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STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

STATE OF RHODE ISLAND

Plaintiff,

vs.

Case No.: PC-2018-4716

CHEVRON CORP.;
CHEVRON U.S.A. INC.;
EXXONMOBIL CORP.;
BP P.L.C.;
BP AMERICA, INC.;
BP PRODUCTS NORTH AMERICA, INC.;
ROYAL DUTCH SHELL PLC;
MOTIVA ENTERPRISES, LLC;
SHELL OIL PRODUCTS COMPANY 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;
GETTY PETROLEUM MARKETING, INC.; AND
DOES 1 through 100, inclusive,

Defendants.

PLAINTIFF STATE OF RHODE ISLAND'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO CLARIFY AND STRIKE

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I. INTRODUCTION

On April 28, 2023, the Court authorized jurisdictional discovery on three, clearly defined topics:

1. "Defendants' fossil-fuel business activity in Rhode Island during the times set forth in Plaintiff's Complaint;"

2. "Defendants' marketing and promotion of fossil-fuel products to Rhode Island consumers during the same time period;" and

3. "Defendants' historical knowledge of climate change impacts in the State of Rhode Island during that time period."

Decision at 10. Now, in a poorly disguised motion for reconsideration, Defendants seek to rewrite that Decision in ways that would prematurely and improperly deprive the Court of the evidence that it needs to adjudicate Defendants' motion to dismiss for lack of personal jurisdiction.

Defendants begin by redlining Topic 2. Even though the Decision encompasses "marketing and promotion of fossil-fuel products to Rhode Island consumers," *id.*, Defendants ask the Court to exclude all marketing and promotion that reached Rhode Island consumers through out-of-state media outlets, such as the *New York Times* and the *Wall Street Journal*. It is well settled, however, that regional, national, and even international promotional campaigns are jurisdictionally relevant when they are reasonably calculated to reach consumers in the forum state. And it is beyond dispute that Defendants promoted their products in out-of-state media outlets that had wide circulation and viewership in Rhode Island. Far, then, from "clarifying" Topic 2, Defendants' line editing would significantly narrow the scope of authorized discovery and potentially exclude wide swaths of evidence central to the jurisdictional inquiry.

So, too, Defendants' proposed rewrite of Topic 3. Defendants evidently would cabin that topic to documents and other evidence that specifically and explicitly reference climate change impacts in Rhode Island. If that rewrite were adopted, however, it could severely limit the State's

ability to discover "Defendants historical knowledge of climate change impacts in the State of Rhode Island." Decision at 10. A factfinder could easily conclude that Defendants knew or should have known of the climate change impacts in Rhode Island based on documents and other evidence showing that Defendants knew that climate change impacts would occur in similarly situated locations, such as the Northeastern United States, the Eastern Seaboard, and low-lying coastal communities (among others).

Unable to find a basis in the Decision or the law for narrowing the scope of jurisdictional discovery, Defendants insist that the Decision must be modified to prevent the State from serving overly broad and burdensome discovery. But Defendants' concerns are premature and wholly speculative, given that the State has not yet served any discovery requests. And Defendants seriously misrepresent the State's position as presented to them during the May 15 meet-and-confer. The Court should not rewrite its Decision to exclude jurisdictionally relevant evidence based on Defendants' hypothetical objections to the breadth and burdens of unserved discovery requests.

Finally, the Court should disregard Defendants' groundless accusations of judicial bias. It is common and proper for courts to use extra-record materials to provide background context to a lawsuit. And that is precisely what the Court did when it situated the State's litigation within a broader conversation occurring at the United Nations Climate Change Conference. In accurately describing that Conference, the Court did not make any findings of adjudicative fact (nor are any such findings called for by Plaintiff's motion for leave to conduct jurisdictional discovery); at most, the Court properly took notice of legislative facts that are not subject to the rules of evidence because they do not concern the facts or parties involved in this particular case. Nor did the Court prejudge—in any way—the merits of the State's lawsuit. Instead, the Court made the simple,

obvious, and uncontestable observation that both the State and several small nations blame oil companies for certain climate-related injuries. Nothing in the Decision suggests that the Court has prejudged any aspect of this case. There is no need for this Court to delete the Decision's brief discussion of the Conference.

Instead, the Court should deny Defendants' self-styled "motion to clarify and strike," and enter the State's proposed order. It is time to let the discovery process take its ordinary course.

II. BACKGROUND

The State filed this lawsuit five years ago, seeking to hold Defendants liable for concealing and mispresenting the climate change impacts of their fossil-fuel products. *See* Compl. ¶¶ 1–12. After Defendants improperly removed the case to federal court, the State filed a motion to remand, which was granted and affirmed on appeal. *Rhode Island v. Shell Oil Prods. Co.*, 35 F.4th 44, 49–51 (1st Cir. 2022), *cert. denied*, 143 S. Ct. 1796 (2023). Back in this Court, Defendants moved to dismiss the case for lack of personal jurisdiction, and in response, the State sought leave to serve jurisdictional discovery. Before those motions could be resolved, however, the Court stayed proceedings pending resolution of two appeals involving questions of personal jurisdiction: *Martins v. Bridgestone Americas Tire Operations, LLC*, 266 A.3d 753 (R.I. 2022), and *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017 (2021).

