No. 18-16663

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF OAKLAND, a Municipal Corporation, and The People of the State of California, acting by and through the Oakland City Attorney Barbara J. Parker; CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, and The People of California, acting by and through the San Francisco City Attorney Dennis J. Herrera,

Plaintiffs-Appellants,

v.

B.P. P.L.C., a public limited company of England and Wales; CHEVRON CORPORATION, a Delaware corporation; CONOCOPHILLIPS, a Delaware corporation; EXXON MOBIL CORPORATION, a New Jersey corporation; ROYAL DUTCH SHELL PLC, a public limited company of England and Wales; 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)

PLAINTIFFS-APPELLANTS' CONSOLIDATED REPLY BRIEF

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INTRODUCTION

Although the parties and their amici have briefed a broad range of issues, the Court need only reach the threshold issue of federal subject-matter jurisdiction. These consolidated cases were improperly removed from state court. They should be remanded. While Defendants are entitled to challenge personal jurisdiction and the sufficiency of the People's public nuisance claims, they must do so in the proper forum, based on the actual allegations of the People's complaints and the well-established elements of California public nuisance law.

For more than a century, California public entities have had statutory authority to seek abatement of public nuisances, defined as "[a]nything which is injurious to health, ... or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property" if it "affects at the same time an entire community or neighborhood, or any considerable number of persons." Cal. Civ. Code §§3479, 3480; *see* Cal. Code Civ. Proc. §731. Abatement liability merely requires "proof that a defendant knowingly created or assisted in the creation of a substantial and unreasonable interference with a public right." *People v. ConAgra Grocery Prod. Co.*, 17 Cal.App.5th 51, 79 (2017); *Cty. of Santa Clara v. Atl. Richfield Co.*, 137 Cal.App.4th 292, 309-10 (2006).

The public nuisance in these cases is the substantial and unreasonable interference with public infrastructure resulting from rising sea levels and increasingly frequent and severe storms associated with climate change. *See, e.g.*, ER 84-114 ¶¶74-91, 124-36; ER154-179 ¶¶74-91, 124-36. Under California law, Defendants may be held responsible for abating that nuisance if, as the People's complaints allege, they misleadingly promoted their fossil-fuel products through "large scale, sophisticated advertising and communications campaigns to promote pervasive fossil fuel usage," including by deliberately concealing the known consequences of climate change on public infrastructure—knowledge that Defendants have had since at least the early 1970's. ER89-106 ¶¶92-123; ER159-74 ¶¶92-123; AOB 1, 4; *see ConAgra*, 17 Cal.App.5th at 83-94.

If this Court agrees that these cases were improperly removed to federal court, it must remand for the California courts to adjudicate the People's claims under state public nuisance law. Even if the Court finds that federal subject-matter jurisdiction existed (despite the absence of complete preemption or any other ground for removal), these lawsuits must proceed in federal court under *state* law, because neither federal common law nor the Clean Air Act displace or preempt the People's public nuisance claims, and because the People's uncontested jurisdictional allegations fully satisfy due process requirements for specific personal jurisdiction.

ARGUMENT

I. The District Court Erred in Denying the Motions to Remand.

There is a "strong presumption against removal jurisdiction." *Hunter v. Philip Morris USA*, 582 F.3d 1039, 1042 (9th Cir. 2009) (quotation omitted). "[T]he defendant always has the burden of establishing that removal is proper, and … the court resolves all ambiguity in favor of remand to state court." *Id.* Where, as here, public entities brings state law claims in state court on behalf of the People to protect public health and safety, the "claim of sovereign protection from removal arises in its most powerful form." *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 676 (9th Cir. 2012) (quotation omitted). Defendants have not overcome that powerful presumption. *See Mayor and City Council of Baltimore v. BP P.L.C.*, — F.Supp.3d —, 2019 WL 2436848 (D. Md. June 10, 2019) ("*Baltimore*") (remanding city's public nuisance allegations under Maryland law against fossil-fuel companies that improperly removed case to federal court).

A. The People did not waive their objections to removal.

After the district court denied the People's remand motions, the People had a choice: either allow entry of final judgment on their exclusively state law claims, or amend their complaints to conform to the district court's rulings while preserving their objections to removal. The People chose the latter course, adding a federal common law claim (whose allegations tracked the People's state law

claim almost word-for-word, *compare* ER116-117 ¶¶145-146 *with* ER115-16 ¶¶140-141 *and* ER182-183 ¶¶145-146 *with* ER180-181 ¶¶140-141), while expressly preserving their objections to subject-matter jurisdiction and stating that they only added the federal common law claim to conform to the Court's order. As the People explained in their amended complaints:

> Defendants have removed to this Court and the Court has ruled that it has jurisdiction under 28 U.S.C. §1331. The People have amended this Complaint to conform to the Court's ruling and reserve all rights with respect to whether jurisdiction is proper in federal court.

ER63 ¶12; ER134 ¶12; *see also* ER115 ¶138 ("The People ... bring this claim seeking abatement pursuant to federal common law to conform to the Court's ruling ...."); ER180 ¶138; Chevron Supplemental Excerpts of Record ("SER") 3 (Notice of Filing Amended Complaint: "In order to conform their complaint to the Court's ruling, Plaintiffs have separately pled a federal common law claim.").

Defendants contend that despite the People's express preservation of their challenge to removal, the People forfeited their right to challenge removal on appeal by amending their complaints "to conform to the [District] Court's ruling." Chevron Br. 12-16. This Court's recent decision in *Singh v. Am. Honda Fin. Corp.*, 925 F.3d 1053 (9th Cir. 2019), precludes that argument.

The panel in *Singh*, after surveying the applicable case law, identified the following questions governing whether a plaintiff's timely challenge to removal jurisdiction has been waived:

> *First*, has the party contesting jurisdiction preserved the contention that removal was improper? *Second*, was there a jurisdictional defect at the time of removal and, if so, was it properly cured before the entry of final judgment so that federal subject-matter jurisdiction existed at the time of final judgment? *Third*, if no jurisdictional defect remained at the time of final judgment, do "considerations of finality, efficiency, and economy," outweigh the statutory defect in the case ... such that dismissal would be inconsistent "with the fair and unprotracted administration of justice"?

925 F.3d at 1065 (italics added) (quoting *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 73, 75, 77 (1996)). Under these standards, the People's jurisdictional challenge is not waived.

First, the People preserved their objections to removal by timely filing motions to remand, which is "'all that was required.'" *Id.* at 1064 (quoting *Caterpillar*, 519 U.S. at 74). No interlocutory appeals were necessary. *Caterpillar*, 519 U.S. at 74.

Second, there was no federal subject-matter removal jurisdiction at the time of removal for the reasons set forth in the People's Opening Brief pages 9-29 and Section I.B, *infra*.

Third, although the People added a federal common law cause of action in response to the district court's refusal to remand, *Singh* makes clear that for purposes of analyzing waiver, compelled amendment does not "properly cure" a jurisdictional defect. *Singh*, 925 F.3d at 1066, 1070 n.17. Where a remand ruling forces a plaintiff to add new claims or parties to avoid dismissal and "[i]t is clear ...

that [the plaintiff] had no intention of waiving her claim that jurisdiction was not proper in federal court," *Halloran v. Univ. of Washington*, 856 F.2d 1375, 1380 (9th Cir. 1988), amendment does not constitute waiver.

The district court's order denying remand unequivocally held that the People could proceed, if at all, only under federal common law. ER29, 34.[1] The People did everything they reasonably could to explain, in their amended complaints and the notices accompanying those amendments, that they added the federal common law claim only to conform to the district court's order and did *not* waive their previously-asserted removal objections. ER63, 115, 134, 180. Under *Singh* and *Halloran*, the People preserved those objections.[2]

Finally, even if the People's amended allegations had "properly cured" the lack of federal removal jurisdiction, remand would still be required because the

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[1] The district court's subsequent order dismissing the People's claims confirmed that position. *See* ER25 ("For the reasons stated in the ... order denying remand ... plaintiffs' nuisance claims must stand or fall under federal common law. Accordingly, plaintiffs' state law claims must also be dismissed.").

[2] The amended complaints' addition of San Francisco and Oakland as plaintiffs does not change the analysis. Although California city attorneys may bring a representative public nuisance action in *state court* in the name of the People under California Code of Civil Procedure §731, no similar procedural mechanism seems to be available in federal court under federal common law. That is why, to ensure continued standing and to conform to the district court's ruling, the cities were added as plaintiffs with respect to the new federal common law claim (although there will be no need for them to continue as plaintiffs once the cases are remanded).

equitable "'considerations of finality, efficiency, and economy,' outweigh the statutory defect ... such that dismissing this case now ... would be inconsistent 'with the fair and unprotracted administration of justice.'" *Singh*, 925 F.3d at 1071 (quoting *Caterpillar*, 519 U.S. at 73).

