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Case No. N20C-09-097 MMJ CCLD

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE, *ex rel.* KATHLEEN JENNINGS, Attorney General of the State of Delaware,

Plaintiff,

v.

BP AMERICA INC., BP P.L.C., CHEVRON CORPORATION, CHEVRON U.S.A. INC., CONOCOPHILLIPS, CONOCOPHILLIPS COMPANY, PHILLIPS 66, PHILLIPS 66 COMPANY, EXXON MOBIL CORPORATION, EXXONMOBIL OIL CORPORATION, XTO ENERGY INC., HESS CORPORATION, MARATHON OIL CORPORATION, MARATHON OIL COMPANY, MARATHON PETROLEUM CORPORATION, MARATHON PETROLEUM COMPANY LP, SPEEDWAY LLC, MURPHY OIL CORPORATION, MURPHY USA INC., ROYAL DUTCH SHELL PLC, SHELL OIL COMPANY, CITGO PETROLEUM CORPORATION, TOTAL S.A., TOTAL SPECIALTIES USA INC., OCCIDENTAL PETROLEUM CORPORATION, DEVON ENERGY CORPORATION, APACHE CORPORATION, CNX RESOURCES CORPORATION, CONSOL ENERGY INC., OVINTIV,

C.A. No. N20C-09-097-MMJ CCLD

INC., and AMERICAN PETROLEUM INSTITUTE,

Defendants.

REPLY BRIEF IN SUPPORT OF DEFENDANTS CHEVRON CORPORATION AND CHEVRON U.S.A. INC.'S ANTI-SLAPP SPECIAL MOTION TO DISMISS

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I. INTRODUCTION

Plaintiff does not dispute that it seeks to hold Chevron liable based on its purported speech. Nor does it dispute that this speech touches issues of public concern that fall within the plain ambit of California's anti-SLAPP law. *See* Opp. at 33 (acknowledging that "the Complaint references Chevron's efforts to stop climate regulation"). Instead, Plaintiff contends that California's anti-SLAPP law—which by its own terms "shall be construed broadly," Cal. Code Civ. Proc. § 425.16(a)—presents no hurdle to this action for two reasons. On both counts, it is wrong.

First, Plaintiff argues that California's anti-SLAPP law does not apply to this case. *See* Opp. at 13–28. Despite acknowledging at least half a dozen cases holding that the state of the speaker's domicile typically has the greatest interest in applying its anti-SLAPP law, Plaintiff insists that *other* considerations weigh in favor of applying Delaware's anti-SLAPP law here. But Plaintiff fails to explain why those considerations—including the fact that "Chevron U.S.A., Inc. is registered to do business in Delaware and maintains a registered agent in Wilmington," Opp. at 19, and Delaware's supposed "'paramount' interest in 'applying its law and policies to those who seek relief in its courts,'" *id.* at 20—outweigh California's "public interest [in] encourag[ing] continued participation in matters of public significance" by its residents, Cal. Code Civ. Proc. § 425.16(a). Indeed, many of the considerations cited by Plaintiff are present in *every* suit brought in Delaware courts. If Plaintiff were

correct that they are sufficient to apply Delaware law here, there would never be *any* case in which foreign law would apply. That is not the law.

More fundamentally, Plaintiff elides the distinction between Delaware's interest in applying its law to Chevron's anti-SLAPP motion and Delaware's interest in applying its law to Plaintiff's underlying claims. But Delaware's choice-of-law analysis is *issue specific*, meaning that different states' laws can apply to different issues in a single case. *See Laugelle v. Bell Helicopter Textron, Inc.*, 2013 WL 5460164, at *3 (Del. Super. Ct. Oct. 1, 2013). Chevron does not dispute that Delaware law, rather than California law, applies in evaluating Plaintiff's tort claims. *See, e.g.*, Joint Opening Brief in Support of Motion to Dismiss Plaintiff's Complaint for Failure to State a Claim ("Joint Merits Br.") at 39–64. Rather, Chevron contends only that California law applies in evaluating Chevron's anti-SLAPP motion.

