No. 19-1189

In the Supreme Court of the United States

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

Petitioners,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE,

Respondent.

BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF MANUFACTURERS, SOCIETY OF INDEPENDENT GASOLINE MARKETERS OF AMERICA, NATIONAL ASSOCIATION OF CONVENIENCE STORES, AND ENERGY MARKETERS OF AMERICA IN SUPPORT OF PETITIONER

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

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are the National Association of Manufacturers ("NAM"), Society of Independent Gasoline Marketers of America ("SIGMA"), National Association of Convenience Stores ("NACS"), and Energy Marketers of America ("EMA").

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 $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

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

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[1] Pursuant to Rule 37.6, counsel for *amici curiae* certifies this brief was not authored in whole or in part by counsel for any party and no person or entity, other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief. Petitioners and Respondents filed blanket consents to the filing of amicus briefs.

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.

SIGMA, founded in 1958, represents a diverse membership of approximately 260 independent chain retailers and marketers of motor fuel.

NACS, founded in 1961, is a non-profit trade association representing more than 1900 retail and 1800 supplier company members in the United States and abroad. NACS is the pre-eminent representative of the interests of convenience store operators. In 2019, the convenience and fuel retailing industry employed approximately 2.46 million workers and generated $647.8 billion in total sales, representing approximately 3 percent of the United States Gross Domestic Product. Of those sales, approximately $395.9 billion came from fuel sales alone.

Together SIGMA and NACS represent approximately 80 percent of retail fuel sales in the United States. Their members sell gasoline and diesel fuel to the American public at the retail level, distribute fuel to retailers and are not oil producers or refiners.

EMA is a federation of 47 state and regional trade associations representing energy marketers throughout the United States. Energy marketers represent a vital link in the motor and heating fuels distribution chain. EMA members supply 80 percent of all finished motor and heating fuel products sold nationwide including renewable hydrocarbon biofuels, gasoline, diesel fuel, biofuels, heating fuel, jet fuel, kerosene, racing fuel and lubricating oils. Moreover, energy marketers represented by EMA own and oper-

ate approximately 60,000 retail motor fuel stations nationwide and supply heating fuel to more than 5 million homes and businesses.

The NAM, SIGMA, NACS, and EMA have substantial interests in attempts by local governments––here, the Mayor and City Council of Baltimore—to subject their 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 second wave of highly coordinated lawsuits born out of political frustration that the federal government has not adopted specific policies to address climate change. This particular lawsuit seeks to use state tort law to regulate the national production and sale of energy products that have been essential to modern life since the industrial revolution. *Amici* appreciate that due to climate change, developing new technologies to reduce greenhouse gas ("GHG") emissions and make energy more efficient and environmentally friendly has become an international imperative. But, as the Court stated in *Am. Elec. Power Co. v. Connecticut*, which ended the first wave of this litigation, the decisions needed to achieve these goals are "national" and, ultimately, not well-suited for the "vacuum" of tort litigation. 564 U.S. 410, 421, 427 (2011) (hereafter "*AEP*").

After the Court's ruling in *AEP*, the strategists behind this nationwide litigation campaign began developing ideas for circumventing the Court's ruling. They spent several years developing new legal theories aimed at achieving comparable national regulatory goals as *AEP*, but that would *appear* different from *AEP* to some courts. In 2017, they started teaming with local governments to file these lawsuits in carefully chosen jurisdictions around the country. This case is one of more than twenty lawsuits, which are largely identical to each other.

Each complaint asserts that Defendants' 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. Thus, to get around *AEP*, which involved a federal public nuisance claim, this suit and others like it seek to draw state courts into establishing national public policy affecting carbon emissions. The end result would be for state litigation around the country to effectively create national, parallel and potentially conflicting regulatory structures on the sale and use of fossil fuels.

Regardless of where the cases are filed or how the claims are fashioned, the subject matter and remedies sought are still inherently national, as well as legislative and regulatory in nature. The policy this litigation seeks to drive through state courts impact a multitude of national interests including energy independence, stability of America's electric grid, and affordability for families and businesses across the country, in addition to climate impacts. Such complex policy matters should not be driven by individual state judges in individual state courtrooms applying (or misapplying) various state liability laws.

