No. 19-1189

In The

Supreme Court of the United States

B.P. PLC et al.,

Petitioners,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE,

Respondents.

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

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

MATTHEW D. HARDIN
Counsel of Record
1725 I Street NW, Suite 300
Washington, DC 20006
Phone: 202-802-1948
Email: Matt@MatthewHardin.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF *AMICUS CURIAE*[1]

Energy Policy Advocates ("EPA") is a nonprofit organization incorporated under the laws of Washington State, dedicated to bringing transparency to the actions of government at all levels. As part of its mission, EPA has obtained emails, handwritten and typewritten notes, and purported common interest agreements. These documents were released pursuant to public records requests, and the records on their face confess to the driving factor behind this litigation and similar litigation that has sprung up across the Nation. These records confirm that widespread state court "climate nuisance" litigation is part of a coordinated national campaign to obtain or influence national policy. As such, these records also inform this Court's inquiry into whether federal removal jurisdiction is proper. The records EPA obtained prompted it to file its first *amicus* brief in the U.S. Court of Appeals for the First Circuit, where removal of another among the growing number of "climate nuisance" lawsuits filed by governmental entities seeking billions of dollars from private parties was until recently pending,[2] then another in this Court at the petition stage.[3] Those

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[1] The parties have consented to this filing. 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*, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] See *Rhode Island v. Shell Oil Prods. Co.*, No. 19-1818, 2020 U.S. App. LEXIS 34194 (1st Cir. Oct. 29, 2020).

[3] See *Amicus* Brief of Energy Policy Advocates filed in this matter on April 30, 2020.

briefs revealed public records of communications among the network organizing, promoting and filing a nationwide quilt of state-court "climate nuisance" litigation. These included, *inter alia*, two sets of notes each recording the assertion by an official with the governmental plaintiff in the First Circuit case, the State of Rhode Island, that the State's climate nuisance litigation seeks to obtain a "sustainable funding stream" to underwrite that State's spending ambitions, after the state's legislature declined to provide the desired funds, and emphasizing the desire to proceed in state court. Rhode Island's confession was made at a meeting attended by "cabinet"-level representatives of numerous state governments from across the nation, including a representative from Maryland. Other public records obtained by *Amicus* EPA quite tellingly reveal how a network of privately-hired attorneys were placed in state offices of the attorney general and tasked with assisting litigation which advances "clean energy, climate change, and environmental issues of regional or national importance, such as those matters that cross jurisdictional boundaries or have nationwide applicability."[4] Moreover, these records reveal these attorneys were tasked with the effort to keep

[4] August 25, 2017 email from the "State Energy & Environmental Impact Center" Director David Hayes to staff from attorneys general offices of California, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Kentucky, Maine, Massachusetts, New York, Mississippi, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington State, Subject: State Energy & Environmental Impact Center. Available at https://climatelitigationwatch.org/wp-content/uploads/2018/08/FN-3-Organic-NYU-Hayes-email-to-OAGs-copy.pdf.

such "nuisance" litigation in state court (including in the matter below).[5]

Indeed, *Amicus* EPA has obtained a document from the litigant in the First Circuit, the State of Rhode Island, purporting a legal privilege exists on supposedly local public nuisance litigation among these same attorneys general – from Vermont and Massachusetts, across to Minnesota and New Mexico, and over to California and Washington State "and any other state, municipality, or other governmental entity that completes the attached Addendum"[6] – and that the privilege extends to counsel for any of the parties to the nuisance litigation, on the basis of a claimed "common legal interest." Such coordination on, and purported "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," which litigation purports to raise only state causes of action proves far too much. *Amicus* EPA respectfully submits that the courts must take these parties at their word and consider the many admissions about the nature of their litigation campaign which have been obtained by *Amicus* EPA. These records reveal an attempt to raise governmental revenues and obtain national policies, both outside the democratic process.

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[5] See Brief of *Amicus Curiae* States of Maryland, California, Connecticut, New Jersey, New York, Oregon, Rhode Island, Vermont and Washington in *Mayor & City Council of Baltimore v. BP P.L.C.*, 4th Cir. Case No. 19-1644 (Doc. No. 92-1, filed 09/03/2019).

[6] See fn. 4, *supra*.

In the First Circuit litigation, numerous parties relied upon the Fourth Circuit's decision in the instant matter, and parties to the First Circuit litigation addressed the Fourth Circuit's opinion below in letters of supplemental authority. Subsequently, the First Circuit issued an opinion that substantially echoes the decision of the Fourth Circuit in the case at bar, and the Fourth Circuit's opinion undermines federal primacy on interstate and even international climate policies.[7] Because EPA has obtained records which affirm the intention to influence national policy but also demonstrate improper objectives at the heart of the veritable tsunami of state-court "climate nuisance" lawsuits, such as the one filed by Baltimore in the instant matter, and which records show the emphasis among peers on the strategy of using state courts for actions with national policy implications, EPA is keenly interested in this case and previously asked this Court to grant certiorari to address the proper relationship between the state and federal court systems. At this juncture, EPA again appears as an *amicus* to argue for reversal.

SUMMARY OF ARGUMENT

As important as climate policy is to both state and federal governments, equally and arguably more important is the principle that it is not the role of the courts to make policy judgments. Yet a desire among

[7] *Rhode Island v. Shell Oil Prods. Co.*, No. 19-1818, 2020 U.S. App. LEXIS 34194 (1st Cir. Oct. 29, 2020)

some litigants to influence or obtain preferred policies on interstate – and even international – energy and environmental policy matters via state court litigation has led to the case at bar and dozens of other cases that have sprung up across the Nation.