Second**,** Plaintiff argues that even if California's anti-SLAPP law applies, Plaintiff satisfies its burden because the Complaint establishes a probability of prevailing. *See* Opp. at 28–30. Not so. Although Plaintiff does not dispute that the Complaint fails to identify any knowingly false statements made *by Chevron*, it assumes, without proving, that Chevron can be held liable for the speech of industry groups and trade associations that it allegedly funded and supported—contrary to Supreme Court precedent. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 908 (1982). And although Plaintiff does not dispute that the *Noerr-Pennington*

doctrine protects publicity campaigns directed at the general public even if such campaigns include statements that were allegedly false, Plaintiff insists that the speech alleged here was merely "commercial." Opp. at 32. But this is belied by Plaintiff's own Complaint. *See infra* at 19–20. And even if Chevron's speech were commercially *motivated*, that is irrelevant because, under the *Noerr-Pennington* doctrine, "the parties' motives are generally irrelevant and carry no legal significance." *A.D. Bedell Wholesale Co., Inc. v. Philip Morris Inc.*, 263 F.3d 239, 253 (3d Cir. 2001).

Because California's anti-SLAPP law applies, and because Plaintiff does not satisfy the burden imposed by that law, the Complaint should be dismissed.

II. ARGUMENT

A. California's Anti-SLAPP Law Applies Under Delaware's Choice-of-Law Rules.

"When conducting a choice of law analysis, Delaware Courts follow the 'most significant relationship' test in the Restatement (Second) of Conflict of Laws." *State Farm Mut. Auto. Ins. Co. v. Patterson*, 7 A.3d 454, 457 (Del. 2010). Plaintiff conducts a lengthy choice-of-law analysis in arguing that Delaware has the most significant relationship to this dispute, Opp. at 13–28, but fundamentally misunderstands (and thus misapplies) that analysis in two ways.[1]

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[1] Plaintiff contends that there is no reason even to conduct a choice-of-law analysis "because the State's claims fall within the [California] statute's commercial

First, Plaintiff conflates the question of which state has the most significant interest in Plaintiff's *underlying claims* with the question of which state has the most significant interest in Chevron's *anti-SLAPP motion*. Under Delaware law, "[c]hoice-of-law determinations must be made as to each issue when presented, not to the case as a whole." *Laugelle*, 2013 WL 5460164, at *3. For this reason, "[P]laintiff's [substantive] claims and defendant's anti-SLAPP defenses need not be governed by the same state's laws." *Intercon Sols., Inc. v. Basel Action Network*, 969 F. Supp. 2d 1026, 1035 (N.D. Ill. 2013), *aff'd*, 791 F.3d 729 (7th Cir. 2015).

Plaintiff argues that "[e]ach relevant factor weighs in favor of applying Delaware law: [1] both the State and Chevron have extensive contacts with Delaware, [2] all the alleged injuries are located in Delaware, [3] Chevron directed a substantial portion of its tortious conduct at Delaware, and [4] the parties' relationship is centered in Delaware." Opp. at 13–14. But crucially, Plaintiff takes each of these purportedly "relevant factor[s]" from Section 145 of the Restatement, which addresses which state has the most significant relationship "with respect to an issue *in tort*." Restatement (Second) of Conflict of Laws § 145(1) (emphasis added). Although the claims asserted in Plaintiff's Complaint sound in tort, an anti-SLAPP motion does not. Rather, anti-SLAPP laws provide an immunity from suit that is

speech exemption." Opp. at 10. This is incorrect for the reasons explained below. *See infra* at 13–15.

wholly disconnected from the underlying claim asserted. *See DC Comics v. Pac. Pictures Corp.*, 706 F.3d 1009, 1015 (9th Cir. 2013) ("California's anti-SLAPP statute functions as an immunity from suit.").

Plaintiff does not just improperly apply the *law* relevant to its underlying claims in arguing that Delaware's anti-SLAPP law should apply, it also improperly applies the *facts* relevant to those claims. Anti-SLAPP laws are "'designed to protect defendants from meritless lawsuits that might chill the exercise of their rights to speak and petition on matters of public concern.'" *Bonni v. St. Joseph Health Sys.*, 11 Cal. 5th 995, 1008–09 (2021). They do so not by changing the underlying standards for liability, but by screening out claims that are unlikely to satisfy those standards. *See Agar v. Judy*, 151 A.3d 456, 471 (Del. Ch. 2017) ("'The intent of an anti-SLAPP statute is to encourage the exercise of free speech . . . and screen out meritless claims.'"); *Baral v. Schnitt*, 1 Cal. 5th 376, 392 (2016) (noting that "the central purpose of the statute" is "screening out meritless claims that arise from protected activity, before the defendant is required to undergo the expense and intrusion of discovery").

