No. 18-16663

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

v.

B.P. P.L.C., a public limited company of England and Wales; CHEVRON CORPORATION, a Delaware corporation; CONOCOPHILLIPS, a Delaware corporation; EXXON MOBIL CORPORATION, a New Jersey corporation; ROYAL DUTCH SHELL PLC, a public limited company of England and Wales; and DOES, 1 through 10,

Defendants-Appellees.

On Appeal From The United States District Court, Northern District of California
Case Nos. 3:17-cv-06011-WHA, 3:17-cv-06012-WHA (Hon. William H. Alsup)

PLAINTIFFS-APPELLANTS' CONSOLIDATED OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Court Cases

State Court Cases

Federal Statutory Authorities

State Statutory Authorities

Federal Rules and Regulations

Constitutional Provisions

Additional Authorities

INTRODUCTION

The People of the State of California, by and through the Oakland and San Francisco City Attorneys (and later joined by the City of Oakland and the City and County of San Francisco) (collectively, "the People"), filed these two lawsuits in California state court, under California public nuisance law, against five of the world's largest investor-owned oil and gas companies. *See* Excerpts of Record ("ER") 89, 90-92 ¶¶92, 94; ER159, 160-61 ¶¶92, 94. The People seek equitable abatement—the only remedy available in a "representative" public nuisance action brought by California public entities—to mitigate the enormous harms to San Francisco's and Oakland's public infrastructure caused by rising sea levels, increasingly frequent and severe storms, and other direct consequences of Defendants' challenged conduct.

Defendants have known for decades that the continued burning of fossil fuels would increase global temperatures and cause devastating impacts on coastal communities like Oakland and San Francisco. Yet they continued to wrongfully promote the increased, unrestricted use of their products, deliberately concealing from the People their knowledge of the direct link between fossil-fuel combustion and the destructive effects of climate change on coastal communities. Defendants' wrongful conduct makes them liable for contributing to a public nuisance under long-settled California law. *See generally, e.g.*, *People v. ConAgra Grocery*

Prods. Co., 17 Cal.App.5th 51 (2017), *review denied* (2018), *cert. denied*, 139 S.Ct. 377 (2018).

After these cases were removed, the federal district court issued the three orders at issue: (1) denying the People's motions to remand; (2) granting all five Defendants' Rule 12(b)(6) motions to dismiss; and (3) additionally granting four Defendants' Rule 12(b)(2) motions to dismiss.

Each of those orders was reversible error. Because the district court lacked subject matter jurisdiction, though, this Court should reverse on that threshold ground, leaving further adjudication to the state courts.

JURISDICTIONAL STATEMENT

The district court asserted jurisdiction under 28 U.S.C. §§1331 and 1441(a) and entered final judgment fully resolving all claims on July 27, 2018. The People timely filed Notices of Appeal on August 24, 2018. ER50-55; Fed. R. App. P. 4(a)(1)(A). This Court has appellate jurisdiction under 28 U.S.C. §1291.

ISSUES PRESENTED

1. Whether the district court erred in denying the People's motion to remand on the ground that their state law claims were "necessarily governed by" (and thus arose under) "federal [common] law."

2. Whether the district court erred in dismissing the People's public nuisance claims under Rule 12(b)(6) on the ground that adjudication of those

claims would violate the "presumption against extraterritoriality" and raise "foreign policy" concerns.

3. Whether the district court erred in declining to exercise specific personal jurisdiction over four Defendants on the ground that the People did not adequately allege that those Defendants' production, sale, and misleading promotion of fossil-fuel products was a cause of the challenged public nuisance.

STATEMENT OF THE CASE

I. State Court Proceedings

The San Francisco and Oakland City Attorneys originally filed these lawsuits in California state court, each pleading a single claim under California's longstanding public nuisance law, which since 1872 has authorized California public prosecutors to bring "representative actions" for equitable abatement on behalf of the People of the State of California against those whose conduct is a substantial cause of a California public nuisance. *See* Cal. Civ. Code §§3479, 3480, 3491, 3494; Cal. Civ. P. Code §731.[1]

[1] California law defines "public nuisance" as an "obstruction" of public rights that "affects at the same time an entire community or neighborhood, or any considerable number of persons …." Cal. Civ. Code §§3490, 3480; *see also id.* §3479. To be actionable, the obstruction must be "substantial and unreasonable," meaning it must "cause significant harm." *People ex rel. Gallo v. Acuna*, 14 Cal.4th 1090, 1104-05 (1997) (public nuisance injunction against gang activity). All applicable statutory provisions are set forth in the Addendum.

The complaints alleged that Defendants have known for decades about the direct link between fossil-fuel use and climate change, yet intentionally engaged in a deliberate, coordinated effort to conceal their knowledge from the general public and local governments; to discredit the growing body of scientific evidence documenting the catastrophic impacts of fossil-fuel-triggered climate change (particularly on coastal communities whose infrastructures are most susceptible to the destructive impacts of rising sea levels); and to wrongfully promote the *expanded* use of their products without providing timely or effective warnings about the direct link between fossil-fuel combustion and climate change (warnings that could have mitigated the severe harms to local infrastructure that San Francisco and Oakland now face). ER89-114 ¶¶92-136; ER159-180 ¶¶92-136. The People's complaints expressly disclaimed any intent to regulate or to impose liability on Defendants based on their greenhouse-gas emissions or to obtain any remedy other than an order requiring Defendants to bear the costs of abating the localized impacts of their wrongful conduct. ER62 ¶11; ER115-117 ¶¶137-147; *see also* ER118 ¶2; ER134 ¶11; ER180-183 ¶¶137-147; ER184 ¶2.

II. Federal Court Proceedings

Defendants removed these cases on October 20, 2017. ER203, 239. Four of the seven asserted grounds for removal rested on 28 U.S.C. §1441(a) and Defendants' contention that the People's state law public nuisance law claims

"arose under" federal law. ER206-208 ¶¶5-7, 10; ER242-244 ¶¶5-7, 10. Defendants alternatively asserted removal jurisdiction under the Outer Continental Shelf Lands Act, 43 U.S.C. §1349(b) ("OCSLA"); the federal officer removal statute, 28 U.S.C. §1442(a)(1); and the federal bankruptcy statute, 28 U.S.C. §1452(a). ER207-208 ¶¶8, 9, 11; ER243-244 ¶¶8, 9, 11.

On February 27, 2018, the district court denied the People's motions to remand, concluding that "Plaintiffs' nuisance claims—which address the national and international geophysical phenomenon of global warming—are necessarily governed by federal common law." ER29.[2] The court did not state whether its ruling rested on a finding of "preemption," "complete preemption," or some other theory, and gave no indication of what the scope or content of that governing federal common law might be. Nor did it address any of Defendants' other asserted grounds for removal. *See generally* ER27-35.