After those decisions came down, Defendants renewed their motion to dismiss, and the State renewed its motion to compel. Before the Court could rule on the State's motion, however, Defendants notified the Court of their petition for certiorari review of the order remanding this case to state court. That generated another round of briefing over whether the State's case should be stayed again pending resolution of Defendants' certiorari petition. The issue was mooted, however, when the United States Supreme Court denied certiorari review on April 24, 2023.

Shortly after, the Court granted the State's request for jurisdictional discovery in a detailed,

10-page decision. As the Court explained, jurisdictional discovery was warranted because the State had made a colorable showing of personal jurisdiction, and because a more satisfactory showing of the facts was necessary to adjudicate Defendants' motion to dismiss. *See* Decision at 7, 9. In reaching this conclusion, the Court rejected Defendants' argument that jurisdictional discovery would be too "burdensome," noting that "many of the Defendants are multi-billion dollar companies with resources to defend this lawsuit." *Id.* at 8. Indeed, jurisdictional discovery was "particularly important," the Court explained, because the relevant evidence was in the exclusive control of Defendants. *Id.* at 7 (citation omitted). The Court therefore granted "limited jurisdictional discovery into Defendants' contacts with Rhode Island." *Id.* at 10. And to ensure that the scope of discovery would remain limited, it carefully and precisely defined three topics of discovery relating to Defendants' fossil-fuel business activity in Rhode Island, their marketing and promotion to Rhode Island consumers, and their historical knowledge of climate change impacts in Rhode Island. *See id.* The Court then concluded by instructing "[c]ounsel from both parties [to] confer and prepare an appropriate order." *Id.*

Following that instruction, the State drafted and sent to Defendants a proposed order that copied—verbatim—the Decision's description of the three discovery topics. *See* Declaration of Sarah W. Rice ("Decl.") at ¶¶ 2–3; Exs. 1–2. The parties then met on May 15 to confer about the draft proposed order. Decl. at ¶ 4. At that meeting, Defendants voiced concerns that the State would serve overbroad discovery requests. *Id.* at ¶ 5. In response, the State explained that it was not prepared to discuss the contents of discovery requests that it had not yet drafted or served. *Id.* at ¶ 6. It did assure Defendants, however, that its forthcoming requests would be based on the three topics identified in the Decision, and it promised that those requests would be significantly narrower than the discovery that the State served in 2020. *Id.* at ¶ 7. In the spirit of cooperation,

moreover, the State offered to assuage Defendants' concerns by serving a draft of its jurisdictional discovery after submitting the proposed order. *Id.* at ¶ 8. And in the hopes of reaching a consensus on the language of the proposed order, the State asked Defendants to send their counterproposal to the draft order. *Id.* at ¶ 9. Defendants agreed that the State's request for a counterproposal was reasonable, and the meet-and-confer then ended. *Id.*

By the evening of May 18, however, the State had not heard back from Defendants about the proposed order. *Id.* at ¶ 10. The State therefore emailed Defendants, informing them that it intended to file its proposed order shortly. *Id.*; Ex. 4. In response, Defendants asked the State to wait to file until close of business Monday, May 22. Decl. at ¶ 11; Ex. 5. They said they hoped to send the State a draft by then. Decl. at ¶ 11; Ex. 5. On Monday afternoon, however, Defendants informed the State that they would not be sending a draft order that day. Decl. at ¶ 12; Ex. 6. The State therefore submitted its proposed order with the Court. *Id.* at ¶ 13. Defendants then filed the "motion to clarify and strike" that is now before this Court.

III. LEGAL STANDARD

Modifications to an interlocutory order "should not be undertaken lightly." *Atmed Treatment Ctr., Inc. v. Travelers Indem.* Co., 285 A.3d 352, 362 (R.I. 2022). That is because "the prevailing party has a stake in the original decision," and "a change of course" is "a serious event to all concerned." *Id.* Accordingly, courts should not reconsider past decisions when the moving party seeks "merely to relitigate old matters," *Paroskie v. Rhault*, 241 A.3d 698, 701 (R.I. 2020) (citation omitted), or to advance arguments that it "could have and should have . . . presented to the court," *Atmed*, 285 A.3d at 362. Instead, modification of a prior decision is warranted "only when necessary to accomplish justice in extraordinary circumstances." *Cary v. 3M Co.*, No. PC 10-3263, 2014 WL 572320, at *1 (R.I. Super. Feb. 07, 2014) (cleaned up).

IV. ARGUMENT

A. The Court should not narrow the topics of discovery to exclude jurisdictionally relevant evidence.

Defendants insist that they are merely seeking to "clarify" the scope of jurisdictional discovery relating to their marketing activities ("Topic 2") and knowledge of climate change ("Topic 3"). But the Court should see this self-styled "motion to clarify" for what it is: a transparent attempt to narrow the topics of discovery and deprive the Court of evidence central to its jurisdictional inquiry. *See Cary*, 2014 WL 572320, at *1 (treating the defendants' motion to clarify as a motion for reconsideration because courts "look to substance, not labels" (cleaned up)).

1. Topic 2 properly encompasses "Defendants' marketing and promotion of fossil fuel products to Rhode Island consumers," including through national and regional media outlets.

