STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

STATE OF RHODE ISLAND,

Plaintiff,

v.

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 PETROLEUM CORP.; MARATHON PETROLEUM COMPANY LP; SPEEDWAY LLC; HESS CORP.; MARATHON OIL COMPANY; MARATHON OIL CORPORATION; LUKOIL PAN AMERICAS, LLC.; GETTY PETROLEUM MARKETING, INC.; AND DOES 1 through 100, inclusive,

Defendants.

C.A. No.: PC-2018-4716

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO CLARIFY AND STRIKE PORTIONS OF THE COURT'S APRIL 28, 2023 DECISION

I. INTRODUCTION

On April 28, 2023, this Court issued a Decision granting Plaintiff's Motion to Compel Jurisdictional Discovery (the "Decision"). The State has since indicated that it interprets the Decision to authorize sweeping discovery—de facto full-merits discovery. The State's interpretation conflicts with the Court's express statement that it authorized only "limited" discovery. For this reason, Defendants move to clarify the scope of discovery permitted. In addition, because the

Decision refers at some length to materials outside the record to which Defendants had no opportunity to respond, Defendants also move to strike those portions of the Decision that rely on external information not presented by the parties. Those parts of the opinion address disputed issues in a manner that could be seen as prejudging the merits of the case. Defendants request that the Court remove them to prevent their misuse and potential prejudice to Defendants in this Court or elsewhere.

1. The Court should clarify the scope of permissible jurisdictional discovery. The State repeatedly told this Court and Defendants that its motion for jurisdictional discovery was a "limited" request and vowed not to engage in broad discovery. *See* Pl.'s Mem. of Law in Supp. of Mot. to Compel at 1, 2, 7 and 9 ("Pl.'s Mem."); Pl.'s Reply Mem. in Supp. of Mot. to Compel at 2 ("Pl.'s Reply"). At the hearing on the Motion, the State reiterated its pledge and argued that it required limited jurisdictional discovery specifically to refute Defendants' contention that they lacked clear notice that the State might hale them into a Rhode Island court.

The Court's Decision identifies and permits three subjects of discovery: (1) Defendants' oil and gas business activity in Rhode Island during the times set forth in Plaintiff's Complaint; (2) Defendants' marketing and promotion of oil and gas 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. In allowing this discovery, the Court emphasized that it would *not* permit a fishing expedition. *Id.* at 6, 8. Indeed, the Court stated it "is confident the discovery parameters it will be granting will be limited in scope and that Defendants will not be unfairly harmed." *Id.* at 8. And the Court reiterated that it was allowing "*limited* jurisdictional discovery into *Defendants' contacts with Rhode Island*." *Id*. at 10 (emphasis added).

But the State apparently reads the Court's Decision expansively to include activities and conduct occurring far beyond Rhode Island's borders. The State's position, communicated during a meet and confer, is at odds with both the Court's direction that jurisdictional discovery would be limited and the State's prior representations to the Court. Indeed, the State's expansive interpretation would lead to burdensome, broad, merits discovery that will take years to complete and disregards the well-established requirement that the Court first determine whether it can and should exercise personal jurisdiction *before* permitting broad discovery.

Defendants believe that the Court did not intend this outcome. The Court stated that it was granting jurisdictional discovery to allow for "a more satisfactory showing of the facts necessary" to support *specific* jurisdiction. Decision at 9. Accordingly, discovery should be limited to Defendants' marketing and promotion of fossil-fuel products *specific* to Rhode Island—that is, occurring in Rhode Island and targeted to Rhode Island consumers, rather than marketing and promotional efforts outside of Rhode Island (including national marketing and promotional efforts). As explained below, Defendants maintain that historical knowledge of climate change impacts is irrelevant to the personal jurisdictional inquiry because knowledge is not a forum contact. Accordingly, the third topic similarly should be limited to—at most—Defendants' historical knowledge of climate change impacts *specific* to Rhode Island, rather than historical knowledge of broader national and global impacts such as sea level rise and global warming.

As a result, Defendants move to clarify and confirm that:

- Topic 2 is limited to "Defendants' marketing and promotion of fossil-fuel products *occurring in Rhode Island and targeted to Rhode Island consumers*" and excludes marketing and promotional efforts outside of Rhode Island (including national marketing and promotional efforts).

- Topic 3 is limited to "Defendants' historical knowledge *that focuses on and concerns Rhode Island specific climate change impacts*" and excludes historical knowledge of broader potential national and global impacts.

Because the State has taken positions in the meet-and-confer process that are at odds with both the Court's direction that jurisdictional discovery would be limited and the State's prior representations to the Court, Defendants respectfully request the Court clarify certain issues to ensure discovery is indeed limited to questions of specific personal jurisdiction, so the Court can proceed to expeditiously adjudicate Defendants' Rule 12(b)(2) and, if necessary, Rule 12(b)(6) motions to dismiss.

2. The Court should remove the Decision's references to matters outside the record. The Decision references two six-month-old news articles that Defendants anticipate will be misconstrued and misused by the State and others. *See* Decision at 8–9. Defendants had no opportunity to present evidence or even argument on the factual and policy positions that the two selected articles present. Neither article so much as mentions Defendants' position on the issues the articles highlight. And neither mentions the longstanding policy of the United States to *oppose* the types of "compensatory" and "liability" schemes that the quoted speakers present without critique or contradiction—and which the Decision could be seen to endorse. Indeed, as the Second Circuit observed in affirming the dismissal of a similar climate change lawsuit filed by the City of New York, "the United States' longstanding position in international climate-change negotiations is to oppose the establishment of liability and compensation schemes at the international level."[1] Neither article is relevant to the issue of personal jurisdiction, and the Court's reaching out to comment on these matters could be read as opining on liability issues based on extraneous and inadmissible materials not before the Court.

