No. 22-524

In The

Supreme Court of the United States

SHELL OIL PRODUCTS COMPANY LLC, ET AL.,

Petitioners,

v.

STATE OF RHODE ISLAND,

Respondent.

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

BRIEF OF *AMICUS CURIAE* ENERGY POLICY ADVOCATES IN SUPPORT OF THE PETITIONERS

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STATEMENT OF INTEREST OF THE *AMICUS CURIAE*[1]

Energy Policy Advocates ("EPA") previously filed an amicus brief in this matter when it was pending before the First Circuit as *Rhode Island v. Chevron Corp., et al.*, No. 18-cv-00395 (July 22, 2019), and subsequently filed an amicus brief at both the petition stage and the merits stage before this Court in *Rhode Island v. Shell Oil Products Co. L.L.C., et al.*, No. 19-1818 (May 23, 2022).

In those briefs, EPA highlighted records that EPA obtained through state open records laws which illustrate the Plaintiff seeks state court jurisdiction in pursuit of improper purposes and as the venue most likely to support its drive to obtain what it privately calls a "sustainable funding stream" for the state—and thereby "transform state courts into global climate-change regulators" (Appellants'-Petitioners' Petition for Certiorari, ECF No. 1, at 2)—*because its legislature is not sufficiently persuaded to enact desired policies*.

Since those briefs, EPA and others have obtained additional public records highly relevant to this proceeding, shining much more light on the "coordinated campaign" (*Id.*) of which this matter is a part, which has repeatedly come before this Court and likely will

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae* EPA, its members, or its counsel made a monetary contribution to its preparation or submission.

continue to do so unless and until the key questions these suits raise are resolved.

SUMMARY OF ARGUMENT

EPA wishes to support the Petition for Certiorari because EPA hopes that this Court will ensure the lower courts give serious consideration to the importance of federal jurisdiction, to this coordination, and to "climate" Plaintiffs' actual, confessed use of the courts. Further, a campaign of "massive resistance" is apparent in the lower federal courts to this Court's rulings on these cases, which EPA wishes to address. Although this Court has repeatedly vacated judgments analogous to the one at issue here, the lower courts continue to cite their old, vacated judgments as precedent. See, e.g., *W. Va. State Univ. Bd. of Governors v. Dow Chem. Co.*, 23 F.4th 288, 301 (4th Cir. 2022) (citing to the vacated opinion in *Mayor & City Council of Baltimore v. BP P.L.C.*, 952 F.3d 452, 464 (4th Cir. 2020) for the proposition that "even when a contract specifies the details of the sales and authorizes the government to supervise the sale and delivery, the simple sale of contracted goods and services is insufficient to satisfy the federal officer removal statute"), *Moore v. Elec. Boat Corp.*, 25 F.4th 30, 34 n.2 (1st Cir. 2022) (citing to the reversed opinion in *Rhode Island v. Shell Oil Prods. Co., L.L.C.*, 979 F.3d 50, 59 (1st Cir. 2020) for the proposition that there must be a "nexus" between allegations in the Complaint and actions undertaken *at the behest* of a federal officer).

As a nonprofit, EPA has no direct interest, financial or otherwise, in the outcome of the case, aside from its interest in good governance and advocating for the proper role of the federal judiciary. Because of its lack of a direct interest combined with its intimate and firsthand knowledge of the records illustrating the above-described concerns, EPA can provide the Court with a perspective that is distinct and independent from that of the parties.

ARGUMENT

The initial District Court discussion of the factual background in this matter began with the blunt assessment, "Climate change is expensive, and the State wants help paying for it." *State of Rhode Island v. Shell Oil Products Co., L.L.C., et al.*, Case No. 19-1818, App. 27a. Public records now reveal more plainly than ever that this suit is an attempt to obtain policies through the judiciary, including the imposition of taxes which the state legislature is not interested in enacting.

This lawsuit was listed in an "Amendment to Confidentiality Agreement Regarding Participation in Climate Change Public Nuisance Litigation" among ideologically aligned state attorneys general, signed by Rhode Island on November 26, 2019.[2] That pact,

[2] EPA obtained the original Agreement and Amendment from, *inter alia*, Rhode Island's Office of the Attorney General under that state's Access to Public Records Act. The original Agreement was dated April 25, 2018. It may be found at

claiming a common interest "in one or more cases brought, or that will be brought, in state court or U.S. District Court, or appealed to state or federal courts of appeal, including the highest state appellate court or the U.S. Supreme Court" cited seven cases "referred to herein as the 'Litigation.'" That list of cases included "*Rhode Island v. Chevron Corp.* (R.I. Super. Ct. PC-2018-4716, and D. R.I. 18-00395)."