Yet nearly all the facts Plaintiff cites go to Delaware's interest in redressing its alleged injuries—not its interest in the distinct public speech and debate issues implicated by an anti-SLAPP motion. For example, Plaintiff asserts that "[a]ll the injuries the State seeks to redress are located in Delaware," and "Delaware has the

'most significant interest in applying its law' where 'the consequences of [a] tortfeasor's conduct are suffered in Delaware.'" Opp. at 17–18. It likewise argues that "a substantial portion of Chevron's production and sales of fossil fuels has been conducted in Delaware or directed at Delaware residents." *Id.* at 17. But there is no dispute that Delaware law governs Plaintiff's claims, and thus whether Plaintiff can recover for its alleged injuries. The applicable anti-SLAPP law will not change the underlying rule of decision.

The case Plaintiff most relies on for its contention that California's anti-SLAPP law does not govern—*City & County of Honolulu v. Sunoco LP*—committed this same fundamental error. *See* Opp. at 14. The trial court in that case held that California law did not apply to Chevron's anti-SLAPP motion because "[t]he alleged damages include harm to the shoreline, infrastructure, buildings, and economy of Hawai'i," Opp., Ex. 1 ¶ E, and because "[t]here are non-California Defendants," *id.* ¶ H. As here, those factors are relevant in determining which state has the most significant interest in applying its law to Honolulu's underlying claims, but not in determining which state has the most significant interest in applying its law to an anti-SLAPP motion. In any event, that unpublished decision is currently on appeal.

Second, even if Plaintiff had identified the correct factors in determining which state's law governs Chevron's anti-SLAPP motion, it failed to properly weigh those factors. As the Delaware Supreme Court has explained, "[t]he Restatement test is

not mathematical; that is, it 'does not authorize a court to simply add up the interests on both sides of the equation and automatically apply the law of the jurisdiction meeting the highest number of contacts.'" *Bell Helicopter Textron, Inc. v. Arteaga*, 113 A.3d 1045, 1050–51 (Del. 2015). On the contrary, "the facts specific to each issue are relevant in determining which factors are most important." *Id.* at 1051; *see also* Restatement (Second) of Conflict of Laws § 6, cmt. c ("Varying weight will be given to a particular factor, or to a group of factors, in different areas of choice of law."). Indeed, in some contexts, certain factors will not merit *any* weight. *See, e.g.*, *Soares v. Cont'l Motors, Inc.*, 2021 WL 6015701, at *11 n.96 (Del. Super. Ct. Dec. 17, 2021) ("'The parties had no relationship prior to the crash. . . . This factor carries no weight in the choice-of-law analysis.'"); *Ortega v. Yokohama Corp. of N. Am.*, 2010 WL 1534044, at *2 (Del. Super. Ct. Mar. 31, 2010) ("A place of injury does not play an important role in the selection of the applicable law 'when the place of injury can be said to be fortuitous or when for other reasons it bears little relation to the occurrence and the parties with respect to the particular issue.'").

A long line of cases holds that the domicile of the speaker is the most important factor in determining which state has the most significant interest in an anti-SLAPP motion. *See, e.g.*, *Chi v. Loyola Univ. Med. Ctr.*, 787 F. Supp. 2d 797, 803 (N.D. Ill. 2011) ("[T]he domicile of the speaker [is] central to the choice-of-law analysis."); *Glob. Relief Found. v. New York Times Co.*, 2002 WL 31045394, at *11 (N.D. Ill.