[1] *City of New York v. Chevron Corp.,* 993 F.3d 81, 103, n.11 (2d Cir. 2021) (quoting an amicus brief submitted in support of Defendants by the United States) (citing Todd Stern, Special Envoy for Climate Change, Special Briefing (Oct. 28, 2015), https://2009-2017.state.gov/s/climate/releases/2015/248980.htm (stating that "[w]e obviously do have [a] problem with the idea, and don't accept the idea, of compensation and liability and never accepted that and we're not about to accept it now")).

For these reasons, the Court should strike the Decision's statements regarding un-briefed and un-proven disputed factual issues. For example, the Decision states that "the consequences Rhode Island has borne have been significant especially as said consequences relate to sea-level rise, rising temperatures, and severe storms." Decision at 9. But no party has introduced any evidence here regarding any harms to Rhode Island caused by anthropogenic climate change—much less caused by these Defendants' supposedly misleading *speech* about climate change. This will be a disputed factual issue in this case if it proceeds to the merits. The inclusion of such statements in the Decision based on extra-record material without the presentation of evidence or briefing by both sides on these contested issues will be cited, quoted, and misused if they remain in the Court's Decision,[2] and they undermine the perceived impartiality that Rhode Island Code of Judicial Conduct Rules 2.2 and 2.11 require of the Court.

Consistent with these concerns, Rule 2.9(C) of the Judicial Code provides that "[a] judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed." This prohibition ensures both the reality and the appearance of judicial neutrality: "It is a fundamental principle of our jurisprudence that a factfinder may not consider extra-record evidence concerning disputed adjudicative facts." *Lussier v. Runyon*, 50 F.3d 1103, 1113 (1st Cir. 1995); *see also* American Bar Association's Standing Committee on Ethics and Professional Responsibility, Formal Opinion 478, *Independent Factual Research by Judges Via the Internet* at 2 (2017) (independent research undermines the "hallmark principle of judicial impartiality").

[2] *See, e.g.*, R.I. Lawyers Weekly Staff, *Jurisdictional Discovery Allowed in Climate Suit*, R.I. Lawyers Weekly, May 2, 2023, *available at* https://rilawyersweekly.com/blog/2023/05/02/jurisdictional-discovery-allowed-in-climate-suit/. This article devoted three of its five paragraphs to discussing the material Defendants seek to be stricken from the record.

In sum, the Court should clarify the limited nature of the discovery authorized and strike the extra-record portions of the Decision, as detailed below.

II. ARGUMENT

"A trial justice retains the authority 'to modify any interlocutory judgment or order prior to final judgment.'" *Atmed Treatment Ctr., Inc. v. Travelers Indem. Co.*, 285 A.3d 352, 362 (R.I. 2022) (quoting *Renewable Res., Inc. v. Town of Westerly*, 110 A.3d 1166, 1171 (R.I. 2015)); *Murphy v. Bocchio*, 338 A.2d 519, 522 (R.I. 1975) (same). This Court has complete power to clarify and/or modify its interlocutory orders "as justice requires." *Chavers v. Fleet Bank, N.A.*, No. CIV.A.00-5237, 2001 WL 770904, at *2 (R.I. Super. June 29, 2001) (quoting 11 Wright & Miller, Federal Practice & Procedure § 2852 at 233 n.8 (1998)). Under this long-recognized standard, the trial court has "broad discretion to decide whether to entertain a request for reconsideration or modification" and "should exercise that discretion in a manner that is mindful of the delicate balance between securing the 'speedy and inexpensive determination of every action,' ... and the 'incessant command of the court's conscience that justice be done.'" *Id.* at *2 n.7 (citing *Murphy*, 114 R.I. at 685; *Bankers Mortgage Co. v. United States*, 423 F.2d 73, 77 (5th Cir. 1970)).

A. The Court Should Clarify That It Is Permitting Only Discovery Limited to Defendants' Activities in and Directed to Rhode Island.

As the Court recognized, "[W]hen granting a motion to compel jurisdictional discovery, the Court must ensure that the grant does not evolve into a 'fishing expedition.'" Decision at 8 (quoting *Coia v. Stephano*, 511 A.2d 980, 984 (R.I. 1986)); *see also Martin v. Howard*, 784 A.2d 291, 297 (R.I. 2001) ("[T]his Court has been reluctant to allow litigants to engage in a discovery 'fishing expedition' merely to establish personal jurisdiction"). The Court therefore set parameters intended to limit the scope of discovery and ensure it does not "unreasonabl[y] spiral." Decision at 8.

The Decision identifies and permits three "limited" categories of discovery: (1) Defendants' oil and gas business activity in Rhode Island during the times set forth in Plaintiff's Complaint; (2) Defendants' marketing and promotion of oil and gas 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. *Id.* Consistent with the Court's statements, the law is clear that jurisdictional discovery should be limited. *See United States v. Swiss Am. Bank, Ltd.*, 274 F.3d 610, 625 (1st Cir. 2001) ("We have long held that a diligent plaintiff who sues an out-of-state corporation and who makes out a colorable case for the existence of *in personam* jurisdiction *may* well be entitled to *a modicum of jurisdictional discovery* if the corporation interposes a jurisdictional defense" (quotation omitted and last emphasis added)).

