

No. 19-1189

IN THE
Supreme Court of the United States

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

Petitioners,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE,

Respondent.

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

**BRIEF OF *AMICI CURIAE* SENATORS
WHITEHOUSE, CARDIN, BLUMENTHAL,
WARREN, MARKEY, AND VAN HOLLEN
IN SUPPORT OF RESPONDENT**

GERSON H. SMOGER

Counsel of Record

SMOGER & ASSOCIATES

13250 Branch View Lane

Dallas, TX 75234

(510) 531-4529

gerson@texasinjurylaw.com

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*¹

United States Senator Sheldon Whitehouse is a Democrat representing the State of Rhode Island. First elected to the Senate in 2006, Senator Whitehouse has been active in seeking comprehensive solutions to our climate crisis. He is a member of the Senate’s Finance and Environment & Public Works Committees, and author of the American Opportunity Carbon Fee Act, which would establish a fee on carbon emissions and return the revenues generated to the American people. Senator Whitehouse has closely observed the influence of corporate lobbying and election spending in Congress, particularly how the fossil fuel industry has used its political and electioneering influence. The Senator regularly speaks on the Senate floor about the need to act on climate change and the role of anonymous political spending— “dark money” — in obstructing climate progress. He is the author of *Captured: The Corporate Infiltration of American Democracy*.

United States Senator Ben Cardin represents the State of Maryland. First elected to the Senate in 2006, Senator Cardin is Ranking Member of the Subcommittee on Transportation and Infrastructure, Environment and Public Works Committee. He led the U.S. Senate delegation to the 21st

¹ Pursuant to Rule 37.6, *amici* affirm that no counsel for any party authored this brief in whole or in part and no person or entity, other than *amici*, its members, or its counsel has made a monetary contribution to its preparation or submission. Petitioners and Respondents have consented to the filing of this brief.

Conference of the Parties to the UN Framework Convention on Climate Change in 2015, where the Parties adopted the Paris Agreement to combat climate change and adapt to its effects.

United States Senator Richard Blumenthal represents the State of Connecticut in the United States Senate. First elected to the Senate in 2010, and previously Attorney General of Connecticut, Senator Blumenthal has spent much of his career fighting for the environment and public health. He has co-chaired the Senate Fuel Cell and Hydrogen Caucus and has introduced annual resolutions recognizing National Hydrogen and Fuel Cell Day to bring awareness to the fuel cell industry, while also advocating for increased investment in fuel cell technology. Senator Blumenthal also has an interest in reducing greenhouse gas emissions and preparing for the ongoing impacts of climate change through actionable and meaningful steps. In addition to leading letters that support the protection and restoration of public lands, the Senator has co-sponsored legislation to achieve net-zero greenhouse gas emissions by no later than 2050 and create a national climate bank that leverages public and private funds to invest in clean energy technologies and infrastructure.

United States Senator Elizabeth Warren has represented the Commonwealth of Massachusetts in the United States Senate since 2013. Senator Warren is a member of the Senate Committees on Banking, Housing, & Urban Affairs; Health, Education, Labor & Pensions; and Armed Services. Senator Warren is also a member of the Special

Committee on Aging and is the Ranking Member of the Subcommittee on Financial Institutions and Consumer Protection. Before her election to the United States Senate, Senator Warren served as Chair of the Congressional Oversight Panel for the Troubled Asset Relief Program in the aftermath of the financial crisis and previously taught courses on commercial law, contracts, and bankruptcy for more than 30 years. Among other ambitious proposals, Senator Warren has led the Climate Risk Disclosure Act to help markets appropriately assess the risk of the climate crisis and has called for sweeping changes to eliminate the influence of money on government decision making.

United States Senator Edward J. Markey represents the Commonwealth of Massachusetts in the United States Senate. He is a member of the Committee on Environment and Public Works, the Committee on Commerce, Science, and Transportation, and the Foreign Relations Committee. He also serves as Chair of the Senate Climate Change Task Force. Senator Markey's more than 40 years of legislative experience includes co-authorship with Congressman Henry Waxman of the only comprehensive climate legislation ever to pass a chamber of Congress. It would have cut national global warming emissions by 17 percent by 2020 and 80 percent by 2050. He was also the principal House author of a 1987 energy conservation act and a 2007 law to increase national fuel economy standards, which reduced consumer costs and greenhouse gas emissions. Senator Markey is the Senate sponsor of the Green New Deal resolution, which calls for a historic mobilization with the goal of

achieving a just transition to a net-zero emissions economy.

United States Senator Chris Van Hollen is a Democrat representing the State of Maryland and the City of Baltimore. He served in the Maryland General Assembly and the U.S. House of Representatives before being elected to the Senate in 2016. He has been focused on addressing climate issues throughout his public service career, from passing energy efficiency tax credits and preventing drilling in sensitive areas adjacent to the Chesapeake Bay in the Maryland General Assembly to introducing the Healthy Climate and Family Security Act, a comprehensive climate solution, in the U.S. Congress. He has been active in combatting the harmful influence of unaccountable "dark money" in politics, passing legislation to require candidate disclosure of bundled contributions from lobbyists, authoring the DISCLOSE Act to provide transparency for "dark money" spending in the wake of the *Citizens United* case, and pursuing legal action against the Federal Election Commission to push for increased disclosure of "dark money" contributions for political ads. He serves on the Environment and Public Works Committee and both the Appropriations Subcommittee on Interior, Environment, and Related Agencies and the Subcommittee on Financial Services.

SUMMARY OF ARGUMENT

The fossil fuel petitioners seek to broaden what may be reviewed on remand beyond what Congress has specifically allowed under 28 U.S.C. 1447(d). We see this gambit, joined by fossil fuel-connected *amici*, as part of a continuing effort to block progress on addressing climate change.