This pact that Rhode Island's Attorney General joined sets forth its objective: "The Parties to this Agreement have a common interest in ensuring the proper application of the federal and/or state common law of public nuisance arising from the effects of climate change, including sea level rise."[3] This theory kept losing in federal court, so "climate" Plaintiffs simply rebranded and relocated their claims, first as state nuisance claims and then into purportedly local, consumer protection claims (still seeking nuisance remedies). As an email sent by the Plaintiff's law firm to a prospective funder of this "contingency fee" campaign acknowledged, "[o]ur co-counsel—the lawyers for these public entities—are exceptionally creative and dedicated."[4]

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https://climatelitigationwatch.org/wp-content/uploads/2021/01/Climate-Change-Public-Nuisance-Litigation-CIA-Amendment.pdf.

[3] Available at https://climatelitigationwatch.org/wp-content/uploads/2021/01/Climate-Change-Public-Nuisance-Litigation-CIA.pdf.

[4] July 22, 2017 email from Dan Emmett to UCLA Law faculty and administrators, released April 21, 2022, available at https://climatelitigationwatch.org/wp-content/uploads/2022/12/SherEdling-recruting-Emett-then-Carlson-recruting-Sabin.pdf.

Public records obtained by Energy Policy Advocates and its counsel document members of the Plaintiff's legal team, in its efforts to recruit other governmental entities to their campaign, acknowledged their view that state courts are the "more advantageous venue for these cases."[5] Another member of the team echoed this 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, immediately prior to the State of Rhode Island filing its suit in Rhode Island Superior Court, when UCLA law professor and also consultant to Plaintiff's counsel Sher Edling, Ann Carlson,[6] signaled the change of course, opining that the Plaintiff's chances for recovery are much better in state fora.[7]

Now, other public records further reveal the coordinated national campaign, showing that these suits which claim to be a series of unrelated state actions have in fact, throughout, been quietly underwritten as

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[5] See, e.g., email from a recruiter for Rhode Island counsel Sher Edling, LLP named Seth Platt to the Mayor of Fort Lauderdale, Florida, at https://climatelitigationwatch.org/wp-content/uploads/2019/09/GsPlatt-responds-to-Ft-Lauderdale-signaling-Judge-Alsup-opinion-is-too-much-for-them.pdf.

[6] Ms. Carlson's disclosures to the University of California at Los Angeles regarding her outside employment with Plaintiff's counsel Sher Edling can be found at https://climatelitigationwatch.org/wp-content/uploads/2021/01/Responsive-Documents-20-8525.pdf. These records were released under California's Public Records Act.

[7] 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-tossedout/.

a single body of work by private funders, to the tune of millions of dollars to Plaintiff's counsel through "charitable grants" to Plaintiff's counsel.[8]

As detailed, *infra*, this is revealed by tax filings juxtaposed with a candid email from the Plaintiffs' law firm to a potential underwriter of the litigation. That email was then forwarded by the targeted donor to a public law school the faculty of which were serving as consultants to Plaintiff's counsel.

Public records leave little doubt that the instant litigation seeks at least two impermissible objectives.

First, the state Plaintiff in this matter seeks to use state courts to create or modify federal energy and environmental policy as stand-ins for the political process that has denied Plaintiff its desired policies. Second, the state seeks to raise revenues through the courts rather than through the proper legislative means which, Plaintiff confesses, is not of interest to its legislature.

Public records provide strong impetus to acknowledge, now more than ever, that this suit is but one small part of a coordinated and improper litigation campaign seeking to use the courts to attain political goals denied the Plaintiffs through the political process. That this suit has returned to this Court and other similar suits are en route are symptoms of improper "massive resistance" to this Court's rulings by

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[8] This is despite being the subject of generous "contingency fee" agreements.

the lower courts which also must be terminated by this Court firmly resolving the issues at hand.

I. RECORDS DEMONSTRATE THIS CASE IS AN ATTEMPT TO USE THE STATE COURTS FOR FEDERAL POLICYMAKING

As EPA previously informed this Court in earlier amicus briefing, emails and two sets of meeting notes, one handwritten and another typewritten, released under public records laws, shed light on what this proceeding truly represents. These documents independently record a Rhode Island cabinet-level official expressly acknowledging the state's motives for pursuing this litigation, specifically its General "Assembly [led by] very conservative leadership—doesn't care about env't," leaving the state's executive branch "looking for sustainable funding stream" for its spending ambitions. Both sets of notes reflect that this lawsuit was filed in "State court against oil and gas" companies because of the executive's "Priority—sustainable funding stream," to fulfill certain spending ambitions which the executive failed to convince the voters' elected representatives to provide through the ordinary process of taxation.[9]

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[9] These notes 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 Center for a New Energy Economy's Patrick Cummins to RBF's Michael Northrop.