The State, however, contends the Decision permits virtually unbounded discovery. On May 15, 2023, Defendants met and conferred with the State regarding the scope of discovery under the Decision and learned that the State's interpretation of the "limited scope" has no limits at all. The State seeks 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. Given the State's position on the scope of the Decision and the enormous reach of the jurisdictional discovery previously filed and later withdrawn, *see* Exhibit 1 (representative examples of discovery previously propounded by the State), Defendants anticipate that the State's forthcoming discovery requests will exceed the intended "limited . . . scope" of the Decision. It is not necessary, however, for Defendants to await those requests because the State has made clear that its reading of the Decision is far from a limited authorization to conduct jurisdictional discovery.

The State's position amounts to full merits discovery. The State's *merits* case is premised

on allegations that Defendants promoted and marketed the sale of oil and gas on a national and global basis while allegedly concealing their knowledge that the combustion of oil and gas would cause severe climate change impacts worldwide. But the Decision concluded that the State's case for personal jurisdiction turns on what it considered the "limited" questions about Defendants' promotion in Rhode Island and impacts in Rhode Island. The State now inappropriately seeks to use "limited" jurisdictional discovery to take what amounts to *merits* discovery on these broad aspects of their claims even before the Court first determines whether it can constitutionally exercise specific personal jurisdiction over Defendants. In doing so, the State also contradicts its pledge that "its personal jurisdictional arguments are grounded in allegations pertaining to Defendants' operations *in* and marketing activities *directed at Rhode Island*, not anywhere else." Pl.'s Reply at 11.[3]

The requested clarifications of the Decision also are consistent with the State's allegations limiting the Court's jurisdiction to *specific jurisdiction*.[4] The overall volume or depth of any Defendant's Rhode Island based contacts is not relevant to this jurisdictional dispute, because the State concedes that *no Defendant* is "at home" in Rhode Island and thus the State instead seeks to establish only specific personal jurisdiction over each of the Defendants. *See* Decision at 2.

To establish specific personal jurisdiction, the State *must* show that its claims "'arise out of or relate to the defendant's contacts with the forum.'" *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1026 (2021) (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014)). "The phrase 'relate to' incorporates real limits, as it must to adequately protect defendants

[3] Moreover, the State's new position runs counter to the "'strong policy to conserve judicial time and resources'" which "require[s] that 'preliminary matters such as personal jurisdiction [are] raised and disposed of before the court considers the merits or quasi-merits of a controversy.'" *Pullar v. Cappelli*, 148 A.3d 551, 556 (R.I. 2016) (quoting *Bel–Ray Co. v. Chemrite (Pty) Ltd.*, 181 F.3d 435, 443 (3d Cir. 1999)).

[4] As the Court has recognized and the State concedes, general jurisdiction is not at issue here. *See* Decision at 2.

foreign to a forum." *Id.* Thus, what matters here is not the overall volume or depth of a Defendant's contacts with Rhode Island, but only in-state activities that relate to the claims alleged.

The Decision states incorrectly that "Defendants here argue any injury to Rhode Island, if any, is incidental and unsubstantial." *See* Decision at 9. Defendants' jurisdictional argument is instead that any in-state activities are insufficiently related to the State's claims, regardless of the magnitude of any injuries the State alleges. *Id.*

Although the Court has determined that some jurisdictional discovery is appropriate, the law is clear that such discovery should be limited at most "to a modicum of jurisdictional discovery." *Swiss Am. Bank,* 274 F.3d at 625. Even the Rhode Island cases cited by the State in its motion to compel support this limitation. *See* Pl.'s Mem. at 8 n.5, 21.[5] Broad discovery is both unnecessary and inappropriate, and the requested clarifications support the limited discovery the Decision says the Court intended.

Jurisdictional discovery in this case should be limited—tailored to the jurisdictional bases asserted by the State. Specific jurisdiction examines whether the State's claims arise out of or relate to Defendants' *in-state activities*. Defs.' Memo at 17. Regarding the second topic, Defendants' national marketing and promotional efforts are irrelevant to specific jurisdiction. *See Coia*, 511 A.2d at 984 ("The advertising alleged to have been done by defendants was not calculated to

[5] Specifically, the State relied upon three decisions of the Rhode Island Superior Court permitting jurisdictional discovery, but limiting it to specific aspects of the defendants' business activities with Rhode Island. *See, e.g.*, *Beddoe-Greene v. Basic, Inc.*, No. PC2011-4617, 2012 WL 1440600, at *9 (R.I. Super. Apr. 20, 2012) (granting leave to investigate only the defendant's Rhode Island sales and Rhode Island contacts that related specifically to an art gallery archive, and adding: "Plaintiff should not interpret permission to conduct jurisdictional discovery as an open invitation to scour [the defendant]'s past for all of [its] possible contacts with Rhode Island."); *Cary v. American Optical Corp.*, No. PC 10-3263, 2013 WL 5508819, at *4 (R.I. Super. Sep. 30, 2013) (permitting discovery to determine whether the defendant "took deliberate and voluntary actions to send its [asbestos-containing] products into Rhode Island"); *Kroskob v. AGCO Corp.*, No. 07-4627, 2009 WL 3328534, at *4 (R.I. Super. Aug. 20, 2009) (granting leave to investigate "how many Carquest Auto Parts stores were in Rhode Island," the defendant's product sales and deliveries into Rhode Island, and the defendant's advertising and marketing activities in Rhode Island).

