaintiffs, under federal or state law, or for injunctive relief or damages.

II. THIS CASE IS PART OF A NATIONAL LITIGATION CAMPAIGN TO HAVE STATE COURTS UNDERMINE THIS COURT'S JURISPRUDENCE

The advocacy groups and lawyers behind this national litigation campaign were undeterred by *AEP*. In 2012, they convened in La Jolla, California to brainstorm on how to re-package the litigation in hopes of achieving their national goals. *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"). The strategies discussed included the one they ultimately employed: filing lawsuits in multiple jurisdictions, hoping at least one case would reach discovery and help them advance their preferred national and international policy agenda. *Id.*

Organizers of the conference captured their discussion and strategies for this litigation in a published report. *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).[3] 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," as here. *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 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

[3] https://www.ucsusa.org/sites/default/files/attach/2016/04/establishing-accountability-climate-change-damages-lessons-tobacco-control.pdf.

in hopes state courts would not follow *AEP*. Finally, they discussed "the importance of framing a compelling public narrative," including "naming [the] issue or campaign" to generate "outrage." *Id.* at 21, 28.

In 2016, another strategy session was held in New York City to discuss the litigation campaign's goals as they had developed since the La Jolla conference. *See Entire January Meeting Agenda at Rockefeller Family Foundation*, Wash. Free Beacon, Apr. 2016.[4] Specifically, the organizers discussed leveraging the filing of these lawsuits and government investigations to generate media coverage. They wanted "to establish in the public's mind" that these companies were "corrupt," to "delegitimize them" and to "force officials to disassociate themselves" from the industry. *Id.* They hoped "creating scandal" through these lawsuits would drive these outcomes. *Id.*[5]

Lawsuits following these tenets were filed starting in 2017. As indicated, this case, along with the others, is meant to look facially different from *AEP*, which targeted fossil fuel users (utilities) and sought injunctive relief under federal public nuisance law. These cases target energy producers, invoke state tort laws, and seek abatement and damages. To name the campaign, they falsely asserted a widespread "campaign of deception" involving the various

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

[5] As Prof. Mary Wood, a La Jolla participant, later said, "Building 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*, Creek Project YouTube Channel, May 23, 2018.

companies named in the numerous 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 five defendants, others name one or two, whereas some name dozens of energy manufacturers, including local companies in an effort to keep cases in state court. This ever-changing list of companies alleged to be in on some "campaign of deception" underscores the specious nature of the cases.

Supporters of this national litigation campaign have used political-style tactics, both to drive this litigation effort as well as to achieve the true, extrajudicial goals of the campaign. They have taken out paid advertisements and billboards blaming energy companies for climate change and urging public officials to file lawsuits, hosted symposiums and press conferences to generate media attention to their narrative, and launched websites to recruit governments to file lawsuits. *See generally* Beyond the Courtroom, Manufacturers' Accountability Project,[6] (detailing the coordinated funding, legal and media components of this litigation campaign). Thus, unlike traditional state tort suits, success for this litigation campaign is not about proving legal or factual allegations, but filing and maintaining lawsuits in state courts to achieve national public policy goals.

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[6] https://mfgaccountabilityproject.org/beyond-the-courtroom. The week before this briefing, the advocates started a second website specifically to rally political support for this litigation. *See* https://l4ca.org/ and https://payupclimatepolluters.org/.

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

The legal theories presented in this litigation are nothing more than mere fig leafs; unlike traditional local property damage cases, their claims are not moored to any specific plaintiff, defendant, location or jurisdiction. As Judge Alsup observed in dismissing this case, any municipality, county or state could file these lawsuits. *City of Oakland*, 325 F. Supp. 3d at 1022. "Their theory rests on the sweeping proposition that otherwise lawful and everyday sales of fossil fuels, combined with an awareness that greenhouse gas emissions lead to increased global temperatures, constitute a public nuisance." *Id*. It attempts to "reach the sale of fossil fuels anywhere in the world." *Id*. Merely referencing state claims and asking for compensation does not make these federal matters suddenly suitable for state courts.

