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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

CITY AND COUNTY OF HONOLULU AND HONOLULU BOARD OF WATER SUPPLY, Plaintiffs, v. SUNOCO LP; ALOHA PETROLEUM, LTD.; ALOHA PETROLEUM LLC; EXXON MOBIL CORP.; EXXONMOBIL OIL CORPORATION; ROYAL DUTCH SHELL PLC; SHELL OIL COMPANY; SHELL OIL PRODUCTS COMPANY LLC; CHEVRON CORP; CHEVRON USA INC.; BHP GROUP LIMITED; BHP GROUP PLC; BHP HAWAII INC.; BP PLC; BP AMERICA INC.; MARATHON PETROLEUM CORP.; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66; PHILLIPS 66	CIVIL NO. 1CCV-20-0000380 (JPC) (Other Non-Vehicle Tort) **CHEVRON DEFENDANTS' SPECIAL MOTION TO STRIKE AND/OR DISMISS THE COMPLAINT PURSUANT TO CALIFORNIA'S ANTI-SLAPP LAW; MEMORANDUM IN SUPPORT OF MOTION; NOTICE OF HEARING MOTION AND CERTIFICATE OF SERVICE** **HEARING**: DATE: August 27, 2021 TIME: 8:30 a.m. JUDGE: Honorable Jeffrey P. Crabtree No Trial Date Set

COMPANY; AND DOES 1 through 100, inclusive,

Defendants.

CHEVRON DEFENDANTS' SPECIAL MOTION TO STRIKE AND/OR DISMISS THE COMPLAINT PURSUANT TO CALIFORNIA'S ANTI-SLAPP LAW

Defendants CHEVRON CORPORATION and CHEVRON U.S.A. INC. (collectively, the "Chevron Defendants" or "Chevron"), by and through their undersigned counsel, respectfully move this Court for an order striking and/or dismissing the First Amended Complaint, filed herein on March 22, 2021 [Dkt. 45] (the "Complaint") pursuant to California's anti-SLAPP law, Cal. Code Civ. Proc. § 425.16. Striking and/or dismissing the Complaint pursuant to California's anti-SLAPP law is proper for numerous reasons.

First, the Chevron Defendants are protected by California's anti-SLAPP immunity because the Chevron Defendants are California-domiciled corporations. *Second*, the Complaint is subject to California's anti-SLAPP immunity because: (A) Plaintiff's claims arise solely from speech on issues of public interest; and (B) Plaintiff's claims do not fall within any of the narrow exemptions to California's anti-SLAPP statute, *i.e.* the public enforcement, public interest, and commercial speech exemptions. *Third*, Plaintiff cannot demonstrate that the allegations in the Complaint are properly pleaded or not subject to a legal bar. The Complaint is devoid of any allegation that Chevron's speech (whatever it may be) caused climate change. Moreover, *even if* Plaintiff could allege that Chevron engaged in a purported publicity "campaign" *and* made false statements that *caused* Plaintiff's injuries, Plaintiff's claims would be barred pursuant to the *Noerr-Pennington* doctrine.

This Motion is made pursuant to Rules 7 and 12 of the Hawai'i Rules of Civil Procedure, Rules 7 and 7.2 of the Rules of the Circuit Courts of the State of Hawai'i ("***RCCH***"), and Section

§ 425.16 of the California Code of Civil Procedure, and is supported by the attached Memorandum in Support of Motion, further argument to be presented at the hearing of the Motion, and the entire record and files herein.

DATED: Honolulu, Hawai'i, June 2, 2021.

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

CITY AND COUNTY OF HONOLULU AND HONOLULU BOARD OF WATER SUPPLY, Plaintiffs, v. SUNOCO LP; ALOHA PETROLEUM, LTD.; ALOHA PETROLEUM LLC; EXXON MOBIL CORP.; EXXONMOBIL OIL CORPORATION; ROYAL DUTCH SHELL PLC; SHELL OIL COMPANY; SHELL OIL PRODUCTS COMPANY LLC; CHEVRON CORP; CHEVRON USA INC.; BHP GROUP LIMITED; BHP GROUP PLC; BHP HAWAII INC.; BP PLC; BP AMERICA INC.; MARATHON PETROLEUM CORP.; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66; PHILLIPS 66 COMPANY; AND DOES 1 through 100, inclusive, Defendants.	CIVIL NO. 1CCV-20-0000380 (JPC) (Other Non-Vehicle Tort) **MEMORANDUM IN SUPPORT OF MOTION**

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MEMORANDUM IN SUPPORT OF MOTION[1]

I. INTRODUCTION

Plaintiffs the City and County of Honolulu and the Honolulu Board of Water Supply seek to use state tort law to regulate global fossil fuel emissions and force a selected group of energy companies to pay for all the alleged harms of global climate change. As explained in Defendants' concurrently filed joint motion to dismiss, such claims are barred by federal law. Mot. to Dismiss at 11–22; *City of New York v. Chevron Corp*., 993 F.3d 81, 86 (2d Cir. 2021) (affirming dismissal of analogous state-law climate change claims). Attempting to avoid this result, Plaintiffs have tried to frame their claims as based on *speech* directed to policy makers, regulators, and the public advocating against "regulation" of the oil and gas industry. Compl. ¶ 90. But under Hawai'i's choice of law rules, California-based defendants like Chevron Corporation and Chevron U.S.A., Inc. ("Chevron") are entitled to the immunities that California law accords their speech, and California's "anti-SLAPP" law protects them from claims targeting their speech on such issues of public interest.[2] Thus, if Plaintiffs are right to characterize their Complaint as focused on *speech* for purposes of liability, as they did to defeat federal jurisdiction, their claims against Chevron are subject to strike and dismissal under applicable California law. And because Plaintiffs cannot carry their burden under that law to show that their claims have legal validity, their claims should be struck and the Complaint dismissed.

California's anti-SLAPP law provides California defendants with a qualified immunity from

[1] This Memorandum of Law is submitted subject to, and without waiver of, any defense, affirmative defense, or objection, including lack of personal jurisdiction.