solicit Rhode Island business."); *see also, e.g.*, *Rilley v. MoneyMutual, LLC*, 884 N.W.2d 321, 334 (Minn. 2016) ("[W]e hold that a purely national advertising campaign that does not target Minnesota specifically cannot support a finding of personal jurisdiction."). Topic 2 therefore should permit discovery only as to Defendants' marketing and promotion of fossil-fuel products *occurring in Rhode Island and targeted to Rhode Island consumers*; it should exclude marketing and promotional efforts outside of Rhode Island (including national marketing and promotional efforts).[6]

As for the third topic, Defendants maintain that alleged knowledge of impacts of global climate change is irrelevant to specific jurisdiction because knowledge is not an in-state contact. For the Court to exercise personal jurisdiction "consistent with due process," the nonresident defendants' "suit-related conduct must create a substantial connection with the forum State," and that connection "*must arise out of contacts* that the 'defendant *himself*' creates with the forum State." *Walden v. Fiore*, 571 U.S. 277, 284 (2014) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)) (first emphasis added). Defendants have argued that, accepting the contacts alleged with Rhode Island in the Complaint as true for purposes of the motion to dismiss for lack of personal jurisdiction, the Court cannot exercise personal jurisdiction as a matter of law and thus no jurisdictional discovery is necessary. The Court nonetheless concluded that "a more satisfactory showing of the facts is necessary." Decision at 9. But if the purpose of jurisdictional discovery is to establish a more satisfactory showing of minimum contacts, historical knowledge of climate change is not relevant. Indeed, "'[s]pecific' or 'case-linked' jurisdiction 'depends on . . . an '*activity or an occurrence that takes place in the forum State* and is therefore subject to the State's

[6] By "national marketing and promotional efforts," Defendants refer to, for example, television advertising shown during national programming or print advertising run in print publications with a national circulation. This would include, among other things, television advertising run during the Super Bowl or print advertising run in an edition of the New York Times or the Wall Street Journal, as opposed Rhode Island-targeted advertising placed in the Newport Daily News or the Providence Journal.

regulation.'" *Walden*, 571 U.S. at 283 n.6 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011)) (emphasis added). Defendants' alleged general knowledge of climate change impacts is not an activity or occurrence that takes place in Rhode Island. Indeed, in asking for jurisdictional discovery to determine whether Defendants had clear notice that they could be subject to jurisdiction in Rhode Island, Plaintiff premised that request on "in-state business" and "commercial activities," not general knowledge. *See* Pl's Mtn. to Compel at 22–23. On Topic 3, therefore, the Court should clarify that—at most—it is limited to knowledge of climate change impacts *specific* to Rhode Island, and excludes alleged knowledge of broader national and global impacts such as sea level rise and global warming.[7]

For the same reason that such broad allegations of "knowledge" are insufficient to establish specific personal jurisdiction, so, too, jurisdictional discovery into these generalized and non-Rhode-Island-specific subjects should be denied.

B. The Court Should Remove the Decision's References to Media Articles and Events That Are Outside the Record.

The Decision currently references two news articles (the "Articles") that feature speakers who target oil and gas companies such as the Defendants here, as the headlines themselves reveal: *Treaty Against Fossil Fuels Floated at UN Climate Summit*,[8] and *UN Chief, Gore, Others Give*

[7] Defendants filed this motion requesting that the Court set clear guidelines regarding the scope of the jurisdictional discovery permitted before the State serves discovery in an effort to narrow and, hopefully, reduce discovery disputes. Defendants nevertheless anticipate that they will have additional, more specific objections to the State's jurisdictional discovery requests once they are served, and expressly preserve all objections to such requests, including on the ground that the specific time periods sought in those requests are not relevant to the Court's exercise of personal jurisdiction, that the requests are overly burdensome, and that they are not reasonable and proportional to the needs for jurisdictional discovery under applicable law.

[8] Frank Jordans and Wanjohi Kabukuru, Associated Press (Nov. 8, 2022), https://apnews.com/article/united-nations-antonio-guterres-climate-and-environment-ea4c22fa9ab87d11cc23ff4ad0bb087f.

Heated Warnings in Climate Talks.[9] The Articles have nothing to do with establishing specific personal jurisdiction in Rhode Island—the only issue before the Court—and the assertions in the Articles are subject to myriad objections and strong counter-arguments that are nowhere presented.

Because these Articles are inadmissible extra-record materials that the Court reached out and gathered on its own, without notice to the parties, the Decision does not reflect consideration of the contrary evidence and argument that Defendants could have presented had they been given the chance. The references thus contravene Rhode Island's requirement that its judges act exclusively on the admissible evidence and arguments advanced by the parties in the context of each particular case, and not rely on media accounts and the positions of third parties advanced outside the courtroom, without the benefit of adversarial testing or the rules of evidence. The requirement that judges confine themselves to admissible evidence is particularly apt here, where the Court's statements could be read as going to liability issues on complex and highly contested factual issues that are not germane to the specific personal jurisdiction issue before the Court, based on claims that the State asserts are focused on Defendants' *speech*.