Since *AEP*, public nuisance has been the tort of choice for climate litigation because, in large part, its "vague" sounding terms are often misunderstood.[7] *City of Milwaukee*, 451 U.S. at 317. In fact, the architects of this effort have tried and failed for nearly fifty years to transform state public nuisance law into a tool for industry-wide liability. *See* Denise E. Antolini, *Modernizing Public Nuisance: Solving the Para-*

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[7] *See* W. Page Keeton, et al., Prosser & Keeton on the Law of Torts 616 (5th ed. 1984). "In popular speech it often has a very loose connotation of anything harmful, annoying, offensive or inconvenient. . . . Occasionally this careless usage has crept into a court opinion. If the term is to have any definite legal significance, these cases must be completely disregarded." Restatement (Second) of Torts § 821A cmt. b (1979).

dox of the Special Injury Rule, 28 Ecol. L.Q. 755, 838 (2001) (recounting campaign to change elements of the tort that would have "[broken] the bounds of traditional public nuisance"). The allure of such a legal theory is understandable. As here, the lawsuits are generally funded by contingency-fee counsel, promise funding for local projects, and target unpopular products. *See* Phil Goldberg, Christopher E. Appel & Victor E. Schwartz, *Can Governments Impose a new Tort Duty to Prevent External Risks? The 'No-Fault' Theories Behind Today's High Stakes Government Recoupment Suits*, 44 Wake Forest L. Rev. 923 (2009). But, they are legally unfounded, and courts have greeted them with appropriate skepticism.[8]

In the climate change cases, the attempt to mask federal issues under state public nuisance law does not stand up to even minimal scrutiny. For example, it is unclear what would qualify as the alleged public nuisance in these cases: the accumulation of GHGs in the atmosphere, global warming-induced sea level rise around the world, or the international promotion and sale of fossil fuels—all of which exist far outside any local government's authority. Also, political leaders say they are bringing these suits because the defendants promoted "phony science to deny climate change. But at oral argument, plaintiffs' counsel clarified that any such promotion remained merely a 'plus factor'" and not required for their liability theory. *City of Oakland*, 325 F. Supp. 3d at 1022.

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[8] *See*, *e.g.*, *North Carolina v. Tennessee Valley Auth.*, 615 F.3d 291, 296 (4th Cir. 2010) (stating such lawsuits would "encourage [state] courts to use vague public nuisance standards to scuttle the nation's carefully created system of accommodating the need for energy product and the need for clean air").

Further, the damages sought are entirely speculative. As Judge Alsup said to the Cities' lawyers at a hearing, "You're asking for billions of dollars for something that hasn't happened yet and may never happen to the extent you're predicting it will happen." Nicholas Iovino, *Judge Skeptical of Cities' Climate Change Suits,* Courthouse News Service, May 24, 2018. To this end, in Oakland's 2017 bond offering (the year it filed this lawsuit), the City stated it was "unable to predict" the impact of climate change on the City and "if any such events occur, whether they will have a material adverse effect on the business operations or financial condition of the City or the local economy." 2017 Oakland General Obligation Bond, A-48–49 (Aug. 1, 2017);[9] *see also* Letter from Lindsey de la Torre, Nat'l Ass'n of Mfrs., to the Securities and Exchange Comm'n, Mar. 27, 2018.[10]

Federal judges have seen through these thinly-veiled attempts to mischaracterize the federal nature of the litigation. Here, Judge Alsup stated in his ruling, "[t]he scope of plaintiffs' theory is breathtaking." *City of Oakland*, 325 F. Supp. 3d at 1022. Similarly, 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." Larry Neumeister, *Judge Shows Skepticism to New York Climate Change Lawsuit*, Assoc. Press, June 13, 2018.[11] They were "hiding an emissions case." *Id.*

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[9] https://cao-94612.s3.amazonaws.com/documents/OAK067652.pdf

[10] https://mfgaccountabilityproject.org/wp-content/uploads/2018/04/SEC-Letter_3.27.18-3.pdf.

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

Plaintiffs should not be able to avoid such scrutiny merely by painting federal claims with a state tort brush. *See* Susanne Rust, *California Communities Suing Big Oil Over Climate Change Face a Key Hearing Wednesday*, L.A. 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 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 the Court has appreciated, 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 recent suit expressed unusual confidence that "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.

There is no doubt if any state court allows a hometown recovery, there will be a race to the courthouse in communities across this country. State courts are simply not positioned to be arbiters of who, if anyone, is to be legally accountable for climate change, how energy policies should change to address it, and how local mitigation projects in communities across the country should be funded.

