No. 19A368

In the Supreme Court of the United States

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

Applicants,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE,

Respondent.

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF APPLICATION TO STAY REMAND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND PENDING APPEAL AND REQUEST FOR IMMEDIATE ADMINISTRATIVE STAY

Directed to the Honorable John G. Roberts
Chief Justice of the United States
And Circuit Justice for the Fourth Circuit

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MOTION FOR LEAVE TO FILE

The National Association of Manufacturers (NAM) requests leave to file the accompanying brief as *amicus curiae* in support of the application by 26 multinational energy companies (the "Applicants") to stay the remand order of the U.S. District Court for the District of Maryland in a lawsuit proposing to subject the Applicants to liability for impacts caused by global climate change.

As the largest manufacturing association in the United States, the NAM has a substantial interest in attempts by local governments—here, the Mayor and City Council of Baltimore—to subject energy manufacturers to liability for alleged harm from climate change. Climate change is one of the most important public policy issues of our time, and one that plainly implicates federal questions and policymaking. This Court made that clear in unanimously dismissing the climate change case *Am. Elec. Power v. Connecticut*, 564 U.S. 410 (2011). The Court recognized that setting energy policy to account for climate change concerns was "within national legislative power," and that Congress and EPA are "better equipped to do the job than individual district judges issuing ad hoc, case-by-case" decisions. *Id.* at 421, 428.

As explained more fully in the attached brief, the lawsuit by the City of Baltimore is part of a broad, coordinated effort by state and local governments to subject energy manufacturers to liability for global climate change. The NAM is well-suited to provide a national perspective to this Court about these efforts, and the context in which this matter should be considered. The NAM can also put in context the decisions of other courts to stay climate change lawsuits

pending appeal in light of the significant federal questions implicated.

The NAM, therefore, respectfully requests that the Court grant leave to file the attached brief as *amicus curiae*.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Manufacturers (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 their reductions are continuing. The NAM is committed to protecting the environment and to environmental sustainability, and fully supports the ongoing national effort to protect our environment and improve public health through appropriate laws and regulations. The NAM has grave concerns, though, about the attempt here to circumvent products liability law and create category liabil-

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity, other than *amicus curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief. The parties received notice of the intent of *amicus curiae* to file this brief. Applicants consented to the filing of this brief, and Respondent conveyed that it is withholding its consent at this time.

ity for lawful, beneficial energy products that are essential to modern life.

INTRODUCTION AND SUMMARY OF ARGUMENT

This lawsuit is part of a new wave of politically-oriented litigation born out of frustration that not enough is being done on climate change. Defendants are engaged in the production and sale of lawful energy products that are essential to modern life and largely responsible for the monumental progress in global health and living standards over the past century. *Amicus* fully appreciates that due to climate change, developing new technologies that can reduce greenhouse gas (GHG) emissions and make energy more efficient and environmentally friendly has become an international imperative. But, as this Court explained in *Am. Elec. Power v. Connecticut*, making the public policy decisions needed to advance such innovation "cannot be prescribed in a vacuum" of tort litigation. 564 U.S. 410, 427 (2011). Nevertheless, there are impassioned individuals still seeking to leverage the judiciary to regulate emissions and turn the promotion and sale of oil, gas and other traditional energy products into liability-inducing events.

In 2017, advocacy groups and lawyers started teaming with a dozen local governments and the State of Rhode Island to file nearly identical lawsuits in carefully chosen jurisdictions around the country. This case is one of these lawsuits. Each complaint asserts that the defendants' promotion and sale of oil, gas or other traditional energy sources is a public nuisance or violates another tort under the common law in those states. These cases, though, are built on the same faulty legal foundations rejected by this

Court in *AEP*. To obfuscate the issues, the advocates have attempted to differentiate these cases from *AEP*. Two federal district courts have already held that these are differences without distinction. By filing their claims in multiple jurisdictions, the litigation advocates have sought to increase the odds that a single court or jurisdiction—as here—will nevertheless allow a case to proceed.

Nearly all of these cases, including the one at bar, are pending in federal circuit courts, with one lawsuit stayed pending the outcome of these cases. The Second and Ninth Circuits are assessing the merits in response to the two dismissals. The First and Tenth Circuits, in addition to the Fourth Circuit here, are reviewing the jurisdictional question of whether federal or state law governs the national energy policies at issue and, accordingly, which courts should hear the claims. The Court should allow the appellate courts to resolve these jurisdictional questions before allowing any of the cases to proceed in state court. The legal issues in this litigation are of major significance, could have precedential value far beyond these cases, and will likely warrant this Court's review. The federal judiciary should speak with one voice on a single legal issue, regardless of how many cases are filed. Lawyers and advocacy groups should not be rewarded for filing multiple claims in multiple jurisdictions.