This Court held in *American Electric Power v. Connecticut*, 131 S. Ct. 2527, 2539, 564 U.S. 410, 426 (2011) that "the federal courts would have no warrant to employ the federal common law of nuisance to upset" agency regulation of carbon dioxide. But rather than heed the *American Electric Power* opinion's warnings that federal policy decisions are to be made by Congress or by federal agencies exercising properly delegated authority, certain litigants have instead attempted to end run that holding by seeking to create policy in state, rather than federal, courts. Despite the new wave of creative pleading being used to argue that state court jurisdiction exists for claims that are substantively identical to foreclosed theories based on the federal common law of nuisance, such claims are nothing short of an attempted end run around this Court's clear precedents.

Although post-*American Electric Power* litigants cleverly avoid citing claims under federal statutes in the complaints now proliferating in state courts, the gravamen of the complaint at issue in this case and in each of the cavalcade of similar cases filed by the same counsel is inherently focused on redress of supposed interstate and international harms from global burning of fossil fuels. Unsurprisingly, state court litigants also seek abatement of perceived environmental harms. See Appendix at p. 182. As the petitioners argue in their brief, however, "respondent's claims do not

just implicate federal-law issues – they inherently are federal claims, arising under federal law. No state law exists in this area for respondent to invoke." Brief of the Petitioners at p. 43.

Allowing the opinion below to stand will cause mischief in state courts across the Nation as litigants unhappy with Congressional policy (or inaction) and the *fora* provided by federal law to challenge such policy are incentivized to "shop around" in the thousands of state trial courts for the remedy they seek. Perhaps even more alarming than creating an incentive for forum shopping, however, the decision below also encourages the circuit courts to maintain their unique precedents even when the foundations for such precedents have been expressly overturned by Congress or eroded by the decisions of this Court. This Court should prevent litigants from seeking the most favorable forum to obtain political and policy ends by judicial means, and it should remind the circuit courts that rote recitation of their own precedents is no substitute for textual analysis of duly-enacted statutes.

ARGUMENT

I. THE FOURTH CIRCUIT'S DECISION DEFIES MORE RECENT HOLDINGS OF THIS COURT AND OF THE SEVENTH CIRCUIT, AND FAILS TO IMPLEMENT EXPRESS STATUTORY AMENDMENTS ENACTED BY CONGRESS.

The decision below, which is published and has the potential to shape the law for years to come, is based

on a series of precedents unique to the Fourth Circuit, many of which contradict more recent holdings of this Court and even statutory changes enacted by Congress. Unfortunately, and despite its unique foundations, the Fourth Circuit's decision has already been cited by the First Circuit and by District Courts in the Seventh, Ninth, and Tenth Circuits.[8] The Fourth Circuit's reliance on its own, idiosyncratic precedents led to a result that is in conflict with the holdings of numerous other courts. Unfortunately, it now appears that the Fourth Circuit's decision, despite its infirmities, is being exported for use nationwide.

The Fourth Circuit's decision below (hereinafter "*Baltimore*"), while published only this year, has its foundations in a holding from the 1970s that has foundered in changing legal seas since then, and was implicitly swamped by a holding of this Court twenty years ago. That Fourth Circuit opinion, *Noel v. McCain*, 538 F.2d 633 (4th Cir. 1976), based on 28 U.S.C. § 1447(d) as that statute read during the Ford Administration, held that remand orders are essentially unreviewable unless they are based on very narrow statutory grounds. Although *stare decisis* is no doubt an important legal principle, in this case the Fourth

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[8] *Massachusetts v. Exxon Mobil Corp.*, 2020 U.S. Dist. LEXIS 93153, 50 Envtl. L. Rep. 20136, 2020 WL 2769681, *Baker v. Atl. Richfield Co.*, 962 F.3d 937, 2020 U.S. App. LEXIS 19097, 2020 WL 3287024, *Cty. of San Mateo v. Chevron Corp.*, 960 F.3d 586, 2020 U.S. App. LEXIS 16643, CCH Prod. Liab. Rep. P20901, 50 Envtl. L. Rep. 20125, 2020 WL 2703701, *Bd. of Cty. Comm'rs v. Suncor Energy (U.S.A.) Inc.*, 965 F.3d 792, 2020 U.S. App. LEXIS 21053, 50 Envtl. L. Rep. 20161, 2020 WL 3777996

Circuit's adherence to its own precedents has placed it at odds with both the text of the statute as it reads today, and with the intervening decisions of both the Seventh Circuit and this Court interpreting identical statutory language.

The Fourth Circuit's decision below acknowledges that this Court subsequently interpreted the same statutory language differently in *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996). The Fourth Circuit even acknowledged that the *Yamaha* decision was "entirely textual." *Baltimore*, 952 F.3d at 460. Nevertheless, the Fourth Circuit panel held that it could not say its *Noel* decision was abrogated and held that "*Noel* remains binding precedent in this Circuit." *Id.* at 461. Although it is the practice of federal circuit court panels in the Fourth Circuit not to overrule the precedents of a prior panel, it is the role of this Court to step in to ensure circuit courts are implementing statutes as written rather than relying on decades-old precedents that deviate from the current text. Compare *McMellon v. United States*, 387 F.3d 329, 332 (4th Cir. 2004) (collecting cases) with *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020) ("When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law").

