No. 18-16663

In the United States Court of Appeals for the Ninth Circuit

City of Oakland, et al.,

Plaintiffs and Appellants,

vs.

BP P.L.C., et al.,

Defendants and Appellees.

BRIEF OF PROFESSORS RICHARD A. EPSTEIN, JASON SCOTT JOHNSTON, AND HENRY N. BUTLER AS AMICI CURIAE IN SUPPORT OF DEFENDANTS AND APPELLEES

[ALL PARTIES HAVE CONSENTED. FRAP 29(A)]

On Appeal from the
U.S. District Court for the Northern District of California,
Case Nos. 17cv-06011 and 17-cv-06012

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

Richard A. Epstein is the Laurence A. Tisch Professor of Law at New York University Law School, the Peter and Kirsten Bedford Senior Fellow at the Hoover Institution at Stanford University, and the James Parker Hall Distinguished Service Professor Emeritus and Senior Lecturer at the University of Chicago Law School. Professor Epstein is a leading national scholar in the field of tort law. He has been either a sole or co- editor of *Cases and Materials on Torts* from the Third Edition in 1977 through the Eleventh Edition in 2016. He is also the author of *Torts* (1999), a one-volume treatise on the law of torts.

He has published many articles on the law of nuisance, many of which apply principles of nuisance law to areas of environmental protection—including, specifically, the application of public nuisance to global warming. *See, e.g.*, Richard A. Epstein, *Beware of Prods and Pleas: A Defense of the Conventional Views on Tort and Administrative Law in the Context of Global Warming*, 121 Yale L. J. Online 317 (2011); Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. Legal Stud. 49, 101-02 (1979). He also has written a number of shorter essays on the specific questions raised in this case, including *Is Global Warming a Public Nuisance?*,

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1 Amici state that no party's counsel in this case authored this brief, and no party, party's counsel in this case, or person other than amici or their counsel contributed financial support intended to fund the preparation or submission of this brief. Fed. R. App. Proc. 29(a)(4)(e). All parties have consented to the filing of this brief. *Id.* 29(a)(2).

Hoover Defining Ideas, January 15, 2018, available at https://www.hoover.org/research/global-warming-public-nuisance.

Jason Scott Johnston is the Henry L. and Grace Doherty Charitable Foundation Professor of Law, the Armistead L. Dobey Professor of Law, and the Director of the John M. Olin Program in Law and Economics at the University of Virginia Law School. He has published several articles on tort law in law reviews—including *Climate Change in the Courts*, an online debate with then Dean Heidi Hurd of the University of Illinois Law School over whether there should be a public nuisance tort for greenhouse gas emissions in light of *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011). *See* Jason Scott Johnston, Heidi M. Hurd, Debate, *Climate Change and the Courts*, 160 U. Pa. L. Rev. PENNumbra 33 (2011), http://www.pennumbra.com/debates/pdfs/ClimateChange.pdf. Professor Johnston is also completing a book on climate change policy with an entire chapter devoted to greenhouse gas, public nuisance suits.

Henry N. Butler is the Dean, the George Mason University Foundation Professor of Law, and the Executive Director of the Law & Economics Center at George Mason University's Antonin Scalia Law School. For over 30 years, he has developed and led educational programs that teach the basics of economics, finance, accounting, statistics, and the scientific method to federal and state judges, as well as other legal professionals and scholars. He has also written numerous articles relating to environmental policy and the judiciary. *See* Henry N. Butler & Nathaniel J. Harris, *Sue Settle, and Shut Out the States:*

Destroying the Environmental Benefits of Cooperative Federalism, 37 Harv. J. L. & Pub. Pol'y 579 (2014); Henry N. Butler & Todd J. Zywicki, *Expansion of Liability under Public Nuisance*, 18 Sup. Ct. Econ. Rev. 1 (2010); Henry N. Butler, *A Defense of Common Law Environmentalism: The Discovery of Better Environmental Policy*, 58 Case W. Res. L. Rev. 705 (2008).