First, the Decision appears to recite as fact what are instead contested liability issues in the case, without any evidence having been introduced. The Decision states that Rhode Island has already borne "significant" climate change "consequences." *See* Decision at 9. But the existence, extent, and responsibility for any localized impact of climate change borne by Rhode Island are major disputed issues in this case, which will be addressed if it proceeds to the merits. The same is true of the question of what damages if any may be attributable to whom for such

[9] Seth Borenstein, Associated Press (Nov. 7, 2022), https://apnews.com/article/king-charles-iii-british-politics-europe-africa-asia-1f5ac31ef2a343b323f78fe7e3c4a9a1.

impacts. Eighty-seven percent of global CO_2 emissions come from activities outside of the United States.[10] And the State of Rhode Island itself has recognized *for decades* that an adequate supply of gasoline and diesel fuel at reasonable prices "throughout the state vitally affects the public health, welfare, and safety." R.I. Gen. Laws § 5-55-2; *see also, e.g.*, R.I. Gen. Laws § 42-81-2 (ensuring adequate supply of gasoline in Rhode Island). Rhode Island has also enacted *as its de facto climate change policy* the promotion of increased use of natural gas within the State—because of its proven and effective capacity to meet the State's needs for energy while enabling the displacement of coal-fired electrical plants.[11]

The analogy that the Decision draws between the "situat[ion of]" the State of Rhode Island and the "small countries" whose views the Articles discuss is thus neither obvious nor supported by the record in this case—where no evidence of any kind has been introduced on any "consequences Rhode Island has borne," much less on "consequences relat[ing] to sea-level rise, ising temperatures, and severe storms." Decision at 9. The Decision likewise enters disputed territory when it states that the Court may have to "oversee" the question: "[W]ho pays for the damage and loss this State has had to incur from climate change effects?" *Id*. Again, no party has presented any evidence scientifically tracing any damage or loss the State claims to anthropogenic climate change, much less showing that any Defendant bears responsibility for any such losses. Nor, for

[10] International CO_2 Emissions in 2022, International Energy Agency, at 3, 11 (Mar. 2023), https://iea.blob.core.windows.net/assets/3c8fa115-35c4-4474-b237-1b00424c8844/CO2Emissionsin2022.pdf (estimating U.S.-energy related emissions for 2022 to be 4.7 Gt versus 36.8 Gt of global emissions).

[11] For example, in 2004, then R.I. Governor Carcieri observed that "[f]ederal and state policy has encouraged the use of natural gas, because it's clean-burning." Opening Statement Of Chairman James M. Inhofe Hearing On The Impact Of Clean Air Regulations On Natural Gas Prices Subcommittee On Clean Air, Climate Change, And Nuclear Safety (Feb. 9, 2006), https://www.epw.senate.gov/public/index.cfm/2006/2/post-90cf5311-8fcf-489e-bb80-19e61e8ef005. It is thus not by chance that, in 2021, "natural gas fueled 87% of Rhode Island's electricity net generation, the largest share of any state." U.S. Energy Info. Agency, Rhode Island (Oct. 20, 2022), https://www.eia.gov/state/analysis.php?sid=RI. Nor was the State duped into doing so. According to the U.S. Energy Information Agency, between 2005 and 2019, the cumulative United States CO_2 emissions reductions from shifts in electricity generation from coal to natural gas totaled 3,351 MMmt—a reduction whose amount is equivalent to almost 65% of all energy-related CO_2 emissions in the U.S. for 2019.

that matter, has there been any evidence of "damage or loss" at all.

Second, the discussion of the Articles in the Decision conveys the appearance that the Court has prejudged the merits of the case. For example, by stating that "the Court is compelled by the fact that climate change was recently on the world stage at the recent UN climate change conference, where country leaders and advocates met to discuss damages caused by industrial greenhouse gas emissions to countries around the entire planet," the Court appears to rely on the statements made in the Articles as a substantive basis for its Decision. *See* Decision at 8–9. The Decision then states, without record evidence in support, that Rhode Island is "similarly situated" to small countries such as Kenya, Tanzania, and the Seychelles that seek reimbursement for costs incurred to address the effects of global climate change. *Id.* at 9. None of the parties has presented any evidence whatsoever that Rhode Island has borne or will bear any specific and discernible consequences from climate change, much less that Rhode Island is similarly situated to any developing nation with respect to these purported consequences.

Yet the Court granted jurisdictional discovery in apparent reliance on its research:

> 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. The United Nations Conference attendees were left with a similar question this Court might ultimately have to oversee: who pays for the damage and loss this State has had to incur from climate change effects? This Court sees no compelling argument that would prevent Plaintiff from engaging in limited jurisdictional discovery, which, if fruitful, could help address the very question those small nations in the United Nations Conference faced.

Id.[12] The Court did not provide notice that it would rely on this information and did not grant the

[12] This passage in the Decision mistakenly states that Defendants argued that jurisdiction is absent because the State suffered only de minimis injuries. *See* Decision at 9. But Defendants never advanced that argument. And the misunderstanding appears to be based on accepting language in the article to (mis)characterize Defendants' argument. Rather, Defendants contend that any in-state activities are insufficiently related to the State's claims, regardless of the magnitude of any injuries the State alleges it suffered or might suffer. The breadth of the State's claims reveals that there is no specific jurisdiction here. The complaint alleges that the State's injuries arise not out of Defendant's in-state conduct, but rather out of "global greenhouse gas pollution" caused by worldwide combustion of fossil fuels

parties an opportunity to be heard on the purported facts and positions presented in the Articles.

Similarly, the Decision's assertion that it was permitting discovery, "which, if fruitful, could help address the very question those small nations in the United Nations Conference faced" (*id.*), conveys the appearance that the Court has prejudged the merits of the case. Nothing in the Articles—much less the record—suggests those "small nations" were pursuing personal jurisdiction—rather than a liability "question" that the Articles treat as a foregone conclusion. The only question jurisdictional discovery can and should answer is whether the State's claims arise out of or relate to a given defendant's contacts with Rhode Island.