In response, the People amended their complaints "to conform to the Court's ruling" by adding a claim for public nuisance under federal common law, while "reserv[ing] all rights with respect to whether jurisdiction is proper in federal court." ER62-63 ¶12; ER134 ¶12.

[2] Because the district court entered identical orders in both cases, the People have included only one copy of each order in the Excerpts of Record.

On June 25, 2018, the court granted Defendants' motions to dismiss for failure to state a claim, concluding that although it had denied the People's remand motions on the ground that federal common law governed, no rights or remedies were actually made available by that federal common law. ER11-26. Characterizing the People's claims as an unbounded attempt to regulate worldwide greenhouse-gas emissions (despite the express disclaimers and narrowly targeted focus of the People's public nuisance claims), the court ruled that to allow the People to seek equitable abatement of the localized harms caused by Defendants' wrongful conduct would impermissibly violate a presumption against giving U.S. laws "extraterritorial" effect and would "effectively allow plaintiffs to govern conduct and control energy policy on foreign soil." ER20-21.

On July 27, 2018, the court granted four Defendants' motions to dismiss for lack of personal jurisdiction as well. ER3-10.[3] Despite acknowledging those Defendants' concession that they had sufficient contacts with California to satisfy the "purposeful direction" prong of specific-personal-jurisdiction analysis, the court ruled that the People's jurisdictional allegations failed to establish a sufficient causal link between the People's public nuisance claim and Defendants' challenged conduct. To satisfy that requirement, the court concluded, the People

[3] Defendant Chevron, headquartered in the Northern District of California, did not move to dismiss on this ground. ER4.

had to show that each Defendant's activities "in California" was the but-for cause of the People's entire claimed injury, an erroneous legal standard that would be impossible to meet in any representative public nuisance action against multiple defendants. ER7-8.

STANDARD OF REVIEW

This Court reviews de novo: (1) a denial of a motion to remand, *Hamilton Materials, Inc. v. Dow Chem. Corp.*, 494 F.3d 1203, 1206 (9th Cir. 2007); (2) a "dismissal for failure to state a claim upon which relief can be granted, … accept[ing] as true all well-pleaded allegations of material fact and constru[ing] them in the light most favorable to the plaintiffs," *Puri v. Khalsa*, 844 F.3d 1152, 1157 (9th Cir. 2017); and (3) a dismissal for lack of personal jurisdiction, *CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1073 (9th Cir. 2011).

SUMMARY OF THE ARGUMENT

The district court's orders lead to anomalous and unprecedented results, and each constitutes reversible error.

For purposes of federal subject matter jurisdiction, the court concluded that the People's public nuisance claims, although pleaded exclusively under California state law, were "necessarily governed by federal common law" and thus belonged in federal court as federal common law claims. In later ruling on Defendants' motions to dismiss, though, the court concluded that this "govern[ing]" federal

common law actually provided no actionable rights or remedies, and it therefore dismissed the People's cases with prejudice.

The court got it doubly wrong. First, it erred by failing to remand the People's well-pleaded state law claims to state court in the absence of complete preemption (or any alternative basis for removal). Under the "complete preemption" doctrine, a federal preemption *defense* cannot support federal *removal* jurisdiction, unless: (1) Congress's intent to preempt state law in its entirety is clear and manifest, *and* (2) federal law provides an independent source of rights and remedies—neither of which is true here.

Second, the court compounded its error by dismissing the People's claims. Both of its principal grounds for dismissal—the supposedly "extraterritorial" reach of the People's legal challenge and the interference with "foreign policy" that such extraterritorial reach would require—rested on a mischaracterization of the People's public nuisance claims. The People's Complaints do not challenge Defendant's greenhouse-gas emissions, "worldwide" or domestic, and do not seek to enjoin or regulate any company's (or country's) emissions.

Finally, the court erred in declining to exercise specific personal jurisdiction over the four out-of-state Defendants. The court concluded that even though Defendants *conceded* for purpose of personal jurisdiction that they had purposefully directed their climate-change-related conduct at California knowing

the harm to public infrastructure that would inevitably result, the People's complaints did not allege a sufficient but-for causal relationship between each Defendant's conduct *in California* and the *full* extent of the resulting harms—a test that no court has previously required as a condition for exercising personal jurisdiction. The district court instead should have asked whether the People's complaints adequately allege that Defendants purposefully directed acts at California that caused the type of harms that Defendants knew would likely be suffered in California, and if so, whether a direct nexus existed between those acts and the People's public nuisances claims. Under that standard, the court surely had personal jurisdiction.

Accordingly, this Court should either (1) reverse the judgment in its entirety based on the district court's erroneous refusal to remand, without reaching the other issues; or (2) if federal subject matter jurisdiction exists, reverse the Rule 12(b)(6) and 12(b)(2) dismissal orders and remand for further proceedings against all Defendants.

ARGUMENT

I. The District Court Erred in Denying the Motions To Remand, Because the People's Claims Do Not Present a Federal Question.

The district court concluded that it had original "arising under" jurisdiction because the People's representative public nuisance claims were "necessarily

governed by federal common law." ER29. That conclusion is contrary to the well-pleaded complaint rule and decades of consistent case precedent.

A. The People's California public nuisance claims are not "governed by federal common law."

It is axiomatic that the removal statute, 28 U.S.C. §1441, must be "strictly construed against removal jurisdiction." *Provincial Gov't of Marinduque v. Placer Dome, Inc.*, 582 F.3d 1083, 1087 (9th Cir. 2009). Because "removal jurisdiction raises significant federalism concerns," "all doubts about jurisdiction should be resolved in favor of remand to state court" to avoid "depriv[ing] a state court of its right under the Constitution" to resolve state law disputes "in its own courts." *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 411 (11th Cir. 1999); *see Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 32 (2002). Particularly when a *public entity* sues to enforce state law in state court, as here, the "claim of sovereign protection from removal arises in its most powerful form," and only "an overriding federal interest" can justify removal. *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 676 (9th Cir. 2012) (citation omitted).

1. The district court erred in concluding that the People's claims are completely preempted by a federal common law that provides no rights or remedies.

The well-pleaded complaint rule makes plaintiffs the "master[s] of the[ir] claim," who "may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987); *see Franchise Tax Bd. v.*

Constr. Laborers Vacation Tr., 463 U.S. 1, 9-10 (1983). Under this rule, "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar*, 482 U.S. at 392. "[A] case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." *Id.* at 393; *accord*, *Stillaguamish Tribe v. Washington*, 913 F.3d 1116, 1118-19 (9th Cir. 2019) (rejecting "federal common law" defense of tribal sovereign immunity as a basis for federal question jurisdiction).