[2] The Complaint improperly conflates the activities of Defendants with the activities of their separately organized predecessors, subsidiaries, and affiliates. Although the Chevron Defendants reject Plaintiff's erroneous attempt to attribute the actions of predecessors, subsidiaries, and affiliates to Chevron Corporation, for purposes of this motion only they accept the Complaint's unavailing conflation of Chevron Corporation with its predecessors, subsidiaries, and affiliates.

suit for any "cause of action" that "aris[es] from any act" of the defendant that is taken "in furtherance of the [defendant]'s right of petition or free speech . . . in connection with a public issue." Cal. Code Civ. Proc. § 425.16(b)(1); *DC Comics v. Pac. Pictures Corp.*, 706 F.3d 1009, 1013 (9th Cir. 2013) ("California's anti-SLAPP statute functions as an immunity from suit, and not merely as a defense against liability"). An "act in furtherance of the [defendant]'s right of petition or free speech" is broadly defined to include practically all statements regarding "an issue of public interest," *id.* (e)(4), which without question includes climate change. And numerous courts have held—pursuant to choice of law principles analogous to those applied by Hawai'i's courts—that California's anti-SLAPP immunity applies to claims against California defendants, even if the claims are brought in a different jurisdiction, and even if another state's law governs other issues in the case. *See, e.g., Sarver v. Chartier*, 813 F.3d 891, 897–99 (9th Cir. 2016) (California's anti-SLAPP statute applied to suit filed in New Jersey against California defendants).

California's anti-SLAPP immunity protects California defendants from the costs of suit by staying discovery while an anti-SLAPP motion is pending, and deters baseless suits by awarding a successful defendant its attorney's fees. *See* Cal. Code Civ. Proc. §§ 425.16(c)(1) & (g). The immunity is qualified, not absolute, and can be overcome if the plaintiff shows that its claims are legally valid. Cal. Code Civ. Proc. § 425.16 (b)(1). But even if the plaintiffs can show that *some* of their claims survive—either because they are not based on speech on a matter of public concern, or because they are legally supported—*any* speech-based allegations that the plaintiffs cannot support should be stricken. *Baral*, 1 Cal. 5th at 393, 376 P.3d at 615.

Here, Plaintiffs' claims—which, in their own telling, are based on speech on matters of public concern—fail as a matter of law. The "campaign" about which Plaintiffs complain consists

of communications (allegedly made by parties other than Chevron) intended to influence the government and the voting public. In fact, Plaintiffs do not identify even a *single statement* in the "campaign" that was allegedly made by Chevron. *See* Compl. ¶¶ 90–117. For that reason alone, Plaintiffs' claims against Chevron are subject to dismissal. And even setting the paucity of Chevron speech alleged, Plaintiffs' speech-based claims are *legally* barred by the First Amendment. Under the *Noerr-Pennington* doctrine, the First Amendment's Petition Clause immunizes from liability "[a] publicity campaign directed at the general public and seeking government action." *Manistee Town Ctr. v. City of Glendale*, 227 F.3d 1090, 1091–92 (9th Cir. 2000) (citing *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965)). This legal bar applies even if Plaintiffs' allegations are accepted as true. *See Just. v. Fuddy*, 125 Haw. 104, 108 (Ct. App. 2011) (complaint should be dismissed if legally barred). Thus, to the extent that Plaintiffs' claims are, as they assert, based on a decades-long publicity campaign aimed at influencing the public's views on climate change, then *Noerr-Pennington* bars their claims, and the Complaint should be dismissed pursuant to California's anti-SLAPP statute, or, in the alternative, under H.R.Civ.P 12(b)(6).

In sum, California's anti-SLAPP immunity protects California-based defendants, like Chevron, from meritless claims that burden constitutionally protected speech on issues of public interest. And Plaintiffs cannot satisfy their anti-SLAPP burden to show their claims have merit, both because they have not pleaded facts showing Chevron's involvement in the complained-of speech *and* because their claims are barred by *Noerr-Pennington* and the First Amendment. Accordingly, the Court should strike and dismiss the Complaint as to Chevron, and award Chevron its attorney's fees and costs. At the very least, the allegations barred by the First Amendment should be struck.

II. PLAINTIFFS' ALLEGATIONS AND PROCEDURAL BACKGROUND

A. Plaintiffs Seek Remedies for Global Emissions

Plaintiffs seek to hold Chevron liable for harms allegedly caused or to-be-caused by the emissions of anyone who might have burned any fossil fuels, including coal. *See* Compl. ¶¶ 2–3 ("[D]isruptions of the Earth's otherwise balanced carbon cycle have substantially contributed to a wide range of dire climate-related effects," and "Plaintiffs' residents . . . suffer the consequences"); ¶ 2 (alleging "massive increase in the extraction and consumption of oil, coal, and natural gas"); ¶ 9 ("Defendants are directly responsible for the substantial increase in *all* CO_2 emissions between 1965 and the present.") (emphasis added); *see generally id.* ¶¶ 13(b)-(e), 44-71 (alleging harm from greenhouse gas emissions). Plaintiffs concede that "it is not possible to determine the source of any particular individual molecule of CO2 in the atmosphere . . . because such greenhouse gas molecules do not bear markers that permit tracing them to their source, and because greenhouse gasses quickly diffuse and comingle in the atmosphere." *Id*. ¶¶ 171, 184, 196, 205. Nonetheless, Plaintiffs seek to compel Chevron to pay damages for global warming, give Plaintiffs their profits, and somehow "abate[]" the effects of climate change. Compl. at 115 (demanding compensatory and punitive damages, equitable relief "including abatement," and "[d]isgorgement of profits").