Third, the Decision's reliance on the Articles and associated references is inconsistent with the Judicial Code. Rule 2.9(C) of the Code of Judicial Conduct provides that "[a] judge *shall not investigate* facts in a matter independently, and *shall consider only* the evidence presented and any facts that may properly be judicially noticed" (emphasis added).[13] The prohibition against independent judicial research extends to internet research, such as that on which the Decision relies. *See* R.I. Code Rule 2.9(C), Comment 5 (the prohibition against judicial fact investigation "extends to information available in all mediums, including electronic"); ABA Formal Opinion 478 at 3.

---

produced and sold by Defendants and countless other sources of emissions. Compl. ¶¶ 1, 7, 19, 96–97. Rhode Island courts cannot assert personal jurisdiction over out-of-state defendants where the alleged source of the plaintiff's claims and injuries—here, global greenhouse gas emissions—does not arise out of and lacks a substantial connection with the defendants' in-state activities. *See* Defs.' Opp. at 10-17. Indeed, the State's claims and alleged injuries would be the same even if Rhode Island residents had never combusted fossil fuels. *See* Defs.' Memo at 17.

[13] Similarly, Rhode Island's rules of procedure and evidence are built on the fundamental premise that the judge and jury will consider only the evidence introduced by the parties, and will neither gather nor rely on facts that lie outside the record. R.I. Rule of Evid. 101 (noting application of rules to proceedings like this); R.I. Rule of Evid 103(c) ("In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means . . . ."); *Lussier v. Runyon*, 50 F.3d 1103, 1114 (1st Cir. 1995) ("Ours is a system that seeks the discovery of truth by means of a managed adversarial relationship between the parties. If we were to allow judges to bypass this system, even in the interest of furthering efficiency or promoting judicial economy, we would subvert this ultimate purpose. As Rule 201(b) teaches, judges may not defenestrate established evidentiary processes, thereby rendering inoperative the standard mechanisms of proof and scrutiny, if the evidence in question is at all vulnerable to reasonable dispute.").

The Judicial Code implements this fundamental concept by forbidding a judge from relying on facts from outside the record other than those properly subject to judicial notice, and then only after the parties are heard. Under Rule 201(b) of the Rhode Island Rules of Evidence, a court may take judicial notice of certain limited facts that *must be* "not subject to reasonable dispute." A fact that is not subject to reasonable dispute is one that "is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Id.* The facts the Court referenced do not meet these criteria, and the Court's inclusion of citations to these Articles in its Decision could be read to suggest that the Court accepts as true the alleged facts reported and endorses the views expressed in the Articles.

Fourth, reliance on extra-record media pieces is particularly fraught in climate change cases like this one. As is widely recognized, "Climate change has staked a place at the very center of this Nation's public discourse. Politicians, journalists, academics, and ordinary Americans discuss and debate various aspects of climate change daily—its causes, extent, urgency, consequences, and the appropriate policies for addressing it." *National Review v. Mann*, 140 S. Ct. 344, 348 (2010) (Alito, J., dissenting from denial of certiorari). Given the widespread public debate and widely differing opinions on these questions, media reports will often reflect the views of advocates with less than objective or incontestable views on the issues being debated.

Courts therefore warn that the judiciary should avoid "[r]eports even by 'mainstream media' …, as such reports may contain commentary or reaction favoring one point of view." *Church of Firstborn Kahal Hab'Cor v. Comm'r of Correction*, 99 Mass. App. Ct. 1116, at *5, *review denied*, 171 N.E.3d 709 (Mass. 2021) (citation omitted); *see also Adesso v. Long Island Veterinary Specialists*, 43 Misc. 3d 131(A), *2 (N.Y. Sup. Ct., App. Term 2014) (finding it improper for trial

court to conduct its own independent research and to refer to an article in support of its decision, which "depriv[ed] defendant of an opportunity to respond to the court's independent findings").[14]

* * *

Defendants raise these serious concerns reluctantly, but the important principles implicated demand it. Defendants respectfully ask the Court to address these concerns by removing the Decision's improper references to and reliance on the Articles and the Court's statements relating to Rhode Island's alleged damages, and correct the appearance of bias by confirming that it has not prejudged this case. Specifically, the Court should issue an amended Decision and remove:

- The final partial paragraph on page 8 that continues to page 9 and begins "Finally, this Court is compelled. . . ."
- The first full paragraph on page 9, which begins "Rhode Island, the smallest state in the country . . . ."
- The second full paragraph on page 9, which begins "Defendants here argue. . . ."

Rules 2.9(C) and 2.11 require this relief to address the appearance of partiality created by these statements in the Decision based on materials outside the record that could be misconstrued as "findings," prejudging both liability and damages, especially if quoted in isolation.

[14] In *Church of Firstborn*, the Massachusetts appellate court held that a judge abused her discretion in denying the defendants' motion to recuse after the judge re-tweeted an article involving parties on the eve of trial. 99 Mass. App. Ct. 1116, at *5. The Court cautioned "the act of retweeting generally suggests that the user endorses the views." *Id.* (citing Opinion No. 2016-09, Mass. Committee on Judicial Ethics (Nov. 22, 2016)). "[T]he article and the comments contained therein could easily be read, at least in part, as critical of the defendants and their treatment of inmates at MCI-Norfolk," which was one of the issues for trial. *Id.* Thus, despite the judge's "averment that she harbors no actual bias toward the defendants," an objective observer might reasonably question the judge's impartiality, and the judge should have recused herself. *Id.*

III. CONCLUSION

For these reasons, the Court should clarify the scope of discovery and remove the Decision's references to and reliance on the Articles.