EPA obtained these public records from Colorado State University under the Colorado Open Records Act ("CORA"). 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, New York, styled "Accelerating State Action on Climate Change." They include numerous emails, agendas and attachments including a set of handwritten notes prepared by attendee Carla Frisch of the Rocky Mountain Institute ("RMI"), and a second, corroborating set of typewritten notes taken by attendee Katie McCormack of the Energy Foundation.

The 2019 RBF meeting was a forum for policy activists and a major funder to coordinate with senior public employees.[10] These included a governor's chief of staff, and department secretaries and their cabinet

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Available at https://climatelitigationwatch.org/wp-content/uploads/2020/03/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; these appear to be produced as document EPA_CORA1542.pdf, derived from Ms. McCormick's transmittal email, 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 to EPA as document EPA_CORA1505.pdf).

[10] The agenda for the meeting is available at https://govoversight.org/wp-content/uploads/2020/01/Draft-Agenda-EPA_CORA0008-copy.pdf.

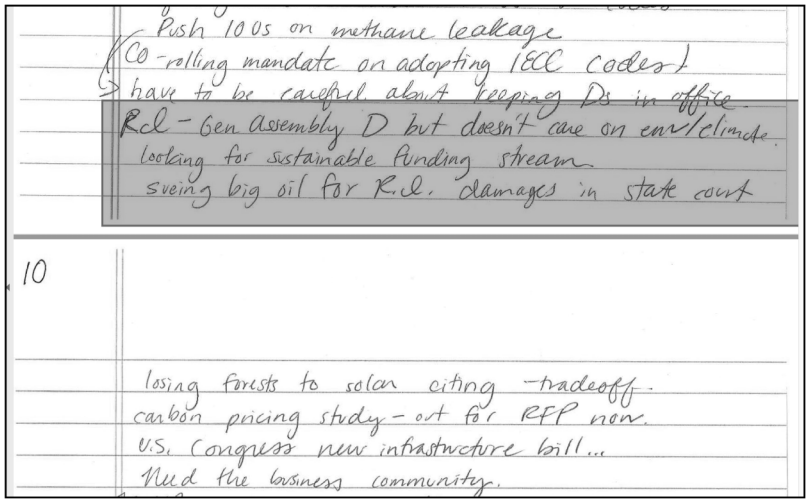
equivalents from fifteen states,[11] including Plaintiff Rhode Island, represented by its Department of Environmental Management Director, Janet Coit.

These meeting notes obtained by EPA contemporaneously record the comments of Director Coit discussing the instant matter among peers. One passage in each set of notes, attributed to Coit and replicated almost verbatim in both, illustrates that the State was seeking to use litigation to force a change in climate policy.

Rocky Mountain Institute's Frisch recorded Director Coit speaking to this litigation as shown in the below excerpted image:[12]

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

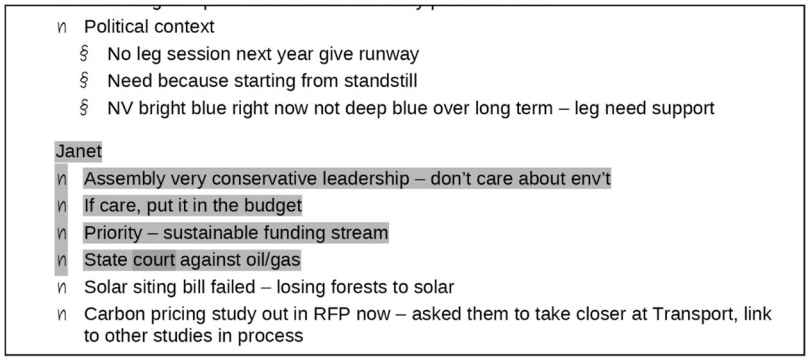
[12] This image shows the native appearance of the record and therefore is significant independent of the text. Ms. Frisch's notes are available in full at https://climatelitigationwatch.org/wp-content/uploads/2020/03/Carla-Frisch-handwritten-notes-EPA_CORA1505.pdf.


Push 100s on methane leakage
CO - rolling mandate on adopting IECC codes?
have to be careful about keeping Ds in office.
RI - Gen assembly D but doesn't care on env/climate.
looking for sustainable funding stream
sueing big oil for R.I. damages in state court
10
losing forests to solar siting - tradeoff.
carbon pricing study - out for RFP now.
U.S. Congress new infrastructure bill...
Need the business community.