Defendants read Topic 2 as categorically excluding evidence that they marketed or promoted their products to Rhode Island consumers through regional and national media outlets, such as the "New York Times," "the Wall Street Journal," and "television advertising run during the Super Bowl." Br. at 9, 10 & n.6. Topic 2 contains no such limitation, however. Instead, it authorizes discovery on "Defendants' marketing and promotion of fossil-fuel products *to* Rhode Island consumers." Decision at 10 (emphasis added). By its plain terms, then, the topic encompasses marketing and promotional campaigns that used non-Rhode-Island media outlets to reach Rhode Island consumers.

Contrary to Defendants' assertions, moreover, those campaigns are not "irrelevant to specific jurisdiction." Br. at 9. Courts in this State and elsewhere routinely sustain jurisdiction based in whole or in part on advertisements that reached the forum state through regional,[1]

[1] *Soares v. Roberts*, 417 F. Supp. 304, 307–08 (D.R.I. 1976) (relevant contacts with the forum included advertisements "placed in a Boston-based newspaper and broadcast by a Boston-based

national, [2] or even international[3] media outlets. That is because specific jurisdiction derives from "a defendant's purposeful contacts with the forum." *Martins v. Bridgestone Ams. Tire Operations, LLC*, 266 A.3d 753, 758 (R.I. 2022) (citations omitted). And a defendant's purposeful contacts with the forum include any advertising campaigns that have the "intended, calculated purpose of soliciting Rhode Island business." *Coia v. Stephano*, 511 A.2d 980, 983 (R.I. 1986); *see also Walden v. Fiore*, 571 U.S. 277, 285 (2014) ("[W]e have upheld the assertion of jurisdiction over defendants who have purposefully reached out beyond their State and into another by . . . circulating magazines to deliberately exploit a market in the forum State . . . ." (cleaned up)).

Accordingly, a defendant cannot evade personal jurisdiction by arguing that the forum state is just one of many targets of a national promotional campaign. *See uBID, Inc. v. GoDaddy Grp., Inc.*, 623 F.3d 421, 428 (7th Cir. 2010) (sustaining jurisdiction where the defendant argued that its Illinois advertisements were "only parts of a national advertising campaign" that was not "target[ed] . . . towards Illinois residents in particular"). Where a defendant "produces a national publication aimed at a nationwide audience[t]here is no unfairness in calling it to answer for the contents of that publication wherever a substantial number of copies are regularly sold and

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television station which [were] both widely received in Rhode Island"); *Smith v. Atlas Vacation Serv., Inc.*, No. C.A. NO. 79-3478, 1980 WL 336059, at *4 n.2 (R.I. Super. Mar. 7, 1980) ("In *Soares*, the Court found that the nonresident corporation solicited customers directly through local and regional advertising and indirectly by soliciting referrals from local organizations").

[2] *Lemaire v. Warner*, No. 77-214, 1978 WL 196162, at *1 (R.I. Super. May 15, 1978) (relevant contacts with the forum included publications in "a nationally circulated magazine [with] wide distribution in Rhode Island"); *PY Small Boats, Inc. v. Int'l Marine Mktg. Corp.*, No. CIV. A. 89-0317B, 1990 WL 40924, at *3 (D.R.I. Mar. 2, 1990) (jurisdictionally relevant that the defendant "ran ads in a nationally circulated magazine"); *Total Commc'ns Sys., Inc. v. Mailing Machs., Inc.*, No. C.A. 78-1349, 1978 WL 196198, at *1–2 (R.I. Super. June 9, 1978) (jurisdictionally relevant that the defendant placed advertisement in a "nationally distributed trade publication" that was "circulated in Rhode Island").

[3] *Nowak v. Tak How Invs., Ltd.*, 94 F.3d 708, 717 (1st Cir. 1996) (relevant contacts with the forum included advertisements "in national and international publications that circulated in Massachusetts").

distributed." *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 781 (1984). Nor can a defendant defeat jurisdiction by claiming that "they are not responsible for the circulation" of promotional statements that they placed in regional or national media outlets. *Calder v. Jones*, 465 U.S. 783, 789 (1984). Where a defendant voluntarily decides to advertise in an out-of-state media outlet that has wide circulation in the forum state, its advertising contacts with the forum are purposeful and foreseeable, not "random, isolated, or fortuitous." *Rodríguez-Rivera v. Allscripts Healthcare Sols., Inc.*, 43 F.4th 150, 163 (1st Cir. 2022) ("[W]e focus on a defendant's intentions, and the cornerstones are voluntariness and foreseeability.") (cleaned up); *see also Ben's Marine Sales v. Sleek Craft Boats*, 502 A.2d 808, 813 (R.I. 1985) ("The Supreme Court has acknowledged that when a defendant 'delivers its products into the stream of commerce' with the expectation that they will reach the forum state, the forum's court may assert jurisdiction." (citation omitted)); *U.S. SEC v. Carrillo*, 115 F.3d 1540, 1545 (11th Cir. 1997) ("It is well settled that advertising that is reasonably calculated to reach the forum may constitute purposeful availment of the privileges of doing business in the forum.").