In the amici curiae's view, the City's attempted reliance on public nuisance law as the basis for its claims would dramatically and unwisely expand the law beyond the discrete private harms to which it has always been limited.[2]

II
SUMMARY OF ARGUMENT

As the district court correctly concluded, the City's public-nuisance claims are just an attempted end-run around *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011) ("*AEP*"). *AEP* held that the Clean Air Act displaced federal common law nuisance claims to enjoin emissions of greenhouse gases in the United States. *Id.* at 416.

To evade *AEP*, the City tries two maneuvers. First, the City raises claims against (only a select group of) companies who sell fossil fuels to others—who, in turn, burn the fuels and emit greenhouse gases. The district court correctly noted that *AEP* forecloses this claim, as the harm alleged still comes from the

[2] We refer to plaintiffs and appellees the City of Oakland and the City of San Francisco collectively as the "City".

actual *emissions* of fossil fuels—not the mere *extraction or sale* of fossil fuels. Second, the City complains about emissions worldwide outside the United States. But that contention runs straight into the presumption against extraterritorial application of domestic law, as the district court also recognized.

This amicus brief will address yet another basis to reject plaintiffs' claims: The City asks the federal courts to drastically expand the law of public nuisance to cover cases far beyond its common law foundations. That ill-advised extension would lead to a morass of litigation resulting in arbitrary, inconsistent, and ill-considered outcomes in multiple jurisdictions domestically and globally.

By asking this Court to create a sweeping new federal common law cause of action, the City disregards a key limitation on the public-nuisance doctrine. Since at least the sixteenth century, courts have barred individual public-nuisance claims for diffuse harms. By the same token, even the actions of public bodies to abate nuisances have to show some nuisance to abate, such as the blockage of a public highway or the pollution of public waters. In this regard, private nuisance claims can be entertained only when their occurrence is either actual or imminent—*not* uncertain and speculative—so that their causal origin can be traced to the defendant's activities, emissions, or discharges.

In addition, there has never been a claim for a public nuisance by any public body to address harms originating outside the local government's jurisdiction and thus beyond its power to correct by local administrative action.

In those cases, where the local governments seek only the same damages available to private parties, they should be subject to the same limitations that apply to public nuisance actions brought by those private parties.

These rules, governing all suits for damages, are essential to prevent groundless public-nuisance claims from swamping the courts in litigation. The administrative costs of so much litigation would quickly eclipse any potential social value, for the mass of claims would distract courts from dealing with ordinary harms (such as automobile accidents or product-related injuries) that are amenable to litigation. For that reason, courts have long recognized that these types of diffuse harms are the proper subject of only administrative regulation.

Thus, as early as the 1536 case of *Anonymous*, the Court Leet (an administrative body) was found responsible for imposing sanctions on any party that placed an obstacle on a public road, delaying traffic and inconveniencing a large number of users. *See Anonymous*, Y.B. Mich. 27 Hen. 8, f. 27, pl. 10 (1536), *reprinted in* Richard A. Epstein & Catherine M. Sharkey, *Cases and Materials on Torts* 621 (11th ed. 2016). Private lawsuits relating to that public nuisance were narrowly confined so that only persons with direct physical injuries from impact with the obstacle were allowed to bring their individual law suits under the standard rules that governed road accidents, that are amenable to tort principles. *See* Richard A. Epstein, *Federal Preemption, and Federal Common Law, in Nuisance Cases*, 102 Nw. U. L. Rev. 551, 558–60 (2008). In that 1536 case, there was only one entity to administer all public

sanctions, which it could do effectively since that public nuisance took place entirely within its jurisdiction. In these global warming cases, literally thousands of state, county, and local governments district could bring such actions.

These points are not novel. In an article that he wrote 40 years ago, well before global warming assumed the importance it has today, one of the amici here observed that widespread air pollution is not a proper subject for public-nuisance actions. "Every automobile, for example, creates a nuisance by the emission of smoke and other pollutants; yet it is inconceivable for practical reasons to entertain the prospect of systematic redress for each violation of individual rights." Epstein, *Nuisance Law*, 8 J. Legal Stud. at 101. Of course that does not mean that pollution must go unaddressed. Rather, "[p]ublic regulation is justified . . . because all private remedies are inadequate for the protection of admitted private rights, given the administrative complications that they spawn." *Id.* at 102. That was true of air pollution then, and it is true of global warming today.