The first line attributes to Director Coit the position that Rhode Island's legislature is not persuaded of the claims set forth by the State in this matter. It appears to also reflect Coit's view of why the legislature has declined to directly obtain from the taxpayer the "sustainable funding stream" that Plaintiff desires. These notes reflect a senior official confessing that Rhode Island's climate litigation is apparently a product of Rhode Island's elected representatives lacking enthusiasm for certain policies, including concomitant revenue measures. Thus, rather than work with the Rhode Island legislature to obtain such policies through the give and take of the legislative process, the State's executive branch elected to "look for [a] sustainable funding stream" by "suing big oil."

The Energy Foundation's McCormack provided RBF with a typewritten set of her own notes

transcribing the proceedings which reads on this point almost verbatim to the recollection of Ms. Frisch.[13]



- 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 illustrate two troubling, related aspects of the recent epidemic of "climate" litigation, which has been channeled into state courts after the first generation of suits were terminated by this Court in *American Electric Power v. Connecticut*, 131 S. Ct. 2527, 2539, 564 U.S. 410, 426 (2011) and a second generation of suits similarly failed. *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017 (N.D. Cal. 2018), see also *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021). Specifically, these suits seek to use the (state) courts to stand in for (state and federal) policymakers first by asking the state courts to substitute their authority for that of the political branches of government at both the state and federal level on matters of climate policy. Second, these suits seek billions of dollars in revenues, which would ordinarily be obtained through

[13] This image shows the native appearance of the record and therefore is significant independent of the text. Ms. McCormack's notes are available in their entirety at https://climatelitigationwatch.org/wp-content/uploads/2020/03/EF-Katie-McCormack-typed-notes-EPA_CORA1542.pdf.

taxation enacted by legislators, for distribution toward political uses and constituencies.

First, the RBF meeting notes echo a comment made to The Nation magazine by a Plaintiffs' lawyer credited with inventing this litigation, Matt Pawa. "[I]t'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.'"[14]

Second, this Court must confront assertions by Rhode Island's Coit that this new wave of state court "climate" litigation is a grab for revenues, something that is more properly be attained through the political process. This litigation promises to erode the separation of powers as courts, rather than legislators, are used to raise revenues for the executive branch to spend.

The U.S. Chamber of Commerce addressed the apparent drive, through these suits, for more governmental revenue without adopting the necessary direct taxes for which there can be a political price to pay, in

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[14] 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/.

a 2019 report entitled "Mitigating Municipality Litigation: Scope and Solutions." 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."[15]

The National Association of Manufacturers has similarly argued that, "The towns and lawyers have

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[15] *Mitigating Municipality Litigation: Scope and Solutions*, U.S. Chamber Institute for Legal Reform, March 2019, http://www.instituteforlegalreform.com/uploads/sites/1/Mitigating-Municipality-Litigation-2019-Research.pdf, at p. 1, 6, 7 and 18.

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."[16]

Rhode Island's attempted use of the courts to attain revenue and other policy ends that have eluded it through legislation or regulation is improper, but the attempt also informs a conclusion that these cases belong in federal court. Such suits should also be dismissed for reasons including the confessed policymaking purpose of the litigation.

If the Plaintiff's motivation to obtain and influence policy were not itself an improper use of the courts, the proponents of this climate litigation are also increasingly candid about the litigants' motive to use the pressure of this vexatious multi-front litigation to coerce opponents to capitulate to legislative change that they would otherwise oppose.

This is clear in yet another exemplar from public records obtained by EPA, an email in which an official with one municipal nuisance Plaintiff, the City of Boulder, Colorado admits that "the pressure of litigation could also lead companies . . . to work with lawmakers on a deal" about climate policies.[17] Former Connecticut

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[16] 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

[17] January 5, 2018 email from Boulder Chief Sustainability & Resilience Officer Jonathan Koehn to Alex Burness of the Boulder Daily Camera. Available at https://climatelitigationwatch.org/

Attorney General Richard Blumenthal is quoted similarly describing *American Electric Power v. Connecticut*, 564 U.S. 410, 426 (2011), which suit he brought before being elected to the United States Senate. "My hope is that the court case will provide a powerful incentive for polluters to be reasonable and come to the table . . . We're trying to compel measures that will stem global warming regardless of what happens in the legislature."[18] This Court cannot sanction the use of the courts to force legislative change, and it should be especially zealous in protecting federal policies and legislation from being forced by actions taken in various state court systems.[19]

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boulder-official-climate-litigation-is-tool-to-make-industry-bend-a-knee/.

[18] Editorial, "The New Climate Litigation," Wall Street Journal, December 28, 2009, https://www.wsj.com/articles/SB10001424052748703478704574612150621257422.