To be sure, jurisdiction might not attach when a defendant publishes in a media outlet that has "limited circulation" in the forum state. *Compare Coia*, 511 A.2d at 983 (rejecting jurisdiction where the publication containing the defendant's advertisement did "not have a specific circulation in Rhode Island" and was not distributed "to the general public"), *with Lemaire*, 1978 WL 196162, at *1 (sustaining jurisdiction where the defendant advertised in "a nationally circulated magazine" that had "wide distribution in Rhode Island"), *and Soares*, 417 F. Supp. at 307–08 (sustaining jurisdiction where the defendant placed advertisements in regional media outlets that were "widely received in Rhode Island"). But Defendants cannot seriously argue that the *New York Times*, the *Wall Street Journal*, or the Super Bowl—the three specific media outlets that Defendants identify

as supposedly irrelevant to the jurisdictional analysis—had only limited circulation or viewership in Rhode Island.[4] While the State has not yet propounded discovery, much less identified any particular media outlets that will be the subject of that discovery, *see infra* Section IV.A.3 (explaining that Defendants' purported discovery disputes are entirely hypothetical), inquiry into these and similar national marketing campaigns that reach into Rhode Island would be entirely appropriate.

Nor do any of Defendants' cited cases demand a contrary conclusion. In *Coia*, the Rhode Island Supreme Court confirmed that advertising through out-of-state media outlets is jurisdictionally relevant when "calculated to solicit Rhode Island business." 511 A.2d at 983. And none of the other Rhode Island cases cited by Defendants even addressed the question of whether specific jurisdiction can be supported by advertisements that were disseminated to Rhode Island through out-of-state media outlets. *See, e.g.*, *Beddoe-Greene v. Basic, Inc.*, No. PC2011-4617, 2012 WL 1440600, at *9 (R.I. Super. Apr. 20, 2012) (analyzing general jurisdiction, not specific jurisdiction); *Kroskob v. AGCO Corp.*, No. 07-4627, 2009 WL 3328534, at *3 (R.I. Super. Aug. 20, 2009) (same); *Cary v. Am. Optical Corp.*, No. PC 10-3263, 2013 WL 5508819, at *1 (R.I. Super. Sept. 30, 2013) (plaintiffs did not assert jurisdiction on the basis of advertising).

That leaves *Riley v. MoneyMutual, LLC*, an out-of-state decision that rests on a mistaken reading of precedent. 884 N.W.2d 321 (Minn. 2016). There, the Minnesota court believed that

[4] *See, e.g.*, Ted Nesi, *Providence Ranks 8th for Super Bowl TV Ratings*, WPRI News (Feb. 5, 2018), https://www.wpri.com/news/providence-ranks-8th-for-super-bowl-tv-ratings/ ("More than half of all households in the Providence region tuned in for the Patriots' hard-fought Super Bowl loss Sunday night. . . ."); *Circulation & Distribution Areas*, Wall St. J., https://classifieds.wsj.com/circulation-distribution-areas/ (last visited July 3, 2023) (circulation statistics for the New England Region); New York Times, 2001 Form 10-K at 1, https://nytco-assets.nytimes.com/2020/06/2001_Annual_Report.pdf ("The Times is circulated in each of the 50 states . . . .").

"relying on purely national marketing activity to support minimum contacts appears to be in tension with the United States Supreme Court's holding in *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 886 [] (2011) (plurality opinion)." *Id.* at 334. But in the next breath, the court conceded that *Nicastro* was entirely "distinguishable" from national marketing campaigns that reach into a forum state because "the 'marketing efforts' in that case consisted solely of attending several national trade shows outside of New Jersey, rather than advertising content that actually appeared in the forum state." *Id.* And indeed, the fractured opinion in *Nicastro* cannot be read as overruling *sub silentio* prior U.S. Supreme Court decisions that have sustained specific jurisdiction based on the circulation of national publications in the forum state. *See Keeton*, 465 U.S. at 781; *Calder*, 465 U.S. at 789. To the contrary, the Supreme Court has since reaffirmed those prior decisions to uphold "assertion of jurisdiction over defendants who have purposefully reached out beyond their State and into another . . . by circulating magazines to deliberately exploit a market in the forum State." *Walden*, 571 U.S. at 285 (cleaned up) (citing *Keeton*, 465 U.S. at 781). As a result, *Riley* provides no basis for adopting Defendants' *per se* rule that a defendant's in-state advertisements are jurisdictionally irrelevant if those advertisements were disseminated through out-of-state media outlets.[5]

[5] Outside of Rhode Island, some courts have suggested that, "[b]y itself, . . . national advertising that reaches the forum state is not always sufficient to establish minimum contacts." *Williams v. Bowman Livestock Equip. Co.*, 927 F.2d 1128, 1131 (10th Cir. 1991); *see also Haelan Prods. Inc. v. Beso Biological Rsch. Inc.*, No. 97-571, 1997 WL 538731, at *3 (E.D. La. July 15, 1997) ("The Fifth Circuit has set forth the following factors in determining whether the advertisements in nationally-circulated trade magazines are sufficient, without more, to establish personal jurisdiction over a nonresident defendant . . . ."). But even assuming *arguendo* that specific jurisdiction could not rest *entirely* on statements that Defendants disseminated to Rhode Islanders through out-of-state media outlets, those statements would still be *relevant* to the jurisdictional inquiry. As this State's Supreme Court has explained, forum-related contacts that "standing alone might not be sufficient to establish jurisdiction" are still "significant" insofar as they "contribute[] to the totality of the contacts between the forum and defendants." *Ben's Marine Sales*, 502 A.2d at 815 (cleaned up).

