

Nos. 21-15313, 21-15318

IN THE
United States Court of Appeals for the Ninth Circuit

CITY AND COUNTY OF HONOLULU,

Plaintiff-Appellee,

v.

SUNOCO LP, et al.,

Defendants-Appellants.

COUNTY OF MAUI,

Plaintiff-Appellee,

v.

CHEVRON USA INC., et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Hawaii,
Nos. 20-cv-00163, 20-cv-00470 (The Honorable Derrick K. Watson)

APPELLANTS' MOTION TO TAKE JUDICIAL NOTICE

THOMAS G. HUNGAR
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
(202) 955-8500
thungar@gibsondunn.com

THEODORE J. BOUTROUS, JR.
WILLIAM E. THOMSON
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, California 90071-3197
(213) 229-7000
tboutrous@gibsondunn.com
wthomson@gibsondunn.com

*Counsel for Defendants-Appellants Chevron Corporation and Chevron U.S.A. Inc.
[Additional counsel listed on signature page]*

INTRODUCTION

Pursuant to Federal Rule of Evidence 201, Defendants respectfully move the Court to take judicial notice of two hearing transcripts from *City & County of Honolulu v. Sunoco LP*, No. 1CCV-20-0000380 (Haw. Cir. Ct.), that are relevant to and cited in the Reply Brief filed concurrently with this motion.

Defendants request judicial notice of the following documents, which are attached as exhibits to this motion:

Exhibit 1: Hearing Transcript, *City & Cnty. of Honolulu v. Sunoco LP*, No. 1CCV-20-0000380 (Haw. Cir. Ct. Aug. 27, 2021). At various points, Plaintiffs’ counsel stated on the record that the causal chain central to Plaintiffs’ theory of liability and damages encompasses the increased combustion of oil and gas, which led to increased greenhouse-gas emissions, which led to global climate change and Plaintiffs’ alleged injuries. *See, e.g.*, Hr’g Tr., at 107:8–17; 123:4–5.

Exhibit 2: Hearing Transcript, *City & Cnty. of Honolulu v. Sunoco LP*, No. 1CCV-20-0000380 (Haw. Cir. Ct. Oct. 15, 2021). Plaintiffs’ counsel stated on the record that the theory of Plaintiffs’ lawsuits encompasses not just alleged misrepresentations, but also increased combustion and emissions of fossil-fuel “products,” leading to global climate change and Plaintiffs’ alleged injuries. *See, e.g.*, Hr’g Tr., at 35:13–15.

ARGUMENT

Rule 201 states that “[t]he court may judicially notice a fact that is not subject to reasonable dispute because it ... can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b)(2). “The court may take judicial notice at any stage of the proceeding,” including on appeal. Fed. R. Evid. 201(d); *see also Bryant v. Carleson*, 444 F.2d 353, 357 (9th Cir. 1971). Defendants respectfully request judicial notice of Plaintiffs’ counsel’s transcribed statements, on the record, before a Hawaii state court, in which they admit that their Complaints’ theory of causation and damages hinges on increased combustion of fossil fuels, resulting in increased emissions and, allegedly, climate change and its attendant effects on Plaintiffs’ communities. These statements can be readily determined from the exhibits—two Hawaii state-court documents—whose accuracy cannot be reasonably questioned.

This Court regularly takes notice of “the records of ... inferior court[s] in other cases.” *United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980); *see also, e.g., United States v. Ross*, 771 F. App’x 345, 348 n.1 (9th Cir. 2019) (taking judicial notice of “the same special verdict form used by the district court in another case”); *Chavez v. Robinson*, 817 F.3d 1162, 1166 n.1 (9th Cir. 2016) (taking judicial notice of “the trial court’s immunity order, and of [defendant’s] first criminal judgment”).

And this Court has held that it “may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue.”” *U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) (quotation omitted); *cf.* Fed. R. App. P. 32.1(b) (instructing parties to submit a copy of an “opinion, order, judgment, or disposition” unavailable on publicly accessible databases).

Here, the statements made by Plaintiffs’ counsel on the record in Hawaii state court in these very cases have a clear and “direct” connection to the matters at issue in this appeal. Before this Court, Plaintiffs claim that their cases solely involve allegations of “deception,” *see* Resp.3, a claim that the district court credited in ordering remand, 1-ER-3. This allegedly exclusive focus on misrepresentation, Plaintiffs maintain, prevents federal-officer removal or removal based on the Outer Continental Shelf Lands Act. *See generally* Resp.36–46; Resp.48–57. But in state court on remand, these same Plaintiffs have taken the contrary position, pointing to their allegations about the production, marketing, sale, and third-party combustion of Defendants’ fossil fuels as necessary links in Plaintiffs’ alleged causal chain. Plaintiffs argued in state court that it is Defendants’ fossil-fuel “products,” not alleged misrepresentations, “that give rise to claims of tortious conduct.” Tr. 35:13–15, *City & Cnty. of Honolulu v. Sunoco LP*, No. 1CCV-20-0000380 (Oct. 15, 2021). Plaintiffs’

counsel also conceded that their causal chain for Plaintiffs’ alleged injuries is premised on “increased combustion, which le[d] to increased emissions, which le[d] to accelerated global climate change, which le[d] to injuries in Hawaii.” Hr’g Tr. 107:8–17, *Honolulu*, No. 1CCV-20-0000380 (Aug. 27, 2021). In fact, Plaintiffs’ counsel conceded that Defendants’ assertions that Plaintiffs’ causal chain includes production, sales, and emissions were “exactly correct.” *Id.* at 123:5.

The nature of Plaintiffs’ claims is vital to determining these lawsuits’ removability: Do their Complaints assert claims, causation theories, and damages based on misrepresentations alone, as Plaintiffs contend before this Court, or do they also concern the extraction, production, sale, and use of oil and gas, as Plaintiffs have admitted in the state court proceedings? This Court should therefore take judicial notice of these proceedings in Hawaii state court. *See U.S. ex rel. Robinson Rancheria Citizens Council*, 971 F.2d at 248.

CONCLUSION

The Court should grant Defendants’ motion to take judicial notice.

DATED: November 8, 2021

Respectfully Submitted,

By: /s/ Deborah K. Wright
Deborah K. Wright
WRIGHT & KIRSCHBRAUN, LLC
1885 Main Street, Suite 108
Wailuku, HI 97693
800.695.1255
deborah@wkmaui.com

Paul Alston
DENTONS US LLP
1001 BISHOP ST., SUITE 1800
HONOLULU, HI 96813
808.524.1800
paul.alston@dentons.com

Theodore V. Wells, Jr.
Daniel J. Toal
Caitlin Grusauskas
Yahonnes Cleary
PAUL, WEISS, RIFKIND, WHARTON &
GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
212.373.3089
twells@paulweiss.com
dtoal@paulweiss.com
cgrusauskas@paulweiss.com
ycleary@paulweiss.com

Kannon K. Shanmugam
William T. Marks
PAUL, WEISS, RIFKIND, WHARTON &
GARRISON LLP
2001 K Street, NW
Washington, DC 20006-1047

By: ** /s/ Theodore J. Boutrous, Jr.
Theodore J. Boutrous, Jr.
William E. Thomson
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
Telephone: 213.229.7000
Facsimile: 213.229.7520
tboutrous@gibsondunn.com
wthomson@gibsondunn.com

Thomas G. Hungar
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5306
Telephone: (202) 955-8500
thungar@gibsondunn.com

Andrea E. Neuman
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166
Telephone: 212.351.4000
aneuman@gibsondunn.com

Joshua D. Dick
GIBSON, DUNN & CRUTCHER LLP
555 Mission Street, Suite 3000
San Francisco, CA 94105-0921
Telephone: 415.393.8200
jdick@gibsondunn.com

Melvyn M. Miyagi
WATANABE ING LLP
999 Bishop Street, Suite 1250

202.223.7300
kshanmugam@paulweiss.com
wmarks@paulweiss.com

Attorneys for Defendants Exxon Mobil Corporation and ExxonMobil Oil Corporation

Honolulu, HI 96813
Telephone: 808.544.8300
Facsimile: 808.544.8399
mmiyagi@wik.com

Attorneys for Defendants Chevron Corporation and Chevron U.S.A., Inc.

**** Pursuant to Ninth Circuit L.R. 25-5(e),
counsel attests that all other parties on
whose behalf the filing is submitted concur
in the filing's contents.**

By: /s/ Michael Heihre

C. Michael Heihre

Michi Momose

CADES SCHUTTE

Cades Schutte Building

1000 Bishop Street, Suite 1200

Honolulu, HI 96813

Telephone: 808.521.9200

Facsimile: 808.521.9210

mheihre@cades.com

mmomose@cades.com

J. Scott Janoe

BAKER BOTTS L.L.P

910 Louisiana Street

Houston, Texas 77002

713.229.1553

713.229.7953

scott.janoe@bakerbotts.com

Megan Berge

Sterling Marchand

BAKER BOTTS LLP

700 K Street, N.W.

Washington, D.C. 20001

202.639.1308

202.639.7890

megan.berge@bakerbotts.com

sterling.marchand@bakerbotts.com

Attorneys for Defendants

Sunoco LP, Aloha Petroleum, LTD., and

Aloha Petroleum LLC

By: /s/ Crystal K. Rose

Crystal K. Rose
Adrian L. Lavarias
David A. Morris
BAYS, LUNG, ROSE & VOSS
Topa Financial Center, Suite 900
700 Bishop Street
Honolulu, HI 96813
808.523.9000
CRose@legalhawaii.com
ALavarias@legalhawaii.com
DMorris@legalhawaii.com

Steven M. Bauer
Margaret A. Tough
LATHAM & WATKINS LLP
505 Montgomery Street, Suite 2000
San Francisco, CA 94111-6538
415.391.0600
steven.bauer@lw.com
margaret.tough@lw.com

*Attorneys for Defendants ConocoPhillips,
ConocoPhillips Company, Phillips 66, and
Phillips 66 Company*

By: /s/ Lisa Bail

Lisa Bail
David Hoftiezer
GOODSILL ANDERSON QUINN &
STIFEL
A Limited Liability Law Partnership LLP
999 Bishop Street, Suite 1600
Honolulu, Hawaii 96813
808.547.5600
808.547.5880
lbail@goodsill.com
dhofstiezer@goodsill.com

John D. Lombardo
Matthew T. Heartney
ARNOLD AND PORTER KAYE
SCHOLER LLP
777 S. Figueroa St., 44th Floor
Los Angeles, CA 90017-2513
213.243.4000
John.Lombardo@arnoldporter.com
Matthew.Heartney@arnoldporter.com

Jonathan W. Hughes
ARNOLD AND PORTER KAYE
SCHOLER LLP
Three Embarcadero Center, 10th Floor
San Francisco, CA 94111
415.471.3100
Jonathan.Hughes@arnoldporter.com

*Attorneys for Defendants
BP plc and BP America Inc.*

Jameson R. Jones
Daniel R. Brody
BARTLIT BECK LLP
1801 Wewatta Street, Suite 1200
Denver, CO 80202
303.592.3100
jameson.jones@bartlit-beck.com
dan.brody@bartlit-beck.com

*Attorneys for Defendants ConocoPhillips
and ConocoPhillips Company*

By: /s/ Joachim P. Cox
Joachim P. Cox
Randall C. Whattoff
COX FRICKE LLP
Queen's Court
800 Bethel Street, Suite 600
Honolulu, HI 96813
808.585.9440
jcox@cfhawaii.com
rwhattoff@cfhawaii.com

David C. Frederick
Daniel S. Severson
KELLOGG, HANSEN, TODD, FIGEL &
FREDERICK, P.L.L.C.
1615 M. St., N.W., Suite 400
Washington, D.C. 20036
202.326.7900
dfrederick@kellogghansen.com
dseverson@kellogghansen.com

*Attorneys for Defendants
Royal Dutch Shell plc, Shell Oil Company,
and Shell Oil Products Company LLC*

By: /s/ Victor L. Hou

Victor L. Hou
Boaz S. Morag
CLEARLY GOTTLIEB
One Liberty Plaza
New York, NY 10006
212 225 2894
vhou@cgsh.com
bmorag@cgsh.com

Margery S. Bronster
Lanson Kupau
BRONSTER FUJICHAKU ROBBINS
1003 Bishop St. #2300
Honolulu, HI 96813
Telephone: 808.524.5644
Facsimile: 808.599.1881
mbronster@bfrhawaii.com
lkupau@bfrhawaii.com

*Attorneys for Defendants BHP Group
Limited, BHP Group plc, and BHP Hawaii
Inc.*

By: /s/ Shannon S. Broome

Shannon S. Broome
HUNTON ANDREWS KURTH LLP
50 California St., Suite 1700
San Francisco, CA 94111
415.975.3700
sbroome@huntonak.com

Shawn Patrick Regan
HUNTON ANDREWS KURTH LLP
200 Park Avenue, 52nd Floor
New York, NY 10166
212.309.1000
sregan@huntonak.com

Ann Marie Mortimer
HUNTON ANDREWS KURTH LLP
550 South Hope Street, Suite 2000
Los Angeles, CA 90071
213.532.2103
AMortimer@HuntonAK.com

Ted N. Pettit
CASE LOMBARDI & PETTIT
737 Bishop St. #2600
Honolulu, HI 96813
tpettit@caselombardi.com

*Attorneys for Defendant
Marathon Petroleum Corp.*

CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: November 8, 2021

/s/ Theodore J. Boutrous, Jr.
Theodore J. Boutrous, Jr.

GIBSON, DUNN & CRUTCHER LLP

*Attorneys for Defendants-Defendants
Chevron Corp. and Chevron U.S.A. Inc.*

EXHIBIT 1

PERMISSION TO COPY DENIED, HRS 606.13, etc.

COPY

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

CITY AND COUNTY OF HONOLULU
AND HONOLULU BOARD OF WATER
SUPPLY,

Plaintiffs,

vs.

SUNOCO LP; et al.,

Defendants.

CIVIL NO. 1CCV-20-0000380

TRANSCRIPT OF PROCEEDINGS

had before the HONORABLE JEFFREY P. CRABTREE,
Sixth Division, Judge presiding,
on Friday, August 27, 2021.

APPEARANCES: (See pages 2 and 3)

REPORTED BY:
Sandra M. N. You, CSR 406, RPR
Official Court Reporter
State of Hawaii

Official Court Reporter
First Circuit Court
State of Hawaii

PERMISSION TO COPY DENIED, HRS 606.13, etc.

1 APPEARANCES: (Via Videoconference)

2 For Plaintiffs City and County of Honolulu and Honolulu
3 Board of Water Supply:

4 ROBERT M. KOHN, ESQ.
5 JEFF A. LAU, ESQ.
6 NICOLETTE WINTER, ESQ.
7 PAUL AOKI, ESQ.
8 VICTOR M. SHER, ESQ. (Pro Hac Vice)
9 MATTHEW K. EDLING, ESQ. (Pro Hac Vice)
10 CORRIE J. YACKULIC, ESQ. (Pro Hac Vice)

11 For Defendants Sunoco LP, Aloha Petroleum, Ltd., and Aloha
12 Petroleum LLC:

13 C. MICHAEL HEIHRE, ESQ.
14 MICHI MOMOSE, ESQ.
15 J. SCOTT JANOE, ESQ. (Pro Hac Vice)
16 MEGAN BERGE, ESQ. (Pro Hac Vice)

17 For Defendants Exxon Mobil Corporation and ExxonMobil Oil
18 Corporation:

19 PAUL ALSTON, ESQ.
20 DANIEL TOAL, ESQ. (Pro Hac Vice)

21 For Defendants Royal Dutch Shell PLC, Shell Oil Company,
22 and Shell Oil Products Company LLC:

23 JOACHIM P. COX, ESQ.
24 RANDALL C. WHATTOFF, ESQ.
25 DAVID C. FREDERICK, ESQ. (Pro Hac Vice)
JAMES M. WEBSTER, III, ESQ. (Pro Hac Vice)
DANIEL S. SEVERSON, ESQ. (Pro Hac Vice)

26 For Defendants Chevron Corporation and Chevron U.S.A. Inc.:

27 MELVYN M. MIYAGI, ESQ.
28 ROSS T. SHINYAMA, ESQ.
29 SUMMER M. KAIWE, ESQ.
30 THEODORE J. BOUTROUS, JR., ESQ. (Pro Hac Vice)
31 ANDREA E. NEUMAN, ESQ. (Pro Hac Vice)
32 ERICA W. HARRIS, ESQ. (Pro Hac Vice)

For Defendants BHP Group Limited, BHP Group PLC, BHP Hawaii Inc.:

MARGERY S. BRONSTER, ESQ.
LANSON K. KUPAU, ESQ.
BOAZ S. MORAG, ESQ. (Pro Hac Vice)
VICTOR L. HOU, ESQ. (Pro Hac Vice)

For Defendants BP PLC and BP America Inc.:

LISA A. BAIL, ESQ.
DAVID J. HOFTIEZER, ESQ.
JONATHAN W. HUGHES, ESQ. (Pro Hac Vice)
JOHN D. LOMBARDO, ESQ. (Pro Hac Vice)

For Defendant Marathon Petroleum Corporation:

TED N. PETTIT, ESQ.
STEPHANIE TEECE, ESQ.
SHANNON S. BROOME, ESQ. (Pro Hac Vice)
SHAWN PATRICK REGAN, ESQ. (Pro Hac Vice)

For Defendants ConocoPhillips, ConocoPhillips Company, Phillips 66, Phillips 66 Company:

CRYSTAL K. ROSE, ESQ.
JAMESON R. JONES, ESQ. (Pro Hac Vice)
DANIEL R. BRODY, ESQ. (Pro Hac Vice)
KATHERINE A. ROUSE, ESQ. (Pro Hac Vice)

For Amicus Curiae Hawaii State Association of Counties:

MIRANDA C. STEED, ESQ.

For Amicus Curiae State of Hawaii:

EWAN C. RAYNER, ESQ.

PERMISSION TO COPY DENIED, HRS 606.13, etc.

FRIDAY, AUGUST 27, 2021

THE CLERK: In the Circuit Court, First Circuit, State of Hawaii, Sixth Division, with the Honorable Jeffrey P. Crabtree presiding this morning on Friday, August 27, 2021.

Calling Case Number 1 for hearing, 1CCV-20-380, City and County of Honolulu versus 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 Corporation, Chevron U.S.A. Inc., BHP Group Limited, BHP Group PLC, BHP Hawaii Inc., BP PLC, BP America Inc., Marathon Petroleum Corporation, ConocoPhillips, ConocoPhillips Company, Phillips 66, Phillips 66 Company, and the other Does 1 through 10, inclusive.

And this is for hearing on defendants' two motions to dismiss and Chevron's anti-SLAPP motion.

Counsel, appearances, please. We'll start, as we practiced, plaintiffs first. Go ahead.

MR. KOHN: Good morning, Your Honor. Robert Kohn, deputy corporation counsel, for the City and County of Honolulu. Also attending, Jeff Lau, deputy corporation counsel, for Board of Water Supply. Also from my office, Nicolette Winter, deputy corporation counsel, for the City, and Paul Aoki, deputy corporation counsel, for the City.

1 There are three attorneys admitted pro hac vice
2 who will be arguing today from the Sher Edling law firm,
3 Victor Sher arguing the 12(b)(6) motion, Corrie Yackulic
4 arguing the 12(b)(2) motion, and Matthew Edling arguing the
5 anti-SLAPP motion. There are also others listening from
6 the Sher Edling law firm, but they are not officially
7 attending.

8 THE COURT: Thank you. Good morning.

9 Next.

10 MR. HEIHRE: Good morning, Your Honor. Michael
11 Heihre and Michi Momose, Cades Schutte, on behalf of Sunoco
12 LP, Aloha Petroleum Ltd., and Aloha Petroleum LLC. With
13 us, pro hac Scott Janoe and Megan Berge from the Baker
14 Botts firm, Your Honor.

15 THE COURT: Thank you.

16 MR. ALSTON: Good morning, Your Honor. Paul
17 Alston and Daniel Toal appearing for Exxon Mobil
18 Corporation and ExxonMobil Oil Corporation. There are also
19 client representatives. And then there are attorneys from
20 the mainland law firm appearing -- not appearing, but
21 observing.

22 THE COURT: Okay. Thank you. Welcome,
23 everybody.

24 MR. COX: Good morning, Your Honor. Joachim Cox
25 and Randall Whattoff appearing on behalf of Royal Dutch

1 Shell PLC, Shell Oil Company, and Shell Oil Products
2 Company LLC. Also appearing pro hac vice are David
3 Frederick, James Webster, and Daniel Severson. Also
4 present is corporate representative Joe'l Mafrige.

5 THE COURT: Thank you.

6 MR. MIYAGI: Good morning, Your Honor. Melvyn
7 Miyagi, Ross Shinyama, Summer Kaiawe appearing on behalf of
8 Chevron Corporation, Chevron U.S.A. Inc. Also appearing
9 pro hac vice counsel Theodore Boutrous, Andrea Neuman, and
10 Erica Harris.

11 And Mr. Boutrous will be speaking for all of the
12 defendants on the motions to dismiss, except Mr. Alston
13 will be speaking for Exxon under a separate personal
14 jurisdiction motion, Your Honor.

15 THE COURT: Understood. Thank you.

16 MR. MIYAGI: We did have a request, as long as
17 we're going through, Your Honor, which we mentioned to your
18 clerk before we came on, a suggestion that all counsel
19 black out their screen if they're not going to be speaking
20 or arguing. That way, the Court and the court reporter
21 won't have this flickering effect, if you will, going back
22 and forth on the screen, if that's okay with the Court.

23 THE COURT: That's fine with me. Some attorneys
24 are more proficient at turning things off and on than
25 others. So if someone just wants to leave their video on,

1 that's okay too.

2 MR. MIYAGI: Thank you, Your Honor.

3 Oh, also watching, but not appearing, will be
4 representatives of Chevron, as well as other members of
5 Mr. Boutrous's firm, but they will not be appearing, and
6 therefore, I'm not naming them for the record, Your Honor.

7 THE COURT: Yeah, that's fine. They're all
8 welcome, of course.

9 MS. BRONSTER: Good morning, Your Honor.
10 Margery Bronster and Lanson Kupau for BHP Group Limited,
11 BHP Group PLC, and BHP Hawaii Incorporated. Also present
12 are pro hac vice counsel Boaz Morag and Victor Hou.

13 THE COURT: Thank you.

14 MS. BAIL: Good morning, Your Honor. Appearing
15 for BP PLC and BP America are Lisa Bail, myself, and David
16 Hoftiezer with Goodsill Anderson Quinn & Stifel. Also with
17 us are pro hac vice counsel Jonathan Hughes and John
18 Lombardo of Arnold & Porter. We also have corporate
19 representatives observing, but not appearing.

20 THE COURT: Thank you. Good morning.

21 MR. PETTIT: Good morning, Your Honor.
22 Appearing for Marathon Petroleum Corporation, Ted Pettit
23 and Stephanie Teece of Case Lombardi & Pettit. And
24 appearing as pro hac vice counsel Shannon Broome and Shawn
25 Regan. Thank you, Your Honor.

PERMISSION TO COPY DENIED, HRS 606.13, etc.

1 THE COURT: Thank you.

2 MS. ROSE: Good morning, Your Honor. Crystal
3 Rose from Bays, Lung, Rose & Voss appearing for
4 ConocoPhillips, ConocoPhillips Company, Phillips 66, and
5 Phillips 66 Company. Appearing for ConocoPhillips and
6 ConocoPhillips Company pro hac vice is Jameson Jones and
7 Dan Brody. And appearing for Phillips 66 and Phillips 66
8 Company as well as the Conoco entities is Katherine Rouse.
9 We also have client representatives listening in. Thank
10 you.

11 THE COURT: Thank you. Welcome.

12 MS. STEED: Good morning, Your Honor. Miranda
13 Steed from the Law Office of Jon F. Jacobs appearing on
14 behalf of Amicus Curiae Hawaii State Association of
15 Counties.

16 THE COURT: Thank you. Good morning.

17 MR. RAYNER: Good morning, Your Honor. Ewan
18 Rayner, deputy attorney general, appearing on behalf of
19 Amicus Curiae State of Hawaii.

20 THE COURT: Thank you.

21 All right. Is that everybody?

22 THE CLERK: Yeah, that's it.

23 THE COURT: Great. Thank you, everyone. That
24 went more smoothly than the first time we did this.

25 All right. So we're going to do the anti-SLAPP

1 motion first.

2 And just as -- the only general comment I have
3 is, you know, these motions have different legal standards.
4 And I think those -- applying those standards could be very
5 important here. So I'm going to ask counsel to be very
6 precise about the legal standard they apply to each of
7 these separate motions. Please be mindful about that.
8 Thank you.

9 Okay. Who's arguing first on the anti-SLAPP?

10 MR. BOUTROUS: I am, Your Honor. Theodore
11 Boutrous from Gibson, Dunn & Crutcher for Chevron.

12 THE COURT: Thank you. Go ahead.

13 MR. BOUTROUS: Thank you, Your Honor.

14 In its decision recently in the *City of New York*
15 case, the Second Circuit called global warming one of the
16 most -- one of the greatest challenges facing humanity
17 today. I think we can all agree it's an exceedingly
18 important issue of utmost public concern. And it's been
19 the subject of significant public debate, discussion,
20 argument going back at least 60 years to when Charles
21 Keeling went to Hawaii and did his famous research and
22 developed the Keeling Curve.

23 The *New York Times versus Sullivan*, United
24 States Supreme Court, talked about how the First Amendment
25 is intended to foster robust, wide-open, vehement, caustic

1 debate on public issues and why that's crucial to
2 democracy, so citizens can learn about the issues and make
3 their decisions and participate in democracy.

4 California's anti-SLAPP statute was intended to
5 foster the same sort of values. And we respectfully submit
6 that the Court should grant our motion to dismiss or strike
7 under that statute and Hawaii Rule 12(b)(6) because
8 California's anti-SLAPP statute, not Hawaii's, applies
9 here. The statute's immunity is triggered, and none of the
10 exemptions apply. And the plaintiffs fail to meet their
11 burden of showing that they will probably prevail.

12 First, California's anti-SLAPP statute, not
13 Hawaii's, a much weaker version, governs because Chevron is
14 domiciled in California. Its speech originated in
15 California. And California has an especially strong policy
16 of protecting freedom of speech.

17 And when applying choice-of-law principles,
18 courts often hold that the speaker's domicile has the most
19 significant relationship to an anti-SLAPP motion. The
20 Ninth Circuit in the *Sarver* case applied California's
21 anti-SLAPP statute in a case emanating from New Jersey.
22 And other courts have done the same thing.

23 And in here, it's particularly pertinent and I
24 think compelling because Hawaii's interest in the speech as
25 to Chevron are minimal to nonexistent because plaintiffs do

1 not allege that Chevron made a single statement directed at
2 or in Hawaii. So it's California speech.

3 Second, the statute's immunity protection is
4 triggered because this suit targets speech and opinions on
5 an issue of great public concern, climate change, and none
6 of the exemptions apply. And the statute, Your Honor, is a
7 substantive statute that creates an immunity so as to
8 preclude and bar suits that are not going to -- not likely
9 to succeed on the merits, in order to avoid speech being
10 chilled. And we believe that this case fits that model.

11 Plaintiffs challenge public statements, or
12 purport to, aimed at persuading national and international
13 regulators, so it implicates both the right of free speech
14 and the right of petition on public issues of public
15 importance. And both those rights are covered by the
16 anti-SLAPP statute. This is core constitutionally
17 protected speech on an issue of public concern.

18 Plaintiffs have argued that the commercial
19 speech exemption applies, but they ignore the California
20 Supreme Court's decision in the *FilmOn.com* case, where the
21 court clarified that that exception only applies to a
22 subset of commercial speech, specifically comparative
23 advertising.

24 And that's not what we have here. What they're
25 targeting are statements in the midst of public debate

1 about climate change. And -- and they say it over and over
2 again in the complaint, that this was meant to affect
3 regulation nationally and internationally that would have
4 combatted climate change in a different way than the
5 plaintiffs think it should have been protected or -- or
6 controlled. So this is not commercial speech.

7 In addition, much of their complaint focuses on
8 speech by trade associations, and the California Court of
9 Appeal has held that the commercial speech exception does
10 not apply to trade associations because they are not in the
11 business of selling goods. And that's what the commercial
12 exemption talks about.

13 Third, plaintiffs fail to meet their burden of
14 showing they are likely to prevail. And, Your Honor, on
15 the standard of review under California statute, the
16 plaintiffs -- once the defendant has shown that an issue of
17 public concern is -- is at play, the burden shifts to the
18 plaintiff to show that they're -- they have a probability
19 of prevailing on the merits. And here, they fail that
20 test.

21 Most glaringly, Your Honor, their complaint does
22 not allege any actual statements by Chevron about climate
23 change. They have one in paragraph 130, were about -- 131
24 of the complaint. It's the only one that specifically
25 mentions Chevron, and it's about its policy on renewable

1 energy that it announced in 2010, and then they say -- they
2 changed all -- their approach in 2014.

3 But none of the statements in their long litany
4 are -- are tied to Chevron specifically. And so right out
5 of the box, either under Rule 12(b)(6) or the anti-SLAPP
6 statute, their case should be dismissed.

7 In addition, the First Amendment bars their
8 claims for many reasons. But in particular, since I know
9 the Court has studied all these briefs, I wanted to focus
10 on *Noerr-Pennington*, which is, the Court knows, developed
11 the -- originally in the antitrust context, but has been
12 held over and over again to apply in state lawsuits and
13 other suits targeting speech.

14 And here, the -- the speech -- as I mentioned,
15 the plaintiffs say over and over again, paragraph 97, that
16 to the extent their -- their complaint is focused on this
17 campaign of deception, the entire thrust of it is that
18 defendants engaged in a deceptive campaign, quote, to
19 change public opinion and avoid regulation. That's in
20 paragraph 97. And the -- the *Noerr-Pennington* doctrine
21 immunizes that sort of speech in order to foster the
22 ability of citizens and companies and people to petition
23 the government.

24 The Ninth Circuit in the *Manistee Town Center*
25 case said that -- held that the *Noerr-Pennington* doctrine

1 immunized from civil liability, quote, a publicity campaign
2 directed at the general public in seeking government
3 action, close quote. That's exactly what plaintiffs are
4 claiming here.

5 And I'll get -- when we get to the motion to
6 dismiss, I'll explain why they -- they don't have a claim.
7 But that's their claim. It targets speech that was meant
8 to cause government action. That is protected by the First
9 Amendment, protected by *Noerr-Pennington*.

10 And I'll make one last point on plaintiffs'
11 arguments. They suggested that the Supreme Court's *Allied*
12 *Tube* decision created an exception, where the speaker had
13 an economic motive for engaging in public debate and
14 petitioning on public issues. But that's just wrong.

15 The Ninth Circuit in the -- in the *Kottle* case
16 we cited -- and it's K-o-t-t-l-e -- rejected that argument,
17 rejected the argument that *Allied Tube* created a
18 distinction between political and economic lobbying
19 activity. And its reasoning is pretty clear that, as I
20 mentioned, the doctrine of *Noerr-Pennington* developed in
21 the antitrust context, economic speech.

22 And the Ninth Circuit said that it's doubtful
23 that there would ever be a *Noerr-Pennington* case because,
24 you know, antitrust cases, economic motive is what's at
25 play. So the court read *Allied* narrowly as merely

1 recognizing a public/private distinction. And there, the
2 speech was made to a private organization and, therefore,
3 didn't implicate the petition clause of the First
4 Amendment.

5 So for all those reasons, Your Honor, the First
6 Amendment and California law bar these claims. And the
7 Court, we respectfully submit, should dismiss Chevron from
8 the case or strike all of the speech-related allegations.

9 THE COURT: Okay. Couple of questions. At the
10 very beginning of your argument, you mentioned 12(b)(6).
11 That threw me for a loop a little bit because I did not
12 understand this to be a 12(b)(6) motion.

13 MR. BOUTROUS: We -- we --

14 THE COURT: Can you explain what --

15 MR. BOUTROUS: Yes. I'm --

16 THE COURT: -- you mean by that?

17 MR. BOUTROUS: Yes, Your Honor. We -- we
18 included in our moving papers, our motion, Hawaii Rule 12
19 because this is a facial attack on the pleadings. And
20 other courts, for example the federal courts -- we cited
21 the *Planned Parenthood* in our motion. When the federal
22 courts tackle a California anti-SLAPP motion, they treat it
23 as a 12(b)(6) in terms of the standards. So I wanted to
24 make sure the Court knew that this is, in essence -- we're
25 not, you know, citing other evidence or anything like that.

1 It's on the pleadings. And so we believe we meet the
2 12(b)(6) standard as well.

3 THE COURT: Okay. Well, that leads to another
4 question, because if you're saying that under the
5 California statute, there's a 12(b)(6) standard, how does
6 that connect with the argument you made that there's a
7 burden shifting?

