

No. 19-1818

IN THE

United States Court of Appeals
FOR THE FIRST CIRCUIT

STATE OF RHODE ISLAND,
Plaintiff-Appellee,

v.

SHELL OIL PRODUCTS COMPANY, LLC; CHEVRON CORP.; CHEVRON USA, INC.;
EXXON MOBILE CORP.; BP, PLC; BP AMERICA, INC.; BP PRODUCTS NORTH
AMERICA, INC.; ROYAL DUTCH SHELL PLC; MOTIVA ENTERPRISES, LLC;
CITGO PETROLEUM CORP.; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY;
PHILLIPS 66; MARATHON OIL COMPANY; MARATHON OIL CORPORATION;
MARATHON PETROLEUM CORP.; MARATHON PETROLEUM COMPANY, LP;
SPEEDWAY, LLC; HESS CORP.; LUKOIL PAN AMERICAS LLC; AND DOES 1-100
Defendants-Appellants,

GETTY PETROLEUM MARKETING, INC.,
Defendant.

*Appeal from the United States District Court
for the District of Rhode Island, No. 1:18-cv-00395-WES-LDA
(The Honorable William E. Smith)*

**BRIEF OF AMICI CURIAE SENATORS SHELDON WHITEHOUSE,
JACK REED, AND EDWARD MARKEY
IN SUPPORT OF APPELLEES AND AFFIRMANCE**

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AMICUS CURIAE'S IDENTITY, INTEREST AND AUTHORITY TO FILE

United States Senator Sheldon Whitehouse represents the State of Rhode Island. First elected to the Senate in 2006, Senator Whitehouse has been active in seeking comprehensive solutions to address climate change. He is a member of the Senate's Environment and Public Works Committee and author of the American Opportunity Carbon Fee Act, which would establish a fee on carbon emissions and return all revenue generated to the American people.

Senator Whitehouse has closely observed the influence of corporate lobbying and election spending in Congress, as well as 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 is the author of *Captured: The Corporate Infiltration of American Democracy*. He has participated as amicus curiae in other cases concerning climate change, including cases that raise similar issues to this one. See *City of Oakland v. BP P.L.C.*, No. 18-16663 (9th Cir., docketed Sept. 4, 2018), *Cty. of San Mateo v. Chevron Corp.*, No. 18-15499 (9th Cir., docketed Mar. 27, 2018); and *Mayor and City Council of Baltimore v. BP P.L.C.*, No. 18-cv-02357 (4th Cir. Docketed Sept. 4, 2019).

United States Senator Jack Reed has represented the State of Rhode Island in the Senate since 1997. His home state of Rhode Island is one of the fastest warming states in the country and among the most vulnerable to the impacts of climate change, especially sea level rise. He is the Ranking Member of the Senate Armed Services Committee and the Ranking Member of the Transportation, and Housing and Urban Development, and Related Agencies Senate Appropriations Subcommittee. He is a senior member of the Senate Banking Committee. He is the co-chair of the Renewable Energy and Energy Efficiency Caucus and a member of the Climate Action Taskforce. He has long advocated the need to address climate change with a particular focus on its national security implications.

United States Senator Edward J. Markey represents the Commonwealth of Massachusetts in the United States Senate. He is a member of the Environment and Public Works, the Commerce, Science, and Transportation, and the Foreign Relations committees. 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. He has participated as *amicus curiae* in other cases concerning climate change, including *City of Oakland v. BP P.L.C.*, No. 18-16663 (9th Cir., docketed Sept. 4, 2018) and *Mayor and City Council of Baltimore v. BP P.L.C.*, No. 18-cv-02357 (4th Cir. Docketed Sept. 4, 2019).

The Senators file this brief to underscore the need to address these issues in court, as well as in the other branches of government; particularly when *amici curiae* for Appellants opposed addressing those issues in the courts, while outside this arena, working to stop other branches from moving forward on ways to inhibit climate change.¹

INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus Curiae Chamber of Commerce of the United States [hereinafter, “the Chamber”] asks this Court to reverse the District Court’s order remanding this matter to state court because it asserts that climate change is uniquely a federal issue, denying any role that can be taken by the States or their courts. The erroneous nature of the Chamber’s (and the Defendants’) exclusivity argument becomes more acute when examined in the context of these same parties’ decades-long efforts to stifle action by both Congress and the executive branch, to pervert climate science and the public’s understanding of climate science, and to undermine the United States’ role in international negotiations.

¹ All parties have consented to the filing of this brief. No party’s counsel authored the brief in whole or in part, no party or party’s counsel contributed money that was intended to fund preparing of submitting the brief, and no person other than the senators or their counsel contributed money that was intended to fund preparing or submitting the brief.