Sept. 11, 2002) ("California has a great interest in determining how much protection to give California speakers such as [defendants]. Thus, California has the most significant relationship and the law of California will apply to defenses to defamation."); *Diamond Ranch Acad., Inc. v. Filer*, 117 F. Supp. 3d 1313, 1324 (D. Utah 2015) ("[T]he residence of the party seeking protection under the anti-SLAPP law . . . has great weight in the analysis."); *Underground Sols., Inc. v. Palermo*, 41 F. Supp. 3d 720, 726 (N.D. Ill. 2014) ("A speaker's residence . . . is not an 'isolated fact' but one of the 'central' factors to be considered."); *GOLO, LLC v. Higher Health Network, LLC*, 2019 WL 446251, at *13 (S.D. Cal. Feb. 5, 2019) ("[C]ourts often find that 'the place where the allegedly tortious speech took place and the domicile of the speaker are central to the choice-of-law analysis on this issue.'"); *Sarver v. Chartier*, 813 F.3d 891, 898 (9th Cir. 2016) (holding that even if "New Jersey was [the plaintiff's] domicile," California's anti-SLAPP law controlled because "all of the corporate defendants other than Playboy Enterprises are incorporated and alleged to be conducting business in California").[2]

Plaintiff does not dispute that these cases hold that the speaker's domicile is of

[2] Plaintiff argues that *Sarver* is distinguishable because, even after determining the speaker's domicile, that court "consider[ed] the factors enumerated in section 145 of the Second Restatement." 813 F.3d at 898. As explained above, this was error because an anti-SLAPP motion is not a tort. *See supra* at 4–5.

paramount importance in an anti-SLAPP choice-of-law analysis,[3] but rather insists that "[b]ecause the courts considered only one factor—the defendant's domicile—in deciding which state's law to apply, these cases are not persuasive with respect to Delaware's choice-of-law rules." Opp. at 26. But each of these jurisdictions applies the same test under the Second Restatement as Delaware. *See Chi*, 787 F. Supp. 2d at 801; *Diamond Ranch*, 117 F. Supp. 3d at 1320; *Sarver*, 813 F.3d at 897. And far from ignoring other factors, they simply concluded that those factors did not merit meaningful weight in determining which state had the greatest interest in an anti-SLAPP motion. *See, e.g.*, *Diamond Ranch*, 117 F. Supp. 3d at 1323 ("[T]he place where the injury occurred . . . [has] little, if any, relevance in this area of law."); *Underground Sols.*, 41 F. Supp. 3d at 726 ("'[P]lace of injury . . . is less important' in 'the anti-SLAPP context.'" (quoting *Chi*, 787 F. Supp. 2d at 803)). As explained above, Delaware courts routinely recognize that the respective weight of each relevant factor varies based on the issue. *See Bell Helicopter Textron*, 113 A.3d at 1050–51; *Soares*, 2021 WL 6015701, at *11 n.96.

It makes eminent good sense that these courts would give near-dispositive weight to the speaker's domicile. Because anti-SLAPP statutes aim to encourage

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[3] Plaintiff notes that "Chevron Corporation is incorporated in Delaware," Opp. at 16, but "a corporation's principal place of business is a more important connection than the corporation's state of incorporation for determining . . . where a corporation is domiciled," *In re American International Group, Inc.*, 965 A.2d 763, 820 (Del. Ch. 2009).

participation in the political process, a state has a profound interest in the application of its anti-SLAPP law to speech by members of its own political community—its own citizens and residents. Indeed, many jurisdictions have written their anti-SLAPP laws with an express focus on their interest in protecting their own citizens' ability to freely engage in public debate on topics of public importance. *See, e.g.*, Ark. Code Ann. § 16-63-502(1); Ga. Code Ann. § 9-11-11.1(a); N.M. Stat. Ann. § 38-2-9.2. But whether or not a state's anti-SLAPP statute expressly mentions its own citizens and residents, by its nature it is designed to protect the rights of that state's citizens and residents to participate in public discussion of topics of public significance by creating an immunity from the burdens of meritless lawsuits that would otherwise threaten those constitutionally protected speech and related activities—including lawsuits brought against them by other states. The cases cited assigning predominant weight to the speaker's domicile relied on precisely this reasoning in doing so. *See Chi*, 787 F. Supp. 2d at 803 ("A state has a strong interest in having its own anti-SLAPP law applied to the speech of its own citizens."); *Underground Sols.*, 41 F. Supp. 3d at 726 (acknowledging "a state's acute interest in protecting the speech of its own citizens, which counsels in favor of applying the anti-SLAPP statute of a speaker's domicile to his statements.").