Had there been extensive discovery and lengthy pre-trial maneuvering in these cases that culminated in a trial or summary judgment ruling by a federal court applying California law, this Court might have cause to excuse the improper removal under *Singh* to avoid "impos[ing] an exorbitant cost on our dual court system ... incompatible with the fair and unprotracted administration of justice" that would result from having to start again from scratch. *Id.* at 1071; *see, e.g.*, *Caterpillar*, 519 U.S. at 66-67 (lack of diversity cured long before six-day jury trial). But these cases were resolved at the earliest possible stage of litigation under Federal Rule of Civil Procedure 12, and the considerations of finality, efficiency, and economy all favor remand. Not only did the district court dismiss the People's claims at the outset of the litigation, but it did so incorrectly and under the wrong body of law, thus "destroy[ing the People's] legitimate state claim[s], rather than ... simply chang[ing] the identity of the deciding court." *King v. Marriott Int'l Inc.*, 337 F.3d 421, 426 (4th Cir. 2003); *see also Waste Control Specialists, LLC v. Envirocare of Texas, Inc.*, 199 F.3d 781, 787, *superseded in*

part on unrelated grounds, 207 F.3d 225 (5th Cir. 2000); *Chivas Products, Ltd. v. Owen*, 864 F.2d 1280, 1286-87 (6th Cir. 1988).

For these reasons, and because Defendants' cited authorities pre-date *Singh* and are either inconsistent with that decision or easily distinguished,[3] the Court should conclude that the People sufficiently preserved their jurisdictional objections under *Singh*.

B. The People's state law claims were not removable.

1. The People's state law claims do not arise under federal common law.

The "well-pleaded complaint rule" provides that "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Rivet v. Regions Bank of La.*, 522 U.S. 470, 475 (1998) (quotation omitted). This rule "makes the plaintiff the master of [its] claim" and allows it to "avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987) ("*Williams*"). The only

[3] *See Retail Property Trust v. United Brotherhood of Carpenters & Joiners of America*, 768 F.3d 938, 949 n.6 (9th Cir. 2014) (amendment voluntary where plaintiff failed to "indicate[] ... it was [amending] solely in order to comply with the district court's order and ask[] the court to note its objections"); *Local Union 598, Plumbers & Pipefitters Indus. Journeymen & Apprentices Training Fund v. J.A. Jones Const. Co.*, 846 F.2d 1213, 1215 (9th Cir. 1988) ("The plaintiff at no time has raised any objection to federal jurisdiction."); *Barbara v. N.Y. Stock Exchange, Inc.*, 99 F.3d 49, 55 (2nd Cir. 1996) (same); *see also Moffitt v. Residential Funding Co., LLC*, 604 F.3d 156, 158-60 (4th Cir. 2010) (plaintiff amended complaint to add federal claims *before* moving to remand).

exception is where federal law provides the "exclusive cause of action" for a given claim, "wholly displac[ing] the state-law cause of action through complete pre-emption." *Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 8-9 (2003).

Defendants conflate the complete preemption required for removal with the defense of ordinary preemption, which is never a valid ground for removal. *See Williams*, 482 U.S. at 392. Complete preemption can only be found when "federal law not only preempts a state law cause of action, but also substitutes an exclusive federal cause of action in its place." *Hansen v. Group Health Coop.*, 902 F.3d 1051, 1057 (9th Cir. 2018).

Defendants ignore the fundamental jurisdictional principle that there can be no removal without complete, rather than ordinary, preemption. Instead, they reiterate the district court's assertion that because the People's state law claims allegedly involve "uniquely federal interests," they are necessarily "governed by federal common law" rather than state public nuisance law. Chevron Br. 17-28. That is an argument for ordinary preemption, though, not complete preemption, and it is not meritorious in any event. *See* Section II.C, *infra*; *Boyle v. United Tech. Corp.*, 487 U.S. 500, 504 (1988); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987); *Baltimore*, 2019 WL 2436848, at *6-9.

This Court has unambiguously held that "[i]f ... state law is preempted by federal law and federal law provides no remedy, the state claim cannot be

recharacterized as federal, as no federal claim exists, preemption is interposed solely as a defense, and removal is improper." *Sullivan v. First Affiliated Sec., Inc.*, 813 F.2d 1368, 1372 (9th Cir. 1987). Defendants do not identify any federal common law cause of action or remedy available to the People. Chevron Br. 43-52. Their "arising under" argument is just an improper attempt to circumvent the well-pleaded complaint rule. Because a case may not be removed based on ordinary preemption, *Williams*, 482 U.S. at 393; *Retail Property Trust*, 768 F.3d at 946-47, the district court's sole stated basis for denying remand was erroneous.[4] *See generally* Gil Seinfeld, *Climate Change Litigation in the Federal Courts: Jurisdictional Lessons from* California v. BP, 117 Mich. L. Rev. Online 25, 32-35 (2018) (criticizing the district court's ruling denying remand in this case).

[4] Defendants' cited cases are not to the contrary. There was no dispute about removal or jurisdiction in *United States. v. Standard Oil of California*, 332 U.S. 301 (1947). The rulings in *Wayne v. DHL Worldwide Express*, 294 F.3d 1179, 1184 (9th Cir. 2002) and *New SD, Inc. v. Rockwell Int'l Corp*., 79 F.3d 953 (9th Cir. 1996) predate *Beneficial* (which requires defendants to demonstrate the existence of an exclusive federal replacement cause of action); both cases were limited to addressing whether federal common law applied; and in neither case did the plaintiffs dispute that removal jurisdiction was proper if federal common law applied. The Fifth Circuit's decision in *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922 (5th Cir. 1997), is inapposite because it concluded that, unlike here, Congress *had* expressly preserved a federal common law cause of action governing the claims at issue.

2. The Clean Air Act does not completely preempt the People's state law claims.

Complete preemption is "rare" and has only been recognized by the Supreme Court under three statutes: Section 301 of the Labor-Management Relations Act, Section 502(a) of the Employee Retirement Income Security Act, and Sections 85 and 86 of the National Bank Act. *Retail Prop. Trust*, 768 F.3d at 947-48 & n.5. Before a federal statute can be found to be completely preemptive, the defendant must establish that "Congress intended the scope of federal law to be so broad as to entirely replace any state-law claim." *Id.* at 947. The Clean Air Act's ("CAA") savings clauses, which expressly leave certain claims available under state law, *see* 42 U.S.C. §§7604(e), 7412(r)(11), thus preclude any finding that Congress intended the CAA to be *completely* preemptive. *See Her Majesty The Queen In Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332, 342-43 (6th Cir. 1989); *see also Virginia Uranium, Inc. v. Warren*, 139 S.Ct. 1894, 1904-05 (2019) (Gorsuch, J., plurality opinion) (because preemption of state laws represents a "serious intrusion into state sovereignty," no intent to preempt state police power regulation may be inferred absent a "clear congressional command" in the statutory text) (quotation omitted).

The CAA cannot completely preempt the People's public nuisance claim because it does not replace that claim in any way: it does not provide *any* cause of action that would allow the People to seek *any* remedy for the harms to public

infrastructure resulting from Defendants' wrongful marketing and sale of fossil fuels.[5]

The only private rights of action authorized by the CAA are for injunctive relief: to compel an emitter to comply with air quality standards or permits, 42 U.S.C. §7604, to compel the Environmental Protection Agency ("EPA") to comply with a nondiscretionary duty, *id.*, or to challenge an EPA emissions standard, *id.* §7607. Nothing in the CAA comes close to creating a cause of action against Defendants for contributing to a California public nuisance in the manner and on the facts alleged in the People's complaints. Nor does anything in those complaints preclude the EPA from setting whatever future emissions limits it may find appropriate. *See Baltimore*, 2019 WL 2436848, at *11-13. While Defendants contend that federal law can be completely preemptive even if it does not provide a substitute federal cause of action, Chevron Br. 38, their cited cases simply indicate that the substitute federal law need not provide the same *remedies* for a particular wrong, while still requiring the federal law to provide a substitute *cause of action* to be completely preemptive. *See, e.g., Fayard v. Northeast Vehicle Servs., LLC*, 533 F.3d 42, 48-49 (1st Cir. 2008); *Botsford v. Blue Cross & Blue Shield of*

[5] The CAA does not "ordinarily" preempt the People's state law claims either. *See* Section II.C, *infra*.

Montana, Inc., 314 F.3d 390, 397 (9th Cir. 2002); *Prince v. Sears Holdings Corp.*, 848 F.3d 173, 177 (4th Cir. 2017).

3. The People's state law claims do not "necessarily raise" disputed, substantial issues of federal law.

Defendants have not identified any question of federal law that is "necessarily raised" as an element of the People's state public nuisance claims for purposes of embedded federal question jurisdiction. A question of federal law is "necessarily raised" by a state law cause of action only if it "is a necessary element of one of the well-pleaded state claims." *Tax Bd. of State of Calif. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 13 (1983); *see also Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 813 (1986) ("the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction"); *Nevada*, 672 F.3d at 675 ("the mere use of a federal statute as a predicate for a state law cause of action does not necessarily transform that cause of action into a federal claim").