The fossil fuel industry has tried to close every door—local, state, federal; legal, legislative, and administrative—to a solution to the climate crisis. Here, they invite this Court to ignore the precise question and statute at hand, and render them a larger result — one that would help them in shutting all state legal doors to remedies for the harms they have caused by their carbon emissions and in misleading about the harm to the public. In essence, they propose a novel political doctrine of “too big to adjudicate” to free Petitioners from bearing the consequences in state courts of their own polluting and misleading.

Amici echoing this position include the United States Chamber of Commerce (hereafter, “Chamber”), the National Association of Manufacturers (NAM), the American Petroleum Institute (API), the Washington Legal Foundation (WLF), the Atlantic Legal Foundation (ALF), and Energy Policy Advocates (EPAD).² All of these *amici* are

² See, e.g., Chamber brief at 3 (“[T]he Chamber believes that, under our system of government, thoughtful governmental policies that will have a meaningful impact on global climate change should come from the national government, and in particular from Congress and the Executive Branch.”); NAM

funded by or connected to the fossil fuel industry. The full extent to which they are also directed by the fossil fuel industry is unknown. The connection among them, and with petitioners, would be clearer to this Court, the parties and the public were it not for these *amici*'s narrow reading of Supreme Court Rule 37.6 by which they avoid spelling out that connection.

These fossil fuel-connected *amici* argue that all problems related to climate change, regardless of individual damages sustained by parties or par-

brief at 19 (“*[A]mici* believe the best way to address climate concerns related to energy is for Congress, federal agencies, and local governments to work with America’s manufacturers and other businesses...”); API brief at 30 (“To ensure that the federal interests embodied in the federal common law on ‘transboundary pollution’ are adequately protected, a federal court of appeals must be able to consider the relevance of federal common law in determining whether a case should stay in federal court...”); ALF brief at 4-5 (“The legal issues raised by climate change tort suits are federal issues that should be addressed by federal courts. They include, for example, the threshold question of whether such suits require adjudication of nonjusticiable political questions in violation of the Constitution’s separation of powers.”); EPAD brief at 4 (“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.”); WLF brief at 1 (“By holding that its appellate jurisdiction was limited to the federal-officer removal issue, the Fourth Circuit avoided addressing whether climate-change litigation presents a federal question. This abdication of its responsibility to review the District Court’s order denied Petitioners their right to have this federal-law question decided by a federal judge with Article III protections.”)

ticular details of the case at issue, must be denied any state's judicial forum for redress. They ultimately wish to steer all such matters into the executive and legislative branches, where they have maintained a decades-long political blockade. They urge this Court that those political branches are the proper forum, while failing to disclose the scope of their own efforts to see to it that those other branches fail at providing any response or remedy. And their reading of Rule 37.6 helps obscure to the Court, the parties and the public their common role in a scheme to stymie judicial, regulatory, or legislative action that would significantly limit carbon pollution or permit accountability for resulting harms.

Courts have long been a proper avenue of resort for those that have suffered harm at the hands of others. Courts have a particularly vital role when redress in the executive and legislative branches is blocked by powerful political forces. The independence of courts and juries, the requirements of discovery and truthful testimony, the protections against influence and tampering, the stricture to follow the evidence and the law -- all of these make courts a pathway that sometimes is the last and only avenue of redress. That's not new; Blackstone saw juries as a structural check against the excesses of the "more powerful and wealthy citizens," including those who could control governors, ministers and legislatures.³ To undo this sovereign capability of state courts, present since the inception of our jurisprudence, would be wrong. The im-

³ 3 William Blackstone, Commentaries *381.

placit doctrine of “too big to adjudicate” is not found in our Constitution or history.

ARGUMENT

I. THIS APPEAL IS PART OF THE FOSSIL FUEL INDUSTRY'S CAMPAIGN TO BLOCK PROGRESS ON CLIMATE CHANGE

A. Petitioners' *Amici* Have Ties to the Fossil Fuel Industry

The Chamber does not disclose its donors, but voluntary disclosures made by many large public companies reveal that many fossil fuel companies contribute substantial sums to the Chamber,⁴ as do entities affiliated with the fossil fuel billionaire Koch family.⁵ The Koch family is at the center of a network of foundations and other nonprofits

⁴ Dan Dudis, “The Chamber of Secrets: An Investigation into who Funds the Notoriously Opaque U.S. Chamber of Commerce,” *Public Citizen* (Sept. 13, 2017), http://chamberofcommercewatch.org/wp-content/uploads/2017/09/Chamber_of_Secrets_members_report.pdf

⁵ For example, in 2012, an organization linked to the Koch brothers is known to have funneled \$3 million to the Chamber. *See*, Matea Gold, “Koch-backed political network, built to shield donors, raised \$400 million in 2012 elections,” *The Washington Post* (Jan. 5, 2014), https://www.washingtonpost.com/politics/koch-backed-political-network-built-to-shield-donors-raised-400-million-in-2012-elections/2014/01/05/9e7cfd9a-719b-11e3-9389-09ef9944065e_story.html.

that fund and carry out a covert political operation dedicated to blocking action to limit carbon pollution or otherwise address climate change.⁶

NAM only discloses the names of member companies that have given more than \$5000 in a given quarter for lobbying purposes. According to NAM's most recent disclosures, several fossil fuel companies are donors, as is at least one of the Koch network of companies.⁷ Like the Chamber, NAM has also received money from Koch-linked nonprofit groups, in this case, Freedom Partners,⁸ which has been described as the Kochs' "secret bank."⁹ NAM runs something it calls the Manufacturers Accountability Project (MAP), which was created to fight climate-related lawsuits.¹⁰ NAM does not disclose which companies or other entities fund MAP.

