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

BRIEF OF ATLANTIC LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE* [1]

Founded in 1977, the Atlantic Legal Foundation is a national, nonprofit, public interest law firm whose mission is to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and efficient government, sound science in judicial and regulatory proceedings, and school choice. With the benefit of guidance from the legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, the Foundation pursues its mission by participating as *amicus curiae* in carefully selected appeals before the Supreme Court of the United States, federal courts of appeals, and state supreme courts.

Nationally recognized for its advocacy of sound science in the courtroom, and consistent with its strong commitment to serve the public interest, the Atlantic Legal Foundation has submitted amicus briefs on behalf of renowned scientists such as Nicholaas Bloembergen (a Nobel laureate in physics) and Bruce Ames (one of the world's most frequently citied scientists) in each of the "*Daubert* trilogy" of

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[1] Petitioners' and Respondent's counsel of record have lodged blanket consents for the filing of merits-stage amicus briefs. In accordance with Supreme Court Rule 37.6, *amicus curiae* Atlantic Legal Foundation certifies that no counsel for a party authored this brief in whole or part, and that no party or counsel other than the *amicus curiae* and its counsel made a monetary contribution intended to fund preparation or submission of this brief.

cases—*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). In *Daubert*, the Court quoted the Foundation's brief on the meaning of "scientific . . . *knowledge*" as used in Federal Rule of Evidence 702. *See Daubert*, 509 U.S. at 590 ("Indeed, scientists do not assert that they know what is immutably `true' — they are committed to searching for new, temporary theories to explain, as best they can, phenomena.") (quoting Brief for Nicholaas Bloembergen, *et al.* at 9).

* * *

As this litigation reflects, the ongoing, decades-long, highly contentious scientific debate concerning the extent to which industrial activities, particularly carbon dioxide and other greenhouse gas emissions attributable to "fossil fuel" energy companies, may have contributed to global climate change also has engendered significant, unresolved, legal issues. *See generally* Columbia Law School, Sabin Center for Climate Change Law and Arnold & Porter, U.S. Climate Change Litigation data base (indexing 1,292 climate change-related litigation matters in the United States).[2]

The question presented in this appeal involves the scope of appellate review under 28 U.S.C. § 1447(d) where a state-court action has been removed to a federal district court in part on federal-officer removal grounds, 28 U.S.C. § 1442(a)(1). This seemingly esoteric question of appellate law arises here in

[2] http://climatecasechart.com/us-climate-change-litigation (last visited Nov. 9, 2020).

connection with global climate change tort litigation brought against more than two dozen multinational energy companies by a financially distressed city in the comfortable surroundings of its own state circuit court (the Circuit Court for Baltimore City), where locally elected judges preside. *See* App. 31a. Many similar state-court suits seeking to hold virtually the entire fossil fuel industry liable under state common law for the alleged harmful effects of global climate change have been filed around the nation by state and local governments. *See* Br. for the Petitioners at 6-7 & 7 n.1; Sabin Ctr., *supra* (listing suits raising "common law claims" against "fossil fuel companies" for "climate change impacts").

Amicus curiae Atlantic Legal Foundation believes that it is important for this Court to consider the § 1447(d) scope-of-review issue in the context of the state-court global climate change litigation in which it arises. Although Baltimore's artfully drafted state-court attack against the fossil fuel industry is couched in state common law terms, the city's public nuisance claims and other state-law causes of action unavoidably implicate federal constitutional, statutory, regulatory, and common law. The Foundation submits that the geographically unbounded, global climate change liability claims lodged against major fossil fuel energy companies in this and similar suits should be adjudicated—if at all—by the federal judiciary, not in 50 separate state-court systems.

SUMMARY OF ARGUMENT

The Fourth Circuit's opinion begins by explaining that "[t]his appeal is about whether a climate-change

lawsuit against oil and gas companies belongs in federal court." App. 2a. It does. The court of appeals erred by confining its analysis to the basis for federal-officer removal, thereby refusing to consider petitioners' additional grounds for removal (e.g., that there is § 1331 federal question jurisdiction because Baltimore's claims necessarily arise under federal common law).