The sole exception to the well-pleaded complaint rule arises in the "rare" case of "complete preemption," where "federal law not only preempts a state law cause of action, but also substitutes an exclusive federal cause of action in its place." *Hansen v. Group Health Coop.*, 902 F.3d 1051, 1057 (9th Cir. 2018) (and cases cited); *see Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003); *see also id*. at 12-17 (Scalia, J., dissenting). When a federal law arguably eliminates a state law claim without substituting rights and remedies of its own, that federal law provides at most a preemption *defense*, but cannot provide a complete-preemption ground for *removal*. *See, e.g.*, *Hunter v. United Van Lines*, 746 F.2d 635, 642-43 (9th Cir. 1984) ("removal is improper when federal law simply displaces state law without replacing the state cause of action with a federal one"). As the Second

Circuit held in *Sullivan v. American Airlines, Inc.*, 424 F.3d 267, 276 (2d Cir. 2005), a federal court may not "allow[] removal … on complete-preemption grounds," only to later dismiss based on the absence of any federal law claim. "[T]he district court must have jurisdiction for removal to be proper, but [if] the court must then dismiss the removed case" for want of a federal cause of action, removal under the complete preemption doctrine was improper in the first place. *Id*.

The district court's order denying remand never mentions "complete preemption" (or even "preemption"). *See* ER27-35. While its statement that federal common law "necessarily governs" may suggest that federal common law "completely preempts" the People's state law public nuisance claims, there can be no complete preemption by a federal law that provides no alternative cause of action. *Hansen*, 902 F.3d at 1057; *Hunter*, 746 F.2d at 642-43; *Wayne v. DHL Worldwide Express*, 294 F.3d 1179, 1184 (9th Cir. 2002). That is why the correct order of analysis on a motion to remand must be to determine, first, whether a particular federal cause of action is available, and only then to determine whether Congress intended that federal law to completely preempt the state law claim. *Hart v. Bayer Corp.*, 199 F.3d 239, 244 (5th Cir. 2000); *Schmeling v. NORDAM*, 97 F.3d 1336, 1343-45 (10th Cir. 1996); *see also Hansen*, 902 F.3d at 1058;

Wayne, 294 F.3d at 1184. Had the district court followed that required approach, it could not have found complete preemption.

In fact, the district court did not conduct *any* complete-preemption analysis. Without discussion, it concluded that the People's claims were necessarily "governed by federal common law" because "claims for public nuisance, though pleaded as state-law claims, depend on a global complex of geophysical cause and effect" that require application of federal law to fairly "apportion[] responsibility." ER34. The court was wrong to conclude that a new body of federal common law is required to govern public nuisance cases like this. *See infra* at 34-42. But that makes no difference at the threshold jurisdictional stage, because if the district court were correct that the "governing" federal common law did not confer any rights or remedies on California public entities seeking to mitigate the harm to local infrastructure caused by Defendants' challenged conduct, that federal common law could not have provided a basis for complete-preemption removal jurisdiction.

Without an actionable federal right and remedy, there can be no complete preemption; and where there is no complete preemption (or an independent ground for federal subject matter jurisdiction, *see infra* at 18-30), remand is required. *Beneficial Nat'l Bank*, 539 U.S. at 8; *Hansen*, 902 F.3d at 1058; *cf. Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972) ("*Milwaukee I*") (federal common law,

rather than state common law, is only available for claims seeking abatement of interstate pollution controls if "federal remedies" have not been displaced).[4]

2. To the extent the People's public nuisance claims can be characterized as being based on greenhouse-gas emissions, federal common law has been entirely displaced by the Clean Air Act.

Central to the district court's analysis in its first two orders was its incorrect assertion that the People's public nuisance claims ultimately seek to regulate greenhouse-gas emissions. *See, e.g.*, ER19, 25, 30-31. The People vigorously dispute that assertion for the reasons explained *infra* at 32-34. But to the extent the district court's identification of the "governing" federal common law rested on that mischaracterization, the court also erred by failing to apply the Supreme Court's and this Court's rulings that the federal common law governing greenhouse-gas emissions has been entirely displaced by the Clean Air Act, 42 U.S.C. §§7401 *et seq.* ("CAA")—which prevents that federal common law from providing a basis for "complete preemption" removal. *See Am. Elec. Power Co. v. Connecticut*

[4] The same logical flaw undermines the district court's statement that "federal common law jurisdiction" existed because the "instrumentality of plaintiffs' alleged injury" was "the navigable waters of the United States." *See* ER34. The court did not explain how a federal navigable-waters claim could completely preempt the People's state law public nuisance claim; and the sole case it cited, *Michigan v. U.S. Army Corps of Engineers*, 667 F.3d 765 (7th Cir. 2011), did not address whether federal common law completely preempted any state law public nuisance claim involving navigable waters because the plaintiffs had filed their lawsuit in federal court alleging federal causes of action only. *See id.* at 768-69.

("*AEP*"), 564 U.S. 410, 423 (2011) ("federal common law claim[s] for curtailment of greenhouse gas emissions because of their contribution to global warming" have been "displaced by the federal legislation authorizing EPA to regulate carbon-dioxide emissions" under the CAA).

In *AEP*, eight states sued several major electric power companies in federal court, alleging that the companies' greenhouse-gas emissions violated the federal common law or, in the alternative, state tort law. *Id.* at 418. The Supreme Court concluded that the federal common law underlying the states' claims had been displaced by the CAA. *Id.* at 423. Because Congress, through the CAA, had spoken directly "to emissions of carbon dioxide," the Court concluded that the CAA "displace[d] any federal common law right to seek abatement of carbon-dioxide emissions." *Id.* at 424.

The Supreme Court in *AEP* expressly chose *not* to invalidate the plaintiffs' *state-law* nuisance claims, even after concluding that the plaintiffs' federal common law nuisance claims were displaced by the CAA, explaining that "[i]n light of our holding that the Clean Air Act displaces federal common law, the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act." *Id.* at 429 (citing *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 489, 491, 497 (1987)). As the Court made clear, a far more specific expression of congressional intent is required to "preempt" state law than to "displace" any

federal common law (which is a judicial construct created to regulate federal interests in the absence of federal statutory authority). *See AEP*, 564 U.S. at 423 (citing *City of Milwaukee v. Illinois* ("*Milwaukee II*"), 451 U.S. 304, 314 (1981)).

In *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012), *cert. denied*, 133 S.Ct. 2390 (2013), this Court followed *AEP* in holding that the CAA entirely displaced the plaintiffs' federal common law claim for abatement of the localized effects of climate change. In *Kivalina*, two public entities asserted state and federal common law public nuisance claims against various oil and gas companies. The district court dismissed the state law claims without prejudice, eliminating those state law claims as an issue on appeal. *Id.* at 853. Consistent with *AEP*, this Court concluded that the public entities' remaining *federal* public nuisance claims (alleging that the oil and gas company defendants had emitted "massive amounts of greenhouse gases that contribute to global warming which, in turn, has severely eroded the land where the [public entities] sit[]," thereby "threaten[ing them] with imminent destruction") had been displaced by the CAA and thus could not support plaintiffs' federal common law claim for relief. *Id.* at 853, 856-58; *id.* at 858 (Pro, J., concurring).