⁶ Christopher Leonard, *Kochland: The Secret History of Koch Industries and Corporate Power in America*, Simon & Schuster (2019)

⁷ NAM Affiliated Organizations, <http://documents.nam.org/law/lobbying/Q3-2020.pdf>

⁸ National Association of Manufacturers, Conservative Transparency Project, <http://conservativetransparency.org/org/national-association-of-manufacturers/?opptax=recipient#grants>

⁹ Mike Allen and Jim Vandehei, "The Koch brothers' secret bank," *Politico* (Sept. 11, 2013), <https://www.politico.com/story/2013/09/behind-the-curtain-exclusive-the-koch-brothers-secret-bank-096669#ixzz2hj4y5I8o>

¹⁰ John Siciliano, "Manufacturers push back against environmentalists' climate court strategy," *The Washington Examiner* (Dec. 4, 2017), <https://www.washingtonexaminer.com/manufacturers-push-back-against-environmentalists-climate-court-strategy>

It is not clear whether NAM treats *amicus* briefing as lobbying under its disclosure policy.

API, as the largest trade association for the oil and gas industry, is unsurprisingly tied to the fossil fuel industry. Petitioners BP America, Chevron, ConocoPhillips, Exxon Mobil, Hess, Marathon Petroleum, Phillips 66, and Shell are all members of API.¹¹ API is a known donor to Americans for Prosperity, a Koch-linked group.¹² API notes in its brief that it is a defendant in several similar climate cases filed subsequent to the instant case.¹³

ALF describes itself as a “nonprofit, nonpartisan public interest law firm,”¹⁴ but its efforts in the “public” interest customarily align with the interests of its corporate donors, particularly polluting entities.¹⁵ ALF’s known funders include the Sarah Scaife Foundation, the Lynde and Harry Bradley Foundation, and the Olin Foundation. These foundations all oppose climate action directly and through organizations they fund. Several of their founders made their fortunes in fossil fuels.¹⁶

¹¹ Members, American Petroleum Institute, <https://www.api.org/membership/members>

¹² American Petroleum Institute, Conservative Transparency Project, http://conservativetransparency.org/basic-search/1/?q=American%20Petroleum%20Institute&order_t=year%20DESC&sf%5B0%5D=transaction

¹³ API brief at 1

¹⁴ <https://atlanticlegal.org/about-us/>

¹⁵ *Id.*; Constitutional Issues, Atlantic Legal Foundation, <https://atlanticlegal.org/category/programs/constitutional-issues/>

¹⁶ Jane Mayer, *Dark Money*, pgs. 6-7, Doubleday (2016)

ALF's donors include petitioner Exxon Mobil as well as the Donors Trust,¹⁷ a "donor-advised fund" tied to the Koch network that serves as their "dark-money ATM,"¹⁸ and is at the heart of the web of groups that propagate climate misinformation and obstruct climate legislation.¹⁹

WLF, like ALF, has funders tied to the fossil fuel industry's obstruction and misinformation campaign. WLF's known donor roster looks a lot like ALF's. It includes the Sarah Scaife Foundation, the Olin Foundation, the Koch-controlled Claude R. Lambe Foundation, the Lynde and Harry Bradley Foundation, the Charles G. Koch Charitable Foundation, petitioner Exxon Mobil, and Donors Trust.²⁰ These donors have collectively given

¹⁷ Atlantic Legal Foundation, Conservative Transparency Project, <http://conservativetransparency.org/recipient/atlantic-legal-foundation/>

¹⁸ Andy Kroll, Exposed: The Dark-Money ATM of the Conservative Movement," *Mother Jones* (Feb. 5, 2013), <https://www.motherjones.com/politics/2013/02/donors-trust-donor-capital-fund-dark-money-koch-bradley-devos/>

¹⁹ Robert Brulle, "Institutionalizing delay: foundation funding and the creation of the U.S. climate change counter-movement organizations," *Climatic Change* 122, pgs. 681-94, (Dec. 2013), <https://link.springer.com/article/10.1007/s10584-013-1018-7>

²⁰ Washington Legal Foundation, Conservative Transparency Project, <http://conservativetransparency.org/basic-search/?q=washington+legal+foundation&sf%5B%5D=candidate&sf%5B%5D=donor&sf%5B%5D=recipient&sf%5B%5D=transaction&sf%5B%5D=finances#transactions>

WLF at least \$9.6 million.²¹ WLF's main activity is litigating in favor of corporate and polluter interests.²²

Finally, there is EPAD. Despite claiming its mission is “bringing transparency to energy policy,”²³ EPAD is totally opaque as to its own funders. Although there is no information available about EPAD's funders, the group has numerous links to the fossil fuel industry. At least one board member is a coal industry lawyer, and the group is tied to a second group with links to the fossil fuel industry.²⁴ EPAD's primary activity seems to be attempting to support fossil fuel industry efforts to defeat climate-related lawsuits in court.²⁵

It is notable that this armada of *amici* materializes when interests of the fossil fuel industry are at stake. The Chamber says this case raises “a question of appellate procedure that is important to the Nation's business community far beyond the specifics of this case,”²⁶ yet the Chamber and its allies were absent from the briefing in *Lu Junhong v.*

²¹ *Id.*

²² About WLF's Litigation Division, Washington Legal Foundation, <https://www.wlf.org/litigation/>

²³ Energy Policy Advocates, <http://epadvocates.org/>

²⁴ Dana Drugmand, “Energy Policy Advocates' and the Fossil Fuel Boosters Attacking Legal Efforts to Hold Climate Polluters Accountable,” *DeSmogBlog* (April 30, 2020), <https://www.desmogblog.com/2020/04/30/energy-policy-advocates-horner-exxon-legal-climate>

²⁵ *Id.*

²⁶ Chamber brief at 2

Boeing,²⁷ the Seventh Circuit case argued to be in conflict with this one. That case involved the United States’ largest exporter, Boeing. Neither the Chamber nor any other of the *amici* in this case filed *amicus* briefs in *Lu Junhong*.²⁸ This “important” question of appellate procedure seems to trouble these *amici* only when it has a bearing on the fortunes of their fossil fuel industry donors.