Finally, Defendants misstate the law when they assert—without citation—that "[t]he overall volume or depth of any Defendant's Rhode Island based contacts is not relevant to this jurisdictional dispute." Br. at 8. "In reviewing a defendant's contacts with the forum, [the Rhode Island Supreme] Court looks to the 'quality and quantity' of the contacts." *Martins*, 266 A.3d at 758 (citation omitted). That is because specific personal jurisdiction rests on "the totality of [a defendant's] activities, voluntarily undertaken, that connect [it] to [the forum state]." *Knox v. MetalForming, Inc.*, 914 F.3d 685, 692 (1st Cir. 2019). Here, the totality of relevant forum contacts undoubtedly includes Defendants' regional and national marketing to Rhode Islanders through out-of-state media outlets. The Court should therefore reaffirm its original articulation of Topic 2, which is consistent with precedent from both the Rhode Island Supreme Court and the United States Supreme Court.

2. Topic 3 properly encompasses "Defendants' historical knowledge of climate change impacts in the State of Rhode Island," including all bases that formed their knowledge.

The Court should also reject Defendants' proposed narrowing of Topic 3. Defendants evidently want to limit this topic to documents and other evidence that specifically and expressly reference climate change impacts in Rhode Island. *See* Br. at 3, 11. But that limitation is missing from Topic 3, which instead encompasses "Defendants' historical knowledge of climate change impacts in the State of Rhode Island during that time period." Decision at 10. And if the Court were to graft Defendants' proposed limitation onto Topic 3, it would significantly limit the State's ability to discover "Defendants historical knowledge of climate change impacts in the State of Rhode Island." *Id.*

To see why, suppose that Defendants possessed historical documents predicting that climate change would cause sea level rise along the Eastern Seaboard. Under Defendants' rewriting of Topic 3, those documents would presumably fall outside the scope of jurisdictional

discovery, even though they are probative of Defendants' historical knowledge that sea-level rise would impact Rhode Island—a state with over 400 miles of Atlantic coastline. Compl. ¶ 212 ("With over 400 miles of coastline and large inland watersheds, Rhode Island's transportation and transit infrastructure . . . is vulnerable to sea level rise and flooding."). And the same would be true of other historical documents predicting that climate change would make extreme weather events more deadly in the Northeastern United States, would negatively impact fisheries in the Atlantic Ocean, or would increase the frequency and severity of storm surges for low lying coastal communities around the globe—to name just a few, hypothetical examples. *See id.* at ¶¶ 201–12 (detailing these and other climate-related impacts in Rhode Island). If those documents were in Defendants' possession, they would clearly support a factfinder's determination that Defendants knew or should have known that their tortious marketing of fossil fuels would contribute to climate impacts in Rhode Island. Yet under Defendants' distorted reading of Topic 3, none of those documents would be produced in jurisdictional discovery.

To justify their narrowing of Topic 3, Defendants rehash arguments that they already litigated and lost. Defendants insist that their "historical knowledge of climate change is not relevant" to specific jurisdiction. Br. at 10. Yet as the State explained in its motion to compel, Defendants themselves made their historical knowledge relevant to the jurisdictional analysis when they argued that "they did not have 'clear notice' that they 'could be subjected to suit' in Rhode Island for 'local environmental injuries' caused by their conduct in the forum state and elsewhere." Mot. to Compel at 18 (quoting Renewed Jt. Mot. at 18); *see also id.* at 22 ("Defendants' 'clear notice' argument is a poorly disguised attack on the allegations concerning Defendants' knowledge."). Defendants do not disavow their "clear notice" argument, and so their historical knowledge remains as relevant today as it was when this Court "agree[d] with Plaintiff"

that Defendants' motion to dismiss "includes factual arguments that pertain to jurisdiction." Decision at 3; *see also id.* (agreeing with the State that "Defendants seemingly argue there are no issues of jurisdiction at this instance yet argue the exact opposite in their motion to dismiss for lack of personal jurisdiction"). The Court need not—and should not—revisit its decision to order jurisdictional discovery on Defendants' historical knowledge of climate change impacts in Rhode Island. *See Paroskie*, 241 A.3d at 701 (reconsideration of a prior order is not warranted when the moving party merely seeks to "relitigate old matters" or to "persuade the trial justice to change his mind" (citations omitted)).[6]

3. The Court should not rewrite its Decision based on Defendants' hypothetical discovery disputes.

Finally, Defendants insist that Topics 2 and 3 must be narrowed to prevent the State from serving overly broad and burdensome discovery. *See* Br. at 3, 8, 9. Defendants admit—as they must—that they have not seen any of the State's forthcoming discovery requests. *Id.* at 7. Nonetheless, they "anticipate" that those requests will exceed the scope of jurisdictional discovery authorized by the Decision. *Id.* at 7. Those predictions are baseless, resting on pure speculation and a gross mischaracterization of the meet-and-confer process.