While that holding fully disposed of the *Kivalina* plaintiffs' *federal* common law claims (because the scope of CAA displacement was co-extensive with the scope of the otherwise applicable federal common law), it left plaintiffs' *state-law*

claims untouched, for as the concurring judge noted, *AEP* provides that "[o]nce federal common law is displaced, state nuisance law becomes an available option to the extent it is not preempted by federal law." *Id.* at 866 (Pro, J., concurring); *see AEP*, 564 U.S. at 424.

Thus, even under the district court's mistaken belief that these cases seek to regulate emissions, *AEP* and *Kivalina* preclude any finding of complete preemption: the federal common law concerning regulation of emissions cannot be completely preemptive, because it has been displaced by statute.

The district court sought to distinguish *Kivalina* on the ground that the People's "claims here attack behavior worldwide," while the claims in *Kivalina* allegedly "sought only to reach domestic conduct." ER33. That mischaracterizes the facts of *Kivalina* and this Court's analysis, which did not distinguish between the defendants' foreign and domestic practices. Plaintiffs in *Kivalina* "attribute[d] the impending destruction of [their] land to the effects of global warming, which [they] allege[d] results in part from emissions of large quantities of greenhouse gases by the Energy Producers" and that in turn caused global-warming induced "sea level[] rise," without regard to where the fossil fuels were extracted or burned. 696 F.3d at 853-54. Those plaintiffs further alleged that defendants, "as substantial contributors to global warming, [were] responsible for [the entities'] injuries,"

because their "emissions of carbon dioxide and other greenhouse gases, by contributing to global warming," had created a public nuisance. *Id.* at 854.

In *Kivalina*, then, the public entity plaintiffs sought to abate the localized consequences of the defendants' *worldwide* contributions to climate change. Accordingly, this Court's conclusion in *Kivalina*—that the CAA (in which Congress decided which emissions to regulate, and how) displaced any federal common law that might otherwise be applicable to those emissions—should have precluded the district court's conclusion here that, to the extent these are "emissions" cases, they "arise" under federal common law.[5]

B. Defendants' other asserted grounds for removal jurisdiction are meritless.

The district court's denial of the People's motions to remand rested upon its erroneous conclusion that the People's state public nuisance claims were "governed by federal common law." ER34. The court did not reach any of the Defendants' other asserted grounds for removal. However, for the reasons stated by the Plaintiffs-Appellants in *County of San Mateo, et al. v. Chevron Corp., et al.*, 9th Cir. Nos. 18-15499, 18-15502, and 18-15503 (AOB, Jan. 22, 2019) ("Dkt.

[5] *See also infra* at 32-42 (explaining why, because these are *not* "emissions" cases, no federal common law has *ever* applied to the types of public nuisance claims alleged by the People and why, even if any such federal common law existed, it would not preempt those claims).

88")—which arguments the People hereby incorporate by reference[6]—none of those additional grounds permits the exercise of federal subject matter jurisdiction either.

1. The CAA does not completely preempt the People's California public nuisance claims.

Defendants contended in their Notices of Removal that the CAA "provide[s] an exclusive federal remedy for plaintiffs seeking stricter regulation of the nationwide and worldwide greenhouse gas emissions put at issue in the Complaint." ER207, 243. The People do *not* seek any such regulatory remedy in these actions and, indeed, lack statutory authority to seek any remedy that extends beyond their jurisdictions. *See* Cal. Civ. P. Code §731; Cal. Const. art. XI, §7; *City of Lodi v. Randtron*, 118 Cal.App.4th 337, 352 (2004). For removal jurisdiction, though, it makes no difference. Even if Defendants' characterization were accurate, the CAA expressly *preserves* the states' traditional police power to regulate air pollution, *see Oxygenated Fuels Ass'n v. Davis*, 331 F.3d 665, 670-71 (9th Cir. 2003), and its saving clause plainly states that "nothing in" the chapter

[6] Fed. R. App. P. 28(i) expressly permits incorporation of arguments in "consolidated" cases, while Circuit Rule 28-1(b) prohibits incorporation of arguments from "prior appeals." Neither rule addresses the present situation, in which one set of California public entities seek to incorporate by reference legal arguments made by other California public entities in a pending appeal that raises identical subject matter jurisdiction challenges involving substantially similar complaints. To avoid unnecessary duplication of briefing or a request to exceed the applicable word limits, the People therefore request this incorporation.

governing citizen suits "shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief." 42 U.S.C. §7604(e). There can be no "complete preemption" by a federal statute that preserves existing state law claims and does not replace them with an available federal cause of action. *See supra* at 10-14; *see also* Dkt. 88 at 33-38; *In re NOS Comm'ns, MDL No. 1357*, 495 F.3d 1052, 1058 (9th Cir. 2007).

2. The People's state law claims do not present any embedded federal questions within the meaning of *Grable*.

Defendants next asserted that the People's public nuisance claims implicate federal questions concerning "national energy, economic development, and federal environmental protection and regulatory policies" and that any remedy should be limited to those provided by "other federal statutes and the United States Constitution" under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005). ER207, ER213-214 ¶¶7, 22, 24; ER243, ER250-251 ¶¶7, 22, 24. None of these assertions of embedded federal law justifies removal. *See* Dkt. 88 at 38-47.

Only in a "'special and small' category of cases" may federal question jurisdiction be exercised over a state law claim on the theory that the claim "really and substantially involv[es] a dispute or controversy respecting the validity, construction or effect of [federal] law" under *Grable*. *Gunn v. Minton*, 568 U.S.

251, 258 (2013) (quoting *Empire Healthchoice Assurance v. McVeigh*, 547 U.S. 677, 699 (2006)); *Grable*, 545 U.S. at 313 (quoting *Shulthis v. McDougal*, 225 U.S. 561, 569 (1912)). To establish *Grable* jurisdiction, a defendant must show that a federal issue is: "(1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn*, 568 U.S. at 258 (2013); *Grable*, 545 U.S. at 313-14.

A federal question is only "necessarily" raised under *Grable* if that "question of federal law is a necessary element of one of the well-pleaded state claims." *Franchise Tax Bd.*, 463 U.S. at 13. That is why a "state-law claim will present a justiciable federal question only if it satisfies *both* the well-pleaded complaint rule *and*" the four elements of *Grable*. *Cal. Shock Trauma Air Rescue v. State Comp. Ins. Fund*, 636 F.3d 538, 542 (2011) (emphasis in original).

Nothing in the People's public nuisance claims "require[s] resolution of a substantial question of federal law," or even interpreting federal law. *Franchise Tax Bd.*, 463 U.S. at 13. Defendants' embedded "federal questions" are, at best, federal *defenses* to state law claims. Although those defenses might overlap at some high level of generality with "national energy, economic development, and federal environmental protection and regulatory polic[y]" concerns, ER215 ¶24; ER251 ¶24, those concerns could, at most, support a preemption *defense* (although

they do not, for the reasons explained in the next section). But again, ordinary "preemption, without more, does not convert a state claim into an action arising under federal law." *Metro. Life Ins. v. Taylor*, 481 U.S. 58, 65 (1987); *see Caterpillar, Inc.*, 482 U.S. at 391-92.