[19] Another Boulder official is on record describing its companion suit to the instant matter as one way to "drive more fundamental systems change" (William Allison, "Boulder Officials: Actually, Our Climate Lawsuit Is About Driving 'Systems-Level Change,'" RealClear Energy, July 16, 2021, https://www.realclearenergy.org/2021/07/16/boulder_officials_actually_our_climate_lawsuit_is_about_driving_systems-level_change_785683.html). One of its attorneys acknowledges the lawsuit seeks what an interviewer summarized as a "secondary aim," to "also shift behavior" "Whether that's cutting back on the harmful activities, and/or to raise the price of the products." *Telluride Joins Lawsuit Seeking to Force Energy Companies to Offset Climate Change*, KSUT.org, December 18, 2020, https://www.ksut.org/news/2020-12-18/telluride-joins-lawsuit-seeking-to-force-energy-companies-to-offset-climate-change#stream/0 quoting Boulder attorney Marco Simons. Another lawyer behind some of the earlier suits boasted that suits have "the potential really to bring down the

The records EPA has obtained support its concern that the courts are being exploited to balance municipal/state budgets, to erode the separation of power between branches of state governments, and to make policy decisions that both state and federal legislators have declined to make. Further, new information from public records shows that the "contingency fee" arrangements at issue in this litigation are a mirage and obfuscate the true policymaking purpose and funding of these suits, adding a further troubling element to this coordinated national litigation campaign.

This Court should grant certiorari and reverse the judgment below to guard against this improper use of the judiciary.

II. NEW INFORMATION FURTHER SUPPORTS THE LAWSUIT'S COORDINATED NATIONAL CAMPAIGN BELONGS IN FEDERAL COURT

EPA and other parties have obtained further information supporting the position that the Plaintiff's-Appellee's cause of action seeks to influence policy as "part of a coordinated campaign" (Defendants'-Appellants' Notice of Removal, ECF No. 1, at 2), which is thereby properly before the federal courts and not a local matter of state statutory or common law. This

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fossil fuel companies" while dreaming of a "massive settlement" (Geoff Dembicki, "Meet the Lawyer Trying to Make Big Oil Pay for Climate Change," Vice.com, December 22, 2017, https://www.vice.com/en/article/43qw3j/meet-the-lawyer-trying-to-make-big-oil-pay-for-climate-change).

includes records showing common financing of the lawyers filing these suits to the tune of millions of dollars, despite the lawsuits all being nominally the subject of generous "contingency fee" agreements which by their terms strongly suggest they are *the* compensation for the work.[20] EPA wishes to make the Court aware of this background.

Public record productions reveal at least two charitable foundations are financing this class of governmental "climate" litigation, of which the instant matter is part, with charitable contributions to achieve *policy* aims. Public records show one of these groups is Resources Legacy Fund ("RLF"), a non-profit dedicated to achieving policy outcomes. "We are a 501(c)(3) nonprofit organization that partners with leaders in philanthropy, communities, government, science, and business to promote smart policies and secure equitable public funding for the environment, climate change resilience, and healthy communities."[21] Coincident with

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[20] In pursuit of this coordinated national campaign, counsel for governmental Plaintiffs gain admission to the local courts *Pro Hac Vice*, in all of which jurisdictions the local rules apply including, where applicable, the local equivalent of ABA Model Rule 1.8(f) "A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client gives informed consent."

[21] https://resourceslegacyfund.org/our-cause-values/. See also "A fiscally sponsored project of New Venture Fund, the Collective Action Fund for Accountability, Resilience, and Adaptation [which] makes charitable grants that enable cities, counties, and states hard hit by climate change to file high-impact climate damage and deception lawsuits represented by expert counsel." https://hewlett.org/grants/new-venture-fund-for-the-collective-

the advent of these climate lawsuits, RLF began reporting in its annual Internal Revenue Service ("IRS") filings "charitable grants" of millions of dollars to Plaintiff's law firm. Each year RLF declared an environmental purpose for these gifts. Other records released in public records litigation confirm that these contributions finance the states' and municipalities' climate litigation in various iterations.[22] The expenditures are apparently managed by the grantor.[23]

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action-fund-for-accountability-resilience-and-adaptation/. See also https://www.macfound.org/grantee/new-venture-fund-43535/, "This award supports NVF's Collaborative Action Fund for Accountability, Resilience, and Adaptation (CAF), which supports precedent-setting lawsuits to hold major corporations accountable for costs associated with the effects on climate of their pollutants. The award renews support for legal processes associated with a variety of lawsuits filed in support of states, counties and cities affected by climate change."

[22] Regardless of whether this reflects any intention to obscure the group's financing of these suits out of concern over particular rules of professional conduct such as the ABA Model Rule of Professional Conduct 1.8(f) (*supra*), public records now confirm that these monies paid by RLF of between $5.25 million and $7.65 million to Rhode Island's counsel over the first four years of filing these suits, from the year litigation first commenced through 2020, are to bring this and those other lawsuits.