The global, or at least nationwide, scope of Baltimore's claims regarding petitioners' alleged significant contributions to climate change not only place this and similar litigation within the province of federal law, but also compel the conclusion that such cases should be resolved by federal, not state, courts. Unlike the 50 state court systems, the unitary federal judicial system requires federal judges and litigants to proceed in accordance with a single set of nationally uniform (i) procedural rules, (ii) pretrial discovery requirements, (iii) standards governing motions to dismiss and for summary judgment, and (iv) criteria for admissible evidence, including the testimony of scientific experts. Federal district courts are generally more experienced than state trial courts in managing complex cases that involve conflicting expert testimony on scientific subjects. And unlike the states' 50 separate judicial systems, Article III establishes only one Supreme Court to interpret and apply the law.

The legal issues raised by climate change tort suits are federal issues that should be addressed by federal courts. They include, for example, the threshold question of whether such suits require adjudication of nonjusticiable political questions in violation of the

Constitution's separation of powers. And insofar as climate change tort suits are justiciable, they raise important federal questions such as whether climate change-related public nuisance claims, although styled as state common law claims, actually arise under federal common law and thus are displaced by federal statutory law. Or alternatively, whether federal statutory, regulatory, or common law preempts state-law climate change claims.

Unless climate change tort suits can remain in federal court following removal, there is a significant risk that the states' differing court systems will impose upon the same group of multinational defendants conflicting or inconsistent state-law judgments and remedies. Allowing states or their political subdivisions to continue pursuing climate change litigation in their own state courts—where they enjoy a decidedly home-court advantage—undermines interstate federalism by enabling the states that file these suits to assert their coercive power over the states that do not.

ARGUMENT

Federal Courts Are The Appropriate Forum For Climate Change Tort Suits

A. State-law tort claims seeking damages or other remedies for global climate change unavoidably implicate federal law

In this litigation "Baltimore avers that it has suffered various 'climate change-related injuries.'" App. 3a. But these alleged climatological harms—"an increase in sea levels, storms, floods heat-waves, droughts, and extreme precipitation," *id.*—do not stop

at the Baltimore city limits. Instead, as the spate of similar suits from coast to coast suggests, the alleged adverse effects of climate change (sometimes called "global warming") are global, or at least nationwide, in scope. So is Baltimore's complaint, which broadly claims that the production, promotion, and use of fossil fuel products has "substantially contributed" to global climate change. App. 3a.

Despite Baltimore's efforts to avoid removal by restricting its complaint to ostensibly garden-variety state common law nuisance and other claims, *see* App. 3a, 32a, "[w]hat matters is the crux—or, in legal speak, the gravamen—of the plaintiff[s]' complaint, setting aside any attempts at artful pleading." *Fry ex rel. E.F. v. Napoleon Cmty. Schools*, 137 S. Ct. 743, 755 (2017); *cf. Rivet v. Regions Bank*, 522 U.S. 470, 475 (1988) (discussing the "artful pleading" corollary to the "complete preemption" removal doctrine) ("[A] plaintiff may not defeat removal by omitting to plead necessary federal questions. If a court concludes that a plaintiff has 'artfully pleaded' claims in this fashion, it may uphold removal even though no federal question appears on the face of the plaintiff's complaint." (internal quotation marks and citation omitted)).

Baltimore's artfully drafted complaint, like climate change itself, is necessarily interstate in nature. Indeed, the 132-page complaint contains "many references to fossil fuel production" that "serve to tell a broader story . . . about how the unrestrained production and use of Defendants' fossil fuel products contribute to greenhouse gas pollution." App. 21-22a. Regardless of the local environmental impacts that

Baltimore claims the petitioners' fossil fuel-related activities may have triggered, the alleged tortious conduct at issue in this litigation is nationwide or global in scope, and neither limited to, nor directed toward, the City of Baltimore.

This Court already has recognized that climate-related public nuisance claims arise under, or at least are controlled by, federal law. In *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011), the Court addressed the question of whether several states, New York City, and private land trusts "can maintain federal common law public nuisance claims against carbon-dioxide emitters (four private power companies and the federal Tennessee Valley Authority)." *Id.* at 415. The plaintiffs, which sought "a decree setting carbon-dioxide emissions for each defendant," *id.*, claimed that "[b]y contributing to global warming . . . the defendants' carbon-dioxide emissions created a substantial and unreasonable interference with public rights, in violation of the federal common law of interstate nuisance, or, in the alternative, of state tort law." *Id.* at 418 (internal quotation marks omitted).