Likewise, Defendants' argument that their First Amendment, Due Process Clause, and Commerce Clause rights are threatened by the People's public nuisance claims, ER218 ¶33; ER254 ¶33, simply identifies additional defenses, none of which are necessary elements of the People's state law claims. *See, e.g.*, *Nevada v. Culverwell*, 890 F.Supp. 933, 937 (D. Nev. 1995) (no removal based on First Amendment defense); *Caterpillar, Inc.*, 482 U.S. at 391-92.

Nor is there any merit to Defendants' assertion that the People's claims present an embedded federal question concerning the "foreign affairs doctrine." ER219-220 ¶¶33-34; ER255-56 ¶¶33-34. Even if Defendants had a factual basis for this assertion, the foreign affairs doctrine at most provides another preemption defense. *Gingery v. City of Glendale*, 831 F.3d 1222, 1228 (9th Cir. 2016). Because none of Defendants' asserted "federal questions" are essential elements of the People's public nuisance claims as required by *Grable*, Defendants have failed to establish this ground for federal subject matter jurisdiction.[7]

[7] Defendants also failed to satisfy any of the other elements of the *Grable* test, for the reasons set forth in Dkt. 88 at 45-47.

3. There is no basis for federal officer removal.

Defendants next asserted that removal was proper under 28 U.S.C. §1442(a)(1) because "a causal nexus exists between their actions, taken pursuant to a federal officer's directions." This is the ground that Judge Chhabria in the San Mateo cases characterized as "dubious," and which is the principal focus of the San Mateo Plaintiff-Appellants' brief. *See San Mateo Cty. v. Chevron Corp.*, 294 F.Supp.3d 934, 939 (N.D. Cal. 2018); *see also* Dkt. 88 at 12-23. Because the only relationships between Defendants and the federal government (1) involve ordinary contractual obligations that do not establish "unusually close" federal oversight "involving detailed regulation, monitoring, or supervision," *Watson v. Philip Morris Cos., Inc.*, 551 U.S. 142, 153 (2007), or (2) mere compliance with federal law in extracting fossil fuels, there is no federal officer jurisdiction.

4. There is no basis for OCSLA removal.

Defendants also asserted that original jurisdiction existed "pursuant to the Outer Continental Shelf Lands Act." ER207 ¶8, ER242 ¶8. This contention is meritless, because the People's claims do not "aris[e] out of, or in connection with ... any operation conducted on the outer Continental Shelf" within the meaning of the statute. *See also* Dkt. 88 at 48-50.

The OCSLA provides, in relevant part:

> [T]he district courts of the United States shall have jurisdiction of cases and controversies arising out of, or in connection with (A) any operation conducted on the outer Continental Shelf which

> involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals….

43 U.S.C. §1349(b)(1). To establish OCSLA jurisdiction, Defendants had to show not only that they conducted operations on the Outer Continental Shelf ("OCS"), but that those operations were sufficiently connected to the elements of the People's public nuisance claims to support federal jurisdiction—which they are not.

The People's public nuisance claims do not require any showing of where Defendants' fossil-fuel products originated or which companies extracted or produced those products. Under California law, a company that lawfully sells a product whose use or disposition causes substantial and unreasonable harms can only be held liable for contributing to a public nuisance if it wrongfully promoted that product—for example, by failing to disclose known hazards or misleading the public about those hazards. *See ConAgra*, 17 Cal.App.5th at 83-84 (citing *Cty. of Santa Clara v. Atlantic Richfield Co.*, 137 Cal.App.4th 292, 309-10 (2006)). Where the product was extracted or by whom makes no difference at all.

The fact that some of Defendants' products may have originated on the OCS is thus far too tenuous a connection to support OSCLA "arising out of, or in connection with" jurisdiction. *See Par. of Plaquemines v. Total Petrochem. & Ref. USA*, Inc., 64 F.Supp.3d 872, 894-98 (E.D. La. 2014) (no OCSLA jurisdiction over

pollution claims from oil and gas exploration and production in Louisiana waters, even though some claims "involved pipelines that ultimately stretch to the OCS," because "'mere connection' between the claims asserted and an OCS operation is 'too remote' to establish federal jurisdiction") (quoting *In re Deepwater Horizon*, 745 F.3d 157, 163 (5th Cir. 2014)).[8] Under Defendants' theory of OCSLA jurisdiction, federal courts would have jurisdiction over every product-defect and related claim in which there may be some connection, however attenuated, between the substance of the claim and the raw components of the injury causing product. That pushes OCSLA jurisdiction too far. Because the People's claims (and Defendants' liability) would be the same whether or not Defendants were in the fossil-fuel extraction business, and whether or not their extractions were based on any OCS operations, there is no basis for federal OCSLA jurisdiction.

5. There is no basis for federal enclave jurisdiction.

Defendants also sought removal under 28 U.S.C. §1441(a) and 28 U.S.C. §1331 because the People's claims "arise[] on federal enclaves." ER207, 243. That theory does not work, either. *See* Dkt. 88 at 50-52.

[8] *See also Stutes v. Gulfport Energy Corp.*, No. 6:16-cv-01253, 2017 WL 4286846, at *12 (W.D. La. June 30, 2017), *rep. & rec. adopted*, 2017 WL 4274353 (W.D. La. Sept. 26, 2017); *Plains Gas Sols., LLC v. Tennessee Gas Pipeline Co., LLC*, 46 F.Supp.3d 701, 704-05 (S.D. Tex. 2014) (cautioning that "a blind application of this test would result in federal court jurisdiction over all state law claims even tangentially related to offshore oil production on the OCS" and lead to "absurd results").

Federal enclave jurisdiction exists only "over tort claims that *arise* on 'federal enclaves.'" *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1250 (9th Cir. 2006) (emphasis added); *see Alvares v. Erickson*, 514 F.2d 156, 160 (9th Cir. 1975) (federal enclave jurisdiction "depends upon ... the locus in which the claim arose"), *disapp'd on other grounds by Local 144 Nursing Home Pension Fund v. Demisay*, 508 U.S. 581 (1993). But public nuisance claims "arise" *where the injury occurred*, here, in San Francisco and Oakland. *See* Cal. Civ. P. Code §731 (abatement for public nuisance may be sought by district attorney, county counsel, or city attorney only in county, town, or city "in which the nuisance exists"); *ConAgra*, 17 Cal.App.5th at 124, 167 (abatement remedy appropriate only where "defendants' public nuisance exists"); *In re High-Tech Empl. Antitrust Litig.*, 856 F.Supp.2d 1103, 1125 (N.D. Cal. 2012) (rejecting argument that "federal enclave doctrine applies as long as some of the alleged events occurred on the federal enclave," and applying the "locus" standard). The People's claims "arise" within their jurisdictions, not on federal enclaves—and the complaints expressly disavow any intent to "seek abatement with respect to any federal land." ER116 n.154, 118 n.155, 181 n.82, 183 n.83.