By contrast, many of the factors that Plaintiff cites have no particular relevance in the anti-SLAPP choice-of-law analysis. For example, Plaintiff argues that,

"[g]iven the State's fundamental attachments to Delaware, and because those attachments underlie the State's interest in these claims, Delaware law should determine the scope of any anti-SLAPP protection here." Opp. at 16. But this would be true in any case brought by the State. Plaintiff does not articulate why such a generalized interest should weigh in the choice-of-law analysis—especially considering that it would not play any role if the same claims were brought by a private plaintiff. The same is true with respect to Plaintiff's assertion that "Delaware has a 'paramount' interest in 'applying its law and policies to those who seek relief in its courts.'" Opp. at 20. According such an interest any weight would skew the analysis in nearly every Delaware choice-of-law analysis, as those analyses almost always arise in Delaware courts.

Plaintiff simply misapplies other factors. Although Plaintiff alludes to the supposed inefficiency or difficulty of applying California law, California's anti-SLAPP caselaw is the most robust and well developed in the country. Plaintiff points to "several pleading stage procedures that Delaware law does not countenance," Opp. at 26–27, but those procedures—such as "automatically stay[ing] discovery upon filing [of an anti-SLAPP motion], creat[ing] an immediate right of appeal, and requir[ing] a hearing within thirty days of filing," Opp. at 27 n.3—do not require any special expertise in California law. Plaintiff claims that "[p]redictability and uniformity of result favor applying Delaware law" because "[a]pplying the anti-

SLAPP law of each Defendant's home jurisdiction likely would result in applying different pleading standards to the claims against each Defendant." Opp. at 27–28. But this factor is not concerned with ensuring uniformity among *different defendants* in the *same action*, but rather with ensuring uniformity for the *same defendant* across *different actions*. *See* Restatement (Second) of Conflict of Laws § 6, cmt. i (explaining that this factor advances the law's general principle that "forum shopping will be discouraged"). Indeed, Plaintiff's interpretation would *incentivize* forum-shopping.

But there is no need to get lost in the morass that Plaintiff presents. Delaware's choice-of-law rules require this Court to apply the anti-SLAPP law of the state with the greatest interest in Chevron's anti-SLAPP motion. Courts routinely hold that the speaker's domicile is the predominant—if not the only—factor in identifying that state. Because California is Chevron's domicile, that is the end of the analysis. This Court should apply California's anti-SLAPP law.

B. The Complaint Is Subject to Anti-SLAPP Immunity.

Plaintiff's Complaint falls squarely within the ambit of California's anti-SLAPP law, which by its own terms "shall be construed broadly." Cal. Code Civ. Proc. § 425.16(a). Plaintiff does not dispute that each of its claims "aris[es] from any act . . . in furtherance of the [defendant]'s right of petition or free speech under the United States Constitution or the California Constitution in connection with a public

issue." *Id.* § 425.16(b)(1). This is for good reason. Climate change is clearly an issue of profound public importance. And the Complaint's allegations directly target purported statements about climate change and its regulation. *See, e.g.*, Compl. ¶ 8 ("Defendants . . . sought to undermine public support for greenhouse gas regulation.").

Instead, Plaintiff argues that the Complaint falls within the commercial speech exemption to California's anti-SLAPP law because "[t]he Complaint focuses on prototypical examples of commercial speech: Chevron made factual representations about the qualities of its fossil fuel products and their associated risks, to keep its clients purchasing its goods and services, and those representations are the alleged basis for liability." Opp. at 11; *see* Cal. Code Civ. Proc. § 425.17(c).[4] But this argument fails for two reasons.

First, extensive California caselaw interpreting the commercial speech exemption holds that the exemption applies only to comparative advertising. *See* Mot. at 24–25 (collecting cases). Plaintiff disagrees, stating that "the cases relied on by Chevron emphasize and apply the plain language of the statute to particular

[4] In a footnote, Plaintiff argues that "[i]f the Court decides to apply California law," it should "also conclude that the State satisfies the statute's public enforcement exemption" because "[t]o do otherwise" would be "inequitabl[e]." Opp. at 23 n.2. But the applicability of the public enforcement exemption is an issue of statutory interpretation, not equity, and the statutory text plainly limits this exemption to "enforcement action[s] brought in the name of the people of the *State of California* by the Attorney General, district attorney, or city attorney, acting as a public prosecutor." Cal. Code Civ. Proc. § 425.16(d) (emphasis added).