In its unanimous opinion, the Court emphasized in *American Electric Power* that "[e]nvironmental protection is undoubtedly an area within national legislative power, one in which federal courts may fill in statutory interstices, and if necessary, even fashion federal law." *Id.* at 421 (internal quotation marks omitted). Although the Court explained that "'[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law,'" *id.* (quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 103

(1972) ("*Milwaukee I*"), it indicated that any "federal common law claim for curtailment of greenhouse gas emissions because of their contribution to global warming . . . would be displaced by the federal legislation authorizing EPA [the U.S. Environmental Protection Agency] to regulate carbon-dioxide emissions." *Id.* at 423.

The Court therefore held in *American Electric Power* that "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants." *Id.* at 424. "The critical point is that Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants; the delegation is what displaces federal common law." *Id.* at 426; *see also id.* at 419 (noting that in *City of Milwaukee v. Illinois*, 451 U.S. 304, 316–319 (1981) ("*Milwaukee II*") "this Court held that Congress had displaced the federal common law right of action recognized in *Milwaukee I* by adopting amendments to the Clean Water Act . . . an all-encompassing regulatory program, supervised by an expert administrative agency, to deal comprehensively with interstate water pollution").

Along the same lines, the plaintiffs in *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012), filed a federal district court action "contending that greenhouse gases released by the [defendant] Energy Producers cross state lines and thereby contribute to the global warming that threatens the continued existence of [the] village." *Id.* at 855. Unlike the emissions abatement decree requested in *American Electric Power*, the *Kivalina*

plaintiffs sought "damages under a federal common law claim of public nuisance" for past emissions. *Id.* at 853. Recognizing that "federal common law can apply to transboundary pollution suits," *id.* at 855 (citing *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987) ("the control of interstate pollution is primarily a matter of federal law")), the court held that *American Electric Power* required dismissal of the *Kivalina* suit. *See id.* at 856-57. The Ninth Circuit explained in *Kivalina* that "the Supreme Court has held that federal common law addressing domestic greenhouse gas emissions has been displaced by Congressional action. That determination displaces federal common law public nuisance actions seeking damages, as well as those actions seeking injunctive relief." *Id.* at 858.

Since the Court in *American Electric Power* held that the Clean Air Act displaced the plaintiffs' federal common law nuisance claim, there was no reason to address, and the Court did not address, whether the plaintiffs' placeholder state-law nuisance claim was preempted. *See* 546 U.S. at 429. Nonetheless, in *dicta*, the Court implicitly recognized that federal law controlled the viability of the plaintiffs' state-law claim: "In light of our holding that the Clean Air Act displaces federal common law, the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act." *Id.*

The Supreme Court precedents discussed above, and also the *Kivalina* decision, demonstrate that petitioners' alleged contributions to global climate change involve a subject that arises under, or is entirely subject to, federal law. Therefore, the crucial

questions that govern the viability of Baltimore's suit—

(i) whether Baltimore's purported state-law claims necessarily arise under federal common law, and thus are displaced by federal statutes and/or regulations, and

(ii) whether Baltimore's claims, even if not displaced, are expressly and/or impliedly preempted by federal statutes and regulations,

are questions that belong in federal court. They are federal questions that federal district courts have § 1331 subject-matter jurisdiction to decide, and should decide. *Cf. Milwaukee I*, 406 U.S. at 99 (holding that interstate water pollution "creates actions arising under the 'laws' of the United States within the meaning of § 1331(a)"). And more fundamentally, whether Baltimore's claims require adjudication of political questions, and thus violate the separation of powers and are nonjusticiable, is a threshold constitutional issue that should be decided exclusively by federal courts.

B. Federal courts are the appropriate forum for determining whether climate change tort claims are justiciable, and if they are, whether federal law displaces such claims, or alternatively, preempts them

Under Article III of the Constitution, "no justiciable 'controversy' exists when parties seek adjudication of a political question." *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007). Because a "political question" is an issue that is "entrusted to one of the political branches," *Vieth v. Jubelirer*, 541 U.S. 267,

277 (2004), "[t]he nonjusticiability of a political question is primarily a function of the separation of powers." *Baker v. Carr*, 369 U.S. 186, 210 (1962). In *Baker,* this Court "set forth six independent tests for the existence of a political question." *Vieth*, 541 U.S. at 277. They include "a lack of judicially discoverable and manageable standards for resolving" an issue, and "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." *Id.* at 277-78 (quoting *Baker*, 369 U.S. at 217).

There is substantial reason to conclude that Baltimore's global climate change claims would require adjudication of nonjusticiable political questions. At the very least, applicability of the political question doctrine to this case, and to similar cases, is a separation of powers issue that should be considered by federal courts.