6. There is no basis for bankruptcy jurisdiction.

Defendants next sought removal under 28 U.S.C. §1452(a) and 28 U.S.C. §1334(b) "because Plaintiff's state-law claim is related to cases under Title 11 of

the United States Code" (although Defendants do not identify any particular bankruptcy proceeding or which of them, if any, were involved in it). ER208 ¶11, ER244 ¶11.

Defendants' invocation of bankruptcy jurisdiction is frivolous. *See* Dkt. 88 at 52-55. Although Section 1452(a) authorizes removal of claims arising "under section 1334 of this title," it *exempts* from removal any "action by ... governmental unit[s] to enforce ... police or regulatory power." The People's public nuisance lawsuits are clearly within that police or regulatory power exemption because these lawsuits primarily "seek[] to effectuate public policy" rather than primarily to "adjudicate private rights." *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1109 (9th Cir. 2005); *ConAgra*, 17 Cal.App.5th at 136; *Acuna*, 14 Cal.4th at 1103.

The fact that "[m]ost government actions ... have some pecuniary component … "does not abrogate their police power function." *In re Universal Life Church*, 128 F.3d 1294, 1299 (9th Cir. 1997); *see City & Cty. of S.F. v. PG&E Corp.*, 433 F.3d 1115, 1123-26 (9th Cir. 2006). The People's lawsuits are therefore exempted from bankruptcy jurisdiction by Section 1452(a)'s police power exception.

7. There is no basis for Defendants' untimely assertions of federal admiralty jurisdiction.

Despite the exhaustive list of grounds for removal in Defendants' Notices of Removal, Defendants did not raise federal admiralty jurisdiction under 28 U.S.C. §1333(1) until after remand briefing was completed, when they filed a

supplemental brief in response to the court's inquiry. ER202, 193-198. Courts may only consider the grounds asserted in the notice of removal, however; "alternative bases for removal jurisdiction" are waived and cannot be considered. *ARCO Envtl. Remediation, LLC v. Dept. of Health & Envtl. Quality*, 213 F.3d 1108, 1117 (9th Cir. 2000). Defendants' untimely assertions, nearly four months after their Notices of Removal, were too late. *See, e.g., O'Halloran v. Univ. of Wash.*, 856 F.2d 1375, 1381 (9th Cir. 1988); *Wood v. Crane Co.*, 764 F.3d 316, 323 (4th Cir. 2014).[9]

Even without waiver, there is no admiralty jurisdiction. *See* Dkt. 88 at 55-58. Section 1333(a) provides that "[t]he district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, *saving to suitors in all cases all other remedies to which they are otherwise entitled*." (Emphasis added). This "saving to suitors" clause has consistently been construed to mean that admiralty and maritime claims brought in state court "are not removable under 28 U.S.C. §1441 *absent some*

[9] The district court's conclusion that Defendants did not waive federal admiralty jurisdiction because the Notices of Removal "invoked federal common law as a grounds [sic] for removal," ER34, is foreclosed by this Court's precedent. Besides, Defendants' failure to invoke admiralty jurisdiction in their Notices of Removal is not a mere "technical" mistake that the district court would have discretion to allow Defendants to correct; it is a wholly independent theory of removal not timely asserted, which the district court had no power to recognize. *Wood*, 764 F.3d at 323.

other jurisdictional basis." *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1069 (9th Cir. 2001) (emphasis added); *Coronel v. AK Victory*, 1 F.Supp.3d 1175, 1178-89 (W.D. Wash. 2014) (same). Because there is no other jurisdictional basis for removing the People's claims, there is no admiralty jurisdiction.

Besides, a tort claim only comes within the district court's original admiralty jurisdiction where, inter alia, "the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity." *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 533-34 (1995). Defendants cannot plausibly claim that the "general character" of the activities giving rise to their public nuisance liability (their wrongful promotion of known dangerous products while actively concealing those dangers) has any "substantial relationship to traditional maritime activity." Nor can Defendants show that the People's injuries were "caused by a *vessel* on navigable waters," as required by 46 U.S.C. §30101(a) (emphasis added). *See Myhran v. Johns-Manville Corp.*, 741 F.2d 1119, 1122 (9th Cir. 1984).

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

Because the district court lacked subject matter jurisdiction, it should have remanded these cases and not reached Defendants' Rule 12(b)(6) motions to dismiss. Even if the court had such jurisdiction, though, it erred in dismissing the People's public nuisance claims.

A. The district court erred in finding no CAA displacement, given its characterization of the People's claims as seeking to regulate greenhouse-gas emissions.

The court began its analysis of displacement by acknowledging that under *AEP* and *Kivalina*, the CAA displaced federal common law claims pertaining to domestic emissions of greenhouse gases. ER19. While the court recognized that complete displacement by the CAA would require dismissal of any federal common law claims, it sought to distinguish *AEP* and *Kivalina* as applying only to *domestic* greenhouse-gas emissions. The court concluded that because the People's allegations "centered on defendants' placement of fossil fuels into the flow of international commerce," there was no CAA displacement because "foreign emissions are out of the EPA and Clean Air Act's reach." *Id.*

The People demonstrated *supra* at 10-14 why the displaced federal common law governing greenhouse-gas emissions could not "completely preempt" the People's state public nuisance claims for purposes of removal jurisdiction, even assuming (as the district court did) that the People's complaints sought to regulate greenhouse-gas emissions. That same displacement analysis compels the conclusion that, if the court had some basis for exercising removal jurisdiction *other than* complete preemption (which it does not, *see supra* at 14-30), its Rule 12(b)(6) analysis should have been directed at the People's non-preempted state public nuisance claims, not the displaced federal common law claims that the court

declared should "govern[]" instead. *See* ER32 ("presum[ing]" "that once federal common law is displaced, state law once again governs") (citing *AEP*, 564 U.S. at 429; *Oullette*, 479 U.S. 481).

For the reasons demonstrated *supra* at 14-18, no federal common law of emissions survives CAA displacement. Consequently, *if* the district court had some basis for exercising subject matter jurisdiction other than complete preemption, *but see supra* at 18-29, and *if* the People's public nuisance claims actually sought to regulate greenhouse-gas emissions, *but see infra* at 32-34, the district court *should* have ruled that the federal common law relating to emissions has been displaced and that any Rule 12(b)(6) motion therefore had to be directed at the People's state law public nuisance claims only (to determine whether those state law claims were either preempted by the CAA or failed to state a claim for any other reason).