Defendants properly removed each case to the federal judiciary based on these and other federal law grounds, but the Circuits declined to address most of the compelling reasons these cases do not belong in state court. *Amici* respectfully request the Court to reverse the judgment below and hold Respondent's claims belong in federal court.

ARGUMENT

I. THIS COURT HAS ALREADY STATED THAT LITIGATION INEXTRICABLY TIED TO U.S. ENERGY POLICY ON CLIMATE ARISES UNDER FEDERAL LAW

The first wave of climate change tort litigation effectively ended in 2011 when this Court unanimously ruled in *AEP* that the Clean Air Act displaced federal common law claims over GHG emissions. *See* 564 U.S. at 425 (there is "no room for a parallel track" of tort litigation because Congress delegated authority to regulate GHG emissions to the Environmental Protection Agency). In addition to *AEP*, other climate cases were filed against producers and others in the energy sector, much like the case at bar.

Specifically, an Alaskan village sued many of the same energy producers as here for damages related to rising sea levels under federal law. *See Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012). In Mississippi, a purported class action of homeowners sued a multitude of energy producers under state tort law for property damage caused by 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 and inflict their property damage. Thus, these cases have arisen in various forms—over energy products and use, by public officials and private plaintiffs, under federal and state law, and for injunctive relief and damages.

Soon after *AEP*, the Ninth Circuit dismissed *Kivalina*, finding that even though the legal theories pursued in *Kivalina* differed slightly from *AEP*, given the Court's broader message, "it would be incongruous to allow [such litigation] to be revived in another form." 696 F.3d at 857. It was of no legal import that plaintiffs, as here, argued they were only seeking damages for harm caused by climate change, not to regulate emissions. A federal judge then dismissed Mississippi homeowners' state law claims in *Comer*. *See Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849, 865 (S.D. Miss. 2012) (asking a Court to make "determinations regarding the reasonableness of the defendants' emissions" through tort damages invoked the same federal interests in *AEP*).

At the time, the plaintiffs in these cases fully embraced the national policy focus of the litigation, hoping courts would set national emissions standards through injunctive relief or drive global energy policy by threatening huge monetary damages over the production and sale of fossil fuels. *See* Symposium, *The Use of Civil Litigation as a Tool for Regulating Climate Change*, Valparaiso University School of Law, Feb. 18, 2011 (presentation from Brent Newel, attorney for the Village of Kivalina). As then Maine Attorney General Rowe said, "It's a shame that we're here, here we are trying to sue [companies] . . . because the federal government is being inactive." Symposium, *The Role of State Attorneys General in*

National Environmental Policy, 30 Colum. J. Envtl. L. 335, 339 (2005). Gerald Maples, a plaintiffs' attorney in *Comer*, echoed this point, saying their "primary goal was to say [to defendants] you are at risk within the legal system and you should be cooperating with Congress, the White House and the Kyoto Protocol." Mark Schleifstein, *Global Warming Suit Gets Go-Ahead*, Times-Picayune, Oct. 17, 2009, at 3.

As of 2012, it appeared clear lines were drawn. Climate litigation targeting private actors were inherently federal in nature, regardless of the cause of action, court, parties involved, or whether the claims were stated under federal or state law.

II. THIS CASE IMPLICATES THE SAME FEDERAL INTERESTS RECOGNIZED IN *AM. ELEC. POWER V. CONNECTICUT*

A. This Case Is A Thinly-Veiled Attempt To Plead Around *AEP*

The advocacy groups and lawyers intent on using tort litigation to drive climate public policy were undeterred by *AEP*. They convened in La Jolla, California in 2012 to brainstorm on how to re-package the litigation in hopes of achieving success. *See* Findings of Fact and Conclusions of Law, *In re ExxonMobil Corp.*, No. 096-297222-18 (Tex. Dist. Ct.–Tarrant Cty. Apr. 24, 2018), at 3 (discussing the "Workshop on Climate Accountability, Public Opinion, and Legal Strategies"). The strategies discussed included the one they ultimately employed: filing lawsuits in multiple jurisdictions, hoping one or more case would reach discovery and put "pressure on the industry that could eventually lead to its support for legislative and regulatory responses to global warming." *Id*.