8 MR. BOUTROUS: We believe that in state court,
9 in Hawaii, that the burden shifting applies. That is a
10 substantive burden shifting that's meant to protect speech,
11 and, therefore, we believe that the burden shifting
12 applies.

13 But it's a -- it's a pleadings-based motion,
14 and, therefore, no other evidence can be offered up. But
15 it is -- it is based on the pleadings. We agree that the
16 Court should take, you know, the allegations as true for
17 purposes of this motion.

18 THE COURT: Okay.

19 MR. BOUTROUS: And so that's -- that's how --
20 and that's the interplay.

21 THE COURT: Got it. Okay.

22 And then, you know, the choice-of-law issue was
23 interesting to the Court while I was reading through the
24 briefs. I mean, there's really only the one Hawaii case
25 that folks were citing to. It's a pretty straightforward,

1 you know, family law property case, so the facts weren't
2 really complicated, but they definitely relied on facts.

3 And to the extent there's facts that need to be
4 determined for this motion -- I'm not sure there are. But
5 if facts need to be determined on this motion, how's the
6 Court supposed to do that?

7 MR. BOUTROUS: Your Honor, I think -- we believe
8 that there are no facts that need to be determined. And I
9 think I'll start with that point, because the complaint
10 alleges Chevron's based in California. Its -- its speech
11 would emanate from there. There's no -- and there's no
12 suggestion otherwise. Plaintiffs don't contest that.
13 They -- they do not allege any speech in Hawaii by Chevron.
14 And -- and so it's -- the face of the complaint, there's --
15 they just do not plead anything that -- that really bears
16 on the choice-of-law issues.

17 And with respect to California's strong
18 interest, the fact that it's -- Chevron is indisputably
19 domiciled based in California, we believe that those are
20 the only facts that -- that matter.

21 They didn't identify any unknown facts. They
22 didn't -- and suggest they needed any. And the purpose of
23 this anti-SLAPP statute is to allow a defendant to come in
24 and get a swift dismissal without discovery. There would
25 be a stay of discovery. And it's the plaintiffs' burden to

1 come forward and -- and make factual determinations so as
2 not to chill speech.

3 THE COURT: I think before when I was talking
4 about the Hawaii case, I said *Harris*. I meant *Lewis*. So
5 looking back at *Lewis*, it talks about how the Court's
6 supposed to adopt a flexible approach and that the primary
7 factor is deciding, you know, which state has the strongest
8 interest. You're arguing basically that California has the
9 strongest interest because that's where all the speech is
10 emanating from.

11 But what about the -- where the speech is aimed
12 at, where the speech is heard, and at least according to
13 allegations in the complaint, where the speech has impact?
14 Is the Court --

15 MR. BOUTROUS: That, I think --

16 THE COURT: Is the Court just to ignore all
17 that? Or is it a weighing -- do I weigh it with the
18 California --

19 MR. BOUTROUS: You're not -- you're not to
20 ignore it, Your Honor. You're absolutely not to ignore it.

21 But here, the complaint does not make an
22 allegation I don't think with respect to any defendant, let
23 alone Chevron, that speech was directed to Hawaii
24 residents, let alone the plaintiffs themselves. The
25 plaintiffs don't allege that they heard any of the speech

1 or read it. They -- it's a huge hole in their complaint
2 that I'll -- I'll hit when we get to the motion to dismiss.
3 They don't say that anyone relied on it.

4 So -- so in terms of the impact of the speech,
5 they're saying that the speech affected others outside
6 Hawaii, including regulators and the public, and that --
7 that global activity -- then the global emissions that
8 resulted had an impact in Hawaii. And that is -- and in
9 terms of speech causing this harm -- because they do not
10 allege that the speech from Chevron or anybody else -- but
11 since this is Chevron's motion, I'll focus on Chevron --
12 was directed at Hawaii.

13 So it's not a case where a company is marketing
14 a product in Hawaii; someone says, "You told me the product
15 would do this. I relied on that. I bought it. It doesn't
16 do that. I'm injured." It's just not that kind of a case.

17 And that's why, here, the -- the domicile of
18 the -- the defendant and -- and California's strong
19 interest -- the *Sarver* case from the Ninth Circuit said,
20 because California has this strong policy and it's in --
21 California speakers and it's to encourage freedom of speech
22 on these issues -- here, Hawaii has an anti-SLAPP statute,
23 but it's not -- it's not as strong an interest for
24 Hawaii -- the balance tips to California as the correct
25 place whose law should apply.

1 THE COURT: I didn't check specifically the
2 pleading on Chevron, but I did look at it closely for Exxon
3 because of Exxon's separate motion.

4 I'm going to read from this paragraph 21h:
5 Exxon has and continues to tortiously distribute, market,
6 advertise, and promote its products in Hawaii.

7 So there is an allegation of direct tortious
8 marketing in Hawaii. I'm going to just -- I shouldn't
9 assume that that same language was used with Chevron, but
10 it wouldn't surprise me. But I guess we can dig into the
11 complaint and see if there's a similar allegation as to
12 Chevron.

13 MR. BOUTROUS: Yeah, I don't think there is,
14 Your Honor. And if I may say, that that kind of allegation
15 wouldn't be enough, because they don't say that a
16 particular statement that somehow led a person in Hawaii to
17 buy more, consume more oil or gas that then caused their
18 injuries was -- was made by -- by Exxon or anyone else.

19 And on the question of aiming speech, the
20 domicile cases say that aiming it is not enough. So in --
21 in the *Sarver* case, and there's a *Chi* case that we cite,
22 simply the fact that it's emanating from a state and is
23 aimed at would not be enough.

24 And here, they just never make the connection,
25 Your Honor. It's a major flaw in their entire complaint.

1 They don't tie the statements to anything that actually
2 happened in Hawaii that caused an increase in emission --
3 global emissions or -- and that had any incremental effect
4 on them. And so they -- they cannot -- the speech
5 connection is just too weak.

6 And then going back to Chevron, I do not think
7 they make that kind of allegation at Chevron at all.
8 There's no specific statements about Chevron directed at
9 Hawaii. And it's just that one statement that I mentioned
10 about renewable energy that mentions Chevron.

11 THE COURT: Okay. Well, we'll see what
12 plaintiffs have to say about that. And then maybe you and
13 I will talk about it again on your rebuttal argument. All
14 right.

15 MR. BOUTROUS: Thank you, Your Honor.

16 THE COURT: All right. Thank you.

17 MR. EDLING: Thank you, Your Honor.

18 THE COURT: Plaintiffs.

19 MR. EDLING: This is Matt Edling, Your Honor.

20 Can you hear me okay?

21 THE COURT: It's -- short answer, okay, but it's
22 not great.

23 MR. EDLING: Can you hear me well?

24 I turned the volume up. I hope that helps.

25 THE COURT: Maybe a little more up.

1 MR. EDLING: How about now?

2 THE COURT: That's a little better.

3 MR. EDLING: Okay. I have it -- I have it right
4 next to my mouth.

5 THE COURT: All right. Thank you.

6 MR. EDLING: I'd like to start where you left
7 off with Mr. Boutrous, which is, if you were to -- if the
8 Court were to direct its attention to paragraph 23h --

9 THE COURT: Hang on.

10 MR. EDLING: -- it describes --

11 THE COURT: Hang on. I've got the complaint
12 right here. Let me just turn to it. 23 what?

13 MR. EDLING: 23h, which is on page 16 of the
14 complaint.

15 THE COURT: Okay. I'm there.

16 MR. EDLING: And you will see, Your Honor, a
17 very similar line to the one that you shared with
18 Mr. Boutrous with respect to Exxon. It is also found at
19 paragraph 23h, which goes on to describe with specific
20 particularity the actions that the Chevron defendants took
21 within Hawaii, directed at Hawaii, and intended to reach
22 Hawaii consumers.

23 Additionally, the paragraphs in the complaint
24 that, in fact, do relate to Chevron that you'll find at
25 paragraphs 93 through 114 describe the actions, true, of

1 associational conduct that was directed at Hawaii.

2 But what the defendants omit in their briefs and
3 Mr. Boutrous omits from his argument is that Chevron was a
4 representative -- in fact, founding representative -- of
5 those associations. And the plaintiffs allege that Chevron
6 participated in the creation of those statements. So you
7 have specific statements attributed to Chevron, which can
8 be found at 23h, as Your Honor has already pointed out.

9 I would like to begin with what the Court's test
10 is, because Mr. Boutrous in his argument never actually
11 said what the test is for (indiscernible) --

12 THE REPORTER: I'm sorry. What?

13 MR. EDLING: The test is --

14 THE COURT: Hold on. The court reporter didn't
15 quite hear that. Could you repeat the last part of your
16 sentence?

17 MR. EDLING: Yes, Your Honor.

18 I would like to begin with what the test is
19 under the conflict of laws for the State of Hawaii.

20 THE COURT: Thank you. Go ahead.

21 MR. EDLING: Thank you.

22 The test is set forth in the *Mikeelson* case, 107
23 Hawaii at 192. Importantly, Hawaii's choice of law creates
24 a presumption that Hawaii law applies. So we start in the
25 race with Hawaii ahead.

1 Now, the issue before this Court is when there
2 is a conflict of laws, as there is here between the Hawaii
3 anti-SLAPP statute and the California anti-SLAPP statute,
4 what test should the Court apply? *Mikelson* tells us that
5 there is a flexible approach, looking to the state with the
6 most significant relationship to the parties, plural, and
7 the subject matter, not just one California defendant. And
8 Chevron is the only party in this case that is a California
9 citizen. Hawaii resolves those conflicts of laws by
10 deciding which state, you correctly pointed out, Your
11 Honor, has the strongest interest.

12 Here are the specific factors that the courts
13 looked to. And this is set forth, as Your Honor already
14 indicated, as well as in *Mikelson*, *Hamby*, and the *Jou* case,
15 which the defendants cited and I believe Mr. Boutrous
16 referred to.

17 The first is, where did the relevant events
18 occur? Well, here, as I just showed Your Honor from
19 paragraph 23h as well as what is littered through the
20 complaint, the misleading promotions and campaigns were, in
21 fact, targeted at Hawaii, the injuries and impacts of those
22 statements were felt in Hawaii, causing injury to Hawaii
23 citizens in Hawaii. Nothing to do with California.

24 Now, while Mr. Boutrous correctly points out
25 that Chevron is domiciled in California, there are no

1 allegations that Chevron's tortious conduct necessarily
2 incepts from California. Now, we can surmise that
3 certainly some may, but there's nothing in the pleading
4 that says all of Chevron's misleading and tortious conduct
5 incepts from the state of California. In fact, we identify
6 associations that Chevron participated in with wrongful
7 conduct incepting from those associational activities that
8 have nothing to do with California.

9 Next, the courts looked to the residence of the
10 parties, plural. There's no case that the defendants cite
11 or that we have found that says you only look to one party,
12 the domiciled alleged tortfeasor, with respect to speech as
13 the only party you look to. There's no such case.

14 In fact, Hawaiian courts look to the residence
15 of all the parties. In the *Sarver* case, which I will get
16 to in just a moment because Mr. Boutrous referenced it a
17 couple of times, does not just look to the domicile of a
18 single defendant. It looked to the domicile of all the
19 parties. And, in fact, in that case, I think there's
20 something like two dozen defendants, all of which were
21 California citizens, as opposed to the one plaintiff that
22 was a New -- New Jersey citizen.

23 Next, and finally, the third element is whether
24 any parties have any particular tie to one jurisdiction or
25 another. There can be no greater tie than a Hawaiian

1 public entity as to a particular state, which, of course,
2 is representative of the people. Applying the correct
3 test, which state would have the strongest interest in
4 seeing its law applied, the answer is Hawaii.

5 I do want to address one point that was made in
6 the defendants' reply quite strongly and alluded to by
7 Mr. Boutrous in his argument, which is when it comes to
8 anti-SLAPP, the only thing that matters is the domicile of
9 the defendant. That is incorrect, as a matter of law under
10 Hawaii law, because we apply Hawaii conflict of law, not
11 Utah, not New Jersey, not Illinois, which is what the
12 defendants cite in their briefs. They cite no Hawaii case.

13 Now, we found one, Your Honor, and it is the
14 *Ratner v. Kohler* case. And I'm going to give you the
15 citation. It's 2018 Westlaw 105528. We did not cite this
16 in our opposition. The reason that we didn't cite it in
17 our opposition is the defendants in their motion cites the
18 correct case, the *Mikeelson* test. They do it at pages 9 and
19 12 of their motion. Then they pivot in their reply and say
20 the domicile of the defendant is the only thing you look
21 to.

22 This *Ratner* case, the facts were a defendant,
23 who was a Hawaii resident, Plaintiff Brett Ratner, a famous
24 movie producer, by defendants' analysis in their reply
25 brief, that would be all the Court would need to know to

1 resolve what choice of law on an anti-SLAPP motion. If the
2 defendants are correct, it should be Hawaii law because the
3 defendant was a Hawaii resident. But, in fact, the court
4 applied *Mikelson* and did an evaluation of the factors to
5 determine which state had the strongest interest in having
6 its laws apply.

7 Now, in that case, it chose California, but it
8 applied the *Mikelson* test. And in that case, the *Ratner*
9 case, all of the alleged conduct, which related to an
10 alleged rape by Mr. Ratner, the -- the speech and all of
11 the parties were in California, save for the one individual
12 who was a Hawaii citizen.

13 But as it would apply to what the defendants
14 would say is the test, it's the domicile of the defendant
15 and nothing else, that is incorrect. Hawaii law is the
16 *Mikelson* test.

17 Now, the *Sarver* case, which Mr. Boutrous just
18 referenced, applied the Restatement of Conflict of Laws.
19 Now, Hawaii jurisprudence does not follow the Hawaii
20 conflict of laws, and we cite that from the *Mikelson* case
21 in our opposition.

22 But even if we were to look at the Restatement,
23 what the *Sarver* case looked to was a four-factor test set
24 forth in that Restatement, not just the domicile of the
25 defendant. It said: Where did the injury occur? Where

1 was the conduct causing the injury? The domicile of the
2 parties, plurals, not just one, and the place, if any,
3 between the relationship where the parties are centered.

4 In that particular case, all of the conduct
5 resided in California, and the parties were in California.
6 But the court didn't stop there in the *Sarver* case. It
7 (indiscernible) at the interest of the two states,
8 comparing California anti-SLAPP law to New Jersey, which
9 had no anti-SLAPP law, and determined, given that the
10 injury and the conduct and the domicile of almost all of
11 the parties was in California and New Jersey has no
12 anti-SLAPP statute, it applied California law.

13 And it stated specifically in its holding:
14 Moreover, because the vast majority of the parties in this
15 action are citizens of or do business in California, the
16 parties' expectations, likewise, tilt in favor of
17 California law.

18 There are no such facts here.

19 Now, Mr. Boutrous does correctly point out that
20 California takes a more expansive view as to protected
21 speech than does Hawaii, if you were to compare the two
22 anti-SLAPP statutes. There's no debate there. However,
23 that is a policy choice that Hawaii has made, choosing to
24 balance the encouragement of protected speech, as it does,
25 with a desire to protect citizens from tortious conduct, as

1 it also does, limiting the statute to speech to an actual
2 governmental body in Hawaii.

3 The defendants do not argue that such conduct
4 occurred here, and they would have no basis to bring a
5 claim under Hawaii law, which they should have, because
6 under a conflict-of-laws approach, California law does not
7 apply.

8 The District Court in Massachusetts in the
9 *Ayyadurai* case, which we cite in our opposition, at 270 F.
10 Supp. 3d at 343, had a very similar situation, where it was
11 asked to compare the Massachusetts anti-SLAPP statute
12 versus the California anti-SLAPP statute -- and when it
13 looked at an issue of comity as between the states, it came
14 to the conclusion that there is no reason, when there is a
15 presumption as there was in that case, just as there is in
16 Hawaii, that Massachusetts law should apply to the
17 parties -- that California law in that particular case
18 should trump, which is what the defendants are asserting
19 here.

20 To wrap up on the choice of law, because this is
21 where the defendants' motion dies, there are no factors at
22 all which overcome the presumption that Hawaii law should
23 apply. They do not cite the correct test, which is the
24 *MikeIson* test, and instead invent a test that domicile of
25 the defendant is the only thing that matters, which is

1 belied by the very cases that they rely on. And I only ask
2 you to look at the holding where the domicile of the
3 defendant is not the only factor.

4 THE COURT: Let me stop you -- let me stop you
5 there, because I think one of the arguments that
6 Mr. Boutrous or movants are making in their briefing is
7 that there's a difference between applying domicile for
8 purposes of the anti-SLAPP statute versus applying other
9 factors other than domicile on the underlying -- on the
10 underlying substantive claims. So they're drawing this
11 distinction between the SLAPP statute versus an ordinary --

12 MR. EDLING: I understand.

13 THE COURT: -- sort of conflict-of-laws analysis
14 where you were just looking at which jurisdiction.

15 So could you comment on that?

16 MR. EDLING: Yes, Your Honor.

17 And that is incorrect. There -- it is
18 absolutely true that this Court can and should, to the
19 extent that there are issues that require a
20 conflict-of-laws analysis, to apply a conflict analysis --
21 conflict-of-laws analysis to a particular issue.

22 In fact, the *Ratner* court did just that. It
23 looked at the issue, which was an anti-SLAPP issue there,
24 just as what's being asked of Your Honor to look at, and
25 applied the *Mikeelson* test to that issue. If the defendants

1 were correct, the court should have applied Hawaii law, the
2 domicile of the defendant, to the issue as to whether
3 Hawaii or California law should apply to the anti-SLAPP
4 motion and California to the balance. There is no
5 distinction between what test to apply when it is an issue
6 within a case versus the case in sum. There is no case
7 that says that.

8 Now, it is absolutely accurate, Your Honor, that
9 you can apply that test to different issues within a case,
10 but the test is the same. It is the *Mikelson* test. And
11 when you apply the *Mikelson* test, the defendants lose.

12 THE COURT: Sorry I interrupted you while you
13 were sort of summarizing your points. Go ahead.

14 MR. EDLING: I just want to make sure, the --
15 the three points, to sum up, and then I want to make sure
16 that you -- if you need it, Your Honor, that I will give
17 you the cite for *Ratner*.

18 But there are no factors when you apply the
19 correct test which overcome the presumption that Hawaii law
20 applies. Applying the correct test, the state with the
21 greatest interest is Hawaii. And there is no reason to
22 choose California policy over Hawaii policy.

23 What I have walked you through, Your Honor, is
24 the California test as well as the Restatement test, even
25 though Hawaii doesn't rely on the Restatement. And the

1 reason I did that is every case that the defendants rely on
2 applies the Restatement. We satisfy even that test. But
3 they do not and don't try to convince you that the *Mikeelson*
4 test, which is the conflict-of-laws test for Hawaii, can be
5 satisfied here, because it cannot.

6 That said, Your Honor, I'm going to move to, if
7 Your Honor disagrees with me, the California anti-SLAPP
8 statute.

9 THE COURT: I'm not -- I'm not ruling
10 mid-hearing. You should make your argument.

11 MR. EDLING: Oh, I'm just -- I'm pivoting to new
12 issues. So if Your Honor doesn't have any other questions
13 on the conflict of laws, I'm going --

14 THE COURT: No, I don't.

15 My only -- I want to comment on this before we
16 move on and maybe forget about it. You know, I'll take all
17 the legal authority anybody wants to give me on these
18 motions. I mean, they're obviously very important motions.
19 And if additional authority has come to light or if you
20 just decided you want to use it, whereas before you didn't,
21 that's fine.

22 But obviously I'm going to give the other side a
23 chance to respond. It's not fair for you to bring a new
24 case in and then not having a full opportunity to analyze
25 it and present a written argument to the Court. So we

1 might have a round of supplemental briefing, but that's
2 fine with me.

3 Go ahead.

4 MR. EDLING: Your Honor, that's understood. The
5 *Ratner* case, I -- I only raise it because the defendants
6 pivot in their reply. You don't even need it if you
7 understand and apply the correct test, which is the
8 *Mikelson* test.

9 Now, assuming California law applies, I'm just
10 going to focus on the commercial exemption. There are
11 three elements.

12 The first is that the claim must arise from any
13 statement or conduct from a person primarily engaged in the
14 business of selling or leasing goods. And our claims arise
15 from Chevron's participation as an entity that sells or
16 leases goods.

17 The next element is where the defendants divorce
18 from the plain language of the statute and binding
19 California Supreme Court law. And that is that the conduct
20 must consist of representations of fact about that person's
21 or -- that's the disjunctive -- or a business competitor's
22 business operations, goods, or services. That's
23 425.17(c)(1). Plain language is disjunctive. The first
24 part is representations of fact about that person.

25 And we allege that Chevron's conduct was done

1 (inaudible) Chevron's commercial advantage. And you can
2 find that at various citations in the complaint, but
3 including paragraphs 93 through 114.

4 The California Supreme Court in the *Simpson*
5 *Strong* case, which we cite, 230 -- pardon me --

6 THE COURT: If you cited it, no need to cite it
7 in the record.

8 MR. EDLING: Okay. You can find it at page 10
9 of our opposition.

10 -- confirmed that this statute exempts any cause
11 of action arising from representations of fact about that
12 person's or a business competitor's business operations,
13 goods, or services, California Supreme Court authority
14 applying the plain language of the statute.

15 Chevron's argument completely misreads the cases
16 and the statutes. Mr. Boutrous pointed to *FilmOn* as his
17 quintessential example as to the -- this somehow -- this
18 statute somehow has eliminated the first clause, which is
19 representations of fact about that particular person. That
20 is a complete misread of *FilmOn*.

21 I only need to direct Your Honor to *FilmOn* at
22 Note 4, where the facts of *FilmOn* were of two alleged
23 competitors. So the court was only looking at whether or
24 not the conduct fit within the competitor's business
25 operations.

1 Note 4 reads: The parties agree that
2 DoubleVerify's reports to its clients are not exempted
3 under Section 425.17, subdivision (c), because DoubleVerify
4 was not making representations about its own business, but
5 FilmOn's, and DoubleVerify and FilmOn were not competitors,
6 citing *Simpson*, specifically saying it didn't apply, quote,
7 when the representation was not about defendant's or a
8 competitor's services or business operations.

9 The defendants are misapplying the plain
10 language in the statute and misreading and misrepresenting
11 that case to the Court.

12 *Industrial Waste* is also inapposite. They rely
13 on two cases, *FilmOn* and *Industrial Waste*, for this
14 proposition. *Industrial Waste* specifically reads, in
15 pertinent part, when it identified the relevant statute --
16 because there, too, it was two competitors that were at
17 issue. There is no case that says the plain language of
18 the statute precludes representations of fact about the
19 defendant's own conduct.

20 Now, the last element is the intended audience
21 must be an actual or potential buyer or customer. Our
22 complaint specifies at various paragraphs, including 105,
23 137, 130, 142, and these are listed in our opposition at
24 page 11, that the intended audience is consumers. And this
25 is not a terribly difficult logical leap. Chevron is a

1 rational economic actor. Its marketing and promotions are
2 directed at those that buy products, consumers.

3 Now, I do want to just address this issue that
4 Mr. Boutrous made and the defendants make -- although, as
5 Your Honor has already indicated and I've shown you in
6 paragraph 23h, there is activity directed specifically at
7 consumers that is particularly alleged at 23, sub h.

8 The *All One God* case that the defendants cite,
9 at 183 Cal. App. 4th 1186, is distinguishable there because
10 it was a trade association itself that was the defendant,
11 and because it did not itself buy or sell or lease goods,
12 it was outside of the plain language of the statute. That
13 is not the case for Chevron, which, of course, sells goods.

14 Now, I'm just going to move to the last point,
15 Your Honor, which is that Chevron's conduct, according to
16 their papers and Mr. Boutrous, is entitled to First
17 Amendment protection and immunity, under *Noerr-Pennington*.

18 The First Amendment does not protect Chevron's
19 false and misleading (indiscernible) advertisements
20 (indiscernible) --

21 THE COURT: Timeout. That came through very
22 garbled, I think because you moved your head suddenly. You
23 should back up and start over with your First Amendment
24 argument.

25 MR. EDLING: Okay. I felt strongly about that

1 one, so I was moving my head rapidly.

2 The First Amendment does not protect Chevron's
3 false and misleading commercial advertisements, promotional
4 materials, funding, organizing, and implementing an
5 industry-wide deception campaign, period.

6 This is true even if Chevron believed that its
7 unlawful conduct might actually secure governmental action
8 that it desires. Directed at the consumers, which is what
9 their activity was, does not immunize that tortious conduct
10 under the First Amendment or *Noerr-Pennington*.

11 Now, it is not petitioning. *Noerr-Pennington*
12 only applies if it is petitioning. When you direct
13 misleading qualities of products, attempting to mislead the
14 public, there is no petitioning that is satisfied, which is
15 what's required under *Noerr-Pennington*.

16 In a similar case, Your Honor, in -- albeit in
17 California, where public entities sued various lead paint
18 manufacturers under a theory of public nuisance, asserting
19 there that the defendants created a public nuisance through
20 their promotion of lead paint, which they, as the evidence
21 showed, understood to be hazardous to the public, asserted
22 that that promotional conduct, both from themselves and
23 through associational activity, was, in fact, immune
24 because of the First Amendment and *Noerr-Pennington*.

25 The Sixth District Court of Appeal, after a

1 verdict against those defendants, stated the following:
2 Defendants' lead paint promotional advertising and
3 participation in trade-association-sponsored lead paint
4 promotional advertising were not entitled to any First
5 Amendment protections. If defendants promoted lead paint
6 for interior residential use while knowing that such use
7 would create a public health hazard, then their promotions
8 were misleading and not entitled to any First Amendment
9 protection.

10 So too here. Our allegations are that Chevron's
11 promotional advertising and participation in trade-
12 association-sponsored advertising, marketing, and
13 promotion, give rise to tort. And they are not entitled to
14 First Amendment protection.

15 If Chevron did not knowingly promote its
16 products or is able to prove that it didn't know at the
17 time that it would create a public health hazard, they'll
18 win. They'll win at trial. But there is no immunity under
19 the allegations of this complaint, which this Court must
20 take as true, that this wrongful conduct is somehow
21 immunized under the First Amendment or *Noerr-Pennington*.
22 There's no -- there's no cases that say that that should be
23 so.

24 With respect to Mr. Boutrous's point that at
25 various places in the complaint the word "regulators"

1 appear, Chevron's conduct, as was all the defendants'
2 conduct, indeed was directed at a wide audience. But that
3 which gives rise to liability is the conduct where they
4 concealed the hazards of their products, the dissemination
5 and funding information to mislead, and their failure to
6 warn, and their dissemination of false information to
7 promote the use of their product.

8 Simply because they also may have had an
9 ancillary motivation or a positive governmental result is
10 not sufficient, under *Allied Tube*. Their conduct was
11 directed at consumers, and as such, there is no immunity.

12 So, Your Honor, to wrap, Hawaii law applies,
13 under the correct conflict of laws. Once you are there,
14 California law as to anti-SLAPP matters not a drop. It is
15 Hawaii's anti-SLAPP statute that applies. Chevron has no
16 argument. The type of conduct that is asserted in the
17 complaint is not subject to First Amendment immunity. And
18 the best example of that is the *ConAgra* case in California.

19 Thank you very much.

20 THE COURT: Thank you.

21 Mr. Boutrous, back to you.

22 MR. BOUTROUS: Thank you, Your Honor.

23 Let me start with the fact that Mr. Edling did
24 not identify one single specific advertisement, statement
25 whatsoever from Chevron. I challenged him to, and he

1 didn't. He cites this paragraph 23h. It's a completely
2 conclusory statement that it -- Chevron distributes,
3 markets, advertises, and promotes its products in Hawaii.
4 It doesn't identify a single statement.

5 And before you try to punish a company --
6 they're seeking punitive damages in this case based on
7 speech -- you at least need to identify a specific
8 statement. And -- and they cannot do it.

9 The other statements by trade associations, the
10 trade associations are not subject to the commercial speech
11 exception. They're now arguing that Chevron can be held
12 liable for those statements, even though the trade
13 associations couldn't. That's ludicrous. And the First
14 Amendment would forbid that.

15 And so the -- the -- they fail to identify a
16 single statement, let alone a statement in Hawaii that
17 contributed to their injuries, that caused global emissions
18 to increase and then injure Hawaii. That's what their
19 claim is. So all the rhetoric, all the heat and fire that
20 Mr. Edling is bringing to this falls apart when you just
21 read what they're alleging.

22 With respect to the emanating from California,
23 choice of law, we -- we relied on the *Jou* case, which
24 relied on *Mikelson*, so we cited the *Mikelson* test. And we
25 understand it is a bit -- as Your Honor said, a bit less

1 rigid than some of the cases. It draws on the Restatement.
2 But the *Jou* case talks about the -- the concept of depecage
3 and that the -- you don't -- we're not saying that the
4 claims are governed by California law. Certain different
5 issues are.

6 And here, the issue that we're focusing on is
7 the immunity from such a bogus First Amendment violating
8 lawsuit, where they don't even claim the company made a
9 specific statement that injured them. They're doing it in
10 order to chill speech and debate on these important issues.
11 And that's what the California anti-SLAPP law was meant to
12 protect against.

13 The *ConAgra* case was completely different.
14 That's a case where there was specific advertisements
15 that -- that sold lead paint in California that were
16 identified. They were in evidence.

17 There's nothing like that here. You can't lump
18 parties together. You can't just make conclusory
19 allegations about speech that you cannot tie to your
20 injury. We -- as we laid out in our brief, Your Honor, the
21 *NAACP v. Claiborne Hardware* case is a First Amendment
22 decision from the Supreme Court that requires a plaintiff
23 to identify and untangle protected speech and protected
24 conduct from unprotected conduct before you can punish the
25 latter. And they just fail to do that.

1 This is not a consumer deception claim. They're
2 not claiming that anybody paid too much for oil and gas or
3 that -- that someone in Hawaii relied on a statement from
4 Chevron or anybody else that caused them to buy more oil
5 and gas and that that incrementally caused global emissions
6 to increase. They could never show that because Hawaii's
7 contributions are minuscule and -- and irrelevant.

8 And so this is an incoherent claim, Your Honor,
9 of -- and I won't start arguing the rest of the motions.
10 But on the First Amendment front, they -- they're the ones
11 that are dead out of the box because they don't cite a
12 statement, one single statement, from -- from Chevron, and
13 even today.

14 And I would like the chance to read that *Ratner*
15 case.

16 But, again, we're -- we're saying that because
17 there are no statements in Hawaii, there are no statements
18 from Chevron. 23 -- paragraph 23a and d makes very clear
19 they're saying Chevron's based in San Ramon, California,
20 and Chevron controlled everything that's in this complaint.
21 There's no statements coming from anywhere other than
22 California.

23 So we think California has a very strong
24 interest here to avoid being sued in courts around the
25 country for -- for purported statements that it made from

1 California that weren't even relied on by anyone in a
2 particular state.

3 With respect to the government exception, the
4 *City of Montebello* case says that a city doing what the
5 City and County are doing here, suing in its own name, not
6 on behalf of the people, and hiring private counsel, like
7 Mr. Sher and Edling, do not get a government exception. It
8 does not apply. And they don't really make that argument.

9 And on the *FilmOn* case, which -- which postdates
10 the *Simpson* case that Mr. -- Mr. Edling cited, the
11 California Supreme Court specifically said it applies to
12 commercial -- a subset of commercial speech, comparative
13 advertising. And -- and that was a clarification. The
14 court said subsequent case law indicates that the -- that's
15 what it's for.

16 But to that point, Your Honor, it doesn't really
17 matter. I don't think the Court needs to take a lot of
18 time deciphering that point because the only statement in
19 the -- the complaint that's specific is -- with respect to
20 Chevron has nothing to do with their theory of the case in
21 terms of deceiving people into supposedly buying more oil
22 and gas products and consuming them. It's that renewable
23 energy sentence in paragraph 131. So everything else in
24 that should be stricken.

25 And I think with that, Your Honor, unless the

1 Court has any other questions -- oh, one last -- if I can
2 make one last point. This is what Mr. Edling finished on.

3 Their complaint, I counted up at least -- at
4 least 15 different places where they say things like the --
5 the defendants embarked on a decades-long campaign designed
6 to maximize continued dependence on their products and
7 undermine national, international efforts to rein in
8 greenhouse gases. That's paragraph 92. They say it was a
9 public -- a public campaign, a dogged campaign -- this is
10 paragraph 45 -- against regulation of those products.

11 That's what their case is about. How are they
12 going to show causation otherwise? They can't. But that's
13 what their case is about, Your Honor. And -- and it's
14 pretty clear they're trying to make this like the tobacco
15 cases, which never produced any sort of ruling on these
16 issues. But it just falls apart.

17 And this anti-SLAPP motion, which ties into
18 everything else, I think just puts a glaring light on how
19 their case is -- is incoherent, and -- and there's no proof
20 of causation. There's no proof of a statement by Chevron.

