

No. 18-16663

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**United States Court of Appeals  
for the Ninth Circuit**

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CITY OF OAKLAND; and  
CITY AND COUNTY OF SAN FRANCISCO,  
*Plaintiffs-Appellants,*

v.

B.P. P.L.C.; CHEVRON CORPORATION; CONOCOPHILLIPS;  
EXXON MOBIL CORPORATION; ROYAL DUTCH SHELL  
PLC; and DOES, 1 through 10,

*Defendants-Appellees.*

On Appeal from The United States District Court, Northern District of California  
Case Nos. 3:17-cv-06011-WHA, 3:17-cv-06012-WHA (Hon. William H. Alsup)

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**BRIEF OF AMICI CURIAE SENATORS SHELDON WHITEHOUSE,  
DIANNE FEINSTEIN, RICHARD BLUMENTHAL, MAZIE K. HIRONO,  
EDWARD J. MARKEY, AND KAMALA D. HARRIS  
IN SUPPORT OF APPELLEES AND REVERSAL**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1, amici curiae certify that they are individuals and not corporations.

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## **AMICI CURIAE’S IDENTITY, INTEREST, AND AUTHORITY TO FILE**

**Senator Sheldon Whitehouse** represents the State of Rhode Island in the United States Senate. First elected to the Senate in 2006, Senator Whitehouse has actively sought comprehensive solutions to address climate change. He is a member of the Senate’s Environment and Public Works Committee and author of the American Opportunity Carbon Fee Act, which would establish a fee on carbon emissions.

Senator Whitehouse has closely observed the influence of corporate lobbying and election spending in Congress, as well as how the fossil fuel industry has used its political and electioneering influence to impede necessary steps to address climate change. He is the author of *Captured: The Corporate Infiltration of American Democracy*.

**Senator Dianne Feinstein** has represented the State of California in the United States Senate since 1992. Prior to her time in the Senate, Senator Feinstein served the City of San Francisco for 18 years, first as a member of its Board of Supervisors and then as its Mayor. Senator Feinstein has long championed policies to address climate change.

**Senator Richard Blumenthal** represents the State of Connecticut in the United States Senate. First elected to the Senate in 2010, and previously Attorney General of Connecticut, Senator Blumenthal has spent much of his career fighting

for the environment and public health. He has co-chaired the Senate Fuel Cell and Hydrogen Caucus and has introduced annual resolutions recognizing National Hydrogen and Fuel Cell Day to bring awareness to the fuel cell industry, while also advocating for increased investment in fuel cell technology.

**Senator Mazie K. Hirono** has represented the State of Hawaii in the United States Senate since 2013. From 2007 to 2013, she served as a member of the United States House of Representatives for Hawaii's 2nd Congressional District. She is a member of the Senate Energy and Natural Resources Committee and the Senate Armed Services Committee and has an interest in reducing and responding to the impact of climate change on the United States.

**Senator Edward J. Markey** represents the Commonwealth of Massachusetts in the United States Senate. He is a member of the Environment and Public Works, the Commerce, Science, and Transportation, and the Foreign Relations committees. He also serves as Chair of the Senate Climate Change Task Force. Senator Markey's more than 40 years of legislative experience includes co-authorship with Congressman Henry Waxman of the only comprehensive climate legislation ever to pass a chamber of Congress. It would have cut national global warming emissions by 17 percent by 2020 and 80 percent by 2050. He was also the principal House author of a 1987 energy conservation act and a 2007 law to increase national fuel economy standards, which reduced consumer costs and

greenhouse gas emissions. Senator Markey is a sponsor of the Green New Deal resolution, which sets out the principles to achieve a just transition to a net-zero emissions economy.

**Senator Kamala D. Harris** represents the State of California in the United States Senate. Since 2017, Senator Harris has fought the rollback of environmental and climate change regulations. She has also led a resolution supporting federal clean vehicle emissions standards, secured a federal report on the impact of climate change on the nation's superfund sites, and introduced legislation to help communities invest in green infrastructure to mitigate the impacts of sea level rise. Previously, Senator Harris served as the Attorney General of California from 2011 to 2017, where she fought to hold polluters accountable and defend key environmental laws. She was the District Attorney of San Francisco from 2004 to 2011, where she established San Francisco's first Environmental Justice Unit to tackle environmental crimes that disproportionately affect the city's poorest communities.<sup>1</sup>

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<sup>1</sup> All parties have consented to the filing of amicus briefs. No party's counsel authored the brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person other than Senator Whitehouse or his counsel contributed money that was intended to fund preparing or submitting the brief.

## SUMMARY OF ARGUMENT

Defendants ask this Court to affirm the District Court because they assert that any assignment of liability or the injunctive relief sought in this case should be exclusively pleaded to Congress and the Executive Branch, rather than to a court of law. Yet, determinations of liability and remedy fall squarely within the realm of the judiciary, being the stuff of judicial, rather than political, examination. The errant nature of the Defendants' exclusivity argument becomes even more acute when examined in the context of these same defendants' decades-long efforts to stifle action by Congress; and to pervert independent scientific consideration by those two branches of government by: 1) stifling action by Congress; 2) preventing the EPA from promulgating fact-based regulations reliant upon a truly accurate assessment of costs and benefits; and (3) undermining the United States' political and moral authority in international negotiations. When viewed from the perspective of Defendants' actions in the halls of Congress and the Executive, it becomes apparent that Defendants' real position is that no one should address climate change, the cataclysmic effects it is already having, and particularly the real injuries that Defendants have proximately caused.

As United States Senators with decades of collective experience in Congress, we have watched from the front row the efforts of these Defendants, directly, through trade associations, and through other groups they fund, to block

climate action in the other coequal branches. Crediting Defendants' argument would effectively reward their multi-million dollar campaign of deception and obstruction against progress on climate change. In this brief, we will summarize the various means by which Defendants have squelched climate action in Congress, at executive agencies, and at international fora. Using its broad equitable authority, this Court should consider Defendants' claims about separation of powers with a clear eye to the pretextual and disingenuous nature of their argument, and recognize it as a ruse to avoid responsibility for harms they have caused.

Nor should this Court be deterred from sending this case back to the District Court for adjudication. What is presented is not some abstract political question that is both nonjusticiable and committed to the other branches of government. It is, instead, a classic case or controversy with parties who have both standing to bring it and injury in fact. Defendants long have engaged in successful efforts to block climate action in the other coequal branches. They now seek to do the same before the judiciary. This Court should exercise its jurisdiction over the instant case to provide Plaintiffs with an opportunity for the justice that is sorely needed.