[23] In Form I (Part IV, Supplemental Information) for additional explanation RLF reports (CAPS in original), "RLF GRANTS INCLUDE REQUIREMENTS FOR PERIODIC REPORTS RECONCILING GRANT ACTIVITIES, PROGRESS, AND OUTCOMES WITH GRANT OBJECTIVES, AS WELL AS A RECONCILIATION OF GRANT EXPENDITURES WITH THE PROPOSAL BUDGET. IN ADDITION, STAFF MAINTAINS CONTACT WITH GRANTEES AND PERIODICALLY CONDUCTS FIELD VISITS FOR SIGNIFICANT PROJECTS."

Sher Edling, LLP, is the law firm that has filed the overwhelming majority of these "climate" lawsuits against the same and similarly situated defendants since 2017, including Rhode Island's July 2018 lawsuit that is again before this Court. In its IRS Form 990 for the year 2017, RLF listed a charitable grant to Sher Edling, LLP in the amount of $432,129 for "Land or Marine Conservation."[24] RLF's 2018 990 reports a $1,319,625 charitable grant to Sher Edling, LLP, this time claiming a different purpose, of "Advancing Healthy Communities."[25] RLF's 2019 990 reports a $1,110,000 in a charitable grant to Sher Edling, LLP, this time for another stated environmental purpose, "Land or Marine Conservation Promotion of Education and/or Healthy Communities."[26] RLF's 2020 990, released in 2022, reported a $2,394,000 charitable grant to Sher Edling, LLP, this time for the same stated environmental purpose as a previous year, "Land or Marine Conservation Promotion of Education and/or Healthy Communities."[27]

Further details have recently emerged. In late April 2022, the public interest group Government Accountability & Oversight obtained records in

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[24] https://resourceslegacyfund.org/wp-content/uploads/2018/11/RLF_990_2017.pdf, Schedule I, Part II.

[25] https://resourceslegacyfund.org/wp-content/uploads/2020/03/RLF-IRS-Final-990-12.31.18-Public-Copy-4829-6612-8044.pdf.

[26] https://resourceslegacyfund.org/wp-content/uploads/2021/02/RLF-Public-Copy-IRS-Form-990-12.31.19-4824-7483-1056.pdf.

[27] https://resourceslegacyfund.org/wp-content/uploads/2022/03/RLF-2020-IRS-Form-990-Public-Copy-Amended.pdf.

California Public Records Act litigation against the University of California. Among these were correspondence from Sher Edling, LLP, to a prospective donor asking if that individual could support the firm's climate nuisance lawsuits. The email confirmed that the contingent fee litigation was actually being privately underwritten through something the firm's representative called the "Collective Action Fund." Specifically, Sher Edling's Chuck Savitt wrote on July 19, 2017, in pertinent part:

> "Dear Dan, Wanted to let you know that we filed the first three law suits supported by the Collective Action Fund on Monday. These precedent setting cases call on 37 of the world's leading fossil fuel companies to take responsibility for the devastating damage sea level rise—caused by their greenhouse gas emissions—is having on coastal communities. The suits were filed in California Superior Court on behalf of the City of Imperial Beach and the Counties of Marin and San Mateo. . . . We will keep you up to date as the cases move forward and as we file additional cases. Dam [sic], can we find a time to continue our conversation about your possible support for the project? And it would be great to have you meet Vic Sher."[28]

[28] See fn. 4.

The recipient, Dan Emmett, forwarded this email to the University of California at Los Angeles ("UCLA") School of Law.[29] Mr. Emmett wrote, *inter alia*, "Chuck Savitt who is heading this new organization behind the lawsuits has been seeking our support. Terry Tamminen in his new role with the DiCaprio Foundation has been a key supporter. I don't know how realistic this approach is from a practical and legal point of view though I respect the good intentions and the message. I am wondering what you or any of your group thinks about the viability of this approach and these suits? Or if you know Vic Sher."[30] Prof. Ann Carlson wrote back, *inter alia*, "I am serving—along with Terry—on a committee advising the Plaintiffs' lawyers so I definitely have thoughts about this. Generally I think it's high-quality litigation but with a very uncertain outcome given its novelty."

In February 2018, Carlson wrote again to Emmett asking, "Do you think Andy [Sabin] would have any interest in helping to finance the nuisance litigation? I was on a call with the lawyers today (Vic Sher and team) and continue to be very impressed with them. Would you be willing to reach out to him or do you think it would be OK if I did? Or we could jointly?" *Id*. Emmett replied to Carlson in pertinent part, "You can

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[29] https://climatelitigationwatch.org/wp-content/uploads/2021/03/Carlson-reporting-forms-Responsive-Documents-20-8525.pdf.

[30] See correspondence at https://climatelitigationwatch.org/wp-content/uploads/2022/12/SherEdling-recruting-Emett-then-Carlson-recruting-Sabin.pdf.

tell [Sabin] Terry's organization and I are both serious supporters." *Id*.