The first half of the Complaint is a lengthy discussion of the extent to which "global warming and climate disruption" is "caused by anthropogenic greenhouse gas emissions." *Id.* ¶ 35. Plaintiffs allege that the burning of fossil fuels—conducted around the globe, by the inhabitants of every country—has caused "myriad environmental and physical consequences," including warming of the Earth's average surface temperature and "[c]hanges to the global climate." *Id.* ¶¶ 40 (a)–(d). Although Plaintiffs include a bare assertion that "Defendants' contribution to the buildup of greenhouse gases" can somehow be quantified, they do not explain how. *Id.* ¶ 44. In particular,

they do not identify any specific Chevron statement as misleading or allege how or whether such statement(s) impacted greenhouse gas emissions after it was made. Instead, Plaintiffs simply blame Defendants for all harmful aspects of climate change. *Id.* ¶ 148.

B. Plaintiffs Attack Defendants' Political Speech and Petitioning on a Public Issue

In an attempt to make this case about something other than emissions, Plaintiffs attack Defendants' (and others') purported participation in the public discourse on oil and gas regulation and climate change—attempting to argue that Defendants are liable for the greenhouse gas emissions of all humanity because Defendants allegedly launched "a public campaign aimed at evading regulation of their fossil fuel products and/or emissions therefrom." *Id.* ¶ 90. According to Plaintiffs, Defendants "embarked on a concerted public relations campaign to cast doubt on the science connecting global climate change to fossil fuel products and greenhouse gas emissions, in order to influence public perception of the existence of anthropogenic global warming and sea level rise." *Id.* ¶ 94. Plaintiffs vaguely assert that all "Defendants" somehow engaged in this speech "campaign," but Plaintiffs do not identify *any* statement allegedly made by Chevron. *Cf. id.* ¶¶ 92–117.

Plaintiffs claim this "public campaign" was intended to discourage further "regulation of their business practices," *id.* ¶ 107, and "undermine national and international efforts like the Kyoto Protocol to rein in greenhouse gas emissions," *id.* ¶ 92. Yet, it is a matter of public record that—despite extensive public debate—three different administrations did not adopt the Kyoto Protocol, and the Byrd-Hagel Resolution barred its adoption by a 95-0 vote of the Senate. *See* S. Res. 98, 105th Cong. 1st Sess. (July 22, 1997); 143 Cong. Rec. S8138 (July 25, 1997).

Plaintiffs allege that "Defendants" engaged in speech that was intended "to change public opinion and avoid regulation" by emphasizing the heavy social costs imposed by over-regulation of energy. *Id.* ¶ 98. For example, Plaintiffs denounce a 1994 (non-Chevron) report advocating

against "policies to curb greenhouse gas emissions beyond 'no regrets' measures." *Id.* ¶ 96. Similarly, Plaintiffs criticize a 1997 (non-Chevron) speech arguing that "[i]t's bad public policy to impose very costly regulations and restrictions when their need has yet to be proven." *Id.* ¶ 102. The Complaint also includes images of (non-Chevron) print advertisements that discussed "global warming" and explained the "substantial loss of U.S. jobs and manufacturing capacity" that could result from regulation and "high energy prices." *Id.* ¶¶ 99, 104. Plaintiffs allege these public statements were intended to "induce political inertia" against further regulation. *Id.* ¶ 99. Plaintiffs do not allege what percentage of the extensive public discourse these statements represented nor do they deny that competing views obtained front-page coverage or that the public discourse, including the scientific debate, on these issues was at all relevant times uninhibited and robust.

Plaintiffs do allege that Defendants supported trade organizations that organized campaigns to oppose energy regulation. Plaintiffs allege that the "Global Climate Coalition (GCC), on behalf of Defendants and other fossil fuel companies, funded deceptive advertising campaigns and distributed misleading material to generate public uncertainty around the climate debate, with the specific purpose of preventing U.S. adoption of the Kyoto Protocol." *Id.* ¶ 108. Plaintiffs likewise allege that Defendants were connected to the American Petroleum Institute ("API"), which "developed a Global Climate Science Communications Plan" with a "multi-million-dollar, multi-year proposed budget" that "included public outreach and the dissemination of educational materials to schools to 'begin to erect a barrier against further efforts to impose Kyoto-like measures in the future.'" *Id.* ¶ 105. Plaintiffs describe this campaign as "a blatant attempt to disrupt international efforts . . . to negotiate a treaty that curbed greenhouse gas emissions." *Id.*

C. Plaintiffs Concede Their Complaint Targets Political Speech

Defendants removed this case to federal court, arguing that the Complaint "arises under

federal laws and treaties, and presents substantial federal questions as well as claims that are completely preempted by federal law." Dkt. 1 at 2–3.[3] More specifically, Defendants pointed out that Plaintiffs were attempting to use a civil lawsuit to regulate "*global* greenhouse gas emissions," and that such regulation-by-lawsuit is precluded by federal law. *Id.* at 3-7. Likewise, Defendants explained that Plaintiffs were attempting "to undermine and supplant federal regulation of greenhouse gas emissions and hold an international industry responsible for the alleged consequences of rising ocean levels . . . allegedly caused by global climate change," and that this raised "federal issue[s]" that supported federal jurisdiction. *Id.* at 25. Defendants also argued the case was subject to "federal officer removal," because Defendants' extraction of petroleum from federal lands and its provision to the federal government—which is the world's largest institutional user, powering its military and official operations—is part of the activity Plaintiffs complain about. *Id.* 47–50.

In response, Plaintiffs argued that their claims were not based not on emissions but on Defendants' purported *speech* opposing oil and gas regulation. In their motion to remand the case to this Court, Plaintiffs described their Complaints as based on "a decades-long campaign of denial and disinformation about the existence, cause, and adverse effects of global warming" that was purportedly intended to thwart "government regulation." Dkt. 116-1 at 5. And Plaintiffs argued that "Defendants' tortious campaign to mislead" was the *sole* basis for their claims. *Id.* at 7.[4]

The federal district court credited Plaintiffs' framing of their complaint and remanded the case. *See City & Cty. of Honolulu v. Sunoco LP*, 2021 WL 531237, at *1 (D. Haw. Feb. 12, 2021). In its remand order, the district court adopted Plaintiffs' argument that their claims are based *solely*

[3] Unless otherwise indicated, citations to "Dkt." are to filings on the federal district court docket in *City & Cty. of Honolulu v. Sunoco LP*, No. 20-CV-00163-DKW-RT (D. Haw.).