Organizers of the conference captured their discussion and strategies for this litigation in a report they posted online. *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).[2] As the report details, they still believed "the courts offer the best current hope" for imposing their national policy agenda against fossil fuels. *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.

They emphasized making these new lawsuits look like traditional tort 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 in hopes of avoiding *AEP*'s shadow. Finally, they discussed "the importance of framing a compelling public narrative, including "naming [the] issue or campaign" to generate "outrage." *Id.* at 21, 28.

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

Additional information about the goals and tactics of the litigation campaign continue to emerge. In January 2016, a second strategy session was held in New York City to discuss the goals of the litigation campaign, as they had developed since the La Jolla conference. *See Entire January Meeting Agenda at Rockefeller Family Foundation*, Wash. Free Beacon, April 2016.[3] Specifically, they discussed how they were going to leverage the filing of these lawsuits, the media surrounding the litigation, and certain government investigations they sought to facilitate in order "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 also emphasized the importance of "creating scandal" to drive this narrative. *Id.*[4]

Lawsuits following these tenets were filed starting in 2017. This case, along with the two dozen local government climate tort suits the energy industry removed to the federal judiciary, are parts of the same litigation campaign. As indicated, the cases are meant to look facially different from *AEP*, which targeted energy users (utilities) and sought injunctive relief under federal public nuisance law. These cases target energy producers and others in the sales chain of commerce, invoke state tort laws, and seek abate-

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

[4] 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.

ment and damages. To name the campaign, they have falsely asserted there has been a widespread "campaign of deception" involving all of the various 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).

Since 2017, they have generated significant attention to their allegations, taking out paid advertisements and billboards urging public officials to file lawsuits, hosting symposiums and press conferences to generate media attention to this narrative, and trying to impact state and federal legislation. *See generally* Manufacturers' Accountability Project, Beyond the Courtroom[5] (detailing the coordinated funding, legal and media components of this litigation campaign). Thus, unlike traditional state tort suits, success for this national litigation campaign is not about proving legal or factual allegations, but trying to leverage their ability to file and sustain lawsuits in state courts for national, extrajudicial purposes.

B. Facial Differences Between This Case and *AEP* Do Not Alter the Federal Nature of this Litigation

To be clear, the facial differences between this litigation and *AEP* do not change the fundamental nature of the litigation's goals, purposes, and impacts. This litigation campaign is still about driving federal public policy on the production and sale of oil, gas and other traditional energy sources. The only difference is that they are seeking to have these decisions made in state, rather than federal court.

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

First, the strategy of invoking state law and naming local companies is intended to keep the cases in state court, as the organizers believe federal courts "are less favorable" to their claims given *AEP*. Mark Kaufman, *Judge Tosses Out Climate Suit Against Big Oil, But It's Not the End for These Kinds of Cases*, mashable.com, June 26, 2018 (quoting Prof. Carlson, an advisor to Plaintiff's counsel); *see also* 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 California governments "are arguing to have their suits heard in California state courts, which compared to their federal counterparts, tend to be more favorable to 'nuisance' lawsuits").

In *AEP* the Court already explained that the climate public policies at the center of this litigation are "of special federal interest" and that "borrowing the law of a particular State would be inappropriate." *Id.* at 422-24. It also found that the federal policy matters at issue here are not well-suited for "judges issuing ad hoc, case-by-case" decisions. *AEP*, 564 U.S. at 428. Misapplying the well-pleaded complaint rule to keep cases in state court exacerbates, not solves, these predicaments. State judges could create national, conflicting regulatory structures on the sale and use of fossil fuels. Of particular concern is that state courts, given the parochial nature of the remedies sought, "may reflect 'local prejudice' against unpopular federal laws" or defendants. *Watson v. Philip Morris Cos.*, 551 U.S. 142, 150 (2007); *accord Savoie v. Huntington Ingalls, Inc.*, 817 F.3d

457, 461 (5th Cir. 2016) (observing "historic concern about state court bias" in federal officer cases).