Instead of identifying elements of the People's public nuisance claims that necessarily require the courts to adjudicate an embedded federal law question, Defendants offer vague references to abstract federal policies that might tangentially be affected if the state courts were required to balance the costs and benefits of fossil-fuel production in adjudicating the People's claims. Chevron Br. 36-37. No such balancing is required under the People's theory of state law

liability. In any event, embedded federal question jurisdiction cannot rest on the speculative indirect effects of a state court claim on federal policy decisions.

To establish a "public nuisance," the People need only show the existence of a hazardous condition that substantially and unreasonably interferes with a public right; and a substantial hazard *unreasonably* interferes with the public right to safety and health if the costs of abatement are greater than the People in fairness should be required to bear. *See ConAgra*, 17 Cal.App.5th at 112; *Wilson v. S. Calif. Edison Co.*, 21 Cal.App.5th 786, 804 (2018) (citing Prosser & Keeton, Torts §88, p. 629 (5th ed. 1984)); Restatement (Second) of Torts ("Restatement") §§821B, 826(b) & cmt. f, 829A (1979).[6]

California state courts will also not be required to interpret or apply any federal statutes or regulations in adjudicating Defendants' abatement liability. Once the People establish the existence of a public nuisance, Defendants' responsibility for abatement will depend on whether they created or assisted in the creation of that nuisance—which has nothing to do with any of the federal laws Defendants have cited. *See* Chevron Br. 37 n.12. Although Defendants make

[6] Any balancing required for state law *tort claim* adjudication would in any event have a different focus and purpose than the balancing approach used by Congress or executive agencies to set regulatory policy. *See, e.g., Freeman v. Grain Processing Corp.*, 848 N.W.2d 58, 69-70 (Iowa 2014); *Brown-Forman Corp. v. Miller*, 528 S.W.3d 886, 894 (Ky. 2017).

generalized references to "foreign affairs," for example, they do not identify any particular federal treaty or law that would need to be interpreted to adjudicate any element of the People's public nuisance claims. Foreign affairs preemption is just another preemption defense anyway, *see* Section II.D.2, *infra*, so it cannot establish embedded federal question jurisdiction. *Williams*, 482 U.S. at 393; *Baltimore*, 2019 WL 2436848 at *9-11.

Finally, Defendants' assertion that some unspecified question of federal law arises because "the instrumentality of the alleged harm is the navigable waters of the United States," ER25, is entirely unsupported, legally or factually, *see* AOB 14 n.4, which is why the United States disavowed that theory of jurisdiction. *See* U.S. Br. 9; *see also Baltimore*, 2019 WL 2436848 at *10-11 (rejecting embedded federal question jurisdiction theory based on navigable waters).

4. There is no OCSLA jurisdiction.

The Court should reject Defendants' overbroad interpretation of the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. §1349(b)(1). The mere possibility that an abatement order might discourage a company from extracting fossil fuels from the outer continental shelf ("OCS") in the future, Chevron Br. 39-40, does not establish a sufficiently direct connection to any OCS operations to establish federal jurisdiction. *See, e.g.*, *Plains Gas Sols., LLC v. Tennessee Gas Pipeline Co., LLC*, 46 F.Supp.3d 701, 704-05 (S.D. Tex. 2014) (rejecting OCSLA

jurisdiction because the alleged connection to OCS operations was "'too remote'" and would lead to "absurd results") (quoting *In re Deepwater Horizon*, 745 F.3d 157, 163 (5th Cir. 2014)); AOB 23-25 and cases cited.[7]

Nor is the fact that some small subset of Defendants' fossil-fuel products may have originated in the OCS sufficient to confer OCSLA jurisdiction. The People's claims challenge Defendants' wrongful promotion and marketing activities. None of that allegedly tortious conduct occurred on the OCS. No actionable harms to public infrastructure occurred on the OCS. The location of any Defendant's fossil-fuel extraction has no bearing on its abatement liability. Consequently, any link between Defendants' "physical acts" on the OCS and the elements of the People's claims is "simply too remote and attenuated" to confer OCSLA jurisdiction. *Par. of Plaquemines v. Total Petrochem. & Ref. USA, Inc.*, 64 F.Supp.3d 872, 898 (E.D. La. 2014); *see also Baltimore*, 2019 WL 2436848 at *16-17 (rejecting OCSLA jurisdiction).[8]

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[7] The claims in *Amoco Prod. Co. v. Sea Robin Pipeline Co.*, 844 F.2d 1202 (5th Cir. 1988), had a direct and immediate connection to physical activity on the OCS, and were of the type "Congress anticipated that [federal] oil and gas leases on the OCS and operations thereunder might generate." *Id.* at 1206-10 (addressing mineral lease dispute that determined the current and future production of specific OCS gas wells).

[8] The fact that federal law applies to the OCS, *see Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S.Ct. 1881 (2019), has no bearing on jurisdiction here because the People's claims do not arise out of, or in connection with, any operation on the OCS and because no jurisdictional question was before the *Parker*

5. There is no federal officer jurisdiction.

The only federal contract that Defendants identify (pertaining to the Elk Hills Reserve) does not create federal officer removal. The language Defendants cite simply provides ordinary contract rights to the government—e.g., the ability to decide the upper range of permissible production and the extent of exploration in the reserve. SER27-28.[9] Those contract terms do not create the "unusually close" relationship "involving detailed regulation, monitoring, or supervision" required for federal officer removal. *Watson v. Philip Morris Cos., Inc.*, 551 U.S. 142, 153 (2007). Defendants also cannot establish the necessary "causal nexus" between the People's claims and any actions allegedly taken pursuant to a federal officer's directions. *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1251 (9th Cir. 2006). The Elk Hills contract had no bearing on Defendants' misleading marketing campaigns, and Defendants cannot show that any government contract directed them to conceal the hazards of fossil fuels or prohibited them from providing warnings to the consuming public. *See Baltimore*, 2019 WL 2436848 at *17-18 (rejecting federal officer removal jurisdiction).

Court (as the entirety of the plaintiffs' wage claim was based on work physically performed on an OCS drilling platform and all parties agreed that OCSLA applied to that work). *Id.* at 1886.

[9] Contrary to Chevron Brief 41, that contract did not *require* Standard Oil to produce 15,000 barrels per day, but set that amount as the upper limit of removal from the shared field. SER28 §4(b).

6. There is no admiralty, bankruptcy, or federal enclave jurisdiction.

Defendants do not seriously raise any other grounds for removal jurisdiction. They do not dispute that they waived their assertion of admiralty jurisdiction by failing to include it their removal notice. AOB 27-28. Nor do they dispute that the "saving-to-suitors" clause prevents the removal of admiralty claims brought in state court absent some other jurisdictional basis. *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1069 (9th Cir. 2001).

For bankruptcy jurisdiction, Defendants make no attempt to establish the requisite "close nexus," *In re Ray*, 624 F.3d 1124, 1134 (9th Cir. 2010), between this case and the single bankruptcy proceeding identified in their removal notice. ER234. The People's claims are also exempted from the jurisdiction of the bankruptcy courts by the police power exemption. AOB 27; *see City & Cty. of San Francisco v. PG&E Corp.*, 433 F.3d 1115, 1123-24 (9th Cir. 2006); *In re Universal Life Church*, 128 F.3d 1294, 1299 (9th Cir. 1997); *see also Baltimore*, 2019 WL 2436848, at *19-21 (rejecting bankruptcy jurisdiction).

Finally, Defendants' one-sentence, conclusory assertion regarding federal enclave jurisdiction, Chevron Br. 40, ignores that federal enclave jurisdiction only covers torts that "arise on" federal enclaves, *Durham*, 445 F.3d at 1250. The People's claims here arise exclusively on non-federal lands within the jurisdictions

of San Francisco and Oakland. *See* ER116 n.154, 118 n.155, 181 n.82, 183 n.83; AOB 26; *Baltimore*, 2019 WL 2436848 at *14-16 (rejecting enclave jurisdiction).

For all these reasons, remand is required.