[4] Although Plaintiffs' argument vaguely invokes language used in the context of product advertising, their Complaint does not identify *any* product advertisement. *See* Compl. ¶¶ 92–117 (making numerous allegations about the alleged "public campaign" to influence public opinion and regulators, without including any allegation about any product advertisement).

on speech—i.e., "Defendants' alleged concealment of the dangers of fossil fuels." *Id.* at *1.

III. LEGAL STANDARDS

"The question of the 'choice of law to be applied in a case is a question of law.'" *Mikelson v. United Servs. Auto. Ass'n*, 107 Haw. 192, 197 (2005) (quoting *Jenkins v. Whittaker Corp.*, 785 F.2d 720, 724 (9th Cir. 1986)) (alterations adopted). Hawai'i's choice of law rules are "flexible," and focus on "the state with the most significant relationship to the parties and subject matter." *Lewis v. Lewis*, 69 Haw. 497, 499 (1988). "Primary emphasis is placed on deciding which state would have the strongest interest in seeing its laws applied." *Id.* And "[i]t is a well-settled principle of conflict-of-law analysis that different jurisdictions' laws can apply to different issues in the same case." *Jou v. Adalian*, 2018 WL 1955415, at *7 (D. Haw. Apr. 25, 2018) (applying Hawai'i's choice-of-law rules). "It is not inconsistent to apply California law to [one] question" in a case, even if the court "applied Hawaii law" to another issue. *Jou*, 2018 WL 1955415, at *7.

IV. ARGUMENT

The Chevron Defendants, as California-domiciled corporations, are protected by California's anti-SLAPP immunity, and thus protected by California's anti-SLAPP law. Plaintiffs cannot show that their claims are subject to any of the narrow exemptions from the law, which means that Plaintiffs bear the burden to show their claims are valid. And Plaintiffs' cannot carry their burden—both because Plaintiffs have failed to allege that Chevron is responsible for the speech Plaintiffs complain of, and because the First Amendment bars Plaintiffs' attempt to impose tort liability based on speech attempting to influence public opinion.

A. Chevron Is Protected by California's anti-SLAPP Immunity

Although Hawai'i has its own anti-SLAPP statute, California law governs the anti-SLAPP

immunity applied to California speakers like Chevron.[5] Under Hawai‘i’s choice-of-law test, the key question is “which state would have the strongest interest in seeing its laws applied” to the issue at hand. *Lewis*, 69 Haw. at 499. And as numerous courts have held when applying analogous choice-of-law tests, the defendant’s home state has the strongest interest in seeing its anti-SLAPP immunity applied to claims based on its citizen’s speech. Accordingly, the defendant’s domicile is given heavy—and often dispositive—weight in the anti-SLAPP choice-of-law analysis. Thus, California’s anti-SLAPP protections apply here to the California-based Chevron Defendants.

1. California’s anti-SLAPP Law Provides Broad Immunity

Based on its finding of “a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition,” the California legislature passed California’s anti-SLAPP law to protect and encourage speech and “participation in matters of public significance.” Cal. Civ. Proc. Code § 425.16(a). “California’s anti-SLAPP statute functions as an immunity from suit, and not merely as a defense against liability.” *DC Comics v. Pac. Pictures Corp.*, 706 F.3d 1009, 1013 (9th Cir. 2013). In order to effectuate this immunity, the statute “authorizes defendants to file a special motion to strike in order to expedite the early dismissal of unmeritorious claims” that are based on speech. *City of Montebello v. Vasquez*, 1 Cal. 5th 409, 416, 376 P.3d 624, 628 (2016). Discovery is stayed and a defendant whose motion is denied has an immediate right to appeal. *See* Cal. Code Civ. Proc. §§ 425.16(c)(1), (g) & (i).

California’s anti-SLAPP “special motion to strike” may target any cause of action that “aris[es] from any act” of the defendant that is taken “in furtherance of the [defendant]’s right of

[5] Hawai‘i’s law is similar to California’s statute, but the California law provides a broader immunity from suit. *Compare* Cal. Civ. Proc. Code § 425.16 (b)(1) (California’s anti-SLAPP immunity applies to causes of action “arising from any act of [the defendant] in furtherance of the person's right of petition or free speech”), *with* HRS § 634F-1 (Hawai‘i’s law applies only to suits based on “oral or written testimony submitted or provided to a governmental body”).

petition or free speech under the United States or California Constitution in connection with a public issue." Cal. Civ. Proc. § 425.16(b)(1). An "act in furtherance of a person's right of petition or free speech under the United States or California Constitution" is defined broadly to include all speech regarding "a public issue or an issue of public interest," as well as speech regarding topics that are "under consideration" by "a legislative, executive, or judicial body." Cal. Civ. Proc. Code § 425.16(e). A cause of action "aris[es] from" such speech, and thus is subject to strike, *whenever* the speech is alleged to "support a claim for recovery," and the only speech allegations that are *not* subject to the anti-SLAPP statute are those that are "merely background" and thus irrelevant to the plaintiff's claims. *Sheley v. Harrop*, 9 Cal. App. 5th 1147, 1170, 215 Cal. Rptr. 3d 606, 623 (2017).