## **ARGUMENT**

### **I. THE LOWER COURT'S DECISION WITH RESPECT TO THE SEPARATION OF POWERS DOCTRINE RELIED ON INCOMPLETE INFORMATION AS TO DEFENDANTS' OWN**

**EFFORTS TO PREVENT POLICIES THAT ADDRESS CLIMATE CHANGE.**

In its June 25, 2018, order, the District Court dismissed this matter based on its conclusion that:

The problem [of global warming] deserves a solution on a more vast scale than can be supplied by a district judge or jury in a public nuisance case. While it remains true that our federal courts have authority to fashion common law remedies for claims based on global warming, courts must also respect and defer to the other co-equal branches of government when the problem at hand clearly deserves a solution best addressed by those branches.<sup>2</sup>

In stating this, the District Court relied at least in part on Defendants' contentions that "[m]atters of global concern, such as rising seas allegedly caused by worldwide emissions, are 'committed by the Constitution to the political departments of the Federal Government' (citation omitted),"<sup>3</sup> that "[f]or several decades, Congress has engaged in robust debate about the potential harms of global warming and the economic and political consequences of regulating greenhouse gases," and that "EPA has similarly balanced the costs and benefits of regulating greenhouse gases."<sup>4</sup>

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<sup>2</sup> *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1029 (N.D. Cal. 2018).

<sup>3</sup> Doc. 225, Defendants' Motion to Dismiss First Amended Complaints; Memorandum of Points and Authorities, at 23-24, Case No. 3:17-cv-6011-WHA (N.D. Cal.).

<sup>4</sup> *Id.* at 24.



Defendants’ Pollyannaish paean to our separated powers ignores both the collective effect of the millions of dollars these same Defendants have spent to ensure political gridlock and international inaction, and the “virtually unflagging obligation of the federal courts to exercise the jurisdiction given them.”<sup>5</sup>

Defendants’ extensive, decades-long opposition to congressional, executive, and international efforts to limit their carbon emissions (which they concede<sup>6</sup> are responsible for climate change) provides vital context for Defendants’ separation of powers argument. Following their argument would effectively reward their multi-million dollar campaign of deception and obstruction. Principles of equity counsel against such a perverse outcome.

In cases where the public interest is involved—as it most certainly is in the instant case—the U.S. Supreme Court has held that a federal court’s equitable powers are “broader” and “more flexible” than when only a private interest is at stake.<sup>7</sup> “Courts of equity may, and frequently do, go much farther” to give “relief

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<sup>5</sup> *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

<sup>6</sup> See, e.g., Chevron’s slides for the “climate change tutorial” ordered by Judge Alsup, available at [http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180321\\_docket-317-cv-06011\\_notice-3.pdf](http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180321_docket-317-cv-06011_notice-3.pdf).

<sup>7</sup> *Kansas v. Nebraska*, 135 S.Ct. 1042, 1053 (2015) (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)).

in furtherance of the public interest than they are accustomed to go when only private interests are involved.”<sup>8</sup> In exercising their jurisdiction, courts of equity may “mould each decree to the necessities of the particular case” and “accord full justice” to all parties.<sup>9</sup>

Given that this Court possesses these “broad” and “flexible” equitable powers, an outcome that accepts Defendants’ separation of powers argument at face value and thereby rewards their campaign to prevent Congress, the executive agencies, and international fora from addressing climate change, would not be consistent with the public interest or the full justice Plaintiffs deserve. We therefore urge the Court to avail itself of the flexibility that equity affords it, to mold its decision to the necessity of the instant case,<sup>10</sup> and, despite the barrier of money and influence that Defendants have erected to block climate action in the other coequal branches, to offer Plaintiffs an opportunity for the justice that is sorely needed.

**A. Defendants Have Prodigiously Funded Efforts to Prevent Congress from Acting to Address Carbon Pollution.**

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<sup>8</sup> *Virginian R. Co. v. Railway Employees*, 300 U.S. 515, 552 (1937).

<sup>9</sup> *Porter*, 328 U.S. at 398.

<sup>10</sup> The limits of judicial authority inherent in our constitutional system may well inform the remedies that may be imposed, but it is premature at this stage to abandon the field to the political branches.

In the mid to late 1980s, Congress began to hold hearings on climate change. Almost two decades later, Congress seriously considered legislation to reduce carbon emissions.<sup>11</sup> In 2003<sup>12</sup>, and again in 2005,<sup>13</sup> and 2007,<sup>14</sup> Senators John McCain (R-AZ) and Joe Lieberman (D-CT) introduced legislation to cap carbon emissions. Each of these bills enjoyed bipartisan support, as did other measures circulating in Congress.

In 2009, prospects for positive climate action brightened with a new president in the White House and his party in control of both Houses of Congress. Several bills to limit carbon emissions were introduced in the House of Representatives and the Senate, and one of them, H.R. 2454, known as Waxman-Markey, passed the House but advanced no further.<sup>15</sup> Climate legislation

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<sup>11</sup> A large part of this took place at the same time that at least some of the Defendants began funding groups to sow doubt on climate change; this was particularly true after Congress held its first hearings on the subject. This campaign will be discussed in more detail in section I.A. of this brief.

<sup>12</sup> S.139 “Climate Stewardship Act of 2003,” 108<sup>th</sup> Cong., available at <https://www.edf.org/climate/clean-power-plan-case-resources>.

<sup>13</sup> S.1151 “Climate Stewardship and Innovation Act of 2005,” 109<sup>th</sup> Cong., available at <https://www.congress.gov/109/bills/s1151/BILLS-109s1151is.pdf>.

<sup>14</sup> S.280 “Climate Stewardship and Innovation Act of 2007,” 110<sup>th</sup> Cong., available at <https://www.congress.gov/110/bills/s280/BILLS-110s280is.pdf>.

<sup>15</sup> In addition to Waxman-Markey in the House, these bills included three primary bills in the Senate to limit carbon emissions: S.1733, the Clean Energy Jobs and

ultimately died in the Senate in 2010, the same year that *Citizens United v. FEC*<sup>16</sup> was decided, allowing unlimited political spending by outside groups. The power of unlimited and anonymous political spending, as well as threats and promises of such spending, were brought to bear on the Republican Party in Congress with the result that bipartisanship on serious climate measures ended. Since 2010 and the fundamental changes wrought by *Citizens United*, Congress has not seriously considered legislation to comprehensively reduce carbon emissions. During this time, however, Congress has voted on legislation to roll back the regulation of discrete sources of particular greenhouse gases.

1. *Defendants bankrolled lobbying efforts to block climate legislation.*

a. *Lobbying by Defendants.*

The fossil fuel industry, including these Defendants, directly and indirectly employed an army of lobbyists to prevent climate change legislation from passing Congress.