The Fourth Circuit's reliance on *Noel* also compelled it to reject the 7th Circuit's expressly textual conclusion relating to the same statute and the same language about the reviewability of district court orders on remand in *Lu Junhong v. Boeing Co.*, 792 F.3d

805, 810-13 (7th Cir. 2015). Even assuming, *arguendo*, that the Fourth Circuit properly decided the *Noel* case in 1976, its continued reliance on *Noel* is no longer appropriate. This Court should step in to ensure the circuit courts are applying the "express terms of the statute" rather than "extratextual considerations" such as their own prior precedents.

Precedent isn't the only thing that has changed since the Fourth Circuit issued its opinion in *Noel*, however. Relevant statutory law has also changed: the Removal Clarification Act of 2011, Pub. L. No. 112-51, 125 Stat. 545, made plain the Congressional intent to "clarify and improve certain provisions relating to the removal of litigation against Federal officers or agencies to Federal courts." Although the circuit courts once perceived a "strong congressional policy against review of remand orders," *Dalrymple v. Grand River Dam Auth.*, 145 F.3d 1180, 1185, fn. 8 (10th Cir. 1998), Congress has now expressly modified the relevant statutory text to broaden reviewability in the Removal Clarification Act. As this Court recognized in *Bostock*, the direction "Congress has moved" is a relevant consideration in interpreting the text of a statute. *Bostock v. Clayton Cty.*, 140 S. Ct. at 1739. Reliance on precedents which pre-date Congress's current intent to broaden reviewability of remand orders thus put the Fourth Circuit in the unique position of thwarting, rather than implementing, legislative directives.

Continued reliance by the lower courts on precedents that have been overruled by this Court or supplanted by changes in relevant law is nothing new. As

Jonathan Adler wrote in *The Misbegotten Judicial Resistance to the* Daubert *Revolution*, 89 Notre Dame L. Rev. 27, 52 (2013), lower federal courts "resurrected the ghost" of long superseded evidentiary precedents rather than comply with this Court's *Daubert* trilogy of cases. Those same lower courts often attempt to evade the binding presents of this Court by "neglecting not just the text" of amended statutory or other law, but also this Court's precedents. *Id.* at 55. And, Professor Adler noted, the impulse to defy this Court's precedents has been strongest "when a case involves issues on the frontier of scientific knowledge." *Id.* at 70. Perhaps because "public nuisance law, like common law generally, adapts to changing scientific and factual circumstances," *Am. Elec. Power Co.*, 564 U.S. at 423, it appears that history is now repeating itself as the lower courts now "resurrect the ghost" of state law nuisance claims that were long ago pre-empted by the comprehensive federal regulatory scheme, which this Court recognized in *American Electric Power* similarly displaced federal common law claims.

Because the Fourth Circuit's decision below is based on foundations that Congress, other federal courts and this Court have steadily eroded since the Fourth Circuit issued the authority on which *Baltimore* rests, this Court must reverse the opinion below. This Court, the Seventh Circuit, and Congress itself have all spoken more recently, and it is the proper role of this Court to ensure its own precedents and recent Congressional intent govern disputes such as the one at bar, rather than implicitly abrogated circuit

precedents from the 1970s. The innovative legal theories brought by the Plaintiffs in this case – and their recitation of grave impending harms to all mankind if climate change is not abated by judicial fiat in the state courts – only serves to further highlight the need to decide the matter based on current laws this Court declared. Indeed, the reticence of lower federal courts to "exercise their gatekeeping responsibilities when a case involves issues on the frontier of scientific knowledge" only heightens the need for this Court to enforce its own precedents. See Adler, 89 Notre Dame L. Rev. at 70.

II. THE DECISION BELOW MUST BE REVERSED TO PREVENT FEDERAL POLICIES FROM BEING UNDERMINED AT THE STATE LEVEL.

This suit is but one of dozens of similar suits that have been filed all over the country. A broad and growing collection of U.S. cities, states and counties including the State of Rhode Island, City and County of Boulder County (CO), City and County of Honolulu (HI), City of New York (NY), Marin, San Mateo and Santa Cruz Counties (CA), the cities of Imperial Beach, Oakland, Richmond, San Francisco, San Mateo, and Santa Cruz (CA), and King County (WA), among others have filed similar claims against similar and generally the same defendants alleging similar causes of action which allegedly arise under state law. The rapid proliferation of state court litigation involving the same legal theories, the same defendants, and usually the

same plaintiff's counsel has the unfortunate effect of driving up litigation costs and complicating the eventual resolution of claims that are inevitably national or international in scope. Worse, though, the continual filing of new litigation in new forums has made the litigation itself a penalty for politically disfavored or targeted defendants and a form of regulatory burden imposed by state and local governments even absent a final judgment on the merits. As at least one court has previously noted, multi-front litigation raises important concerns about the motivations of litigants. *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 475 (S.D.N.Y. 2014) ("The point of the multi-front strategy thus was to leverage the expense, risks, and burden to [defendant] of defending itself in multiple jurisdictions to achieve a swift recovery, most likely by precipitating a settlement."), later upheld at *Chevron Corp. v. Donziger*, 833 F.3d 74 (2d Cir. 2016).