Global warming perfectly illustrates the wisdom of the rule that bars public-nuisance claims for diffuse harms. If every person, water or park district, county or town, or other governmental entity who claims to have suffered, or potentially to suffer, from a diffuse harm could bring an action, the courts would be inundated with suits, as even a single public nuisance could give rise to thousands of claims, leading to enormous administrative costs, inconsistent judgments and crushing claims for liability.

Moreover, even if courts could handle that mass of public-nuisance litigation, courts would still face a crucial causation problem: identifying which of the numerous sources of carbon emissions is the proper defendant. Everyone on the planet contributes to carbon emissions—by driving cars, by using electricity, by consuming products manufactured in carbon-emitting facilities, and even by exhaling. There is no clear reason why the particular fossil fuel producers arbitrarily sued here should be held uniquely responsible for harms generated by all human activity. This is especially true given that the City targeted these entities solely to circumvent *AEP*, which barred claims against carbon dioxide *emitters*—who are in all cases better positioned to deal with the liability than the fossil fuel *producers* sued here.

No one company—or set of companies—can be tagged with responsibility for this complex global phenomenon. Indeed, the City itself, its residents, and its businesses all make copious use of fossil fuels and thus, if anything, bear a greater responsibility for the harms that the City wishes to blame on others.

Finally, courts would struggle to quantify the damages caused by carbon emissions given the complexity of the climate system. Without contesting that carbon emissions have real effects, it remains the case that scientists cannot say precisely what those effects are, let alone quantify the damages that they cause or the risks that they create.

None of this is to say that the control of the potential harms from global warming is beyond government's reach if these suits are rejected as they should

be. The federal government, presumably through the EPA, can orchestrate that effort. *See, e.g.*, Epstein, *Beware of Prods and Pleas*, 121 Yale L.J. Online at 320. That is essentially what the Supreme Court held in *AEP*. Global warming can be effectively addressed, but not in the first instance by the courts creating a sweeping variety of crisscrossing public-nuisance claims, all of which move far beyond the disciplined limitations that were part of the common law.

III
LEGAL ARGUMENT

A. Since The Sixteenth Century, The Common Law Prohibited Use Of The Public-Nuisance Doctrine To Regulate Diffuse Harms

The City fails to grapple with a key, long-standing element of the public-nuisance doctrine: it does not extend to diffuse, uncertain and future harms. Those harms are instead the appropriate sphere of administrative regulation. The City disregards that longstanding limitation on the public-nuisance doctrine and instead urges a significant but unwise expansion of it.

1. The Common Law Has Limited The Availability Of Public-Nuisance Suits Since At Least 1536

In *Anonymous*, a case from 1536, the defendant had "stopped the King's highway," causing delays and other difficulties for every person who relied upon the road. *Anonymous*, Y.B. Mich. 27 Hen. 8, f. 27, pl. 10 (1536),

reprinted in Richard A. Epstein & Catherine M. Sharkey, *Cases and Materials on Torts* 621 (11th ed. 2016). Two opinions from that case established the rule that remains vibrant today: absent a claim to special damages, diffuse harms are appropriately redressed through regulatory action.

The first opinion, drafted by the Chief Justice, recognized that it would be impractical to extend a cause of action to every person harmed by a stop on the highway because, "if one person shall have an action for this, by the same reason every person shall have an action, and so [the defendant] will be punished a hundred times on the same case." *Id.* The second opinion, penned by Justice Fitzherbert, elaborated that a person harmed by such a stoppage in the road could recover damages, but only if he "suffered greater damage than all others." *Id.* As, for example, if he "had more convenience by this highway than any other person." *Id.*

These statements from *Anonymous* remain central tenets of the common law today. The Restatement of Torts, for instance, almost verbatim blends the statements from the Chief Justice and Justice Fitzherbert: "In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public." Restatement (Second) of Torts § 821C. Those observations were made in traditional contexts in which there was only one public entity capable of representing the public. With global warming, only one entity could assume overall control of the public nuisance as did the Court Leet in 1536. That entity is the United States. For this reason, the Supreme Court in *AEP* rejected the

prospect of multiple suits against particular defendants, and those arguments are equally applicable to a flood of local government lawsuits, all of which duplicate the failed claims in *AEP* on the critical issues dealing with the type of damage and the mechanism of damage in categorically ruling out any action for emitters. If local governments could not sue emitters, there is no reason to allow thousands of these same local governments to sue these defendants on even weaker substantive theories. *See* Epstein, *Beware of Prods and Pleas*, 121 Yale L.J. Online at 323-41; *see also* Restatement (Second) of Torts § 821C ("It is not enough that [the plaintiff] has suffered the same kind of harm or interference but to a greater extent or degree.").