During 2009 and 2010, the years when cap and trade legislation was being actively considered in Congress, lobbying spending by all five Defendants soared.

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American Power Act, S.1462; the American Clean Energy Leadership Act of 2009; and S.2877, the Carbon Limits and Energy for America's Renewal (CLEAR) Act.

<sup>16</sup> 558 U.S. 310 (2010).

BP's federal lobbying jumped from \$10.45 million in 2008 to \$16 million in 2009, the most it ever spent on federal lobbying during a single year.<sup>17</sup> Chevron's federal lobbying jumped from \$13 million in 2008 to \$21 million in 2009, also a record.<sup>18</sup> ConocoPhillips' federal lobbying spending more than doubled from \$8.5 million in 2008 to more than \$18 million in 2009.<sup>19</sup> ExxonMobil, ever at the vanguard of efforts to kill climate legislation, seemed to anticipate the results of the 2008 elections and increased its lobbying to \$29 million in 2008 from \$17 million in 2007; it then kept up the onslaught in 2009, spending more than \$27 million on federal lobbying.<sup>20</sup> Shell more than doubled its lobbying spending from \$4.5 million in 2008 to \$10.2 million in 2009.<sup>21</sup>

Companies are not required to disclose how much money they spend lobbying on individual pieces of legislation, but they are required to identify which

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<sup>17</sup> BP Lobbying Totals 1998 – 2018, Center for Responsive Politics, available at <https://www.opensecrets.org/orgs/lobby.php?id=D000000091>.

<sup>18</sup> Chevron Lobbying Totals 1998 – 2018, Center for Responsive Politics, available at <https://www.opensecrets.org/orgs/lobby.php?id=D000000015>.

<sup>19</sup> ConocoPhillips Lobbying Totals 1998 – 2018, Center for Responsive Politics, available at <https://www.opensecrets.org/orgs/lobby.php?id=D000000303>.

<sup>20</sup> ExxonMobil Lobbying Totals 1998 – 2018, Center for Responsive Politics, available at <https://www.opensecrets.org/orgs/lobby.php?id=D000000129>.

<sup>21</sup> Royal Dutch Shell Lobbying Totals 1998 – 2018, Center for Responsive Politics, available at <https://www.opensecrets.org/lobby/clientsum.php?id=D000042525>.

bills they are lobbying on. The various climate bills considered in 2009 and 2010 were *a* top, if not *the* top, lobbying priority for Defendants based on mentions in lobbying disclosure reports. Waxman-Markey was the number one bill BP lobbied on in 2009 and 2010, while S.1733 was third in 2009 and second in 2010, and S.1462 was fifth in 2009 and third in 2010.<sup>22</sup> Waxman-Markey was the number one bill Chevron lobbied on in 2009 and number two in 2010; S.1462 was number three in 2010.<sup>23</sup> Waxman-Markey was the number one bill ConocoPhillips lobbied on in 2009, while S.1733 was number three in 2010.<sup>24</sup> Waxman-Markey was the number one bill Exxon Mobil lobbied on in 2009 and 2010, S.1462 was third in 2009 and second in 2010, S.1733 was fourth in 2009 and third in 2010, and S.2877 was fourth in 2010.<sup>25</sup> Waxman-Markey was tied at fourth for Shell in 2009; Shell

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<sup>22</sup> BP Bills lobbied 2009, Center for Responsive Politics, available at <https://www.opensecrets.org/lobby/clientbills.php?id=D000000091&year=2009>, and BP Bills lobbied 2010, Center for Responsive Politics, available at <https://www.opensecrets.org/lobby/clientbills.php?id=D000000091&year=2010>.

<sup>23</sup> Chevron Bills lobbied 2009, Center for Responsive Politics, available at <https://www.opensecrets.org/lobby/clientbills.php?id=D000000015&year=2009>, and Chevron Bills lobbied 2010, Center for Responsive Politics, available at <https://www.opensecrets.org/lobby/clientbills.php?id=D000000015&year=2010>.

<sup>24</sup> ConocoPhillips Bills lobbied 2009, Center for Responsive Politics, available at <https://www.opensecrets.org/lobby/clientbills.php?id=D000000303&year=2009>, and ConocoPhillips Bills lobbied 2010, Center for Responsive Politics, available at <https://www.opensecrets.org/lobby/clientbills.php?id=D000000303&year=2010>.

<sup>25</sup> ExxonMobil Bills lobbied 2009, Center for Responsive Politics, available at <https://www.opensecrets.org/lobby/clientbills.php?id=D000000129&year=2009>,

also lobbied on S.1733, and S.1462.<sup>26</sup> We can represent without hesitation that Defendants did not lobby in favor of any of this legislation.

While all five Defendants reduced their annual lobbying spending after successfully killing cap and trade legislation in 2009 and 2010, they continued to spend millions annually lobbying the federal government. What's more, their average annual lobbying spending post-2010 was higher than their average lobbying spending before 2009.

Since 1998, BP has spent a total of almost \$124 million lobbying the federal government.<sup>27</sup> Chevron has spent a total of \$167 million.<sup>28</sup> ConocoPhillips has spent almost \$111 million.<sup>29</sup> ExxonMobil has spent almost \$255 million, and is

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and ExxonMobil Bills lobbied 2010, Center for Responsive Politics, available at <https://www.opensecrets.org/lobby/clientbills.php?id=D000000129&year=2010>.

<sup>26</sup> Royal Dutch Shell Bills lobbied 2009, Center for Responsive Politics, available at <https://www.opensecrets.org/lobby/clientbills.php?id=D000042525&year=2009>, and Royal Dutch Shell Bills lobbied 2010, Center for Responsive Politics, available at <https://www.opensecrets.org/lobby/clientbills.php?id=D000042525&year=2010>.

<sup>27</sup> BP Lobbying Totals 1998 – 2018, Center for Responsive Politics, available at <https://www.opensecrets.org/orgs/lobby.php?id=D000000091>.

<sup>28</sup> Chevron Lobbying Totals 1998 – 2018, Center for Responsive Politics, available at <https://www.opensecrets.org/orgs/lobby.php?id=D000000015>.

<sup>29</sup> ConocoPhillips Lobbying Totals 1998 – 2018, Center for Responsive Politics, available at <https://www.opensecrets.org/orgs/lobby.php?id=D000000303>.

the 13<sup>th</sup> largest total spender.<sup>30</sup> Shell has spent more than \$143 million.<sup>31</sup>

Collectively, the five Defendants have spent \$800 million lobbying the federal government over the last two decades, averaging almost \$40 million a year.