Contrary to Defendants' assertions, the State never took the position that "the Decision permits virtually unbounded discovery." *Id.* 7. Nor did it tell Defendants that it would "seek[] discovery concerning all national promotional and marketing efforts by each Defendant for the past seventy years and all information regarding the global or national impacts of climate change during that period." *Id.* In fact, the State did not even expect to discuss the contents of its undrafted

[6] In a similar attempt to relitigate the Decision, Defendants insist that the "magnitude" of the State's injuries is not relevant to the jurisdictional inquiry. Br. at 9. That is incorrect: evidence showing that the State's injuries are substantial would directly rebut Defendants' clear-notice argument.

and unserved discovery requests during the parties' meet-and-confer on May 15, 2023. *See* Decl. ¶ 4. Instead, it met with Defendants to confer about the proposed order that the State had prepared and emailed to Defendants on May 8. *Id.* During that conference, Defendants expressed concerns that the State would serve overbroad discovery requests, and the State explained that those concerns were premature because the State had not yet drafted its requests. *Id.* ¶¶ 5–6. The State then assured Defendants that it would seek discovery based on the three topics identified by the Court, and it promised that its discovery requests would be significantly narrower than those served in 2020. *Id.* ¶ 7. The State even offered to send Defendants draft discovery so that they could determine whether their fears were real or imagined. *Id.* ¶ 8. But Defendants never took the State up on its offer. *Id.* And they never sent the State a counter proposal to the State's draft order, even though the State asked for one in the hopes of reaching consensus. *Id.* ¶¶ 8–12.

The Court should therefore disregard Defendants' speculations that the State will serve "burdensome, broad, merits discovery that will take years to complete." Br. at 3. Those speculations are nothing more than a transparent bid by Defendants to secure an advisory opinion on theoretical discovery disputes. But courts are "not in the business of adjudicating hypothetical discovery disputes." *Hill v. Xerox Bus. Servs., LLC*, No. C12-0717-JCC, 2019 WL 3804142, at *3 (W.D. Wash. Aug. 13, 2019).[7] And rightly so, because the parties in a lawsuit can often narrow the scope of any disagreement by engaging in meet-and-conferrals. *See Lee v. W Architecture &*

[7] *See also, e.g., In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Pracs. & Antitrust Litig.*, No. 17-md-2785-DDC-TJJ, 2019 WL 1244932, at *2 (D. Kan. Mar. 18, 2019) ("[T]he Court will not fashion a speculative roadmap that attempts to control future discovery in the abstract."); *Karl v. Asarco, Inc.*, No. 93 CIV. 3819 KTD RLE, 1997 WL 642560, at *1 (S.D.N.Y. Oct. 17, 1997) ("The court will address discovery disputes as they arise, and will not engage in speculative or conjectural analysis of requests which may never be made."); *Fialkoff v. VGM Grp., Inc.*, No. 19-CV-2041-CJW-KEM, 2020 WL 13551435, at *1 n.2 (N.D. Iowa June 22, 2020) ("[T]he court declines to rule on a hypothetical future discovery issue that the parties have not narrowed through the meet-and-confer process.").

Landscape Architecture, LLC, No. 18 CV 05820 (PKC) (CLP), 2019 WL 8503358, at *2 (E.D.N.Y. Apr. 30, 2019) ("The purpose of the meet and confer requirement is to resolve discovery matters without the court's intervention to the greatest extent possible." (citation omitted)). Indeed, the expectation is that the parties will "seek court involvement in discovery disputes only as a last resort, and only when the dispute implicates truly significant interests that counsel cannot resolve through *reasonable cooperation* during the meet-and-confer process." *Dairy v. Harry Shelton Livestock, LLC*, No. 18-CV-06357-RMI, 2020 WL 6269541, at *4 (N.D. Cal. Oct. 23, 2020) (emphasis in original); *see also* Super. R. Civ. P. 37(a)(2) ("The motion [to compel] must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action."), 26(c) (similar requirement for protective orders).

There is no reason to believe that this case will be any different. Once the State serves its discovery requests, Defendants will presumably agree to meet and confer with the State in a good-faith effort to find common ground. And although it is difficult—if not impossible—to predict how exactly those discussions will unfold, the parties will likely be able to identify at least some areas of agreement, thereby reducing the number of issues that would require this Court's attention, time, and resources. On the question of national marketing campaigns, for example, the parties could (hypothetically) explore the option of limiting discovery to a finite list of local, regional, and national media outlets that have wide circulation in Rhode Island. Or if (hypothetically) Defendants told the State that its (actually served) discovery requests would require them to review and produce millions of documents, the State might (hypothetically) consider narrowing its requests. But until those conferrals take place, Defendants have no basis for claiming that jurisdictional discovery in this case will be "burdensome," Br. at 3, especially because—as this

Court has already noted—"many of the Defendants are multi-billion dollar companies with the resources to defend this lawsuit," Decision at 8. "It should [therefore] go without saying filing a discovery motion at this juncture was premature and undermines the spirit and purpose of the meet and confer requirement." *In re: Illumina, Inc. Sec. Litig.*, No. 16CV3044-L(KSC), 2018 WL 5617692, at *2 (S.D. Cal. Oct. 30, 2018).