The district court never conducted that analysis. Accordingly, if this Court reaches the Rule 12(b)(6) issues in this appeal (*i.e.*, if it finds some legitimate jurisdictional ground for removal), it should remand for the district court to decide in the first instance whether to dismiss the People's *state law public nuisance claims*—an analysis the court skipped over entirely after erroneously concluding that federal common law "governed."

B. The district court erred in its repeated assertion that the People's public nuisance claims seek to regulate greenhouse-gas emissions.

Central to the district court's analysis in its first two orders was its erroneous assumption that a federal common law applicable to greenhouse-gas emissions governs the People's claims. But the People are not seeking to regulate or to hold Defendants liable for their, or anyone else's, emissions. To be sure, the rising sea levels and unprecedented storms ravaging coastal communities like Oakland and San Francisco are triggered by a cumulative sequence of events, beginning with the extraction of fossil fuels and continuing with their production, sale, and combustion. But whatever role Defendants played at the various stages of the production process, none of that conduct would be sufficient by itself to subject Defendants to liability under California law for contributing to a public nuisance.

The People are only able to seek an equitable abatement remedy under California public nuisance law because each Defendant wrongfully promoted the use of its fossil-fuel products while intentionally failing to disclose material information and/or affirmatively making misleading statements about the inevitable, devastating impacts on coastal communities it knew would result from the expanded use of its otherwise lawful products. *See, e.g.*, *Santa Clara*, 137 Cal.App.4th at 309-10. The People are not seeking to enjoin greenhouse-gas emissions by Defendants or anyone else. They are seeking to require Defendants

to bear the costs of remediating the localized public nuisance that Defendants contributed to creating, and thereby exacerbated, through their wrongful conduct.

The People's public nuisance claims thus differ materially from the emissions-related claims in *AEP* and *Kivalina*. In *AEP*, the plaintiffs filed "federal common law public nuisance claims against carbon-dioxide emitters" and sought "a decree setting carbon-dioxide emissions for each defendant at an initial cap, to be further reduced annually." 564 U.S. at 415. The Supreme Court was asked to decide whether federal courts could issue an injunction to regulate the defendants' greenhouse-gas emissions under federal common law. *Id.* at 424. In *Kivalina*, the plaintiffs sought damages under federal common law for harms arising from the defendants' emissions of greenhouse gas. *Kivalina*, 696 F.3d at 853. In both cases, defendant's emissions were the central focus of the plaintiffs' claims and requested relief. The Courts had to analyze the extent of CAA displacement, because the CAA regulates emissions and permits enforcement of the EPA's emissions regulations. *AEP*, 564 U.S. at 424-25; *Kivalina*, 696 F.3d at 856.

In sharp contrast, the People's state law public nuisance claims do not seek to interfere with any rights, remedies, or obligations created by the CAA, and Congress has never regulated the wrongful promotion or marketing of fossil fuels through the CAA or any other statute. Because the People do not seek to regulate or enjoin any greenhouse-gas emissions, there is no basis for applying any federal

common law to those claims, displaced or otherwise; and because the People's state law claims do not intrude on the domain Congress created through the CAA, there is also no need to determine the extent, if any, to which the CAA displaced federal common law.

C. The People's state law claims are not preempted by federal common law or the CAA.

Before demonstrating why the district court's concerns about extraterritoriality and foreign policy were misplaced, the People reiterate why their state law nuisance claims easily survive any federal preemption defense.

"States are independent sovereigns in our federal system," *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), and have always been empowered to exercise their "traditional authority to provide tort remedies" for wrongful conduct causing harm to themselves and their residents, pursuant to their police powers. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984); *see United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342-43 (2007). That is why the Supreme Court has held that "solicitude for state interests, particularly in the field[s where states have historically strong regulatory interests], should be overridden … only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied." *United States v. Yazell*, 382 U.S. 341, 352 (1966).

For well over a century, California public entities have been authorized to pursue representative public nuisance actions to obtain abatement of "substantial and unreasonable" obstructions of public rights that are causing "significant harm" to "an entire community or neighborhood, or any considerable number of persons." *See supra* at 3 n.1. California courts have frequently applied these principles to remediate the in-state effects of environmental contamination, even when not all sources of that contamination were identifiable and even when federal regulatory schemes may have allowed the contamination to occur.

For example, California courts have held manufacturers of lead-based paint responsible for abating lead contamination in residential housing that resulted in part from those manufacturers' wrongful promotional activity, even though lead paint was not banned in this country until 1978. *See ConAgra*, 17 Cal.App.5th at 169. California courts have also required producers of dry-cleaning chemicals leaching into California groundwater to abate the resulting hazard because those producers wrongfully encouraged local dry cleaning establishments to dispose of those solvents unsafely. *See City of Modesto v. Dow Chem. Co.*, 19 Cal.App.5th 130, 135 (2018).[10]

[10] While the defendants in those cases manufactured the nuisance-causing products, the underlying legal principles apply to any entity that participated at any point in the chain of causation whose conduct substantially contributed to the creation or expansion of the public nuisance. *See Acuna*, 14 Cal.4th at 1100 (neighborhood disturbances caused by gang members); *Eaton v. Klimm*, 217 Cal.

Any inquiry into the appropriateness of creating new federal common law to replace a longstanding state law doctrine must start with the recognition that the creation of new federal common law is highly disfavored and is reserved for "extraordinary cases." *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 89 (1994). Federal common law exists only in "few and restricted" areas, *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963), and can only replace state law in those rare instances where (1) a "uniquely federal interest" or policy is concretely identified, *and* (2) there is "'significant conflict' ... between [that] identifiable 'federal policy

362, 368-70 (1933) (public nuisance caused by smoke that prevented neighbors from ventilating homes or using yards); *People v. Gold Run Ditch & Mining Co.*, 66 Cal. 138, 146-52 (1884) (contamination of river by mining debris); *Birke v. Oakwood Worldwide*, 169 Cal.App.4th 1540, 1548 (2009) (secondhand smoke in private common areas of condominium complex); *People v. Mason*, 124 Cal.App.3d 348, 352-53 (1981) (public nuisance that affected multiple homes in subdivision); *City of Modesto Redev. Agency v. Superior Ct.*, 119 Cal.App.4th 28, 37-43 (2004) (discharge of toxic solvent with the encouragement of defendant solvent manufacturers); *Newhall Land & Farming Co. v. Superior Ct.*, 19 Cal.App.4th 334, 342 (1993) (contamination of water supply); *Venuto v. Owens-Corning Fiberglass Corp*., 22 Cal.App.3d 116, 123-29 (1971) (emissions interfering with enjoyment of private homes); *People v. City of Los Angeles*, 83 Cal.App.2d 627, 632-34 (1948) (ocean contamination); *see also* Restatement (Second) Torts §821B, com. g. Where multiple entities contributed to a nuisance, as here, it is their burden to prove the appropriateness of any apportionment of liability. *See* Restatement (Second) Torts §840E, com. b; *Fibreboard Paper Prods. Corp. v. East Bay Union of Machinists*, 227 Cal.App.2d 675, 704-705 (1964) ("[W]here it is clear that a defendant has been at fault and that he has caused some part of the plaintiff's damages, the burden of proof should rest on him to show the extent of his contribution, and that if he cannot sustain it he should be liable for the entire loss.").

or interest and the [operation] of state law.'" *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507 (1988) (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966) (alteration in original)); *accord*, *O'Melveny*, 512 U.S. at 87-88.[11] Other than the displaced federal common law regulating greenhouse-gas emissions, no other body of federal common law arguably applies to the People's public nuisance claims. Nor has any court ever purported to create a body of federal common law to govern claims against manufacturers or sellers that tortiously promote otherwise lawful products whose hazardous impacts are known but deliberately misrepresented or concealed.