II. The District Court Erred in Granting Defendants' Rule 12(b)(6) Motions to Dismiss.

The district court, after improperly denying remand on the theory that the People's state-law public nuisance claims were actually "governed by federal common law," then executed a complete turnabout by dismissing the case on the grounds that any federal common law claims the People could have asserted were displaced by the CAA and foreclosed by separation of powers and foreign policy concerns. ER19-25. That reasoning was erroneous, and was compounded by the district court's dismissive treatment of the People's state law claims. If this Court determines for any reason that these cases must proceed in federal court, it should allow the People to pursue abatement relief under *California* public nuisance law, for the reasons stated below.[10]

[10] The People explained in their Opening Brief why there is no basis for creating a new category of federal common law to govern public nuisance cases that do not seek to regulate or reduce greenhouse-gas emissions and that neither allege nor require proof of defendants' emissions. *See* AOB 32-41. Even if this were an emissions regulation case, though, *Native Village of Kivalina v. ExxonMobil Corp.* 696 F.3d 849 (9th Cir. 2013), makes clear that any common law regulating such emissions, foreign or domestic, is displaced by the CAA, and thus could not preempt state nuisance law. *See* AOB 14-18. Consequently, even though the district court dismissed the federal common law cause of action that it erroneously believed the People were required to allege, the People focus their

A. The People properly allege ordinary California state law public nuisance claims.

"There are few forms of action in the history of Anglo-American law with a pedigree older than suits seeking to restrain nuisances, whether public or private." *People ex rel. Gallo v. Acuna*, 14 Cal.4th 1090, 1103 (1997); *see, e.g.*, *People ex rel. Ricks Water Co. v. Elk River Mill & Lumber Co.*, 107 Cal. 214, 219-20 (1895) ("pollution of the water by any unreasonable use"); *Bowen v. Wendt*, 103 Cal. 236, 238 (1894) ("polluting the waters of [a] creek"). Under California law, public entities suing on a representative basis on behalf of the People may seek prospective abatement (but no other remedy) from any person or entity whose conduct "knowingly created or assisted in the creation of" a nuisance, i.e., whose affirmative conduct "played at least a minor role in creating the nuisance that now exists"—a factual rather than a legal inquiry. *ConAgra*, 17 Cal.App.5th at 79, 102; *Santa Clara*, 137 Cal.App.4th at 309-10; *see also* Restatement §840E cmt. b.

Liability for prospective abatement does not require proof that a particular defendant is *entirely* responsible for a public nuisance or that it participated in *every* act in the chain of causation. *See* AOB 35-36; *ConAgra*, 17 Cal.App.5th at 164 (rejecting defense that lead manufacturers could avoid responsibility for

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Rule 12(b)(6) analysis on why they stated a valid *state-law* public nuisance claim (although much of the analysis equally applies to any federal common law of public nuisance that has not otherwise been displaced).

abating public nuisance because the most direct cause of the nuisance was the end-use by painters of defendants' lead-based paint); *City of Modesto v. Dow Chem. Co.*, 19 Cal.App.5th 130, 153-58 (2018) (manufacturers' role in creating nuisance is question of fact for jury). Nor does California law require proof that the harms caused by the use of Defendants' fossil-fuel products outweigh the benefits of that use. *See supra* at 14 (citing *ConAgra*, 17 Cal.App.5th at 112; *Wilson*, 21 Cal.App.5th at 804; Restatement §§821B, 826(b) & cmt. f, 829A). "[T]he fact that other persons contribute to a nuisance is not a bar to the defendant's liability for his own contribution," either. Restatement §840E; *see also People v. Gold Run Ditch & Mining Co.*, 66 Cal. 138, 149 (1884). To "assist[] in the creation" of a public nuisance, *ConAgra*, 17 Cal.App.5th at 79, a defendant need only engage in the limited conduct alleged in the People's complaints.[11]

The People's complaints expressly state they "do not seek to impose liability on Defendants for their [or anyone else's] direct emissions of greenhouse gases." ER 62 ¶11 (emphasis omitted); ER134 ¶11. That is because, under California law, it makes no difference how, when, or by whom Defendants' products were released into the atmosphere—any more than it mattered in *ConAgra* which

[11] Once the People establish, under traditional tort causation principles, that a Defendant's conduct was a "substantial factor" in contributing to the public nuisance at issue, that Defendant will have the opportunity to seek any appropriate apportionment. *ConAgra*, 17 Cal.App.5th at 102, 108.

painters or homeowners purchased or applied defendant manufacturers' lead-based paint or whether any homeowner's painted wall surfaces were maintained improperly. As in *ConAgra*, the People are entitled to prospective abatement as long as they can establish the existence of a public nuisance to which Defendants' wrongful promotional activities contributed. *See ConAgra*, 17 Cal.App.5th at 83-84, 113-14; *Modesto*, 19 Cal.App.5th at 156; *see also* National League of Cities Br. 5-7 (collecting public nuisance cases by cities and states addressing the local impacts of exposures to asbestos, tobacco, gun violence, gasoline additives, lead paint, the subprime mortgage crisis, the opioid epidemic, and PCB contamination).[12]

With those principles of California public nuisance law as background, we turn to Defendants' arguments in defense of the district court's Rule 12(b)(6) order.

B. Federal common law does not displace the People's state law public nuisance claims.

Defendants contend that all state law claims relating in any way to global warming are necessarily preempted by federal common law. Chevron Br. 16-24. Largely ignoring the narrow scope of the People's factual allegations and legal

[12] Although an abatement remedy is characterized as prospective equitable relief, it is directed at the existing and continuing consequences of Defendants' *past* conduct, consistent with California public nuisance law. *See* ER59, 106 ¶¶4, 124; ER131, 174 ¶¶4, 124; Climate Scientists Br. 16-27.

claims, Defendants assert that the practical effect of an abatement order would be indirectly to regulate the "transboundary pollution" caused by worldwide greenhouse-gas emissions by discouraging fossil-fuel companies from continuing their current practices. *Id.* 21. But the People's complaints expressly disclaim any intent to regulate emissions, directly or indirectly, ER62 ¶11; ER134 ¶11, and Defendants' liability for abatement can be established merely through proof that they engaged in the wrongful promotion and other affirmative conduct alleged. *See* ER98-106, 116-118 ¶¶103-123, 143-148; ER167-174, 182-183 ¶¶103-123, 143-148.

Defendants rely on cases in which a plaintiff sought to enjoin and obtain compensatory damages for harms directly caused by a company's polluting discharges or emissions. *See, e.g.*, *Missouri v. Illinois*, 200 U.S. 496 (1906) (sewage discharge). But those cases neither address nor govern a representative public nuisance claim that industrial defendants deliberately concealed the hazards they knew would inevitably result from use of their products as directed. While the combustion of fossil-fuel products is part of the chain of causation that begins with fossil-fuel extraction and ends with the need for abatement, that does not mean that the People are suing Defendants for emissions-related "transboundary pollution." No proof of Defendants' emissions practices is needed to hold them liable for assisting in the creation of a California public nuisance; and under

California law the only remedy available for Defendants' wrongful conduct is prospective abatement to remediate the effects of that conduct, not regulation of Defendants' future practices. *Cf. Virginia Uranium*, 139 S.Ct. at 1914-15 & n.4 (Ginsburg, J., concurring in judgment) (for purposes of preemption, courts must focus on what the state law actually regulates, not what upstream or downstream impacts that regulation might have).

Neither *AEP* nor *Kivalina* decided whether the federal common law governing transboundary pollution displaced state law public nuisance claims, let alone public nuisance claims that were not directed at emissions. *See Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 429 (2011) ("*AEP*") ("None of the parties have briefed ... or otherwise addressed the availability of a claim under state nuisance law."); *Kivalina*, 696 F.3d at 858 (Pro, J., concurring) ("The district court dismissed the state law nuisance claim without prejudice to refiling in state court, and no one appeals that decision.").

In both cases, the issue before the court was limited to whether the CAA displaced the plaintiffs' *federal* common law claims that directly challenged the defendants' own greenhouse gas emissions. *AEP*, 564 U.S. at 424; *Kivalina*, 696 F.3d at 858. Neither case held that all public nuisance claims relating in any way to global warming are governed by federal law. Nor did either case decide whether such claims—even if they *did* directly challenge a defendant's emissions—would

be cognizable under state law. In fact, the Supreme Court in *AEP* expressly remanded for consideration of the plaintiffs' state law claims, *see* 564 U.S. at 429, which it could not have done if those claims were entirely displaced by federal common law. *See also Kivalina*, 696 F.3d at 866 (Pro, J., concurring) (under *AEP*, plaintiff on remand may "pursue whatever remedies it may have under state law").

This is not one of the handful of "extraordinary cases" in which federal common law displaces an entire body of state law. *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 89 (1994). Defendants have not established any overriding federal interest in having a "uniform" federal standard for global-warming-related public nuisance cases, or any "significant conflict" between state and federal interests. *See Boyle*, 487 U.S. at 507. Even if state and federal standards for adjudicating public nuisance claims were not based on well-established Restatement principles and thus already mostly uniform, *see* AOB 38-39; Chevron Br. 23-24, 56; *Kivalina*, 696 F.3d at 855, there is no reason why every sovereign state could not devise its own nuisance standard, pursuant to its own police power authority, to regulate conduct causing severe in-state harms.

To be sure, Congress *could* require federal law to govern all cases in which climate change may have contributed to a plaintiff's injury or in which a non-party's contributions to climate change had some causal impact on the nature or extent of that injury. But Congress has not done so, *see infra* at 28-29, and

Congress's inchoate authority to preempt has no effect on the enforceability of state law claims unless and until that authority is exercised. "Invoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption ...." *Virginia Uranium*, 139 S.Ct. at 1901 (plurality opinion).