"If the defendant makes the required showing" that a cause of action arises from speech or petitioning activity, "the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success." *Baral*, 1 Cal. 5th at 384, 376 P.3d at 608. At this stage, the plaintiff must establish that its allegations are properly pleaded and not subject to a legal bar. *See Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 890 F.3d 828, 834 (9th Cir. 2018) ("[W]hen an anti-SLAPP motion to strike challenges only the legal sufficiency of a claim," the trial court "consider[s] whether a claim is properly stated.").[6]

California's statute creates a "substantive" immunity, which can be applied in other courts. *Batzel v. Smith*, 333 F.3d 1018, 1025–26 (9th Cir. 2003), *superseded in part by statute on other grounds as stated in Breazeale v. Victim Servs., Inc.*, 878 F.3d 759, 766–67 (9th Cir. 2017) ("Because California law recognizes the protection of the anti-SLAPP statute as a substantive immunity

[6] A defendant *can* elect to use an anti-SLAPP motion to challenge a complaint's *factual* validity—thus forcing the plaintiff to produce *admissible evidence* supporting its claims. *See Taus v. Loftus*, 40 Cal. 4th 683, 713–14, 151 P.3d 1185, 1204 (2007). For this motion, however, Chevron elects to challenge only the legal validity of Plaintiffs' Complaint, and assumes Plaintiffs' allegations are true. *See Planned Parenthood*, 890 F.3d at 834.

from suit, this Court, sitting in diversity, will do so as well."); *Diamond Ranch Acad., Inc. v. Filer*, 117 F. Supp. 3d 3d 1313, 1318 (D. Utah 2015) ("[T]he court finds that the anti-SLAPP law is substantive," as a "defendant's rights under the anti-SLAPP statute are in the nature of immunity.").

2. California's anti-SLAPP Immunity Protects California Defendants Like Chevron

A defendant's home state has an overriding interest in applying its anti-SLAPP immunity to claims based on the defendant's speech: "The 'purpose behind an anti-SLAPP law is to encourage the exercise of free speech,' and California 'has a strong interest in having its own anti-SLAPP law applied to the speech of its own citizens.'" *Diamond Ranch*, 117 F. Supp. 3d at 1323 (quoting *Chi v. Loyola Univ. Med. Ctr.*, 787 F. Supp. 2d 797, 803 (N.D. Ill. 2011) and applying California's anti-SLAPP law to Utah suit filed against California defendant). Accordingly, the Ninth Circuit in *Sarver* held that California's strong interest in protecting its own citizens' speech mandated application of California's anti-SLAPP law to a suit filed in New Jersey by a New Jersey plaintiff against California defendants. *See* 813 F.3d at 899.[7] "California has expressed a strong interest in enforcing its anti-SLAPP law to 'encourage continued participation in matters of public significance,'" while the interests of the plaintiff's chosen forum—New Jersey—would not be "harmed" by using California's statute to protect California defendants. *Id.* (quoting Cal. Civ. Proc. Code § 425.16(a)).

Other courts have similarly held that the defendant's domicile is controlling in the anti-SLAPP choice-of-law analysis. *See, e.g., GOLO, LLC v. Higher Health Network, LLC*, 2019 WL 446251, at *13 (S.D. Cal. Feb. 5, 2019) (applying California's anti-SLAPP law to suit originally filed in Pennsylvania against California speaker, "because of a state's acute interest in protecting the speech of its own citizens, which counsels in favor of applying the anti-SLAPP statute of a

[7] Although *Sarver* was transferred from New Jersey to California, the suit continued to be treated as if it were being heard in New Jersey for choice-of-law purposes. *See Sarver*, 813 F.3d at 897 ("after a transfer under 28 U.S.C. § 1404, the choice-of-law rules of the transferor court apply").

speaker's domicile to his statements" (citing *Underground Sols., Inc. v. Palermo*, 41 F. Supp. 3d 720, 726 (N.D. Ill. 2014) (applying Tennessee anti-SLAPP law to suit filed in Illinois against a Tennessee defendant, because of "the importance of a speaker's domicile in a court's decision on which state's anti-SLAPP law to apply")).

Here, the Complaint alleges that Chevron Corporation has "its global headquarters and principal place of business in San Ramon, California," Compl. ¶ 23(a), and "controls and has controlled companywide decisions related to climate change and greenhouse gas emissions from its fossil fuel products, including those of its subsidiaries," *id.* ¶ 23(d). Likewise, Chevron U.S.A. Inc. is alleged to have "its principal place of business in San Ramon, California." *Id.* ¶ 23(f). Thus, to the extent the Chevron Defendants are purported to have been involved in any of the speech alleged in this case, the Complaint necessarily alleges that speech would have emanated from its California headquarters, *see id.*, not Hawaii—especially in view of the Chevron Defendants' limited contacts with that State. *See* Motion to Dismiss for Lack of Personal Jurisdiction, at __.

Although Hawai‘i courts have not squarely addressed the question of what jurisdiction's anti-SLAPP law to apply under the choice-of-law rules, Hawai'i's choice-of-law rules are analogous to those of the other states that have held the domicile of the defendant is controlling. Hawaii's choice-of-law rules look generally to "which state would have the strongest interest in seeing its laws applied," *Mikelson*, 107 Haw. at 198—much like New Jersey's rules, which pointed to the application of California's anti-SLAPP statute because "California has expressed a strong interest in enforcing its anti-SLAPP law" to its citizens, *Sarver*, 813 F.3d at 899, or Utah's rules, which required the application of California's law because of "California's strong interest in protecting its citizens' free speech activities," *Diamond Ranch*, 117 F. Supp. 3d at 1324. Therefore, under Hawai‘i's choice-of-law test, the state with "the strongest interest in seeing its [anti-SLAPP] laws

applied" to claims purportedly based on the speech of California-based companies is California. *Lewis*, 69 Haw. at 499. California's anti-SLAPP law protects Chevron here.

B. Under Plaintiffs' Theory, the Complaint Is Subject to anti-SLAPP Immunity

1. Plaintiffs Argue the Claims Arise From Speech on Issues of Public Interest

California's anti-SLAPP immunity applies to claims "arising from" speech on issues of "public interest" or issues that have been subject to "consideration or review" by a governmental body. Cal. Civ. Proc. Code § 425.16(e) (2), (3), (4). It also applies to "mixed" claims predicated both on speech and other activity so long as the speech is not "merely incidental" to the claim. *Baral*, 1 Cal. 5th at 394, 376 P.3d at 607. And here, there is no dispute that fossil fuel emissions, energy regulation, and climate change are all "issue[s] of public interest." "Global warming is one of the greatest challenges facing humanity today." *City of New York*, 993 F.3d at 86. In fact, "Climate change has staked a place at the very center of this Nation's public discourse." *Nat'l Rev., Inc. v. Mann*, 140 S. Ct. 344, 348 (2019) (Alito, J., dissenting from denial of certiorari).