The explosion in "climate" cases filed in state court seeks many hundreds of billions of dollars from private parties, and seeks to enlist the defendants as advocates in pressing for the plaintiffs' and their partners' desired federal policies under the guise of court-ordered "abatement" of environmental nuisances. Records obtained by *Amicus* Energy Policy Advocates also show the attempt to use state court systems to obtain governmental revenues only began after attempts to raise revenue or enact preferred environmental policies failed through the appropriate, political process. Further demonstrating the impropriety of the use of state court litigation to seek remedies that have

already been rejected by the federal courts, EPA has obtained emails and handwritten and typewritten notes under public records requests, discussed below, that illustrate the danger of allowing state courts to interfere in lawful interstate commerce conducted under the regulatory auspices of the federal government. Key among these public records are two sets of notes which record the assertion by a senior State of Rhode Island official that the objective of that state's litigation – brought by the same counsel as Baltimore's case – was to obtain a "sustainable funding stream" for the State's spending ambitions, in the face of a legislature that does not share the executive's priorities.

The records *Amicus* EPA has obtained corroborate that a Rhode Island official emphasized the importance of using state courts to obtain funding denied by the Rhode Island legislature. It thus appears from public records that states are attempting not only to evade the federal statutory and regulatory framework in place for addressing climate issues by suing in state court, but may also be using state courts to evade policy restrictions imposed by state legislatures themselves. Other records EPA has obtained, more fully set forth below, record the plaintiff's legal counsel's team, at least some of whom also represent the City of Baltimore in this litigation, lobbying governmental officials to file suit in the "more advantageous venue for these cases," which plaintiffs in the instant case and in the

dozens of cases like it confess is to be had in state courts.[9]

The public records obtained through state open records laws by *Amicus* EPA show that a Rhode Island "cabinet"-level official confided to peers that the Ocean State's elected representatives are insufficiently moved by the plaintiff's requests to enact laws raising the revenues the State's executive desires; and that the Executive Branch is thus "looking for [a] sustainable funding stream."[10] Such a court-ordered funding stream, the records reflect, is the apparent objective of the onslaught of complaints in which states and municipalities are "suing big oil" for a "Priority – sustainable funding stream." Because savvy counsel realize that the federal courts closed the door to federal nuisance suits in *American Electric Power*, 564 U.S. 410 (2011), the new wave of litigants have attempted to evade the precedents of this Court by emphasizing the "state court" litigation strategy. But dressing up quintessentially federal or even international claims

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

[10] Excerpt of handwritten notes of C. Frisch, located at https://climatelitigationwatch.org/wp-content/uploads/2020/03/Carla-Frisch-handwritten-notes-EPA_ CORA1505.pdf.

in supposed state-law garb cannot change the nature of this Court's *American Electric Power* holding that Congress has entrusted "the complex balancing of an environmental benefit that is potentially achievable, the Nation's energy needs, and the possibility of economic disruption, to the Environmental Protection Agency" – not to state Courts and creative plaintiff's lawyers.

The records EPA has obtained, including a First Circuit Plaintiff's confession and other records which put this litigation in context as part of a broader national campaign, leave little doubt that the growing wave of state court "climate nuisance" litigation seeks at least two impermissible objectives: First, this type of litigation seeks to use (state) courts to effectively create federal energy and environmental policy. Second, in addition to using litigation to thwart the political process that has denied state and municipal plaintiffs their desired policies, it seeks to use litigation to raise revenues that the plaintiffs are unwilling to raise through taxation.

These public records provide strong impetus to acknowledge, as a formal matter, that this "climate nuisance" litigation campaign is an impermissible use of the courts, seeking the most favorable forum to obtain political ends by judicial means and that when filed such suits must be litigated (and almost inexorably dismissed) in federal court.

III. PUBLIC RECORDS OBTAINED BY *AMICUS CURIAE* ENERGY POLICY ADVOCATES AFFIRM THE IMPORTANCE OF HEARING "CLIMATE NUISANCE" CASES IN FEDERAL COURT.

Amicus EPA has obtained public records from Colorado State University's Center for a New Energy Economy ("CNEE") under the Colorado Open Records Act ("CORA"), which EPA previously brought to this Court's attention in an earlier *amicus* brief at the petition stage. Another of EPA's transparency efforts illuminated a startling campaign by private donors and activists to use private funds to hire and place attorneys in state law enforcement offices to pursue favored policies (and disfavored targets) in the state courts. EPA also obtained two agreements purporting a common legal interest among numerous state attorneys general on the nationwide spate of climate nuisance litigation, including that filed by the City of Baltimore, in which attorneys general filed as *amici* in the Fourth Circuit with the assistance of those privately hired attorneys. These agreements also purport to extend privilege to all municipal climate nuisance plaintiffs. These records affirm the coordinated national campaign that such suits represent, and the importance of permitting removal of claims such as those brought by Baltimore to federal court.

The records EPA obtained from Colorado State University pertain to a two-day meeting in July 2019 hosted by the Rockefeller Brothers Fund ("RBF"). The handwritten notes were prepared by attendee Carla

Frisch of the Rocky Mountain Institute ("RMI"), and typewritten corroborating notes of attendee Katie McCormack of the Energy Foundation. The records reveal that Rhode Island – one of the plaintiffs in a similar suit brought by the same counsel that represents Baltimore in this Court – emphasized a state court strategy for litigation the express purpose of which, as set forth in the notes, is improper. Rhode Island's Executive Branch sought policies that the legislature of Rhode Island "doesn't care" about, including a "sustainable funding stream" outside the normal process of taxation.