21 But on the -- I'll finish with the
22 *Noerr-Pennington* case, that literally, here's the *Manistee*
23 case, one of the most recent Ninth Circuit cases, that says
24 that *Noerr-Pennington* immunizes a publicity campaign
25 directed at the general public in seeking government

1 action. That's a quote.

2 They allege, just as an example, Your Honor,
3 that the defendants engaged in deceptive campaigns, quote,
4 to change public opinion and avoid regulation. Of course
5 *Noerr-Pennington* applies. That's the essence of
6 *Noerr-Pennington*.

7 They're trying to stifle speech about a public
8 issue by trying to demonize companies that produce lawful
9 products that Hawaii values greatly. Hawaii has made
10 clear, as by statute, that it needs oil and gas, and it has
11 a criminal statute that says it's a crime if you seek to
12 limit production of oil through anticompetitive means. So
13 this is -- this is just a clear First Amendment violation.

14 We request the Court grant our motion.

15 THE COURT: Okay. Before you leave, so to
16 speak, I really want to focus on this argument that their
17 allegations as to Hawaii are too conclusory. And I'd like
18 you to -- I assume you have the complaint there. I'd like
19 you to turn to --

20 MR. BOUTROUS: I do.

21 THE COURT: I'd like you to turn to paragraph
22 23h.

23 MR. BOUTROUS: Yeah.

24 THE COURT: And just -- you know, just walk me
25 through why you believe this is too conclusory.

1 MR. BOUTROUS: So, Your Honor, I think Hawaii
2 law's generally similar in terms of -- of pleading on this
3 sort of issues. But --

4 THE COURT: Actually, we're quite different from
5 the federal standard. So --

6 MR. BOUTROUS: Different from the federal
7 standard. But I think in terms of California and -- and
8 the anti-SLAPP law, here, they -- it's not enough. And,
9 again, I'm focusing on, you know, applying the California
10 law that says speech must be protected.

11 To say that if a company -- the first
12 sentence -- tortiously distribute, market, advertise, and
13 promote its products in -- in Hawaii, with knowledge that
14 those products have caused and will continue to cause
15 climate-related injuries in Hawaii, including the
16 plaintiffs, they need to show at least a statement, Your
17 Honor. I mean, that's the essence of a conclusion with no
18 facts.

19 They then say: A substantial portion of
20 Chevron's fossil fuel products are or have been refined,
21 traded, distributed, et cetera, consumed in Hawaii and that
22 Chevron made revenue. What does that have to do with
23 anything? And they don't say that that -- those activities
24 increased global emissions in an -- in an appreciable way
25 that made a difference, because they can't. So these --

1 THE COURT: Let me stop you --

2 MR. BOUTROUS: Oh.

3 THE COURT: -- right there.

4 MR. BOUTROUS: Yes.

5 THE COURT: When I hear --

6 MR. BOUTROUS: Sure.

7 THE COURT: -- causation arguments, my radar
8 starts flashing. It sounds like a merits argument to me.
9 So it -- and I'm generally not allowed to go there on these
10 motions. So why should I look at things like causation?

11 MR. BOUTROUS: Well, Your Honor, I think in
12 terms of the First Amendment argument, they have an
13 obligation to at least plead facts that ties the speech
14 they're seeking to punish and to seek discovery on and to
15 put parties through a process based on their speech, to
16 identify a statement that they claim was relied upon and
17 caused their injuries. And so there's -- it's really not a
18 merits issue, because they do not do that.

19 This isn't where I'm asking the Court to go off
20 the pleadings or to -- there's just nothing in this
21 complaint. And it -- it goes to a deeper flaw in the
22 complaint.

23 But as to these speech claims, it's just -- it's
24 the essence of what the California anti-SLAPP statute was
25 meant to preclude, conclusory claims targeting speech meant

1 to -- to deter speech on important public issues without
2 any evidence, without any facts. That's the problem here.

3 They're not likely to prevail. They're going to
4 lose. They couldn't cite a statement to the Court other
5 than this broad statement. If they had statements, Your
6 Honor, they would have given them to you. They don't have
7 any. They don't have any statements from Chevron
8 misleading the public about climate change, let alone that
9 had anything to do with global -- with Hawaii or with
10 global emissions. And that should be the end of the
11 matter.

12 THE COURT: All right. Thank you.

13 MR. BOUTROUS: Thank you.

14 THE COURT: So we've been going over a hour.
15 Let's take a --

16 Let's make sure we have a clear record,
17 Mr. Boutrous. What do you want to do about the *Ratner*
18 case? Do you want to submit a supplemental brief on that
19 or -- if so, I just want to set a deadline so we're all on
20 the same page.

21 MR. BOUTROUS: That would be -- I'd love to take
22 a look at it, and if we could file, you know, a short, you
23 know, couple-page submission -- today's Friday -- say,
24 Wednesday?

25 THE COURT: Okay. That's fine. Thank you.

1 MR. BOUTROUS: Thank you, Your Honor. I
2 appreciate it.

3 THE COURT: No problem.

4 All right. So we'll take a ten-minute break
5 just to stretch our legs and get some water and so forth.

6 And then we'll come back to start arguing the
7 motion to dismiss. I want to start with the personal
8 jurisdiction one, and we'll save the failure to state a
9 claim for last. Okay? Thank you.

10 We're in recess.

11 (A recess was taken.)

12 THE CLERK: City and County of Honolulu versus
13 Sunoco LP, et cetera, and all others. We're ready to
14 begin. Judge is on the bench.

15 THE COURT: All right. So no need to --
16 everyone to give their appearances again. I can see
17 everybody who I think is going to be arguing on my video
18 screen.

19 All right. We're doing the jurisdictional part
20 of this motion first. So I'll hear, of course, from movant
21 and then from Mr. Alston on behalf of Exxon and then the
22 plaintiffs. And then we'll just repeat that cycle.

23 All right. Go ahead.

24 MR. BOUTROUS: Thank you, Your Honor.

25 I think counsel for Sunoco will be ready in case

1 the Court has questions about the alter ego issue, which
2 only applies to them. But I will argue the rest.

3 THE COURT: That's fine.

4 MR. BOUTROUS: Thank you, Your Honor. Theodore
5 Boutrous, Gibson, Dunn, arguing for all defendants.

6 This Court lacks personal jurisdiction over 18
7 of the 20 defendants here because plaintiffs' claims do not
8 arise out of or relate to defendants' alleged activities in
9 Hawaii. Defendants do not have the constitutionally
10 requisite clear notice that they can be subject to suit in
11 Hawaii for the alleged impacts of their conduct around the
12 globe. And exercising personal jurisdiction over them
13 would be unreasonable under the due process clause.

14 First, plaintiffs concede there's no general
15 jurisdiction over these nonresidents, so they must
16 demonstrate specific jurisdiction, which requires them to
17 show that their global warming tort claims arise out of or
18 relate to the defendants' contacts with the state.

19 This test requires proof of the substantial
20 connection -- that's what the Supreme Court said in *Burger*
21 *King* -- or a direct nexus, and it can't be a merely
22 incidental connection, which is what the Hawaii Supreme
23 Court said in the *Shaw* case.

24 The U.S. Supreme Court in the recent *Ford* case
25 says that this test imposes, quote, real limits and does

1 not mean that anything goes. And mere general business
2 activities are not sufficient. That's general
3 jurisdiction. And *Bristol-Myers Squibb* makes that very
4 clear.

5 Plaintiffs, Your Honor, fail this test. Their
6 claims are about global activities and emissions, not
7 activities and emissions in Hawaii. Indeed, they do not
8 dispute what we have said over and over again, that
9 emissions in Hawaii make up a minuscule and irrelevant
10 fraction of the global emissions allegedly causing their
11 injuries. They admit that greenhouse gas emissions cannot
12 be traced to their source. That's the complaint at
13 paragraph 171.

14 And the Supreme Court in *AEP* quoted language
15 from some of the briefs. They're saying it's impossible to
16 tell whether emissions from China had an effect in New York
17 or Hawaii or whether it's the neighboring state. It's
18 impossible. And -- and plaintiffs did admit that in
19 several paragraphs, including paragraph 171.

20 They do not cite a single misrepresentation, as
21 I said before, directed at or that occurred in Hawaii, and
22 they do not contend that Hawaii emissions injured them.
23 They do not make that claim. And they do not dispute that
24 their injuries would be the same if defendants' products
25 had never been used or sold in Hawaii.

1 And that distinguishes this case from the *Ford*
2 case, which they rely on heavily, where the in-state injury
3 was caused entirely by the company's product malfunctioning
4 within the state. And that's not what they're saying here.
5 They're not saying that something happened in Hawaii that
6 increased global emissions and that injured them. They do
7 not make that claim.

8 Their main claim, Your Honor, and Mr. Edling
9 said it before, is that Hawaii has suffered injury due to
10 climate change. But mere injury to a forum resident is
11 insufficient for a specific personal jurisdiction, as the
12 Supreme Court has said many times, including in *Walden*
13 *versus Fiore*. So they don't meet the -- the first test in
14 terms of the arise or relate to.

15 Second, defendants did not have clear notice
16 that they could be sued in Hawaii for plaintiffs' claims,
17 as the Supreme Court has held due process requires.

18 The claims here are unprecedented, Your Honor.
19 They've been rejected repeatedly by courts that have
20 considered them. And they've been never -- never been
21 accepted by any other court in the nation. Defendants
22 could not possibly have the kind of due process, fair
23 warning that they could be subject to jurisdiction in
24 Hawaii based on the undifferentiated conduct of countless
25 individuals, billions of people and entities, who consume

1 fossil fuel products around the world for hundreds of
2 years, conduct that was lawful where it occurred.

3 So this is nothing like the garden -- garden
4 variety product liability tort that was in *Ford*. Someone
5 in a Ford vehicle in a state had a defect -- alleged
6 defect. They had an accident. And they sued in that state
7 where they were injured. That's -- that's just not this
8 case. It's too attenuated. It's merely incidental, the
9 connection to Hawaii.

10 Plaintiffs are asking this Court to break the
11 due process bounds of personal jurisdiction established by
12 the United States Supreme Court and revert to what the
13 court in *Bristol-Myers Squibb* called a sort of loose,
14 spurious kind of general jurisdiction that the court has
15 rejected many times before.

16 Third, it would be unreasonable and grossly
17 unfair to exercise personal jurisdiction in these
18 circumstances. And it would violate both due process and
19 federalism.

20 And here, Your Honor, there's a real dovetail
21 between the personal jurisdiction motion and the motion for
22 failure to state a claim, because the plaintiffs are asking
23 this Court to exert personal jurisdiction to reach and hail
24 in companies. And -- and if this Court can do it, every
25 court's going to be able to do it, because every state can

1 and every county and every municipality will argue that
2 they were affected by climate change.

3 And participants anywhere, who had some role
4 in -- in living modern life, could be brought into court
5 under this theory. Defendants would be subject to suit for
6 harms from global climate change in any forum where they
7 conducted the slightest amount of business.

8 Moreover, they're seeking to use state tort law
9 as a tool to regulate the international energy industry and
10 global greenhouse gas emissions. And that runs into what
11 the Supreme Court has said is a real problem in personal
12 jurisdiction. It's intruding on the -- and conflicting
13 with the sovereignty of -- of other states, the
14 prerogatives and policies of other states, the federal
15 government, and the international community, all of which
16 are, in their own way, and they don't all agree, working to
17 deal with this -- this problem of climate change and to
18 balance that with our need for energy and security to
19 continue functioning and so -- so that our economies can
20 function, and we can live our lives.

21 And in the Supreme Court's jurisdictional cases,
22 like *Burger King*, the *Asahi* case that we've cited,
23 *World-Wide Volkswagen*, talk about the need -- the need to
24 respect the sovereignty of other jurisdictions when
25 evaluating these personal jurisdiction issues. And the due

1 process, federalism, reasonableness concepts preclude
2 asserting personal jurisdiction under circumstances like
3 this, where it's -- the conduct is conduct not specifically
4 tied to Hawaii, but conduct all around the world, emissions
5 all around the world, speech purportedly around the world,
6 and the consequences that the plaintiffs' claim on the
7 speech, which is that more and more people purchased the
8 products, which were lawful.

9 And so for all those reasons, Your Honor, due
10 process prohibits Hawaii from exercising personal
11 jurisdiction over these defendants. And they should be
12 dismissed from this lawsuit with prejudice.

13 I know at a superficial level, the way
14 plaintiffs have argued this, it's something like this:
15 Hawaii has -- the plaintiffs claim there was injury in
16 Hawaii, and they claim that it came from fossil fuels, and
17 the companies sell fossil fuels.

18 That's very much like the *Bristol-Myers Squibb*
19 case, where the company sold products in California. There
20 were plaintiffs in California who claimed injuries from
21 consuming the products there. And plaintiffs from other
22 states came in and said, well, we should -- there should be
23 personal jurisdiction over the defendants in California, as
24 well for us. And the Supreme Court said, no, you can't mix
25 and match. The tort has to be tied to the specific conduct

1 in the state.

2 And that is lacking here, even in -- lacking
3 totally here. And, therefore, the Court should dismiss.

4 THE COURT: Okay. So I mean, you understand
5 what they're arguing, that basically -- I'm going to use
6 the phrase "tortious marketing" for short. I think we all
7 know what I mean by that. That's what they're alleging.

8 And they're saying that all -- if the tortious
9 marketing stopped, that's the key factor. It doesn't have
10 anything to do with regulating air pollution elsewhere or
11 stepping on some sovereign government's toes. It's just
12 about stopping the alleged tortious marketing.

13 So what's your direct response to that?

14 MR. BOUTROUS: Yeah, my direct response to that
15 is, Your Honor, is it's the same exact argument that was
16 made in the *City of New York* case that the Second Circuit
17 decided, which answers basically every issue in this case,
18 which I'll come back to.

19 But on this point, they -- the plaintiffs made
20 the same argument, that they were focused on promotion
21 and -- and other pieces, and -- and they were just bringing
22 a case for damages.

23 But as *City of New York* noted, the U.S. Supreme
24 Court has said in cases like *Kurns* and *San Diego* case and
25 *BMW versus Gore*, that where a state uses its tort law to

1 impose punitive damage and compensatory, which they're
2 seeking here, that has a necessary practical regulatory
3 effect, because the only way a company or person can avoid
4 liability is to change its behavior, even if their behavior
5 comports with the law in another state or in another
6 country.

7 And here, plaintiffs say, well, you could stop
8 speaking. Well, they're not seeking an injunction, which
9 would raise prior restraint issues, anyway. They just
10 said, if you just stop speaking, you're done. They say it
11 in their brief.

12 But, Your Honor, they're seeking future damages
13 for continued effects of climate change. So if these
14 companies continue to sell their lawful products, which
15 Hawaii needs, which every state and country needs, they
16 will be on the hook for the alleged increase in injury that
17 the plaintiffs seek. And that's a regulatory effect,
18 where -- where you're put to the choice of having to change
19 your behavior.

20 And the interference with the sovereignty of
21 other states and other countries comes in where the -- a
22 company from California, like Chevron, a company based in
23 Texas, for example, Exxon Mobil, their states -- they're
24 following their state law, but Hawaii would be saying,
25 we're going to punish you for what you're doing because of

1 the global emissions that result from the lawful sale of
2 your products.

3 And -- and that's -- that is regulation, pure
4 and simple. And, again, I commend the *City of New York's*
5 analysis of that point, 'cause the very -- the same
6 argument was made there.

7 And so -- so then on the question, Your Honor,
8 again, this goes to the crux of it. And this isn't a
9 factual issue. They're not making the argument that --
10 'cause they can't, it's nowhere in their complaint -- that
11 advertising and promotion in Hawaii is what caused their
12 injury, because it would be too small an amount.
13 There's -- Hawaii does not produce enough greenhouse gas
14 emissions to have any effect on the overall climate change.
15 They don't dispute that. And that's not their argument.

16 Their argument is, like *Bristol-Myers Squibb*,
17 you do business -- some of you do business in Hawaii. You
18 sell your products. Your activities outside of Hawaii,
19 selling your products, have had an effect on the global
20 climate. The global climate has injured Hawaii or injured
21 the plaintiffs.

22 That's not enough for specific jurisdiction in
23 Hawaii, because it's just merely an incidental relationship
24 between the claim, as the Supreme Court of Hawaii said in
25 *Shaw*. It's not a direct connection. It would -- it would

1 render the "arising out of or relate to" test, which
2 *Ford* -- the Supreme Court in *Ford* said has real teeth and
3 real bite and means something, it would make it -- it would
4 make it meaningless.

5 THE COURT: Okay. Thank you. I understand.

6 MR. BOUTROUS: Thank you.

7 THE COURT: All right. I'm going to hear from
8 Mr. Alston on the Exxon piece of this.

9 Is there any other defendant who's going to want
10 to -- or any other -- yeah, any other defendant who has
11 their own piece of this that they want to argue? I just
12 want to make sure I get to all of you before I go to
13 plaintiffs.

14 I don't see anyone with their hand up, but
15 there's so many screens, I might be missing somebody. So
16 speak up. After I hear from Mr. Alston, if there's any --

17 MR. JANOE: Your Honor --

18 THE COURT: -- other defendant, just let me
19 know.

20 Okay. Mr. Alston --

21 MR. JANOE: Your Honor?

22 THE COURT: -- go ahead.

23 MR. ALSTON: Sorry. Somebody else was trying to
24 speak, Your Honor.

25 THE COURT: Oh, sorry. I missed that.

1 MR. JANOE: Your Honor, Scott Janoe with Baker
2 Botts for Aloha Petroleum Ltd., Aloha Petroleum LLC, and
3 Sunoco LP. As Mr. Boutrous mentioned (indiscernible) --

4 THE COURT: Timeout. Timeout. Your audio is
5 just not working here in our courtroom. You sound like
6 you're deep underwater.

7 MR. JANOE: Your Honor, is this any better? Any
8 better, Your Honor?

9 THE COURT: That is a little better.

10 Sorry. Start over. Thank you.

11 MR. JANOE: No worries, Your Honor. Scott Janoe
12 with Baker Botts for Aloha Petroleum Ltd., Aloha Petroleum
13 LLC, and Sunoco LP.

14 As Mr. Boutrous mentioned, should the Court have
15 questions around our alter ego arguments, we would be happy
16 to entertain those and respond. Otherwise, anything we
17 would have would be on rebuttal.

18 THE COURT: I'm not sure I'm catching you there.
19 You're saying you're not sure you want to say anything now,
20 but you might want to on rebuttal?

21 MR. JANOE: Your Honor, if Your Honor has
22 questions on the alter ego issues as briefed.

23 THE COURT: I don't think I did. I think that
24 lined up. I understood what people were arguing in there.
25 But I don't want to hold you back from arguing, anyway, if

1 you wish to.

2 MR. JANOE: No argument at this time, Your
3 Honor. Just wanted to make it available.

4 THE COURT: Okay. Thank you.

5 All right. Mr. Alston.

6 MR. ALSTON: Yeah. Thank you, Your Honor.

7 On behalf of Exxon Mobil Corporation and
8 ExxonMobil Oil Corporation, we're making additional
9 arguments because the allegations against them are
10 particularly deficient.

11 As you noted earlier, the allegation -- the
12 operative allegation is in paragraph 21h. That paragraph
13 doesn't contain as much information about in-state
14 activities because there were limited, if any, in-state
15 activities. And it focuses, as you said, on -- and to use
16 the shorthand you used -- tortious marketing. And it
17 covers other things. But the defendants acknowledge that
18 production and consumption activities are themselves not
19 the focus of this case.

20 In the opposition memo, they say very clearly
21 that this case focuses on the campaign -- alleged campaign
22 of deception, and that it's the lack of warning that is
23 (inaudible) --

24 THE COURT: Oops. Your audio just cut out.
25 Somehow you just got muted, Mr. Alston, right in

1 mid-sentence.

2 MR. ALSTON: (Indiscernible.) So -- so the
3 question is whether there is, in fact, any of the alleged
4 tortious marketing, to use that conclusory term, that is
5 tied in any way to Hawaii. Was it made in Hawaii? Was it
6 directed at Hawaii? Was it seen in Hawaii? Was it relied
7 on in Hawaii?

8 Because all of those things are necessary parts
9 of what they must allege in order to establish that there
10 is jurisdiction over the -- the activities of the Exxon
11 parties. And whether it's judged under Rule 8 or whether
12 it's judged, as we say it should be, under Rule 9(b), the
13 answer is no with respect to Exxon.

14 If you look at paragraphs in the complaint, they
15 allege six statements, which are -- which are part of the
16 allegedly deceptive marketing, promotional activities of
17 the companies. None of those has any connection to Hawaii.

18 Paragraph 95 talks about an internal memo, but
19 Exxon is, of course, headquartered in Texas and has no --
20 the memo has no connection to Hawaii.

21 Paragraph 100 refers to an Exxon corporate
22 report. There's no allegation that it was directed at
23 Hawaii, seen in Hawaii, read in Hawaii, and relied upon.

24 Paragraph 102 concerns a speech that Exxon
25 then-CEO made in Beijing in 1997. No allegation that

1 anyone in Hawaii heard about it, read it, relied on it.

2 Paragraph 103 relates to a Canadian publication
3 by an affiliate, Imperial Oil. But there's no allegation
4 that had anything to do with Hawaii.

5 Paragraph 104 refers to an advertisement that
6 appeared in the *New York Times*. Again, no indication it
7 was directed at Hawaii, seen, or relied upon in Hawaii.

8 And finally, in paragraph 114, they say that
9 defendants have funded dozens of third-party organizations.
10 Even if you get over the obvious question whether we could
11 possibly be liable for activities merely by having funded
12 third-party organizations, there's no indication that any
13 of that was directed at Hawaii.

14 And so from -- and so the problem is that *Ford*
15 *Motor*, *Shaw*, *Six Flags* all teach that the jurisdictional
16 basis has to be grounded on the activities that gave rise
17 to the tort.

18 Here, when they're relying on alleged deception
19 and claiming that there was harm from deception, they have
20 to link those things, those activities, those statements to
21 Hawaii. And they simply have not done that. And it's a
22 crucial gap in the complaint that -- that destroys personal
23 jurisdiction.

24 It may seem like a small thing. But it -- but
25 they can't cover that gap with conclusory statements about

1 tortious marketing, and they -- they have to show that
2 there is something that ties the alleged deceptive
3 marketing to Hawaii. They haven't done that. And with
4 that, under 12(b)(2), they can't -- they can't satisfy
5 either the Hawaii Supreme Court's cases or *Ford Motor*.

6 THE COURT: Okay. Do you want to talk about the
7 due process part of it?

8 MR. ALSTON: I think that's adequately briefed,
9 Your Honor. I don't think we need to add to it, unless you
10 have questions about it.

11 THE COURT: Hang on. Let me check my notes.

12 MR. ALSTON: All right.

13 THE COURT: Do you agree that plaintiffs do not
14 need to make a showing on causation for purposes of this
15 motion?

16 MR. ALSTON: I -- I don't agree, Your Honor. I
17 think that that's part of -- I think showing reliance is
18 part of what's required in order to state a viable claim.
19 And they've got to do it to the standards of 9(b).

20 THE COURT: Hang on. Stand by.

21 MR. ALSTON: All right.

22 THE COURT: So the -- one of the quotes from
23 *Ford Motor* that the plaintiffs are relying on is that a
24 company will be subject to specific jurisdiction where it
25 has systematically served a market for its products and

1 where the company enjoyed the benefits and protection of
2 the state's laws, such as the enforcement of contracts,
3 defense of property, and the resulting formation of
4 effective markets.

5 Any comment on that?

6 MR. ALSTON: Yes, Your Honor.

7 I mean, that is certainly part of the
8 requirement to establish personal jurisdiction. The other
9 part of it is that the claim that's being asserted has to
10 arise out of or be related to the jurisdiction.

11 And here, when they are alleging deceptive
12 marketing, then they've got -- they've got to say something
13 that ties the alleged marketing campaign of misinformation
14 to -- to Hawaii. And they have to establish -- in order to
15 make a claim grounded on deception, they have to show that
16 someone, that they or others in Hawaii, at minimum, saw the
17 deceptive campaign, were influenced by it in some way, and
18 that, therefore, there was some injury that resulted from
19 the alleged deception. They just don't do that.

20 THE COURT: I guess the question I have -- and I
21 don't mean this as a rhetorical question. I'm really
22 struggling with it. I mean, the phrase "arises out of or
23 relates to" is a bit squishy --

24 MR. ALSTON: Right.

25 THE COURT: -- I think we have to say. And so

1 I'm wondering why -- why isn't that directed at, say --
2 let's say Exxon had its, you know -- I'll call it gas and
3 oil activities in Hawaii, for short. But let's say it was
4 also --

5 MR. ALSTON: All right.

6 THE COURT: -- you know, manufacturing PV
7 panels. Okay? Is that the type of differentiation that
8 this standard is applying to? In other words, the claim
9 would have to relate to the oil products, not to the PV
10 panels? So is it --

11 MR. ALSTON: That's -- that's certainly one type
12 of activity that would create or justify a distinction
13 between the claim and the, you know, in-state activities.
14 But when a claim is based on deception, it -- it's got to
15 be -- in order to state a claim at all, they have to
16 demonstrate some connection between the alleged deceptive
17 activities and Hawaii.

18 If, for example, there were either no promotion
19 or advertising activities by Exxon in Hawaii and therefore
20 nobody in Hawaii could possibly have been deceived, then
21 the fact that someone else at some other time and some
22 other place saw something that was allegedly deceptive
23 doesn't support jurisdiction in Hawaii.

24 The deception -- the deception as well as other
25 aspects of the claim has to -- have to occur in Hawaii, the

1 injury has to be here, but also the operative facts that
2 triggered the liability at the threshold have to have some
3 relationship to Hawaii.

4 And here -- and here, because they're relying on
5 an alleged campaign of deception that occurred some other
6 place, some other time, it would -- with a different
7 audience, that's not a basis for assertion of jurisdiction
8 in Hawaii.

9 THE COURT: I'm just wondering if it's simpler
10 than that. You know, whether -- as long as the deception
11 arises out of oil and gas, as opposed to PV panels, I
12 wonder if that's the end of the analysis.

13 MR. ALSTON: Well, it can't be. It can't be,
14 Judge. I mean, in the sense that it arises out of oil and
15 gas generally doesn't -- doesn't reflect the required test,
16 which is that the claim has to arise out of or relate to
17 the forum activities. Talking generally about the industry
18 doesn't demonstrate that connection at all.

19 MR. BOUTROUS: And, Your Honor, may I address
20 this point --

21 THE COURT: Not yet.

22 MR. BOUTROUS: -- briefly?

23 THE COURT: We're not done. Thank you.

24 MR. BOUTROUS: Okay.

25 THE COURT: I'll give -- you'll get your chance,

1 for sure.

2 MR. BOUTROUS: Okay. Thank you.

3 THE COURT: All right. Mr. Alston, anything
4 further on that?

5 MR. ALSTON: No, Your Honor. I'll yield to
6 Mr. Boutrous.

7 THE COURT: Okay. Let me -- before I go to
8 Mr. Boutrous, though, I want to make sure that anyone else
9 who wants -- on the defense side of the caption, if anyone
10 else wants to argue any specific tweak of this issue for
11 their particular client.

12 Hang on. I'm going to change my view here.

13 I'm not seeing anybody with their video on and
14 their hand up. Okay. So I'm going to take that as a
15 negative.

16 All right. So, Mr. Boutrous, I'll -- I guess
17 it's best to get whatever it is you want to say out on the
18 table so that the plaintiffs will be able to respond to it,
19 rather than waiting till your rebuttal. So go ahead.

20 MR. BOUTROUS: Thank you, Your Honor, because I
21 think you're really getting to the nub of the whole issue
22 here.

23 And -- and if -- in the *Ford* case, the quote
24 that Your Honor read, if that had been the only activity,
25 that they sold their products, even the same car in

1 Minnesota, and the plaintiffs had bought the car somewhere
2 else and been injured in a different state, then there
3 would have been no specific jurisdiction. So there
4 needed -- the crucial fact was that the car was in the
5 state, and it malfunctioned in the state. That was the
6 crucial additional fact.

7 The -- the plaintiffs are arguing here for, as I
8 said, the sort of jurisdiction that was rejected in the
9 *Bristol-Myers Squibb* case. There, the drug manufacturer
10 sold their drugs in California. People bought them.
11 Plaintiffs said that they were injured by the drug, by the
12 same drug as the other plaintiffs from out of state who
13 sought to sue the same companies in California.

14 And even though they were brought into court on
15 the other cases, there was -- the Supreme Court said there
16 was no personal jurisdiction over them in the cases brought
17 by people who bought the drugs in a different state and
18 claimed that they were injured in those other states.

19 So it's a very precise -- it's not a loose
20 analysis. It's very precise. I think Justice Ginsburg and
21 Justice Kagan in *Ford* called it case-linked jurisdiction.
22 So that's really the crucial thing about it.

23 And when it's a misrepresentation, there needs
24 to be -- that pulls into the effects test that the
25 plaintiffs are relying on, the *Calder* test, where there has

1 to be a showing that the defendant directed -- and this
2 goes to what Mr. Alston was saying -- aimed their speech,
3 aimed their -- you know, purposefully into the state.
4 And -- and that's just missing here.

5 Thank you.

6 THE COURT: All right. Understood.

7 All right. Who's arguing for plaintiffs?

8 MS. YACKULIC: Corrie Yackulic.

9 THE COURT: I'm sorry. Okay. Got it. Go
10 ahead.

11 MS. YACKULIC: Can you see me? Can you hear me?

12 THE COURT: I can hear you fine. Thank you.

13 MS. YACKULIC: Okay. Thank you, Your Honor.
14 Corrie Yackulic on behalf of the plaintiffs.

15 The Supreme Court's opinion five months ago in
16 the *Ford Motor* case controls the personal jurisdiction
17 issue in this case. The issue in *Ford* was the same issue
18 that the fossil fuel defendants are raising here, and that
19 is, do plaintiffs' claims have to bear some causal
20 connection with the defendants' forum activities in order
21 to support the "related to or arise under" prong of the
22 special -- specific jurisdiction test?

23 The Supreme Court in *Ford* -- and I am going to
24 talk about *Ford* a bit because it's directly on point, and
25 you asked us to discuss the standard, and it sets the

1 standard.

2 The Supreme Court was unequivocal in *Ford*. It
3 said that they had never required a showing that the
4 plaintiff's claim come (sic) about because of defendant's
5 in-state conduct. Never -- that's a direct quote. Never
6 required a showing that the plaintiff's claim came about
7 because of defendant's in-state conduct.

8 The parallels between *Ford* and this case are
9 important. Ford, like the fossil fuel defendants here, is
10 a global company that had purposefully and systematically
11 and consistently and deliberately established its business,
12 its car and truck sales business, in Montana and Minnesota.

13 And for that reason, just like the fossil fuel
14 defendants here, it had to concede the first prong of the
15 specific jurisdiction test. It had to admit that it
16 purposefully availed itself of the privileges of doing
17 business in Montana and Minnesota, and so have the fossil
18 fuel defendants here with respect to Hawaii.

19 Despite what Justice Alito referred to as Ford's
20 heavy presence in Montana and Minnesota, Ford argued it
21 didn't have -- the courts there didn't have specific
22 jurisdiction, didn't have jurisdiction over it because none
23 of the tortious conduct occurred in Montana or Minnesota --
24 and we've heard a version of that argument already here
25 today -- and said that was fatal to personal jurisdiction,

1 because the court had not -- the cars had not been first
2 sold by Ford to the -- in Montana or Minnesota. They
3 weren't designed or manufactured in Montana or Minnesota.
4 They said that's fatal to personal jurisdiction.

5 The Supreme Court, all eight of the
6 participating justices, rejected that argument. They said,
7 again, we have never required a showing of causation
8 between the plaintiff's claim and the defendant's in-state
9 conduct.

10 And I'd like to read from -- from the opinion,
11 again, because you've asked to focus in on what the test
12 is.

13 THE COURT: That's fine.

14 MS. YACKULIC: They said -- the court said:
15 Ford's causation-only approach finds no support in this
16 court's requirement of a connection between a plaintiff's
17 suit and a defendant's activities. We have never framed
18 the specific jurisdiction inquiry as always requiring proof
19 of causation, i.e., proof that the plaintiff's claim came
20 about because of the defendant's in-state conduct.

21 Instead, what is required in a case like *Ford*,
22 and also like this one, where the defendants have a heavy
23 presence in the forum state, by their own admission, where
24 they have purposefully availed themselves of the privileges
25 of doing business in the -- the forum state and where the

1 very product that they have created a market for causes
2 injury in that state, then this is what's required: Quote,
3 a relationship among the defendant, the forum, and the
4 litigation.

5 Or stated another way, there must be an
6 affiliation between the forum and the underlying
7 controversy, principally an activity or an occurrence that
8 takes place in the forum state and is therefore subject to
9 the state's regulation.