The Court will not, moreover, "conserve judicial time and resources" by rewriting its Decision to address Defendants' hypothetical discovery disputes. Br. at 8 n.3 (citation omitted). Indeed, Defendants are already "anticipat[ing] that they will have additional, more specific objections to the State's jurisdictional discovery requests once they are served." *Id.* at 11 n.7. If Defendants were truly interested in the "expeditious[] adjucat[ion]" of their Rule 12(b)(2) motion, *id.* at 4, they would have waited to file any objections until after the State had served its discovery and after the parties had met and conferred, thereby allowing the Court to resolve all of their supposedly unresolvable objections at once. *See* Super. R. Civ. P. 26(c) (requiring "good faith conferr[al]" before moving for a protective order). Instead, Defendants have opted for a piecemeal approach that unnecessarily increases the likelihood that this Court will need to intervene multiple times during the discovery process.

In short, Defendants' "hypothetical dispute[s] should not stand in the way of discovery progress." *Stiles v. Wal-Mart Stores, Inc.*, No. 2:14-cv-02234-MCE-CMK, 2018 WL 3093501, at *8 (E.D. Cal. June 20, 2018). Instead, the Court should deny Defendants' premature motion, enter an order implementing its Decision, and allow the ordinary discovery process to take its course.

B. The Decision does not create any appearance of bias.

In another misguided attempt to line edit the Decision, Defendants ask the Court to delete references to two news articles, arguing that those references create the impression of judicial bias. That accusation of bias is absurd.

Contrary to Defendants' misrepresentations, the Decision did not rely on the two articles to resolve any "contested liability issues in the case" or to make any findings of fact. Br. at 12. Instead, the Court clearly used those articles to provide helpful background and context to this lawsuit—a common and entirely permissible use of extra-record materials. *See, e.g.*, *O'Toole v. Northrop Grumman Corp.*, 499 F.3d 1218, 1225 (10th Cir. 2007) ("It is not uncommon for courts to take judicial notice of factual information found on the world wide web." (collecting cases)).[8] Defendants do not dispute that "country leaders and advocates [recently] met" at the United Nations Climate Change Conference "to discuss damages caused by industrial greenhouse gas emissions." Decision at 8. They do not dispute that the question of "loss and damages" "was notably uncertain during the conference." *Id.* They do not dispute that several "small countries" claimed that "oil companies have benefited billions in corporate profits at the expense of their climate-related disasters that have caused severe destruction." *Id.* at 9. And they do not dispute that those claims are "similar" to the State's claims in the general sense that both assert that oil companies should "pay" for certain climate-related damages. *Id.* As a result, it was entirely proper for the Court to include this undisputed background information in the Decision, which helpfully situates the State's case within a broader context. *See, e.g.*, *Padilla v. City of Gallup*, No. CIV 05-00505 MV/KBM, 2006 WL 8444138, at *3 (D.N.M. June 28, 2006) (collecting cases where courts took judicial notice of newspaper articles).[9]

[8] *See also, e.g.*, *James v. Albert Einstein Med. Ctr.*, 170 A.3d 1156, 1159 n.1 (Pa. Super. Ct. 2017) (in medical malpractice case, taking judicial notice of basic facts about certain tumors); *Feliciano v. City of New York*, No. 14 Civ. 6751 (PAE), 2015 WL 4393163, at *2 n.3 (S.D.N.Y. July 15, 2015) ("Solely for background and context, the Court takes judicial notice of these facts.").

[9] *See also, e.g.*, *Ex parte Barrett*, 608 S.W.3d 80, 86 (Tex. App. 2020) (taking judicial notice of newspaper articles "solely for the purpose of providing context to the case"); *Peters v. Del. River Port Auth. of Pa. & N.J.*, 16 F.3d 1346, 1357 (3d Cir. 1994) (taking "judicial notice of newspaper accounts"); *Ritter v. Hughes Aircraft Co.*, 58 F.3d 454, 458 (9th Cir. 1995) (similar);

That conclusion is reinforced by the longstanding distinction between adjudicative facts and legislative facts. As the Rhode Island Supreme Court has explained, "adjudicative facts are those developed in a particular case concerning the immediate parties," whereas "legislative facts are the social, economic, political, and scientific facts that simply supply premises to guide judges in the process of their legal reasoning." *Boucher v. Sayeed*, 459 A.2d 87, 92 (R.I. 1983) (citations omitted); *see also* Fed. R. Evid. 201, advisory committee's note (a) ("Adjudicative facts are simply the facts of the particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning. . . ."). It is well-settled that the rules of evidence apply only to adjudicative facts, not legislative ones. *See* R.I. R. Evid. 201(a) ("This rule governs only judicial notice of adjudicative facts."); Fed. R. Evid. 201, advisory committee's note (a) ("No rule deals with judicial notice of 'legislative' facts."). And "[q]uite often," courts take judicial notice of legislative facts, including facts that are not raised by any party and facts that are "far from indisputable." 1 Jones on Evidence § 2:4 (7th ed. 2023) (collecting cases).