Second, the lawsuits also falsely disclaim any attempt to regulate or impact national emission standards, asserting the claims are solely about funding infrastructure projects needed to deal with climate change. But, as the Ninth Circuit recognized in *Kivalina*, seeking abatement or damages instead of injunctive relief does not change the federal regulatory nature of this litigation. *See* 696 F.3d at 857. Indeed, this Court has consistently held that state tort damages "directly regulate" conduct the same as legislation and regulation. *See, e.g., Riegel v. Medtronic, Inc.*, 552 U.S. 312, 325 (2008) ("tort duties of care" under state law "directly regulate" a defendant's conduct). A person subjected to liability must change the offending conduct to avoid liability, just as it must to comply with statutes and regulations. *See Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005) (finding state tort liability imposes state law requirements); *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.").

As alluded to above, the ultimate public policy goal of this litigation is to penalize energy production and use—what litigation proponents 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. As fifteen state attorneys general wrote in an *amicus* brief in one of these cases, these remedies

would know no state bounds: "Plaintiffs are attempting to export their preferred environmental policies and their corresponding economic effects to other states." *Amicus* Brief of Indiana and Fourteen Other States in Support of Dismissal, *City of Oakland v. BP* (9th Cir. filed Apr. 19, 2018).

A reporter who follows this litigation has observed the incongruity between the ways the cases are presented and their true goals:

> State and local governments pursuing the litigation argue that the cases are not about controlling GHG emissions but instead about collecting damages from oil companies for the harms their products have already caused. But they also privately acknowledge that the suits are a tactic to pressure the industry to support future mitigation policies.

Dawn Reeves, *As Climate Suits Keeps Issue Alive, Nuisance Cases Reach Key Venue Rulings*, Inside EPA, Jan. 6, 2020.[6]

Third, shifting the targets of the litigation from utilities to others in the energy sector is of no legal consequence. To the contrary, the ever-changing list of companies named in this litigation—including among the recently filed cases—underscores the political nature of each lawsuit. Some localities are seeking to blame only one or two fossil fuel producers for their alleged climate-related injuries; others are targeting dozens of disparate companies, including

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

various energy manufacturers and gas stations, under a large Cuisinart of liability. The truth, as the Court observed in *AEP*, is that GHGs are not particular to any industry, but a by-product of modern society. *AEP*, 564 U.S. at 428-29 ("Similar suits could be mounted . . . against 'thousands or hundreds or tens' of other defendants fitting the description 'large contributors' to carbon-dioxide emissions."). Here, Respondent made a political decision as to whom to sue in its state courts.

Finally, the penalty these lawsuits seek to impose would be assessed irrespective of the ability of families and businesses to pay more for their energy needs, the impact on the U.S. economy and energy independence, or the other imperative factors that go into America's national energy policies. David Bookbinder of the Niskanen Center, which represents plaintiffs in an action by the County of Boulder, Colorado, candidly acknowledged the litigation's true goal: "Given that companies are agents of consumers, however, holding companies responsible is to hold oil consumers responsible." Jerry Taylor & David Bookbinder, *Oil Companies Should Be Held Accountable for Climate Change*, Niskanen Ctr., Apr. 17, 2018.

To be clear, the case at bar along with the other lawsuits that comprise this litigation campaign are not traditional local property damage cases appropriate for state courts. They are not moored to any location, jurisdiction or circuit. The people developing these cases have been actively recruiting localities around the country to allow them to file claims on their behalf in multiple state court jurisdictions as a political tactic. Their ultimate goal is to drive national energy policy through these state tort

claims, presumably through a national settlement or the threat of massive liability.[7]

III. THE COURT SHOULD ENSURE ALL GROUNDS FOR REMOVAL ARE EVALUATED, WHICH WILL SHOW THIS LITIGATION ARISES UNDER FEDERAL LAW

In an effort to avoid a proper assessment of the inherently federal nature of this litigation, the organizers of this legal campaign carefully chose the jurisdictions where these cases have been filed, both in terms of the states and federal circuits. With respect to the federal common law grounds for removal raised by Petitioners, none of the state court cases have been filed in the Circuits—the Fifth, Sixth and Seventh Circuits—that would "allow appellate review of the *whole* order" when the removing defendant premised removal in part on the federal-officer removal statute, 28 U.S.C. § 1442. *See Lu Juhong v. Boeing Co.*, 792 F.3d 805, 811 (7th Cir. 2015). They were filed in circuits that have no on-point rulings or will review only the federal officer removal grounds.