The Chamber is no stranger to *amicus* practice in the circuit courts of appeal.²⁹ The Chamber filed an *amicus* brief in this case before the Fourth Circuit,³⁰ and filed *amicus* briefs in climate-related cases in the First, Ninth, and Tenth Circuits.³¹ In one of the Ninth Circuit cases, NAM and WLF also appeared as *amici* in support of the fossil fuel industry defendants.³²

²⁷ 792 F.3d 805 (7th Cir. 2015)

²⁸ *Id.*

(<https://www.law360.com/cases/55e0eed736cf482951000003/duckets>)

²⁹ During a recent three year period, the Chamber appeared as a litigant or *amicus* before a circuit court of appeal almost 180 times. See, Dan Dudis, “The Chamber of Litigation,” Public Citizen (Oct. 26, 2016), https://www.citizen.org/wp-content/uploads/chamber_litigation_report_part_1.pdf

³⁰ Mayor and City Council of Baltimore v. BP P.L.C., et al., No. 19-1644 (4th Cir. 2020).

³¹ Rhode Island v. Shell Oil Products, Co., LLC, et al., No. 19-1818 (1st Cir. 2020). City of Oakland v. BP PLC, No 18-16663 (9th Cir. 2020). Boulder County Commissioners v. Suncor Energy, No. 19-1330 (10th Cir. 2020).

³² City of Oakland v. BP PLC, No. 18-16663 (9th Cir. 2020).

B. Petitioners' *Amici* Read this Court's Disclosure Rules So Narrowly that the Fossil Fuel Industry's Ubiquitous Presence in this Case is Not Clear in the Record

We should not have to be telling the Court, the parties, and the public about all of this. Supreme Court Rule 37.6 provides that:

[A] brief filed under this Rule shall indicate whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and shall identify every person or entity, other than the *amicus curiae*, its members, or its counsel, who made such a monetary contribution to the preparation or submission of the brief.

The Supreme Court adopted its *amicus* funding disclosure rule in 1997 “in an effort to stop parties in a case from surreptitiously ‘buying’ what amounts to a second or supplemental merits brief, disguised as an *amicus* brief, to get around word limits.”³³ In 2018, the Supreme Court’s public information office explained that “the Clerk’s Office

³³ *Supreme Court Rule Puts a Crimp in Crowd-Funded Amicus Briefs*, LAW.COM (Dec. 10, 2018), available at <https://www.yahoo.com/now/supreme-court-rule-puts-crimp-075351473.html?guccounter=1>.

interprets [the Rule] to preclude an *amicus* from filing a brief if contributors are anonymous.”³⁴

But Rule 37.6 is read by Petitioners to require disclosure only of donations directly given to fund “the preparation or submission of the brief”—meaning, evidently, writing, printing, binding and serving the brief. This little armada of *amici* is out to do precisely what the rules were intended to prevent, i.e. buying a little chorus of supplemental merits briefs disguised as *amicus* briefs,³⁵ leaving this Court, opposing parties and their *amici*, and the public all none the wiser. Worse, the fossil fuel industry appears to be mounting an orchestrated and coordinated campaign of briefing to create the misleading illusion of broad support, obscuring the common connectors in the scheme.

³⁴ *Id.*

³⁵ One recent high-profile Supreme Court case illustrates this problem. In *Google LLC. v. Oracle America Inc.* (No. 18-956), the Internet Accountability Project (IAP)—a 501(c)(4) “social welfare” organization that does not disclose its funders—filed an *amicus* brief supporting Oracle's position, telling the Court that it wanted to “ensure that Google respects the copyrights of Oracle and other innovators.” *Bloomberg* subsequently reported that Oracle had itself donated between \$25,000 and \$99,999 to IAP as “just one part of an aggressive, and sometimes secretive, battle Oracle has been waging against its biggest rivals,” including Google. The report further documented donations from Google to at least ten groups that filed briefs in support of its position. See, Naomi Nix and Joe Light, “Oracle Reveals Funding of Dark Money Group Fighting Big Tech,” *Bloomberg* (Feb. 25, 2020), <https://www.bloomberg.com/news/articles/2020-02-25/oracle-reveals-it-s-funding-dark-money-group-fighting-big-tech?sref=ygM2vgD8>.

It may be expected that API, an oil and gas industry trade association, would have members that are parties in this case. The Chamber and NAM purport to represent a broad base of our country's business community, but they will not disclose here or elsewhere who all their members are; and they have not disclosed here or elsewhere which members had a role in making the policy and litigation decisions behind their participation in this case or in the array of climate-related cases in which they have appeared.

On climate change, the Chamber's and NAM's funding is particularly curious, as many member companies disagree with and deny accountability for the climate positions the Chamber espouses.³⁶ WLF, ALF, and EPAD all do not disclose their funders, though evidence suggests common funders and close ties to the fossil fuel industry.³⁷ History shows them at the ready to support the fossil fuel industry when its interests are threatened. If this is an orchestrated chorus funded directly or indirectly by entities with a direct stake in the outcome of the case, that is something parties, the Court, and the public should know. Indeed, if this is an orchestrated chorus funded di-

³⁶ See, e.g., Senators Whitehouse & Elizabeth Warren, *et al.*, U.S. Chamber of Commerce: Out of Step with the American People and its Members *available at* https://www.warren.senate.gov/files/documents/2016-6-14-Chamber_of_Commerce_Report.pdf.

³⁷ See, *supra*, notes 14 to 25.

rectly or indirectly by any entity, that is something parties, the Court, and the public should know.

Astronomers divine the presence of dark stars from their effect on the behavior of visible bodies; and one can divine some unseen force driving *amici* to group behavior that suggests a common scheme, and to a position on climate issues that for many their own member corporations decline to espouse. The secrecy of their funding obscures the exact explanation of this aberration. Arguably, these *amici* are sustained and controlled by fossil fuel industry funding in a common scheme.