A search of the Wayback Machine (Archive.org) reveals that, months before, "Terry"—Tamminen, the then-chief executive officer of one organization channeling money to the lawsuits—acknowledged that his group's "grant" to "**The Collective Action Fund** (Resources Legacy Fund) [was] to support precedent-setting legal actions to hold major corporations in the fossil fuel industry liable for the effects of climate change pollution"[31] (emphasis and RLF parenthetical in original). This was deemed necessary because of "a lack of political leadership" to enact the desired policies. *Id*. That Fund then made those "charitable grants" to Plaintiff's counsel totaling millions of dollars, which increased in amount as the number of suits filed also increased.

In July 2020, in the face of some of the above-cited 990 information suggesting that this might be occurring, a law professor at George Mason University School of Law took notice of these payments in the context of another "consumer protection" climate lawsuit against oil companies by Sher Edling, LLP, on behalf

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[31] "Leonardo DiCaprio Foundation awards $20 million in environmental grants," September 17, 2017 https://web.archive.org/web/20171002192851/https:/www.leonardodicaprio.org/leonardo-dicaprio-foundation-awards-20-million-in-environmental-grants/. See also "Highlighted grantees include: . . . **The Collective Action Fund** (Resources Legacy Fund): to support precedent-setting legal actions to hold major corporations in the fossil fuel industry liable for the effects of climate change pollution." *Id*.

of the District of Columbia. Professor Michael Krauss's commentary raised serious tax and public policy consequences should this suspicion bear out (as it now has with the release of additional public records).[32] Subsequently, RLF's 2020 990 added an entry for the first time listing Sher Edling, LLP as an independent contractor, indeed now its "highest compensated independent contractor," with fees paid in an amount identical to the "charitable grant for Land or Marine Conservation Promotion of Education and/or Healthy Communities" for that year, $2,394,000. Remarkably, this entry was for "Consulting." This brought the total sent to the law firm for just that most recent year released to $4,788,000.

EPA previously sought any public records submitted to these governmental Plaintiffs by their law firm reflecting any such disclosures about this extant financing, for which the Plaintiffs nonetheless promised extremely generous "contingency fees" to file these lawsuits. For example, EPA obtained the package filed by Minnesota Attorney General Keith Ellison in an application seeking approval for the contract engaging Sher Edling, LLP from the Minnesota Legislative Advisory Commission. These records, available at https://govoversight.org/wp-content/uploads/2021/01/AGO-LAC.pdf, contain no disclosure that the firm is

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[32] Prof. Michael I. Krauss "Using Charitable Funds to Subsidize "Legislation Through Litigation," Forbes, July 28, 2022, https://www.forbes.com/sites/michaelkrauss/2020/07/28/using-charitable-funds-to-subsidize-legislation-through-litigation/?sh=1f7098ff3342.

being compensated for the litigation by a party other than the client, which promised the firm "16.67% of the first $150 million recovered, and 7.5% for any portion greater than $150 million."[33] In fact, the records suggest that this contingency fee to be paid out of alleged taxpayer damages is *the* compensation for the representation. The public record reveals no reason to believe that that Office of the Attorney General informed the Legislative Advisory Commission that it had any knowledge prior to signing that agreement that the law firm was already being paid substantial sums by a private foundation to file these lawsuits, raising the question whether it knew and failed to report this disclosure, or the disclosure was not made. To date, records indicate that only one governmental Plaintiff, Anne Arundel County, Maryland, has any records reflecting knowledge of this arrangement. Although the County will not release the email in question which references RLF, it describes the email in an affidavit as being dated eight weeks before the County filed its version of the instant suit.[34] Other governmental

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[33] *Id.*, reflecting $25 million of the first $100 million, 15% of the next $50 million, "plus seven and one-half percent (7.5%) of the amount of the Net Monetary Recovery greater than one hundred fifty million dollars ($150,000,000) (San Francisco City and County), https://climatelitigationwatch.org/wp-content/uploads/2018/12/SF-CC-2018-11-20-Legal-Services-Agreement-SF-SE-AB-FINAL-EXECUTED.pdf.

[34] Letter from Anne Arundel County available here, https://climatelitigationwatch.org/wp-content/uploads/2022/12/Letter-to-R.-Schilling-MPIA-Response-00367084xA76A4.pdf. Affidavit available here http://epadvocates.org/wp-content/uploads/2022/08/Exhibit-B-Affidavit-of-Custodian-00374196xA76A4.pdf.

climate Plaintiffs have all indicated they have no records mentioning Resources Legacy Fund.

This information further affirms that a vexatious multi-front litigation campaign of which the instant suit is a part is in fact a national, coordinated campaign that belongs in federal court.