The 1536 decision allowed a local government to redress an actual harm that was located entirely within its jurisdiction. It did not contemplate that thousands of local governments could sue for speculative damages when none of them have the capacity to either enjoin or correct the alleged nuisance for which they seek only compensation without any proof of special damages.

2. Limiting The Availability Of Nuisance Actions For Diffuse Harms Would Prevent Litigation Costs From Overwhelming The Legal System

Tort law's fundamental function is to address discrete (as opposed to diffuse) harms with discrete causes. The paradigm example of this is "the direct and immediate application of force against the person and property."

Epstein, *Nuisance Law*, 8 J. Legal Stud. at 56. In this situation, there is an easily identifiable victim and perpetrator.

Tort law expands from there to include injury caused to a person or property by "the creation of dangerous conditions" by another person. *Id.* Even there, though, causation is apparent with readily identifiable parties. Traditional nuisance suits expand only slightly further from there. For example, the harm caused by smoke, noise, or heat can be seen as a large number of separate physical invasions, and "if each individual particle, each individual event, is attributable to the defendant's activities, then so too is their aggregate impact." *Id.* at 57.

Classic nuisance cases therefore involve localized injuries to a limited set of plaintiffs. In each of the above three situations, the person harmed, the person causing the harm, and the cause of the harm remain identifiable. Courts are therefore quite able to tailor injunctive relief and damages to prevent future harms and rectify past harms. For example, courts can require different responses from defendants at night, when quiet is needed, as opposed to the day, when it is less so.

But those forms of remedial fine-tuning are completely unavailable in mass tort cases where local governments with no powers of direct regulation are utterly unable to calibrate any corrective remedy to the unique position of identifiable parties. For all intents and purposes, each of the myriad of local governments is just like private plaintiffs because at no point do they claim that

they could exert direct powers of regulation over events that go far beyond their respective jurisdictions.

At a certain point, however, harms become so diffuse that they can no longer be addressed through ad hoc litigation, whether brought by public or private parties, which causes great expense to both the parties involved and the society at large. *See* Epstein, *Nuisance Law*, 8 J. Legal Stud. at 75-76. In a paradigmatic case involving discrete harms, those costs are justified as a means to achieve justice in the individual case. *See id.* at 75. But the costs of litigation "are apt to be overwhelming where a large number of persons are both entitled to compensation and obligated to pay it." *Id.* at 78-79. "Let these administrative costs be sufficiently large and it follows that all persons may be worse off in differing degrees if a systematic policy of individual compensation is pursued." *Id.* at 79. In that case, "[t]he faithful application of a theory of justice can become so expensive as to be self-defeating." *Id.* All of these concerns apply to government lawsuits that only seek damages for harms that originate and extend far beyond their respective jurisdictions.

The case against these nuisance suits contrived by local governments is not to suggest that diffuse harms must go unaddressed. Rather, these harms are the proper subject of administrative regulation by governments that are capable of dealing with the problem in a unified fashion, as only the federal government can.

One of the amici on this brief recognized 40 years ago—long before global warming became a major issue—that these considerations supported an administrative approach to air pollution. To repeat what was said there: "Every automobile, for example, creates a nuisance by the emission of smoke and other pollutants; yet it is inconceivable for practical reasons to entertain the prospect of systematic redress for each violation of individual rights." Epstein, *Nuisance Law*, 8 J. Legal Stud. at 101. In these cases, "[p]ublic regulation is justified . . . because all private remedies are inadequate for the protection of admitted private rights, given the administrative complications that they spawn." *Id.* at 102. That remains true today: "ordinary litigation is not easily scalable," and "[w]hat works for a dispute between two neighboring landowners may not work with the constant interaction of traditional pollutants, let alone for carbon dioxide." Epstein, *Beware of Prods and Pleas*, 121 Yale L.J. Online at 322-23.