Here, the Court clearly referred to legislative facts when it discussed the United Nations Climate Change Conference. In observing that both the State and several small nations blame oil companies for certain climate-related impacts, the Court used the two newspaper articles to "illustrate the circumstances" surrounding the State's lawsuit—a textbook use of legislative facts. *Boucher*, 459 A.2d at 92 (citation omitted); *see also id.* at 93 (taking judicial notice of the legislative facts contained in a "Providence Journal article"). In fact, those articles could not possibly supply this Court with any adjudicative facts because they do not even reference "the

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Estabrook v. City of Dayton, No. C-3-96-71, 1997 WL 1764764, at *2 (S.D. Ohio Mar. 24, 1997) (similar); *Hussey v. City of Cambridge*, No. 21-CV-11868-AK, 2022 WL 6820717, at *3–4 (D. Mass. Oct. 11, 2022) (similar); *United States ex rel. Conroy v. Select Med. Corp.*, 211 F. Supp. 3d 1132, 1143 & n.5 (S.D. Ind. 2016).

immediate parties" in this "particular case," *id.* at 92—much less "supply evidence on an essential element of [the State's] case," *id.*, or address any "historical facts pertaining to the incidents which g[a]ve rise to [the State's] lawsuit,[]" 2 McCormick On Evidence § 331 (8th ed. 2022); *see also* 2 McCormick on Evidence § 328 (8th ed.) (8th Ed. 2022) (observing that the U.S. Supreme Court has taken notice of legislative facts that "were not part and parcel of the disputed event being litigated but bore instead upon the court's own thinking about the tenor of the law to be applied in deciding the dispute"). Accordingly, there is no basis for striking the Court's discussion of the Conference, which helpfully situates the State's case within the broader landscape of climate-related actions. *See Boucher*, 459 A.2d at 93 (underscoring "our willingness to take judicial notice of changing times and conditions").

Nor is there any risk that the Decision will be viewed as "prejudging the merits of th[is] case," Br. at 2, simply because it draws an obvious parallel between the allegations in the Complaint and the allegations "presented" by small nations at the United Nations Conference, Decision at 9. The Court clearly attributes the allegation that "oil companies have benefitted billions in corporate profits at the expense of their climate-related disasters that have caused severe destruction" to "[s]mall countries . . . like Kenya, Tanzania, and the Seychelles." *Id.* Nor can the Decision plausibly be read as "endors[ing]" any "compensation and liability schemes" for climate-related harms, or as "reaching out to . . . opin[e] on liability issues" in this case. Decision at 4 n.1 (citation omitted). To the contrary, the Court made clear that it might not even reach the merits of the State's claims. *See id.* at 9 ("The United Nations Conference attendees were left with a similar question this Court *might* ultimately have to oversee . . . ." (emphasis added)).

In arguing otherwise, Defendants misleadingly suggest that the Court relied on the two news articles when it wrote: "the consequences Rhode Island has borne have been significant

especially as said consequences relate to sea-level rise, rising temperatures, and severe storms." Br. 5 (quoting Decision at 9). But, in fact, the Court expressly attributed that sentence to representations made by *Defendants* "in their briefs and during oral argument." Decision at 9. In any event, the Court correctly characterized the magnitude of Rhode Island's alleged injuries as a disputed issue of fact. *See* Decision at 9 ("Defendants here argue any injury to Rhode Island, if any, is incidental and unsubstantial. Plaintiff argued during oral argument that they are seeking limited jurisdictional discovery to rebut this."). Accordingly, the Decision leaves no impression whatsoever that this Court has prejudged any questions relating to the State's injuries or Defendants' liability.

In a final act of desperation, Defendants attack the integrity of the State. *See* Br. at 4. But they offer no grounds for claiming that "the State and others" will "misconstrue[] and misuse[]" the Decision's references to newspaper articles. *Id.* Nor do they identify any misconstruction or misuse by non-litigants. Instead, all Defendants can muster is a single newspaper article that accurately quotes from multiple parts of the Court's Decision. Br. 5 n.2. Nothing in that article suggests that the Court has prejudged the merits of this litigation; in fact, the author makes clear in the opening paragraph that the Decision simply "granted the state's request to conduct discovery into whether a jurisdictional basis exists for its suit against oil and gas companies alleged to have contributed to climate change." R.I. Lawyers Weekly Staff, *Jurisdictional Discovery Allowed in Climate Suit*, R.I. Lawyers Weekly (May 2, 2023), https://rilawyersweekly.com/blog/2023/05/02/jurisdictional-discovery-allowed-in-climate-suit/. And so even if press coverage were relevant to a motion for reconsideration, *but see Chisom v. Roemer*, 501 U.S. 380, 400 (1991) ("[P]ublic opinion should be irrelevant to the judge's role . . . ."), it would not justify rewriting the Court's Decision here.

V. CONCLUSION

The Court should deny Defendants' "motion to clarify and strike," the latest in a long line of attempts to delay prosecution of the State's case. The Decision provides clear instructions on the scope of jurisdictional discovery, and it is past time for the parties to implement those instructions through the ordinary meet-and-confer process. If the parties are ultimately unable to reach agreement on one or more issues, Defendants can—at that point—ask the Court to adjudicate real, concrete discovery disputes. But until then, this Court should not prematurely and unnecessarily deprive itself of evidence central to the jurisdictional inquiry.

Date: July 5, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2023, I filed and served this document through the Rhode Island Judiciary's Electronic Filing System on all counsel who are registered for e-service. This document electronically served is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System.

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