The notes EPA obtained contemporaneously record the comments of Rhode Island's Director of Environmental Management, Janet Coit, discussing Rhode Island's entry in this litigation campaign, alongside various other states and municipalities. The records show RMI's Frisch recorded Director Coit speaking to this litigation. Ms. Frisch recorded Director Coit as saying, about its suit:

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

As noted by *Amicus* EPA in its petition stage brief, the typewritten notes repeat these claims. These notes suggest the litigation resulted from the conclusion that the Rhode Island legislature was not persuaded of the claims set forth by that State in its own lawsuit. With this manifestation that in the executive's mind the legislature "doesn't care", the State – or at least its

Executive Branch – turned to the courts to pursue revenue-raising measures and add to the litigation campaign that plaintiffs admit is about coercing the targets of the litigation to cooperate as advocates for certain federal policies.

These notes affirm that although the first generation of "climate nuisance" suits fell flat in federal court, and ultimately were terminated by this Court in *American Electric Power v. Connecticut*, 131 S. Ct. 2527, 2539, 564 U.S. 410, 426 (2011), the litigants in those cases and their boosters continue to pursue an almost identical strategy in the federal courts and, as these records show, with the same national policy objective admitted to by the state attorney general who brought *American Electric Power*, of "trying to compel measures that will stem global warming regardless of what happens in the legislature."[11]

First, the new generation of climate nuisance suits, just like its predecessor, ask the courts to substitute their authority for that of the political branches of government on matters of policy. Second, such suits seek billions of dollars in revenues for ambitious political spending programs, as well as distribution to preferred constituencies, which would otherwise be raised in the form of taxation by politically accountable actors in the various legislative bodies.

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[11] "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." "The New Climate Litigation," *Wall Street Journal*, Dec. 28, 2009.

Other public records obtained by *Amicus* EPA reveal how a network of privately-hired attorneys placed in state attorneys general offices expressly to work on matters of national impact have been tasked with assisting such municipal litigation, and specifically with keeping such litigation in state court (including in the matter at bar here).[12]

The State Energy & Environmental Impact Center ("SEEIC") at the New York University School of Law, funded by grants from the Bloomberg Family Foundation, hires outside lawyers who are then "seconded" to work in state Offices of the Attorney General on projects of interest to the donor of regional or national importance.[13] As former presidential candidate Michael Bloomberg's family foundation openly – indeed aggressively – concedes, he and it have long sought policy outcomes in the name of "climate change" calculated even to drive particular industries out of

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[12] See Brief of *Amicus Curiae* States of Maryland, California, Connecticut, New Jersey, New York, Oregon, Rhode Island, Vermont and Washington in *Mayor and City Council of Baltimore v. BP P.L.C.*, 4th Cir. Case No. 19-1644 (Doc. No. 92-1, filed September 3, 2019) (signed by privately hired and "seconded" "Special Assistant Attorneys General" Joshua M. Segal and Steve J. Goldstein).

[13] See "State AGs for Rent: Privately funded litigators wield state police power", *Wall Street Journal*, November 6, 2018, https://www.wsj.com/articles/state-ags-for-rent-1541549567. For a deeper examination of the record of this collaboration, see also, Christopher Horner, "Law Enforcement for Rent", Competitive Enterprise Institute, August 2018, https://cei.org/sites/default/files/Christopher%20Horner%20-%20Law%20Enforcement%20for%20Rent%20with%20Appendix.pdf.

the national economy.[14] Similarly, tort firms revealed as recruiting and coordinating closely on climate nuisance litigation campaigns with the state AG offices favored by Bloomberg's resources[15] have confessed not only that their efforts could "bring down the fossil fuel companies"[16] but also that climate tort litigation is

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[14] See, e.g., "Michael Bloomberg Launches Beyond Carbon, the Largest-Ever Coordinated Campaign Against Climate Change in United States: $500 Million Program Will Employ Advocacy, Legal, and Electoral Strategies to Accelerate Coal Plant Retirements, Stop Gas Rush, Win State and Local Policy Changes and Help Elect Candidates Who Are Climate Champions. Beyond Carbon Brings Bloomberg's Global Investment in Fighting Climate Change to $1 Billion", Press Release, Bloomberg Philanthropies, https://www.beyondcarbon.org/news/michael-bloomberg-launches-beyond-carbon-largest-ever-coordinated-campaign-climate-change-united-states/, viewed November 19, 2019. Two of the four priorities are "Win state and local policy changes" and "Help elect climate champions." The Bloomberg Family Foundation's public IRS Form 990 for 2018 described the 2018 tranche of $2.8 million for the SEEIC, in toto, as "To support the effort to move the U.S. beyond coal." Part XV Grants and contributions paid through the year. Available at https://govoversight.org/wp-content/uploads/2020/11/Bloomberg-FF-2018-990.pdf.

[15] See, e.g., Sean Higgins, *NY atty. general sought to keep lawyer's role in climate change push secret*, Washington Examiner (Apr. 18, 2016), http://www.washingtonexaminer.com/ny-atty-general-sought-to-keep-lawyers-role-in-climate-change-push-secret/article/2588874; Terry Wade, *U.S. state prosecutors met with climate groups as Exxon probes expanded*, Reuters (Apr. 15, 2016), http://www.reuters.com/article/us-exxonmobil-states/u-s-state-prosecutors-met-with-climate-groups-as-exxon-probes-expanded-idUSKCN0XC2U2.