Respectfully submitted,

Dated: June 7, 2023

By: */s/ Gerald J. Petros*

Gerald J. Petros (#2931)
Ryan M. Gainor (#9353)
HINCKLEY, ALLEN & SNYDER LLP
100 Westminster Street, Suite 1500
Providence, RI 02903
Telephone: (401) 274-2000
Facsimile: (401) 277-9600
Email: gpetros@hinckleyallen.com
Email: rgainor@hinckleyallen.com

Theodore J. Boutrous, Jr. (*pro hac vice*)
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
Telephone: (213) 229-7000
Facsimile: (213) 229-7520
Email: tboutrous@gibsondunn.com

Attorneys for Defendants CHEVRON CORPORATION and CHEVRON U.S.A. INC.

By: */s/ John A. Tarantino*

John A. Tarantino (#2586)
Patricia K. Rocha (#2793)
Nicole J. Benjamin (#7540)
ADLER POLLOCK & SHEEHAN P.C.
One Citizens Plaza, 8th Floor
Providence, RI 02903
Tel.: (401) 427-6262
Fax: (401) 351-4607
Email: jtarantino@apslaw.com
Email: procha@apslaw.com
Email: nbenjamin@apslaw.com

Nancy G. Milburn (admitted *pro hac vice*)
Diana E. Reiter (admitted *pro hac vice*)

ARNOLD & PORTER KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019-9710
Tel.: (212) 836-8383
Fax: (212) 715-1399
Email: nancy.milburn@arnoldporter.com
Email: diana.reiter@arnoldporter.com

John D. Lombardo (admitted *pro hac vice*)
ARNOLD & PORTER KAYE SCHOLER LLP
777 South Figueroa Street, 44th Floor
Los Angeles, CA 90017-5844
Tel.: (213) 243-4000
Fax: (213) 243-4199
Email: john.lombardo@arnoldporter.com

Jonathan W. Hughes (admitted pro hac vice)
ARNOLD & PORTER KAYE SCHOLER LLP
Three Embarcadero Center, 10th Floor
San Francisco, CA 94111-4024
Tel.: (415) 471-3100
Fax: (415) 471-3400
Email: jonathan.hughes@arnoldporter.com

Attorneys for Defendants BP PRODUCTS NORTH AMERICA INC., BP plc, and BP AMERICA INC.

By: */s/ Matthew T. Oliverio*
Matthew T. Oliverio (#3372)
OLIVERIO & MARCACCIO LLP
30 Romano Vineyard Way, Suite 109
North Kingstown, RI 02852
Tel.: (401) 861-2900
Fax: (401) 861-2922
Email: mto@om-rilaw.com

Theodore V. Wells, Jr. (*pro hac vice*)
Daniel J. Toal (*pro hac vice*)
Yahonnes Cleary (pro hac vice)
Caitlin E. Grusauskas (pro hac vice)
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
Tel.: (212) 373-3000
Fax: (212) 757-3990

Email: twells@paulweiss.com
Email: dtoal@paulweiss.com
Email: ycleary@paulweiss.com
Email: cgrusauskas@paulweiss.com

Attorneys for Defendant EXXON MOBIL CORP.

By: */s/ Jeffrey S. Brenner*

Jeffrey S. Brenner (#04369)
NIXON PEABODY LLP
One Citizens Plaza, Suite 500
Providence, RI 02903
Tel.: (401) 454-1042
Fax: (866) 947-0883
Email: jbrenner@nixonpeabody.com

David C. Frederick (*pro hac vice*)
Daniel S. Severson (*pro hac vice*)
Grace W. Knofczynski (*pro hac vice*)
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
Tel.: (202) 326-7900
Fax: (202) 326-7999
Email: dfrederick@kellogghansen.com
Email: dseverson@kellogghansen.com
Email: gknofczynski@kellogghansen.com

Attorneys for Defendants SHELL PLC (f/k/a ROYAL DUTCH SHELL PLC); SHELL OIL PRODUCTS COMPANY LLC

By: */s/ Stephen J. MacGillivray*

John E. Bulman, Esq. (#3147)
Stephen J. MacGillivray, Esq. (#5416)
PIERCE ATWOOD LLP
One Financial Plaza, 26th Floor
Providence, RI 02903
Tel.: 401-588-5113
Fax: 401-588-5166
Email: jbulman@pierceatwood.com
Email: smacgillivray@pierceatwood.com

Nathan P. Eimer, Esq. (*pro hac vice*)
Pamela R. Hanebutt, Esq. (*pro hac vice*)

Lisa S. Meyer, Esq. (*pro hac vice*)
EIMER STAHL LLP
224 South Michigan Avenue, Suite 1100
Chicago, IL 60604
Tel.: (312) 660-7600
Fax: (312) 692-1718
Email: neimer@EimerStahl.com
Email: phanebutt@EimerStahl.com
Email: lmeyer@EimerStahl.com

Robert E. Dunn, Esq. (*pro hac vice*)
EIMER STAHL LLP
99 S. Almaden Blvd., Suite 642
San Jose, CA 95113
Tel.: (408) 889-1690
Fax: (312) 692-1718
Email: rdunn@eimerstahl.com

Attorneys for Defendant CITGO PETROLEUM CORP.

