No. 19-1644

# United States Court of Appeals for the Fourth Circuit

MAYOR AND CITY COUNCIL OF BALTIMORE,

*Plaintiff-Appellee,*

v.

BP P.L.C., et al.,

*Defendants-Appellants,*

Appeal from the United States District Court
for the District of Maryland, No. 1:18-cv-02357-ELH
(The Honorable Ellen L. Hollander)

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

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(a)(4)(A) of the Federal Rules of Appellate Procedure, counsel for *amici curiae* hereby state that the National Association of Manufacturers, National Association of Convenience Stores, Society of Independent Gasoline Marketers of America, and Energy Marketers of America have no parent corporations and have issued no stock.

Pursuant to Local Rule 26.1(a)(2)(B), counsel for *amici* is unaware of any publicly held corporation or similarly situated legal entity, other than those listed in Appellants' corporate disclosure statement, that has a direct financial interest in the outcome of the litigation by reason of a franchise, lease, other profit sharing agreement, insurance, or indemnity agreement.

Dated: August 13, 2021

/s/ Philip S. Goldberg
Philip S. Goldberg

# TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii

INTEREST OF *AMICI CURIAE* ..... 1

INTRODUCTION AND SUMMARY OF ARGUMENT ..... 1

ARGUMENT ..... 3

I. ADJUDICATING ALLEGATIONS OVER EFFECTS OF GLOBAL CLIMATE CHANGE REQUIRES FEDERAL JURISDICTION ..... 3

II. THIS CASE IS PART OF A LITIGATION CAMPAIGN TO HAVE STATE COURTS UNDERMINE THE U.S. SUPREME COURT'S JURISPRUDENCE ON CLIMATE LAWSUITS ..... 6

III. CLAIMS ALLEGING HARMS FROM CLIMATE CHANGE PRESENT UNIQUELY FEDERAL INTERESTS ..... 8

IV. THE COURT SHOULD MAINTAIN THE INTEGRITY OF THE FEDERAL-STATE DUAL COURT SYSTEM ..... 11

CONCLUSION ..... 13

CERTIFICATE OF COMPLIANCE ..... END

CERTIFICATE OF SERVICE ..... END

# TABLE OF AUTHORITIES

## Cases

*Am. Elec. Power v. Connecticut*, 564 U.S. 410 (2011).....*passim*

*BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532 (2021).....11

*City of Milwaukee v. Illinois*, 451 U.S. 304 (1981).....9

*City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021).....9, 13

*City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017 (N.D. Cal. 2018).....10

*Comer v. Murphy Oil USA, Inc.*, 718 F.3d 460 (5th Cir. 2013).....5

*Illinois v. City of Milwaukee*, 406 U.S. 91 (1972).....3

*Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012).....5

*North Carolina v. Tennessee Valley Auth.*, 615 F.3d 291 (4th Cir. 2010).....10

*Rivet v. Regions Bank of Louisiana*, 522 U.S. 470 (1998).....11

*United States v. Standard Oil Co. of Cal.*, 332 U.S. 301 (1947).....4

*Watson v. Philip Morris Cos.*, 551 U.S. 142 (2007).....11

## Other Authorities

*Amicus* Brief of Indiana and Fourteen Other States in Support of Dismissal, *City of Oakland v. BP*, No. 18-1663 (9th Cir. filed Apr. 19, 2018).....12

Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 Ecol. L.Q. 755 (2001).....9

*Atmospheric Recovery Litigation: Making the Fossil Fuel Companies Pay for Cleaning up the Atmosphere*, YouTube, May 23, 2018.....7

Beyond the Courtroom, Manufacturers' Accountability Project, at https://mfgaccountabilityproject.org/beyond-the-courtroom .....8

Complaint, *City of Charleston v. Brabham Oil Co., Inc.*, No. 2020-CP-10 (S.C. Ct. Comm. Pleas Sept. 9, 2020) .....8

Brooks Dubose, *Annapolis Sues 26 Oil and Gas Companies for their Role in Contributing to Climate Change*, Cap. Gazette, Feb. 23, 2021 .....11