[16] Geoff Dembicki, "Meet the Lawyer Trying to Make Big Oil Pay for Climate Change," Vice News, December 22, 2017, https://www.vice.com/en_us/article/43qw3j/meet-the-lawyer-trying-to-make-big-oil-pay-for-climate-change.

being used against energy interests as a result of the democratic process denying climate activists what they demand.[17] This is consistent with the acknowledgement by an official with one municipal nuisance plaintiff, the City of Boulder, Colorado, obtained by *Amicus* EPA, echoing then-Attorney General Blumenthal's confession, noted *supra*, in an email that "the pressure of litigation could also lead companies . . . to work with lawmakers on a deal" about climate policies.[18]

Now, state attorneys general promise in applications for funding from SEEIC (and indirectly from Bloomberg philanthropies) that they will apply privately hired attorneys provided to them by the Bloomberg program to pursue "clean energy, climate change or environmental issues of national or regional

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[17] Tort lawyer Matt Pawa, who brought many of the first "climate nuisance" suits and who originally recruited attorneys general to the cause of targeting the parties he was suing, was quoted in The Nation as saying "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. . . . Legislation is going nowhere, so litigation could potentially play an important role." 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/.

[18] January 5, 2018 email from Boulder Chief Sustainability & Resilience officer Jonathan Koehn to Alex Burness of the Boulder Daily Camera, Subject: RE: Follow-up to council discussion. Available at https://climatelitigationwatch.org/boulder-official-climate-litigation-is-tool-to-make-industry-bend-a-knee/.

importance."[19] Several of these state attorneys general indicated a desire to pursue certain industries.[20] By chance, after receiving these "Special Assistant Attorneys General," the states' posture changed to claim that they were filing purely local nuisance litigation and other litigation involving "climate"-related consumer fraud under state or local statutes all in state or other local courts.[21]

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[19] Office of New York State AG Eric T. Schneiderman, Application to NYU State Energy & Environmental Impact Center, Special Assistant Attorneys General Fellowship Program, September 15, 2017, p. 5. Produced as June 1, 2018, [New York] OAG record production FOIL Request G000103-020718, available at https://climatelitigationwatch.org/wp-content/uploads/2018/08/FN-105-NY-OAG-application-for-Bloomberg-SAAGs-copy.pdf; Maryland's Attorney General, who tasked his "SAAGs" with supporting the Baltimore litigation at issue in this matter, noted the same purpose for these privately hired attorneys (application available at https://climatelitigationwatch.org/wp-content/uploads/2019/10/Exhibit-1-MD-OAG-NYU-application-as-provided-to-GAO-copy.pdf), and Minnesota, who then tasked his two "SAAGs" with filing a purportedly local consumer fraud suit against energy companies in the name of climate change.

[20] See Maryland, Massachusetts, Minnesota and New York applications for "SAAGs" at https://climatelitigationwatch.org/wp-content/uploads/2019/10/Exhibit-1-MD-OAG-NYU-application-as-provided-to-GAO-copy.pdf, https://climatelitigationwatch.org/wp-content/uploads/2019/10/MA-AG-NYU-Application.pdf, https://climatelitigationwatch.org/wp-content/uploads/2019/09/MN-OAG-NYU-Application.pdf, and https://climatelitigationwatch.org/wp-content/uploads/2019/12/NY-OAG-application-for-Bloomberg-SAAGs.pdf, respectively.

[21] See, e.g., *State of Minnesota v. American Petroleum Institute, et al.*, Case No. 0:20-cv-01636 (D. Minn.), originally filed as *State v. American Petroleum Institute*, Case No. 62-CV-20-3837 (Minn. Dist. Ct.), https://climatelitigationwatch.org/wp-content/

This alarming practice is underway in this very matter.[22] In September 2019, "SAAGs" Joshua Segal and Steven J. Goldstein filed a 37 page *amicus* brief supporting the Mayor of Baltimore's lawsuit "seeking to hold 26 fossil fuel companies liable for injuries resulting from climate change."[23]

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uploads/2020/09/ExxonKochAPI_Complaint.pdf (see also, e.g., "Bloomberg-Provided Attorneys File Next AG 'Climate' Suit in Minnesota," ClimateLitigationWatch.org, June 24, 2020, https://climatelitigationwatch.org/bloomberg-provided-attorneys-file-next-ag-climate-suit-in-minnesota/); *State of Connecticut v. Exxon Mobil Corporation*, Case No. 3:20-cv-01555-JCH (D. Conn.), originally filed as *State v. Exxon Mobil Corp.*, Case No. HHDCV206132568S (Conn. Super. Ct.), September 14, 2020, https://portal.ct.gov/-/media/AG/State-v-Exxon-Mobil---Signed-Complaint.pdf; *State of Delaware v. BP America Inc., et al.*, Case No. N20C-09-097 (Del. Super. Ct.), September 8, 2020, https://climatelitigationwatch.org/wp-content/uploads/2020/09/2020-09-09-Delaware-Final-Complaint.pdf; *District of Columbia v. Exxon Mobil Corp., et al.*, Superior Court of the District of Columbia, Case No. 1:20-cv-01932 (D.D.C.), originally filed as *District of Columbia v. Exxon Mobil Corp*., Case No. 2020 CA 002892 B (D.C. Super. Ct.), June 25, 2020, https://oag.dc.gov/sites/default/files/2020-06/DC-v-Exxon-BP-Chevron-Shell-Filed-Complaint.pdf.

[22] https://www.marylandattorneygeneral.gov/News%20Documents/090319_Baltimore_climate_amicus.pdf, in *Mayor and City Council of Baltimore v. BP, P.L.C. et al*, Case No. 19-1644, Dkt. No. 92-1 (4th Cir. Sept. 3, 2019).