According to Plaintiffs, each of the Complaint's causes of action "aris[es] from" Defendants' speech about this important topic. In fact, Plaintiffs have vigorously argued that—despite the Complaint's allegations about production and emissions—the *only* basis for liability in this case is "Defendants' [alleged] decades-long campaign" to oppose greenhouse gas regulation. Dkt. 116-1 at 1, 5 ; Dkt. 121 at 35. Plaintiffs are therefore judicially estopped from arguing otherwise. *See Roxas v. Marcos*, 89 Haw. 91, 124 (1998) (citing *Rosa v. CWJ Contractors, Ltd.*, 4 Haw. App. 210, 218 (1983)). According to Plaintiffs, *every* cause of action "aris[es] from" Defendants' speech. Cal. Civ. Proc. Code § 425.16(b)(1).

2. Plaintiffs' Claims Do Not Fall Within Any Anti-SLAPP Exemption.

Given that Plaintiffs' claims arise from Defendants' speech, Plaintiffs' claims are subject to

strike and dismissal *unless* Plaintiffs can meet their burden to demonstrate that their suit falls within one of the three narrow exemptions to California's anti-SLAPP statute. *See Simpson*, 49 Cal. 4th at 26, 230 P.3d at 1126 (plaintiff bears the burden of showing an anti-SLAPP exemption is applicable). But Plaintiffs cannot carry this burden, because none of the three "narrowly construed" exemptions—the public enforcement, public interest, and commercial speech exemptions—applies here. *See Montebello*, 1 Cal. 5th at 419–20, 376 P.3d at 631 (exemptions are "narrowly construed").

The public "enforcement" exemption is extremely narrow, applying only to "enforcement action[s]" that are "brought in the name of the people of the State of California." Cal. Civ. Proc. Code § 425.16 (d). Plaintiffs' suit clearly does not qualify. *See Montebello*, 1 Cal. 5th at 420 (the "public enforcement" exception does not apply to action brought by city "in its own name").

Plaintiffs' suit also does not qualify for the "public interest" exemption for "private enforcement" lawsuits. Cal. Civ. Proc. Code § 425.17 (b). By its terms, this exemption applies only to "private" class actions and private-attorney-general suits. *Id.* (b)(3); *Tourgeman v. Nelson & Kennard*, 222 Cal. App. 4th 1447, 1459, 166 Cal. Rptr. 3d 729, 740 (2014) ("exempt[s] class actions and private attorney general suits"). And the exemption is doubly inapplicable here because it does not apply to actions seeking compensatory damages for the plaintiff. *See Ingels v. Westwood One Broad. Servs., Inc.*, 129 Cal. App. 4th 1050, 1067, 28 Cal. Rptr. 3d 933, 943 (2005) ("Because appellant alleges and seeks recovery of damages personal to himself, his claim fails to meet the first requirement set out in section 425.17, subdivision (b).").

Finally, the "commercial speech exemption"—an exemption for "false advertising claims"—does not apply. *See Dean v. Friends of Pine Meadow*, 21 Cal. App. 5th 91, 105 n.5, 229 Cal. Rptr. 3d 865, 875 (2018); Cal. Civ. Proc. Code § 425.17(c). As the California Supreme Court

has explained, the "commercial speech exception" applies to only one narrow "subset of commercial speech": "comparative advertising" between competitors. *FilmOn.com Inc. v. DoubleVerify Inc.*, 7 Cal. 5th 133, 147, 439 P.3d 1156, 1163 (2019). The exemption, "by its terms, is limited to statements by one business competitor about the products or services of another." *Indus. Waste & Debris Box Serv., Inc. v. Murphy*, 4 Cal. App. 5th 1135, 1152, 208 Cal. Rptr. 3d 853, 866 (2016). Here, Plaintiffs' claims are not based on "statements by one business competitor about the products or services of another," *id.*, such as Chevron advertising disparaging its competitors' products. In fact, much of the alleged speech was not made by any Defendant at all. Rather, Plaintiffs' allegations are largely based on the speech of industry groups and trade associations such as GCC and API. *See generally* Compl. ¶¶ 92–117; *see also, e.g.*, ¶ 97 ("the Information Council for the Environment ('ICE') . . . launched a national climate change science denial campaign"); *id.* ¶ 101 (allegations about the speech of "API"); *id.* ¶ 128 (same for "GCC"). Even assuming that Chevron could otherwise be held liable for the speech of these third parties, statements by trade groups are *not* the kind of comparative advertising covered by the commercial speech exemption. *See All One God Faith, Inc. v. Organic & Sustainable Indus. Standards, Inc.*, 183 Cal. App. 4th 1186, 1212, 107 Cal. Rptr. 3d 861, 882–83 (2010) ("[T]he exception does not apply" to a "trade association.").

While Plaintiffs include a perfunctory assertion that Defendants are "greenwashing" by "promoting themselves as sustainable energy companies," Plaintiffs do not identify any comparative product advertisement—or even any Chevron statement they claim is false. Compl. ¶¶ 140–42. In any event, Plaintiffs do not contend their alleged "injuries"—"global warming" and its "environmental changes"—have been *caused* by alleged "greenwashing," *id.* ¶¶ 140, 148. Rather, Plaintiffs allege that global warming was caused by the campaign against regulation described in paragraphs 92 through 117 of the Complaint. *id.* ¶ 9 (alleging "[b]ut for such campaigns," Plaintiffs

would not be injured). "On its face, this type of speech"—i.e., speech supporting or opposing public policy—"is political rather than commercial in nature." *Pine Meadow*, 21 Cal. App. 5th at 104-05; *see also Baral*, 1 Cal. 5th at 394, 376 P.3d at 607 (anti-SLAPP statute applies to "mixed" claims).