II. ARGUMENTS ADVANCED BY THE CHAMBER, NAM, AND API ARE BELIED BY A WELL-DOCUMENTED RECORD OF OBSTRUCTING CLIMATE ACTION IN CONGRESS AND BEFORE EXECUTIVE AGENCIES

Petitioners' *amici* stray from the central legal question presented by this case to argue that Respondent's claims are preempted by federal law and/or constitute a nonjusticiable political question.³⁸ They seem very eager to have this Court say that. In pursuit of that end, several of the fossil fuel-connected *amici* even claim to support federal

³⁸ See, *supra*, note 2.

action to combat climate change.³⁹ Not so, in our experience.

The trade association *amici* have a long history of obstructing both federal legislative and regulatory efforts to mitigate climate change. That obstruction continues to this day. As members of Congress with a combined 12 decades spent on Capitol Hill, the authors of this brief have had a front row seat to observe the remorseless efforts of these *amici* to thwart serious climate action in Washington.

The Chamber, as Washington's largest lobbyist⁴⁰ and a prolific "dark money" elections spender on congressional races, has a particularly robust record of opposing legislative and regulatory efforts to mitigate climate change. The Chamber claims to support "serious solutions" to climate change,⁴¹ but we have seen the exact opposite purpose in its influence activities.

³⁹ See, e.g., Chamber brief at 3 ("[T]he Chamber believes that, under our system of government, thoughtful governmental policies that will have a meaningful impact on global climate change should come from the national government, and in particular from Congress and the Executive Branch."); NAM brief at 1-2 ("NAM is committed to protecting the environment and to environmental sustainability, and fully supports national efforts to address climate change and improve public health through appropriate laws and regulations.")

⁴⁰ Top Spenders 1998-2020, Center for Responsive Politics, <https://www.opensecrets.org/federal-lobbying/top-spenders?cycle=a>

⁴¹ Chamber brief at 3

Take federal legislation. In 2007, the Chamber opposed bipartisan cap and trade legislation.⁴² In 2009, the Chamber was one of the leading interest groups lobbying against the Waxman-Markey cap and trade measure.⁴³ Since the failure of Waxman-Markey, the Chamber's allies in Congress have refused to hold hearings on, mark up, debate, or vote on any legislation proposing a policy framework for economy-wide reductions in carbon pollution. More recently, the Chamber was a ferocious opponent of the "Green New Deal," and took a position against even an aspirational statement of policy goals that would not have had the force of law had it passed.⁴⁴ The Chamber has repeatedly expressed opposition to Senator Whitehouse's carbon fee legislation, and to any other form of carbon fee or carbon pricing. The Chamber opposes the only three serious solutions proposed in Congress that would have some chance of holding the global average temperature increase below 1.5 degrees Celsi-

⁴² See, e.g., "Wake Up to Climate Change Legislation" attack ad, U.S. Chamber of Commerce (Nov. 9, 2007), <https://www.youtube.com/watch?v=XevRKc82soI>.

⁴³ See, e.g., Letter Opposing H.R. 2454, the "American Clean Energy and Security Act of 2009," U.S. Chamber of Commerce (June 24, 2009), <https://www.uschamber.com/letter/letter-opposing-hr-2454-american-clean-energy-and-security-act-2009>. Of particular note is the Chamber's threat to consider votes on this legislation in its "How They Voted" scorecard, which may in turn influence election spending decisions.

⁴⁴ U.S. Chamber Letter to the Senate Opposing S.J.Res.8, the Green New Deal, U.S. Chamber of Commerce, <https://www.uschamber.com/letter/us-chamber-letter-the-senate-opposing-sjres8-the-green-new-deal>

us:⁴⁵ a cap and trade system; a massive investment program in low carbon technologies along the lines of the Green New Deal; or a carbon price. The Intergovernmental Panel on Climate Change’s 2018 report on global warming of 1.5 degrees Celsius concluded that “carbon prices remain a necessary condition of ambitious climate policies.”⁴⁶ The Chamber has opposed every variant.

The Chamber works assiduously to defeat regulatory actions in the executive branch to limit carbon pollution. In 2010, the Chamber sued the Environmental Protection Agency (EPA), seeking to overturn its finding that greenhouse gas emissions endanger public health and welfare.⁴⁷ Beginning in 2014, the Chamber has convened fossil fuel industry lobbyists, lawyers, and political strategists to plot legal strategies for opposing future regulatory actions to limit carbon pollution.⁴⁸ In 2015, the

⁴⁵ Scientists have determined that warming beyond 1.5 degrees Celsius would have catastrophic effects on humanity and the planet. See, Global Warming of 1.5 Degrees Celsius, Intergovernmental Panel on Climate Change (Oct. 8, 2018), <https://www.ipcc.ch/sr15/>

⁴⁶ Global Warming of 1.5 Degrees Celsius, Section 4.4.5.2, Intergovernmental Panel on Climate Change, <https://www.ipcc.ch/sr15/chapter/chapter-4/>

⁴⁷ *Chamber of Commerce v. EPA*, Petition for Review (Feb. 12, 2010), Case No. 10-1030 (D.C. Cir.), <https://www.chamberlitigation.com/sites/default/files/cases/files/2010/Chamber%20of%20Commerce%20v.%20EPA%20%28Endangerment%20Rule%29%20%28Petition%20for%20Review%29.pdf>

⁴⁸ Coral Davenport and Julie Hirschfeld Davis, “Move to Fight Obama’s Climate Plan Started Early,” *The New York Times*

Chamber led a coalition of trade associations that filed suit to block the EPA’s proposed Clean Power Plan (CPP) to reduce carbon emissions in the electric power sector.⁴⁹ It is clear that the Chamber is at the center of the web of climate opposition.