The not-for-profit organization InfluenceMap has devised a methodology to estimate the percentage of overall lobbying spending a company or trade association spends on activities designed to obstruct climate action.<sup>32</sup> This methodology multiplies an entity's gross spending on influencing activities by the percentage of its public facing activities (press releases, position papers, etc.) that are obstructive of climate action.<sup>33</sup> When this methodology was used to examine ExxonMobil's and Shell's anti-climate influencing activities, it revealed that ExxonMobil likely spent at least \$27 million obstructing climate action in 2015<sup>34</sup>

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<sup>30</sup> Top Spenders, Center for Responsive Politics, available at <https://www.opensecrets.org/lobby/top.php?showYear=a&indexType=s>.

<sup>31</sup> Royal Dutch Shell Lobbying Totals 1998 – 2018, Center for Responsive Politics, available at <https://www.opensecrets.org/lobby/clientsum.php?id=D000042525>.

<sup>32</sup> “How much big oil spends on obstructive climate lobbying,” InfluenceMap (Apr. 2016), available at [https://influencemap.org/site/data/000/173/Lobby\\_Spend\\_Report\\_March\\_2016.pdf](https://influencemap.org/site/data/000/173/Lobby_Spend_Report_March_2016.pdf) [hereinafter, “InfluenceMap (Apr. 2016)”].

<sup>33</sup> *Id.* at 7-8.

<sup>34</sup> *Id.* at 14-15.



alone while Shell spent \$22 million.<sup>35</sup> (In our view, this methodology likely underestimates the amount corporations and trade associations spend obstructing climate action, as given the overwhelming scientific consensus around climate change and the strong public support for climate action, trade associations and particularly corporations are likely attempting to hide many of their anti-climate efforts. Indeed, various dark-money channels that Defendants support give them the means to hide their role.<sup>36</sup>).

*b. Lobbying through trade associations and front groups.*

Defendants also use trade associations and other front groups to lobby Congress. The biggest of these, the U.S. Chamber of Commerce (the Chamber), has spent more than \$1.5 billion lobbying the federal government since 1998, making it by far the largest lobbying spender.<sup>37</sup> Although the Chamber does not disclose its members, Defendants Chevron and ConocoPhillips are current members according to their corporate disclosures, and Defendant ExxonMobil

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<sup>35</sup> *Id.* at 16-17.

<sup>36</sup> *See generally* Robert Brulle, “Institutionalizing delay: foundation funding and the creation of U.S. climate change counter-movement organizations,” *Climatic Change* (Dec. 2013), available at <https://drexel.edu/now/archive/2013/December/Climate-Change/>.

<sup>37</sup> Top Spenders, Center for Responsive Politics, available at <https://www.opensecrets.org/lobby/top.php?showYear=a&indexType=s>.

discloses contributions to the Chamber's foundation. The National Association of Manufacturers (NAM) has spent more than \$163 million lobbying the federal government since 1998.<sup>38</sup> Disclosures by NAM indicate that Defendants BP, ConocoPhillips, ExxonMobil, and Shell are all current members. The American Petroleum Institute (API), the oil and gas industry's largest trade association of which all five Defendants are members, has spent more than \$112 million lobbying the federal government since 1998.<sup>39</sup>

InfluenceMap concluded that Defendants ExxonMobil and Shell have significant influence on climate policy via their numerous and deep relationships with anti-climate trade associations.<sup>40</sup> This same report found NAM to be the most influential trade association in obstructing climate action, the Chamber to be the second most obstructive, and API to be the fifth most obstructive.<sup>41</sup>

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<sup>38</sup> National Assn of Manufacturers Summary, Center for Responsive Politics, available at <https://www.opensecrets.org/orgs/summary.php?id=D000054156&cycle=A>.

<sup>39</sup> American Petroleum Institute Summary, Center for Responsive Politics, available at <https://www.opensecrets.org/orgs/summary.php?id=D000031493&cycle=A>.

<sup>40</sup> "Trade Associations and their Climate Policy Footprint," InfluenceMap (December 2017), available at [file:///C:/Users/dd86294/Downloads/Trade\\_Association\\_Report\\_Dec\\_17.pdf](file:///C:/Users/dd86294/Downloads/Trade_Association_Report_Dec_17.pdf).

<sup>41</sup> *Id.* at 8-9.

InfluenceMap also concluded that API spent a whopping \$64 million obstructing climate action in 2015 alone.<sup>42</sup>

In addition to their membership in anti-climate trade associations, Defendants have also funded an array of front groups to oppose climate legislation.<sup>43</sup> These front groups include well-known “think tanks,”<sup>44</sup> such as the Heritage Foundation<sup>45</sup> and the Cato Institute,<sup>46</sup> in addition to lesser-known advocacy organizations, such as the Heartland Institute.<sup>47</sup> Like trade associations,

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<sup>42</sup> InfluenceMap (April 2016), at 18-19, *supra* n.32.

<sup>43</sup> For a more detailed discussion of the front groups most active in climate denial and some of their known sources of funding, *see* Brulle, *supra* n.36.

<sup>44</sup> Jane Mayer, *Dark Money: The Hidden History of the Billionaires Behind the Rise of the Radical Right*, at 79 (2016).

<sup>45</sup> Defendants Chevron and ExxonMobil are known to have funded the Heritage Foundation. *See* 2006 Annual Report, pg. 28, Heritage Foundation, available at <http://web.archive.org/web/20100308180351/http://www.heritage.org/About/upload/AnnualReport06.pdf>.

<sup>46</sup> Defendant ExxonMobil is known to have funded the Cato Institute. *See* Cato Institute, Conservative Transparency, available at [http://conservativetransparency.org/recipient/cato-institute/page/4/?order\\_by=recipient\\_name%20DESC](http://conservativetransparency.org/recipient/cato-institute/page/4/?order_by=recipient_name%20DESC).

<sup>47</sup> Defendant ExxonMobil and NAM are known to have funded the Heartland Institute. *See* Heartland Institute, Conservative Transparency, <http://conservativetransparency.org/recipient/heartland-institute/?opptax=recipient>.

these front groups are not required to disclose their donors, but researchers and journalists have obtained some information about who funds them.

Examples abound of how Defendants use their array of trade associations and front groups to pursue anti-climate policies. In the 2000s, in response to the McCain-Lieberman bills to cap carbon emissions, the fossil fuel industry, including these Defendants, launched a nominally independent campaign, entitled “United for Jobs,” to build public opposition to these bills.<sup>48</sup> Frontiers of Freedom, the organization that ran the “United for Jobs” campaign, received over \$1.1 million in funding from defendant ExxonMobil from 2001 through 2007.<sup>49</sup> The “United for Jobs” campaign was also backed by the Chamber and NAM.<sup>50</sup>

More recently, in the 115<sup>th</sup> Congress, the House and Senate voted on a Congressional Review Act resolution to disapprove a Bureau of Land Management

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<sup>48</sup> Marianne Lavelle, “John McCain’s Climate Change Legacy,” Inside Climate News (Aug. 26, 2018), available at <https://insideclimatenews.org/news/26082018/john-mccain-climate-change-leadership-senate-cap-trade-bipartisan-lieberman-republican-campaign>.