Editorial, *Climate Lawsuits Take a Hit*, Wall St. J., May 17, 2021 .....6

*Entire January Meeting Agenda at Rockefeller Family Foundation*, Wash. Free Beacon, Apr. 2016, *available at* https://freebeacon.com/wp-content/uploads/2016/04/Entire-January-meeting-agenda-at-RFF-1-1.pdf .....7

*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), *available at* https://www.ucsusa.org/sites/default/files/attach/2016/04/establishing-accountability-climate-change-damages-lessons-tobacco-control.pdf .....6

Findings of Fact and Conclusions of Law, *In re ExxonMobil Corp.*, No. 096-297222-18 (Tex. Dist. Ct.–Tarrant Cty. Apr. 24, 2018) .....6

Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741 (2003) .....10

Larry Neumeister, *Judge Shows Skepticism to New York Climate Change Lawsuit*, Assoc. Press, June 13, 2018, at https://apnews.com/dda1f33e613f450bae3b8802032bc449 .....10

Dawn Reeves, *As Climate Suits Keeps Issue Alive, Nuisance Cases Reach Key Venue Rulings*, Inside EPA, Jan. 6, 2020, at https://insideepa.com/outlook/climate-suits-keeps-issue-alive-nuisance-cases-reach-key-venue-rulings .....12

## INTEREST OF *AMICI CURIAE*[1]

*Amici curiae* are the National Association of Manufacturers ("NAM"), National Association of Convenience Stores ("NACS"), Society of Independent Gasoline Marketers of America ("SIGMA"), and Energy Marketers of America ("EMA"). *Amici* are dedicated to manufacturing and selling safe, innovative and sustainable products that provide consumer benefits while protecting human health and the environment, and fully support national efforts to address climate change. They have a substantial interest in attempts by state and local governments—here, the Mayor and City Council of Baltimore—to subject their members to unprincipled state liability for harms associated with climate change. Climate change is one of the most important public policy issues of our time, and one, as the U.S. Supreme 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 THE ARGUMENT

This case is part of a coordinated, national litigation campaign over global climate change and the debate as to how to mitigate impacts of modern energy use. *Amici* appreciate that developing new technologies to reduce greenhouse gas

[1] The parties consented to the filing of *amicus curiae* briefs. No counsel for a party authored this brief in whole or in part; and no party, party's counsel, or other person or entity—other than *amici* or its counsel—contributed money intended to fund preparing or submitting the brief.

("GHG") emissions, make energy more efficient, and modify infrastructure to deal with the impacts of climate change has become an international imperative. State tort suits against the energy sector cannot achieve these objectives, and state courts are not the appropriate forums to decide these critical national issues.

In *Am. Elec. Power Co. v. Connecticut*, the U.S. Supreme Court addressed the first wave of this litigation campaign. 564 U.S. 410 (2011) (hereafter "*AEP*"). It unanimously held claims alleging harm from the effects of global climate change sound in federal common law and Congress displaced such claims when it enacted the Clean Air Act. *See id.* at 424. Soon after, the strategists behind the litigation campaign began developing ideas for trying to circumvent *AEP*. They looked for legal theories that would achieve comparable national goals, but *appear* different. The focal point of this effort, as embodied by this lawsuit, is re-casting federal public nuisance claims for injunctive relief against the utilities in *AEP* as state public nuisance lawsuits for damages against energy manufacturers.

This case is one of two dozen nearly identical lawsuits filed since 2017 in carefully chosen states based on this same premise. Each complaint asserts that various defendants' production, promotion, and sale of oil, gas or other carbon energy is a public nuisance under state common law or violates another state law. To adjudicate the claims, though, the state courts must create new rules and standards governing the international production, sale, promotion, and use of fossil fuels. But

as this litigation campaign demonstrates, these lawsuits are not specific to any company or community. They are interstate and international in nature and scope.

*Amici* request the Court to determine that putative state-law claims alleging harm from global climate change are removable because they arise under federal law. As the Supreme Court explained in *AEP*, the climate change issues in these cases have unique federal significance. This climate litigation will undermine national energy objectives, including federal efforts on the climate, energy independence, the stability of the electric grid, and energy affordability. The Constitution requires these interstate questions to be decided in a federal forum.