10 That last statement, which is at page 1025 of
11 the Supreme Court Reporter in *Ford*, is a quote from the
12 *Bristol-Myers Squibb* case, which I'd like to address here
13 for a second, because Mr. Boutrous mentioned it multiple
14 times. *Bristol-Myers Squibb* was addressed by *Ford* and
15 distinguished and distinguished in a way that the *Ford*
16 court said, supports our decision here.

17 *Bristol-Myers Squibb* involved plaintiffs who
18 were in Texas and Ohio and who sued in California. They
19 purchased the drug. They ingested the drug. They were
20 exposed to the drug. And they were injured by the drug
21 only in Texas and Ohio, and yet they sued in California.

22 And the court correctly, in *Bristol-Myers*
23 *Squibb*, found that there was no connection between their
24 claims and California and that, frankly, they were forum
25 shopping. And that wasn't -- that wasn't consistent with

1 concerns about interstate federalism. That's not this
2 case.

3 We have here injuries which occur because of the
4 very activities and products defendants sell and market and
5 produce and promote in Hawaii, occurring in Hawaii, which
6 is the forum state.

7 The defendants -- before I go and address some
8 of the other specific arguments of the defendants, I want
9 to talk again about the defendants' characterization of the
10 test, because it's incorrect.

11 Both in their reply brief, both the Exxon and
12 the joint reply brief, and at argument today, they use
13 three phrases and incorporate them into the related-to
14 test. And those three phrases come from other cases that
15 don't talk about that test. The three phrases that they
16 use are "merely incidental," "substantial connection," and
17 "clear notice."

18 In fact, Exxon, on the first page of its reply
19 brief, says -- and this is a quote -- the "arise out of or
20 relate to" standard requires a, quote, substantial
21 connection between plaintiffs' claims and defendants'
22 in-state activities, not one that is, quote, merely
23 incidental. And Exxon cites *Ford Motor* at page 1028 for
24 that -- those quotes.

25 *Ford Motor* never uses either the phrase "merely

1 incidental" or "substantial connection" anywhere in the
2 opinion. Those phrases come from -- "merely incidental"
3 comes from the Hawaii Supreme Court's decision in *Shaw*.

4 In *Shaw*, the court was concerned with whether a
5 California title company had more than merely incidental
6 contacts with Hawaii to support jurisdiction under the long
7 arm statute, nothing at all to do with the connection
8 between the plaintiff's claim and the defendant's forum
9 contacts. It had to do with the long arm statute and
10 whether the defendant had enough contact with Hawaii at
11 all. And the court found it didn't, that it didn't meet
12 the long arm statute.

13 These defendants, again, have conceded that they
14 have sufficient -- that the long arm statute is satisfied
15 here.

16 Same problem with the "substantial connection"
17 phrase that they use over and over again. And I counted 27
18 times where those phrases occur in the joint reply brief.
19 "Substantial connection" comes from *Burger King*, which is a
20 Supreme Court decision in 1985, and from *Walden versus*
21 *Fiore*, which is a 2014 decision.

22 Both of those cases exclusively considered the
23 first prong of the test. They were looking at the
24 defendants' contacts with the forum state. They were not
25 looking at the connection between the defendants' forum

1 contacts and the plaintiffs' claim, but the defendants'
2 contacts with the forum state.

3 And *Burger King* found that there was a
4 substantial enough connection between the franchisee -- the
5 out-of-state franchisee in Florida, which was the forum
6 state, to support the purposeful availment test.

7 *Walden versus Fiore* did not find that
8 substantial connection. And Justice Kagan in *Ford*
9 specifically addressed the *Walden versus Fiore* case and
10 says, we never even reached the issue here, which is
11 "related to or arising from."

12 THE COURT: Sorry.

13 MS. YACKULIC: You okay?

14 THE COURT: I'm sorry. I had a very strange
15 whistle in the courtroom. We're trying to figure out where
16 it came from.

17 MS. YACKULIC: I heard that.

18 THE COURT: I think we're okay.

19 MS. YACKULIC: It's the ghost saying, hurry it
20 up.

21 THE COURT: I'm sorry. Go ahead.

22 MS. YACKULIC: So in any case, those -- those
23 two cases don't have anything to do with the "related to or
24 arising from" test. The language "substantial connection"
25 isn't part of the test that is before you on defendants'

1 motion. And the issue that those cases address, they've
2 already -- these defendants have already conceded.

3 And, likewise, this phrase "clear notice," clear
4 notice, Mr. Boutrous says that it's a standalone
5 requirement, and we haven't met it. "Clear notice" is a
6 phrase that comes from the Supreme Court decision in
7 *World-Wide Volkswagen*, which was a 1980 case.

8 And here's what the court said in *World-Wide*
9 *Volkswagen*: When a corporation purposefully avails itself
10 of the privilege of conducting activities within the forum
11 state, it has clear notice that it is subject to suit
12 there.

13 So "clear notice" follows from purposeful
14 availment. It is not a standalone requirement. It is not
15 connected to the "related to or arise from" test. And so,
16 again, this is a missed citation of these cases in an
17 effort to raise the hurdle on the "related to or arising
18 from" part of the specific jurisdictions test.

19 In any event, our complaint easily establishes a
20 prima facie case of a relationship or a connection or an
21 affiliation between the defendants' admitted substantial
22 Hawaii contacts involving the promotion, the production,
23 the sale of fossil fuel and our claims for
24 misrepresentation, failure to warn, and deception in the --
25 in the sale and promotion of these -- of these products in

1 Hawaii and elsewhere.

2 The misrepresentation and failure to warn drove
3 demand in Hawaii and elsewhere, which then, in turn, has
4 resulted in global warming and the climate change effects
5 that are being felt in Hawaii today and will be for a long
6 time to come.

7 That -- that's all that *Ford Motor* requires.

8 We would -- we would point out that the case for
9 personal jurisdiction in this case is stronger than it was
10 in *Ford Motor* because some of the tortious conduct that we
11 have alleged did happen in Hawaii. So it is undisputed.

12 We have alleged that these defendants failed to
13 warn of the risk of unabated consumption of their fossil
14 fuel products in Hawaii. That is in the complaint. And
15 these defendants have conceded those allegations for
16 purposes of this motion. So that is tortious activity that
17 has occurred in Hawaii. And there was no tortious activity
18 in the *Ford* case that occurred in Montana or Minnesota.

19 I'll address some of the additional arguments
20 that these defendants -- that counsel made.

21 Mr. Boutrous, I think, worried that if this
22 Court exercises personal jurisdiction over the defendants
23 in this case, then they're subject to jurisdiction
24 wherever. That is actually an argument that Ford made in
25 the *Ford Motor* case and the Supreme Court addressed. The

1 Supreme Court said, you have the right to structure your
2 activities to limit your liability if you want to, but if
3 you want to be a global -- a global company and you want to
4 do business everywhere, which is how Justice Kagan
5 described Ford's activities, then you will -- you get the
6 benefits of doing that everywhere, but there are
7 accompanying obligations. And -- and so that's -- just
8 because you might be sued elsewhere for defective products
9 that cause injury elsewhere, doesn't mean that's unfair.

10 It is not true that these defendants can be sued
11 anywhere for injuries occurring in Hawaii. And I would
12 point out that we represent public entities in other cases
13 around the country, and there are fossil fuel companies
14 named in some of those other cases that are not defendants
15 here because they don't do business in Hawaii.

16 So the test that the *Ford Motor* court
17 articulated is not unbounded. I think your example of the
18 claims having to relate to fossil fuel activities is -- is
19 exactly right.

20 Another example of a case that would be
21 unavailable would be -- for example, say Chevron decided to
22 manufacture baby car seats and sell them, but only in
23 California. A Hawaii resident traveled to California,
24 happened to buy a Chevron baby car seat to get back to
25 Hawaii, and it failed in Hawaii. And the Hawaii resident

1 wanted to sue Chevron in Hawaii.

2 Under *Ford Motor*, that -- jurisdiction would not
3 be available in Hawaii for that suit because Chevron
4 doesn't have -- would not have, under that hypothetical,
5 any baby car seat activities in Hawaii. So the standard
6 has limits. But we fall squarely within what is allowed
7 under *Ford Motor*.

8 The defendants -- defense counsel, the defense,
9 in their briefs talk about how the contribution to global
10 greenhouse gases from their Hawaii activities is minuscule,
11 and that defeats personal jurisdiction. That is a
12 causation argument, which is foreclosed by the analysis in
13 *Ford Motor*.

14 And, in fact, that is akin to the arguments that
15 Ford made, that the claims would be exactly the same if
16 they had no presence in Montana or Minnesota. And the
17 Supreme Court said, what you're trying to do is inject
18 causation back into the test, and that is not okay. We're
19 not going to entertain that argument.

20 Defense counsel said that we had failed to
21 identify a single misrepresentation or omission or act of
22 deception in Hawaii. And I think I've already mentioned
23 that they do not dispute that -- that they have failed to
24 warn, which is one of our allegations. And we have claims
25 for negligence and strict liability, failure to warn,

1 because they failed to warn of the risks of unabated use of
2 their fossil fuels. They failed to warn Hawaii consumers
3 or the plaintiffs in this case.

4 And, in any case, again, that is a version of a
5 causation argument, which *Ford Motor* says is not allowed
6 under the test.

7 I'd like to finish by stepping back from this
8 level of detail and talk just for a minute about the two
9 overarching concerns that underlie the specific
10 jurisdiction line of jurisprudence, which are fairness to
11 the defendants and what the court called interstate
12 federalism. It talked about the fairness issue to some
13 extent.

14 But -- but just like the Supreme Court in the
15 *Ford Motor* case, for companies like these fossil fuel
16 defendants that are global, that do business everywhere,
17 that, as Justice Gorsuch described *Ford Motor*, are
18 corporate behemoths, it is hard to do substantial business
19 in Hawaii in the fossil fuel world. By their own
20 admission, it's hard to argue that it is unfair for them to
21 have to stand to account in a Hawaii court for injuries to
22 Hawaii from their conduct here in Hawaii and elsewhere.

23 The interstate federalism concern is really
24 about what court a dispute belongs in, whether a court is
25 improperly reaching out and taking a case that belongs

1 somewhere else. And as Mr. Edling said earlier, it's hard
2 to think of any court that has a greater interest in this
3 dispute than this Court in this state involving harms that
4 are localized to Hawaii.

5 The implication of the defendants' argument is
6 that this case needs to be split up into 10 or 12 or 15
7 different lawsuits and filed wherever these defendants are
8 incorporated or have their principal place of business.
9 That scenario does not advance the interests of interstate
10 federalism. And those courts have no particular interest
11 in Hawaii's -- Hawaii laws or Hawaii's injuries.

12 Those interests in fairness and interstate
13 federalism were served by allowing suits to proceed in
14 Montana and Minnesota. And those would be served by this
15 Court exercising jurisdiction over these defendants here.

16 These defendants want to talk about causation,
17 and even though they avoid the word, that is what these
18 arguments come down to. We will talk about causation in
19 this case, but -- and we look forward to that, but the time
20 for that discussion is not on this motion to dismiss.

21 Thank you, Your Honor.

22 THE COURT: Question. Mr. Boutrous is arguing
23 that the *City of New York* case is key to the Court's
24 analysis. Could you comment on that, please?

25 MS. YACKULIC: I am going to -- I'm going to

1 give that one to Mr. Sher. That was not a personal
2 jurisdiction case. That was a 12(b)(6).

3 THE COURT: All right. Understood.

4 All right. Let's see. Back to -- I'm trying to
5 look at the clock here.

6 Mr. Boutrous and Mr. Alston, can you give me an
7 estimate of how much time you're going to use on rebuttal?
8 I'm just trying to think of where we should take our break.

9 Go ahead.

10 MR. BOUTROUS: Your Honor, I probably have six
11 or seven minutes at most.

12 THE COURT: All right. Mr. Alston?

13 MR. ALSTON: Probably three or four minutes at
14 most, Your Honor.

15 THE COURT: All right. Hang on.

16 All right. We'll go ahead now, then. We'll
17 take our break between -- just before the 12(b)(6) motion.

18 Go ahead, Mr. Boutrous.

19 MR. BOUTROUS: Thank you, Your Honor.

20 First of all, plaintiffs' counsel has just given
21 Your Honor a depiction of the Supreme Court of the United
22 States's personal jurisdiction jurisprudence that's just
23 wrong. She's basically just argued for the -- as I
24 predicted -- the *Bristol-Myers Squibb* standard, where it
25 was a sliding scale. And Counsel just said that the

1 more -- when you have a lot of activities in a state,
2 basically that means the connection can be diluted between
3 the actual torts that's involved.

4 And the Supreme Court in *Bristol-Myers Squibb* --
5 the one -- the case right -- one of the -- it was 2017 --
6 said: Under the California approach, the strength of the
7 requisite connection between the forum and the specific
8 claims at issue is relaxed if the defendant has extensive
9 forum conduct -- contacts that --

10 THE COURT: Mr. Boutrous --

11 MR. BOUTROUS: -- are unrelated to those claims.

12 THE COURT: Sorry. Sorry. Hold on.

13 MR. BOUTROUS: Yes.

14 THE COURT: A lot of --

15 MR. BOUTROUS: Sure.

16 THE COURT: -- people speed up when they start
17 reading. You're doing it too.

18 MR. BOUTROUS: Yes.

19 THE COURT: So please slow --

20 MR. BOUTROUS: I will slow back down.

21 THE COURT: -- down. Thank you.

22 MR. BOUTROUS: Absolutely.

23 And the court said: Our cases provide no
24 support for this approach, which resembles a loose and
25 spurious form of general jurisdiction. For specific

1 jurisdiction, a defendant's general connections with the
2 forum are not enough.

3 And that's what Counsel's arguing, that these
4 companies, because they're there, it's not unfair for them
5 to have -- to be hailed into court on these claims that
6 involve global conduct. That is wrong, and the Supreme
7 Court said that.

8 Number two, we are not arguing for a strict
9 causation test like in *Ford*. We said that in our reply
10 brief at 4. We never made this argument. One factor is,
11 in looking at the connection, is whether anything different
12 would have happened if our products had never been sold in
13 Hawaii. That's relevant to the connection between the
14 claim and the defendants' contacts in the state. But we're
15 not arguing a strict causation theory. That's just a straw
16 man, a straw person that's been thrown up.

17 We did not concede purposeful availment. We
18 specifically said in a footnote we weren't addressing it
19 because we didn't have to. And so it was very clear in our
20 opening -- in our motion.

21 But in -- on this -- the connection, the
22 "arising and relating to" test, Your Honor, as plaintiffs'
23 counsel just outlined, it's a completely meaningless test.
24 She noted that their theory is that demand elsewhere caused
25 emissions to increase, and that's what is the source of

1 their damages. That's our point, that they're not
2 saying -- and this isn't to -- necessarily just causation.
3 It's just what their claim is. They're claiming that the
4 global emissions that change -- that changed the climate
5 has caused injury in Hawaii.

6 But the Supreme Court in the *Walden v. Fiore*
7 case and many others makes very clear that injury in a
8 state is not enough. That's all they're claiming; they're
9 saying general activities and injury in the state. That's
10 not enough. There has to be the final piece.

11 And -- and they're -- they're really overplaying
12 their hand with the *Ford* case, because the big difference
13 in *Ford*, Your Honor, was a -- an alleged defective product
14 in the state, a state resident was injured by the product
15 in the state.

16 This case is the opposite. They don't say that
17 the oil and gas itself caused any harm or malfunctioned or
18 was -- cost too much because of deceptions. They say that
19 the sale -- the statements around the world stopped
20 regulation from happening, stopped international and
21 national regulators from doing more to combat climate
22 change. That increased global emissions, global emissions
23 changed the climate, and that is what caused their injury.

24 So they're not saying that the -- the claim
25 arises from or relates to the defendants' acts in Hawaii;

1 it's the defendants' acts everywhere else but Hawaii. And
2 that claim, Your Honor, is -- that's -- that's -- does not
3 provide personal jurisdiction.

4 The -- the last point I'll make, Your Honor, is
5 that the substantial connection language, direct connection
6 language, Supreme Court has said that, on a number of
7 occasions, that's the test. *Burger King* -- and these cases
8 are all good law. The Supreme Court cites them all the
9 time, including in *Ford* and *Bristol-Myers Squibb*,
10 *World-Wide Volkswagen*. These are basic bread-and-butter
11 concepts.

12 And it's not some amorphous you do business in
13 our state, it's fair for you, you're already here. It's
14 whether it's reasonable and fair as a due process matter
15 for Hawaii -- and this is where *City of New York* comes in,
16 Your Honor -- for Hawaii to say, we're going to bring
17 companies into our court and adjudicate global warming
18 around the world and -- even if other states have different
19 policies. We're going to bring a citizen from California,
20 like Chevron, into Hawaii court, even if it's complying
21 with California law, and we're going to -- we're going to
22 hail them into our court.

23 That's where the unfairness and the state
24 sovereignty issues come in and *City of New York* talked
25 about in the context of a 12(b)(6) motion.

1 So for all those reasons, Your Honor, plaintiffs
2 are taking you down a path that has been trod on -- trod
3 before and found to be erroneous only a few years ago, and
4 they're arguing for a -- an amorphous form of general
5 jurisdiction that's been rejected.

6 THE COURT: Thank you.

7 Mr. Alston.

8 MR. BOUTROUS: Thank you.

9 MR. ALSTON: Yeah, thank you, Your Honor. I'm
10 not going to repeat anything Mr. Boutrous argued. I agree
11 with everything he said, obviously. But I want to add a
12 couple points.

13 First, we're not arguing for a strict causation
14 test. What we're saying is that in *Ford Motor*, the Supreme
15 Court said that the relatedness inquiry has real limits.

16 And here, where it is a claim of deception, that
17 means the deception has to have some link to Hawaii. And
18 the problem is that nothing they've said about Exxon Mobil
19 has any link to Hawaii. And Ms. Yackulic did not offer
20 anything to correct my or to dispute my arguments about
21 that when I pointed out that what they are complaining
22 about are things that were said in other countries and
23 never -- there was no indication that they had related --
24 any connection to Hawaii.

25 THE COURT: What about the --

1 MR. ALSTON: The second thing --

2 THE COURT: What about the -- excuse me. What
3 about the failure to warn argument?

4 MR. ALSTON: I was about to say, the problem
5 with their failure to warn argument is that they don't cite
6 cases that support the notion of jurisdiction grounded on a
7 failure to warn. We cited a number of cases that reject
8 that outright. And there are more, including a case that
9 we found recently decided by Dave Ezra in 2009, a case
10 called *Sulak versus American Eurocopter*, 2009 Westlaw
11 2849136. And I would like the opportunity to submit that
12 to the Court and of course give the plaintiffs an
13 opportunity to respond.

14 But in *Sulak*, like the other cases we've cite --
15 already cited, the plaintiff made the argument that there
16 was a failure to warn and that that failure to say anything
17 could somehow ground -- be a ground for personal
18 jurisdiction.

19 Well, the problem with the failure to warn
20 argument is, of course, that when it's -- you know,
21 that's -- the silence is directed at the world, and
22 therefore, it would support jurisdiction anywhere in the
23 world, apparently. But Judge Ezra, like the other judges
24 in the cases we've cited, says that's simply not a -- an
25 adequate foundation for jurisdiction, for assertion --

1 asserting personal jurisdiction.

2 And lastly, she said that some of -- this case
3 is stronger than *Ford Motor* because, quote, some of the
4 tortious activity, close quote, occurred in Hawaii. Well,
5 you know, what she's talking about when she says that is
6 there was silence in Hawaii and that, therefore, that
7 (electronic noise) tortious activity in Hawaii. Well, you
8 know, that's an oxymoron. You cannot have silence from an
9 absent or distant defendant and say that that's tortious
10 activity.

11 So I would ask you, Judge, to simply decide
12 consistent with the cases we've cited, that a failure to
13 warn is not a foundation for jurisdiction.

14 THE COURT: Okay. Thank you.

15 All right. Ms. Yackulic -- I hope I'm
16 pronouncing your name correctly. If not, my apologies.
17 Anything you want to comment on? Just want --

18 MS. YACKULIC: Oh --

19 THE COURT: -- to make sure I give everybody a
20 full chance here on this motion.

21 MS. YACKULIC: Thank you.

22 I would -- the cases that Exxon cites on this
23 omission point don't say what they say they say. But --
24 the first case, for example, the *Chlebda versus Fortna*, it
25 was a purposeful availment case. It had nothing to do with

1 the "relate to or arise from" standard. And it's true of
2 the other cases.

3 So I would say urge -- I would like to see this
4 2009 case.

5 But nothing in the brief changes what I've
6 already said. And, you know, again, I guess I will say one
7 last time that what they are arguing against is causation.
8 And causation, according to *Ford*, is not part of the
9 "related to or arise from" test. That is clear. That is
10 done. So that's all.

11 Thank you.

12 THE COURT: All right. Thank you.

13 So last time around with you, Mr. Boutrous, and
14 Mr. Alston. And then let's clarify supplemental briefing
15 on the Judge Ezra case.

16 Go ahead, Mr. Boutrous.

17 MR. BOUTROUS: I'll just make one point, one
18 point on the last point, that, as I said, we are not
19 arguing for strict causation. We're arguing that the claim
20 must arise from or relate to the defendants' activities in
21 the jurisdiction.

22 In *Ford*, of course -- I mean, there was a
23 connection. The car accident occurred in the state. A
24 defective vehicle allegedly caused the injury in the state.
25 And I think it's Justice Alito in his concurrence, he said,

1 well, that does kind of fold in concepts of causation.
2 It's not strict proximate cause, but there is a
3 relationship.

4 And so our point is here, again, is that --
5 again, counsel did not say it. There's no claim
6 that the -- it's the conduct in Hawaii that caused the
7 injury, the contacts with Hawaii that caused the injury.
8 It's the contacts everywhere around the globe. And that is
9 not enough for specific jurisdiction. In a case like that,
10 it would intrude on the sovereignty of other states, the
11 federal government, other countries, and it would violate
12 due process.

13 THE COURT: Got it. Thank you.

14 Mr. Alston?

15 MR. ALSTON: Nothing more, Your Honor.

16 THE COURT: All right. So let's -- why don't --
17 Mr. Alston, since you're the one who brought the case up --
18 is it *Sulak*? Is that the right way to pronounce it?

19 MR. ALSTON: Yes, Your Honor. S-u-l-a-k.

20 THE COURT: Yeah, I'd like you to get in a
21 supplemental brief just on that point. I don't want to
22 open the door to reargue all these other issues again, but
23 just focus in on that case and why you think it's relevant
24 to the Court.

25 And when do you think you can get that in?

1 MR. ALSTON: By Wednesday, Your Honor.

2 THE COURT: All right. And then plaintiffs, is
3 a week enough time for you to file whatever sort of further
4 supplemental rebuttal brief?

5 MS. YACKULIC: Of course, yes.

6 THE COURT: All right. And same guidance to
7 you. Please do not use this as a springboard to argue
8 things that have been argued.

9 All right. Okay. That's it for that motion, I
10 believe. Let's take a recess. Ten minutes again. And
11 then we'll come back for the 12(b)(6) motion. Thank you
12 very much.

13 We're in recess.

14 (A recess was taken.)

15 THE CLERK: Recalling case City and County of
16 Honolulu versus Sunoco LP, et al.

17 THE COURT: The Court sees counsel that expects
18 to argue in the video screen. I think everyone's present.

19 Mr. Boutrous, are you taking the lead on this
20 one?

21 MR. BOUTROUS: I am, Your Honor.

22 THE COURT: Okay. Go ahead. Thank you.

23 MR. BOUTROUS: Thank you, Your Honor.

24 May it please the Court, on our motion to
25 dismiss for failure to state a claim, I'd like to begin by

1 focusing on three key points. The courts have repeatedly
2 rejected the climate change tort theories advanced by
3 plaintiffs here. The Second Circuit *City of New York*
4 decision, as I mentioned earlier, is directly on point and
5 dispositive in terms of the analysis. And the federal
6 constitution bars these claims for multiple reasons.

7 First, this case is just the latest in a series
8 of ill-conceived climate-change-related tort suits seeking
9 damages for global greenhouse gas emissions. None have
10 proceeded beyond a motion to dismiss. And this Court
11 should not allow this suit to be the first.

12 The United States Supreme Court in *AEP*, the
13 Ninth Circuit in *Kivalina* in the Northern District of
14 California, in the *General Motors* case, rejected similar
15 claims on the first round of climate litigation last
16 decade. And in this latest wave of such suits, the three
17 courts to have addressed the merits, the District Court and
18 Second Circuit in *City of New York* and the Northern
19 District of California in *City of Oakland* held them barred
20 by federal law.

21 The plaintiffs here are really seeking to
22 persuade this Court to do something radical and
23 unprecedented that no other court had done before, even
24 though they've invoking this notion that this is
25 traditional tort law, local issues. We've been -- it's --

1 it's not.

2 Second, the *City of New York* case rejected every
3 argument that plaintiffs make here and -- and really
4 provides the answers to all the questions. An affirming
5 dismissal of nearly identical claims asserted under New
6 York law, the court held that, quote, such a sprawling case
7 is simply beyond the limits of state law, close quote,
8 observing that global warming presents a uniquely
9 international problem of national concern. Indeed, the
10 court said they -- they could only be federal claims, but
11 then any claim under federal law was displaced by the Clean
12 Air Act and foreclosed by foreign policy concerns.

13 So the court made very clear this -- this --
14 state law just can't apply here. It's -- it's an
15 extraterritorial global tort that's being alleged, and the
16 limits of state power imposed by the due process clause,
17 the foreign commerce clause, all -- all of the features
18 that give congress and the executive branch of the federal
19 government the power in those areas precludes states from
20 wading into that area.

21 This Court should reach the same result as the
22 *City of New York* here for several -- for the same reasons.
23 And as I mentioned, in *New York*, it was a -- it was brought
24 in federal court (indiscernible) jurisdiction, but it was a
25 claim alleged under New York state law.

1 The plaintiffs in that case, just like the *City*
2 *of New York* -- the plaintiffs here, just like in *City of*
3 *New York*, try to avoid this result by arguing that their
4 claims are all about defendants' alleged deception and
5 misrepresentation, as we've been talking about.

6 But the Second Circuit correctly rejected the
7 argument in *City of New York*. The plaintiffs there had the
8 same sort of deceptive promotion arguments and claims. The
9 Second Circuit opinion and District Court opinions make
10 that clear. The complaint had an entire section on this
11 very -- exact same claim, that the companies knowingly
12 engaged in this publicity campaign. And they argued it
13 wasn't about emissions; it was about these statements
14 and -- and then production activities.

15 The Second Circuit said it's precisely because
16 fossil fuels emit greenhouse gases, which collectively
17 exacerbate global warming, that the city is seeking damages
18 and that artful pleading cannot transform the complaint
19 into anything other than a suit over global greenhouse gas
20 emissions.

21 And I -- I would love to hear if the Court asks
22 Mr. Sher the question whether global emissions are part of
23 the causal chain in their tort, because he's got to answer
24 yes based on the fact that the complaint -- I counted up
25 this morning. It talks about emissions at least 70 times.

1 And it's the emissions that cause climate change, which
2 inflict injuries. If he says no, then that gives us
3 another reason to dismiss the case, because the -- the
4 alleged misrepresentations without the global emissions go
5 nowhere.

6 So it's a real dilemma for them, Your Honor, but
7 it's -- this case is all about the effort to rein in and
8 combat global emissions. And it's a worthy goal, as we've
9 discussed. It's an important policy question. It's just
10 not something that state tort law can regulate.

11 This is not a local product liability suit
12 regarding deceptive promotion of dangerous products, as
13 plaintiffs have tried to characterize it. Their claims
14 bear no resemblance whatsoever to any tort theory ever
15 endorsed by Hawaii courts or the courts anywhere else in
16 the nation. I've never seen a trespass case that involves
17 misrepresentations, let alone one -- misrepresentations
18 around the world. And Hawaii law does not support such a
19 claim.

20 If this case, Your Honor, were really about
21 misrepresentations in Hawaii, plaintiffs would be arguing
22 for and would be limited to, at most, seeking damages for
23 any incremental injury from the incremental increase to
24 global emissions from the marginal increased demand in
25 Honolulu due to the alleged deception in Honolulu on which

1 people in Honolulu relied.

2 If it were really a consumer protection case --
3 the State of Hawaii kind of focuses on this notion -- they
4 would have invoked the consumer protection statutes in the
5 state, and they would be arguing that consumers paid too
6 much or were injured by the products because of deceptions.

7 But that's not what they're arguing. What
8 they're arguing is that they -- they should be able to
9 recover billions of dollars of compensatory and punitive
10 damages based on defendants' activities and the total
11 greenhouse gas emissions produced by all humankind around
12 the world since the industrial revolution. They are trying
13 to regulate global greenhouse gas emissions through tort
14 damages, just like the City of New York, and that's barred
15 by federal law.

16 And as I said, Judge Crabtree, *City of New York*
17 looked at the question you asked me earlier about
18 regulation and -- and found that the Supreme Court's cases
19 in the *Kurns*, *BMW*, couple of other cases make exactly this
20 point, that tort damages, particularly punitive damages,
21 which they're seeking here, but all tort damages are -- the
22 purpose of them is to, you know, both compensate, but
23 through compensation and damages, change behavior.

24 And -- and that's what this is -- this is all
25 about. And that regulatory effect is being exported. It's

1 being ejected around the -- it would be around the global,
2 because if -- the conduct and activities that are being
3 targeted are -- are outside the State's borders.

4 Third, just to -- and this relates to the prior
5 point. The federal constitution, including principles of
6 due process and federalism, forbid such a sweeping,
7 unprecedented extraterritorial application of state law.
8 States cannot regulate or punish conduct outside their
9 borders, in other states or in other nations. And it has a
10 real intrusive and conflicting effect.

11 And the Second Circuit found that to permit this
12 suit to proceed, the one in that case, under state law,
13 would risk upsetting the careful balance that has been
14 struck between the prevention of global warming, a project
15 that necessarily requires national standards and global
16 participation on the one hand, and energy production,
17 economic growth, foreign policy, and national security on
18 the other.

19 And that, Your Honor, is why the Supreme Court
20 in the *AEP* case held that our, quote, basic scheme of the
21 constitution demands, close quote, that federal law apply
22 in these circumstances and that federal law bars such
23 claims, that the -- the Clean Air Act, where the EPA has
24 been given the authority, with its expertise, to regulate
25 greenhouse gas emissions, and states like Hawaii can

1 participate by commenting in -- and participate in the
2 process, that's what the -- the system is.

3 And, Your Honor, if the -- and Justice Ginsburg
4 wrote the opinion for the Court in *AEP* and said it's for
5 congress, not the federal courts, to establish national
6 policy in this area. And if -- if that's true, how could
7 it be that plaintiffs are right that the Supreme Court of
8 the United States says this -- federal courts can't get
9 involved, and this is for the executive branch, but that
10 state courts, using state tort law, would be able to
11 regulate this behavior through tort law? It's -- it's --
12 it just doesn't make any sense.

13 And in the *AEP* case, Justice Ginsburg explained
14 why, and the Second Circuit picked up on it, that the
15 question of global greenhouse gas emissions and how we deal
16 with it involves what the Supreme Court called a complex
17 balancing of the -- the benefits that we get from energy
18 and oil and gas that we all take advantage of. As I
19 mentioned earlier, Hawaii has strong policies, including on
20 jet fuel, to keep the economy going, to get -- for tourism
21 and other -- other activities.

22 How do we balance our needs, including national
23 security? President Biden just a couple of weeks ago, you
24 know, demanded that OPEC increase production of oil. And
25 we have national security issues and other issues. How do

1 we balance that with the need to deal with climate change
2 and those issues?

3 And the Supreme Court said, federal judges are
4 not equipped to -- even if they're experts on environment
5 law, like Your Honor -- to engage in the scientific study,
6 to engage -- you know, and convene groups and -- and study
7 the issues and -- and engage in science and apply the
8 science and figure out these solutions. That's for the EPA
9 and the policy branches of the federal government when
10 we're talking about the global and national solutions. And
11 so for all those reasons, this type of tort suit is not the
12 answer. It's not constitutional.

13 I think we're going to hear from my friends on
14 the other side that, we're just seeking to redress the
15 injuries in Hawaii. But the problem is that they want to
16 impose billions of dollars of damages, into the future,
17 too, for this global activity. And that interferes with
18 what the -- the Paris Agreement and it interferes -- that
19 the federal government is now back in on, UN activities.

20 It's just beyond the power of a state court or a
21 federal court, as the Supreme Court found in *AEP*. And for
22 those reasons, the Court should dismiss.

23 And the one issue, just to touch on -- it's in
24 our brief. Another route to the same destination is
25 preemption when -- the Clean Air Act. We've made that

1 argument, that even if we assume -- state all claims exist,
2 that -- they're preempted by the Clean Air Act and the
3 foreign policy concerns that were -- were deemed to
4 displace federal common law.