For these reasons, and as detailed below, *amicus* curia requests that the Court grant this Application.

ARGUMENT

I. PROCEDINGS IN THIS CASE SHOULD BE STAYED UNTIL THE FEDERAL COURTS DETERMINE THE PROPER PATH, IF ANY, FOR THIS CLIMATE TORT SUIT

This Court effectively ended the first wave of climate change tort litigation in 2011 when it unanimously ruled in *AEP* that the Clean Air Act displaced any federal common law claims over GHG emissions. *See* 564 U.S. at 425 (explaining there is "no room for a parallel track" of tort litigation because Congress delegated the authority to regulate GHG emissions to the Environmental Protection Agency). Importantly, this Court explained the institutional deficiencies with judges being enmeshed in climate change public policy, stressing that Congress and EPA are "better equipped to do the job" of making national energy policy decisions to account for climate change than "district judges issuing ad hoc, case-by-case" decisions. *Id.* at 421, 428.

After *AEP*, the two remaining climate change tort suits were quickly dismissed. The Ninth Circuit disposed of *Kivalina v. ExxonMobil Corp.*, where an Alaskan village sued many of the same companies as here for alleged damages related to rising sea levels. *See* 696 F.3d 849 (9th Cir. 2012). The court appreciated that even though the legal theories pursued in *Kivalina* differed slightly from *AEP*, given this Court's broader message, "it would be incongruous to allow [such litigation] to be revived in another form." 696 F.3d at 857. A federal judge then dismissed Mississippi homeowners' claims in *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 249 (S.D. Miss. 2012) over property damage caused by Hurricane Katrina,

finding *AEP* preempted those claims. A fourth case seeking to subject auto manufacturers to liability for making cars that emit GHGs through exhaust had already been dismissed and was not revived. *See California v. General Motors Corp.*, C06-05755 MJJ, 2007 WL 2726871, at *14 (N.D. Cal. Sept. 17, 2007).

Undeterred, the advocacy groups and lawyers intent on using tort litigation to drive climate change public policy convened in La Jolla, California in 2012 to brainstorm 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"). They discussed the importance of filing multiple lawsuits in multiple jurisdictions, hoping the threat of liability or at least discovery, would put "pressure on the industry that could eventually lead to its support for legislative and regulatory responses to global warming." *Id*. They specifically discussed, *inter alia*, "Strategies to Win Access to Internal Documents," "The Importance of Creating a Public Narrative," and the need to "coordinate on future efforts." *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). In early 2017, these advocates found several localities receptive to filing government public nuisance lawsuits. This case is one of fourteen such lawsuits filed by two law firms on a contingency-fee basis.

These cases are actively working through the appellate process. The two district courts reaching a resolution on the merits have found that these cases raise the same public policy, not liability, concerns as in *AEP*. *See City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1022 (N.D. Cal. 2018) ("The scope of plaintiffs' theory is breathtaking. . . . [I]t rests on the sweeping proposition that otherwise lawful and everyday sales of fossil fuels, combined with an awareness that greenhouse gas emissions lead to increased global temperatures, constitute a public nuisance."); *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 474-75 (S.D.N.Y. 2018) ("[T]he serious problem caused thereby are not for the judiciary to ameliorate. Global warming and solutions thereto must be addressed by the two other branches of government."). These cases have been appealed and are before the Ninth and Second Circuits, respectively, with oral arguments being scheduled over the next few months. *See City of Oakland v. BP P.L.C.*, No. 18-16663 (9th Cir.); *City of New York v. BP P.L.C.*, No. 18-2188 (2nd Cir.). The appellate process is working.

The other cases, like here, are at early procedural stages of determining whether the cases are to be heard in federal or state court. In three California cases, which were consolidated for purposes of procedural motions, the district court granted the motions for remand. As should occur here, it then stayed the cases pending review by the Ninth Circuit. *See* Order Granting Motions to Stay, *Cty. of San Mateo v. Chevron Corp.*, No. 17-cv-04929 (N.D. Cal. Apr. 9, 2018) (granting the motions to stay the remand orders in all three cases pending appeal).

Two other remand cases were recently decided by the district courts. *See Rhode Island v. Chevron Corp.*, __ F. Supp. 3d __, 2019 WL 3282007 (D. R.I. July 22, 2019); *Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, __ F. Supp. 3d __, 2019 WL 4200398 (D. Colo. Sept. 5, 2019). Appeals in both cases are pending in the federal circuits. *See Rhode Island v. Shell Oil Prods. Co., LLC*, No. 19-1818 (1st Cir.); *Bd. of Cty. Comm'rs of Boulder Ct. v. Suncor Energy (U.S.A.) Inc.*, No. 19-1330 (10th Cir.). The issue of whether the cases will be stayed pending appeal are still being heard, making this Court's ruling on this Application particularly timely.

