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PROTECTING PEOPLE AND THE PLANET

January 31, 2020

Via ECF

Molly C. Dwyer
Clerk of Court
U.S. Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: *City of Oakland, et al. v. BP P.L.C., et al.*, No. 18-16663
Oral Argument Scheduled for Feb. 5, 2020 (Ikuta, Christen, Lee, J.J.)

Dear Ms. Dwyer,

We respond to Defendant-Appellee's letter citing *Juliana v. United States*, 2020 WL 254149 (9th Cir. Jan. 17, 2020).

Juliana concerned Article III redressability, and whether federal courts could adequately "supervise[] or enforce[]" the plaintiffs' requested *prospective* remedy –"an order requiring the [federal] government to develop a plan to 'phase out fossil fuel emissions and draw down excess atmospheric CO_2,'" based on plaintiffs' asserted constitutional right to a "climate system capable of sustaining human life." *Id. at* *2, 9.

This case, in sharp contrast, targets private actors with a single, limited claim under long-established California representative public nuisance law, and seeks the only remedy permitted under Cal. Code Civ. Proc. §731—equitable abatement of *localized* harms.

The People's complaints detail how each defendant "assisted in the creation" of a public nuisance, thus triggering statutory liability, by knowingly disseminating false information and deliberately concealing material facts concerning the destructive public impacts that would inevitably result from expanded use of their products. *See, e.g.*, ER89-106 ¶¶92-123; ER 159-74 ¶¶92-123; *People v. ConAgra Grocery Prod. Co.*, 17 Cal.App.5th 51, 83-84, 91-94 (2017) (public-nuisance liability rested upon defendants' wrongful promotional conduct, not mere manufacture and distribution); *Birke v. Oakwood Worldwide*, 169 Cal.App.4th 1540, 1548, 1552 (2009) (secondhand smoke in common areas of condominium complex is public nuisance; abatement liability rests upon owner's conduct that encouraged smoking). There is no "uniquely federal interest" in such claims, let alone in the defendants' acts of wrongful promotion.

Juliana's generalized references to federal interests—in a case alleging that the federal government had a constitutional obligation to formulate a forward-looking zero-emissions nationwide plan–have no application to the inquiry here, which asks whether the People's state law representative public nuisance claims against private actors are completely preempted by any non-displaced federal common law or directly conflict with any specifically identifiable, substantial federal interest. *See Virginia Uranium, Inc. v. Warren*, 139 S.Ct.1894, 1901 (2019) (plurality); *Provincial Government of Marinduque v. Placer Dome, Inc.*, 582 F.3d 1083, 1091 (9th

Cir. 2009) ("general invocation[s] of international law or foreign relations" are insufficient to establish a federal question for jurisdictional purposes).

Respectfully submitted,

/s/ Victor M. Sher
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cc: All Counsel of Record (via ECF)