5 The Supreme Court's decision on the *Ouellette*
6 case, under the Clean Water Act, directly points to
7 preemption here. Other courts, the North -- the Fourth
8 Circuit in the North Carolina case we've cited found that
9 the Clean Air Act had the same preemptive effect of
10 nuisance claims, because you can't have 50 states
11 regulating the same behavior and punishing and deterring
12 and establishing different standards.

13 So that's -- and the *City of New York* case,
14 while it found that there was displacement of federal
15 common law, it talks a lot about the Clean Air Act and why
16 it -- it displaces, and the same analysis really leads to
17 preemption.

18 One final point. Plaintiffs claim that --
19 that -- they don't even dispute that federal common law is
20 displaced. They claim that that miraculously causes state
21 law to come alive. And the Second Circuit said, that's --
22 it's such a bizarre concept, it's hard to even take it
23 seriously.

24 But it's -- it's just wrong in the sense that
25 the reason, as the Supreme Court said in the *Milwaukee II*

1 case and in *AEP* and *City of New York* said this, state law
2 doesn't exist in this area. State law cannot be used
3 because it involves activity that go far beyond the state's
4 borders. The only possible source of law is federal law,
5 and federal law does not allow a claim here because the
6 Clean Air Act and foreign policy prerogatives of the other
7 branches preclude the courts from getting involved.

8 So for all those reasons, Your Honor, the Court
9 should dismiss this case for failure to state a claim.

10 THE COURT: Did any of these issues get
11 specifically ruled on by the U.S. District Court here
12 during the removal proceedings?

13 MR. BOUTROUS: No, Your Honor. The court there,
14 the main issues on removal -- and they were only on
15 removal, so we didn't get into the merits.

16 It's -- it's refreshing to be able to actually
17 argue the merits of these issues, so -- to really dig into
18 it. So if my enthusiasm causes me to keep talking, I'll
19 stop.

20 But the key issue there was the debate was --
21 because the federal common law, jurisdictional issue, the
22 Ninth Circuit decided, the court didn't get into that. And
23 the debate was plaintiffs argued their claim was all about
24 misrepresentation, not production and -- and extraction.
25 And the reason the debate was there was we were arguing

1 that those activities happened on federal land and -- and
2 with the companies being federal officers, for removal
3 purposes.

4 And District Court agreed with plaintiffs that
5 their case is only about misrepresentation, which now that
6 we're back on the merits, I can tell you, really helps us,
7 because they've narrowed their case. It's all about these
8 misrepresentations. They've taken production -- the
9 companies' production activity and extraction activity off
10 the table. And so they're left just with the
11 misrepresentation theory.

12 And so the District Court didn't get into the
13 key here, which is what the Second Circuit said, that
14 however you slice it, it's artful, it's creative, but their
15 claim hinges on the fact that -- that global greenhouse gas
16 emissions have increased beyond what it would have been due
17 to the companies' behavior. We reject that notion. That's
18 their theory. And that theory is barred by federal law.
19 It's preempted. It's unconstitutional.

20 THE COURT: Okay. Thank you.

21 MR. BOUTROUS: Thank you.

22 THE COURT: I don't think any other defendants
23 wanted to argue sort of their slice of this motion; right?
24 This is --

25 MR. BOUTROUS: That's -- that's correct.

1 THE COURT: Okay. All right.

2 MR. ALSTON: Your Honor, I --

3 THE COURT: Mr. Alston, yeah, go ahead.

4 MR. ALSTON: Yeah, Your Honor. Mr. Boutrous
5 argued on the substance.

6 I do want to emphasize that the 9(b) argument is
7 very important to us, and the significance of 9(b) with
8 respect to the pleadings, in light of the argument we heard
9 from Ms. Yackulic this morning, is emphasized. They've got
10 to plead with the who, what, where, when, and how if you
11 ever get past the strong arguments that Mr. Boutrous has
12 put before you. That's all.

13 THE COURT: Got it. Thank you.

14 All right. Mr. Sher or Mr. Edling, who's
15 arguing?

16 MR. SHER: Thank you, Your Honor. It's Vic Sher
17 for the plaintiffs.

18 THE COURT: Okay. Go ahead.

19 MR. SHER: Can you hear me okay?

20 THE COURT: You know, I can, but honestly, it's
21 not ideal. I think -- I think you folks need to upgrade
22 your hardware a little bit. I mean, we'll be able to hear
23 you today, but I'm just saying, going forward, you might
24 want to invest in -- I mean, Mr. Boutrous, whatever headset
25 he's using, is just coming through crystal clear. There's

1 a qualitative difference. But I can still understand you.
2 No problems. So go ahead.

3 MR. EDLING: Ted, we're coming to steal it.

4 MR. BOUTROUS: I'll -- I'll -- we'll work on
5 this later. I'll give you a recommendation.

6 MR. SHER: Your Honor asked counsel to address
7 standards, and Mr. Boutrous did not, and it's telling why
8 he did not, because the Court's role at this point is to
9 look at the specific claims that we've pled and to
10 determine whether there is any set of facts that would
11 allow us to proceed. That's the first standard.

12 Related to that is the fact that we are the
13 masters of the complaint, not Mr. Boutrous, not the City of
14 New York, and not any other case. And I will explain why
15 that matters in a moment.

16 And the third standard is, when you look at
17 preemption defenses as they were asserted, whether it
18 was -- whether it is with respect to the availability of
19 federal common law or the preemptive effect of a statute,
20 you have to look at the specific claim raised in
21 relationship to a specific federal interest that is in
22 substantial conflict with a specific state claim.

23 This case is not about regulating emissions.
24 It's not about emissions since the dawn of the industrial
25 revolution. It's not about setting climate change policy.

1 And it does not affect future behavior, other than
2 penalizing tortious deception and -- and failures to warn.

3 And, ironically, Your Honor, there is actually a
4 graphic in the defense reply brief that -- at page 5. What
5 they talk about in it is not correct, but the graphic
6 itself truly does capture our theory of the case.

7 THE COURT: I'm there.

8 MR. SHER: Okay. It's this graphic that's about
9 three-quarters of the way down the page. And it says that
10 you have the alleged misrepresentation, which leads to
11 increased demand, which leads to increased production and
12 sale, which leads to increased combustion, which leads to
13 increased emissions, which leads to accelerated global
14 climate change, which leads to injuries in Hawaii that
15 affected the plaintiff.

16 And, Your Honor, conceptually that's exactly
17 right. And what this encapsulates, our burden -- and this
18 is another standard, Your Honor -- under tort law in
19 Hawaii, is whether the specific conduct that we complain of
20 is a substantial cause of the injury. Substantiality is a
21 causation standard, and it's our burden to prove it at
22 trial. But that is our theory. Our theory is that the
23 failures to warn combined with the deceptive campaigns were
24 substantial contributions to the injury that we've
25 suffered.

1 I -- I want to make four points. And then, of
2 course, any -- any questions that Your Honor has, I'll
3 be -- actually, Your Honor, let me frame that
4 appropriately. If you have any questions at any time, I'll
5 be happy to answer them, but I would like to get to these
6 four points at some point.

7 THE COURT: Please go ahead. I'm not shy about
8 asking questions. Don't worry about that.

9 MR. SHER: I've noticed that, and I welcome
10 them.

11 First, this case is nothing like the *City of New*
12 *York* case, specifically because the conduct that triggers
13 liability in our case, pled in our complaint, read in the
14 manner most favorable to us, is that defendants' failure to
15 warn and deceptive promotion is the -- is the foundation of
16 the claims. Whereas, in *New York*, New York's theory of
17 liability would have -- as the Second Circuit concluded,
18 would have imposed strict liability for lawful commercial
19 conduct.

20 Our case, tortious conduct leads to liability.
21 Their case, legal commercial conduct leads to liability.
22 It's a fundamental difference in the way the case is going
23 to be not only pled, as we've done it in the complaint, but
24 the way we're going to prove it.

25 Second, defendants' preemption defenses fail,

1 whether it's under federal common law, which has been
2 displaced, or under the Clean Air Act, because both the
3 federal law -- federal common law of interstate emissions
4 and the Clean Air Act only preempt claims that have the
5 purpose and effect of regulating interstate or cross-border
6 emissions.

7 And under the *City of New York's* Second
8 Circuit's own analysis, this lawsuit does not and cannot
9 regulate greenhouse gas emissions. Again, in contrast to
10 the *City of New York* case, the defendants here can comply
11 with both their state law obligations to warn and behave
12 honestly, any obligations they have under federal law with
13 respect to emissions. Whereas, under the *City of New*
14 *York's* case, as they presented it and argued it to the
15 Second Circuit, the defendants could not. And that is a
16 crucial difference.

17 Third, defendants' main counterargument on
18 reply, that federal law applies because greenhouse gas
19 emissions cannot be decoupled -- and this was
20 Mr. Boutrous's comment where he said, pose the question to
21 Mr. Sher whether emissions are part of their claim. The
22 answer, of course, is yes.

23 But that doesn't affect the -- the case, which
24 is that emissions alone do not support liability. It's the
25 tort that leads to liability. And our burden, again, is

1 substantial contribution, not but-for causation. And while
2 the emissions are necessary to deliver the injury, they are
3 not sufficient, absent a tortious conduct, to establish
4 liability.

5 And the fourth point is that we have pled all of
6 this with ample particularity. It is not a fraud claim.
7 Reliance is not an element of any of our claims. And --
8 and we've done -- the complaint is more than sufficient to
9 survive this motion.

10 So the theory of our case -- and you've heard it
11 characterized, but let me just make sure that it is clear
12 on the record here. For decades, these defendants have
13 concealed and misrepresented the climate impacts of their
14 products, using sophisticated disinformation campaigns to
15 discredit the science of global warming, the scientists who
16 were undertaking this very important work, downplay the
17 catastrophic consequences of a change in climate, and
18 mislead consumers and the rest of the world about the
19 dangers of using their products as intended in a profligate
20 manner.

21 In turn, these deceptive commercial activities,
22 not legal commercial activities, inflated the overall
23 consumption of fossil fuels, which increased greenhouse gas
24 emissions, which exacerbated climate change, which created
25 the hazardous environmental conditions that are already

1 affecting Honolulu, and that will only get worse, by the
2 way, even if emissions stop today. And I'll explain that
3 in a moment, because Mr. Boutrous has alleged that we're
4 looking about regulating emissions in the future, and
5 that's just simply not true.

6 Thus, as the complaint makes clear, the conduct
7 that triggers defendants' liability is their failure to
8 warn and deceptive promotion of dangerous products. And it
9 will be our burden at trial to prove, as in any tort case,
10 that this wrongful and unlawful and tortious conduct was a
11 substantial factor in bringing about these injuries.

12 Now, our case is not the *City of New York* case,
13 and the difference matters for preemption. So let me --
14 let me talk about that for a moment.

15 Setting aside that whatever former federal
16 common law may have applied to interstate pollution has
17 been displaced by the Clean Air Act, the United States
18 Supreme Court has only ever applied the federal common law
19 of interstate pollution to a lone category of claims, those
20 that have the purpose and effect of regulating cross-border
21 pollution. That's what was discussed in the *AEP* case.
22 It's what was discussed in the *Kivalina* case. It's what
23 was discussed in the *GM* case.

24 And the Second Circuit's opinion in the *City of*
25 *New York* case is no different. It applied federal common

1 law because, and I quote, the city's lawsuit would regulate
2 cross-border emissions.

3 Now, as for the Clean Air Act, its preemptive
4 scope is more limited, still. Through the Act, two very
5 broad savings clauses, congress expressly preserved wide
6 swaths of state rights and remedies, including in the area
7 of air pollution.

8 And based on nearly identical savings clauses in
9 the Clean Water Act, the Supreme Court in the *Ouellette*
10 case, which Mr. Boutrous referred to, held that -- and I'm
11 going to quote again -- the Clean Water Act precludes only
12 those suits that may require standards of effluent control
13 that are incompatible with those established by the
14 procedures set forth in the Act.

15 And in that case, the court held that -- that
16 the federal interest in promoting the efficacy of
17 state-issued water discharge permits pursuant to the
18 federal act would be undermined unless you applied the law
19 of the source state, not the law of the injured state.
20 State law still applied, but there was a choice of which
21 laws state applied -- which laws -- which state's law
22 applied.

23 Now, our claims do not regulate emissions. And
24 this is how the *City of New York* decision is fundamentally
25 different. Defendants do not and cannot show that the

1 deceptive marketing and failure to warn claims that are the
2 actual subject of this complaint would regulate interstate
3 pollution of any sort.

4 In fact, the *City of New York's* Second Circuit
5 opinion makes it clear. As the Second Circuit explained,
6 that lawsuit sought to impose, quote, strict liability,
7 unquote, on the oil and gas defendants in that case for
8 their, quote, lawful, unquote, production, promotion, and
9 sale of fossil fuels.

10 And, in fact, the city, on appeal, expressly
11 told the Second Circuit in their opening brief that its,
12 quote, particular theory of the claims assumes that the
13 defendants' business activities have substantial social
14 utility and does not hinge on a finding that those
15 activities themselves were unreasonable or violated any
16 obligation other than the obligation to pay compensation,
17 unquote.

18 Taking the plaintiff at its word, the Second
19 Circuit held that the defendants could not avoid ongoing
20 liability unless they, quote, ceased global production
21 altogether, unquote. And that threat of ongoing liability
22 for the mere production and distribution and combustion
23 legally and nontortiously of their products would no doubt
24 compel the defendants to develop new means of pollution
25 control, as the plaintiff itself admitted.

1 And for that reason, the court concluded that
2 plaintiffs' claims, quote, would regulate cross-border
3 emissions, unquote, bringing them within the scope of the
4 now displaced federal common law of interstate emissions.

5 Now, Your Honor asked about Judge Watson and his
6 opinion on -- in connection with the remand from federal
7 District Court to this court. And it's correct that Judge
8 Watson was dealing with the jurisdictional question, not
9 with the merits question.

10 But the important point was that his
11 jurisdictional ruling depended on a correct reading of the
12 complaint, in which he said that what was at stake in this
13 case is not defendants' normal legal promotion and
14 production of a legal product, but rather, the failure to
15 warn and the dissemination of misleading information.

16 This means -- now -- and this is pertinent both
17 to whether we state a claim and whether it's preempted,
18 Your Honor. This means that, unlike in the *City of New*
19 *York* case, defendants can easily comply both with the --
20 their state law obligation to warn and behave honestly in
21 the marketplace, on the one hand, and with whatever
22 regulation is imposed on them by federal interest and
23 federal law, whether it's the now displaced federal common
24 law or the Clean Air Act itself.

25 Indeed, so long as they provide adequate

1 warnings and stop their deception, which is outlined in our
2 complaint, they are free to sell as many fossil fuel
3 products as they can without any fear of incurring
4 additional liability, under our theory of our complaint.

5 And so nothing in this lawsuit incentivizes,
6 much less compels, defendants to stop selling their
7 products or develop new means of pollution control. And
8 under the City of New York's, the opinions, own reasoning,
9 this lawsuit does not regulate cross-border emissions, and
10 it, therefore, cannot be preempted by either federal common
11 law or the Clean Air Act.

12 Now, we've cited and discussed in our brief,
13 Your Honor, an earlier Second Circuit case, *In re MTBE*.
14 Many of the defendants in this case were defendants in that
15 case. And I actually represented the City of New York in
16 that matter.

17 And in that case, the defendant fossil fuel
18 companies argued that the tort claims for well water --
19 drinking water, well contamination were preempted by the
20 Clean Air Act. And by the way, Your Honor, that case
21 involved both nuisance and trespass claims, along with
22 failure to warn and negligence claims.

23 And the case went to the Second Circuit,
24 following judgment in the city's -- in the city's favor.
25 And the defendants there argued that because the Clean Air

1 Act had established a standard for the oxygen content of
2 gasoline in an effort to reduce emissions of noxious
3 compound and that the U.S. EPA had certified MTBE for that
4 purpose, as provided for in the Act, that their -- that the
5 state law claims were preempted.

6 The Second Circuit disagreed. It held that even
7 if the Clean Air Act regulated MTBE, it would not preempt
8 those claims because, quote, the mere use of MTBE would not
9 have caused the defendants to incur liability, unquote.

10 Instead, those claims -- and I'm quoting
11 again -- required the jury to find that defendants engaged
12 in additional tortious conduct, such as failing to warn of
13 MTBE's dangers or failing to exercise reasonable care when
14 storing gasoline that contained MTBE.

15 And so even though MTBE was highly regulated by
16 federal law and even though MTBE had been certified for use
17 for the purpose of air pollution reduction by the U.S. EPA
18 and even though MTBE was the center causal issue in the
19 case, the same way fossil fuel emissions are here -- that
20 is, you don't have water contamination of MTBE in gasoline
21 unless the gasoline contains MTBE, and it was therefore a
22 necessary causal link -- federal law did not preempt the
23 plaintiffs' claims because the defendants, quote, could
24 have complied with federal and state law by using MTBE
25 without engaging in tortious acts.

1 And so too here, Your Honor. For plaintiffs to
2 prevail in this case, the jury will have to find not only
3 that defendants produced or sold fossil fuel, but that they
4 engaged in additional tortious conduct; namely, the ones we
5 complain about in the complaint, failing to warn about the
6 dangers of fossil fuel products and using climate
7 disinformation to promote those same products.

8 And so even if -- even if greenhouse gas
9 emissions are regulated by federal law and even though
10 greenhouse gas emissions are a necessary link in the causal
11 chain of injury, federal law does not preempt this -- this
12 state law action because defendants could have -- can
13 comply with state and federal law by producing fossil fuels
14 without using deception to sell those products.

15 And, Your Honor, you will search in vain through
16 the defendants' briefs and through Mr. Boutrous's argument
17 to find a federal interest in protecting corporations from
18 the consequences of lying and deceptive and -- behavior and
19 failing to warn. There is no such thing.

20 And in the absence of a specific federal
21 interest that conflicts substantially with a state law
22 claim and state interest, there's no preemption. And, in
23 fact, there's no federal common law that governs it either.

24 I want to spend a moment, Your Honor, on
25 defendants' argument in their brief that you cannot

1 decouple -- that's their word -- our claims from global
2 emissions. This is a red herring.

3 Liability here rests on tortious conduct, as
4 I've been explaining. And if the jury finds that there was
5 no tortious conduct or the tortious conduct did not
6 substantially contribute to the injury, then we lose.
7 Conversely, if the jury finds that it was a substantial
8 contributor to the injury, we win. That's tort law.

9 And I'd like to spend just a moment with the
10 allegations in the complaint about how we are intending to
11 establish these claims.

12 First, failure to warn, the standards under
13 Hawaii law is that a manufacturer must give appropriate
14 warning of any known dangers which the user of its product
15 would not ordinarily discover. We quote that in our brief,
16 Your Honor. It's from the *Ontai* case.

17 And we will prove, and the allegations of the
18 complaint surely support, that defendants knew that
19 profligate use of their products would cause exactly the
20 devastating impacts we see affecting Honolulu today. They
21 knew that users of their products would not ordinarily
22 discover those dangers. And they failed to do what Hawaii
23 tort law requires of every other manufacturer with such
24 knowledge. They provided no warnings commensurate with the
25 danger. Instead, they waged a disinformation campaign that

1 prevented plaintiffs and consumers from gaining access to
2 comparable knowledge.

3 Your Honor, we heard in connection with both of
4 the two earlier motions -- it's afternoon here, but morning
5 where you are, still, I think -- that you cannot use a
6 failure to warn, an omission, a silence, to support
7 jurisdiction and that somehow it's not present in the
8 transactions in Hawaii.

9 Well, Your Honor, the complaint alleges -- and
10 for Chevron, just as an example, it's in paragraph 26h --

11 MR. EDLING: G.

12 MR. SHER: G?

13 MR. EDLING: 23.

14 MR. SHER: 23? You're sure?

15 MR. EDLING: Yeah.

16 MR. SHER: 23g, Your Honor. Let me check just
17 to make sure it's --

18 MR. EDLING: 23h.

19 MR. SHER: 23h. Thank you.

20 That they -- that -- that's related to Chevron,
21 but it's substantially the same for all of the defendants,
22 that they conduct numerous fossil-fuel-related business
23 transactions. They have gas stations. They sell
24 wholesale. They sell retail. They do credit card
25 transactions. They have all these transactions with buyers

1 and customers and consumers on Oahu, in the County of
2 Honolulu, and that they never warned any of their
3 purchasers that supporting those products and using them
4 was going to lead to rising seas, rain bombs, et cetera, on
5 Hawaii.

6 The fact that defendants were doing the same
7 conduct elsewhere at the same time is of no matter. And
8 one way you can think about this is if -- if Mr. Boutrous
9 tortiously throws a rock at my home in Honolulu, it doesn't
10 matter whether he's standing next door in Honolulu, whether
11 he's standing on the mainland anywhere, or if he's standing
12 anywhere else. And it doesn't matter if he does it all at
13 the same time, and it doesn't matter if he does it
14 repeatedly. What matters is that he's doing it in Hawaii
15 too. And that's -- that's what our claims are related to.

16 So the complaints detail the knowledge and set
17 out what Hawaii law requires to prove this claim. And
18 there are two points.

19 First, if the jury finds at trial either that
20 these companies gave adequate warnings -- and we haven't
21 heard anything to that effect -- or that adequate warnings
22 would have made no difference, frankly, Your Honor, we lose
23 on that claim.

24 And, second, as I mentioned earlier, they can
25 both provide those warnings and comply with federal

1 requirements under the Clean Air Act, or for that matter,
2 federal common law if any still exist to apply.

3 Now, I mentioned Mr. Boutrous said something
4 about future -- future liability and setting policy into
5 the future. And that's just simply wrong. The -- the way
6 that future damages -- we will be entitled at the time of
7 trial, Your Honor, to prove all of the damages that are
8 reasonably traceable to the injuries that we suffered as of
9 the date of trial.

10 The problem is that the impacts of the emissions
11 that have already occurred, which are substantially caused
12 by the tortious conduct that we're alleging here, will
13 cause -- even if emissions cease tomorrow, will cause the
14 seas to continue to rise and atmospheric weather changes to
15 occur for many, many years into the future. We'll be
16 entitled to prove those as consequences of the conduct up
17 till the time of trial.

18 Doesn't have anything to do with setting climate
19 change policy in the future or setting emissions limits in
20 the future. Those are -- I think Mr. Boutrous is correct;
21 those are matters for other players. But they're not the
22 subject of this lawsuit, which focuses backwards, as tort
23 law always does.

24 And I'd like to spend -- I've been going on
25 longer than I intended to. I want to talk about the

1 nuisance claim for a moment.

2 So our burden is, again, to show the defendants
3 participated in creating the public nuisance by their
4 failure to warn and campaign of deception, and we have to
5 show, obviously, that it was a substantial contributor,
6 substantial cause of the nuisance.

7 We do not have to show that it was a but-for
8 cause. So all of this talk about how -- how we have to
9 prove that emissions on Hawaii or that the purchases on
10 Hawaii, in the absence of those, the injury would not have
11 occurred. That's not correct. Our burden is substantial
12 causation.

13 And as -- this is what Judge Watson said that's
14 important about understanding what the complaint is about.
15 He said: The important part for this analysis is how the
16 defendants allegedly created that nuisance. Contrary to
17 defendants' assertions, it is not through their fossil fuel
18 production activities, but through their alleged failure to
19 warn about the hazards of using their fossil fuel products
20 and disseminating misleading information about the same.

21 Also, he said: The court further disagrees with
22 defendants that plaintiffs' claims rest upon the cumulative
23 production of petroleum products. Instead, as stated in
24 the complaints, plaintiffs' claims focus on defendants'
25 alleged exacerbation of global warming. In other words,

1 plaintiffs do not claim that no petroleum products would
2 have been used, only the defendants would have made the use
3 worse.

4 And that's correct. That's why the graphic on
5 page 5 of the reply brief is exactly correct.

6 Now, if you look at paragraph 158 of the
7 complaint, Your Honor --

8 THE COURT: Hang on. Let me get there.

9 MR. SHER: Me too.

10 THE COURT: Okay. I'm there.

11 MR. SHER: So this is where we explain how the
12 defendants created, contributed to, assisted, and/or were
13 substantial contributing factors in the creation of the
14 public nuisance. And it is -- and I won't read it all,
15 because it's lengthy. But the four subsections there
16 describe why the defendants' tortious conduct played a
17 role -- played a substantial causal role in causing this
18 problem.

19 The case, Your Honor, that Mr. Edling referred
20 to from California called the *ConAgra* case, that was the
21 lead paint manufacturer case. That case is very, very
22 similar to this one. And that one, the basis for public
23 nuisance liability in that case was the affirmative
24 promotion of lead paint for interior use, not the mere
25 manufacture and production and distribution of lead paint.

1 And by the way, a good deal of the tortious
2 conduct was accomplished through trade associations that
3 the defendants formed, funded, led. And so they were tied
4 to in a -- both a causal and a liability way.

5 And the court held that the plaintiff in that
6 case had established that those campaigns did substantially
7 contribute to the problem and that you could -- you could
8 conclude that by looking at the fact that the -- that the
9 members of the coalition themselves believed that the
10 campaigns had succeeded. And we've laid out in our
11 complaint exactly the same kind of connection between this
12 tortious conduct and substantial causation of the nuisance.

13 And just very briefly, trespass is very similar.
14 Under Hawaii law, trespass requires a tortious, unpermitted
15 entry caused -- causing a thing to enter the land of
16 another. Innocent, nonnegligent, or unintentional entries
17 will not support liability. And if you look at the
18 allegations in the complaint about trespass in paragraphs
19 201 and 204, we -- similar to the nuisance allegations we
20 laid out for trespass.

21 Again, if the jury finds that the defendants
22 didn't act tortiously, we lose.

23 And they can comply both with the Hawaii tort
24 duties and any federal requirements.

25 The fact that defendants may be sued in multiple

1 forums involving, in theory, different state laws and
2 different duties and different standards of proof is of no
3 moment as to whether a case is a federal case or invokes
4 federal law. It does not. And that's the nature of the
5 federal system. Unless you have a specific conflict
6 between the claims and the federal defense preemption and
7 the federal interest asserted, there's no preemption, and
8 there's no federal issues.

9 Let me -- finally, I want to address two points.
10 And that is the 9 -- Rule 9(b), pleading with specificity
11 issue. Rule 9(b) requires nothing more than that we plead
12 the claims with sufficient particularity to allow the
13 defendants to prepare a defense. And this complaint does
14 that. We've identified the role each defendant has played
15 in the disinformation campaign. We've identified the areas
16 where they should have warned, but they did not, both in
17 Hawaii and elsewhere.

18 And the who, what, where, when, and how as to
19 each defendant are laid out for each cause of action. We
20 actually -- we actually summarized them I think really
21 effectively in a series of bullets on pages 40 and 41 of
22 our opposition brief.

23 Related to this is that reliance is not an
24 element of any claim in this -- in this case. And fraud,
25 we do not assert a fraud claim. So defendants' arguments

1 that we have to identify specific misrepresentations and
2 show that individuals relied on them is not true.

3 Our burden is to show that the tortious conduct
4 substantially caused the problem. And -- and we will do
5 that, but we do not have to show individual reliance or
6 particular misstatements.

7 And finally, Mr. Boutrous allowed (sic) to the
8 foreign commence clause and the due process clause, et
9 cetera. Those were not raised in the Rule 12 motions,
10 and -- and they were waived. So --

11 (Counsel confer.)

12 MR. SHER: Yes. Let me conclude, Your Honor, by
13 circling back to one of the first things that Mr. Boutrous
14 said. He said that a line of cases have rejected this case
15 or cases that were identical to this one. And they did
16 not.

17 In *AEP*, the plaintiffs sued to regulate the
18 emissions of major power plants in the country, in other
19 states, and they invoked expressly federal common law to
20 try to accomplish that. And the issue that the court dealt
21 with was whether there was a federal common law that
22 remained to apply following the enactment of the Clean Air
23 Act, and the court concluded there was not. There is no
24 state court claim -- no state law claim that went to the
25 Supreme Court.

1 And instead, what Justice Ginsburg said, as
2 Mr. Boutrous pointed out, writing for a unanimous court,
3 what the -- the availability vel non -- which, Your Honor,
4 I thought for some time was some fancy term, but it just
5 means "or not" -- the availability vel non of state law
6 remedies depends on the preemptive effect of the statute.

7 So once you have federal -- you have federal
8 common law, but once you have a federal statute that
9 displaces it, your question then becomes, does the statute
10 preempt the state law claim?

11 This was exactly the same issue that was in
12 *Kivalina*, except that the only difference was that in
13 addition to seeking to regulate emissions, the Kivalina
14 plaintiffs sought damages in -- money damages that was
15 caused by sea levels rising in Alaska and affecting their
16 native village.

17 But the state law claims -- the judge dismissed,
18 declining to take under pendent jurisdiction, the state law
19 claims. They did not go up. And the Ninth Circuit did not
20 address them, therefore, because they weren't presented
21 with them.

22 All they held was that those claims, too, had
23 been displaced under the federal common law that the
24 plaintiffs invoked and that the only question on state law
25 would be whether they survive the preemptive effect of the

1 Clean Air Act.

2 The Second Circuit in the *City of New York* --

3 THE COURT: Wait a minute. Before you leave the
4 Alaska case, what happened to the state law claim?

5 MR. SHER: They were dismissed, and they were
6 never raised --

7 MR. EDLING: Without prejudice.

8 MR. SHER: -- or completed.

9 They what?

10 MR. EDLING: Without prejudice.

11 MR. SHER: They were dismissed without prejudice
12 by the District Court. And there was a conspiracy claim
13 that was part of the federal -- that was attached to the
14 federal common law claim, but both the -- well -- but it
15 fell with the absence of federal common law. So not
16 like -- not like those here.

17 THE COURT: So it wasn't -- so it wasn't
18 dismissed on the merits. It was dismissed because of the
19 pendent jurisdiction issue?

20 MR. SHER: Correct.

21 THE COURT: Okay.

22 MR. SHER: Correct. The court -- no court --

23 THE COURT: Were they ever refiled? Did they go
24 anywhere?

25 MR. SHER: No.

1 THE COURT: Okay.

2 MR. SHER: No. And -- and it was the same thing
3 in the *GM* case that Mr. Boutrous referred to. That -- that
4 case ended after the District Court decision. But there
5 was no ruling on the state law claims.

6 Now, the -- I wanted to address Mr. Boutrous's
7 reference to the City of New -- I'm sorry -- the *Oakland*
8 District Court decision by Judge Alsup --

9 THE COURT: Let me -- hold on. I'm sorry to
10 interrupt. But I just want to take a very brief break here
11 for a second.

12 (Pause.)

13 THE COURT: All right. We can continue. Thank
14 you. Sorry to interrupt.

15 MR. SHER: Sure. Thanks, Your Honor.

16 So it's true that Judge Alsup first denied the
17 motion to remand and then granted the defendants' -- which
18 were oil and gas companies -- motion to dismiss. And he
19 did so on grounds that were similar to the Second Circuit
20 in the *City of New York* case. That case -- that opinion
21 has been vacated. It has no precedential value for any
22 purpose.

23 But the important point of it is is that in that
24 case, as in *City of New York*, the plaintiff based its claim
25 on the mere production, distribution, and combustion of

1 fossil fuels. And Judge Alsup said -- he said, this would
2 mean that anyone who supplied fossil fuels with knowledge
3 of the problem would be liable.

4 At one point, counsel seemed to limit liability
5 to those who had promoted allegedly phony science to deny
6 climate change. But at oral argument, plaintiff's counsel
7 clarified that any such promotion remained merely a plus
8 factor. Their theory -- unlike ours, Your Honor, their
9 theory rests on the sweeping proposition that otherwise
10 lawful and everyday sales of fossil fuels, combined with an
11 awareness that greenhouse gas emissions lead to increased
12 global temperatures, constitute a public nuisance.

13 Not our case. It's the City of New York's case.
14 It's not our case. It's not preempted.

15 And, Your Honor, I'd be happy to take any
16 questions you may have.

17 THE COURT: I don't know how relevant it is, but
18 I'm just -- natural curiosity. Mr. Boutrous said none of
19 the other cases have gone further than a motion to dismiss.

20 So I guess my question is -- I mean, I know
21 there was initially a number of cases filed. I know a
22 number of them were removed to federal court and then were
23 remanded to state courts around the country. I don't have
24 an exact score sheet. I don't know how many, or any of
25 that, but I know some of them were.

1 So I'm a little curious on why none of those
2 cases have yet gone through a motion to dismiss. I mean,
3 ours was certainly --

4 MR. SHER: Well --

5 THE COURT: -- not the earliest one filed.

6 MR. SHER: It was not. And it's a feature of --
7 well, let me say it's a little bit of a mystery to us too.

8 But what happened was this: The City of
9 Baltimore's case, which is in the Fourth Circuit, the State
10 of Rhode Island's case, which is the First Circuit, and the
11 Boulder counter -- County case, which is in the Tenth
12 Circuit, were all remanded to state courts.