<sup>49</sup> Frontiers of Freedom, Conservative Transparency, available at [http://conservativetransparency.org/advanced-search/1/?adv=frontiers%20of%20freedom&donor&recipient&candidate&min&max&yr&yr1&yr2&order\\_by&submit](http://conservativetransparency.org/advanced-search/1/?adv=frontiers%20of%20freedom&donor&recipient&candidate&min&max&yr&yr1&yr2&order_by&submit).

<sup>50</sup> Coalition Partners, United for Jobs, available at <http://web.archive.org/web/20061006080648/http://www.united4jobs.org/partners/>.

rule limiting methane leakage and flaring at oil and gas facilities on public lands.<sup>51</sup>

The Chamber lobbied in favor of this resolution, even sending out a “key vote alert” which told Senators that the Chamber would consider their vote on this when it came time to evaluate them—thereby implying that if they wanted to remain on the Chamber’s good side, they needed to vote for the resolution.<sup>52</sup> NAM also sent “key vote” letters on this resolution,<sup>53</sup> and API not only lobbied in favor of this resolution but also sent a letter to the leadership of both parties urging that all members vote in favor.<sup>54</sup>

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<sup>51</sup> H.J. Res. 36, 115<sup>th</sup> Congress, available at <https://www.congress.gov/115/bills/hjres36/BILLS-115hjres36rfs.pdf>.

<sup>52</sup> Key Vote Alert, U.S. Chamber of Commerce (May 9, 2017), available at [https://www.uschamber.com/sites/default/files/5.9.17-key\\_vote\\_letter\\_to\\_senate\\_supporting\\_h.j.\\_res.\\_36\\_cra\\_resolution\\_repealing\\_bl\\_m\\_methane\\_rule.pdf](https://www.uschamber.com/sites/default/files/5.9.17-key_vote_letter_to_senate_supporting_h.j._res._36_cra_resolution_repealing_bl_m_methane_rule.pdf).

<sup>53</sup> Key Manufacturing Vote, National Association of Manufacturers (Feb. 3, 2017), available at [https://www.api.org/~media/Files/News/2017/17-May/Letter\\_to\\_Senate\\_Leadership-CRA\\_Venting\\_and\\_Flaring\\_5-9-17.pdf](https://www.api.org/~media/Files/News/2017/17-May/Letter_to_Senate_Leadership-CRA_Venting_and_Flaring_5-9-17.pdf); Key Manufacturing Vote, National Association of Manufacturers (Feb. 13, 2017), available at [https://republicans-naturalresources.house.gov/uploadedfiles/nam\\_key\\_vote\\_senate.pdf](https://republicans-naturalresources.house.gov/uploadedfiles/nam_key_vote_senate.pdf).

<sup>54</sup> May 9, 2017 letter from API President Jack Gerard, available at [https://www.api.org/~media/Files/News/2017/17-May/Letter\\_to\\_Senate\\_Leadership-CRA\\_Venting\\_and\\_Flaring\\_5-9-17.pdf](https://www.api.org/~media/Files/News/2017/17-May/Letter_to_Senate_Leadership-CRA_Venting_and_Flaring_5-9-17.pdf); January 31, 2017 Letter from API President Jack Gerard, available at [https://www.api.org/~media/Files/News/Letters-Comments/2017/4-1-31-17\\_Letter\\_to\\_House\\_Leadership-CRA\\_Venting\\_and\\_Flaring.pdf](https://www.api.org/~media/Files/News/Letters-Comments/2017/4-1-31-17_Letter_to_House_Leadership-CRA_Venting_and_Flaring.pdf).

Even more recently, 18 front groups wrote a letter to then-House Speaker Paul Ryan, urging him to hold a vote on a resolution condemning carbon pricing as bad for the economy.<sup>55</sup> Based upon public reports, BP, Chevron, ExxonMobil, and Shell, as well as API, have provided funding to at least some of these groups.<sup>56</sup>

Just last month, trade association American Fuel and Petrochemical Manufacturers (AFPM), which counts BP, Chevron, ExxonMobil, and Shell among its largest members, reiterated its opposition to carbon pricing despite the fact that BP, ExxonMobil, and Shell all publicly claim to support carbon pricing.<sup>57</sup>

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<sup>55</sup> June 9, 2018, Letter to Paul Ryan and Kevin McCarthy, available at <https://www.americanenergyalliance.org/wp-content/uploads/2018/07/CarbonTaxLetterUpdated.pdf>.

<sup>56</sup> BP is known to have funded ALEC until 2015. *See*, Amy Westervelt, “BP joins list of companies fleeing Alec,” *The Guardian* (March 23, 2015), <https://web.archive.org/web/20150809205916/http://www.theguardian.com/sustainable-business/2015/mar/23/alec-bp-british-petroleum-companies-conservative-lobbyist>. Chevron is also known to have funded ALEC at least through 2015. *See* Nick Surgey, “ALEC Conference Funding Dominated by Big Polluters,” PRWatch (July 23, 2015), available at <https://web.archive.org/web/20150810185553/http://www.prwatch.org/news/2015/07/12891/alec-conference-funding-dominated-big-polluters>. ExxonMobil is known to have provided ALEC funding of at least \$1.5 million before dropping out in 2018, while giving the Competitive Enterprise Institute at least \$1.6 million, the National Black Chamber of Commerce at least \$800,000, the Heartland Institute at least \$500,000, and the National Center for Public Policy at least \$400,000. *See* Exxon Mobil, Conservative Transparency, available at <http://conservativetransparency.org/donor/exxon-mobil/>.

<sup>57</sup> Gregory Meyer and Anjili Raval, “Oil lobby group opposes carbon tax backed by its biggest members,” *The Financial Times* (Mar. 4, 2019), <https://www.ft.com/content/fc462062-3ac4-11e9-b72b-2c7f526ca5d0>.

As astronomers divine the presence of dark bodies from their effect on the behavior of visible bodies, one can divine some unseen force driving AFPM and other industry groups to take positions on climate issues that their very largest and most influential members claim to oppose. And here's the rub: for public relations reasons, it is exceedingly difficult for Defendants to openly oppose climate action. If their CEOs want to be able to jet off to Davos and hobnob with the global elite, they can't engage in flagrant climate denial. But at the same time, any effort to reduce carbon emissions has been viewed as representing a threat to Defendants' future revenues, so they have found ways to mask their opposition to legislation that might jeopardize their business model. This is where the trade associations and front groups they fund come in. Less burdened by concern over their public image, they have opposed climate policies, such as carbon pricing, in a public way that Defendants themselves are reluctant to do.