## ARGUMENT

### I. ADJUDICATING ALLEGATIONS OVER EFFECTS OF GLOBAL CLIMATE CHANGE REQUIRES FEDERAL JURISDICTION

In *AEP*, the Supreme Court unequivocally stated that climate tort litigation raises issues of "special federal interest." 564 U.S. at 424. Before ruling the Clean Air Act displaced any federal common law claims with respect to carbon emissions from fossil fuels, the Supreme Court explained that federal common law addresses subjects "where the basic scheme of the Constitution so demands," including "air and water in their ambient or interstate aspects." *Id.* at 422 (quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972)). This rule of law applies to the climate change claims here in equal force as it did in *AEP*.

The case at bar (and the other climate changes cases) are based on the same predicate as *AEP*: climate change is caused by GHGs that are "naturally present in the atmosphere and . . . also emitted by human activities," including the use of fossil fuels. *Id.* at 416. These GHGs combined with other global GHG sources and have accumulated in the atmosphere for more than a century since the industrial revolution. "By contributing to global warming, the plaintiffs asserted, the defendants' carbon-dioxide emissions created a 'substantial and unreasonable interference with public rights,' in violation of the federal common law or interstate nuisance, or in the alternative, of state tort law." *Id.* at 418. Thus, all of these lawsuits are trying to legally blame climate change on the energy industry.

In *AEP*, the Supreme Court determined that such claims arise under federal common law and "borrowing the law of a particular State would be inappropriate." *AEP*, 564 U.S. at 422 (stating the claims are "meet for federal law governance"). There are certain claims that invoke the "interests, powers, and relations of the Federal Government as to require uniform national disposition rather than diversified state rulings." *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 307 (1947). Determining rights and responsibilities for global climate change is one of them. Only after this determination did the Supreme Court hold that Congress displaced remedies that might be granted under federal common law through the Clean Air Act. *See AEP*, 564 U.S. at 425 (following *Standard Oil*'s two step analysis

that determining federal common law governance is a separate question from whether that common law has been displaced). Only the initial inquiry—whether the subject requires a uniform federal rule—goes to jurisdiction and is before this Court.

When the Supreme Court decided *AEP*, two other climate cases were pending that also have direct parallels to the case at bar. An Alaskan village was suing many of the same energy producers as here under federal law for damages related to sea level rise. *See Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012). In Mississippi, homeowners were suing energy producers under state law for property damage from Hurricane Katrina, alleging the defendants' products caused climate change, the hurricane to be more intense, and in turn, their damage. *See Comer v. Murphy Oil USA, Inc.*, 718 F.3d 460 (5th Cir. 2013).

Both cases were soon dismissed. As the Ninth Circuit explained, even though the legal theories in *Kivalina* differed slightly from *AEP*, given the Supreme Court's message, "it would be incongruous to allow [such litigation] to be revived in another form." *Kivalina*, 696 F.3d at 857. Climate suits alleging harm from emissions across the globe are exactly the sort of "transboundary pollution" claims the Constitution exclusively committed to federal law. *Id.* at 855. For years the law has been clear: regardless of how claims are packaged—over energy use or products, by public or private plaintiffs, under federal or state law, or for injunctive relief or damages—alleging harms from global climate change implicates uniquely federal interests.

## II. THIS CASE IS PART OF A LITIGATION CAMPAIGN TO HAVE STATE COURTS UNDERMINE THE U.S. SUPREME COURT'S JURISPRUDENCE ON CLIMATE LAWSUITS

Strategists behind this litigation campaign were undeterred. They convened in California to brainstorm on how to re-package the litigation in hopes of achieving their own national priorities. *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. They decided to file multiple lawsuits, try to "side-step federal courts and Supreme Court precedent," and convince state courts to help them advance their national agenda. Editorial, *Climate Lawsuits Take a Hit*, Wall St. J., May 17, 2021.