III. THERE IS MASSIVE RESISTANCE IN LOWER COURTS TO THIS COURT'S DECISIONS

This Court previously vacated and reversed a slew of lower Court decisions for reconsideration in light of its prior rulings in *BP P.L.C. v. Mayor of Balt.*, 141 S. Ct. 1532 (2021). Specifically, this Court remanded for further consideration in *Suncor Energy (U.S.A.) Inc. v. Bd. of Cnty. Comm'rs of Boulder Cnty.*, 141 S. Ct. 2667 (2021) (vacating and remanding a 10th Circuit Opinion), *Shell Oil Prods. Co., L.L.C. v. Rhode Island*, 141 S. Ct. 2666 (2021) (vacating and remanding a 1st Circuit opinion), and of course in *BP P.L.C. v. Mayor of Balt.*, 141 S. Ct. 1532, 1543 (2021) ("The judgment of the Fourth Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.").

The Fourth Circuit even acknowledged that when the Supreme Court vacates a prior Circuit Court opinion, "because the Supreme Court vacated the entirety of our prior opinion, it has no precedential effect." *Mayor & City Council of Balt. v. BP P.L.C.*, 31 F.4th 178, 228 (4th Cir. 2022). Nevertheless, and despite this open acknowledgment that vacated opinions cannot

be used as precedent, Circuit Courts across the country continue to cite pre-*Baltimore* precedent to come to pre-*Baltimore* outcomes. This Court must step in to once again make clear that its decisions are binding, and that when lower Court decisions are vacated, they cannot be used as precedent for future litigants.

Despite its admissions that the Supreme Court "vacated the entirety" of its opinion, the Fourth Circuit recently cited that opinion as binding precedent in *W. Va. State Univ. Bd. of Governors*, 23 F.4th at 301. In that opinion, the Fourth Circuit held that it had "clarified [in its prior, vacated opinion] that even when a contract specifies the details of the sales and authorizes the government to supervise the sale and delivery, the simple sale of contracted goods and services is insufficient to satisfy the federal officer removal statute." *Id*. The First and Tenth Circuits are similarly citing to prior, vacated opinions in order to reach desired results. For example, the First Circuit cited its vacated opinion in *Shell Oil Products Co*. in *Moore v. Elec. Boat Corp*., 25 F.4th 30, 34 n.2 (1st Cir. 2022). And Tenth Circuit cited its vacated opinion in *Kinney v. HSBC Bank USA, N.A.* (*In re Kinney*), 5 F.4th 1136, 1141 (10th Cir. 2021). District Courts have gone even further to cite vacated decisions as precedent in order to obtain desired outcomes. Perhaps most emblematic of the District Court decisions is *Sant v. Liberty Mut. Ins. Co*., No. 2:21-CV-00251-WJ-SMV, 2021 U.S. Dist. LEXIS 133130, at *8 (D.N.M. July 16, 2021), in which the District of New Mexico cited *Suncor* for the

proposition that "There is a presumption against the exercise of removal jurisdiction . . . "

This Court has expressly left open the questions that the lower courts attempt to foreclose. Indeed, in *BP P.L.C. v. Mayor of Balt.*, 141 S. Ct. 1532, 1541 (2021), this Court even noted that confusion appeared to arise in the lower courts because "a number of courts of appeals had already interpreted the prior version" of the relevant statute, rather than interpreting and applying the extant version of that statute. Unfortunately, history is now repeating itself: On remand, rather than applying the precedents of this Court and allowing the parties to litigate federal claims in federal court, the lower courts are applying their own strained, pre-*Baltimore* reasoning to come to their desired pre-*Baltimore* result. It is hardly a coincidence that in *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238 (10th Cir. 2022), *Mayor & City Council of Balt. v. BP P.L.C.*, 31 F.4th 178 (4th Cir. 2022), and *Rhode Island v. Shell Oil Prods. Co., L.L.C.*, 35 F.4th 44 (1st Cir. 2022), the respective circuit courts all came to an identical conclusion to the conclusion that was vacated (albeit with slightly different reasoning).

This Court should grant certiorari and reverse to enforce its own precedents.

CONCLUSION

Public records and subsequent litigation activity demonstrate the need for this Court to confront the expanding tsunami of "climate nuisance" litigation. Such suits are not only a grab for revenue and other desired policies that have eluded parties through the political process, but demean the federal judiciary by attempting to seek such federal policies in state court. This Court should grant certiorari to make clear that federal courts are the proper forum to obtain a ruling relating to federal energy and environmental policy matters, and to ensure that courts at both the state and federal level are perceived to rule on such issues in accordance with the law rather than based on apparent or anticipated biases.

Respectfully submitted,

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