13 And similar to your situation here, Your Honor,
14 the federal judges denied stays. In none -- and in all of
15 those cases, the motions to dismiss have been briefed, but
16 not ruled on. In a couple of the cases -- in a couple of
17 the cases, they were stayed by the state court judges.

18 In Rhode Island, it was pending, a Rhode Island
19 State Supreme Court case that involves personal
20 jurisdiction that has not yet issued. We've been waiting
21 over a year for the Rhode Island Supreme Court to rule.
22 The Baltimore case, as I said, was fully briefed on the --
23 at least on the 12(b)(6) motion and has not been argued or
24 ruled on. And the same in Boulder. So Your Honor is
25 the -- is the first state court.

1 It is misleading to say that the cases -- the
2 implication -- what Mr. Boutrous said was that they had
3 been dismissed on the motions to dismiss, and that's not
4 true. The cases are pending.

5 And the one -- the case that has been -- the
6 only case that has been dismissed in the current round are
7 the *City of New York* case, which we've talked about, which
8 is different, and -- and the -- Judge Alsup's decision in
9 the *City of Oakland* case, which has been vacated and is now
10 pending -- in that state, pending further developments in
11 the Ninth Circuit that related to the remand.

12 THE COURT: Okay. I'll just -- I mean, in case
13 Mr. Boutrous is concerned, I didn't take his comment that
14 way. I was certain that if a state court judge had already
15 ruled on these motions, I would have heard about it.

16 MR. SHER: Okay.

17 THE COURT: So I just -- I just assumed there
18 was some kind of procedural or timing issue. And it sounds
19 like that's the case. So you're basically waiting for
20 several state judges to rule on similar motions, is where
21 things are at?

22 MR. SHER: Yes. We --

23 THE COURT: Got it.

24 MR. SHER: That's exactly right.

25 THE COURT: Okay. All right. Back to you,

1 Mr. Boutrous.

2 MR. BOUTROUS: Thank you very much, Your Honor.

3 Let me start with *City of New York*. And this
4 Court has read many, many opinions, so I first urge you to
5 go back and look at it again and to see just how far afield
6 Mr. Sher's description of it is. And for -- I mean, it --
7 it speaks for itself. It nails all these issues.

8 And let me just start with this false claim that
9 that case did not involve a claim of misrepresentation,
10 deception. The Second Circuit itself, describing the
11 case -- I'll just read you -- this is from page 86,
12 spilling over onto 87, Your Honor.

13 It was exactly the same argument. They had a
14 few more arguments. But they -- all Mr. Sher and
15 Mr. Edling are left with is this misrepresentation claim.
16 They gave up on the other stuff because they kept losing.

17 So here's one of the -- one key feature of the
18 New York complaint, as the -- this is the Second Circuit:
19 As the city sees it, the producers have known for decades
20 that their fossil fuel products pose a severe risk to the
21 planet's climate. The city alleges, despite that
22 knowledge, the producers downplayed the risks and continued
23 to sell massive quantities of fossil fuels, which has
24 caused and will continue to cause significant changes to
25 the city's climate and landscape.

1 That's exactly their claim here, Your Honor.
2 It's just that they've -- they've jettisoned the other
3 pieces of it. So their claim is weaker.

4 And Mr. Sher emphasized the statement about
5 lawful commercial activities. There's no dispute that
6 there, when the city mentioned that, they were talking
7 about the production -- extraction and production and sale
8 of oil and gas, which is lawful. It's lawful in New York.
9 It's lawful here, in California. It's lawful in Hawaii.

10 City of New York said that there was tortious
11 behavior with deception. Their complaint had a whole
12 section on this. The complaint alleged that defendants
13 are -- let me just pull this up.

14 They said: Defendants are responsible -- this
15 is paragraph 3 of the New York complaint -- for leading the
16 public relation strategy for the entire fossil fuel
17 industry, downplaying the risk of climate change, and
18 promoting fossil fuel use despite its risks.

19 They -- they talked about literally paragraph 6
20 of the complaint, a campaign of deception and denial that
21 was used to -- with -- I mean, exactly, to downplay the
22 risks of climate change.

23 So that was what the City of New York's
24 complaint said, in addition to other things. But it --

25 THE COURT: Well, that's a -- I mean, that's a

1 characterization. But what were -- what were the claims
2 asserted?

3 MR. BOUTROUS: They sued -- like here, they
4 asserted nuisance and trespass --

5 THE COURT: Okay.

6 MR. BOUTROUS: -- which are two of the claims
7 here.

8 THE COURT: All right. Thank you.

9 MR. BOUTROUS: Yeah. And so, Your Honor, and --
10 and -- so it's just -- I could read to you from their
11 complaint all day long and it -- with the Court's
12 permission, I'll submit the New York City complaint, just
13 so you have it, because I think you'll find it -- there's a
14 whole section on this.

15 So it was the same claim. And so when the
16 Second Circuit said that no matter how you slice it, artful
17 pleading, and -- and we have, you know, some artists on the
18 line here with us. You can try to plead around it. But
19 Mr. Sher admitted that -- that emissions -- global
20 emissions are crucial to their claim. He endorsed our
21 chart, which -- which showed that their claim is -- as in
22 New York, they back up the causal chain. But the global
23 emissions, that's their entire claim.

24 And they're seek -- they're seeking to punish
25 the companies' participation in activities that -- around

1 the world, including statements and speech around the world
2 outside of Hawaii that led to global emissions --
3 contributed to them and increased -- that's their theory --
4 that then caused the climate to change. That's their
5 theory.

6 And the problem -- all these tort concepts that
7 Mr. Sher is pointing to, those apply if something happens
8 in Hawaii and someone's injured in Hawaii, and you apply
9 basic tort principles.

10 The *AEP*, the *Jesner* case that we've cited in our
11 briefs, and that the Second Circuit cited from the U.S.
12 Supreme Court, says that courts cannot regulate and cannot
13 punish and -- and deter conduct or compensate for conduct
14 that occurred outside its borders.

15 And on that point, again, the question -- this
16 notion that, don't worry about it, if you just stop
17 speaking, you won't be held liable, I have several
18 responses to that. But, one, again, if the question isn't
19 what the party will do in the future necessarily, it's the
20 damage award itself. And, again, *City of New York* adopted
21 these exact cases that we cited to them and to you, Your
22 Honor.

23 The court said on page 92: As the Supreme Court
24 has long recognized, regulation can be effectively exerted
25 through an award of damages, and the obligation to pay

1 compensation can be, indeed is designed to be, a potent
2 method of governing conduct and controlling policy.

3 And the court said in this case, it cited the
4 *Ouellette* case that we've mentioned, where the court set a
5 damage award there. And it wasn't talking about what would
6 the parties actually do, but the purpose of those awards;
7 particularly, punitive damages is to change behavior.

8 And here, that's exactly what they're -- they're
9 seeking to do. And -- and so it's just wrong to suggest
10 this is some minor misrepresentation case that has no
11 effect. It has a major effect in terms of policy regarding
12 global warming.

13 And one thing I wanted to clarify. So Mr. Sher
14 kind of calls everything preemption. Our federal common
15 law argument is only a preemption argument as to federal
16 common law. As I said before, the question is, can state
17 law exist in this area? And it cannot. The Supreme Court
18 has said in *AEP*, in all these cases, *Milwaukee I*, *Milwaukee*
19 *II*, state law cannot be used to regulate interstate
20 pollution.

21 And that's what they're challenging here.
22 Because of the interstate and international nature of it,
23 only the federal government can regulate that. So state
24 law does not exist in that area. We do have -- and so that
25 just means federal law -- federal common law is the only

1 possible source of law. And -- and the Clean Air Act
2 displaces it because congress has told the EPA to regulate
3 emissions.

4 But as I said, there is -- we do have a separate
5 preemption argument, which is, even assuming, arguendo,
6 that these five state law claims that have never been
7 applied in this context ever, we assume they are viable,
8 there's -- there's preemption by the Clean Air Act.

9 The *Ouellette* case says that the only sphere
10 that was preserved on the Clean -- under the Clean Water
11 Act -- and the savings clauses are identical to -- to the
12 Clean Air Act -- is the -- the regulation of the in-state
13 sources of pollution. So the only thing that wouldn't be
14 preempted would be Hawaii applying its own law to sources
15 of pollution in Hawaii. You have to apply the law of the
16 other states to pollution emanating from those states. And
17 of course plaintiffs haven't done that here.

18 And on the preemption argument, Mr. Sher says
19 it's only about disinformation; defendants can sell as much
20 oil as they want so long as it's honestly represented. I'm
21 going to come back to that. But the only alleged harm of
22 the mis -- misrepresentation is the emissions. That's what
23 he admitted they -- that that's crucial to their case. And
24 that's another place where preemption comes in.

25 *AEP*, from the Supreme Court, says only federal

1 law can regulate emissions, not state law. And preemption
2 can apply to any element of a claim, as the *Bates* case from
3 the Supreme Court -- which I don't think we cited, so I
4 will -- in keeping with the spirit -- send that around.

5 But *Bates* says you look at the claim and the --
6 the element of a claim, and the proper inquiry is an
7 examination of the elements to see whether federal law has
8 preempted a state from regulating or targeting and getting
9 involved in those issues. And it does not -- the court
10 actually said, it doesn't call for speculation as to
11 whether a jury verdict might prompt the manufacturer to
12 take any particular action, because that involves the mind
13 of the -- the company.

14 So here, there's just no question they're going
15 to punish -- they want to punish the companies for the
16 results of global emissions based on their worldwide
17 statements in speech, and that's just beyond the powers of
18 any state court, because that would have all the states
19 regulating the same thing.

20 As the court knows, there's 24 other suits like
21 this. So all of these states are going to be asked to do
22 exactly what this Court's being asked to do. It -- it's --
23 that's the federalism problem. And that's the reason that
24 the Supreme Court in *AEP*, the *Kivalina* case, again, which
25 was a damages award, the court said that, you know, that

1 the same analysis applies. And so this effort to say,
2 well, we're just seeking damages, don't worry about it,
3 does not -- does not work.

4 With respect to the notion -- again, some of the
5 quotes that Counsel was using from *City of New York*, the --
6 the court rejected all these arguments. The -- the
7 springing back to life argument of the state law, the court
8 just pounded that argument and said -- the quote was: It's
9 too strange to seriously contemplate.

10 Where -- and -- and it's -- it is, because the
11 state law does not exist in this interstate and
12 international area. And, therefore, the fact that congress
13 regulates it, doesn't mean suddenly that the states can
14 too. And -- and so I think that argument just goes
15 nowhere, but they keep hammering it.

16 Let me see here.

17 THE COURT: So let me put on my Homer hat for a
18 minute.

19 MR. BOUTROUS: Please.

20 THE COURT: What's a state -- what's a state to
21 do if the state believes it's being absolutely crushed?
22 You're just going to say, oh, we can't do anything? We'll
23 just have to wait for congress to do something?

24 MR. BOUTROUS: No, Your Honor. I think there
25 are a couple of things. Well, you know, the -- you know,

1 through legislation and its own activities regulating what
2 happens within its borders, there's certain things that can
3 be done. But it is true -- and it is the real thorny
4 aspect of this problem. It's a global issue. It's
5 something that has to be dealt with on a global basis. And
6 that has to be done by policymakers.

7 And for -- I mean, it's very tricky, Your Honor,
8 because as I mentioned, this kind of goes to the whole --
9 what we think is a completely baseless deception argument,
10 because the -- the State of Hawaii has known for a long
11 time about climate change and global warming. And it's
12 looked at these issues.

13 And in our amicus brief response to the State,
14 we walk through, beginning with Charles Keeling at Mauna
15 Loa and his work and the Keeling Curve back in the late
16 '50s, and then news articles, many, many of them, detailing
17 the effects of climate change, and then reports from the
18 government. And I think the last one we cite was from
19 2016, where they were grappling with just this issue.

20 And I think they said, you know, we've got the
21 political -- we need technology. So -- so it has to be
22 technology, science, and a global -- a national and
23 international effort. And it can't be this sort of tort
24 litigation that just does not apply here.

25 And -- and -- so I think that's the real problem

1 here. And the cases that Counsel's relying on, the *MTBE*
2 case that he cited, Second Circuit, well, the Second
3 Circuit addressed it in its *City of New York* case and said
4 this is completely different than that. That was in-state
5 pollution allegations. So it has nothing to do with this.

6 And so it's -- it is an effort to stretch state
7 tort law beyond the bounds of the state's boundaries and
8 beyond the bounds of any -- anything that has ever been
9 done. And that's not to say this is not a really important
10 issue, Your Honor. So there's an impulse to try to come up
11 with some way to do it, but it -- it really has to be the
12 policymakers. And that's what the Second Circuit said.
13 And different countries have different ways of dealing with
14 these issues.

15 And as I said, I did -- I think we did cite, you
16 know, the Second Circuit and other courts on this foreign
17 policy concerns, which are -- emanate from the foreign
18 commerce clause and due process. So we've preserved those
19 issues.

20 But it's -- that's the problem. It's -- it has
21 to be done through policymakers at the national and
22 international level, although states do have some ability
23 to do things within their own borders.

24 THE COURT: Understood. Thank you.

25 MR. BOUTROUS: Thanks.

1 THE COURT: All right. Mr. --

2 MR. SHER: Your Honor, may I -- I'm sorry. May
3 I just offer a very brief comment?

4 THE COURT: Yes, you may.

5 MR. SHER: Thank you, Your Honor.

6 So with respect to the allegations in the City
7 of the New York -- City of New York complaint and what the
8 Second Circuit said about them, Mr. Boutrous quoted both
9 accurately, but what he missed was that the city had
10 disavowed anything other than their strict liability claim
11 as the basis for nuisance relief by the time they got to
12 the Second Circuit.

13 And that's why the Second Circuit was able to
14 find that liability would require -- would regulate
15 interstate emissions and would require the defendants to
16 either assume ongoing liability or cease production
17 altogether.

18 Mr. Boutrous and defendants are notably silent
19 on how tort liability here regulates emissions in any way
20 and what the federal interest is -- is in failures to warn
21 and in dishonest marketing.

22 Damages awards can regulate behavior. But here,
23 the behavior that would be regulated is not emissions,
24 which is arguably the subject of interstate interest by the
25 federal government, but rather, marketing and information

1 about climate change. It's not -- it's not policy. It's
2 not emissions. Regulation of dishonest behavior is not
3 regulation of emissions.

4 And of course this isn't a minor case, but it
5 does use well-established state tort theories to -- to
6 achieve relief for the tort complained of, which is as I
7 described it, what my partner says was great length.

8 Your Honor, may we have an opportunity to
9 respond to the *Bates* case that Mr. Boutrous referred to --

10 THE COURT: Yeah.

11 MR. SHER: -- since that was not part of the --

12 THE COURT: Yes, certainly. Let's --

13 MR. BOUTROUS: And, Your Honor, if I can --

14 THE COURT: -- stick with the same schedule we
15 did on these other supplements.

16 MR. SHER: Okay.

17 MR. BOUTROUS: And, Your Honor, if I could just
18 respond to those few points? First of all --

19 THE COURT: Hold -- hold on. Timeout. Timeout.
20 Just want to make sure Mr. Edling was done, and then I'll
21 be happy to hear from you further.

22 MR. BOUTROUS: Oh, sure. Thank you.

23 MR. SHER: I'm actually Mr. Sher, but that's --

24 MR. EDLING: I have a few comments.

25 MR. SHER: He has a few comments.

1 THE COURT: I'm sorry. I --

2 MR. SHER: No. Your Honor --

3 THE COURT: I apologize.

4 MR. SHER: -- I'm done.

5 That's all right. Thank you.

6 THE COURT: You're concluded? All right. Thank
7 you.

8 Mr. Boutrous, go ahead.

9 MR. BOUTROUS: Thank you, Your Honor. Again,
10 thanks for your patience in letting us be heard all at such
11 length here.

12 So, first of all, the *City of New York* case,
13 Mr. Sher is just wrong about how it play -- I argued that
14 case. The Second Circuit's opinion was after the argument
15 that I -- the portion I read to you, where it said that
16 their claims were the downplaying, the misinformation
17 claim. They didn't give anything up. All they did was
18 make the really unremarkable statement that the production,
19 extraction of oil is a lawful commercial activity.

20 The strict liability point was exactly the same
21 as it is here. This is all about holding these companies
22 strictly liable for global emissions that Mr. Sher and
23 Mr. Edling participated in. We all did. But they're going
24 to hold these companies -- single them out and hold them
25 strictly liable, even though what they were doing was

1 lawful, even though we all participated in it, even though
2 that -- the City of Honolulu is a huge consumer, relatively
3 speaking, of fossil fuels. It's strict liability for these
4 companies.

5 And you can call it misrepresentation. That
6 doesn't get around the fact that it's an -- and it's an
7 effort to punish and deter emissions by going in this
8 roundabout way. That doesn't change it.

9 And I should say one other thing. (Electronic
10 echo.) Oh, I think I'm -- somebody had their --

11 If production and extraction aren't really part
12 of the case, why is it all over the -- why are "emissions"
13 and "production" all over the complaint? It's because we
14 all know -- and it's on the face of the complaint. They
15 talk about emissions over and over again. That's what the
16 case is all about. These damages awards are meant to
17 award, punish, and go into the future in order to affect
18 the consumption of fossil fuels and to regulate speech.

19 And like I said, I think on the merits, it's
20 hard -- it's hard to resist, but since the State of Hawaii
21 came in, it -- there was so much information out there.
22 And there was a debate.

23 Maybe I -- I'll just probably end with my -- a
24 little bit where we started, with the First Amendment,
25 about costs and benefits. And this goes to your question,

1 what do we do? It's a complicated question.

2 We get benefits. Judge Alsup said this in his
3 ruling, and the Second Circuit said it in *City of New York*.
4 We get benefits from oil and gas. But there are -- there
5 are these effects that we need to grapple with. That's a
6 policy issue. It's global. It's national. And -- well,
7 Hawaii can make efforts within its own borders. I think
8 Hawaii has sought to impose a carbon tax within Hawaii
9 several times and rejected it as a policy matter.

10 The answer is not to try to contort and expand
11 tort law in a way that violates the constitution, that
12 flies in the face of federal law, that invades the province
13 of other countries, other states, other municipalities.
14 It's just -- it just doesn't fit. It doesn't work.

15 And so for all the reasons that *AEP*, *Kivalina*,
16 *City of New York*, all these other cases have rejected these
17 claims, even though they're important issues, this Court
18 should reject them as well.

19 THE COURT: All right. Thank you.

20 Well, I've got a lot of homework to do, that's
21 for sure. That means it was a good argument because there
22 was a lot worth listening to and a lot to think about. So
23 I --

24 MR. BOUTROUS: We would --

25 THE COURT: -- look forward to everyone's

1 supplemental briefs. If anyone needs more time, don't
2 worry about it. You know, something comes up and you can't
3 get it done within a week or whatever, that's fine. I'm
4 not going to shut you down because of that. Just let me
5 know what's happening.

6 And, you know, obviously it's not controlling or
7 anything, but I will definitely be curious to read any
8 opinion that is issued by one of the other state court
9 judges that are currently grappling with these issues. So
10 feel free to forward those as well if any of those get
11 decided while I'm still working on this. All right?

12 I want to thank everyone for their arguments and
13 for your patience. And I think all things considered, it
14 went quite smoothly today, considering how many people were
15 involved and how many big issues were involved, and the
16 scope of the motions. I'm pleasantly surprised at how the
17 whole thing went. So thank you very much to all of you.

18 And we are now in recess.

19 (Proceedings adjourned.)

20 -oOo-

C E R T I F I C A T E

STATE OF HAWAII)
CITY AND COUNTY OF HONOLULU)

I, SANDRA M. N. YOU, an Official Court Reporter for the First Circuit Court, State of Hawaii, do hereby certify that the foregoing pages comprise a full, true, and correct transcription of the proceedings had on Friday, August 27, 2021, in connection with the above-entitled cause, to the best of my ability.

Dated this 3rd day of September, 2021.

/s/ Sandra M. N. You
Sandra M. N. You, CSR 406, RPR
Official Court Reporter

Official Court Reporter
First Circuit Court
State of Hawaii

EXHIBIT 2

PERMISSION TO COPY DENIED, HRS 606.13, etc.

ORIGINAL

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

CITY AND COUNTY OF HONOLULU
AND HONOLULU BOARD OF WATER
SUPPLY,

Plaintiffs,

vs.

SUNOCO LP; et al.,

Defendants.

CIVIL NO. 1CCV-20-0000380

TRANSCRIPT OF PROCEEDINGS

had before the HONORABLE JEFFREY P. CRABTREE, Sixth
Division, Judge presiding, on Friday, October 15, 2021;
DEFENDANTS BHP GROUP LIMITED AND BHP GROUP PLC'S MOTION TO
DISMISS FOR LACK OF PERSONAL JURISDICTION,
FILED ON JUNE 2, 2021

APPEARANCES: (See pages 2 and 3)

REPORTED BY:
Sandra M. N. You, CSR 406, RPR
Official Court Reporter
State of Hawaii

Official Court Reporter
First Circuit Court
State of Hawaii

1 APPEARANCES: (Via Videoconference)

2
3 For Plaintiffs City and County of Honolulu and Honolulu
4 Board of Water Supply:

5 ROBERT M. KOHN, ESQ.
6 VICTOR M. SHER, ESQ. (Pro Hac Vice)
7 MATTHEW K. EDLING, ESQ. (Pro Hac Vice)

8
9
10 For Defendants Sunoco LP, Aloha Petroleum, Ltd., and Aloha
11 Petroleum LLC:

12 MICHI MOMOSE, ESQ.

13
14 For Defendants Exxon Mobil Corporation and ExxonMobil Oil
15 Corporation:

16 GLENN T. MELCHINGER, ESQ.
17 YAHONNES S. CLEARY, ESQ. (Pro Hac Vice)

18
19
20 For Defendants Royal Dutch Shell PLC, Shell Oil Company,
21 and Shell Oil Products Company LLC:

22 JOACHIM P. COX, ESQ.

23
24 For Defendants Chevron Corporation and Chevron U.S.A. Inc.:

25 MELVYN M. MIYAGI, ESQ.
ANDREA E. NEUMAN, ESQ. (Pro Hac Vice)
ERICA W. HARRIS, ESQ. (Pro Hac Vice)

26
27 For Defendants BHP Group Limited, BHP Group PLC, BHP Hawaii
28 Inc.:

29 MARGERY S. BRONSTER, ESQ.
30 LANSON K. KUPAU, ESQ.
31 VICTOR L. HOU, ESQ. (Pro Hac Vice)
32 BOAZ S. MORAG, ESQ. (Pro Hac Vice)

For Defendants BP PLC and BP America Inc.:

DAVID J. HOFTIEZER, ESQ.
JOHN D. LOMBARDO, ESQ. (Pro Hac Vice)

For Defendant Marathon Petroleum Corporation:

TED N. PETTIT, ESQ.
STEPHANIE TEECE, ESQ.
SHANNON S. BROOME, ESQ. (Pro Hac Vice)
JENNIFER L. BLOOM, ESQ. (Pro Hac Vice)

For Defendants ConocoPhillips, ConocoPhillips Company,
Phillips 66, Phillips 66 Company:

CRYSTAL K. ROSE, ESQ.
DANIEL R. BRODY, ESQ. (Pro Hac Vice)
STEVEN M. BAUER, ESQ. (Pro Hac Vice)

FRIDAY, OCTOBER 15, 2021

THE COURT: We're on record.

Please call the case.

THE CLERK: Circuit Court of the First Circuit, State of Hawaii, is now in session, the Honorable Jeffrey P. Crabtree presiding.

Calling Case Number 1 on the calendar, Civil Number 1CCV-20-0380, City and County of Honolulu versus Sunoco LP, et al.

Defendants BHP Group Limited and BHP Group PLC's motion to dismiss for lack of personal jurisdiction, filed on June 2nd, 2021.

Counsel, appearances.

THE COURT: I'll do that. Thank you, Judy.

All right. Counsel, I think let's do what we've done in these prior hearings. Instead of everyone giving their own appearance, the attorney who's arguing can introduce whoever they need to in terms of establishing their appearances for the record.

Let's start with movant.

MS. BRONSTER: Actually, good morning, Your Honor, this is Margery Bronster on behalf of BHP Group Limited, BHP Group PLC, and BHP Hawaii Incorporated. Along with me is Lanson Kupau and pro hac vice counsel Victor Hou and Boaz Morag from Cleary Gottlieb. Mr. Hou will be

1 arguing. Also present are Jeff Rosenthal, Declan Higgins
2 of BHP Group Limited. And as I said, Mr. Hou will be
3 presenting this morning.

4 THE COURT: All right. Thank you --

5 MR. HOU: Good morning.

6 THE COURT: -- very much.

7 Good morning.

8 All right. Who else?

9 MR. KOHN: Good morning, Your Honor. For the
10 plaintiffs, Robert Kohn. I'm deputy corporation counsel
11 for the City and County of Honolulu. And with me today are
12 Matthew Edling from Sher Edling, who will be speaking and
13 arguing for the plaintiffs, and Victor Sher, also from Sher
14 Edling, who will be appearing but not speaking.

15 I previously told the Court that Jeff Lau would
16 be appearing for the Board of Water Supply, but I think
17 (indiscernible) that he's on vacation, so he isn't
18 (indiscernible). But we do have Mr. Edling and Mr. Sher,
19 who will be appearing (indiscernible) for the plaintiffs.

20 THE COURT: Okay. We've got a problem, which is
21 your audio. It might sound clear where you are, but, boy,
22 it's not clear where I am. So I'm not sure what kind of a
23 record we're making. Is there any way --

24 MR. KOHN: Oh, (indiscernible) --

25 THE COURT: -- you can tweak things or relocate

PERMISSION TO COPY DENIED, HRS 606.13, etc.

1 or --

2 MR. KOHN: I could --

3 THE COURT: -- whatever?

4 MR. KOHN: -- come closer to the microphone.

5 Should I repeat?

6 THE COURT: That's a little better. Still not
7 good enough, though.

8 MR. KOHN: I don't know how to fix it.

9 MR. EDLING: Your Honor, this is Matt Edling.
10 And I will be doing the arguing. Do you hear me?

11 THE COURT: Yes. You're loud and clear.

12 MR. EDLING: Okay. I'm happy to communicate
13 what Bob Kohn was trying to communicate --

14 THE COURT: Okay.

15 MR. EDLING: -- to Your Honor again, if you
16 would like.

17 THE COURT: Yes, please do.

18 MR. EDLING: Okay.

19 THE COURT: It was really fuzzy.

20 MR. EDLING: Robert Kohn, deputy corporation
21 counsel, for the City and County of Honolulu, is appearing,
22 as am I, Matthew Edling from Sher Edling, and I will be
23 doing the arguing. My partner, Vic Sher, is also appearing
24 but will not be speaking.

25 Mr. Lau from the Board of Water Supply, who we

1 had communicated to the clerk yesterday would be appearing,
2 is unable to appear today.

3 THE COURT: Very well. If it's important, I
4 don't mind talking about pushing the hearing a few days.

5 MR. EDLING: Oh, no. We represent the Board of
6 Water Supply as well, and Mr. Kohn and Mr. Lau are duly
7 represented here today.

8 THE COURT: All right. Fine.

9 How about anyone else? Anyone else going to be
10 arguing today?

11 I don't see anybody with their hand up. Hang
12 on. Let me do my broader view here.

13 MS. MOMOSE: Good morning, Your Honor. I will
14 not be arguing. But this is Michi Momose for Defendants
15 Sunoco LP, Aloha Petroleum, Ltd., and Aloha Petroleum LLC.

16 THE COURT: Thank you.

17 MS. MOMOSE: Thank you.

18 MR. PETTIT: Good morning, Your Honor. Ted
19 Pettit appearing with Stephanie Teece of Case Lombardi &
20 Pettit for Marathon Petroleum Corp. Also appearing but
21 not -- just observing from the Hunton Andrews Kurth law
22 firm, Shannon Broome and Jennifer Bloom. Thank you, Your
23 Honor.

24 THE COURT: Thank you. Good morning.

25 MR. MIYAGI: Good morning, Your Honor. Melvyn

PERMISSION TO COPY DENIED, HRS 606.13, etc.

1 Miyagi appearing for the Chevron defendants. Also
2 appearing, pro hac vice counsel Ms. Andrea Neuman and
3 Ms. Erica Harris. Also listening, but not appearing, are
4 in-house counsel for Chevron, Mr. Andres Romero and
5 Mr. Eric Pardue.

6 THE COURT: Thank you.

7 MR. HOFTIEZER: Good morning, Your Honor. David
8 Hoftiezer appearing on behalf of Defendant BP PLC and BP
9 American Inc. (Indiscernible) pro hac vice counsel John
10 Lombardo from Arnold & Porter.

11 THE COURT: Thank you very much.

12 MR. MELCHINGER: Good morning, Your Honor. It's
13 Glenn Melchinger from Dentons. And with me appearing pro
14 hac vice counsel Yahonnes Cleary of the Paul Weiss law firm
15 will be in essentially listening (indiscernible). Thank
16 you.

17 THE COURT: Thank you.

18 MR. COX: Good morning, Your Honor. Joachim Cox
19 appearing on behalf of Royal Dutch Shell PLC, Shell Oil,
20 and Shell Oil Products Company LLC.

21 THE COURT: Got it. Thank you.

22 Let's see. How about ConocoPhillips?

23 MS. ROSE: Good morning, Your Honor. Crystal
24 Rose on behalf of ConocoPhillips and ConocoPhillips
25 Company. With me today is Dan Brody from Bartlit Beck, pro

PERMISSION TO COPY DENIED, HRS 606.13, etc.

1 hac vice. And I'm also here on behalf of ConocoPhillips
2 and ConocoPhillips Company and Phillips 66 and Phillips 66
3 Company. And with me today is Steven Bauer from -- pro hac
4 vice, from Latham & Watkins. Thank you, Your Honor.

5 THE COURT: Thank you very much.

6 Let's see. I'll double-check my list here. I
7 think that's everybody.

8 Is there anyone else that I missed? If so,
9 please go ahead.

10 I think that's everyone, then.

11 All right. Before we get started, I have one
12 question. One thing that I am not completely clear on --
13 and I'm hoping you folks can address it during your
14 arguments -- is whether or not jurisdiction has to be
15 established based on current contacts and activities -- and
16 by "current," I mean now or, say, within the limitations
17 period -- or can jurisdiction be based solely on past
18 contacts from years or even decades ago?

19 So thank you. That's my primary question, at
20 least one of them.

21 All right. Movant, go ahead.

22 MR. HOU: Thank you, Your Honor. May it please
23 the Court, Victor Hou from Cleary Gottlieb in New York on
24 behalf of the BH (sic) Group entities in this case.

25 There are three BHP entities that are named in

1 this lawsuit, Your Honor: BHP Group PLC, BHP Group
2 Limited, just -- the movant in this case, and BHP Hawaii
3 Inc., which is not a movant in this motion.

4 The plaintiffs have already agreed in their
5 opposition to our motion to dismiss -- to dismiss PLC, so I
6 won't be referring to PLC because my understanding is the
7 plaintiffs have agreed with us that PLC should be dismissed
8 from this case. And we're not going to be focusing on BHP
9 Hawaii since we do not contest Your Honor's jurisdiction
10 over it.

11 So our motion is only focused on the BH Group
12 Limited. I may refer to it as "Limited," just to try to be
13 brief and efficient before Your Honor. Our motion to
14 dismiss is quite straightforward.

15 Limited, which is a holding company based in
16 Australia, with a principal place of business in Melbourne,
17 Australia, has submitted affirmative jurisdictional
18 discovery in this case in the form of affidavit as well as
19 subjected itself to jurisdictional discovery.

20 And as Your Honor now has the record before him,
21 there was produced over 10,000 pages of discovery
22 establishing that there are no jurisdictional facts that
23 have been established by plaintiffs to establish personal
24 jurisdiction over Limited.

25 THE COURT: Mr. Hou -- Mr. Hou, excuse me.

08:54:04 1 MR. HOU: Yeah.

08:54:04 2 THE COURT: I apologize for interrupting, but
08:54:05 3 could you slow down just a little bit, please. We have a
08:54:08 4 recording going here, and of course that can keep up with
08:54:10 5 you, but we also have a court reporter, and it's going
08:54:10 6 pretty rapidly. So if you can just dial it back a little
08:54:17 7 bit. Thank you.

08:54:19 8 MR. HOU: Thank you, Your Honor.

08:54:21 9 Having submitted that affirmative evidence that
08:54:23 10 I've described, Your Honor, and opening ourselves and our
08:54:26 11 client to discovery, the burden is squarely on plaintiffs
08:54:31 12 to take that jurisdictional record and make specific
08:54:35 13 factual based allegations based on that evidence. Because
08:54:41 14 plaintiffs fail to meet their burden, BHP Group Limited
08:54:45 15 should be dismissed based on a lack of personal
08:54:48 16 jurisdiction.