Climate change's looming effects are felt in different ways in different localities, giving each a distinct interest in the issue.² The urgent nature of the crisis and the need to utilize every available tool to address it makes clear that there is no overriding federal common law or federal statutory law that prevents states from imposing liability and state courts from adjudicating liability issues, particularly for the very real injuries that Defendants have proximately caused.

For the reasons set forth below, any legal arguments or factual assertions the Chamber has made about the merits, justiciability, or the proper role of the federal courts vis-à-vis other courts or other branches of government should respectfully be treated with the scrutiny deserving of assertions made by a self-interested party with a long history belying the good faith of its arguments.

ARGUMENT

Senators Whitehouse, Reed, and Markey file this brief to provide context for arguments made by amicus curiae United States Chamber of Commerce (hereafter "the Chamber")³ in support of appellants' request that

² Rhode Island, and, by extension, the Rhode Island state government, is particularly exposed to climate change. Rhode Island is expected to experience several feet of sea level rise by the end of the century. The state has developed a website known as STORMTOOLS that allows users to visualize the parts of the state that will be underwater according to various sea level rise scenarios. *See*, STORMTOOLS, Rhode Island Shoreline Change Special Area Management Plan, *available at* <http://www.beachsamp.org/stormtools/>. Due to the state's low-lying topography and highly indented coastline, even moderate amounts of sea level rise will flood some communities and isolate others, as peninsulas are transformed into islands. Sea level rise is already found to be affecting property values in Rhode Island. The research group First Street has found that increased coastal flooding caused by rising seas and more frequent extreme weather events has already reduced the value of Rhode Island homes by more than \$44 million. *See* Rhode Island, First Street Foundation, *available at* <https://assets.firststreet.org/uploads/2019/08/Rhode-Island-revised.pdf>. In addition to rising seas, Rhode Island is also warming more quickly than anywhere else in the lower 48 states -- an average of two degrees Celsius. *See*, Steven Mufson, et al., "2 Degrees C: Beyond the Limit," *The Washington Post* (Aug. 13, 2019), <https://www.washingtonpost.com/graphics/2019/national/climate-environment/climate-change-america/>. Similarly, Rhode Island has seen the nation's largest increase in extreme precipitation events since the 1950s, with deluges increasing by 76 percent. *See*, Climate Change and Your Health, Rhode Island Department of Public Health, *available at* <http://health.ri.gov/publications/guides/ClimateChangeAndYourHealth.pdf>.

³ This case highlights the fecklessness of the Court's disclosure rules in identifying who the real party in interest is behind an amicus brief. The Chamber manufactures no product and provides no general service. It exists as an intermediary between business interests and the public and political worlds. It is not at all transparent as to the sources of its funding. If the Chamber provides any service other than lobbying and electioneering, it is to mask the identity of real parties in interest or effected industries behind

this Court review and reverse the lower court's order remanding this case to state court. The Chamber's essential argument is that climate change is a federal issue and this Court should deny any role to the states or state courts. It suggests that federal uniformity is a value above all others on this issue. It argues for deference to Congress and what it describes as "federal common law," which to the extent it exists in our court system is largely based upon state common law (and thus provides no proper basis for removal). *See, Phoenix Mut. Life Ins. Co. v. Adams*, 30 F.3d 554, 564 (4th Cir. 1994) ("We have recognized that federal courts may draw on state common law in shaping the applicable body of federal common law.").

The reality is that the rare instances where a developed federal common law exists and differs from that of the states so as to displace state law are "few and restricted." *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963). Without specific congressional authorization, "federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating conflicting rights of States or our relations with foreign nations, and admiralty cases." *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (footnotes omitted). Here, Federal common law does not apply.

I. The Chamber's Record Demonstrates Little Regard for Congressional Action on Climate Change

The Chamber's brief attempts to convince this Court of its sincere concerns about climate change in order to suggest that it has credible concerns on the narrow jurisdictional issue before this Court. However,

the relative anonymity of the Chamber's name. On the issue of climate, its funding is particularly mysterious, as many companies on its board disagree with and deny accountability for the climate denial and opposition the Chamber has long espoused. *See, Whitehouse & 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*. As astronomers divine the presence of dark bodies from their effect on the behavior of visible bodies, one can divine some unseen force driving the Chamber to a position on climate issues no member corporation will publicly espouse. The secrecy of the Chamber's funding obscures the exact explanation of this aberration. Arguably, it is likely that the Chamber is sustained and controlled by fossil fuel industry funding. There is no reason that the Court, the other parties, and the country should be denied the identity of every real party in interest behind its brief.

before the U.S. Congress, the Chamber vigorously opposes any effective congressional effort. It should not be permitted to have it both ways, as the end result would be that no one has authority to address the climate catastrophe we are barreling towards.