circumstances," but do not "*limit[]* the exemption to comparative advertising." Opp. at 12 (emphasis added). But Plaintiff does not grapple with what those cases actually say. As the California Supreme Court has plainly stated, "the language of section 425.17, subdivision (c) and subsequent caselaw indicate that *the provision exempts 'only a subset of commercial speech'—specifically, comparative advertising*." *FilmOn.com, Inc. v. DoubleVerify Inc.*, 7 Cal. 5th 133, 147 (2019) (emphasis added). And while Plaintiff cites *Muddy Waters, LLC v. Superior Court*, 62 Cal. App. 5th 905 (2021), for the proposition that the exemption applies more broadly, Opp. at 12, the court in that case declined to apply the commercial speech exemption precisely because it did not involve comparative advertising: "Muddy Waters is in the business of financial analysis and activist short selling, whereas plaintiff is in the business of importing, exporting, selling, and leasing aluminum goods. There is no evidence to suggest that Muddy Waters is a business competitor of plaintiff; and, therefore, any representation by Muddy Waters does not fall within the commercial speech exception set forth in section 425.17, subdivision (c)." *Muddy Waters*, 62 Cal. App. 5th at 920.

Plaintiff offers an extensive textual dispute with these cases, *see* Opp. at 10–12, but that is beside the point. "The highest state court is the final authority on state law," *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 177 (1940), and here that is the California Supreme Court. Even if there were some doubt as to whether the

California Supreme Court's decision in *FilmOn* directly addressed the question presented here, its text leaves little room to doubt how it would answer. That is dispositive because, "when a Delaware court must use another state's law and when that law is uncertain, the Delaware Court should try to reach the conclusion that the other state's highest court likely would." *In re American International Group*, 965 A.2d at 822 n.221 (citing *Monsanto Co. v. C.E. Health Comp. & Liab. Ins. Co.*, 652 A.2d 30, 35 (Del. 1994)).

Second**,** the commercial speech exemption does not apply because, notwithstanding Plaintiff's assertion that *Chevron* made deceptive or misleading representations, the Complaint does not identify any such representations. Although the Complaint does identify purported misrepresentations by trade associations to which Chevron belonged, trade associations fall outside the scope of the commercial speech exemption. *See All One God Faith, Inc. v. Organic & Sustainable Indus. Stds., Inc.*, 183 Cal. App. 4th 1186, 1212 (2010). Plaintiff attempts to distinguish that case on the ground that the defendant was the trade association itself, whereas here the defendant is a member. *See* Opp. at 13. But there is no reason that the anti-SLAPP law's protections should disappear as a defendant's connection to the speech attenuates. If anything, the risk of chilling constitutionally protected speech in such a situation is even greater where, as here, Plaintiff seeks to hold a defendant vicariously liable for speech made by distinct entities with which it associates.

C. Plaintiff Cannot Carry Its Burden to Support Its Claims.

Because Plaintiff's Complaint arises from acts in furtherance of Chevron's right of petition or free speech on a public issue, the burden shifts to Plaintiff to "demonstrate[] a probability of prevailing on the claim." *Jarrow Formulas, Inc. v. LaMarche*, 31 Cal. 4th 728, 733 (2003). To meet this burden, Plaintiff must "demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." *Wilson v. Parker, Covert & Chidester*, 28 Cal. 4th 811, 821 (2002). Courts have described this standard as "operat[ing] like a demurrer or motion for summary judgment in 'reverse.'" *Briggs v. Eden Council for Hope & Opportunity*, 19 Cal. 4th 1106, 1123 (1999) (quotation marks omitted). As Chevron has explained, Plaintiff cannot satisfy this burden for at least two reasons beyond those outlined in Defendants' Joint Motion to Dismiss. *See* Joint Merits Br. at 12–25 (state law cannot apply here as a matter of constitutional structure); *id.* at 25–31 (Clean Air Act preempts any state law claims); *id.* at 39–64 (Plaintiff fails to adequately plead a claim under state law).