2. *Defendants nearly exclusively fund political campaigns for candidates opposed to legislative action on climate change.*

Since the *Citizens United* decision, no legislation to reduce carbon emissions has been seriously debated or voted on in either Chamber of Congress, nor have any Republicans sponsored such legislation in the Senate.<sup>58</sup> It is our belief that the

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<sup>58</sup> Former Senator Jeff Flake (R-AZ) did cosponsor a carbon pricing bill on December 19, 2018, but this was a mere three days before the Senate concluded legislative business for the 115<sup>th</sup> Congress.

fossil fuel industry, led by Defendants, has weaponized the power of unlimited corporate political spending granted it by *Citizens United* to prevent the debate, consideration, and passage of legislation to limit carbon emissions.<sup>59</sup>

*a. Direct spending.*

Defendants are required to disclose their direct spending, *i.e.*, contributions to candidates and political action committees, on federal elections. Their spending since 1990 has been overwhelmingly in support of candidates opposed to legislation reducing climate legislation:

BP: \$8.6 million, almost 70 percent to candidates opposing climate action;<sup>60</sup>

Chevron: \$28 million, more than 85 percent to candidates opposing climate action;<sup>61</sup>

ConocoPhillips: almost \$10 million, more than 85 percent to candidates opposing climate action;<sup>62</sup>

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<sup>59</sup> Unlimited election spending by corporations and outside groups brought with it the power to threaten such spending, which is often enough to achieve privately and quietly a desired political result. The threat, for instance, of a well-funded primary challenger can be compelling.

<sup>60</sup> BP Totals, Center for Responsive Politics, available at <https://www.opensecrets.org/orgs/totals.php?id=D000000091&cycle=2018>.

<sup>61</sup> Chevron Totals, Center for Responsive Politics, available at <https://www.opensecrets.org/orgs/totals.php?id=D000000015&cycle=A>.

<sup>62</sup> ConocoPhillips Totals, Center for Responsive Politics, available at <https://www.opensecrets.org/orgs/totals.php?id=D000000303&cycle=2018>.



ExxonMobil: almost \$21 million, 85 percent to candidates opposing climate action;<sup>63</sup> and

Shell: more than \$3 million, almost 60 percent to candidates opposing climate action.<sup>64</sup>

*b. Indirect spending.*

Direct political spending by Defendants is the tip of a much larger iceberg. Because our federal election and campaign finance laws do not require companies like Defendants to disclose payments to other entities that engage in electioneering communications on their behalf, the public has no idea of the true sums spent by companies like Defendants to influence elections. For instance, the Chamber, a trade association organized under section 501(c)(6) of the Internal Revenue Code, need not, and does not, fully disclose its membership list and dues structure, so it may be that these Defendants spent substantial additional sums on federal elections through the Chamber outside of the public eye. We do know that the Chamber has spent almost \$150 million on congressional elections since the *Citizens United* decision, with the vast majority of the money benefitting candidates opposed to

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<sup>63</sup> ExxonMobil Totals, Center for Responsive Politics, available at <https://www.opensecrets.org/orgs/totals.php?id=D000000129&cycle=2018>.

<sup>64</sup> Royal Dutch Shell Totals, Center for Responsive Politics, available at <https://www.opensecrets.org/orgs/totals.php?id=D000042525&cycle=2016>.

legislation to combat climate change.<sup>65</sup> The Chamber has run advertisements attacking candidates who support climate change legislation.<sup>66</sup> Indeed, since *Citizens United*, the Chamber has been among the top three largest dark money spenders on federal elections each election cycle.<sup>67</sup>

**B. Defendants Have Deployed the Same Lobbyists and Front Groups to Block Executive Branch Actions.**

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<sup>65</sup> U.S. Chamber of Commerce Summary, Center for Responsive Politics, available at <https://www.opensecrets.org/outsidespending/detail.php?cmte=US+Chamber+of+Commerce&cycle=2018>.

<sup>66</sup> Scott Keyes, “Kissing Cousins: How the U.S. Chamber of Commerce and American Crossroads Hook Up to Elect Republicans (Oct. 7, 2010), available at <https://thinkprogress.org/kissing-cousins-how-the-u-s-chamber-of-commerce-and-american-crossroads-hook-up-to-elect-republicans-b8e3ebe77379/>.

<sup>67</sup> Top Elections Spenders, Center for Responsive Politics, available at <https://www.opensecrets.org/dark-money/top-election-spenders?cycle=2016#spenders>. As a report by several Senators documented in 2016, secret political spending and lobbying through the Chamber allows companies like Defendants to have their cake and eat it too when it comes to climate action. In a review of 108 companies known to be on the Chamber’s Board, not one expressly supported the Chamber’s public position on climate with a significant number instead adopting public positions in support of climate action. Yet, the Chamber’s efforts to block federal efforts to address carbon pollution have continued unabashed, suggesting that many of the Chamber’s members are happy to have it play “bad cop” while they greenwash their public positions through gauzy though ultimately ineffectual statements supporting action. <http://www.whitehouse.senate.gov/download/?id=7c225de8-0d47-4c02-bc4e-5a3e932cc9f>.

Serving in the legislative branch, we are familiar with Defendants' role in obstructing climate policy before the executive branch. We see the same pattern emerge as with Congress, with Defendants relying upon trade associations and front groups they fund to obstruct climate action.

In their brief, Defendants cite a 2010-2012 rulemaking by EPA on greenhouse gas (GHG) emissions standards and corporate average fuel economy (CAFE) standards for light duty vehicles as an example of effective executive climate policy.<sup>68</sup> The irony of this assertion should not be lost on the Court. The very standards that were ultimately determined by this rulemaking later came under attack by the oil industry in 2017 and 2018.<sup>69</sup> AFPM, which counts BP, Chevron, ExxonMobil, and Shell among its largest members, played a key role in the campaign to gut the standards. It lobbied for the standards to be weakened<sup>70</sup> and was publicly outspoken in its support for the EPA's and the National Highway

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<sup>68</sup> Doc. 225, at 24, Case No. 3:17-cv-6011-WHA (N.D. Cal.).

<sup>69</sup> Hiroko Tabuchi, "The Oil Industry's Covert Campaign to Rewrite American Car Emissions Rules," *The New York Times* (Dec. 13, 2018), <https://www.nytimes.com/2018/12/13/climate/cape-emissions-rollback-oil-industry.html>. See also, Comment letter from Sheldon Whitehouse, *et al.*, available at <https://www.regulations.gov/document?D=EPA-HQ-OAR-2018-0283-5483>.