Even still, the cases have resulted in highly divergent outcomes. Specifically, the only two district courts to have fully assessed the climate cases before them issued orders to dismiss the cases. *See City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466 (S.D.N.Y. 2018); *City of Oakland v. BP P.L.C.*, 325 F.

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[7] Steve Berman with Hagens Berman, which represents several localities in this litigation said, "Imagine if I could get ten or 15 cities to all sue and put the same pressure on the oil companies that we did with tobacco companies and create some kind of massive settlement." Geoff Dembicki, *Meet the Lawyer Trying to Make Big Oil Pay for Climate Change*, Vice, Dec. 22, 2017.

Supp. 3d 1017 (N.D. Cal. 2018). Both of them expressed their understanding that the core claims in these cases largely parallel those in *AEP*, *Kivalina*, and *Comer*. They all seek to impose nationwide restrictions or penalties on specific companies and energy sources based solely on a narrow set of issues.

New York City filed its state claims against five energy producers in federal court, allowing the district court to avoid the remand issues at bar and focus on the substantive claims. Judge Keenan observed during a hearing that the City's lawsuit was clearly "hiding an emissions case in language meant to seem it was instead targeting the companies' production and sales operations." Larry Neumeister, *Judge Shows Skepticism to New York Climate Change Lawsuit*, Assoc. Press, June 13, 2018.[8] The court also appreciated that "the serious problems caused thereby are not for the judiciary to ameliorate. Global warming and solutions thereto must be addressed by the two other branches of government." *City of New York*, 325 F. Supp. 3d at 474-75. This case is on appeal in the Second Circuit. *See City of New York v. BP P.L.C.*, No. 18-2188 (2nd Cir.).

The City of Oakland's case, which also blames five companies for its alleged climate injuries, was heard by Judge Alsup. He denied the City's motion to remand the case to state court, explaining that the remedy plaintiffs seek "would effectively allow plaintiffs to govern conduct and control energy policy" nationally and internationally. *City of Oakland*, 325 F. Supp. 3d at 1026. "The scope of plaintiffs' theory is breathtaking. It would reach the sale of fossil fuels

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

anywhere in the world." *Id.* at 1022. "Nuisance suits in various United States judicial districts regarding conduct worldwide are far less likely to solve the problem and, indeed, could interfere with reaching a worldwide consensus." *Id.* at 1026.

On appeal, the Ninth Circuit reversed this order, finding the case did not meet its test for when a purportedly state-law claim nonetheless arises under federal law. *City of Oakland v. BP P.L.C.*, 960 F.3d 57 (9th Cir. 2020). However, in this ruling, the Ninth Circuit fully acknowledged that "[t]he question whether the Energy Companies can be held liable for public nuisance based on production and promotion of the use of fossil fuels and be required to spend billions of dollars on abatement is no doubt an important policy question." *Id.* at 581.

Concurrently, the Ninth Circuit affirmed the remand order in several other California locality cases, finding its review of that order, as here, was limited to the federal officer removal grounds. *See Cty. of San Mateo v. Chevron Corp.*, 960 F.3d 586, 593 (9th Cir. 2020) ("Because we lack jurisdiction to review other aspects of the remand order, we dismiss the remainder of the appeal."). These localities blamed their alleged climate injuries on some two dozen companies, some the same and some different from the other cases. There, in granting the remand motion, the District Court nevertheless recognized that "these state law claims raise national and perhaps global questions." *Cty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 939 (N.D. Cal. 2018).