In its brief, the Chamber cites a web page on climate change that it recently added⁴ to its website. It writes that it “believes that the global climate is changing, and that human activities contribute to those changes,” and also that “global climate change poses a serious long-term challenge that deserves serious solutions.”⁵ Br. at 1. It then makes the following claim:

Governmental policies aimed at achieving these goals should come from the federal government, and in particular Congress and the Executive Branch, not through the courts, much less a patchwork of actions under state common law.

Id. at 2.

Perhaps anticipating that Senator Whitehouse would file an *amicus* brief in this case as he has done in other climate-related cases, the Chamber also cites its support of a recent bill⁶ he authored to provide federal support

⁴ Amy Harder, “America’s business lobby shifting on climate change,” *Axios* (April 18, 2019), <https://www.axios.com/chamber-commerce-shifting-climate-change-6a18f7c6-88ef-446e-99a5-1ed1fd627cbe.html>

⁵ Despite this, in its brief the Chamber uses the language of climate denial. Like a losing army falling back to successive interior trenches, the climate denial apparatus the fossil fuel industry funds has steadily retreated into newly conceived rhetorical positions as its advocated positions have become untenable. It began at climate denial is a hoax, and climate scientists are dishonest. Then, as factual evidence piled up, it moved to ‘the science is uncertain,’ or ‘too uncertain to justify the massive economic costs of responding.’ As both of those propositions were exposed as false, the latest fallback position has become ‘yes, the climate is changing’ and ‘yes, humans have something to do with it’ (note the evasive use of the passive voice rather than ‘humans are changing it’ and the elusive “something” rather than that there is no credible alternative explanation besides human carbon emissions being essentially the sole cause), and ‘maybe we should do something about it some time, but “innovation” will probably get us out of it’ (as they busily protect out-dated technology and stifle innovation). The common true north of all these propositions has been that Congress need not act, and fossil fuel polluters get to continue to pollute without repercussions. This is no small thing for them: the International Monetary Fund has identified the subsidy in the United States favoring the fossil fuel industry at \$650 billion in 2015 alone. That is, billion with a “b.” See, David Cody, *et al.*, Global Fossil Fuel Subsidies Remain Large: An Update Based on Country-Level Estimates, International Monetary Fund, *available at* <https://www.imf.org/en/Publications/WP/Issues/2019/05/02/Global-Fossil-Fuel-Subsidies-Remain-Large-An-Update-Based-on-Country-Level-Estimates-46509>

⁶ See, S.2300, Clean Industrial Technology Act of 2019, *available at* <https://www.govtrack.us/congress/bills/116/s2300/text>

for research, development, and deployment of new technologies to reduce carbon emissions from the industrial sector. *Id.*

However, none of this bears any resemblance to the Chamber's actual position on climate change. The Chamber has a long record of opposition to "governmental policies" and "serious solutions" for climate change, whether those policies come from Congress or the executive branch. As United States Senators with collectively four decades of experience in the Senate, the authors of this brief have had a front row seat from which to observe the Chamber's remorseless efforts to thwart positive climate action in Washington.

This is easily demonstrated by the Chamber's effort to block federal legislation. In 2007, the Chamber opposed bipartisan cap and trade legislation.⁷ In 2009, the Chamber was one of the leading interest groups lobbying against the Waxman-Markey cap and trade legislation.⁸ 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 so-called "Green New Deal," despite the fact that it is only an aspirational statement of policy goals that would not even have had the force of law had it passed.⁹ In conversations with Senators and their staffs, the Chamber has repeatedly expressed its opposition to existing carbon fee legislation¹⁰ and indeed any and every form of carbon fee or carbon pricing.

In sum, the Chamber remains adamantly opposed to the only three "serious solutions" proposed in Congress that would have any chance of holding global average temperature increase to less than 1.5 degrees Celsius:

⁷ See, e.g., "Wake Up to Climate Change Legislation" attack ad, U.S. Chamber of Commerce (Nov. 9, 2007), available at <https://www.youtube.com/watch?v=XevRKc82soI>.

⁸ 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), available at <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.