<sup>70</sup> See, e.g., Second quarter 2018 lobbying report for American Fuel and Petrochemical Manufacturers, available at <https://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=764C96EA-C9CA-4ED8-BFBB-C62E24B6A6BE&filingTypeID=60>.

Traffic Safety Administration’s decision to freeze the standards.<sup>71</sup> It also sponsored an event attacking the standards organized by the State Policy Network, another front group with ties to the fossil fuel industry.<sup>72</sup>

This is not the first time we have seen industry front groups take the lead in blocking executive branch climate regulations. During the Obama Administration, the Chamber played a leading role in developing a strategy to oppose rulemaking to limit carbon emissions.<sup>73</sup> Public reporting reveals that the Chamber organized a vast network of lawyers, lobbyists, and state officials whose plan was to “challenge [Obama’s climate rules] at every opportunity.”<sup>74</sup>

**C. Defendants Have Undermined Diplomatic Solutions to Climate Change through their Domestic and International Actions.**

We also follow quite closely international efforts to develop binding climate agreements. Some of these agreements result in treaties that require Senate

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<sup>71</sup> AFPM Applauds Proposal to Revise Fuel Economy Standards, AFPM (Aug. 2, 2018), <https://www.afpm.org/news-release.aspx?id=7965>.

<sup>72</sup> 26<sup>th</sup> State Policy Network Annual Meeting Agenda: Roundtable: California – Policy Bellwether or Bully?, State Policy Network, <https://spn.org/meeting/26th-spn-annual-meeting/#agenda>.

<sup>73</sup> Coral Davenport and Julie Hirschfeld Davis, “Move to Fight Obama’s Climate Plan Started Early,” *The New York Times* (Aug. 3, 2015), <https://www.nytimes.com/2015/08/04/us/obama-unveils-plan-to-sharply-limit-greenhouse-gas-emissions.html>.

<sup>74</sup> *Id.*

ratification. Some of us have attended international negotiations to demonstrate the United States' ongoing commitment to constructive multi-lateral engagement. Political and moral leadership of the United States is often the lynchpin to international agreements. When our domestic efforts are stymied, our ability to convince other nations to take steps to reduce their carbon emissions is severely weakened.

In the late 1980s, as scientific warnings about climate change became more frequent and pointed, international organizations began to take notice. Because of these scientific warnings, the World Meteorological Organization and the United Nations Environment Programme created the Intergovernmental Panel on Climate Change (IPCC) in 1988. The IPCC was charged with compiling and assessing the scientific evidence for climate change. In 1992, the United Nations organized an "Earth Summit" where the United Nations Framework Convention on Climate Change (UNFCCC) was adopted. The Senate ratified the UNFCCC later that same year.

In response to growing international awareness of climate change and a burgeoning interest in devising an international response, the fossil fuel industry and its allies created several front groups to torpedo international efforts. The Global Climate Coalition (GCC) was founded in 1989; its members included Chevron, Exxon, Mobil, Shell, Amoco (now part of BP), API, NAM, and the

Chamber.<sup>75</sup> The GCC's position on climate change was that "there is no convincing evidence that future increases in greenhouse gas concentrations will produce significant climatic effects."<sup>76</sup> This public position was advanced despite the fact that the oil industry's own scientists, including those at Exxon and API, had already determined that continued combustion of fossil fuels would cause significant warming that would result in potentially enormous damages.<sup>77</sup> The GCC did not trouble itself with accurately communicating what its members knew to be scientifically accurate; its mission was counter to its own scientific understanding and instead designed to sow doubt about the causes of climate change, thereby forestalling international climate action.

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<sup>75</sup> Global Climate Coalition An Overview, at 2, Global Climate Coalition (Nov. 11, 1996), available at <https://www.desmogblog.com/global-climate-coalition>.<https://www.desmogblog.com/global-climate-coalition> [Need Better Cite].

<sup>76</sup> *Id.* at 1.

<sup>77</sup> Brief of amici curiae Robert Brulle, Center for Climate Integrity, Justin Farrell, Benjamin Franta, Stephan Lewandowsky, Naomi Oreskes, and Geoffrey Supran in support of appellees and affirmance, *San Mateo v. Chevron*, Case No. 18-15499 (9<sup>th</sup> Cir.), available at [http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2019/20190129\\_docket-18-15499-18-15502-18-15503\\_amicus-brief-7.pdf](http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2019/20190129_docket-18-15499-18-15502-18-15503_amicus-brief-7.pdf).

As U.N. negotiations gathered steam in Kyoto, Japan in 1997, the GCC spent \$13 million on an ad campaign against climate action.<sup>78</sup> State Department documents reveal that President George W. Bush eventually rejected the Kyoto Protocol “in part based on input from [the GCC].”<sup>79</sup> Nor was the GCC the only one to question climate science and oppose the Kyoto Protocol. Then-Exxon CEO Lee Raymond spoke out at a meeting of the World Petroleum Congress, held months before the Kyoto negotiations. Like the GCC, Raymond ignored what his own scientists knew, claiming that since the science of climate change was yet to be settled, an international agreement limiting fossil fuels was unjustified.<sup>80</sup>

More recently, all five Defendants, at least two of whom we know to be among the largest members of the Chamber, publicly opposed President Trump’s decision to withdraw from the Paris Agreement. Yet at the same time, industry front groups provided justification for the decision to withdraw from the Paris

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<sup>78</sup> Maggie Farley, “Showdown at Global Warming Summit,” *The Los Angeles Times* (Dec. 7, 1997), <https://web.archive.org/web/20160118234039/http://articles.latimes.com/1997/dec/07/news/mn-61743/2>.

<sup>79</sup> “Revealed: how oil giant influenced Bush,” *The Guardian* (Jun. 8, 2005), available at <https://www.theguardian.com/news/2005/jun/08/usnews.climatechange>.

<sup>80</sup> Oct. 13, 1997 Speech of Lee Raymond to the World Petroleum Congress, available at <http://www.climatefiles.com/exxonmobil/1997-exxon-lee-raymond-speech-at-world-petroleum-congress/>.