With the 2016 election of a president opposed to policies limiting carbon emissions, the Chamber switched to offense. In 2017, it funded a study critical of the Paris Agreement.⁵⁰ While the study was cited by President Trump in his justification for withdrawing from the Agreement,⁵¹ it has been thoroughly debunked by independent experts.⁵² In

(Aug. 3, 2015),

<https://www.nytimes.com/2015/08/04/us/obama-unveils-plan-to-sharply-limit-greenhouse-gas-emissions.html>

⁴⁹ *Chamber of Commerce v. EPA*, Petition for Review (Oct. 23, 2015), Case No. 15-1382 (D.C. Cir.),

[https://www.chamberlitigation.com/sites/default/files/U.S.%20Cham-](https://www.chamberlitigation.com/sites/default/files/U.S.%20Cham-ber%2C%20et%20al.%20v.%20EPA%20%28ESPS%29%20--%20Petition%20for%20Review.pdf)

[ber%2C%20et%20al.%20v.%20EPA%20%28ESPS%29%20--%20Petition%20for%20Review.pdf](https://www.chamberlitigation.com/sites/default/files/U.S.%20Cham-ber%2C%20et%20al.%20v.%20EPA%20%28ESPS%29%20--%20Petition%20for%20Review.pdf)

⁵⁰ Impacts of Greenhouse Gas Regulations on the Industrial Sector, NERA Economic Consulting (March 2017), <http://www.globalenergyinstitute.org/sites/default/files/NERA%20Final%20Report%202.pdf>

⁵¹ Glenn Kessler and Michelle Ye Hee Lee, “Fact-checking President Trump’s claims on the Paris climate change deal,” *The Washington Post* (June 1, 2017),

https://www.washingtonpost.com/news/fact-checker/wp/2017/06/01/fact-checking-president-trumps-claims-on-the-paris-climate-change-deal/?utm_term=.42bce20e6fcd

⁵² *See, e.g.*, Kevin Steinberger and Amanda Levin, “Chamber Inflates Costs, Ignores Benefits of Climate Action,” Natural Resources Defense Council (March 22, 2017),

2017, the Chamber spearheaded a lobbying campaign to repeal a Department of Interior rule limiting methane emissions from oil and gas facilities on public lands.⁵³ The Chamber has been a leading supporter of Trump administration efforts to repeal and/or weaken rules limiting carbon pollution. Most recently, the Chamber intervened in a lawsuit to support the administration's proposal to repeal the Obama Clean Power Plan and replace it with a virtually toothless rule against carbon pollution.⁵⁴

The Chamber wields its influence through electoral politics too. Since this Court's 2010 *Citizens United* decision,⁵⁵ which allowed outside groups to spend unlimited sums on electioneering activities, the Chamber has directly spent more than \$150 million⁵⁶ on congressional races, which is

<https://www.nrdc.org/experts/kevin-steinberger/chamber-inflates-costs-ignores-benefits-climate-action>.

⁵³ See, e.g. Key Vote Alert, U.S. Chamber of Commerce (May 9, 2017),

https://www.uschamber.com/sites/default/files/5.9.17-key_vote_letter_to_senate_supporting_h.j._res._36_cra_resolution_repealing_blm_methane_rule.pdf

⁵⁴ U.S. Chamber Motion to Intervene on Clean Power Plan and Affordable Clean Energy Rules, U.S. Chamber of Commerce, <https://www.globalenergyinstitute.org/us-chamber-motion-intervene-clean-power-plan-and-affordable-clean-energy-rules>

⁵⁵ *Citizens United v. FEC*, 558 U.S. 310 (2010)

⁵⁶ U.S. Chamber of Commerce Outside Spending by Year, Center For Responsive Politics, <https://www.opensecrets.org/outsidespending/detail.php?cmte=US+Chamber+of+Commerce&cycle=2018> (Total amount calculated based on adding data for 2010, 2012, 2014, 2016, 2018, and 2020 elections cycles.)

more than any other trade association.⁵⁷ Attack ads funded by the Chamber have targeted candidates for their support of policies to limit carbon pollution.⁵⁸ Candidates benefiting from the Chamber's outside spending have almost without fail been opposed to any meaningful climate legislation. Because of the tsunami of anonymous "dark money" election spending spawned by *Citizens United*, we do not have a full accounting of the Chamber's electioneering. What we know is bad enough.

The political power of the Chamber in elections goes beyond what the Chamber actually spends in an electoral cycle. When this Court unleashed the power of unlimited election spending, it unfortunately unleashed the power to threaten and promise unlimited election spending. The ability to spend unlimited money in politics necessarily imparts the ability to threaten and promise to spend unlimited amounts. Such threats and promises of

⁵⁷ The Chamber goes through extraordinary lengths to keep its membership anonymous and as a trade association organized under section 501(c)(6) of the Internal Revenue Code it is not otherwise obligated to disclose this information. As a result, the corporations that fund this political spending are unknown.

⁵⁸ See, e.g., "Run, Jimmy" attack ad against Katie McGinty, 2016 candidate for U.S. Senate from Pennsylvania, *available at* <https://player.vimeo.com/video/208379329>; Nancy Madsen, "U.S. Chamber of Commerce says Tim Kaine supported higher energy costs for families," *Politifact* Virginia (Aug. 21, 2012), <https://www.politifact.com/virginia/statements/2012/aug/21/us-chamber-commerce/us-chamber-commerce-says-tim-kaine-supported-higher-energy-costs-for-families/>

unlimited spending are advantageous to those spending "dark money": (a) they are effective; (b) they can be kept secret; and (c) they don't require the money to actually be spent. At the beginning of an election cycle, the Chamber often threatens to spend far more than it actually spends.⁵⁹ Between the power of unlimited spending, and the power of related threats and promises, it is no coincidence that bipartisan activity on climate change came to an end in Congress immediately after *Citizens United* was decided. The Chamber has been at the center of that stratagem.