At the time, the strategists did not hide from the fact they were seeking to achieve federal goals through state lawsuits; they published details of their discussions. *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] Despite *AEP*, they said "the courts offer the best current hope" for imposing their national emissions agenda. *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." *Id*. at 12. They talked

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

through various causes of actions, "with suggestions ranging from lawsuits brought under public nuisance laws," such as the one here, "to libel claims." *Id.* at 11.

Given *AEP*, they emphasized making the lawsuits look like traditional damages claims rather than directly asking a court to regulate emissions or put a price on carbon. *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 and discussed "the importance of framing a compelling public narrative," including "naming [the] issue or campaign" to generate "outrage." *Id.* at 21, 28.[3] At a follow up session in 2016, they explained "creating scandal" through lawsuits would also help "delegitimize" the companies politically. *See Entire January Meeting Agenda at Rockefeller Family Foundation*, Wash. Free Beacon, Apr. 2016.[4]

Lawsuits following this plan were filed starting in 2017: to look different from *AEP* they targeted energy producers, invoked state laws, and sought abatement and damages. To name this crusade, supporters asserted some widespread "campaign of deception" involving the many, various companies named in the lawsuits. *See*, *e.g.*,

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[3] One advocate said, "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*, YouTube, May 23, 2018.

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

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). The lawsuit brought by Baltimore names two dozen companies, others name only one or two, whereas some name more, including local companies to try to keep cases in state court. This ever-changing list of companies alleged to have participated in this so-called "campaign of deception" highlights the specious nature of the narrative.

Supporters of this litigation campaign have used political-style tactics, both to drive the litigation and to leverage the litigation to achieve their true, extrajudicial goals. They have taken out advertisements and billboards blaming energy companies for climate change and urging public officials to file lawsuits, as well as hosted symposiums and press conferences to generate media attention. *See generally* Beyond the Courtroom, Manufacturers' Accountability Project[5] (detailing this litigation campaign). Thus, unlike traditional state tort suits, merely filing and maintaining state lawsuits provides grist for their national public policy efforts.

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

The court should not give deference to the fact that the complaint purports to assert claims under state law; the state law theories are mere fig leaves. Unlike traditional local property damage cases, the theory of harm here is not moored to any

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

plaintiff, defendant, location, or jurisdiction. As the Second Circuit stated in response to a similar lawsuit by the City of New York, "we are told that this is merely a local spat about the City's eroding shoreline, which will have no appreciable effect on national energy or environmental policy. We disagree. Artful pleading cannot transform the City's complaint into anything other than a suit over global greenhouse gas emissions." *City of New York v. Chevron Corp.*, 993 F.3d 81, 91 (2d Cir. 2021).

As the Second Circuit explained, merely referencing state claims and asking for compensation does not make these federal matters suddenly suitable for state law. These lawsuits, the court stated, seek to subject energy manufacturers to state liability "for the effects of emissions made around the globe over the past several hundred years," which includes "conduct occurring simultaneously across just about every jurisdiction on the planet." *Id.* at 92. "Such a sprawling case is simply beyond the limits of state tort law." *Id.* This Court should similarly look behind the claims' veneer at the substance of the allegations, not merely the labels the complaint uses.

The complaint sounds in public nuisance and other broad-sounding causes of action because their terms appear "vague" and are often misunderstood. *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981). Architects of this effort have tried—and failed—for fifty-years to transform public nuisance into a tool for such industry liability. *See* Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 Ecol. L.Q. 755, 838 (2001). Certainly, the allure of

such a theory for local governments including Baltimore is understandable: the suits are funded by outside counsel, promise funding for local projects, and target particular products. But they are unfounded, and federal courts have been rightfully skeptical of them. *See*, *e.g.*, *North Carolina v. Tennessee Valley Auth.*, 615 F.3d 291 (4th Cir. 2010); *see also* Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741 (2003) (discussing cases).