The Court in *American Electric* Power, 564 U.S. at 419, noted that the Second Circuit had reversed the district court's ruling that the litigation should be dismissed "as presenting non-justiciable political questions." Although this Court acknowledged that the political question doctrine was one of the "threshold questions" in the case, *id.*, its opinion does not address it. The opinion does point out, however, that "it is *primarily the office of Congress*, not the federal courts, to prescribe national policy in areas of special federal interest." *Id.* at 423-24 (emphasis added). Regulation of greenhouse gas emissions that may contribute to global climate change is clearly such an area of special federal interest. *See id.* at 416 ("In *Massachusetts v. EPA* . . . this Court held that the

Clean Air Act, 42 U.S.C. § 7401 e*t seq.*, authorizes federal regulation of emissions of carbon dioxide and other greenhouse gases. . . . they are therefore within EPA's regulatory ken.").

Similarly, in *Kivalina*, 696 F.3d at 854, the Ninth Circuit explained that "[t]he district court held that the political question doctrine precluded judicial consideration of Kivalina's federal public nuisance claim." Although the court of appeals adhered to the analytical framework that this Court utilized in *American Electric Power*, the court cautioned that "the solution to Kivalina's dire circumstance must *rest in the hands of the legislative and executive branches* of our government, not the federal common law." *Id.* at 858 (emphasis added).

Consider also the Ninth Circuit's more recent holding in *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020). The plaintiffs in this so-called "Kids Climate Suit"—"twenty-one young citizens, an environmental organization, and a 'representative of future generations,'" *id.* at 1165—claimed "that the government has deprived them of a substantive constitutional right to a 'climate system capable of sustaining human life.'" *Id.* at 1169. They sought "declaratory relief and an injunction ordering the government to implement a plan to 'phase out fossil fuel emissions and draw down excess atmospheric [carbon dioxide].'" *Id.* at 1165. The Ninth Circuit concluded that "such relief is beyond our constitutional power. Rather, the plaintiffs' impressive case for redress must be presented *to the political branches* of government." *Id.* (emphasis added).

Because the principal issue before the court of appeals in *Juliana* was whether the plaintiffs had Article III standing to pursue their constitutional claims, the court focused on the well-established redressability prong of the test for standing, *id.* at 1168, i.e., "whether the plaintiffs' claimed injuries are redressable by an Article III court." *Id.* at 1169. More specifically, the court explained that "it is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan. . . . any effective plan would necessarily require a host of *complex policy decisions* entrusted, for better or worse, to the wisdom and discretion of the *executive and legislative* branches." *Id.* at 1171 (emphasis added).

The *Juliana* panel majority's analysis of Article III standing asserts that "we do not find this to be a political question." *Id.* at 1175 n.9. Nonetheless, their opinion explains that "although inaction by the Executive and Congress may affect the form of judicial relief ordered when there is Article III standing, it cannot bring *otherwise nonjusticiable claims* within the province of federal courts." *Id.* at 1175 (emphasis added). The dissenting opinion in *Juliana* only underscores the point that the issue of whether the political question doctrine bars climate change tort claims is a live controversy that federal courts should resolve. *See id.* at 1187 (Stanton, J., dissenting) ("Obviously, the Constitution does not explicitly address climate change. But neither does climate change implicitly fall within a recognized political-question area.").

Whether Baltimore's tort suit, and similar climate change-related tort litigation, raise nonjusticiable political questions because they implicate one or more of the *Baker* factors—for example, a lack of judicially manageable standards for resolving global climate change tort litigation, or the impossibility of resolving such litigation without making policy determinations—is a significant separation of powers issue that is worthy of federal courts' scrutiny. Indeed, the Fourth Circuit, from which this appeal arises, has held, albeit in a different context, that adjudication of tort claims can be barred by the political question doctrine. *See, e.g.*, *Taylor v. Kellogg Brown & Root Servs., Inc.*, 658 F.3d 402 (4th Cir. 2011) (establishing a test for determining whether the political question doctrine bars adjudication of state-law tort claims against war-zone military support contractors). But the applicability of the political question doctrine to climate change tort suits is an issue that cannot percolate among federal district courts or federal courts of appeals if suits like the present case are mired in state courts.