⁹ 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>

¹⁰ See, S.1128, The American Opportunity Carbon Fee Act of 2019, available at <https://www.govtrack.us/congress/bills/116/s1128/text>

a cap and trade system; a massive investment program in low carbon technologies; and a carbon fee. Indeed, 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."¹¹ The Chamber's support for one minor bill, though welcomed by the bill's sponsor amicus Senator Whitehouse, is far from support for a legislative effort that will have any truly measurable effect on the problem. It is clear then that the Chamber's representations in its brief are belied by its long-term behavior.

II. The Chamber's Record Demonstrates Little Regard for Executive Action on Climate Change

The Chamber has worked assiduously to defeat regulatory actions by the executive branch to limit carbon pollution. In 2010, the Chamber sued the Environmental Protection Agency (EPA) to overturn its finding that greenhouse gas emissions endanger public health and welfare.¹² Beginning in 2014, the Chamber convened fossil fuel industry lobbyists, lawyers, and political strategists to plot legal strategies for opposing future regulatory actions to limit carbon pollution.¹³ In 2015, the Chamber led a coalition of trade associations suing to block EPA's proposed Clean Power Plan to reduce carbon emissions in the electric power sector.¹⁴

With the 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,¹⁵ which President Trump cited as part of his

¹¹ 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/>

¹² *Chamber of Commerce v. EPA*, Petition for Review (Feb. 12, 2010), Case No. 10-1030 (D.C. Cir.), available at

<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>

¹³ Coral Davenport and Julie Hirschfeld Davis, "Move to Fight Obama's Climate Plan Started Early," *The New York Times* (Aug. 3, 2015), <https://www.nytimes.com/2015/08/04/us/obama-unveils-plan-to-sharply-limit-greenhouse-gas-emissions.html>

¹⁴ *Chamber of Commerce v. EPA*, Petition for Review (Oct. 23, 2015), Case No. 15-1382 (D.C. Cir.), available at

<https://www.chamberlitigation.com/sites/default/files/U.S.%20Chamber%2C%20et%20al.%20v.%20EPA%20%28ESPS%29%20-%20Petition%20for%20Review.pdf>

¹⁵ Impacts of Greenhouse Gas Regulations on the Industrial Sector, NERA Economic Consulting (March 2017), available at

<http://www.globalenergyinstitute.org/sites/default/files/NERA%20Final%20Report%202.pdf>

justification for withdrawing from the agreement.¹⁶ Notably, the Chamber-funded study was thoroughly debunked by independent climate experts.¹⁷ Also in 2017, the Chamber spearheaded a lobbying campaign in support of a Congressional Review Act resolution to repeal a Department of Interior rule limiting methane emissions from oil and gas facilities on public lands.¹⁸ The Chamber has also been a major supporter of the Trump administration's efforts to repeal and/or water down rules limiting carbon pollution. Most recently, the Chamber intervened in a lawsuit in order to support the administration's proposal to repeal the Clean Power Plan and replace it with a rule that would do little to reduce carbon pollution from the power sector.¹⁹ The Chamber's lobbying blitz has been so prolific during the Trump administration that a recent analysis found that it was one of the two most influential groups pushing for these rollbacks.²⁰ As a result, the Chamber's anti-climate deregulatory agenda is predicted to result in an additional 200 million tons of carbon pollution by 2025, putting the U.S. on a catastrophic pathway consistent with more than four degrees Celsius of warming by 2100.²¹

III. The Chamber Uses its Political Clout to Oppose Action on Climate Change

The Chamber also wields its influence through electoral politics. Since the 2010 *Citizens United* decision permitting outside groups to spend unlimited sums on electioneering activities, the Chamber has directly spent

¹⁶ 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

¹⁷ See, e.g., Kevin Steinberger and Amanda Levin, "Chamber Inflates Costs, Ignores Benefits of Climate Action," Natural Resources Defense Council (March 22, 2017), *available at* <https://www.nrdc.org/experts/kevin-steinberger/chamber-inflates-costs-ignores-benefits-climate-action>.

¹⁸ See, e.g. Key Vote Alert, U.S. Chamber of Commerce (May 9, 2017), *available at* [https://www.uschamber.com/sites/default/files/5.9.17-](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)

[key_vote_letter_to_senate_supporting_h.j._res._36_cra_resolution_repealing_blm_methane_rule.pdf](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).

¹⁹ 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>

²⁰ Trade Groups and their Carbon Footprints, InfluenceMap (Sept. 2019), *available at* <https://influencemap.org/report/Trade-Groups-and-their-Carbon-Footprints-f48157cf8df3526078541070f067f6e6>

²¹ *Id.*

approximately \$150 million²² on congressional races, which is more than any other trade association.²³ The Chamber funds attack ads that target candidates for their willingness to support policies to limit carbon pollution.²⁴ Almost no candidate benefiting from the Chamber's outside spending has supported any meaningful climate legislation.