The Chamber's actions are not those of an organization in search of "serious solutions" on climate. They are instead part of a decades-long campaign of disinformation, obstruction, and political intimidation designed to prevent democratically accountable branches of government from solving the problem of carbon pollution.⁶⁰ The nonpartisan watchdog group InfluenceMap has found the Chamber to be one of the two most obstructive

⁵⁹ See, e.g., Carol Leonnig, "Corporate donors fuel Chamber of Commerce's political power," *The Washington Post* (Oct. 19, 2012)

https://www.washingtonpost.com/politics/decision2012/corporate-donors-fuel-chamber-of-commerces-political-power/2012/10/18/96ad666a-1943-11e2-bd10-5ff056538b7c_story.html?utm_term=.2798acebd23f

⁶⁰ See, e.g., Robert Brulle, "The climate lobby: a sectoral analysis of lobbying spending on climate change in the USA, 2000 to 2016," *Climatic Change*, vol. 149, issue 3-4, pgs. 289 – 303, <https://link.springer.com/article/10.1007%2Fs10584-018-2241-z>

trade associations in the world with respect to climate change mitigation efforts.⁶¹

The other trade association InfluenceMap determined to be most obstructive on climate was NAM.⁶² Like the Chamber, NAM opposed Waxman-Markey,⁶³ filed suit to block the Clean Power Plan,⁶⁴ supported an effort to rescind regulations limiting methane pollution,⁶⁵ and opposed the Green New Deal.⁶⁶ NAM, like the Chamber, has been hostile to putting a price on carbon emissions, paying for a report critical of carbon pricing.⁶⁷

⁶¹ “Trade Associations and their Climate Policy Footprint,” InfluenceMap (Dec. 2017), <https://influencemap.org/report/Trade-Associations-and-their-Climate-Policy-Footprint-067f4e745c9920eb3dfaa5b637511634>

⁶² *Id.*

⁶³ Kate Sheppard, “National Association of Manufacturers claims climate bill would crush economy,” *Grist* (Aug. 13, 2009), <https://grist.org/article/2009-08-12-national-association-manufacturers-climate-bill-crush-economy/>

⁶⁴ Manufacturers Lead Legal Challenge to Clean Power Plan, National Association of Manufacturers (Oct. 23, 2015), <https://web.archive.org/web/20170928013841/http://www.nam.org/Newsroom/Press-Releases/2015/10/Manufacturers-Lead-Legal-Challenge-to-Clean-Power-Plan/>

⁶⁵ Key Manufacturing Vote, National Association of Manufacturers (Feb. 13, 2017), available at https://republicans-naturalresources.house.gov/uploadedfiles/nam_key_vote_senate.pdf

⁶⁶ Key Manufacturing Vote, National Association of Manufacturers (March 26, 2019), [http://documents.nam.org/COMM/KVL_SJ_Res_8_Green_New_Deal_\(Senate\)_FINAL.pdf](http://documents.nam.org/COMM/KVL_SJ_Res_8_Green_New_Deal_(Senate)_FINAL.pdf)

⁶⁷ Economic Outcomes of a U.S. Carbon Tax, NERA Economic Consulting (Feb. 26, 2013),

While NAM may tell the Court that it “fully supports national efforts to address climate change and improve public health through appropriate laws and regulations,”⁶⁸ this statement is a mystery to those of us who have witnessed its political behavior. Like the Chamber, NAM refuses to disclose whether fossil fuel funding paid for this obstruction, and, if so, how much.

Similarly, API enjoys a long record of climate obstruction. InfluenceMap ranks API as the fifth most obstructive trade association in the world with respect to climate action.⁶⁹ API was one of the fiercest opponents of the Waxman-Markey climate legislation, running an ad campaign against it.⁷⁰ API has also opposed efforts to regulate methane,⁷¹

<https://web.archive.org/web/20170927222021/http://www.nam.org/Issues/Tax-and-Budget/Carbon-Tax/2013-Economic-Outcomes-of-a-US-Carbon-Tax-Full-Report.pdf>

⁶⁸ NAM brief at 1-2.

⁶⁹ “Trade Associations and their Climate Policy Footprint,” InfluenceMap (Dec. 2017), <https://influencemap.org/report/Trade-Associations-and-their-Climate-Policy-Footprint-067f4e745c9920eb3dfaa5b637511634>

⁷⁰ Jane van Ryan, “\$4 Gasoline,” American Petroleum Institute (June 24, 2009), <https://www.api.org/news-policy-and-issues/blog/2009/06/24/4-gasoline>

⁷¹ API: BLM Methane Could Suppress American Energy Renaissance, Harm Consumers, American Petroleum Institute (May 10, 2017), <https://www.api.org/news-policy-and-issues/news/2017/05/10/blm-methane-rule-could-suppress-american>

the Green New Deal,⁷² and policies to incentivize electric vehicles.⁷³

In sum, the Chamber, NAM and API have never supported a single piece of comprehensive legislation to remedy carbon emissions and provide a safe planetary climate. To the contrary, they have a long history of opposing all major climate efforts, as well as regulatory sector-by-sector approaches. This Court should assess their non-justiciability arguments accordingly.⁷⁴ In doing so, it would be helpful to know who is actually behind the briefs filed by these *amici*.

⁷² Sam Winstel, “What’s At Stake For Real Americans With These ‘Green New Deals?’” American Petroleum Institute (Aug. 13, 2019), <https://www.api.org/news-policy-and-issues/blog/2019/08/13/whats-at-stake-for-real-americans-with-these-green-new-deals>

⁷³ *Id.*

⁷⁴ Many blue chip companies have cut ties with the Chamber after doing a similar assessment. Over the last 10 years, Apple, Costco, eBay, General Mills, Goldman Sachs, HP, Kellogg, Kraft Heinz, Mars, Mattel, McDonalds, Mondelez, Nestlé, Pacific Gas & Electric, PNM Resources, Starbucks, Unilever, and Walgreens Boots Alliance are all known to have quit the Chamber at least in part over its climate obstructionism and denial. *See, e.g.*, Dominic Rushe, “Disney, the Gap and Pepsi urged to quit the US Chamber of Commerce,” *The Guardian* (April 24, 2017), <https://www.theguardian.com/business/2017/apr/24/disney-the-gap-and-pepsi-urged-to-quit-us-chamber-of-commerce>. Together, these companies have a market capitalization of more than \$3 trillion. This begs the question: why the Chamber would be willing to lose such members at the cost of clinging to climate denial and obstruction.