Insofar as these types of suits are justiciable, federal courts also are the appropriate forum for deciding whether a plaintiff's climate change tort claims are displaced, or alternatively, preempted, by federal law. These issues, as well as the political question defense and other justiciability issues, can be raised in federal district courts by means of a Rule 12(b) motion to dismiss or a Rule 56 motion for summary judgment—motions that are governed by this Court's precedents and the nationally uniform procedural and substantive standards that they establish. Further, in the interest of judicial economy,

pretrial coordination or consolidation of similar climate change suits under multidistrict litigation procedures, 28 U.S.C. § 1407, may be available.

If following removal, however, individual suits like this are remanded to state trial courts, the defendants' ability (i) to raise and obtain timely pretrial rulings on the applicability of the political question doctrine, or on defenses such as federal displacement or preemption, (ii) to support such defenses with any necessary jurisdictional or other discovery, and (iii) even to pursue a pretrial interlocutory appeal of an adverse ruling, will vary from state to state, and perhaps even from court to court within a state.

C. Climate change tort claims should be adjudicated, if at all, by federal courts in order to foster uniformity of decision and preserve interstate federalism

The nature and scope of the growing number of damages suits brought by state and local governments around the nation—each alleging that many of the same multinational fossil fuel energy companies have significantly contributed to global climate change—require consideration by our nation's unitary federal judicial system. If instead each of 50 separate state court systems is free to reject federal defenses and adjudicate essentially the state common law public nuisance claim, or other similar claims, on the merits, there will be tremendous potential for conflicting or inconsistent findings of fact, conclusions of law, judgments, and damages awards or other remedies imposed on the same group of companies—state-law decisions which, on their face, presumably would fall outside this Court's discretionary jurisdiction.

Although a California federal district court's order denying motions to remand filed by Oakland and San Francisco in litigation similar to the present case was vacated by the Ninth Circuit, the district judge made the following apt observation:

> Taking the complaints at face value, the scope of the worldwide predicament demands the most comprehensive view available, which in our American court system *means our federal courts* and our federal common law. *A patchwork of fifty different answers to the same fundamental global issue would be unworkable.* This is not to say that the ultimate answer under our federal common law will favor judicial relief. But it is to say that *the extent of any judicial relief should be uniform across our nation*.

People v. B.P. p.l.c., Civ. Nos. C-17-06011 & C-17-06012 (WHA) (N.D. Cal. Feb 27, 2018) (Order Denying Motions To Remand) (emphasis added), *vacated & remanded sub nom. City of Oakland v. B.P. p.l.c.*, 960 F.3d 570 (9th Cir. 2020). A crazy quilt of state court rulings can be avoided only if climate change tort suits are removed to, and remain in, federal court.

When deciding whether climate change tort suits should be left to the vagaries of state courts, this Court also should consider that unlike federal judges, many state court judges must stand for election. "Campaign spending on state judicial elections continues to . . . increase the influence of special interest groups in states that elect their judges." DRI Center for Law and Public Policy, *No Independence,*

No Justice (Feb. 2019), at 26.[3] Needless to say, global climate change is a subject of enormous interest to many special interest groups.

On a more fundamental level, allowing state courts to adjudicate climate change tort suits imperils "the principles of interstate federalism embodied in the Constitution." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980). Under our federal system, the 50 states are "coequal sovereigns," and "[t]he sovereignty of each State, in turn, implied a limitation on the sovereignty of all its sister States—a limitation express or implicit in the original scheme of the Constitution and the Fourteenth Amendment." *Id.* at 292, 293.

Because climate change is a nationwide, and indeed global, phenomenon, and the allegations against fossil fuel energy companies are correspondingly expansive in scope, any particular state court system holding fossil fuel energy companies liable under that state's tort law for global climate change and its alleged harms would upset the balance of interstate federalism. Such a state, or political subdivision of a state, would be using the state's tort law to exert its coercive power over multinational defendants—and by so doing, make itself "more equal" than other states with regard to those defendants. *See Goodyear Dunlop Tires Ops., S.A. v. Brown*, 564 U.S. 915, 918 (2011) ("A state court's assertion of jurisdiction exposes defendants to the State's coercive power. . . ."). Allowing climate change tort litigation, following removal, to remain in

[3] Available at https://tinyurl.com/yxj5fsf6.

the federal court system, however, would preserve the balance of sovereignty among the states inherent in our federal system.

CONCLUSION

Consistent with the position advocated in the Brief for the Petitioners, the judgment of the court of appeals should be reversed. In the alternative, the judgment should be vacated and the case remanded for further proceedings.

Respectfully submitted,

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