C. Plaintiffs Cannot Carry Their Burden to Support Their Claims

1. Plaintiffs Cannot Carry Their Pleading Burden

Because Plaintiffs' claims against Chevron—at least in Plaintiffs' current telling—arise from speech, the burden shifts to Plaintiffs to establish that their claims are legally valid. But Plaintiffs cannot carry their burden, because they have failed to allege that Chevron engaged in the speech "campaign" that Plaintiffs complain about, or that Chevron's speech (whatever it may be) caused climate change. *See* Compl. ¶¶ 92–117 (failing to attribute *any* statement to Chevron). For that reason alone, Plaintiffs' speech-based claims against Chevron—which, according to Plaintiffs, are *all* of their claims—must be dismissed. *See, e.g.*, *Justice*, 125 Haw. at 108.

Even if Plaintiffs could allege that Chevron made statements as part of the speech "campaign," that would at most be the first step—because the U.S. Constitution requires that Plaintiffs also prove the statements were knowingly false statements of fact. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986) (tort suits based on speech on matters of public concern are subject "to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault"); *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1057–58 (9th Cir. 1990) (such tort suits "are subject to the same first amendment requirements that govern actions for defamation").[8] But the Complaint attacks statements of *opinion*, not fact. *See, e.g.*, Compl. ¶ 102 (complaining about speech arguing that "my belief [is] that [regulatory] proposals are neither prudent nor practical"). And such "opinion" speech is "protected by the First Amendment." *Gardner v. Martino*, 563 F.3d

[8] As explained below, the speech that Plaintiffs attack is speech campaigning against regulation, which is *absolutely* protected under the *Noerr-Pennington* doctrine *even if* it was "false."

981, 992 (9th Cir. 2009). Indeed, "[t]he core purpose of the constitutional protection of freedom of expression is to ensure that all opinions on such issues [like climate change] have a chance to be heard and considered." *Nat'l Rev.*, 140 S. Ct. at 348 (Alito, J., dissenting from denial of certiorari).

Further, even if Plaintiffs could show that *some* conduct they attack is not protected, they must plead and prove that *only* that unprotected conduct caused their injuries. *NAACP. v. Claiborne Hardware Co.*, 458 U.S. 886, 934 (1982) (the plaintiff bears "[t]he burden of demonstrating that [unprotected conduct] rather than protected conduct" caused injury); *Planned Parenthood v. ACLA*, 290 F.3d 1058, 1073 (9th Cir. 2002) (*Claiborne* "made clear that only losses proximately caused by unlawful conduct could be recovered").[9] But Plaintiffs have not even *tried* to carry their constitutionally-imposed burden to allege that unprotected speech *caused* their climate change injuries.

2. Any Speech-Based Claims Are Barred by the *Noerr-Pennington* Doctrine

Even if Plaintiffs could allege that Chevron engaged in the purported publicity "campaign" *and* made false statements that *caused* Plaintiffs' injuries, Plaintiffs' claims would *still* be subject to dismissal. Plaintiffs argue that their Complaint targets "a decades-long campaign" to oppose "government regulation." Dkt. 116-1 at 5. But under the *Noerr-Pennington* doctrine, "[a] publicity campaign directed at the general public and seeking government action" is protected by the First Amendment—*even if* the speech is allegedly misleading. *Manistee*, 227 F.3d at 1092. Plaintiffs' speech-based claims are legally barred and should be dismissed. H.R. Civ. P. 12(b)(6).

a. The Noerr-Pennington *Doctrine Applies to Claims About Public Policy Campaigns*

The *Noerr-Pennington* doctrine protects activities intended to influence the government—

[9] They must also show that this unprotected speech was made by *Chevron itself*, not by some organization (like a trade association) that happened to include Chevron. "First Amendment protections are not lost 'merely because some members of [a] group may have participated in conduct or advocated doctrine that itself is not protected.'" *Santopietro v. Howell*, 857 F.3d 980, 990 (9th Cir. 2017) (quoting *Claiborne*, 458 U.S. at 908).

including publicity campaigns designed to influence the voting public—pursuant to the Petition Clause of the First Amendment. The doctrine was first articulated in *E. R. R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), a case brought by a group of trucking plaintiffs against railroads and affiliated defendants. The trucking plaintiffs alleged the railroads violated the Sherman Act by "conduct[ing] a publicity campaign against the truckers designed to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business," and "creat[ing] an atmosphere of distaste for the truckers among the general public." *Id.* at 129. The plaintiffs alleged that this "publicity campaign" was "fraudulent," because "the publicity matter circulated in the campaign was made to appear as spontaneously expressed views of independent persons and civic groups when, in fact, it was largely prepared and produced by [the railroads' PR firm] and paid for by the railroads." *Id.* at 130. After a bench trial, the district court awarded "substantial damages" and a "broad injunction" to the plaintiffs. *Id.* at 133–34.

The Supreme Court reversed, explaining that "publicity campaign[s]" aimed at influencing governmental action cannot be the grounds for civil liability, as "representative democracy . . . depends upon the ability of the people"—including businesspeople—"to make their wishes known to their representatives." *Id.* at 137. The fact that the defendants "deliberately deceived the public and public officials" by using front groups was irrelevant. *Id.* at 145. Four years later, the Court reiterated that defendants could not be liable for "a concerted effort to influence public officials." *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 669–70 (1965).