[23] Notably, other OAG "Applications" to the Bloomberg Center released to the public expressly name supporting the tort litigation campaign against private energy companies as a use to which they would put Bloomberg Center-funded attorneys. The heavily redacted application by Maryland AG Brian Frosh may have indicated it would do so, as well, although the public has no way of knowing this in the face of these redactions.

Confirming the use of municipal "climate nuisance" litigation as a substitute for national policy-making through the proper democratic process, *Amicus* EPA has obtained a document from the First Circuit public nuisance plaintiff, the State of Rhode Island, purporting a "common legal interest" among attorneys general nationwide – in this very, supposedly local public nuisance litigation (among many others enumerated) – with signatories from Vermont and Massachusetts, across to Minnesota and New Mexico, and over to California and Washington State, and "any other State, municipality, or other governmental entity that completes the attached Addendum."[24] The Vermont Attorney General's Office, less inclined to allow this fact out into the public, describes the pact in a privilege log obtained by *Amicus* EPA in open records litigation, as "[t]he 'Climate Change CA' ", which "notes that such privileged and confidential exchange will allow for the parties' claims and defenses to be thoroughly investigated and prepared and efficient joint participation in the Climate Change Litigation to be developed, including the development of litigation strategy and the preparation of legal briefs."[25]

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[24] April 2018 "Confidentiality Agreement Regarding Participation in Climate Change Public Nuisance Litigation", which phrase is repeated in a December 2019 amendment to same, both available at https://climatelitigationwatch.org/wp-content/uploads/2020/11/Climate-Change-CA-with-12.2019-amendment.pdf.

[25] Entry AGO0085-AGO0119 in Defendant's First Amended Index of Withheld Documents as Exempt from Public Inspection and Copying Pursuant to 1 V.S.A. § 317(c), June 26, 2020, *Energy Policy Advocates v. Attorney General's Office* (Vermont), Vermont

The pacts that *Amicus* EPA has obtained, signed by many of the attorneys general who filed in the matter below seeking to keep this matter in the state courts, itself declares that privilege exists from a common legal interest in "the Litigation", and that, "The Litigation includes, [REDACTED], *City of Oakland, et al. v. BP P.L.C. et al.*, *City and County of San Francisco, et al. v. BP PLC.*, *et al.,* and *San Mateo v. Chevron Corp.*, [REDACTED]." (citations omitted).

Notably about these redactions, and further supporting the body of evidence that these suits are a coordinated national campaign to obtain or influence federal policy, as the Court can see from these documents the context suggests these surely are expansive phrases such as "but not limited to", and "or any similar cases", respectively.[26]

The next sentence reads, "The Parties to this Agreement have a common interest in ensuring the proper application of the federal and/or state common law arising from the effects of climate change." Immediately thereafter, nearly seven lines of text describing further what this common legal interest is are obscured from public scrutiny behind still more blocks of

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Superior Court, Washington County Civil Division, 173-4-20, available at https://climatelitigationwatch.org/wp-content/uploads/2020/11/2020-06-26-EPA-v-Vt-AGO-Docket-173-4-20-1st-Am-Vaughn-Index.pdf.

[26] Their withholding, while improper and the subject to further records litigation, is just as surely because revelation of the lack of a sufficiently narrow common legal interest dooms the claimed privilege.

black ink. Context suggests that this, too, broadly describes other components of this national campaign.

Further, and despite this effort at claiming a common legal interest nationwide in any purportedly local "nuisance" litigation, in December 2019 the parties amended this purported shield from public scrutiny of their work to add to the litany of The Litigation, "*Mayor & City Council of Baltimore v. BP p.l.c.* (Md. Cir. Ct. 24-C-18-004219 and D. Md. 18-02357)", as well as *City of New York v. BP p.l.c.*, *King County v. BP p.l.c.* "and/or *Board of County Commissioners of Boulder County, et al., v. Suncor Energy, et al*."[27]

This suit and those like it, admittedly by these parties and apparently by all counsel to all such plaintiffs, are parts of a coordinated nationwide effort to raise "funding streams" and influence federal policies which have eluded the plaintiffs through the proper democratic processes.

This Court made clear in *American Electric Power* that the federal regulatory regime for pollutants foreclosed any federal common law remedy arising out of purported climate harms. Although the reasoning behind the *American Electric Power* opinion necessarily implies that it is the business of Congress to strike the appropriate balances and compromises between energy and environmental needs – and that it has done

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[27] April 2018 and amended, December 2019 versions, obtained from the Rhode Island Office of the Attorney General, available at https://climatelitigationwatch.org/wp-content/uploads/2020/11/Climate-Change-CA-with-12.2019-amendment.pdf.

so by delegating broad power to the Environmental Protection Agency – the public records *Amicus* EPA has obtained reveal the extraordinary efforts of various states and municipalities (and their partners in litigation) to evade *American Electric Power*. This litigation cannot become a tool empowering private litigants to end industries they have targeted for extinction, or to make such industries a "golden goose." State Court litigation cannot become the weapon at hand to make the process of litigation itself a penalty for federally regulated industries. This Court should reaffirm that interstate pollution is a matter for the U.S. Congress to address, and that state courts are as ill-suited to strike policy compromises as the federal courts. Lastly, this Court should ensure that state court litigation does not become a substitute for the proper, authorized means of obtaining "funding streams" for state governments when elected representatives decline to impose taxes and spending for a particular agenda.