III. COURTS ARE WELL-EQUIPPED TO ADJUDICATE RESPONDENT'S CLAIMS

The fossil fuel-connected *amici*'s legal strategy here is an element of their political one. They seek to prevent judicial action to reduce carbon pollution, because it would reduce demand for their donors' products and intrude on their donors' business model of offloading the negative externality of carbon pollution to the general public. Their immediate hurdle is convincing this Court that the district court's entire remand order should be reviewable on appeal, but their briefs make clear what their ultimate argument will be: "[G]overnmental policies that will have a meaningful impact on global climate change should come from the national government, and in particular from Congress and the Executive Branch. But *ad hoc* and unpredictable decisions of individual state courts, seeking to govern the worldwide conduct of a handful of individual defendants, are not a sensible way to address this problem."⁷⁵

Actually, cases such as this one fall squarely within the competency of the judicial branch. They present factual and local damage claims that courts are expert at resolving. They present questions of harm and liability that courts are expert at resolving. They present the likelihood of the type of ex-

⁷⁵ Chamber brief at 3-4.

pert testimony and analysis that *Daubert*⁷⁶ and other cases confirm that courts are well equipped to evaluate. They require the winnowing of fact from fiction and fraud, where courts have both expertise and the ability to impose consequences for fiction and fraud. Court-required discovery helps winnow fact from industry-funded, poll-tested fictions that are shopped to the public and in legislative and executive arenas. Finally, courts and juries have a storied equalizing role: they are established to provide a forum where even politically mighty interests must stand equal before the law with those they have harmed.⁷⁷ Politically mighty organizations prefer more favorable fields, where their political might more readily settles the question. The role of courts in addressing big national concerns, from the canker of racial segregation to the plague of tobacco-related illness and death, has been salutary and beneficial. “Too big to adjudicate” is not a

⁷⁶ *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993)

⁷⁷ Unique in the constitutional constellation, the jury is designed not just to protect the individual against government, but also to protect the individual against other “more powerful and wealthy citizens.” 3 William Blackstone, *Commentaries* *381. Juries are not obliged to respect political power or proprieties, just to do justice in the case before them. 1 Alexis De Tocqueville, *Democracy in America* 314 (Arthur Goldhammer trans., Penguin Putnam Inc. 2004) (1838) (“The jury system as it is understood in America seems to me a consequence of the dogma of popular sovereignty just as direct and just as extreme as universal suffrage. Both are equally powerful means of ensuring that the majority reigns.”).

constitutional doctrine, however much it may suit the interests of the fossil fuel industry.

History reveals a long battle between powerful influencers who want to bring government to their heel, at whatever the cost to the public, and a public that needs its interests protected against the political might of those big influencers.⁷⁸ Courts have an important role in this contest as the branch of government built to be less responsive to political might. It should come as no surprise that the mightiest of political influencers would like to steer questions to the arenas where their political

⁷⁸ See, e.g., Theodore Roosevelt, *New Nationalism Speech* (1910) (“[T]he United States must effectively control the mighty commercial forces[.] . . . The absence of effective State, and especially, national, restraint upon unfair money-getting has tended to create a small class of enormously wealthy and economically powerful men, whose chief object is to hold and increase their power.”); David Hume, *PHILOSOPHICAL WORKS OF DAVID HUME* 290 (1854) (“[W]here the riches are in a few hands, these must enjoy all the power and will readily conspire to lay the whole burden on the poor, and oppress them still further, to the discouragement of all industry.”); Andrew Jackson, 1832 Veto Message Regarding the Bank of the United States (July 10, 1832) (transcript available in the Yale Law School library) (“It is to be regretted that the rich and powerful too often bend the acts of government to their selfish purpose . . . to make the richer and the potent more powerful, the humble members of society . . . have neither the time nor the means of securing like favors to themselves, have a right to complain of the injustice of their Government.”); Niccolo Machiavelli, *THE PRINCE* IX (1532) (“[O]ne cannot by fair dealing, and without injury to others, satisfy the nobles, but you can satisfy the people, for their object is more righteous than that of the nobles, the latter wishing to oppress, whilst the former only desire not to be oppressed.”).

might holds greatest sway. But that's not how the Founders set our government up. In fact, courts (juries, specifically) are purpose-built as a check on the "more powerful and wealthy" elements of society. The politically mighty have enough advantages without the Court conferring upon them the added benefit of "too big to adjudicate."

CONCLUSION

There may come a time in this litigation when this Court is faced squarely with questions of justiciability. At that time, *amici* Senators expect to provide more extensive context for assessing whether or not legal claims made by petitioners or their supporting *amici* are consistent with actions they take before the other branches of government. For present purposes, and for the foregoing reasons, *amici* Senators respectfully suggest that any legal arguments or factual assertions Petitioners' *amici* make be treated with the scrutiny deserving of assertions made by parties whose credibility is compromised by both their deep and inadequately-disclosed ties to the fossil fuel industry and their long history of ardent opposition to the legislative and regulatory measures to limit carbon pollution that they here claim to support.

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

GERSON H. SMOGER
Counsel of Record
SMOGER & ASSOCIATES
13250 Branch View Lane
Dallas, TX 75234
(510) 531-4529
gerson@texasinjurylaw.com

Counsel for Amici Curiae

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