Agreement via a flawed economic analysis paid for by the Chamber.<sup>81</sup> The Chamber's ultimately successful efforts to sabotage U.S. participation in the agreement can most logically be attributed to the only corporate members of the Chamber with both the financial wherewithal to dictate energy policy to the organization and the business interest in obstructing climate policy: the oil majors, of whom Defendants represent four of the top five.<sup>82</sup>

**II. SHOULD THE COURT CONSIDER DECLINING JURISDICTION, IT SHOULD FIRST ASCERTAIN THE FULL EXTENT OF DEFENDANTS' EFFORTS TO BLOCK GOVERNMENT ACTION.**

The court below concluded that:

questions of how to appropriately balance these worldwide negatives [of carbon pollution] against the worldwide positives of the energy itself, and of how to allocate the pluses and minuses among the nations of the world, demand the expertise of our environmental agencies, our diplomats, our Executive, and at least the Senate.<sup>83</sup>

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<sup>81</sup> Glenn Kessler & Michelle Ye Hee Lee, "Fact-checking President Trump's claims on the Paris climate change deal," *The Washington Post* (June 1, 2017), [https://www.washingtonpost.com/news/fact-checker/wp/2017/06/01/fact-checking-president-trumps-claims-on-the-paris-climate-change-deal/?utm\\_term=.ed81f5bbaa3e](https://www.washingtonpost.com/news/fact-checker/wp/2017/06/01/fact-checking-president-trumps-claims-on-the-paris-climate-change-deal/?utm_term=.ed81f5bbaa3e); Kevin Steinberger & Amanda Levin, "Chamber Inflates Costs, Ignores Benefits of Climate Action," Natural Resources Defense Council (March 22, 2017), available at <https://www.nrdc.org/experts/kevin-steinberger/chamber-inflates-costs-ignores-benefits-climate-action>.

<sup>82</sup> The five commonly agreed upon oil majors are BP, Chevron, ExxonMobil, Shell, and Total.

<sup>83</sup> *City of Oakland*, 325 F. Supp. 3d at 1026.



Whatever the merits of that approach might be in an idealized world, we face an existential challenge in climate change that involves real rights of real Americans that are entirely justiciable. For decades, Defendants misled the people of this planet. Despite knowing that continued combustion of their product would eventually bring drastic changes to our climate, they lied to the public and to policy makers and did everything possible to forestall legislative, executive and international action that might limit their ability to sell their product. Even today, while Defendants publicly accept climate science, they continue to fund groups that attempt to cast doubt upon it and that oppose legislative solutions.

While lies and obfuscation may gain purchase in the political arena, these tactics should be of no moment before courts. When the district court invited the Defendants to participate in a climate tutorial, the lies stopped, and Defendants told the truth about climate science.<sup>84</sup> When the district court prudently ordered *amici* who questioned climate science to disclose their funding and relationships with the parties, they complied.<sup>85</sup> We believe that a similar inquiry should be undertaken of Defendants' federal lobbying and political spending.

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<sup>84</sup> Notice of Tutorial, *California v. BP*, Case No. C 170611 (N.D. Cal.), available at [http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180227\\_docket-317-cv-06011\\_notice-1.pdf](http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180227_docket-317-cv-06011_notice-1.pdf).

<sup>85</sup> Request for Information re Amicus Curiae Materials, *California v. BP*, Case No. C 170611 (N.D. Cal.), available at <http://blogs2.law.columbia.edu/climate-change->

Courts regularly evaluate how much credit to give a party that advances a changed position by looking at evident conflicts of interest. Defendants' efforts in Congress and the Executive Branch to leave climate change unaddressed undermine their argument that courts should leave the problem to the political branches of government. “‘Will you walk into my parlour?’ said the Spider to the Fly,” poetically describes what we see as the true gravamen of Defendants' argument.

Nor is the case and controversy at issue a purely political question that is both nonjusticiable and committed to the other branches of government. Recently, the Supreme Court reemphasized that “the Judiciary has a responsibility to decide cases properly before it, even those it ‘would gladly avoid.’”<sup>86</sup> The narrow exception of a political question exists only “where there is ‘a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.’”<sup>87</sup> Here, there is no textual constitutional commitment of the issues

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[litigation/wp-content/uploads/sites/16/case-documents/2018/20180319\\_docket-317-cv-06011\\_request-1.pdf](https://www.courts.michigan.gov/litigation/wp-content/uploads/sites/16/case-documents/2018/20180319_docket-317-cv-06011_request-1.pdf).

<sup>86</sup> *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194 (2012) (citation omitted).

<sup>87</sup> *Id.* (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993)).

presented to a particular branch of government. Indeed, the judicial branch is well-suited to develop a truthful factual predicate. Nor do the cities of Oakland and San Francisco request a global solution to the climate change problems they are experiencing. Instead, they seek compensation and other relief for the injuries they suffer that were proximately caused by Defendants. That is an issue the Judiciary is competent to resolve. Defendants have clearly had a role in hiding the truth and preventing action that might have avoided or ameliorated the cities' injuries.

Defendants' known direct and indirect obstruction in the other branches of government is but a small part of a much larger picture. The record is far from complete. What we know about Defendants' intentional misconduct to date has been largely the product of a small group of academics, researchers, and journalists who have been able to uncover bits and pieces of the funding streams and relationships between these Defendants and outside political spending groups. Discovery into the true extent of Defendants' direct and indirect deception and obstruction would likely provide the Court with the true picture of Defendants' actions to avoid justice. Certainly, it would allow the Court to better weigh the equity considerations present in the instant case.

### **III. CONCLUSION.**

Having spent three decades directly obstructing climate action in Congress, at executive agencies, and in international fora, while simultaneously funding

myriad trade associations and front groups to lead the obstruction charge, Defendants do not have clean hands. We respectfully request this Court exercise its jurisdiction to allow this case to proceed, providing a forum where even politically mighty interests must stand equal before the law with those they have harmed.<sup>88</sup>

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Respectfully submitted,

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<sup>88</sup> Unique in the constitutional constellation, the jury is designed not just to protect the individual against government, but also to protect the individual against other “more powerful and wealthy citizens.” 3 William Blackstone, Commentaries on the Common Law of England \*381 (1992 reprint) (1765). Juries are not obliged to respect political power or proprieties, just to do justice in the case before them. 1 Alexis De Tocqueville, Democracy in America 314 (Arthur Goldhammer trans., Penguin Putnam Inc. 2004) (1838) (“The jury system as it is understood in America seems to me a consequence of the dogma of popular sovereignty just as direct and just as extreme as universal suffrage. Both are equally powerful means of ensuring that the majority reigns.”).

**CERTIFICATE OF SERVICE**

I hereby certify that I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 20, 2019.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Robert S. Peck

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## CERTIFICATE OF COMPLIANCE

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

This brief complies with Rule 29(a)(5)'s type-volume limitation because it contains 6,978 words (as determined by the Microsoft Word 365 word-processing system used to prepare the brief), excluding the parts the brief exempted by Rule 32(a)(7)(B)(iii).

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

/s/ Robert S. Peck

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