Although *Noerr* and *Pennington* focused on antitrust claims under the Sherman Act, later decisions have made clear that the *Noerr-Pennington* doctrine embodies a constitutional rule that applies to all claims—including common-law torts. "[T]he *Noerr–Pennington* doctrine is not merely a narrow interpretation of the Sherman Act.'" *Kottle v. Nw. Kidney Centers*, 146 F.3d 1056,

1059 (9th Cir. 1998). "Rather, the doctrine is a direct application of the Petition Clause" of the First Amendment. *Id.* "While the *Noerr–Pennington* doctrine originally arose in the antitrust context, it is based on and implements the First Amendment right to petition and therefore, with one exception [for frivolous or sham lawsuits], applies equally in *all* contexts." *White v. Lee*, 227 F.3d 1214, 1231 (9th Cir. 2000) (emphasis added). This includes suits alleging state law torts: "There is simply no reason that a common-law tort doctrine can any more permissibly abridge or chill the constitutional right of petition than can a statutory claim such as antitrust." *Theme Promotions, Inc. v. News Am. Mktg. FSI*, 546 F.3d 991, 1007 (9th Cir. 2008) (quotation omitted).

b. Noerr-Pennington *Protects the Publicity Campaign Alleged in the Complaint*

Just as the *Noerr* plaintiffs could not use the Sherman Act to punish the defendants for engaging in an allegedly "fraudulent" "publicity campaign" aimed at legislative and regulatory action, Plaintiffs here cannot punish Defendants for allegedly doing the same thing. The Petition Clause protects "the right of the people ... to petition the Government," U.S. Const. amend. I—and in a republic, the most effective means of petitioning "the Government" is to speak to the *public* who choose the Government. For that reason, *Noerr* "extended immunity not only to the railroads' direct communications with legislators but *also* to its public relations campaign, finding that the latter's aim was to influence the passage of favorable legislation." *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 934 (9th Cir. 2006) (emphasis added) (citing *Noerr*, 365 U.S. at 140–43).

Here, Plaintiffs repeatedly describe the speech they complain of as a publicity campaign aimed at influencing public opinion and regulators, calling it, for example:

- "a public campaign at evading regulation of [Defendants'] fossil fuel products and/or emissions therefrom," Compl. ¶ 90;
- an "advertising campaign" whose "goal" "was to change public opinion and avoid regulation," *id.* ¶ 98;
- "a deceptive public campaign against regulation of their business practices," *id.* ¶ 107;

- "deceptive advertising campaigns . . . with the specific purpose of preventing U.S. adoption of the Kyoto Protocol," *id.* ¶ 108; and
- an attempt "to evade regulation of the emissions resulting from use of their fossil fuel products," *id.* ¶ 113.

In short, Plaintiffs allege Defendants engaged in "[a] publicity campaign directed at the general public and seeking government action," which is what the *Noerr-Pennington* doctrine protects. *Manistee,* 227 F.3d at 1092; *Noerr*, 365 U.S. at 129.

It does not matter that Plaintiffs allege the campaign was "false" or "misleading," *see, e.g.*, Compl. ¶ 117, or purportedly conducted through "front groups," *id.* ¶ 114. The "publicity campaign" in *Noerr* was alleged to be "fraudulent" and deceptively "made to appear as spontaneously expressed views of independent persons" when it was actually "paid for by the railroads." *Noerr,* 365 U.S. at 129–30. But the speech was still protected by the "right of petition." *Id.* at 138. "As pointed out by the Court in *Noerr,* attempts to influence public officials may occasionally result in 'deception of the public, manufacture of bogus sources of reference, [and] distortion of public sources of information.'" *Boone v. Redev. Agency of City of San Jose*, 841 F.2d 886, 894 (9th Cir. 1988) (quoting *Noerr*, 365 U.S. at 140). Even if such "misrepresentations" occur, the political process is intended to "accommodate false statements and reveal their falsity." *Id.* Merely alleging a speech campaign is "false" does not remove *Noerr-Pennington* immunity. *Id.*

In truth, the speech Plaintiffs identify accurately described the costs of regulation and advocated that voters, legislators, and regulators weigh those costs. Plaintiffs may disagree with this advocacy, but they cannot hold anyone liable for taking a different view. *See id.*

V. CONCLUSION

For the foregoing reasons, the Court should grant Chevron's special motion to strike, dismiss the case with prejudice, and award Chevron its attorney's fees. In the alternative, the Court should dismiss the complaint against Chevron for failure to state a claim. H.R. Civ. P. 12(b)(6).

DATED: Honolulu, Hawai'i, June 2, 2021.

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

CITY AND COUNTY OF HONOLULU, Plaintiff, vs. SUNOCO LP; ALOHA PETROLEUM, LTD.; ALOHA PETROLEUM LLC; EXXON MOBIL CORP.; EXXONMOBIL OIL CORPORATION; ROYAL DUTCH SHELL PLC; SHELL OIL COMPANY; SHELL OIL PRODUCTS COMPANY LLC; CHEVRON CORP; CHEVRON USA INC.; BHP GROUP LIMITED; BHP GROUP PLC; BHP HAWAII INC.; BP PLC; BP AMERICA INC.; MARATHON PETROLEUM CORP.; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66; PHILLIPS 66 COMPANY; AND DOES 1 through 100, inclusive, Defendants.	CIVIL NO. 1CCV-20-0000380 (Other Non-Vehicle Tort) **NOTICE OF HEARING MOTION and CERTIFICATE OF SERVICE**

NOTICE OF HEARING MOTION

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NOTICE IS HEREBY GIVEN that Chevron Defendants' Special Motion to Strike and/or Dismiss the Complaint Pursuant to California's Anti-Slapp Law filed herein on June 2, 2021, shall come on for hearing before the Honorable, Judge Jeffrey P. Crabtree, Judge of the above-entitled Court on August 27, 2021 at 8:30 a.m., via Webex Video Hearing. The parties are directed to refer to an Order Setting Motion for Video Conference Hearing to be filed by the court which will provide instructions for joining the hearing.

DATED: Honolulu, Hawaii, June 2, 2021.

/s/ Melvyn M. Miyagi
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the aforementioned document was duly served on the above-referenced parties through their respective attorneys at their last known address by electronic service via JEFS, as provided by Rule 5(b), HRCP or by depositing it in the U.S. Mail, postage prepaid , for those parties or their counsel not registered with JEFS on the date below.

DATED: Honolulu, Hawaii, June 2, 2021.

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