***First*,** Plaintiff does not allege that Chevron made any specific, knowingly false statements. *See* Mot. at 26–29. Although Plaintiff accuses Chevron of "badly misread[ing] the Complaint when it insists the State does not identify any deceptive speech for which Chevron is liable," Opp. at 29, the best examples it can muster do

not involve Chevron speech at all, but rather Chevron's involvement as a member of trade associations, *see, e.g.*, Opp. at 28–29 (reciting allegations that a "Chevron predecessor created and funded Information Council for the Environment's climate denialist advertorials," "Chevron representatives helped create API's Global Climate Science Communications Team," and "Defendants 'have funded dozens of think tanks, front groups, and dark money organizations pushing climate change denial'").

The law is clear that Chevron cannot be held liable for the speech of independent organizations with which it associates. *See, e.g.*, *Santopietro v. Howell*, 857 F.3d 980, 989–90 (9th Cir. 2017) ("First Amendment protections are not lost 'merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected.'" (quoting *Claiborne Hardware*, 458 U.S. at 908)). Plaintiff does not disagree, but maintains that its "claims do not hold Chevron liable merely for 'being associated with a group that engaged in speech,'" but rather for "fund[ing], support[ing], and authoriz[ing] the climate deception campaigns run through industry groups, think tanks, and dark money organizations." Opp. at 30. But Plaintiff's claims turn solely on the *content* of the speech alleged in the Complaint and its effect on consumers who ultimately consumed and combusted fossil fuels, not Chevron's *support* for that speech. This case is therefore unlike *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), which upheld a statute prohibiting providing material support to foreign terrorist organizations. *See id.* at

28 ("The First Amendment issue before us is . . . whether the Government may prohibit . . . provid[ing] material support to the PKK and LTTE in the form of speech."). And because Plaintiff does not allege that these trade associations were Chevron's agents, *Scott v. Ross*, 140 F.3d 1275 (9th Cir. 1998), is similarly irrelevant. *See id.* at 1283 ("*Claiborne* is distinguishable from the instant case. CAN is not being held liable for any of its speech or associations, but rather for its agent's involvement in Scott's deprogramming.").

Plaintiff contends that its "claims only require showing that Chevron's speech was deceptive or misleading," not that it was false. Opp. at 29. But Supreme Court precedent says otherwise. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986) ("[T]he common law's rule on falsity—that the defendant must bear the burden of proving truth—must similarly fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages."). Plaintiff attempts to distinguish this precedent on the ground that it arose in a defamation context, and "this is not a defamation case." Opp. at 29. But Plaintiff does not explain why this would matter. Indeed, earlier this year the Supreme Court reaffirmed in a different context that the requirement of "a culpable mental state" is designed to ensure that citizens do not engage in "'self-censorship' of speech that could not be proscribed." *Counterman v. Colorado*, 143 S. Ct. 2106, 2115 (2023). Because this is a constitutional rule, its applicability turns on the free speech interests

that are implicated—not how Plaintiff frames its claims. The Constitution does not permit Plaintiff to do an end-run around its protections through artful pleading or post hoc reframing.

Second, Plaintiff's claims are barred by the *Noerr-Pennington* doctrine. *See* Mot. at 29–33. Plaintiff attempts to argue that *Noerr-Pennington* is inapplicable here because the Complaint addresses conduct "'more aptly . . . characterized as commercial activity with a political impact than as political activity with a commercial impact.'" Opp. at 31–32 (quoting *Ticor Title Ins. Co. v. FTC*, 998 F.2d 1129, 1138 (3d Cir. 1993)).[5] But this ignores the Complaint's many allegations directly attacking Chevron's purported efforts to influence government action both directly and through the public:

- "Defendants . . . sought to undermine public support for greenhouse gas regulation," Compl. ¶ 8;
- "Defendants . . . doggedly campaign[ed] against regulation of th[eir] products based on falsehoods, omissions, and deceptions," *id.* ¶ 58;
- "Defendants . . . change[d] their tactics from general research and internal discussion on climate change to a public campaign aimed at . . . evading regulation of their fossil fuel products and/or emissions therefrom," *id.* ¶ 106;

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[5] In *Ticor*, the Third Circuit rejected the defendant's attempt to characterize its fixing of title insurance fees as "a protected form of 'joint petitioning' because it did not agree to charge proposed rates without approval from each state's insurance department." 998 F.2d at 1138. Although the defendant proposed to submit its collusive fees to regulators for approval, the court held that this did not fall within the *Noerr-Pennington* doctrine. *See id.* Unlike in *Ticor*, the speech here did not go only to the terms of Chevron's own business, but an issue of undisputed public concern.