The political power of the Chamber is not only measured by what the Chamber actually spends in each electoral cycle, but also by what it threatens to spend. The ability to spend unlimited money in politics necessarily imparts the ability to threaten to spend unlimited amounts. Such threats provide several advantages to the influencer: they are effective; they can be kept secret; and they don't always actually have to spend the money. At the beginning of almost every election cycle, the Chamber threatens to spend far more than it actually spends, a warning to any moderate Republican who might challenge their climate denial and obstruction.²⁵ It is no coincidence that bipartisan activity on climate change came to an end in Congress immediately after the *Citizens United* decision unleashed these powers.

The Chamber's actions are not those of an organization in search of "serious solutions." Br. at 1. They reflect a decades-long campaign of disinformation, obstruction, and political intimidation designed to prevent democratically accountable branches of government from adopting any

²² 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>

²³ 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.

²⁴ 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-highe/>

²⁵ 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

policies that would reduce carbon pollution.²⁶ This Court should assess the Chamber's arguments accordingly.²⁷

IV. Courts, Including State Courts, Are Well-Positioned to Address the Issues in this Case

The Chamber's legal strategy here is an extension of its political one. While its primary focus is on convincing this Court that the issues raised by the plaintiff-appellee should be addressed in federal court, the Chamber's brief hints at the inevitable argument to come: "Governmental policies aimed at achieving these goals should come from the federal government, and in particular Congress and the Executive Branch, not through the courts, much less a patchwork of actions under state common law." Br. at 2.

However, cases such as this one fall squarely within the competency of the judicial branch. They present factual claims that courts are expert at resolving. They present questions of harm and liability that courts are expert at resolving. 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 shopped in legislative arenas. Finally,

²⁶ The predicament of the climate denial position (now well documented as false in peer-reviewed academic research) is best illustrated by the major oil companies whose CEOs now publicly purport to acknowledge the reality and severity of their product's harmful effects on our planet, and claim to support a market-based carbon price (some even provide slight — by industry standards — support to a 501(c)(4) organization supporting a carbon price). Yet privately, the industry's entire extant (and formidable) political and electioneering apparatus (including, we believe, the Chamber, though the Chamber's non-transparency obscures a true answer) remains in practice remorselessly opposed to any meaningful legislative solution, including a price on carbon. Beyond the Chamber, these groups include the National Association of Manufacturers, the American Petroleum Institute, Americans for Prosperity, and an armada of others that collectively dominate political spending in America. *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, available at <https://link.springer.com/article/10.1007%2Fs10584-018-2241-z>

²⁷ 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 \$2.2 trillion. This begs the question: why would the Chamber be willing to lose such members as a cost of clinging to climate denial and obstruction?

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.²⁸ Politically mighty organizations prefer more favorable fields, where their political might settles the question. The Chamber would clearly love to neuter the judicial branch of government on these questions to the benefit of its fossil fuel donors.

History reveals a long battle between powerful influencers who want to bring government to their heel, at whatever cost to the public, and a public that needs its own interests protected but has not arrayed the political power of the big influencers.²⁹ As the branch of government least responsive to political might, Courts have an important role in this contest. It should come as no surprise that the mightiest of political influencers, the fossil fuel industry, would like to steer all questions of importance to them into the arenas where their political might holds greatest sway. But that's not how the Founders set our government up. There is no doctrine of "too big to adjudicate" or "too important to the politically mighty to adjudicate." The politically mighty have enough advantages without the Court conferring such a benefit upon them.

²⁸ 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, rather, they are obliged 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.").

²⁹ See, e.g., Theodore Roosevelt, *New Nationalism Speech* (1910) ("[T]he United States must effectively control the mighty commercial forces[.] . . . The absence of an 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) ("Where 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 farther, 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 the Government."); Niccolò 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.").

CONCLUSION

For the foregoing reasons, this Court should carefully scrutinize the arguments made before it that urge reversal and instead affirm the District Court's order of remand.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(g), I certify that:

This brief complies with Rule 29(a)(5)'s type-volume limitation because it contains 4602 words (as determined by the Microsoft Word 365 word-processing system used to prepare the brief), excluding the parts the brief exempted by Rule 32(f).

This brief complies with Rule 32(a)(5)'s typeface requirements and Rule 32 (a)(6)'s type-style requirements because it has been prepared in a proportionately spaced typeface using Microsoft Word 365 in 14-point Times Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on December 26, 2019 I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

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