Because the People's claims do not challenge or seek an order reducing greenhouse gas emissions, there is no risk here that courts would impose conflicting obligations on the same emission sources under different state laws. *Cf. Ouellette*, 479 U.S. at 496-97. Defendants will be just as free to continue selling fossil fuels in the future, and emitters will be just as free to continue consuming those products, regardless of the outcome of the People's lawsuits. Defendants' speculation that the practical impact of an abatement order could "cripple" the fossil fuel industry is entirely unsupported, and is an improper basis to decide a motion to dismiss in any event.

Remediating the effects of climate change is not a uniquely federal concern. *See* California et al. Br. 4; National League of Cities Br. 9; *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1324-25 (5th Cir. 1985) ("the existence of national interests, no matter their significance, cannot by themselves give federal courts the authority to supersede state policy"). Nor does the availability of state public nuisance law allowing abatement of local harms trench on "relations with

foreign nations" or "international disputes." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981); *see* Former U.S. Government Officials Br. 6-19. The federal government's international climate negotiations do not involve corporations or corporate liability, and Defendants have not identified any federal foreign policy interest in immunizing corporate deception or concealment.

Defendants' assertion that state law should not apply because of the potentially adverse effect on their profits if *they*, rather than the taxpayers of Oakland and San Francisco, must incur the costs of abatement, Chevron Br. 23, is an argument for avoiding legal responsibility, not for application of a uniform legal standard; and it is an argument for Congress, not the courts. *See City of Milwaukee v. Illinois*, 451 U.S. 304, 312-13 (1981) ("*Milwaukee II*") ("[T]he decision whether to displace state law ... is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress.").

C. The CAA does not preempt the People's state law public nuisance claims.

Defendants contend that even if the CAA does not "completely" preempt the People's state law claims for removal purposes, *see* Section I.B.2, *supra*, it nonetheless provides Defendants an ordinary preemption defense. That is incorrect.

Any analysis of the preemptive effect of federal legislation must "start with the assumption that the historic police powers of the States were not to be superseded by the [federal legislation] unless that was the clear and manifest purpose of Congress." *Milwaukee II*, 451 U.S. at 316 (citation omitted). No clear and manifest intent to preempt California public nuisance law can be found in the CAA, and that would be true even if proof of Defendants' emissions practices were an element of the People's state law claims (although, under *Kivalina*, the CAA would still displace any emissions-related *federal common law claims* that might otherwise exist, *see* AOB 14-18).

The CAA was designed to encourage cooperative state and federal efforts to improve air quality and reduce air-borne pollutants throughout the country. *See, e.g.*, 42 U.S.C. §7416. Far from prohibiting state governments' exercise of police powers to assist in that effort, the CAA "explicitly protects the authority of the states to regulate air pollution." *Exxon Mobil Corp. v. U.S. E.P.A.*, 217 F.3d 1246, 1254 (9th Cir. 2000). In a "sweeping and explicit provision entitled the 'Retention of State Authority,'" *id.*, the CAA expressly preserves any state standard "respecting emissions of air pollutants" or "respecting control or abatement of air pollution." 42 U.S.C. §7416. The CAA also explicitly preserves the states' rights to exercise their statutory and common law authority to obtain relief from harmful emissions, either through "enforcement of any emission standard or limitation" or

through "other relief." 42 U.S.C. §7604(e); *see Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685, 690 (6th Cir. 2015) (CAA savings clauses apply to state statutory and common law claims).

In the few instances in which Congress chose to have the CAA expressly preempt state law, it made that intention clear. *See, e.g.*, 42 U.S.C. §§7543(a), 7545(c)(4)(A), 7573. These express preemption provisions have been construed narrowly, *see* NRDC Br. 26 (collecting cases), and they demonstrate Congress's intent to preempt only those state laws that the CAA expressly designates as preempted.

Defendants do not contend that the CAA exclusively occupies the field of climate change regulation for field-preemption purposes. *See Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1480 (2018). Nor could they, given the CAA's savings provisions; the congressional declaration that "states retain the leading role in regulating matters of health and air quality," *Exxon Mobil Corp.*, 217 F.3d at 1254 (citing 42 U.S.C. §7401(a)(3)); and the structure of the CAA, which embraces cooperative federalism and protects the states' right to continue enforcing laws relating to climate change and abatement. *See Natural Res. Def. Council, Inc. v. U.S. E.P.A.*, 638 F.3d 1183, 1185 (9th Cir. 2011); *see also* S. Rep. No. 91-1196, at 38 (1970) (Senate Committee on Public Works Report explaining that CAA citizen suit provision "would specifically preserve any rights or remedies

under any other law"). Besides, regulation of public nuisances is historically a matter of state law concern, *see Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), and it is "well settled that the states have a legitimate interest in combating the adverse effects of climate change on their residents." *Am. Fuel & Petrochem. Mfrs. v. O'Keeffe*, 903 F.3d 903, 913 (9th Cir. 2018); *see Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960) (environmental regulation is a field traditionally occupied by states); *In re Methyl Tertiary Butyl Ether (MTBE) Products Liab. Litig.*, 725 F.3d 65, 96 (2d Cir. 2013) ("state tort law liability for negligence, trespass, public nuisance, and failure-to-warn" "falls well within the state's historic powers to protect the health, safety, and property rights of its citizens"); *cf. Soto v. Bushmaster Firearms Intl. LLC*, 202 A.3d 262, 272-73 (Conn. 2019) ("regulation of advertising that threatens the public health, safety, and morals has long been considered a core exercise of the states' police powers").

There is also no conflict preemption. Even if the People were required to establish the nature and scope of Defendants' emissions activities to be entitled to an abatement order, there would be no conflict between the CAA and California nuisance law. Conflict preemption only arises where "compliance with both state and federal law is impossible," or where "the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *California v. ARC America Corp.*, 490 U.S. 93, 100-01 (1989) (quotation omitted).

Defendants speculate that a judicial order requiring abatement could "have the effect of curbing nationwide and global emissions," which would in turn interfere with federal regulatory requirements. Chevron Br. 38. That argument rests on the implausible (and in light of *Virginia Uranium*, impermissibly speculative) premise that a prospective abatement remedy would necessarily, and improperly, force Defendants to cease or sharply reduce their fossil-fuel exploration and production. In fact, an abatement remedy would *not* require Defendants to change any of their practices going forward, and Defendants can avoid future liability simply by no longer promoting their products based on knowing misrepresentations. The speculative indirect consequences of an abatement order do not make Defendants' compliance with state and federal law at the same time impossible. *Wyeth v. Levine*, 555 U.S. 555, 573 (2009); *see also Virginia Uranium*, 139 S.Ct. at 1907 (plurality opinion) (rejecting argument that purpose of federal statute would be "effectively undermined" if state law were enforced, as unduly "simplistic"); *English v. Gen. Elec. Co.*, 496 U.S. 72, 85-86 (1990) (whistleblower's state law tort claim not preempted by federal nuclear safety regulatory regime because, even though damages award "may have some effect" on future "decisions ... concerning radiological safety levels," "this effect is neither direct nor substantial enough to place petitioner's claim in the pre-empted field").

Defendants have also not shown that the required elements of proof under California law stand as an obstacle to achieving the purposes of the CAA. Certainly, an abatement fund to remediate the consequences of rising sea levels on public infrastructure does not interfere with any of the CAA's stated goals. *See* 42 U.S.C. §7401(b); *see also Oxygenated Fuels Ass'n v. Davis*, 331 F.3d 665, 671-72 (9th Cir. 2003). Nor have Defendants identified any other conflicts.

The United States offers a different reason why the CAA purportedly preempts state law. U.S. Br. 11. Relying on *Ouellette*, 479 U.S. 481, the United States argues that the principles of conflict preemption applicable under the Clean Water Act ("CWA") should apply under the CAA because both statutes have state-rights savings clauses. But this argument ignores important differences between the CWA and CAA and the fact that before conflict preemption can be found, there must actually be a conflict. *See Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 863 (9th Cir. 2009).

In *Ouellette*, the Court considered a federal program regulating discharge of polluting effluents, a program that distinguished between the rights of "source states" and "affected states." The Court concluded that to apply the law of Vermont (the affected state, under the CWA) to pollution emanating from a "single" New York point source would conflict with the permitting process that the CWA established to address interstate water pollution. 479 U.S. at 489-91, 496.