- "A goal of ICE's advertising campaign was to change public opinion and avoid regulation," *id.* ¶ 115;

- "ICE-funded print advertisements . . . intended to obscure the scientific consensus on anthropogenic climate change and induce political inertia to address it," *id.* ¶ 116;

- "API published an extensive report in the same year warning against concern over CO_2 buildup and any need to curb consumption or regulate the fossil fuel industry," *id.* ¶ 118;

- "Defendants, individually and through trade associations and front groups like API and GCC, mounted a deceptive public campaign against regulation," *id.* ¶ 128;

- "The Global Climate Coalition (GCC), on behalf of Defendants and other fossil fuel companies, funded deceptive advertising campaigns . . . with the specific purpose of preventing U.S. adoption of the Kyoto Protocol," *id.* ¶ 129;

- "Defendants, individually and through their trade association memberships, worked directly, and often in a deliberately obscured manner, to evade regulation of the emissions resulting from use of their fossil fuel products and to conceal and misrepresent their products' known dangers," *id.* ¶ 134;

- "Defendants undertook a momentous effort to evade international and national regulation of greenhouse gas emissions," *id.* ¶ 140;

- "Defendants wrongfully and falsely promoted, campaigned against regulation of, and concealed the hazards of their fossil fuel products," *id.* ¶ 160; and

- "Defendants specifically created, contributed to, and/or assisted, and/or were a substantial contributing factor in the creation of the public nuisance by . . . campaigning against the regulation of their fossil fuel products," *id.* ¶ 257.

That some of these statements may have been directed to the public, rather than policymakers directly, makes no difference because "[a] publicity campaign directed

at the general public and seeking government action is covered by *Noerr-Pennington* immunity." *Manistee Town Ctr. v. City of Glendale*, 227 F.3d 1090, 1092 (9th Cir. 2000).

To be sure, Plaintiff contends that "[t]he campaigns were commercially *motivated*." Opp. at 32 (emphasis added). But that is beside the point, as "the parties' motives are generally irrelevant and carry no legal significance." *A.D. Bedell Wholesale*, 263 F.3d at 253. This makes sense given the Supreme Court's repeated recognition "that First Amendment protection extends to corporations," *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 342 (2010), even though corporations' speech will often have a commercial aspect. And as the Supreme Court recently confirmed, "the First Amendment extends to all persons engaged in expressive conduct, including those who seek profit." *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2320 (2023).[6]

As a fallback, Plaintiff argues that "a motion to dismiss is not the vehicle for drawing lines between Chevron's commercial and petitioning activities," and that "'determin[ing] whether the challenged predicate acts are acts of petitioning is a fact-intensive inquiry' best left for trial." Opp. at 34. But again, the Complaint's own

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[6] Similarly, *Plaintiff's* intent in bringing this action is likewise irrelevant if its effect is to impinge on Chevron's free speech rights. *See Frederick Douglass Found., Inc. v. District of Columbia*, __ F.4th __, 2023 WL 5209556, at *12 (D.C. Cir. Aug. 15, 2023) ("Viewpoint discrimination violates the First Amendment, 'regardless of the government's benign motive . . . or lack of animus toward the ideas contained in the regulated speech.'").

allegations make clear that Plaintiff is attacking Chevron's efforts to influence public policy. Courts have routinely dismissed suits under the *Noerr-Pennington* doctrine when confronted with similarly clear allegations. *See, e.g.*, *Mariana v. Fisher*, 338 F.3d 189, 197 (3d Cir. 2003); *Armstrong Surgical Ctr., Inc. v. Armstrong Cnty. Mem. Hosp.*, 185 F.3d 154, 160 (3d Cir. 1999). Declining to do so would be especially inappropriate in the anti-SLAPP context, as "[t]he point of the anti-SLAPP statute is that you have a right *not* to be dragged through the courts because you exercised your constitutional rights." *People ex rel. Lockyer v. Brar*, 115 Cal. App. 4th 1315, 1317 (2004).

III. CONCLUSION

The Court should grant Chevron's special motion to strike, dismiss the case with prejudice, and award Chevron its attorney's fees.

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Respectfully submitted,

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