08:54:49 17 Now, of course if Your Honor dismisses all the
08:54:51 18 defendants based on the omnibus motions before Your Honor,
08:54:54 19 then we don't need to reach this issue that we're going to
08:54:57 20 be arguing today. As you know, the BHP entities joined in
08:54:59 21 the omnibus motions to dismiss based on other arguments,
08:55:03 22 and we won't try to repeat those arguments here.

08:55:06 23 So the four things I would like to discuss and
08:55:08 24 cover with Your Honor, reserving time for rebuttal after my
08:55:13 25 adversary Mr. Edling goes forward, are four things, Your

08:55:17 1 Honor.

08:55:17 2 First, I would like to talk very briefly about
08:55:19 3 the standards and the burden of proof. I know at the
08:55:23 4 August 27th hearing, Your Honor focused, I think rightly,
08:55:26 5 on the standard and the burden of proof. And it's
08:55:29 6 different in this context than it was before in August when
08:55:32 7 we were last before Your Honor.

08:55:35 8 Number two, I would like to provide a brief
08:55:38 9 background about what BHP Group Limited is and what it is
08:55:41 10 not and its contact with the forum, with Hawaii.

08:55:46 11 Third, I'd like to discuss how no facts have
08:55:49 12 been established as a result of this jurisdictional factual
08:55:53 13 record that demonstrates specific jurisdiction as to BH
08:55:57 14 Group Limited. None of the facts that are alleged as to BH
08:56:01 15 Group Limited happened within the past two decades.

08:56:05 16 And this goes directly to the heart of Your
08:56:07 17 Honor's point about the timing and when Your Honor should
08:56:10 18 consider what are relevant contacts with respect to
08:56:12 19 establishing personal jurisdiction, whether it's specific
08:56:15 20 or general. And I'm going to try to address that question
08:56:18 21 head-on in my third section of my argument, Your Honor. Of
08:56:21 22 course, would answer any questions throughout.

08:56:24 23 We believe, at bottom, that none of those facts
08:56:27 24 that are alleged as to BH Group Limited happened within the
08:56:31 25 past decade, and it would violate notions of due process to

1 extend personal jurisdiction so far into the past.

2 Finally, in the absence of any jurisdictional
3 facts establishing jurisdiction over Limited, plaintiffs
4 urge Your Honor to disregard corporate form to pierce the
5 corporate veil of BHP Hawaii to reach its corporate
6 parents, or in this case, in fact, of BHP Group Limited to
7 reach its great-great-great-grandparent. There are a
8 number of intermediate holding companies that are not even
9 named in this suit.

10 So let me begin talking very quickly, but
11 slowly, about the proper standard and plaintiffs' burden in
12 this case, Your Honor. At the August hearing, Your Honor
13 was required to assume the truth to the jurisdictional
14 allegations in the plaintiffs' complaint. But that is not
15 the case today. BHP Limited challenged the factual
16 allegations made by the plaintiffs, submitting a
17 declaration by our client, Mr. Jamie Stollery, together
18 with our motion to dismiss.

19 And we opened ourselves up to discovery. And
20 plaintiffs, the City and County, took well advantage of
21 that discovery. That discovery is complete. The BHP Group
22 defendants produced over 10,000 pages, as I mentioned, in
23 response to document requests, 30 or so that Your Honor has
24 before you in the record. We attached them as part of our
25 declaration appended to our motion. Production was to the

1 plaintiffs' satisfaction, to the best of our knowledge. No
2 objections have been made to the quality of our production
3 or its extensiveness.

4 So from our perspective, Your Honor, the facts
5 are not disputed. Rather, the dispute that I have with my
6 colleague on the other side of the aisle is over the legal
7 significance of the documents and given information that
8 was produced in jurisdictional discovery.

9 So let me be clear. Your Honor's only being
10 asked to decide whether based on these undisputed facts
11 or the facts that are in this record and the documents that
12 we produced, whether or not the plaintiffs have carried
13 their burden.

14 The Supreme Court of Hawaii has stated that
15 where the defendant, like we have, adduces sufficient
16 evidence to put in issue the question of jurisdiction over
17 the person, it is the plaintiff that bears the burden of
18 establishing jurisdiction over a foreign defendant, like
19 Limited in this case.

20 The Court has a substantial record before you.
21 Plaintiffs bore the burden to provide evidence from that
22 record to establish jurisdictional facts by a preponderance
23 of the evidence, as we point out in our brief. They failed
24 to do so here.

25 But let me turn to my second area, which is a

1 little bit of background on BHP Group Limited in Hawaii.
2 The BHP Group defendants have laid out much of the
3 background of our limited experience in this state in our
4 motion to dismiss and the accompanying declaration of
5 Mr. Stollery I referred to before. At all times, that
6 record as well as the declaration of Mr. Stollery
7 established uncontrovertibly that BHP Group Limited and BHP
8 Hawaii, its distant affiliate, have maintained all
9 corporate formalities at all times.

10 And just by way of background, Your Honor,
11 starting in around the early '80s, in 1983 to '84, a
12 subsidiary of BHP Group Limited, again not a -- subsidiary
13 that's not a party here, began selling a portion of its
14 Australian crude oil production to the Kapolei refinery in
15 Honolulu. Until that time, the Australian government did
16 not allow foreign export of crude oil, so it started in the
17 early '80s.

18 At the end of the '80s, 1989, BHP Group Limited,
19 then called something else, decided to acquire Pacific
20 Resources Inc., PRI, a Hawaii corporation, a subsidiary of
21 which owned and operated the Kapolei refinery. And BHP
22 Group Limited effected that acquisition through, again,
23 indirect wholly-owned subsidiaries that ultimately merged
24 with PRI.

25 The surviving corporation that took the name

09:00:48 1 PRI, Pacific Resources Inc., continued the existing lines
09:00:52 2 of business of that -- of that company until 1997 or 1998.
09:00:58 3 That includes the propane utility business, a
09:01:02 4 nonoperational manufactured gas plant in Iwilei, as well as
09:01:06 5 a synthetic natural gas plant in Kapolei on Oahu, so -- a
09:01:11 6 refinery I've talked about, a petroleum terminal at Pier 29
09:01:15 7 in Honolulu Harbor that was leased from the State of
09:01:17 8 Hawaii -- and I'll get back to that in a moment -- and
09:01:19 9 retail gas stations.

09:01:21 10 By 1998, PRI, which was renamed to BHP Hawaii,
09:01:27 11 had divested all of its operating assets in the state,
09:01:32 12 ending BHP Hawaii's active business operations in the
09:01:37 13 state. Full stop, 1998. In the 23 or so years since that
09:01:41 14 time, BHP Hawaii has been essentially inactive. It remains
09:01:46 15 in existence here today, Your Honor, to address certain
09:01:49 16 legacy environmental issues with respect to the sites that
09:01:53 17 were once owned or operated by BHP Hawaii or its
09:01:56 18 predecessors within the state of Hawaii.

09:01:59 19 So let me focus on BHP Group, since we all agree
09:02:02 20 that PLC should be out of the case. So with respect to
09:02:06 21 what BHP Group Limited does and what -- its interaction
09:02:10 22 with Hawaii, I want to focus Your Honor's attention on.

09:02:12 23 So to be clear, BHP Group Limited is a holding
09:02:15 24 company. It's not subject to general jurisdiction in the
09:02:19 25 state of Hawaii, and plaintiffs do not assert otherwise.

1 It is incorporated, as I mentioned, in Australia and does
2 business in Melbourne.

3 Though plaintiffs characterize Mr. Stollery's
4 declaration as self-serving, they do not argue that any of
5 the facts that are contained within it are incorrect. And
6 they also do not put forward, from our perspective, any
7 evidence that controverts the facts of Mr. Stollery's
8 deposition -- declaration, his deposition, or any of the
9 documents that were produced in discovery. Mr. Stollery's
10 declaration and the evidence establishes that BHP Group
11 Limited does not have any contacts with the state of Hawaii
12 and is not subject to general jurisdiction.

13 Through the discovery that we produced and the
14 declaration that we produced in support of our motion,
15 makes very clear that Limited is not registered to do
16 business in Hawaii, does not pay taxes in the state, does
17 not have a registered agent for service of process, does
18 not have any employees based in Hawaii, does not have
19 offices, telephones or facsimile listing, to the extent
20 people still use them, or mailing addresses in Hawaii
21 either.

22 It doesn't maintain corporate books or records
23 in Hawaii. Does not maintain any bank accounts in Hawaii.
24 Does not own or operate any personal or real property.
25 Does not have any sales or income in Hawaii. Does not

1 direct fossil-fuel-related print advertising specifically
2 to Hawaii customers and has never owned or operated a
3 refinery or retail gas station in the state, full stop.

4 So from our perspective, this uncontroverted
5 record is clear that BHP Group Limited is not subject to
6 specific jurisdiction and should be dismissed outright,
7 because despite the record that the plaintiffs have before
8 them and that's before Your Honor, they have failed to make
9 any showing of any misleading statement or deceptive
10 marketing directed at Hawaii. There is no basis for
11 specific jurisdiction at all.

12 In the briefing and at the hearing before Your
13 Honor in August earlier this year, in the summer,
14 plaintiffs took pains to characterize their case, as they
15 have described it in their complaint, that it's about, at
16 its core, deceptive marketing. That was throughout the
17 hearing. Your Honor heard it. I don't need to cite back
18 to it.

19 But here, there is absolutely -- even after
20 discovery, which is unlike, again, the standard Your Honor
21 was evaluating back in August, now there is a record, and
22 the plaintiffs had a full opportunity to seek discovery of
23 BHP and to get discovery and to show proof of one
24 statement, one misleading or deceptive marketing statement
25 by BHP Group Limited. And they failed to do so, not a one.

09:05:06 1 THE COURT: Question.

09:05:06 2 MR. HOU: So --

09:05:06 3 THE COURT: Question.

09:05:07 4 MR. HOU: -- again --

09:05:09 5 THE COURT: Question.

09:05:09 6 MR. HOU: Yes, Your Honor?

09:05:10 7 THE COURT: I saw in your brief where you're
09:05:11 8 making this argument, that they have to show a specific
09:05:14 9 statement, but I have a question about that.

09:05:19 10 I mean, they're alleging that your client moved
09:05:25 11 their marketing operations from Australia to Honolulu in
09:05:32 12 order to have a better bridge, I guess, to North America
09:05:37 13 and the Pacific Rim specifically for marketing. So if
09:05:42 14 that's true, then obviously some marketing statements were
09:05:45 15 made at some point.

09:05:47 16 Does it really matter if I don't have the
09:05:49 17 specific, you know, Tuesday advertisement in the local
09:05:53 18 newspaper, if your marketing operations for North America
09:05:57 19 were based here?

09:06:01 20 MR. HOU: So a couple of responses to that
09:06:03 21 question, Your Honor. Number one, the plaintiffs argued in
09:06:06 22 their opposition to the merits motion, the omnibus motion,
09:06:09 23 that if you stop deceptive marketing, you can increase
09:06:12 24 sales of greenhouse gases, petroleum products in Hawaii,
09:06:16 25 and not face liability. So deceptive marketing is at the

1 heart of the claim and is what establishes specific
2 jurisdiction in this case, because there's not general
3 jurisdiction.

4 So from our perspective, once you have a factual
5 record here, even if it were true that BHP, as said in the
6 plaintiffs' briefs and as the discovery showed, there were
7 plans to make BHP Hawaii -- through BHP Hawaii and PRI, not
8 Limited, but through BHP Hawaii and PRI, that there might
9 be a marketing presence in Hawaii, in fact, the factual
10 record, as demonstrated by Mr. Stollery's deposition and
11 his testimony therein and the documents that we've
12 produced, shows that, in fact, most of the marketing
13 activities didn't take place in Hawaii. They took place in
14 Singapore or in Melbourne.

15 But in any event, regardless of whether there
16 was a plan to market or to make any statements and to
17 market petroleum products, it was not done on behalf of
18 Limited, specifically. But the -- but the petroleum line
19 of businesses among the BHP Group, that is headed by a
20 different subsidiary that's not before this Court, that is
21 not a party to this action.

22 So the relation between that marketing effort on
23 behalf of the petroleum business and Limited is too
24 attenuated, even if some indirect benefits had accrued to
25 Limited as a distant parent or a great-great-great-

1 grandparent, as the case may be. Even while planning the
2 marketing, the BHP Group in all respects followed corporate
3 formalities and planned to do it through, as I said, PRI
4 and BHP. So even plans to conduct that marketing cannot be
5 grounds for disregarding the corporate form and finding an
6 alter ego relationship or some other jurisdiction because
7 of the imputed acts of what happened.

8 Merely because, if it were true, that BHP
9 marketed for all of the other BHP entities on behalf of the
10 local parent, this is the type of imputed jurisdiction that
11 the Court rejected in *Daimler*. This is with the -- a Ninth
12 Circuit case that we -- *Ranza* case that we've cited in our
13 papers.

14 So from our perspective, Your Honor, it -- it
15 matters very greatly whether or not a single allegation of
16 a misstatement or deceptive marketing campaign or anything
17 was uttered in the state or directed at the state. And
18 even despite this discovery and despite having access to
19 witnesses at BHP, they have not established a one. And we
20 think that is fatal to their arguments for specific
21 jurisdiction.

22 And the only way they can try to get at BHP
23 Group Limited, which has, again, followed all corporate
24 formalities, is to try to pierce the corporate veil. And
25 from our perspective, Your Honor, they have not done so.

1 So unless Your Honor has further questions about
2 that, I'm happy to sort of continue with -- with my
3 argument.

4 THE COURT: No. Go ahead. I mean, we might
5 have to get into the weeds more on that particular issue,
6 but no need to do it right now. Go ahead.

7 MR. HOU: Thank you, Your Honor.

8 The other prong of the plaintiffs' theory is
9 that the defendants are alleged to have failed to warn.

10 And I know there are cases that we cited, the
11 defendants collectively in the omnibus briefing, including
12 *Sulak*, which, in our view, makes clear that you can't
13 transform a failure to act that was directed nowhere in
14 particular to a purposeful avilment of the laws of a
15 specific state. And we rely on and refer to the briefing
16 that's already before Your Honor.

17 From our perspective, that is -- it's very clear
18 that absent a substantial connection between the alleged
19 failure to warn and the deceptive marketing and the
20 contacts with the forum, there is no personal jurisdiction
21 over BHP Limited in this case and on this record.

22 So indirectly, the plaintiffs, even on the
23 specific jurisdiction point, sort of try to argue that BHP
24 Limited should -- should have some exposure here in this
25 state. But what they do by trying to make Group's

1 activities in Hawaii appear to be in Hawaii or directed at
2 Hawaii, what they do is conflate BHP entities. There are a
3 number of different BHP entities, all obeyed their
4 corporate formalities and had all their separate
5 operations. But in the response, our colleagues on the
6 other side group them all together and claim that the BHP
7 Group collectively sold crude oil to refinery in Hawaii, to
8 take one example.

9 But the record does not demonstrate or establish
10 that it was Limited that sold crude oil in Hawaii.
11 Instead, what the evidence established shows is that it was
12 one of BHP Limited's subsidiaries that sold into Hawaii, as
13 Mr. Stollery's declaration makes clear and as his
14 deposition testimony makes clear.

15 And it was also demonstrated in an agreement
16 that we produced between BHP Petroleum Trading and
17 Marketing Proprietary Limited and Tesoro Refining, which is
18 included in Mr. Morag's declaration, my colleague's
19 declaration. So there's an agreement that shows which
20 party was -- was contracting to -- to sell oil in Hawaii,
21 and it was not BHP Limited. It was another nonparty
22 affiliate.

23 Plaintiffs also refer to internal talking points
24 prepared for Limited's CEO about Hawaii being a marketing
25 headquarters, and Your Honor just referred to it. But,

1 again, by their own admission in the opposition to our
2 motion to dismiss, they admit that Limited didn't do so
3 directly. It did so through PRI and BHP Hawaii. We don't
4 believe that the plaintiffs have refuted that such
5 activities were done for the benefit of the Group's
6 petroleum subsidiaries, which are not, again, parties to
7 this case.

8 So from our perspective, this case is very
9 similar to *Moody versus Charming Shoppes of Delaware*. This
10 is a Northern District of California case that we cited.
11 We're very -- the defendants there in that case, it was a
12 parent company, very much like Limited, that was just a
13 holding company that had direct and indirect subsidiaries
14 that had operations at different retail operations and
15 shops that were selling products under a brand, the Lane
16 Bryant brand in that case. And the court, just as Your
17 Honor should find, the fact that subsidiaries were selling
18 products --

19 THE COURT: Mr. Hou, you're -- it's kind of like
20 a fire hose at this point. And it's not just the court
21 reporter. I mean, I really want to understand what you're
22 saying, but my ears are having a hard time keeping up with
23 it. So just please throttle it back just a little bit.
24 Thank you.

25 MR. HOU: I -- I will. I'm from the Pacific

1 Northwest in Seattle, but I've lived in New York too long.
2 So forgive me, Your Honor.

3 THE COURT: It's okay.

4 MR. HOU: (Indiscernible.) So I was directing
5 Your Honor's attention to the *Moody* case, the Northern
6 District of California case, and I do think that's very
7 much on point.

8 In that case, the District Court found that even
9 though subsidiaries below, indirect subsidiaries below the
10 parent company, were selling products on behalf of the
11 parent, that wasn't enough to establish and assert
12 jurisdiction in that case in California over the parent.

13 And now I want to directly address what Your
14 Honor raised about sort of the issue of timing, when
15 contacts makes sense. As we know, the personal
16 jurisdiction inquiry, whether it's specific jurisdiction,
17 whether it's purposeful availment, or whether or not it
18 arises or relates to conduct at issue, there's also a due
19 process prong. And I want to be very clear about this.
20 There's a due process limitation to the extension of
21 specific jurisdiction over foreign defendants.

22 Here, the last act that's been established that
23 plaintiffs claim supported -- supports the exercise of
24 jurisdiction over Limited occurred in 1998, over 20 years
25 ago. That's when the BHP story, for all intents and

1 purposes, in Hawaii effectively ended.

2 So this is a jurisdictional issue. It's not
3 just a limitations issue, although the statute of
4 limitations does figure into it. And let me try to
5 explain.

6 As we set forth in the cases that we cited in
7 our moving papers, Your Honor, if the only relevant contact
8 or conduct that confers -- that is within the jurisdiction
9 occurred outside of the limitations period, then the Court
10 may not rely upon it to exercise jurisdiction over a
11 foreign defendant.

12 So in this case, Your Honor has a number of
13 torts. These are all torts. They're not environmental
14 liability cases, as Your Honor sees in your capacity every
15 day. These are tort cases. This is trespass. This is
16 nuisance. And the statute of limitations in Hawaii for
17 those types of tort cases is two years.

18 The cases that we cite in our brief outside the
19 jurisdiction -- because I don't believe a Hawaii court has
20 addressed this issue directly, but Your Honor has that
21 opportunity -- include the *Skidmore versus Led Zeppelin*
22 case -- I just wanted to say "Led Zeppelin" -- from the
23 Eastern District of Pennsylvania in 2015, Your Honor. And
24 the analysis in those cases, like *Skidmore* and *Cioffi* and
25 *Wilder* and other cases that we cite, is pretty simple, that

1 contact that occurred in the *Led Zeppelin* case was concerts
2 that occurred, you know, 17 years earlier, are not contacts
3 that a court can consider in exercising jurisdiction. And
4 the cases don't always go into full analysis.

5 But Your Honor knows why that makes sense,
6 because there should be a due process limit. And Your
7 Honor's question focused on that, whether or not it's
8 reasonable to hail in -- would a defendant, a remote
9 defendant, a remote foreign defendant, like Limited,
10 reasonably expect to be hailed into court 23 years later
11 after it indirectly pulled up stakes and decided that its
12 investment in Hawaii would end, and it moved on? There is
13 a due process limit to specific jurisdiction.

14 And the statute of limitations -- actually, the
15 policies behind statute of limitations are about fair
16 warning. It's about promoting justice by preventing
17 surprises through the revival of claims that have been
18 allowed to basically rest dormant until evidence has been
19 lost and memories have faded and witnesses have
20 disappeared.

21 That's the policy rationale for statute of
22 limitations, which dovetails very similarly with due
23 process concerns and the initial inquiry about statute of
24 limitations and jurisdiction, whether or not it's fair to
25 expect, again, as a remote parent at best, 23 years later

1 to be hailed into court. We think not.

2 And we think there is an opportunity for Your
3 Honor to rule on this basis alone, that the quality and the
4 timing of these contacts is so far remote that it would
5 violate notions of due process and fairness to hold Limited
6 responsible in this instance.

7 This isn't a case -- and let me also be clear --
8 that there's no recourse, that there's no defendant here.
9 BHP Hawaii is not on this motion. BHP Hawaii is in the
10 state. It's there to be there to be responsible for
11 environmental liabilities that it incurred. It has no
12 active operations, but it exists. There's a real company
13 here with real assets, with its own capitalization and the
14 like. So BHP -- there's no injustice here. There is a
15 company that's been here and is being -- and doing the
16 responsible thing.

17 So from our perspective, there is a very
18 significant due process issue with looking at contacts that
19 dated over 20 years ago. And Your Honor's right to focus
20 on it.

21 So let me turn to the final argument. So in the
22 absence of general jurisdiction over BHP Group Limited and
23 the absence of any specific jurisdiction over BHP Group
24 Limited because it didn't do anything in Hawaii, it
25 certainly hasn't done anything in the last 20 years, what

1 do the plaintiffs rely on? They rely on a theory of alter
2 ego.

3 So for the record, and as I mentioned before,
4 Your Honor, three different corporations separate BHP Group
5 Limited in Australia from its indirect subsidiary, BHP
6 Hawaii. So BHP Group owns BHP Petroleum International
7 Proprietary Limited, which is an Australia company, and
8 that owns BHP Billiton Petroleum Holdings LLC, which is a
9 Delaware corporation based in Houston, Texas, which owns
10 BHP Billiton Petroleum Holdings U.S.A. Inc., U.S., which is
11 also a Delaware corporation and a Houston-based business.
12 And then you get to BHP Hawaii.

13 So there's a lot of stuff that got skipped,
14 companies that exist in Australia as well as in Texas as
15 well as subject to Delaware law. There was no attempt by
16 plaintiffs to try to say, under Australia law -- because
17 you have to breach the corporate formalities -- under
18 Australia law, that they somehow met that standard. They
19 didn't even try, and they didn't name any of the
20 intermediate parent companies before you got to -- from BHP
21 Hawaii to BHP Group Limited in Australia.

22 And there's case law that -- to the extent Your
23 Honor would like it, we could certainly supplement the
24 record and tell Your Honor that when you have instances
25 like that, gaps of proof in terms of veil piercing, there

1 has to be sequential veil piercing. You have to respect
2 the formalities that were erected and observed over the
3 decades that are at issue in this case.

4 So as a fourth-tier subsidiary of BHP Group
5 Limited, BHP Hawaii is not a part of this motion and is not
6 contesting jurisdiction of this Court.

7 So what are we really talking about? We're
8 talking about the plaintiffs saying throw out a basic tenet
9 of U.S. corporate law that's well-established by U.S.
10 federal precedence or by state precedence and the like.

11 Supreme Court has repeatedly said in *Dole Foods*
12 and *Bestfoods* that we cited in our brief, that it's a basic
13 tenet of U.S. law that a corporation and its shareholders
14 are distinct entities and that corporate separateness
15 insulates a parent from liability created by its
16 subsidiary, notwithstanding the parent's ownership of that
17 subsidiary.

18 In Hawaii, this alter ego piercing theory is
19 disfavored. The Hawaii court said this in *Laupahoehoe*.
20 And it's a case that we cited repeatedly. Courts that
21 apply the alter ego doctrine do so with caution and great
22 reluctance. It requires exceptional circumstances, and
23 there is nothing exceptional here.

24 We agree with our friends on the other side that
25 the correct standard for finding an alter ego basis to

1 pierce the corporate veil relies on two prongs. Very
2 quickly, first, there has to be a unity of interest and
3 ownership that separate personalities of the two entities
4 no longer exists. So unity and ownership. Second, there
5 has to be a failure to disregard those separate corporate
6 identities would result in some fraud or some injustice.
7 So let me take those in reverse order.

8 Plaintiffs make no effort -- it's their burden,
9 but they make no effort in their papers, and Your Honor
10 will see this, to try to establish the second necessary
11 prong, of fraud or injustice. That's a necessary element.
12 And on that basis alone, the alter ego allegation and
13 argument should be rejected.

14 Indeed, as I've said before, BHP Hawaii's
15 continued existence in this state is, in fact, the opposite
16 of fraud and injustice that courts generally consider when
17 they look at alter ego arguments. There's no evidence in
18 this record before Your Honor that BHP Hawaii is somehow
19 inadequately capitalized or that it's been robbed of any
20 assets. In fact, the record shows the opposite. It's been
21 adequately capitalized at all times, and it remains in --
22 in existence to satisfy environmental obligations, which it
23 has dutifully paid.

24 So from our perspective, that's a fact to be
25 commended, not condemned. There's no -- respecting the

1 corporate form here does not sanction a fraud in any way.
2 They haven't alleged it. And it certainly doesn't promote
3 injustice.

4 So let me get to the first prong, the unity of
5 interest. Plaintiffs make a wholly conclusory
6 allegation -- that from our perspective we're past the
7 allegation stage; you have to use and rely on evidence --
8 that they say the record and the law somehow demonstrates,
9 just by saying so, that BHP Hawaii is somehow some mere
10 shell.

11 But we described the real purpose and the real
12 legitimate reasons why BHP remains in existence even though
13 it has no operations. It's satisfying its environmental
14 obligations. We've discussed them.

15 And there's no evidence whatsoever that BHP
16 Hawaii failed to follow corporate formalities. And, in
17 fact, I think the record shows, including copies of board
18 minutes and the corporate records and the financial
19 statements that we produced, each of BHP Hawaii and BHP
20 Limited, each have their own assets, their own cash flows
21 and income. They maintained separate financial accounts.
22 They kept accurate books and records for themselves. They
23 kept board minutes. They maintained fiduciary duties to
24 their respective companies. And they followed their
25 company bylaws and articles of incorporation.

1 And from the *Ranza* case that we cited from the
2 Ninth Circuit, the fact that there's proper documentation,
3 even when the plaintiffs try to argue there's this
4 commingling of funds -- and I'll unpack those as my
5 colleague comes back to argue through them, and I can take
6 Your Honor transaction by transaction why that is, in fact,
7 evidence that corporate formalities were not disregarded;
8 they were followed.

9 So at bottom, this isn't an issue in a case
10 involving a circumstance where something happened after
11 this case was filed, that somehow the parents started
12 stripping away assets from a distant subsidiary. That
13 hasn't happened, and there's no allegation that it is.
14 There is a company in Hawaii, BHP Hawaii, which is here and
15 has been for the past 20 years, doing its corporate duty,
16 tending to environmental remediation.

17 There no injustice for Your Honor to apply
18 longstanding Hawaii law to find that a foreign, distant
19 parent of a Hawaii subsidiary has no -- has no contact with
20 the state, and there's no basis for specific or general
21 jurisdiction, and BHP Limited should be dismissed.

22 And respectfully, if I can reserve time for
23 rebuttal, Your Honor. Thank you.

24 THE COURT: That's fine. I always give the
25 movant the last word.

1 But we will take a brief recess before I hear
2 from the County and Board of Water Supply. Five minutes,
3 everyone, five-minute recess. See you back here. Thank
4 you.

5 We're in --

6 MR. HOU: Thank you --

7 THE COURT: -- recess.

8 MR. HOU: -- Your Honor.

9 (A recess was taken.)

10 THE COURT: We're back on record.

11 All right. Mr. Edling, go ahead.

12 MR. EDLING: Thank you, Your Honor.

13 I'd like to start with the timing issue that you
14 raised. Courts examine defendants' conduct and --
15 contacts, pardon me, with respect to personal jurisdiction
16 at the time of the offense underlying the dispute. The
17 case that we identified in Footnote -- I believe it's 6 in
18 our papers at page 5 of our brief is the *Steel* case, which
19 is a Ninth Circuit case.

20 I will profess we have not found a Hawaii
21 Supreme Court case that speaks to this issue. We did look
22 when we read the defendants' reply papers. But the *Steel*
23 case stands for the proposition that courts will look to
24 the defendants' contacts at the time of the events
25 underlying the dispute.

1 In this particular case, we have alleged a
2 multidecade campaign of deception in which BHP is -- BHP
3 Group Limited and BHP Group Hawaii are participants. And
4 that course of misconduct dates back to the 1980s and the
5 '90s. And as the evidence before Your Honor and as Mr. Hou
6 identified, BHP Group Limited's contacts with the state of
7 Hawaii clearly date back and include a period of time that
8 stretches over 18 years, in the 1980s and 1990s.

9 During that time period, BHP Group Limited,
10 according to the CEO, transported more than 8 million
11 barrels of crude to Hawaii, refined that product in Hawaii,
12 marketed that product in and from Hawaii, sold that product
13 in and from Hawaii. That is the -- those are the products
14 that give rise to claims of tortious conduct, which is all
15 that's required under *Ford*.

16 But to specifically answer Your Honor's
17 question, provided that the jurisdictional contacts
18 dovetail at least in part with the alleged misconduct, that
19 is the appropriate time period to look at.

20 The cases that the defendants cite, which are
21 two District Court of Pennsylvania cases and one Southern
22 District of New York case, are readily distinguishable from
23 the *Steel* case.

24 Starting with the *Skidmore versus Led Zeppelin*
25 case -- 'cause like Mr. Hou, I do think it's fun to be able

09:33:22 1 to raise Led Zeppelin in oral argument -- that was a
09:33:26 2 copyright infringement case, specifically where the only
09:33:29 3 alleged misconduct was within the last three years. That's
09:33:32 4 what the statute of limitations found. Here, in sharp
09:33:37 5 contrast, we have continuing torts and alleged deceptive
09:33:39 6 conduct that predates that.

09:33:42 7 The *Wilder* case, there, the court held that the
09:33:47 8 statements in which the plaintiffs premised both their
09:33:51 9 jurisdictional contacts as well as the alleged misconduct
09:33:55 10 was outside of the statute of limitations. But there, the
09:33:58 11 court had, just as it had in the *Skidmore* case, a parallel
09:34:00 12 12(b)(6) motion, where the defendant had raised statute of
09:34:05 13 limitations as an affirmative defense, and the court found
09:34:07 14 that, in fact, all of the claims were barred under the
09:34:11 15 statute of limitations.

09:34:13 16 Here, in sharp contrast, of course, the
09:34:16 17 defendants have never raised in their Rule 12 motion the
09:34:19 18 statute of limitations, which admittedly is a
09:34:20 19 fact-intensive inquiry. So perhaps that's why they didn't
09:34:22 20 raise it. But as what is before Your Honor, statute of
09:34:27 21 limitations was never raised. It is an affirmative defense
09:34:30 22 in which they bear the burden, which they have not met.

09:34:32 23 And as it relates to this 12(b)(2) issue, is, in
09:34:36 24 fact, irrelevant given that the jurisdictional contacts
09:34:40 25 dovetail with a campaign of deception that we have

1 identified in our pleading.

2 I'd like to move to the second question that
3 Your Honor raised, which was during the argument, which is
4 to say, if, in fact, BHP Group Limited has marketing
5 activities, why does it matter if there are any alleged
6 specific misstatements attributable to BHP Group Limited at
7 any time as it would pertain to a 12(b)(2) motion? And the
8 answer is, it doesn't.

9 If this were a different motion -- for example,
10 a motion for summary judgment, wherein the alleged specific
11 misrepresentation were relevant to a claim or defense -- I
12 would be presenting a very different argument.

13 Without going over too much of what we covered
14 in the 12(b)(2) motion before Your Honor several weeks ago,
15 the standard is not what the defendants keep representing
16 it to be. The *Ford Motor* case does not require a strict
17 causal link between claims and forum contacts. And here,
18 plaintiffs' claims clearly relate to BHP Group's contacts
19 with Hawaii; specifically, the sale and marketing of fossil
20 fuel products. That is all that *Ford* requires.

21 Now, the defendants cited to the *Keeton v.*
22 *Hustler* case to stand for the proposition that we need to
23 introduce evidence of misleading statements of deceptive
24 practices in order to establish jurisdictional contacts.
25 That is incorrect. *Keeton* simply stands for the purpose

1 and point that magazine sales are just one example of how a
2 plaintiff can show a nonrandomized contact with the forum.
3 Has nothing to do with any claims that relate to failure to
4 warn or deceptive trade practices. It is simply an
5 incorrect interpretation of *Keeton* and another attempt by
6 the defendants to conflate merits and personal
7 jurisdiction.

