

No. 19-1818

**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.; EXXONMOBIL 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; DOES
1-100,

Defendants-Appellants,

and

GETTY PETROLEUM MARKETING, INC.,

Defendant.

On appeal from the
U.S District Court for the District of Rhode Island
Nos. 1:18-cv-00395-WES-LDA (The Honorable Edgar Smith)

**MOTION FOR LEAVE TO FILE AMICUS BRIEF
ON BEHALF OF ENERGY POLICY ADVOCATES
IN SUPPORT OF DEFENDANTS-APPELLANTS**

Matthew D. Hardin
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Proposed *Amicus Curiae* Energy Policy Advocates, having obtained information highly relevant to this proceeding through public record requests, hereby moves for leave to file an amicus brief in support of the Defendants-Appellants in this matter. In support of this Motion, and pursuant to Rule 29 (a)(3) of the Federal Rules of Appellate Procedure, Energy Policy Advocates states as follows:

1. The proposed *Amicus Curiae* is a nonprofit corporation organized in Washington State and conducts research on how government entities formulate public policy, with a focus on energy and environmental policies. To this end, Energy Policy Advocates files public records requests under state and federal laws, several of which have uncovered documents which are relevant to this Court's consideration of the merits.
2. Energy Policy Advocates wishes to support the Defendants-Appellants in this matter. Its proposed brief will illuminate key facts from public records about the underlying suit, including Plaintiffs' assertions of damages and how these relate to the issue of bias that exists in state courts, as well as representations about same by Plaintiff's counsel's team, all of which are instructive about the

need for this Court to adjudicate the important federal concerns raised in this proceeding.

3. Energy Policy Advocates' brief will amplify, with its unique perspective and the records it has obtained, the concerns raised by another amicus, the U.S.

Chamber of Commerce. The Chamber of Commerce brief, Document:

00117521564 at p. 31, discusses the "historic concern about state court bias" in

the context of federal officer removal. However, the Chamber of Commerce

could not demonstrate particular facts about such bias in its own brief,

especially as it relates to the instant matter, because it is not familiar with the

public records that Energy Policy Advocates has obtained.

4. Energy Policy Advocates' brief also will provide the records it has obtained which confront allegations made by other *Amici*, Senators Markey, Reed and

Whitehouse. The Markey *et al.*, brief, Document: 00117531608, at p. 11,

alleges that a certain party is using the courts, specifically this Court in this

action, in service of financial or economic interests.¹ However, the *Amici*

Senators' allegations demand documentation, and proposed amicus Energy

Policy Advocates has obtained such documentation, allowing this Court to

¹ "The Chamber would clearly love to neuter the judicial branch of government on these questions to the benefit of its fossil fuel donors."

move beyond aspersion to independent, contemporaneous records, each of which corroborates the other. These two sets of notes, public records created at a private gathering, record a party to the matter asserting that its filing was indeed driven by political exigency and financial desires. It is not, however, the party the *Amici* Senators allege.

5. Pursuant to Rule 29 (a)(3) the proposed amicus brief is attached to this Motion as Exhibit 1. It is fully compliant with the requirements of Rule 29(a)(4)(A).
6. Pursuant to Rule 29 (a)(6), the usual time for filing of the proposed amicus brief has elapsed. However, pursuant to that same rule “A court may grant leave for later filing, specifying the time within which an opposing party may answer.” Proposed *Amicus Curiae* Energy Policy Advocates respectfully submits that this Court should accept the brief even at the present time for the following reasons:

a) Numerous letters of supplemental authority have been submitted to this Court, as recently as the day before this filing, and no oral argument has yet been scheduled. Thus, the case is not fully submitted and the legal arguments of the parties are still developing.

b) Only on March 9, 2020 did the City of Honolulu file similar litigation

in the state courts of Honolulu, Hawaii, which litigation is similar in many respects to the litigation pending before this Court. Like Baltimore, the City of Honolulu is even represented by the same counsel that represents Rhode Island in this Court. See *City and County of Honolulu v. Sunoco LP et al.*, First Circuit, State of Hawaii, Case No. 1CCV-20-0000380.² The new state court filings in Hawaii illustrate a new wave of state court litigation that is likely to ensue if the State of Rhode Island's arguments by the same counsel succeed in this Court. That firm's representatives and consultants have made numerous representations, including in public-record emails obtained by Proposed *Amicus Curiae* Energy Policy Advocates, about the issue of state court bias. Proposed *Amicus Curiae* Energy Policy Advocates, which also has engaged in research using public records in the State of Hawaii, is therefore uniquely qualified to address the impact of the new Hawaii litigation on the issues before this Court.

c) To date, 51 *Amicus Curia* appear on this Court's docket, although some *amici* have filed joint briefs. Only two of those amicus briefs, filed by the U.S. Chamber of Commerce and Sens. Markey, Reed and Whitehouse, even touch upon the issues that Energy Policy Advocates seeks to raise, and both in

² For ease of reference, Energy Policy Advocates has included a copy of the Hawaii civil complaint as Exhibit 2.

ways requiring the information that Proposed *Amicus Curiae* Energy Policy Advocates has obtained. The belated filing of the proposed brief by Energy Policy Advocates will serve the interests of justice by allowing the Court to fully inform itself of important issues not heretofore substantively addressed by any of the other *amici*. Energy Policy Advocates respectfully submits that this is exactly the sort of occasion on which a court should permit belated filing under Rule 29 (6).

Wherefore, Energy Policy Advocates respectfully requests that this Court grant it leave to file the proposed Amicus Brief, and that it waive strict compliance with the time requirements pursuant to Rule 29 (6).

Dated: March 10, 2020

Respectfully submitted,

/s/ Matthew D. Hardin

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CERTIFICATE OF SERVICE

I, Matthew D. Hardin, hereby certify that on March 10, 2020, the foregoing document was filed and served through the CM/ECF system.

Respectfully submitted,

/s/ Matthew D. Hardin

Matthew D. Hardin