These cases are not proper vehicles for their desired ends, but are the proper subject of federal officer removal jurisdiction.

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

Federal Officer Removal jurisdiction exists because of "historic concern about state court bias."

Savoie v. Huntington Ingalls, Inc., 817 F.3d 457, 461 (5th Cir. 2016). This Court has expressed concern that when state courts are empowered to judge federal policy or federal officials, local biases or prejudice can infect the judicial process. "State-court proceedings may reflect 'local prejudice' against unpopular federal laws or federal officials." *Watson v. Philip Morris Cos.*, 551 U.S. 142, 150 (2007). Perhaps because bias – whether real or perceived – is so corrosive to the judicial process, and because combatting such bias and instilling confidence in the neutrality of the courts is the policy goal behind federal officer removal, this Court has cautioned against "narrow, grudging interpretation" of § 1442(a)(1). *Willingham v. Morgan*, 395 U.S. 402, 407 (1969). Nevertheless, and although "[t]he removal statute is an incident of federal supremacy," *Murray v. Murray*, 621 F.2d 103, 106 (5th Cir. 1980), the decision below and those from other federal circuits have worked to undermine federal supremacy and subject federal energy and environmental policy to the whims of local tribunals.

The Mayor and City Council of Baltimore, and similar plaintiffs in litigation brought by the same counsel, are engaged in a campaign through the courts to overturn "unpopular federal laws." Rather than recognizing the Constitution and federal laws as supreme and working within the regulatory framework for cooperative federalism that this Court recognized in *American Electric Power*, governmental "climate nuisance" plaintiffs are applying a "narrow, grudging" interpretation of the removal statute to evade the

enforcement of federal law in a federal forum, preferring instead to seek their remedy in the greener pastures that they believe state courts will provide.

It is hard to imagine a more striking case where fear of state court bias could be a concern than is presented in the instant matter and similar cases unfolding across the nation. Indeed, the *hope* for state court bias in these cases is at play, as shown in records obtained by *Amicus* EPA through public records laws. Because state and local officials have consistently emphasized not legal theories or political proposals, but rather the specific *fora* in which they believe they will obtain their preferred outcome, they have abandoned any pretense that the results they hope to obtain are equally likely regardless of the tribunal.

As documented, *supra* and in EPA's prior *amicus* brief in this matter, by its own admission the State of Rhode Island is pursuing its litigation to obtain a "sustainable funding stream" for its Executive Branch officials' spending ambitions, having failed to convince the voters' elected representatives in the state legislature to provide such funds. Rhode Island's circumstance in this respect differs not at all from all such plaintiffs, including the plaintiff in the case at bar. All such plaintiffs are now moving heaven and earth to keep these matters of national importance out of the clutches of federal jurisdiction.

The desired outcome of a campaign to sue to make federal policy in state courts is a thematic cousin of the broader drive to use the courts when legislatures

fail to enact plaintiffs' desired policies, and is well-understood among such plaintiffs and their legal team. That Rhode Island and the City of Baltimore share not only claims and legal strategies but legal counsel based in California, and that the recruiting team has emphasized to targeted governmental entities the desire to keep similar climate nuisance suits in state court as the "more advantageous venue for these cases," given this Court's ruling in *American Electric Power*, raises concerns that the other similarly situated plaintiffs also share the hope for state court biases in the campaign to eliminate budgetary shortfalls and otherwise make policy through tort litigation.

For example, 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, a lobbyist hired to assist with recruiting more governmental plaintiffs for Sher Edling passed along a note of encouragement to one prospective client whose counsel had expressed concern over that latest failure.[28] While seemingly written by legal counsel, this lobbyist/recruiter flatly stated the team's position

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

that state courts are the "more advantageous venue for these cases".[29]

UCLA Law professor – and consultant to plaintiff's counsel Sher Edling – Ann Carlson has similarly been quoted to support the proposition that plaintiffs' chances for recovery are much better in state fora. As recently as February, a *Los Angeles Times* news article quoted Carlson's colleague Sean Hecht, for the same proposition: that state courts are "more favorable to 'nuisance' lawsuits." [30]

V. CONCLUSION.

The participants in the climate nuisance litigation campaign that has now arrived at this Court have been quoted publicly and discovered in public records to have stated that their campaign to make climate policy in the state courts is designed to obtain federal policy ends, and from a perception that state courts will willingly embrace the ideological agenda that this Court declined to embrace in *American Electric Power*. This Court must reverse the decision below to confront the odious traits of a state court "climate nuisance" litigation strategy, which includes efforts to use the courts

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[29] See fn. 12 of *Amicus* EPA's brief at the petition stage.

[30] "Two separate coalitions of California local governments are arguing to have their suits heard in California state courts, which compared to their federal counterparts, tend to be more favorable to 'nuisance' lawsuits. . . ." Los Angeles Times, February 5, 2020, https://www.latimes.com/california/story/2020-02-05/california-counties-suing-oil-companiesover-climte-change-face-key-hearing-wednesday.

both as a grab for revenue and to obtain other desired policies that have eluded parties through the political process, seeking the most favorable forum for a court to stand in for the political process.

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

Dated: November 23, 2020

Respectfully submitted,

MATTHEW D. HARDIN
Counsel of Record
1725 I Street NW, Suite 300
Washington, DC 20006
Phone: 202-802-1948
Email: Matt@MatthewHardin.com