A final case, *King Cty. v. BP P.L.C.*, has already been stayed pending a decision by the Ninth Circuit in *City of Oakland v. BP P.L.C.* *See* Order Granting Partially Unopposed Motion to Stay Proceedings, No. C18-758-RSL (W.D. Wash. Oct. 17, 2018). The court found that "[i]t is unlikely that a stay would result in any significant damage or cause any hardship to any party." *Id*. at 2. It also found the cases to be "materially identical" to the City of Oakland's case. *Id.* Thus, all of the cases pending in the Second and Ninth Circuits or their jurisdictions have been stayed pending a decision on whether the cases state a viable cause of action.

The other cases, including the case at bar, should be treated similarly. These suits were conceived as a single, highly orchestrated attempt to use the litigation system for political purposes. They all raise the same issue: whether energy manufacturers can be subject to liability for harms caused by climate change because they produced and promoted use of fossil fuels. The Court should stay the cases until

the federal judiciary, including this Court, can determine whether this and the other climate tort claims have any legal merit. Permitting Plaintiff to start discovery now—while its case is pending appeal and before any such determination is made—would reward Plaintiff's tactics and invite similarly abusive strategies in the future on other public policy issues.

II. COURTS ARE LIKELY TO DETERMINE THAT THIS AND THE OTHER CLIMATE TORT SUITS INVOKE NATIONAL, LEGISLATIVE—NOT STATE JUDICIAL—ISSUES

The Application should also be granted because it would be a waste of judicial resources for Plaintiffs to start discovery or have a trial in a case when the case—and others like it—are properly before the federal circuits and likely to be dismissed as not viable. In *AEP*, the Court made clear the legal policy decisions governing this litigation, which, if properly followed, should require climate tort cases to be heard in and dismissed by federal courts.

Specifically, the Fourth Circuit should find that remanding this case to state court runs afoul of *AEP*. As the Court explained, setting climate change public policy is solely "within national legislative power" because, "as with other questions of national or international policy, informed assessment of competing interests is required." 564 U.S. at 427. The Court described this issue as one of institutional competency—not merely displacement of federal common law—stating judges "lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order." *Id*. at 428. They "are confined by a record comprising the evidence the parties present," and "may not 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 in the States where the defendants are located." *Id.* Also, they cannot weigh any "environmental benefit potentially achievable [against] our Nation's energy needs and the possibility of economic disruption." *Id.* at 427.

Judges applying state common law suffer from these same deficiencies and are no better situated to make these national energy policies than judges applying federal law. To this end, the Court already stated these public policies are "of special federal interest" and that "borrowing the law of a particular State would be inappropriate." *Id.* at 422-24. Further, in oral argument, Justice Kennedy identified the legal awkwardness of having only a federal cause of action before the Court, saying "[i]t would be very odd" or illogical for state courts to set national caps on GHG emissions when federal courts are barred from doing so. Transcript of Oral Argument, *Am. Elec. Power v. Connecticut*, 564 U.S. 410 (2011), at 32. Accordingly, the Fourth Circuit should find that federal positive law, not state judge-made law, governs the complex national energy issues here.

The different ways that plaintiffs have packaged these lawsuits, namely seeking abatement or money damages instead of injunctive relief, do not cure these institutional deficiencies. To the contrary, the Court has consistently held that 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).

Finally, Plaintiff's proposed remedy underscores the parochial nature of this litigation: it seeks to impose a penalty on energy production, but only on these Defendants and only on their products regardless of fault or causation. Further, this penalty 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 Congress and federal agencies must consider when presented with such public policy choices. Thus, this type of sweeping public policy raises the very competing interests the Court warned against in *AEP*.

To be sure, granting this Application and ultimately dismissing this litigation is not surrendering to climate change. Rather it places the debate where it must be considered: Congress and the federal agencies. The best way to reduce climate change emissions and impacts is for Congress, federal agencies, and local governments to work with America's manufacturers on policies and new technologies that reduce emissions. *See* Ross Eisenberg, *Forget the Green New Deal. Let's Get to Work on a Real Climate Bill*, Politico, Mar. 27, 2019.[2] Innovation and collaboration, not litigation, remain the proven way America has brought about the type of society-wide tech-

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

nological advancement needed to address this shared global challenge. Allowing this case to proceed while on appeal would distract from and undermine the debate this country must have to meaningfully address climate change.

CONCLUSION

For these reasons, *amicus curiae* respectfully request that this Court stay the District Court's remand order pending the disposition of the appeal in the Fourth Circuit and, if that court affirms the remand order, pending the filing and disposition of a petition for writ of certiorari in this Court.

Respectfully submitted,

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