The present cases are readily distinguishable because: (1) the People's lawsuits do not seek to regulate emissions, regardless of their source; (2) the only remedy available in a California representative public nuisance action is prospective abatement; and (3) the core purposes of California public nuisance law (protecting the public against environmental and other harms) and the CAA (preserving clean air) are complementary, not conflicting. In contrast to *Ouellette*, there is no basis here for finding that application of state law would be an obstacle to achieving the purposes of the CAA. *See Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 143 (1990) ("'[T]he mere existence of a federal regulatory or enforcement scheme,' ... even a considerably detailed one, 'does not by itself imply pre-emption of state remedies.'") (quoting *English*, 496 U.S. at 87).[13]

[13] *North Carolina, ex rel. Cooper v. Tennessee Valley Auth.*, 615 F.3d 291 (4th Cir. 2010), confirms that the Court's concern in *Ouellette* was with nuisance actions that sought "to establish emissions standards different" from the federal standards. This caution, and the resulting limitations on state authority, have no application to the People's public nuisance claims for equitable abatement. The United States also cites *Her Majesty*, 874 F.2d at 344, but the court in that case simply noted that the pending state court actions would, if successful, result in more stringent pollution controls (as permitted by the CAA) and would not interfere with any federal permit. Here, because the People's lawsuits do not seek to impose emissions standards, there is no tension between a state law remedy and the CAA.

D. Defendants' and their amici's newly-raised constitutional arguments provide no reason to dismiss the People's state law public nuisance claims.

1. The Dormant Commerce Clause

"The dormant Commerce Clause ... prohibits a state from regulating conduct that 'takes place wholly outside of the State's borders.'" *Am. Fuel & Petrochem. Mfrs.*, 903 F.3d at 916-17 (quoting *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1323 (9th Cir. 2015) (en banc)). Although the Chamber of Commerce contends that the People's complaints violate the dormant Commerce Clause because they seek to regulate "Defendants' fossil-fuel production and exploration ... across the globe," Chamber Br. 19-20, Defendants themselves have not made a dormant Commerce Clause argument and therefore waived it.

In any event, the People's complaints focus on the exclusively *in*-state harms resulting from Defendants' conduct (while alleging in-state *and* out-of-state wrongful conduct). ER98-114 ¶¶103-123, 124-136; ER167-180 ¶¶103-123, 124-136. Further, although the Chamber speculates that the People seek to subject fossil-fuel companies to "conflicting requirements" in different states, Chamber Br. 20 (quotation omitted), it has neither "present[ed] evidence that conflicting, legitimate legislation is already in place or that the threat of such legislation is both actual and imminent," *Rocky Mtn. Farmers Union v. Corey*, 730 F.3d 1070, 1104-05 (9th Cir. 2013) ("*Rocky Mountain I*") (quotation omitted). And because the

People's public nuisance lawsuits are a "classic exercise of police power," a statutory abatement order would not violate the dormant Commerce Clause. *See Rocky Mtn. Farmers Union v. Corey*, 913 F.3d 940, 953 (9th Cir. 2019); *Sam Francis Found.*, 784 F.3d at 1324.

2. The Foreign Commerce Clause and foreign affairs preemption

The United States makes a related argument under the Foreign Commerce Clause (also not raised by Defendants, and thus waived): that adjudication of the People's public nuisance claims will somehow have the effect of regulating "[d]ecisions by foreign governments about energy production." U.S. Br. 16. But the People's complaints are pleaded against investor-owned (rather than foreign-government-owned) companies, ER59, 67-83, and the United States has neither shown that this litigation will have the "practical effect" of "control[ling]" the energy policy of foreign nations, *Rocky Mountain I*, 730 F.3d at 1101 (quotation omitted), nor identified any statements or allegations by the People to support its speculative assertions.

Because these lawsuits seek to remediate local, in-state harms, they also do not interfere with the federal government's ability to speak with "one voice" when "regulating commercial relations with foreign governments." *Barclays Bank PLC v. Franchise Tax Bd. of Calif.*, 512 U.S. 298, 311 (1994). No matter the eventual outcome of these cases, the federal government will remain free to establish and

implement uniform foreign policy regarding climate change and its commercial relations with other nations.

For foreign-affairs *conflict* preemption, the Court must find "'evidence of clear conflict between the policies adopted by'" California public nuisance law and federal foreign policy. *Gingery v. City of Glendale*, 831 F.3d 1222, 1228 (9th Cir. 2016) (quoting *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 421 (2003)). Only an "express federal foreign policy," *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1071-72 (9th Cir. 2012), is "fit to preempt state law," *Garamendi*, 539 U.S. at 398, and neither Defendants nor their amici identify any such policy. *See* Foreign Relation Scholars Br. 21-22 (collecting cases); Former U.S. Government Officials Br. 15 & n.29 (same). The only arguable policies might be (1) the federal government's asserted "longstanding" opposition to its own "sovereign liability" for climate change and (2) the UNFCCC provisions for financial assistance from developed nations to developing countries. U.S. Br. 17. But the People's claims concern *corporate* liability of companies—not intergovernmental or federal government liability. *See* Former U.S. Government Officials Br. 9-10 & n.18. There is no conflict between the United States' policies regarding its own liability and state law claims seeking to hold business entities liable. *Id.*

Foreign affairs *field* preemption is also inapplicable, because the People's public nuisance claims address an area of "traditional state responsibility," *Gingery*, 831 F.3d at 1229-30; *see* Section II.A, *supra*. Even if there were a basis for considering foreign affairs field preemption, "[t]o intrude on the federal government's foreign affairs power, [an action] must have more than some incidental or indirect effect on foreign affairs." *Gingery*, 831 F.3d at 1230. (quotation omitted). There is no reason to conclude that a public nuisance claim seeking to impose corporate liability on investor-owned companies for in-state harms would have more than an "incidental or indirect" effect (if that) on the federal government's ability to conduct foreign affairs regarding climate change. *Id.*

3. Political question

Resolution of the People's state law public nuisance claims is "well within the competence of the Judiciary" and does not raise a non-justiciable political question. *U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 458 (1992). Amici's arguments (which again, Defendants have waived) rest on a characterization of the People's claims presented at an unrecognizable level of generality. *See* Indiana, et al. Br. 6 (courts not equipped to "regulate global climate change"); U.S. Br. 28 (courts not equipped to "determine what level of greenhouse gas regulation is reasonable").

The narrowly-tailored allegations of the People's complaints are plainly justiciable because there is no "'lack of judicially discoverable and manageable standards for resolving' the question" under controlling California law. *Ctr. for Biological Diversity v. Mattis*, 868 F.3d 803, 822 (9th Cir. 2017) (quoting *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012)). To the contrary, California's century-old public nuisance statutes set forth clearly delineated standards that the state appellate courts have carefully developed over time. *See, e.g.*, *Santa Clara*, 137 Cal.App.4th at 309-10; *Gallo*, 14 Cal.4th at 1103-04.

The fact that other government entities have addressed the general topic of climate change in various ways does not render the People's claims "inherently political" either. Indiana, et al. Br. 12; *see U.S. Dep't of Commerce*, 503 U.S. at 457-58. Nor does application of the state law public nuisance standard require any "initial policy determination of a kind clearly for nonjudicial discretion." *Ctr. for Biological Diversity*, 868 F.3d at 824-25. Courts are fully competent to apply California public nuisance law as precedent requires, and nothing inherent in the climate-change context of these cases makes the applicable legal standards non-justiciable. Whether state public nuisance laws should function differently in the realm of climate change is a question for legislatures, not courts.

4. The First Amendment

Defendants finally argue that the People's public nuisance claims are barred by the First Amendment because they seek to hold Defendants liable for "constitutionally protected lobbying activity." Chevron Br. 54. The immediate answer is that the People's complaints expressly disavow any such basis for liability:

> Plaintiffs do not seek to impose liability on Defendants for their direct emissions of greenhouse gases and do not seek to restrain Defendants from engaging in their business operations. *Nor do Plaintiffs seek to impose any liability for lobbying activity*; to the extent any particular promotional activity might have had dual goals of both promoting a commercial product in the marketplace and influencing policy, Plaintiffs invoke such activities for the purpose of the former, not the latter, and/or as evidence relevant to show Defendants' knowledge of the dangerous nature of their products.

ER62 ¶11 (italics added); ER134 ¶11.

The *actual* allegations of the People's complaints challenge Defendants' misleading promotion of fossil fuels to consumers, for commercial purposes, not for political purposes. *See, e.g.*, ER60, 98-106 ¶¶7, 103-23 (challenging Defendants' deliberately misleading "promotion of fossil fuels and efforts to undermine mainstream climate science" through commercial "marketing" to the general public designed "to increase sales and protect market share," rather than to obtain legislative or executive action); ER132, 167-74 ¶¶7, 103-23. Such misleading commercial statements are not protected by the *Noerr-Pennington*

doctrine. *See, e.g., Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499-500 (1988). Nor is there any merit to Defendants' alternative argument that "consumer-facing advertising campaigns" are protected as commercial speech. "[T]he State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978); *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011).