Both the Tenth and First Circuits similarly held that they are hamstrung to review the full grounds for removal, finding they cannot look beyond the fed-

eral officer removal grounds. *See Bd. of Comm'rs of Boulder County v. Suncor Energy*, 965 F.3d 792 (10th Cir. 2020) (blaming only two companies for their alleged climate injuries); *Rhode Island v. Shell Oil Prods. Co., LLC*, – F.3d –, 2020 WL 6336000, at *2 (1st Cir. Oct. 29, 2020) (concluding that its review "is cabined to the question of whether the district court has jurisdiction over this case pursuant to federal officer removal"). The District Court there stated that it refused to "peek beneath the purported state-law façade of the State's public nuisance claim [to] see the claim for what it would need to be to have a chance at viability." *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142, 148 (D. R.I. 2019). The other cases have been stayed or are newer, so courts have not yet decided where the cases should be heard.

Despite the inherently federal nature of these cases, some courts have allowed the cases to proceed in state court with others unable to fully review the rationale for remanding the cases to state court. When the Second Circuit issued a ruling to allow the claims in *AEP* to proceed, the Court reversed it. Here, the Court should again take the opportunity to avoid years of potentially protracted, expensive state litigation designed to achieve federal extrajudicial purposes. It would be a waste of judicial resources for Plaintiffs to start discovery or have a state trial when a full evaluation of their legal claims would dictate that their lawsuits belong in federal courts.

IV. THIS ATTEMPT AT FEDERAL REGULATION THROUGH STATE LITIGATION IS NOT AMENABLE TO JUDICIAL RESOLUTION

Ultimately, *amici* believe the best way to address climate concerns related to energy is for Congress, federal agencies, and local governments to work with America's manufacturers and other businesses that use produce, distribute, and sell energy on public policies and technologies that can meaningfully reduce emissions. *See* Ross Eisenberg, *Forget the Green New Deal. Let's Get to Work on a Real Climate Bill*, Politico, Mar. 27, 2019.[9] The production, sale, and use of oil and gas are hardly state public nuisances. They are essential to modern life, and their risks and externalities must continue to be managed and reduced. The challenge is figuring out how to mitigate modern society's impact on the climate, not deciding who to blame for selling people energy they need to heat their homes, fuel their cars, build their schools, places of worship and workplaces, and turn on lights.

Congress and federal agencies can find appropriate ways to reach these goals without infringing on the primary benefits of affordable energy, which has been a driving force in America's economic success and has led to a major increase in people's standard of living and life spans for more than a century and a half. *See* George Constable & Bob Somerville, *A Century of Innovation: Twenty Engineering Achievements That Transformed Our Lives* (Joseph Henry Press 2003) (calling the societal electrification the "greatest

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

engineering achievement" of the past century). Innovation and collaboration, not litigation, remain the only ways America can bring about the type of society-wide technological advancements needed to address this shared global challenge.

To this end, *amici* appreciated the Court's statements in *AEP* that Congress and EPA are "better equipped to do the job" of making national energy policy decisions to account for climate change than judges issuing a variety of rulings implicating national climate policies. 564 U.S. at 428. "[A]s with other questions of national or international policy, informed assessment of competing interests is required." *Id.* at 427. Judges do not have the institutional tools to properly weigh the "environmental benefit[s] potentially achievable [by the impact of this litigation against] our Nation's energy needs and the possibility of economic disruption." *Id.* They cannot "commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators." *Id.*

For these reasons, Robert Reich, who served as Secretary of Labor under President Clinton, previously termed lawsuits with a regulatory impact "regulation through litigation." Robert B. Reich, *Don't Democrats Believe in Democracy?*, Wall St. J., Jan. 12, 2000, at A22. He concluded that circumventing Congress by using the courts to enact "faux legislation . . . sacrifices democracy." *Id.* As discussed above, all of these deficiencies would be greater if a patchwork of state judges applying state liability law were allowed to make these national energy policy

decisions. Ultimately, this litigation could *undermine* national efforts to address climate change.

For these reasons, *amici* respectfully urge the Court to ensure the inherent federal nature of this litigation is properly addressed before this case and the others like it can proceed. It should either determine the cases belong in federal court or, at the very least, require the circuits to properly vet this attempt at federal regulation through state litigation.

CONCLUSION

Amici curiae respectfully request that this Court reverse the ruling below.

Respectfully submitted,

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