By: */s/ Stephen M. Prignano*
Stephen M. Prignano (3649)
MCINTYRE TATE LLP
321 South Main Street, Suite 400
Providence, RI 02903
Tel.: (401) 351-7700
Email: sprignano@mcintyretate.com

Robert Reznick (*pro hac vice*)
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street NW
Washington, DC 20005
Tel.: (202) 339-8400
Fax: (202) 339-8500
Email: rreznick@orrick.com

James Stengel (*pro hac vice*)
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019-6142
Tel.: (212) 506-5000
Fax: (212) 506-5151
Email: jstengel@orrick.com

Catherine Y. Lui (*pro hac vice pending*)

ORRICK, HERRINGTON & SUTCLIFFE, LLP
405 Howard Street
San Francisco, CA 94105-2669
Tel.: (415) 773-5571
Fax: (415) 773-5759
Email: clui@orrick.com

Attorneys for Defendants MARATHON OIL CORPORATION and MARATHON OIL COMPANY

By: */s/ Paul M. Kessimian*
Paul M. Kessimian (#7127)
Christian R. Jenner (#7731)
PARTRIDGE SNOW & HAHN LLP
40 Westminster Street, Suite 1100
Providence, RI 02903
PHONE: (401) 861-8200
FAX: (401) 861-8210
Email: pkessimian@psh.com
Email: cjenner@psh.com

Jameson R. Jones (*pro hac vice*)
Daniel R. Brody
BARTLIT BECK LLP
1801 Wewatta Street, Suite 1200
Denver, CO 80202
Tel.: (303) 592-3100
Fax: (303) 592-3140
Email: jameson.jones@bartlit-beck.com
Email: dan.brody@bartlit-beck.com

Steven M. Bauer (*pro hac vice*)
Margaret A. Tough (*pro hac vice*)
LATHAM & WATKINS LLP
505 Montgomery Street, Suite 2000
San Francisco, CA 94111-6538
Tel.: (415) 391-0600
Fax: (415) 395-8095
Email: steven.bauer@lw.com
Email: margaret.tough@lw.com

Attorneys for Defendants CONOCOPHILLIPS and CONOCOPHILLIPS COMPANY

By: */s/ Robert G. Flanders, Jr.*
Robert G. Flanders, Jr. (#1785)

Timothy K. Baldwin (#7889)
WHELAN, CORRENTE, FLANDERS, KINDER & SIKET LLP
100 Westminster Street, Suite 710
Providence, RI 02903
Tel.: (401) 270-4500
Fax: (401) 270-3760
Email: rflanders@whelancorrente.com
Email: tbaldwin@whelancorrente.com

Steven M. Bauer (*pro hac vice*)
Margaret A. Tough (*pro hac vice*)
LATHAM & WATKINS LLP
505 Montgomery Street, Suite 2000
San Francisco, CA 94111-6538
Tel.: (415) 391-0600
Fax: (415) 395-8095
Email: steven.bauer@lw.com
Email: margaret.tough@lw.com

Attorneys for Defendant PHILLIPS 66

By: /s/ Jason C. Preciphs
Jason C. Preciphs (#6727)
ROBERTS, CARROLL, FELDSTEIN & PEIRCE, INC.
10 Weybosset Street, Suite 800
Providence, RI 02903-2808
Telephone: (401) 521-7000
Facsimile: (401) 521-1328
Email: jpreciphs@rcfp.com

J. Scott Janoe (pro hac vice)
BAKER BOTTS L.L.P.
910 Louisiana Street, Suite 3200
Houston, Texas 77002-4995
Telephone: (713) 229-1553
Facsimile: (713) 229-7953
Email: scott.janoe@bakerbotts.com

Megan Berge (pro hac vice)
Thomas C. Jackson (pro hac vice)
BAKER BOTTS L.L.P.
700 K St. NW
Washington, D.C. 20001-5692
Telephone: (202) 639-1308

Facsimile: (202) 639-1171
Email: megan.berge@bakerbotts.com
Email: thomas.jackson@baketbotts.com

Attorneys for Defendant HESS CORP.

By: */s/ Jeffrey B. Pine*
Jeffrey B. Pine (SB 2278)
Patrick C. Lynch (SB 4867)
LYNCH & PINE
One Park Row, 5th Floor
Providence, RI 02903
Tel.: (401) 274-3306
Fax: (401) 274-3326
Email: JPine@lynchpine.com
Email: Plynch@lynchpine.com

Shannon S. Broome (*pro hac vice*)
HUNTON ANDREWS KURTH LLP
50 California Street
San Francisco, CA 94111
Tel.: (415) 975-3718
Fax: (415) 975-3701
Email: SBroome@HuntonAK.com

Shawn Patrick Regan (*pro hac vice*)
HUNTON ANDREWS KURTH LLP
200 Park Avenue
New York, NY 10166
Tel.: (212) 309-1046
Fax: (212) 309-1100
Email: SRegan@HuntonAK.com

Ann Marie Mortimer (*pro hac vice*)
HUNTON ANDREWS KURTH LLP
550 South Hope Street, Suite 2000
Los Angeles, CA 90071
Tel.: (213) 532-2103
Fax: (213) 312-4752
Email: AMortimer@HuntonAK.com

Attorneys for Defendants MARATHON PETROLEUM CORP., MARATHON PETROLEUM COMPANY, LP, and SPEEDWAY, LLC

By: */s/ Jeffrey S. Brenner*

Jeffrey S. Brenner
NIXON PEABODY LLP
One Citizens Plaza, Suite 500
Providence, RI 02903-1345
Tel.: (401) 454-1042
Email: jbrenner@nixonpeabody.com

Tracie J. Renfroe (pro hac vice)
Oliver Peter Thoma (pro hac vice)
KING & SPALDING LLP
1100 Louisiana Street, Suite 4100
Houston, TX 77002
Telephone:(713)751-3200
Facsimile:(713)751-3290
E-mail: trenfroe@kslaw.com
E-mail: othoma@kslaw.com

Attorneys for Defendant MOTIVA ENTERPRISES, LLC

CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2023, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's Electronic Filing System.

/s/ Ryan M. Gainor

106351460.6