If the First Amendment prohibited states from imposing liability on manufacturers for introducing a dangerous product into the stream of commerce and knowingly inducing consumers to use it in a harmful manner, "[n]umerous examples … of [other] communications that are [currently thought to be] regulated without offending the First Amendment, such as the exchange of information about securities, corporate proxy statements, the exchange of price and production information among competitors, and employers' threats of retaliation for the labor activities of employees" would no longer be subject to regulation. *Ohralik*, 436 U.S. at 456 (citations omitted). Nor could states impose tort liability for failure to disclose known hazards when promoting a product for a specific, dangerous use—depriving public entities of critical police power authority. Likewise, Defendants' view of the First Amendment would require applying heightened scrutiny to "federal and state labeling requirements" for pesticides and other deadly products,

even those labelling requirements that merely require manufacturers not to make fraudulent or deliberately deceptive claims. *Cf. Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 442 (2005) (states may impose liability for violations of federal and state labeling requirements; no suggestion First Amendment implicated). Indeed, almost every currently permissible law "requir[ing] disclosures" and "intended to combat the problem of inherently misleading commercial advertisements" would be subject to strict scrutiny. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010).

The Supreme Court has consistently held that, while the First Amendment protects "*accurate and nonmisleading* commercial messages," *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 496 (1996) (plurality opinion) (italics added), governments may restrict "false, deceptive, or misleading" commercial speech. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 638 (1985); *see also Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976). These established precedents, not Defendants' inapposite citation to *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 483 (1995)—which involved a prospective ban on advertising that the parties agreed was truthful and non-misleading—control the analysis and preclude Defendants' First Amendment arguments.

III. The District Court Erred in Declining to Exercise Specific Personal Jurisdiction Over ExxonMobil, BP, Royal Dutch Shell, and ConocoPhillips.

For the reasons stated above and in the People's Opening Brief, the Court should remand without reaching the personal-jurisdiction issue. *See* AOB 9-29. Otherwise, it should reverse, because the complaints' jurisdictional allegations, which this Court must accept as true, establish the required "prima facie showing" of specific personal jurisdiction over ExxonMobil, BP, Royal Dutch Shell, and ConocoPhillips. *See* AOB 47-59 and cases cited; *In re Boon*, 923 F.3d 643, 650 (9th Cir. 2019).

Defendants conceded the first prong of specific-personal-jurisdiction analysis in district court. BP Br. 5 n.1; ER7; *see* Further Excerpts of Record ER561 ¶5 (BP's stipulation), ER566-581 (Shell's and Conoco's stipulations). Thus, for purposes of Rule 12(b)(2) they do not contest that they (and their subsidiaries) "purposefully directed" their allegedly tortious conduct at Oakland and San Francisco. *See* AOB 48-52. That means Defendants conceded each element of the Ninth Circuit's first-prong "purposeful direction" test, i.e., that "(1) the defendant committed an intentional act; (2) the act was expressly aimed at the forum state; and (3) the act *caused harm that the defendant knew was likely to be suffered* in the forum state." AOB 50 (citing *Yahoo! Inc. v. La Ligue Contre Le*

Racism et L'Antisemitisme, 433 F.3d 1199, 1205-06 (9th Cir. 2007) (en banc)) (italics added).

Defendants dispute that the first two prongs effectively merge in an intentional tort case. BP Br. 16. But they do not cite a single intentional-tort case in which a plaintiff's allegations were found sufficient for purposes of the first "purposeful direction" prong yet not for the second causation prong. Nor could there be such a case, because to satisfy this Court's "purposeful direction" standard a plaintiff must allege that defendants' intentional conduct was aimed at the forum state and "caused the harm" that defendants "knew was likely to be suffered" in that state as a result of that conduct. *Yahoo!*, 433 F.3d at 1206.[14]

Defendants cite several cases that purportedly addressed second-prong causation after finding first-prong purposeful direction, apparently in an attempt to show that each prong is analytically distinct. *See* BP Br. 17. Four of those cases

[14] Defendants incorrectly assert that the People are foreclosed from making this argument because they argued the two prongs separately below. *See* BP Br. 9, 16-19, citing *Orr v. Plumb*, 884 F.3d 923, 932 (9th Cir. 2018) (argument waived where party "affirmatively represented" in prior brief that it would not pursue argument). This assertion goes too far. Either the prongs are met or they are not. At any rate, the People "sufficiently raised the issue below for the district court to rule on it," *Menken v. Emm*, 503 F.3d 1050, 1058 n.4 (9th Cir. 2007), by noting Defendants' concession, citing the applicable cases, and demonstrating that once the purposeful-direction prong was satisfied, the only remaining causation issue was whether Defendants were correct that their intentional torts had to cause the entirety of the People's claimed harms. *See* BP SER 16-17.

do not support Defendants' point at all.[15] In the fifth, *Haisten v. Grass Valley Med. Reimb. Fund, Ltd.*, 784 F.2d 1392, 1400 (9th Cir. 1986), the court limited its second-prong analysis to a single sentence noting that plaintiff's claims were based on the same contract at issue in its purposeful-direction analysis. *See also Menken*, 503 F.3d at 1059. This makes sense. Once a plaintiff has shown that defendant's intentional tort was purposefully directed against a forum and caused the in-forum harm that defendant knew was likely to result, nothing more should be required. *See* AOB 51 and cases cited; *see also CE Distrib., LLC v. New Sensor Corp.*, 380 F.3d 1107, 1111-12 (9th Cir. 2004) (first two prongs satisfied where "it is reasonable to infer that [defendant] had every reason to know that the effect of [its intentionally tortious] transactions would resonate in [the forum state]"); *Harris Rutsky & Co. Ins. Services, Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1131-32 (9th Cir. 2003); *Myers v. Bennett Law Offices*, 238 F.3d 1068, 1073-75 (9th Cir. 2001).[16]

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[15] In *Omeluk v. Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 271-72 (9th Cir. 1995), and *Doe v. American Red Cross*, 112 F.3d 1048, 1051 (9th Cir. 1997), the plaintiffs did not adequately plead *either* prong. In *In re W. States Wholesale Natural Gas Antitrust Litig.*, 715 F.3d 716, 742-43 (9th Cir. 2013), the Court addressed causation first, before considering the first prong. And in *Mavrix Photo, Inc. v. Brand Technologies*, 647 F.3d 1218, 1228 (9th Cir. 2011), the Court stated that it only needed to address the three elements under the first prong to find jurisdiction, thus fully *supporting* the People's analysis here.

[16] Defendants contend that in two other cases cited by the People, any harms suffered by plaintiffs could only have been caused by the allegedly tortious

Defendants do not respond to the People's showing that the first- and second-prong analyses effectively merge in an intentional tort case. *See* BP Br. 16-19. Instead, they rest their argument on the assertion that the People cannot prove their causation allegations, *see* BP Br. 14, which is not a permissible argument at the personal-jurisdiction stage where, as here, Defendants have chosen not to contest the complaints' jurisdictional allegations. *See In re Boon*, 923 F.3d at 650; *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004).

The People previously identified several material errors in the district court's analysis, which Defendants do not defend. *See* AOB 54-57. Defendants thus acknowledge: (1) that but-for causation can be established for multiple tortfeasors in a single case, BP Br. 26; (2) that an intentional tort can be based on entirely out-of-state conduct and still be "purposefully directed" against an in-state resident (notwithstanding the district court's exclusive focus on Defendants' activities *in* California, *see, e.g.*, ER7-9), BP Br. 20; *see* AOB 54-55 and cases cited; *Haisten*, 784 F.2d at 1399;[17] and (3) that the People need not allege or establish that

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conduct that defendants "expressly aimed" at them. BP Br. 17-18. That may be, but once a defendant has chosen not to contest the jurisdictional allegations of a complaint, it should make no difference how difficult or easy it may be for a plaintiff to *prove* those allegations at trial.

[17] In any event, the complaints allege substantial *in-state* conduct as well. *See* AOB 54 n.17.

California suffered *more* harm than any other jurisdiction, BP Br. 26; *see* AOB 56-57 and cases cited.[18]

Given the critical flaws in the district court's analysis (which at a minimum require remand), Defendants are left to argue that *despite* the allegations of the complaints, the People cannot *prove* a sufficient second-prong nexus between their challenged conduct and the People's alleged injuries, because the impacts of global warming on Oakland and San Francisco could be attributed to many actors and causes. BP Br. 23-25. Defendants seek to distinguish cases like *Calder v. Jones*, 465 U.S. 783, 789 (1984), and *Pakootas v. Teck Cominco Metals, Ltd.*, 905 F.3d 565, 577-78 (9th Cir. 2018), by asserting that the out-of-state conduct in those cases "was unquestionably a but-for cause of the alleged injuries." BP Br. 24-25. Defendants will have ample opportunity at trial to argue that they did not in fact substantially contribute to a public nuisance under California law. *See ConAgra*, 17 Cal.App.5th at 102. But the question at this stage is not whether the People have proven causation to Defendants' satisfaction, but whether the uncontested

[18] Even cases involving worldwide harms, like *Keeton v. Hustler Magazine*, 465 U.S. 770, 776 (1984), hold that due process is satisfied if a defendant's conduct causes enough in-forum harm to give "fair warning" that a defendant may be sued in that forum. AOB 56-57 & n.19; *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985).

allegations of the complaints are sufficient to state a prima facie case of causation under second-prong personal jurisdiction analysis.