8 What we have introduced before Your Honor, among
9 other things, are admissible evidence of sales in Hawaii of
10 crude, marketing of crude attributable to BHP Group Limited
11 over a period of more than a decade, refinement of that
12 crude, more than 8 million barrels, according to the CEO,
13 sales within the period of deceptive conduct, and, in fact,
14 marketing to and from directed at the state of Hawaii.

15 And these are not just my arguments, Your Honor.
16 I submitted with my declaration at Exhibit 3 the statements
17 prepared for the CEO in anticipation of a press rollout for
18 the merger, wherein he specifically identifies that the
19 goal of that merger is to increase, not decrease, what had
20 been a historic beneficial economic activity for BHP Group
21 Limited.

22 I'd like to now focus on the *Moody* case just for
23 a minute that Mr. Hou raised, wherein he said that that
24 somehow was authoritative here. It is not. The *Moody* case
25 stands for the proposition that collective references in an

1 SEC filing cannot impute personal jurisdiction to a parent,
2 absent some other facts.

3 We have something quite different. We have
4 specific jurisdiction based upon BHP Group Limited
5 purposefully availing itself of Hawaii, that the conduct
6 relates to Hawaii, and, in fact, had a course of conduct
7 that extended more than a decade in Hawaii. This is not
8 simply a reading or a recitation of general references in
9 an SEC filing that could be subject to dispute.

10 Next I'd like to pivot, Your Honor, to the *Sulak*
11 argument just briefly that Mr. Hou raised. And I do agree
12 with him. I don't intend to -- to go over what the parties
13 have submitted. But they did raise it again on reply, Your
14 Honor, which is to say, the defendants advanced in their
15 collective 12(b)(2) at oral argument and again here, that
16 in instances where the plaintiff is alleging a failure to
17 warn and nothing more is alleged other than some omitted
18 act, that personal jurisdiction cannot attach. I would
19 agree with that.

20 But what we have here is actual engagement of
21 substantial commercial activity in the forum. And our
22 claims, including claims for failures to warn in Hawaii,
23 relate to those very commercial activities. It would be a
24 very different argument if we had facts that BHP Group
25 Limited imported and sold widgets unrelated to fossil fuel

1 products into Hawaii, and then we were seeking to hold
2 them -- or establish jurisdiction for that activity.
3 That's not what we have here. What we have here are claims
4 that relate to the very contacts that BHP Group Limited has
5 had with the state of Hawaii.

6 Next, just briefly, Your Honor, I'd like to just
7 back up for a moment. I'm focusing specifically on the
8 specific jurisdiction arguments that Your Honor asked and
9 Mr. Hou raised in argument and on reply. It is not to say
10 that we think the general jurisdiction arguments are not
11 strong, but instead, we don't think Your Honor has to go
12 farther than specific jurisdiction here based upon the very
13 statements of the company.

14 I'd like to spend a moment on the legal standard
15 that Mr. Hou raised. In their papers, the defendants said
16 that the standard was a preponderance of evidence. That
17 does not appear to be the law in Hawaii. The law in Hawaii
18 and legal standard on a 12(b)(2) motion, even when
19 jurisdictional discovery is at issue, is when the court
20 holds an evidentiary hearing, it is a preponderance
21 standard. In the absence of an evidentiary hearing, it is
22 not. It is a prima facie standard.

23 But even if we used or employed a preponderance
24 standard, we have introduced evidence whereby a trier of
25 fact could reasonably conclude that the CEO's statements

1 wherein he himself stated that they intended to employ
2 marketing activities from Hawaii's mainland, that they had
3 sold crude and would continue to increase their productive
4 capacity in Hawaii, that those statements, in and of
5 themselves, are admissible, such that jurisdictional
6 contacts should incept.

7 THE COURT: Okay. Question. Can you comment --

8 MR. EDLING: Yes.

9 THE COURT: Can you comment on Mr. Hou's comment
10 that as far as this marketing coming from Australia to
11 Hawaii, that it was mostly Singapore and -- I forget where
12 else he said, but it's somewhere other than Hawaii, in
13 other words. So in other words, he's trying to dilute the
14 amount of activity here. And I'm trying to figure out what
15 the --

16 MR. EDLING: Well --

17 THE COURT: -- what the evidence shows on that.

18 MR. EDLING: Sure. I would direct you to
19 Exhibit 3 of my declaration, specifically at Bates Number
20 7840, 7841, and 7842.

21 THE COURT: Can you repeat the Bates numbers a
22 little more slowly so I can write them down? Thank you.

23 MR. EDLING: Did I go fire hose there, Your
24 Honor? I apologize.

25 7840, 7841, and 7842.

09:42:39 1 THE COURT: Thank you.

09:42:39 2 MR. EDLING: And I'll read just a few snippets
09:42:42 3 at relevant parts to answer Your Honor's question. These
09:42:45 4 are statements prepared for the CEO, Mr. Loton, at the
09:42:48 5 time. And he specifically says, and in the very first
09:42:52 6 line, that this merger and acquisition would give the state
09:42:56 7 of Hawaii access to a secure and stable source of oil
09:42:59 8 through BHP's oil fields in Australia.

09:43:03 9 Note that this is in anticipation of a merger
09:43:07 10 with PRI, which would eventually become BHP Hawaii. The
09:43:11 11 oil fields in Australia are not PRI's oil fields because
09:43:15 12 that is an entity in Hawaii, but instead, we are speaking
09:43:17 13 about Australia's oil fields. And Mr. Loton is the BHP
09:43:23 14 Group CEO at the time. And specifically, that this merger
09:43:27 15 would allow BHP Group Limited access to markets in the
09:43:30 16 Pacific Islands that they do not -- or did not currently
09:43:34 17 have at the time.

09:43:35 18 Relatedly, Mr. Loton speaks to -- that the crude
09:43:42 19 oil that was then being refined in Hawaii, which was to the
09:43:46 20 tune of greater than 8 million barrels as of 1989 -- right?
09:43:51 21 So it had already been transporting for refinement in
09:43:56 22 Hawaii BHP Group Limited's crude, that that would increase
09:44:04 23 in this proposed merger. Additionally, that it would --
09:44:09 24 "it," being BHP Group Limited -- increase its marketing
09:44:14 25 from what has been centered in Australia to now in Hawaii.

1 And, in fact, he states at 7842 -- or pardon me.
2 It states at 7842, quote: You have said that the marketing
3 function will be concentrated in Hawaii.

4 That is to the BHP Group Limited CEO.

5 Will the marketing office relocate to Hawaii,
6 enlarging PRI's staff?

7 He states: Yes, the marketing function and
8 responsibilities for marketing our crude oil -- that is to
9 say, BHP Group Limited's crude oil -- and liquefied
10 petroleum gas will shift to Hawaii.

11 Now, at this stage, Your Honor, let's presume
12 that we went to trial and someone testified that what
13 Mr. Loton meant was not what he said or not what the
14 statements said, and we're wrong. All right? We'll lose
15 the trial.

16 But right now, the standard is either a prima
17 facie case, in which case, we've clearly met that, or the
18 preponderance at trial, in which case I would submit, Your
19 Honor, that a reasonable trier of fact would conclude that
20 it is more likely that one of the largest energy companies
21 in the world at that time was not going to simply have the
22 marketing staff of an entity that it was said to acquire to
23 market all of its crude across the world, as Mr. Hou and
24 the defendants would have you believe, but instead, that
25 BHP Group Limited would seek to employ its marketing

activities from Hawaii in an economically rational way.

I'd like to just spend just a moment or two on the defendants' argument that they put in their reply papers, and Mr. Hou spent a few minutes on, that I'll summarize as the following: That because the claims make evidence of misleading statements or deceptive practices by BHP at issue, that they are necessary to establish personal jurisdiction. That's what I understood him to be arguing, that based upon our allegations of tortious conduct stemming from misleading and deceptive conduct, that you must have evidence of that misleading and deceptive conduct necessary to establish personal jurisdiction.

That is simply wrong. All right? The *Ford* case makes clear that that is wrong. What instead you must have is contact with the forum; right? Here, we have presented evidence that BHP Group marketed fossil fuel products in Hawaii, BHP Group employed marketing personnel in Hawaii who were located in Hawaii, marketed millions of barrels of crude in Hawaii, and sold millions of barrels of crude in Hawaii.

There is no case law anywhere that supports the argument that BHP raises here, that a failure to warn cannot support jurisdiction over a defendant that has systematically and purposefully availed itself of the privileges of doing business in the forum.

1 Just one more point that the defendants raise on
2 reply, Your Honor. They state that plaintiffs acknowledge
3 it is not enough that a defendant sold oil in Hawaii.
4 Well, that may not be enough to prevail at trial as to the
5 underlying claims. But it is certainly enough under the
6 *Ford* case to establish jurisdiction, because the *Ford* case
7 rejected the strict causal relationship between the
8 defendant's forum conduct -- pardon me -- a defendant's
9 forum contacts in a plaintiff's claims.

10 It is an improper effort to inject a causal
11 requirement into the personal jurisdiction test. The
12 Supreme Court called out *Ford* for doing exactly that and
13 rejected that effort. In *Ford*, none of the tortious
14 conduct took place in the forum states, yet the Supreme
15 Court found that personal jurisdiction was proper. Here,
16 we do have tortious conduct in Hawaii.

17 And just to make clear if I hadn't already, Your
18 Honor, this -- these contacts, this is especially true when
19 you have a scenario here where the failure to warn claims
20 are premised on the same contacts with the forum; that is
21 to say, the marketing activity related to the fossil fuels,
22 which is why BHP, according to its own CEO, was, in fact,
23 engaging in activity in Hawaii.

24 Now, the three tests for specific jurisdiction,
25 Your Honor, purposeful availment, relating to, and

1 reasonably, are all satisfied here.

2 For purposeful availment, BHP Group Limited
3 purposefully availed itself of the benefits of Hawaii,
4 including selling crude oil and refining it in Hawaii.

5 Our claims relate to BHP Group's contacts with
6 Hawaii. BHP Group sold fuel in Hawaii and marketed fuel in
7 Hawaii.

8 The last element, reasonableness, is not
9 contested in the defendants' papers, so I won't spend more
10 than a few moments, just to say the exercise of personal
11 jurisdiction over a multibillion-dollar company that, in
12 fact, does business in Hawaii or has done business in
13 Hawaii cannot, in fact, be unreasonable, as the defendants
14 do not contest.

15 To wrap up, Your Honor, you asked two questions.
16 One is on the timeliness, and we gave you a Ninth Circuit
17 authority and distinguished the two authorities that the
18 defendants raised.

19 But the fundamental premise that Mr. Hou was
20 raising, is that somehow it would sort of violate the due
21 process of the defendant if they were hailed into court for
22 personal jurisdictional contacts that may have existed at
23 the time of the tortious conduct but no longer do, I'd like
24 you to consider the opposite, which would be perhaps the
25 following:

1 BHP Group acquired a company ten years ago in
2 Hawaii. And, in fact, during that period, more than ten
3 years ago, committed fraud, and it was concealed and
4 unknown to the company that had done business with BHP
5 Group as of that time, and then upon realizing it, seeks to
6 bring suit. And BHP Group says, well, no, no, no, the
7 personal jurisdictional contacts that we had ten years ago,
8 we no longer have them.

9 It would sort of defy all logical sense that a
10 company that had been defrauded based upon BHP Group's
11 contacts at the time of the fraud, upon realizing that that
12 fraud has occurred, cannot maintain an action because of a
13 lack of personal jurisdiction. Now, that doesn't make any
14 sense. Now, BHP Group could argue statute of limitations,
15 but they did not do that here.

16 So the concept and construct that Mr. Hou is
17 advancing doesn't make any logical sense, and there's no
18 legal authority for it in Hawaii, and the Ninth Circuit has
19 found just the opposite.

20 And in terms of the final element that Your
21 Honor asked about in your question and Mr. Hou spent some
22 time on, this just appears to be a continued argument that
23 *Ford* has injected a causal requirement, when, in fact, *Ford*
24 says just the opposite.

25 We have established personal jurisdiction over

1 BHP Group Limited. They do not contest it over BHP Group
2 Hawaii. We have submitted admissible evidence of specific
3 jurisdiction over BHP Group Limited.

4 To the extent that Your Honor has questions
5 about the general jurisdiction and alter ego, I'm happy to
6 go through them. My take, Your Honor, is that is a very,
7 very factual-intense exercise. We have each, both BHP
8 Group Limited and Mr. Hou in his papers and we in ours,
9 have endeavored to submit evidence establishing each. But
10 as I began with, Your Honor, I don't think you have to go
11 past specific jurisdiction here to establish personal
12 jurisdiction and deny BHP Group Limited's motion.

13 Happy to take any questions.

14 THE COURT: I don't have any questions. Thank
15 you very much. I understand your argument.

16 All right. Mr. Hou, you get the last word.
17 Again, please be mindful of your speed, and please not --
18 please don't reargue things you've already argued. This is
19 just for sort of new information based on Mr. Edling's
20 argument.

21 MR. HOU: Thank you, Your Honor. I will try to
22 briefly address the arguments raised by Mr. Edling.

23 First I want to address the standard on timing
24 as to when Your Honor should consider the relevant conduct
25 for considering jurisdictional facts.

1 Mr. Edling cited the *Steel* case, a Ninth Circuit
2 case, and he said that that case undermined our statute of
3 limitations argument. So the *Steel* case, Ninth Circuit
4 case, we agree on that. If Your Honor were to look at that
5 and to search that opinion for statute of limitations, you
6 wouldn't find it, because it is not a statute of
7 limitations case, unlike the cases that we cited.

8 There is no discussion about the application of
9 the statute of limitations and its relatedness to the point
10 I was making about reasonableness and whether or not, as a
11 due process notion, whether it would be fair to hail in a
12 defendant for conduct that occurred allegedly -- again,
13 they haven't established it -- allegedly 20 years ago. So
14 the *Steel* case is inapposite.

15 We acknowledge readily, Your Honor, that Your
16 Honor has this opportunity to rule for the first time, of
17 course, in Hawaii on this issue.

18 But, of course, we establish through our papers
19 and through the evidence that, in fact, even the contacts
20 that Mr. Edling spent a lot of time on talking about,
21 marketing, sales directed by Limited, was not Limited at
22 all.

23 What I described, and what Mr. Edling cited to,
24 is evidence that other BHP subsidiaries and affiliates sold
25 petroleum or provided the petroleum or marketed the

1 petroleum. It was never BHP Group Limited, which is the
2 only defendant that's making this motion.

3 So to Mr. Edling's hypothetical at the end about
4 what happens if this fraud occurred and it was hidden,
5 that's counterfactual. There's no allegation of any
6 specific fraud, and obviously there'd be a toll on the
7 statute of limitations. And we would certainly be prepared
8 to move for summary judgment on statute of limitations, but
9 we don't think we need to at this stage, but we could.

10 But more importantly, the facts here are and
11 that have been established, is that no contact, no conduct
12 by Limited has occurred within the past 20 years. It would
13 be unfair. It would offend notions of due process for us
14 to extend it that far.

15 So let me go to the evidence that Mr. Edling
16 brought forward about why Limited directed conduct and
17 participated directly in the conduct that he described, the
18 sales, the marketing, the refining, and the -- the sales
19 and marketing of -- of gas in Hawaii.

20 BHP Hawaii is the defendant in this case. They
21 participated in this activity. We are not letting them go.
22 We're not suggesting to Your Honor that there's no recourse
23 if, in fact, there's any wrongdoing by a Hawaii company
24 that acted in the way that Mr. Edling described. Then it's
25 all with respect to BHP Hawaii, which still exists till

09:56:51 1 this day, not so with Limited.

09:56:54 2 Even with respect to the talking points that
09:56:57 3 Mr. Edling quoted from, those talking points, which we
09:57:01 4 produced in jurisdictional discovery, make clear that we're
09:57:04 5 not talking about BHP Group Limited activity. And I'm just
09:57:08 6 going to give Your Honor a couple of examples. I'll be as
09:57:11 7 slow as I can.

09:57:14 8 We produced as evidence the talking points at
09:57:20 9 7840, a statement -- and I'll just quote it. The statement
09:57:27 10 says: BHP isn't a company which just acquires or sells
09:57:31 11 property. We're in the business of doing. Our immediate
09:57:34 12 focus, therefore, is on integrating PRI -- that's the
09:57:38 13 Hawaii entity that later became BHP Hawaii -- into BHP
09:57:43 14 Petroleum, capital P, which is a separate business --
09:57:48 15 integrating PRI into BHP Petroleum's worldwide activities.

09:57:52 16 On the next page of the same document, 7841, the
09:57:58 17 quote is: The petroleum division has been particularly
09:58:01 18 active in the past few years.

09:58:04 19 And it describes, again, what the petroleum
09:58:07 20 companies are doing in this case, not BHP Limited.

09:58:12 21 On page 7842 of the discovery, a question in
09:58:16 22 this mock Q and A says: How do you plan to integrate the
09:58:21 23 operations of BHP and PRI?

09:58:24 24 And the answer listed in this evidence says:
09:58:27 25 PRI will become the downstream business unit for the BHP

1 Petroleum and will assume the marketing of crudes and the
2 like.

3 It is BHP Petroleum, which, again, is not a
4 party to this case, and it's not BHP Limited.

5 Finally, just to give one more example -- there
6 are others -- on the same page, at 7842, quote: PRI will
7 be operated as a separate business unit of BHP's petroleum
8 division in the same way as, say, our Americas operation.

9 It is crystal clear from the evidence, the
10 evidence, not mushing everything together, calling
11 everything BHP Group, but BHP Group Limited is not the
12 party that did any of the things that Mr. Edling says. It
13 is other subsidiaries which are not named.

14 And the plaintiffs had full-on discovery and the
15 opportunity to prove it up and prove it differently to say,
16 well, no, BHP Limited did something different, and they did
17 all these things. They did not.

18 And the only way they can get at that conduct,
19 respectfully, is through the alter ego theory, which,
20 again, I did not hear much about in Mr. Edling's response,
21 so I'm not going to address it, except for it's very clear
22 that the entity that sold crude prior to BHP Hawaii being
23 acquired between 1983 and 1998, that was a different BHP
24 Group entity.

25 That was the contract that I described before,

1 Your Honor. That was the BHP Petroleum Trading and
2 Marketing Proprietary Limited company, which was the
3 counter-party selling gas to -- to -- oil, forgive me, to
4 Tesoro, not BHP Limited, Your Honor.

5 So ultimately, all they have is the alter ego
6 theory, which they appear to have abandoned.

7 We've described the cases very clearly, that in
8 cases that have far more evidence of control and unity of
9 interest, that even in those cases, like *Doe versus Unocal*
10 or the *Ranza* case, the *Ranza versus Nike* case, which I
11 think is really instructive, even in those cases where the
12 court said, yes, the parent is heavily involved in the
13 subsidiary's operations, it exercised control over its
14 budget, it had approval authority over purchases, it
15 established HR policies, it operated information tracking
16 systems, it ensured that the brand is marketed -- this is
17 the case about Nike -- ensured that the Nike brand was
18 marketed consistently, it made hiring decisions, none of
19 that was sufficient in the *Ranza* court's opinion on the
20 Ninth Circuit to qualify for -- for piercing the corporate
21 veil.

22 So, again, from our perspective, there is no
23 direct conduct by BHP Limited in Hawaii, much less during
24 the past two years, much less the past ten years that are
25 relevant for jurisdiction.

1 Mr. Edling also raised in his argument -- he
2 took issue with our standard, and he said, you know, in
3 Hawaii, it's not -- it's not the preponderance of the
4 evidence as we alleged. We ask Your Honor to look at the
5 cases that we cited, but also to look -- bless you, Your
6 Honor.

7 THE COURT: Thank you.

8 MR. HOU: -- at the *Maeda* case, which is 390
9 F.Supp. 3d at 1231, the District of Hawaii, of 2019, as
10 well as the *Marignoli* case, at 472 P.3d 1123. That's the
11 Hawaii Court of Appeals from 2020. Those cases
12 established, just as we said, that whether you're talking
13 about jurisdictional discovery or an evidentiary hearing
14 standard, the standard that applies is the preponderance of
15 the evidence.

16 And in this case, there is no dispute that we
17 produced discovery that was sufficient. There were no
18 complaints about it. And on that record, they failed to
19 allege a single piece of evidence of any deceptive
20 marketing, which is essential to the case.

21 So, Your Honor, I think at bottom, what we have
22 is a company, BHP Hawaii, which remains in the case. There
23 is no injustice about which the -- the hypothetical that
24 Mr. Edling brought before Your Honor is somehow in play.
25 This isn't a case where anyone is getting off.

1 What we're talking about here is respecting
2 corporate formality year after year, resolution after
3 resolution, business decision by business decision. Every
4 chain in the link of corporate companies that make up the
5 BHP Group followed the law. They followed Hawaii law.
6 They followed Australia law. They followed Delaware law.
7 And followed and did things that corporations do every day.

8 And there's no injustice to enforce the law
9 that's recognized in Hawaii and the concept and the basic
10 tenet of limited corporate liability. There is a defendant
11 in this case that remains. But justice requires and the
12 law requires Your Honor to dismiss Limited from this case.

13 Thank you, Your Honor.

14 THE COURT: Okay. Brief question. I understand
15 your arguments about the different entities. And I will
16 have to go draw myself a diagram with boxes and arrows and
17 so forth to figure all that out, and I will do that, but
18 I -- I will do that so I will make sure I understand the
19 particulars. But I understand the concept clearly.

20 However, I -- when you started your argument and
21 you gave me sort of the background of BHP Group, I
22 understood -- and push back if I got this wrong. But I
23 believe I understood that you said before 1998, BHP Group
24 was involved in Hawaii and did, in essence, purposefully
25 avail itself. You know, you go on to argue that doesn't

1 matter; it's too stale. But I want to just try focusing on
2 this very limited issue.

3 Can we agree that before 1998, BHP Group itself,
4 not one of its subsidiaries or divisions or what have you,
5 was purposefully doing business in Hawaii?

6 MR. HOU: The short answer is no, Your Honor.
7 No BHP Group Limited had any involvement in the direct sale
8 of petroleum to Hawaii, full stop. And if I was unclear
9 with Your Honor, let me be clear now.

10 BHP Limited -- Group Limited did not sell
11 petroleum directly to Hawaii, and that's why I mentioned I
12 think on several occasions the fact that Mr. Stollery
13 stated that in his sworn declaration, he testified to that
14 fact in his deposition.

15 And, importantly, the agreement between BHP
16 Petroleum Trading and Marketing Proprietary Limited, that's
17 the BHP entity that entered into an agreement with Tesoro
18 Refining, Marketing, and Supply Company. Literally, the
19 name tells you everything that we're talking about. That
20 was the entity, the BHP entity, that entered into that
21 arrangement for marketing, refining, and supply, not BHP
22 Limit -- Group Limited.

23 So I apologize if I was not crystal clear on
24 that, Your Honor. It's absolutely essential.

25 So the only way that you get to BHP Group

1 Limited is if you mush them all together and treat them as
2 if they were just one thing and one person saying something
3 about describing the Group's general activities, while even
4 saying in his statement that we're respecting the corporate
5 separateness and the formalities, reinforcing again what
6 they've done in the Americas, I think makes very clear that
7 there is no allegation and there's no evidence, more
8 importantly, on the standards that Your Honor has to
9 consider now, that BHP Group Limited had anything to do
10 with the direct sales of petroleum into Hawaii, whether it
11 was before the BHP Hawaii acquisition or -- or before.

12 THE COURT: All right. Let's put direct sales
13 on the side.

14 I think you used the phrase, by 1998, BHP Group
15 had divested itself of all assets in Hawaii. What was that
16 a reference to?

17 MR. HOU: So, again, through the intermediate
18 holding companies, there was a decision made ultimately by
19 the parent, because shareholders make decisions for the
20 companies that they are shareholders for, that they were
21 going to exit the Hawaii business.

22 The -- it didn't work out the way that they
23 hoped, made a business decision, which, again, a parent
24 making a business decision alongside and with its
25 affiliates does not mean you get to pierce the corporate

PERMISSION TO COPY DENIED, HRS 606.13, etc.

1 veil; otherwise, there would be no such thing as corporate
2 formality, and there'd be no such thing as limited
3 liability.

4 So, yes, they made the business decision, which,
5 again, the case law supports is not requiring any piercing
6 of the veil, because those are normal decisions that parent
7 companies do with subsidiaries every day.

8 BHP Hawaii sold its operating subsidiaries in
9 Hawaii. It remains, again, intact in order to deal with
10 environmental obligations that I mentioned at Iwilei and --
11 and in Honolulu Harbor. And that's its only purpose for
12 its existence now.

13 THE COURT: Okay. Understood.

14 All right. Mr. Edling, I'm going to give you a
15 chance to comment, and then I'm going to circle back and
16 give Mr. Hou the last word. But on this issue of what
17 happened --

18 MR. EDLING: Thank you.

19 THE COURT: -- on this issue of, you know, BHP
20 Group's direct --

21 MR. EDLING: Yes, could I --

22 THE COURT: -- direct -- direct involvement
23 before 1998.

24 MR. EDLING: So Mr. Stollery, the declarant that
25 submitted an affidavit with their motion to dismiss, at

1 paragraph 12 of his declaration, states: In 1998, BHP
2 Group Limited decided to acquire Pacific Resources Inc.

3 So what Mr. Hou just said is belied by the very
4 declaration that was submitted in support of their motion
5 at least as it stands for the proposition that BHP Group
6 Limited had no contacts with the state. That's just one
7 example.

8 Further, the annual reports that were submitted,
9 at least at Exhibit 4 of my declaration, also speak to the
10 fact that it is BHP finalizing its acquisition of Pacific
11 Resources Inc., which is consistent with Mr. Stollery's
12 affidavit.

13 Further, Mr. Stollery, when I deposed him,
14 regularly referred to BHP Group in the same way that he
15 would refer to BHP Group and all of its subsidiaries,
16 conflating in his own testimony who and what was the
17 deciding entity. And I raise that to suggest to you, Your
18 Honor, that clearly, there must be an issue of material
19 fact.

20 And as it would relate to the legal standard,
21 again, whether it's preponderance or prima facie, when the
22 very declarant is unclear when I examined him as to who or
23 what the appropriate entity is and his declaration itself
24 talks about BHP Group Limited, not BHP Petroleum, as
25 Mr. Hou just argued, there is admissible evidence in the

1 record subject to dispute, at worst, and we would think
2 it's in our favor, at best.

3 With respect to the Tesoro agreement that
4 Mr. Hou just mentioned, that is a 1997 agreement. The
5 merger was in 1989, and the sales of crude that the CEO
6 identified and the annual reports referred to occurred
7 between 1983 and 1989.

8 Now, just one other fact, just as to the legal
9 standard, just because Mr. Hou raised it, and I just want
10 to make sure that I was clear with Your Honor.

11 The *Shaw* case is the Hawaii Supreme Court case.
12 There are some Intermediate Court of Appeals decisions, at
13 least one of which I believe is unpublished and in dicta
14 raised the preponderance. And I wasn't -- I just want to
15 be clear. There's a Hawaii Supreme Court case. It says
16 that, in fact, prima facie is the standard. But I think we
17 prevail even if it is preponderance.

18 And given, for example, that the declarant that
19 BHP Group Limited is relying upon to support its argument
20 that there were no jurisdictional contacts in the state
21 doesn't, in fact, state that in his declaration
22 unequivocally, and in testimony, doesn't state that
23 unequivocally, but instead says, at least at various
24 points -- and I have them in the record. I believe they're
25 Exhibit 1 to my declaration, and you can see it for

10:11:53 1 yourself. There's some confusion as to that issue.

10:11:57 2 And Exhibit 3, which was the then-CEO of BHP
10:11:59 3 Group Limited's statements, while he does at various points
10:12:04 4 refer to BHP Petroleum, he also refers to BHP's activities,
10:12:08 5 which are far greater than BHP Petroleum, talking about the
10:12:13 6 energy company writ large.

10:12:17 7 Last, Mr. Hou's suggestion that, you know, this
10:12:22 8 isn't going to be an empty chair, and, therefore, you know,
10:12:24 9 any due process concerns -- and, you know, the City and
10:12:31 10 County will not be left without anyone to point to, that's
10:12:34 11 a -- that's a nice statement, Your Honor, but not relevant
10:12:37 12 to this argument.

10:12:38 13 The issue is, were there any jurisdictional
10:12:44 14 contacts during the period in which we argue there was
10:12:47 15 deceptive conduct? And the record, at worst, is that there
10:12:51 16 is admissible evidence for a trier of fact to conclude that
10:12:56 17 there was. And, at best, which is a prima facie standard,
10:12:59 18 there's overwhelming evidence of their contacts based upon
10:13:02 19 the statements of the CEO, their own annual reports, and
10:13:07 20 their declarant in support.

10:13:09 21 THE COURT: Thank you.

10:13:11 22 Mr. Hou, if you could wrap up briefly. Thank
10:13:14 23 you.

10:13:15 24 MR. HOU: I'll be very brief, Your Honor. Thank
10:13:19 25 you.

1 Though I did want to direct Your Honor's
2 attention back to the declaration of Mr. Stollery, which is
3 something that Mr. Edling cited in saying that somehow BHP
4 Group Limited had directed specifically on its own the
5 activities in Hawaii.

6 And to be very clear and to read into the record
7 what is actually said in the declaration at paragraph 12,
8 just one example, there is -- in paragraph 12: In 1989,
9 BHP Group Limited, then called The Broken Hill Proprietary
10 Company Limited, decided to acquire Pacific Resources Inc.

11 THE COURT: Slow down.

12 MR. HOU: Then engaged --

13 THE COURT: Slow down. Everyone speeds up when
14 they read. It's not just you. Go ahead.

15 MR. HOU: Then engaged, through its
16 subsidiaries, in manufacturing, importing, distributing,
17 and retailing of energy products, including gas and
18 petroleum products. To effect that acquisition -- the
19 merger we're talking about -- on May 11th, 1989, RTV Corp.,
20 an indirect wholly-owned subsidiary of BHP Group Limited,
21 merged with Pacific Resources Inc.

22 That's the -- the surviving entity which later
23 became an indirect subsidiary of BHP Group Limited.

24 So Mr. Stollery here and elsewhere, as well as
25 the evidence indicates, Your Honor, very clearly said in --

1 said in his declaration that BHP Group Limited was not the
2 party that was doing any of the activity. It was always
3 operating through its subsidiaries.

4 Mr. Edling raised the agreement that I mentioned
5 from 1997. My understanding is that that's the agreement
6 that we had. We produced it. Our understanding, it's the
7 same entity, the same BHP Petroleum Trading Proprietary
8 company that was doing it before, in 1989, before the
9 transaction. And there's no evidence otherwise.

10 So that was just one more example to show that
11 when -- even when they were owning indirectly through,
12 again, three or four levels of corporate companies, of
13 which -- again, there's no attempt to pierce the veils of
14 Australian companies, much less under Australian law, or
15 much less through the direct parents of BHP Hawaii, which
16 are Delaware companies.

17 And Your Honor indicated that you might diagram
18 it out yourself. With the Court's permission, I would be
19 happy to prepare a very brief one-page chart. I'd be happy
20 to let Mr. Edling see it before, if that would help Your
21 Honor so you wouldn't have to piece it together based on
22 my -- my description of it in the oral argument.

23 But if we -- we had appeared in person in
24 Hawaii, I would have brought my props with me, and I would
25 have shown you that corporate structure, because I think

1 it's absolutely critical, that there are layers in between.
2 No formalities have been -- have been disregarded. There's
3 no allegation or proof that that happened.

4 THE COURT: All right. Thank you. And, sure,
5 I'd be glad to take a diagram. And please do run it past
6 Mr. Edling before you send it so that -- I don't want to
7 get into multipage dueling diagrams, so I'm hoping you
8 folks can agree on it.

9 MR. HOU: It would be one page. I was very --
10 I'll be -- will be brief on that, Your Honor.

11 THE COURT: Okay. All right. Thank you very
12 much, everyone. It was very helpful argument to help get
13 me focused on the key issues. I appreciate it. Everyone
14 did a very good job. It was very helpful.

15 MR. EDLING: Thank you, Your Honor.

16 MR. HOU: Thank you, Your Honor.

17 THE COURT: We're in recess.

18 UNIDENTIFIABLE SPEAKER: Take care.

19 THE COURT: Thank you. You too.

20 Everyone take care.

21 We're in recess.

22 (Proceedings adjourned.)

23 -oOo-

C E R T I F I C A T E

STATE OF HAWAII)
CITY AND COUNTY OF HONOLULU)

I, SANDRA M. N. YOU, an Official Court Reporter for the First Circuit Court, State of Hawaii, do hereby certify that the foregoing pages comprise a full, true, and correct transcription of the proceedings had on Friday, October 15, 2021, in connection with the above-entitled cause, to the best of my ability.

Dated this 20th day of October, 2021.

/s/ Sandra M. N. You
Sandra M. N. You, CSR 406, RPR
Official Court Reporter

Official Court Reporter
First Circuit Court
State of Hawaii