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

This Court should not permit the Cities to mask their attempt to affect national GHG emissions and

the worldwide production of fossil fuels by "artfully" and disingenuously pleading its claims under state tort law. *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 475 (1998). Petitioners are not "ignoring the set of facts" Oakland and San Francisco presented. *Caterpillar, Inc., v. Williams*, 482 U.S. 386, 392 (1987). It is the facts themselves that raise uniquely federal interests. *See Fry ex rel. E.F. v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 755 (2017) ("What matters is the crux—or, in legal speak, the gravamen—of the plaintiffs[s]' complaint, setting aside any attempts at artful pleading.").

Outside of the courtroom, the advocates behind this litigation campaign fully acknowledge that the true goals—or crux—of this litigation is to penalize the worldwide production, promotion, sale and use of fossil fuels—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, Mar. 21, 2018. They want to use the litigation to force Americans into "cutting back" on fossil fuel use and energy manufacturers to raise their prices "so that if they are continuing to sell fossil fuels, that the cost of [climate change] would ultimately get priced into them." Julia Caulfield, *Local Lawsuits Asks Oil and Gas to Help Pay for Climate Change*, KOTO, Dec. 14, 2020 (quoting an attorney in the Boulder climate case).[12]

Indeed, a reporter who follows the litigation has observed the incongruity between the ways the cases are presented in and out of court: "State and local

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[12] https://coloradosun.com/2021/02/01/boulder-climate-lawsuit-opinion/.

governments pursuing the litigation argue that 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.[13]

As the attorneys for the plaintiffs clearly appreciate, when state courts impose liability and damages, the intention is to "directly regulate" the underlying conduct. *See, e.g., Riegel v. Medtronic, Inc.*, 552 U.S. 312, 325 (2008). A person subjected to liability is supposed to change the offending conduct to avoid liability, similar to compliance with statutes and regulations. *See Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005) (finding state tort liability imposes state law requirements); *see also Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 871 (2000) ("[R]ules of law that judges and juries create or apply in such suits may themselves similarly create uncertainty and even conflict, say, when different juries in different [s]tates reach different decisions on similar facts."). However, it is not in the national interest to stop the sale of fossil fuels, and American tort law does not recognize absolute, category liability for selling products with known risks. *See* Restatement of the Law, Third: Prods. Liab. § 2 cmt d (1998).

Again, Judge Alsup saw through this veneer; the City "would have a single judge or jury in California impose" billions of dollars of liability on five companies "to abate the localized effects of an inherently global phenomenon." *City of Oakland*, 325 F. Supp.

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

3d at 1026. The dangers, causes and benefits "of fossil fuels are worldwide." *Id.* at 1029. Fifteen state attorneys general also cautioned in an *amicus* brief below that Oakland and San Francisco should not be able 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).

The Court should grant the Petition to resolve this jurisdictional issue, which lays at the heart of some two dozen climate tort suits that are currently pending around the country, with the organizers actively recruiting more lawsuits. Lawsuits alleging that different combinations of energy manufacturers can be subject to untold liability for local harms caused by global climate change should not be the province of state courts. These courts do not provide the proper jurisdictions for assigning legal rights and obligations for global climate change. The Court should grant review as a matter of judicial efficiency given the proliferation of cases and find that this national climate litigation campaign, regardless of how artfully pleaded, invokes uniquely federal issues.

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Ultimately, *amicus* believes the best way to address climate change over energy is for Congress, federal agencies, and local governments to work with manufacturers and other businesses that use, produce, distribute, and sell energy on developing the public policies and technologies that can meaningfully reduce emissions and mitigate damages. *See* Ross Eisenberg, *Forget the Green New Deal. Let's Get to Work on a Real Climate Bill*, Politico, Mar. 27,

2019.[14] The production, sale, and use of energy are essential to modern life. The challenge facing society is to affordably and reliably provide this energy while reducing environmental impacts. It is not to blame those providers for selling energy people need to heat their homes, fuel their cars, build schools, places of worship and workplaces, and turn on lights.

CONCLUSION

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

Respectfully submitted,

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

Linda E. Kelly
Patrick Hedren
Erica Klenicki
MANUFACTURERS' CENTER
FOR LEGAL ACTION
733 10 Street, N.W., Suite 700
Washington, D.C. 20001

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