To be clear, masking federal climate issues as state public nuisance cases does not stand up to minimal scrutiny. The crux of the allegations relate to accumulation of GHGs in the atmosphere, global warming-induced sea level rise around the world, and the international promotion and sale of fossil fuels—all of which exist far outside any local government's authority. Also, as counsel acknowledged in a sister case, their whole "campaign of deception" narrative is only a "plus factor" or window dressing and not required for their liability theory at all. *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1022 (N.D. Cal. 2018). Again, federal judges have seen through this charade. For example, Judge Keenan, who dismissed New York City's climate lawsuit, observed the City's claims were "trying to dress a wolf up in sheep's clothing" by "hiding an emissions case." Larry Neumeister, *Judge Shows Skepticism to New York Climate Change Lawsuit*, Assoc. Press, June 13, 2018.

Baltimore should not be able to avoid such federal scrutiny by painting federal claims with a state law brush. The Supreme Court has appreciated that state court

proceedings "may reflect 'local prejudice' against unpopular federal laws" or defendants. *Watson v. Philip Morris Cos.*, 551 U.S. 142, 150 (2007). Indeed, Annapolis officials in announcing their climate suit expressed unusual confidence "the Maryland courts will get us there." Brooks Dubose, *Annapolis Sues 26 Oil and Gas Companies for their Role in Contributing to Climate Change*, Cap. Gazette, Feb. 23, 2021. The Court should not allow any such hometown recovery.

The bottom line is state courts are not positioned to decide who, if anyone, is to be legally accountable for climate change, how energy policies should change to address it, and how local mitigation projects should be funded. This is the context in which the U.S. Supreme Court, in *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532 (2021), remanded these cases for this review.

## IV. THE COURT SHOULD MAINTAIN THE INTEGRITY OF THE FEDERAL-STATE DUAL COURT SYSTEM

This Court should not permit Baltimore to mask attempts to regulate national GHG emissions and the worldwide production of fossil fuels by "artfully" pleading claims under state tort law. *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 475 (1998). Outside the courtroom, advocates behind this litigation campaign fully acknowledge the true goals of this litigation is to penalize the worldwide production, promotion, sale and use of fossil fuels. *See*, *e.g.*, Julia Caulfield, *Local Lawsuits Asks*

*Oil and Gas to Help Pay for Climate Change*, KOTO, Dec. 14, 2020.[6] In fact, a reporter following the litigation has observed the incongruity between the ways the cases are presented and their true goals: governments say "the cases are not about controlling GHG emissions . . . But they also privately acknowledge that the suits are a tactic to pressure the industry." Dawn Reeves, *As Climate Suits Keeps Issue Alive, Nuisance Cases Reach Key Venue Rulings*, Inside EPA, Jan. 6, 2020.

Legal strong-arming through this litigation, though, could undermine federal efforts to reach America's climate goals by tying the hands of federal leaders who are trying to head off this climate crisis while making sure families and businesses continue to have access to affordable energy to power their homes and workplaces. They also could hurt efforts by other states to address climate impacts through other, more appropriate measures. More than fifteen state attorneys general have objected to this litigation because Baltimore and other governments are using it to "export their preferred environmental policies and their corresponding economic effects to other states." *Amicus* Brief of Indiana and Fourteen Other States in Support of Dismissal, *City of Oakland v. BP*, No. 18-1663 (9th Cir. filed Apr. 19, 2018).

What these attorneys general understand is that despite Baltimore's rhetoric, when courts impose liability the impact is to regulate conduct. As the Second Circuit observed: "If the Producers want to avoid all liability, then their only solution would

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

be to cease global production altogether." *City of New York*, 993 F.3d at 93. However, the production, sale, and use of energy are essential to modern life. Any decision whether to stop, modify or curb fossil fuel use cannot result from ad hoc case-by-case state court rulings. Only federal law can supply the uniform governing standards that can be applied here.

## CONCLUSION

For these reasons, the Court should reverse the district court's remand order.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7), excluding parts exempted by Fed. R. App. P. 32(f) because it contains 2,981 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2016 in 14 point Times New Roman font for text and footnotes.

Dated: August 13, 2021

/s/ Philip S. Goldberg
Philip S. Goldberg

**CERTIFICATE OF SERVICE**

I hereby certify that on August 13, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit using the Court's CM/ECF system.

Participants in this case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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