B. The Public-Nuisance Doctrine Is Particularly Ill-Equipped To Address Global Warming Issues

Global warming is a diffuse phenomenon, with an almost unlimited number of potential plaintiffs and a similarly broad range of novel types of harm. That combination renders these cases ill-situated to resolution through localized litigation brought by either private or government actions that seek general damages under an ill-considered extension of traditional public-nuisance doctrine.

1. Because Global Warming Harms Everybody, Courts Could Not Possibly Assess The Resulting Damages

The City's proposed cause of action perfectly illustrates the practical problems associated with nuisance actions for diffuse harms. Allowing the City's claim to move forward could lead to a situation without any foreseeable boundaries, as it could set precedent for allowing countless similar claims by public and private entities alike to proceed before this court and others.

If the City can recover for its damages, there is nothing stopping every other municipality in the country from pursuing similar claims. The alleged threats of climate change—increased temperatures, flooding, erosion, and extreme weather events—would not be limited to the City. In fact, suits like the City's have already occurred. Far inland, Boulder and San Miguel counties, along with the City of Boulder, have sued ExxonMobil and Suncor based on global warming, seeking recovery for the costs of road repair and air conditioning.[3] These suits allege no specific connection of these cities to global warming, and at no point mention any of the major changes in these communities in past decades, dealing with such unmentioned critical factors as the intensity of use of their roads and office buildings, or the level of

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3 *See* Charlie Brennan, *Boulder spearheads lawsuit seeking damages from ExxonMobil, Suncor over climate change impacts*, Boulder News, Apr. 17, 2018, available at http://www.dailycamera.com/news/boulder/ci_31810658/boulder-sues-exxon-suncor-climate-change.

maintenance expenditures that every local community needs to make to keep their facilities in working order.

Those suits are just the beginning. Just as a city of 400,000 can claim damages from global warming, so, too, could a town of 40. To put things into perspective, there are over 39,000 municipalities in the United States[4] and the nation itself has approximately 95,000 miles of shoreline.[5] So, there is an enormous amount of similarly situated municipalities and coastal landowners who could raise claims just like the City's.

Given these far-reaching implications of this case, there is no reason for this Court to abandon the line drawn regarding public-nuisance suits since 1536—no matter whether these damage actions are brought by private parties or by thousands of government entities acting on their behalf. Whatever challenges global warming may pose, courts cannot use a massively expanded public-nuisance theory to address what is at root a regulatory issue. The EPA is the appropriate entity to set the country's policies in this context. As a global problem, global warming demands an administrative solution, not a judicial one.

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4 *See* Nat'l League of Cities, Number of Municipal Governments & Population Distribution, https://www.nlc.org/number-of-municipal-governments-population-distribution.

5 *See* NOAA, *How long is the U.S. shoreline?*, https://oceanservice.noaa.gov/facts/shorelength.html.

2. Courts Lack The Capacity To Dictate Who Should Bear The Cost For The Loss Caused By Global Warming, As Everyone Contributes To It

Setting aside the administrative cost associated with the almost infinite number of lawsuits that would result from the City's theory, treating global warming as a public nuisance would give rise to the additional problem of how to apportion the loss among the equally large number of responsible parties. The City has chosen five particular entities to sue. Other cities and local governments could choose five others. Still others could expand their lists further. But this proliferation of litigation strategies just highlights that the courts are not positioned to dictate who should bear the costs for this global phenomenon.

To say the least, global warming lawsuits are complex yet widely underinclusive, as people from all over the world contribute to global warming but only a tiny fraction of people are sued for it:

> First, just looking at the American scene, some good chunk of the carbon dioxide releases are from other oil companies not named in the complaint. Another, probably larger, chunk comes from burning coal, making cement, and human and animal respiration. Carbon dioxide is also released in large quantities by forest fires, including those that recently overwhelmed Northern and Southern California. And that's just in America; vast amounts of carbon

> dioxide are released from a similar range of human activities all across the globe.
>
> Here are some numbers: As of 2015, all carbon dioxide emissions from the United States comprised 14.34 percent of the global total, while China's emissions stood at 29.51 percent. Even if the five oil companies were somehow responsible for, say, 10 percent of the United States' carbon dioxide emissions, that would be less than one percent of the total human releases.