The People's allegations directly link Defendants' "worldwide conduct" to the "climate change" and "accompanying rise in sea levels" that is causing the harms to public infrastructure that the People challenge as a public nuisance. *See* BP Br. 14, 21, 28. For example, the complaints allege:

> Defendants' production and promotion of massive quantities of fossil fuels, and their promotion of those fossil fuels' pervasive use, has caused ... global warming-induced sea level rise, a public nuisance in [Oakland and San Francisco]. ... Each Defendant's past and ongoing conduct is a direct and proximate cause of the People's injuries and threatened injuries. ... Defendants were aware of this dangerous global warming, and of its attendant harms on coastal cities like [Oakland and San Francisco], even before those harms began to occur ... [and ¶] have inflicted and continue to inflict injuries upon the People that require the People to incur extensive costs to protect public and private property ... against increased sea level rise, inundation, storm surges, and flooding. ¶Defendants have promoted the use of fossil fuels at unsafe levels even though they ... have known for many years that global warming threatened severe and even catastrophic harms to coastal cities like [Oakland and San Francisco].

ER117-118 ¶¶145-147; ER182-183 ¶¶145-147; *see also* ER62-63, 67 ¶¶10, 12, 32; ER 133-134, 138 ¶¶10, 12, 32 ("Defendants have contributed to the creation of a public nuisance – global warming-induced sea level rise – causing severe harms and threatening catastrophic harms in [Oakland and San Francisco].").

The People's complaints allege that Defendants have known for decades that "massive fossil fuel usage would cause dangerous global warming." ER59, 89

¶¶2-4, 92; ER131, 159 ¶¶2-4, 92. Despite that knowledge, Defendants embarked on a deliberate campaign to mislead the public and to promote the ever-increasing use of fossil fuels, keeping secret their knowledge of the enormously destructive consequences to public infrastructure that would inevitably result, in order to increase their own profits at public expense.[19] In paragraph after paragraph, the People's complaints cite scientific studies and government reports documenting the current and predictable future impacts of global warming on Oakland and San Francisco, ER60-61, 84-89, 106-114 ¶¶8-9, 74-91,124-136; ER132-133, 154-159, 174-180 ¶¶8-9, 74-91,124-136, while explaining why *these particular Defendants*' wrongful conduct is "quantitatively and qualitatively different from [that of] other contributors." ER89-90 ¶¶92-94; ER159-160 ¶¶92-94.[20]

[19] *See, e.g.*, ER60 ¶5, ER131-132 ¶5 (Defendants "engaged in large-scale, sophisticated advertising and communications campaigns to promote pervasive fossil fuel usage and to portray fossil fuels as environmentally responsible and essential to human well-being – although they knew that their fossil fuels would contribute, and subsequently were contributing, to dangerous global warming and associated accelerated sea level rise"); ER92-106 ¶¶95-123, ER162-174 ¶¶95-123 (Defendants made specific efforts to "encourage[] continued fossil fuel consumption at massive levels that Defendants knew would harm the public," including through "advertising and communications campaigns intended to promote their fossil fuel products by downplaying the harms and risks of global warming"); ER60 ¶7; ER132 ¶7 (Defendants' "purpose" in wrongfully promoting fossil fuels and undermining mainstream climate science "was to increase sales and protect market share").

[20] The complaints also specifically plead the impacts of Defendants' wrongful conduct on Oakland and California (and the People of the State of California), which "already is causing flooding of low-lying areas of [Oakland and San

In addition to itemizing each Defendant's "long-standing and extensive contacts with California," ER68-83 ¶¶35-50 (BP), ¶¶52-55 (ConocoPhillips), ¶¶56-59 (Exxon), ¶¶60-73 (Shell); ER139-154 ¶¶35-73—including their ownership and operation of California oil and gas wells, port facilities, terminals, storage tanks, and pipelines; extraction of oil and natural gas; transportation, marketing and sale of fuel and other refined products (including to their hundreds of branded gas stations); production and shipping of Alaskan crude oil to California port locations; and ownership and operation of refineries that processed hundreds of thousands of barrels of crude oil per day in California, *see* ER70-71, 76-82 ¶¶38-39 (BP), ¶¶53-55 (ConocoPhillips), ¶¶56-59 (Exxon), ¶¶61-67 (Shell); ER141-42, 147-153 ¶¶38-39, 53-67—the complaints allege that these extensive California contacts "furthered and supported [Defendants'] production, marketing, and sale of massive

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Francisco], increased shoreline erosion, and salt water impacts to water treatment systems." ER58 ¶1, ER130 ¶1; *see also* ER63, 106-114 ¶¶14, 124-136; ER135, 174-180 ¶¶14, 124-136. "The rapidly rising sea level along the Pacific Coast and in San Francisco Bay, moreover, poses an imminent threat of catastrophic storm surge flooding, [with t]his threat to human safety and to public and private property [] becoming more dire every day ...." ER58 ¶1; ER130 ¶1; *see also* ER113 ¶133; ER178-179 ¶133. As a result, "it will cost billions of dollars to build sea walls and other infrastructure to protect human safety and public and private property [in Oakland and San Francisco] from global warming-induced sea level rise." ER60-61, 114 ¶¶8, 136; ER132-133, 180 ¶¶8, 136.

quantities of fossil fuels and fossil fuel products, which has injured, and continues to injure, [Oakland and San Francisco.]" ER68 ¶34; ER139 ¶34.[21]

Defendants are entitled to challenge these factual allegations at trial; but having failed to present contrary evidence in support of their Rule 12(b)(2) motion, Defendants are bound by the People's allegations and the district court erred by not accepting them. *In re Boon Global Ltd.*, 923 F.3d at 650; *Schwarzenegger*, 374 F.3d at 800; AOB 48. Consequently, the first and second prongs are fully satisfied.

Defendants also make a brief argument under the third prong, contending that the exercise of specific personal jurisdiction would not comport with "traditional notions of fair play and substantial justice" because if Defendants could be sued in California, they could be sued almost anywhere, as could any fossil-fuel producer that wrongfully promoted its products as alleged in the complaints. *See* BP Br. 11, 31. This argument does not satisfy Defendants' "compelling" burden under the applicable seven-factor test. *See Haisten*, 784 F.2d at 1397. Not only does Defendants' argument ignore most of those factors (*all* of which support jurisdiction, *see Freestream Aircraft v. Aero Law Group*, 905 F.3d 597, 607 (9th Cir. 2018)), but it also ignores the allegations of the complaints that

[21] Defendants' promotional activities occurred throughout California as well, including offering branded credit cards and per-gallon discounts and rewards. *See* ER70-72, 78-82 ¶¶39-41 (BP), ¶58 (Exxon), ¶66 (Shell); ER141-143, 149-152 ¶¶39-41, 58, 66.

distinguish these Defendants' conduct from others'. *See, e.g.*, ER89-92 ¶¶92-94; ER159-161 ¶¶92-94.

Surely it is "reasonable," given the allegations of the complaints, to allow California courts to exercise specific personal jurisdiction over four of the largest oil-and-gas companies in the world, each of which have an enormous in-state presence, based on allegations that these Defendants knew that their conduct, in-state and out-of-state, would result in massive environmental harms to public infrastructure in California. While California has a strong interest in providing an effective means of redress for *residents* who suffer tortious injury, *Harris Rutsky & Co.*, 328 F.3d at 1133, that interest is magnified when the injury is suffered by the sovereign itself, as here. *See* Cal. Govt. Code §100. Any burdens Defendants might face if required to litigate in a state where they already have considerable corporate presence pale in comparison to the burdens the People would face if required to sue each Defendant separately in the jurisdictions where those Defendants are amenable to general personal jurisdiction. *See CE Distribution*, 380 F.3d at 1112.

Finally, the two foreign-based Defendants, BP and Royal Dutch Shell, contend that the impact of their conduct on the United States *as a whole* is insufficient to establish personal jurisdiction for purposes of Federal Rule of Civil Procedure 4(k)(2). BP Br. 34-35. Again, the allegations of the complaints control,

and those allegations detail specific harms throughout the country, as well as specifically in California, that are the direct consequence of BP's and Shell's challenged activities. ER72-75, 82-83 ¶¶42-50 (BP), ¶¶69-73 (Shell); ER143-146, 153-154 ¶¶42-50, 69-73. Defendants will have ample opportunity to contest these allegations at trial, but for now they are sufficient to state a prima case for specific personal jurisdiction, which is all that is required.

CONCLUSION

For the reasons stated above and in the People's Opening Brief, the Court should reverse the district court's judgment and remand with instructions to further remand these cases to state court.

Dated: July 1, 2019

Respectfully submitted,

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FOR THE NINTH CIRCUIT

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I hereby certify that on July 1, 2019, I electronically filed the foregoing Plaintiffs-Appellants' Consolidated Reply Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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Respectfully submitted,

/s/ Michael Rubin
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