Richard A. Epstein, *Is Global Warming a Public Nuisance?*, Hoover Defining Ideas (Jan. 15, 2018).

As relevant here, despite the City suing five specific parties, the history of global warming lawsuits confirms that oil and gas producers are not uniquely responsible for the problem. Tellingly, this lawsuit only arose after the *AEP* litigation targeted power companies, and the Supreme Court in *AEP* held that those global warming claims were displaced by federal law. *See* 564 U.S. at 415. After initially targeting power companies for their carbon emissions, global warming plaintiffs cannot argue that the problems from this global phenomenon must be pinned on oil and gas producers—that are a step further removed on the causal chain. In fact, causation problems would have doomed the suit in *AEP*, and those causation issues are even more pronounced here.

None of this is meant to minimize the significance of global warming or to suggest that the problem is hopeless. The point is also not to suggest that nothing can or should be done. Rather, the idea is that, because global warming is, in part, the product of all human activity across the world, it is not the appropriate role of the federal courts to say who should bear the cost. *See, e.g.*, Epstein, *Beware of Prods and Pleas*, 121 Yale L.J. Online at 329 ("There is excessive discussion on how to deal with global warming right now, so the issue can hardly be said to be concealed in some remote location. Given that high level of public deliberation and engagement, it does not seem plausible that any ill-conceived lawsuit will add sense to the mix.").

3. The Complexity Of The Climate System Further Renders Courts Incapable Of Identifying Damages Caused By Carbon Emissions

Even if these causation and administrability problems could be resolved, there still remains the problem of identifying and quantifying the damages caused by carbon emissions. Given the complexity of the climate system, that task "cannot be shoehorned into the usual public nuisance cases." Epstein, *Beware of Prods and Pleas*, 121 Yale L.J. Online at 325. It thus seems unlikely that any court could accurately identify and quantify the harms produced by carbon emissions.

Without disputing that carbon emissions have real effects, it still bears emphasis that nobody can say with any certainty precisely what those effects

may be. For instance, scientists say that "attributing any particular extreme weather event to global warming remains beyond the current limits of scientific capability."[6] Moreover, even accepting the City's suggestion (City Br. at 4) that fossil-fuel emissions do, in fact, contribute to rising sea levels, scientists still cannot say *how much* more likely it is that sea levels will rise (and have risen) as a result of fossil-fuel emissions. Given this uncertainty, courts are not able to draw a causal link between carbon emissions and injuries, as would be necessary to justify a damages award.

In summary, the cumulative difficulties in the path of the City's public-nuisance action cannot be avoided. The City's proper forum is Congress or the EPA—not the federal courts—because global warming is a global phenomenon requiring a regulatory response. That is what the Supreme Court held in *AEP*, when it found similar claims displaced by federal environmental statutes, and that is what this Court should hold here.

6 NOAA, Earth System Research Laboratory, Global Monitoring Division, https://www.esrl.noaa.gov/gmd/outreach/faq_cat-1.html.

IV
CONCLUSION

For the reasons set forth above, the ruling of the district court should be affirmed.

DATED: May 17, 2019

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CERTIFICATE OF COMPLIANCE
PURSUANT TO FRAP 32 and NINTH CIRCUIT RULE 29

I certify that:

The foregoing contains 4,537 words and complies with the length limits set fort at Ninth Circuit Rule 32-1. The brief's type size and type face comply with Fed. R. App. P. 29(a)(5), 9th L.R. 32-1(a).

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DATED: May 17, 2019

/s/ Raymond A. Cardozo
Raymond A. Cardozo

CERTIFICATE OF SERVICE

City of Oakland, et al. v. BP P.L.C., et al.,
9th Cir. No. 18-16663
USDC, Northern Dist. Of California No. 17-cv-06011 and 17-cv-06012

I herby certify that I caused the foregoing to be filed electronically with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system on May 17, 2019.

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

/s/ Raymond A. Cardozo
Raymond A. Cardozo