The district court concluded (in the context of what it erroneously believed to be an emissions claim) that the People's claims raised uniquely federal interests and that application of California public nuisance law in these cases would significantly conflict with those interests. Neither part of that conclusion survives scrutiny outside of the emissions context.

First, the court's assertion that a "uniform" approach is required for all litigation addressing "the geophysical problem" of climate change, ER29, 30,

[11] The Supreme Court has made clear that federal common law may only be created to address "such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases." *Tex. Indus. v. Radcliff Materials*, 451 U.S. 630, 641 (1981).

ignores that the People expressly disclaim any intent to regulate emissions and do not seek any injunctive or other relief that would prevent any Defendant from continuing their existing business operations. ER62 ¶11; ER134 ¶11. Nor could the limited equitable abatement remedy authorized by California law conflict with any Defendant's ability to comply with whatever other legal obligations it may face.

The district court's asserted need for a "uniform standard of decision," ER30, is particularly weak on the facts of these cases. *See, e.g., O'Melveny*, 512 U.S. at 88 (describing uniformity as "that most generic (and lightly invoked) of alleged federal interests"); *Marsh v. Rosenbloom*, 499 F.3d 165, 177, 182 (2d Cir. 2007) (rejecting uniformity as a cause to invoke federal common law). Public nuisance law is already mostly uniform, because "[a] majority of the states have adopted the Restatement's definition of public nuisance." *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 351 n.28 (2d Cir. 2009), *rev'd on other grounds by AEP*, 564 U.S. 410. As a result, the legal principles governing the People's state law claims are similar to those that most other states would apply to a case alleging comparable public nuisances in their jurisdictions. *See* ER17 (citing Restatement (Second) of Torts §821B)); *see also* Restatement Second, §826 & comm. A; *id.* §829A & comm. A; *id.* §821B.

Companies that sell goods across state or national boundaries frequently face different legal obligations in different jurisdictions. Creating new federal common law to regulate such interstate market transactions has never been necessary. Nor is it necessary now. *See, e.g.*, *In re Agent Orange Prod. Liab. Litig.*, 635 F.2d 987, 994-95 (2d Cir. 1980) (no need for uniform federal standard of decision for tort claims against herbicide manufacturers by Vietnam War veterans injured by overseas wartime use of herbicides); *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1324 (5th Cir. 1985) (en banc) (federal common law does not govern claim against asbestos manufacturers). Because the People are not seeking to regulate Defendants' (or anyone else's) emissions, there is no significant risk that different states would be asked to regulate the same hazardous discharges or seek conflicting and irreconcilable injunctions pursuant to different state laws. *Cf. Ouellette*, 479 U.S. at 496-97; *AEP*, 564 U.S. at 415; *Milwaukee I*, 406 U.S. at 93.

Second, although the district court purported to find a "significant conflict" between the state and federal interests at issue in these cases, no such conflict actually exists.

"It is well settled that the states have a legitimate interest in combatting the adverse effects of climate change on their residents." *Am. Fuel & Petrochemical Mfrs. v. O'Keeffe*, 903 F.3d 903, 913 (9th Cir. 2018) (citing *Massachusetts v. EPA*, 549 U.S. 497, 522-23 (2007)); *cf. Nat'l Audubon Soc. v. Dep't of Water*, 869 F.2d

1196, 1203 (9th Cir. 1988) ("[T]he primary responsibility for maintaining the air quality [under the CAA] rests on the states."). Indeed, many states and cities have passed laws, regulations, and policies, upheld by the courts, that directly bear on elements of the climate change crisis. *See, e.g.*, *Rocky Mtn. Farmers Union v. Corey*, 730 F.3d 1070, 1106-07 (9th Cir. 2013) (state law regulating carbon intensity of ethanol sold in interstate commerce); *Coal. for Competitive Elec. v. Zibelman*, 272 F.Supp.3d 554, 559 (S.D.N.Y. 2017) (state program promoting clean energy sources), *aff'd*, 906 F.3d 41 (2d Cir. 2018).

By erroneously characterizing the People's public nuisance claims as an attempt to regulate worldwide emissions rather than simply to abate the localized effects of Defendants' tortious conduct, the district court improperly stripped the People of their traditional sovereign authority to redress local harms to public infrastructure. Yet longstanding "[f]ederalism concerns require [federal courts to] ... permit state courts to decide whether and to what extent they will expand state common law" to apply to such problems within their borders. *City of Philadelphia v. Lead Indus. Ass'n, Inc.*, 994 F.2d 112, 123 (3d Cir. 1993).

In short, no federal policy or statute regulates the wrongful promotion of fossil fuels or provides an abatement remedy for public entities under the circumstances of these cases. Congress has never addressed the issues raised by Defendants' challenged conduct (in contrast, for example, to legislation

immunizing firearms manufacturers and dealers from the unlawful use of their products, *see* 15 U.S.C. §§7901-7903).[12] Whatever the ultimate outcome of this litigation, Defendants will continue to have the right to produce, promote, and sell fossil fuels. The People simply seek to have Defendants pay to remediate the harms caused by their knowingly wrongful conduct, under traditional tort principles. No such order would significantly conflict with any uniquely federal interest.

Nor does the CAA preempt the People's state law claims. Although a federal statute like the CAA can displace federal common law, it cannot eliminate related state law claims—particularly claims based on a state's historic police powers—absent Congress's "clear and manifest" intent to preempt that state law. *See AEP*, 564 U.S. at 423. Congress did not intend the CAA to preempt non-conflicting state law claims for the reasons explained *supra* at 19-20. As a result, although the 1970 CAA amendments fully displaced whatever federal common law might apply to claims regarding greenhouse-gas emissions, nothing in the

[12] "Congress's mere refusal to legislate ... falls far short of an expression of legislative intent to supplant the existing [federal] common law in that area." *United States v. Texas*, 507 U.S. 529, 535 (1993) (internal quotation marks and citation omitted). Where Congress expressly regulates in one domain (e.g., emissions) but not others (e.g., the creation of a public nuisance through the misleading promotion of fossil fuels for a known hazardous use), courts must presume that Congress made that choice deliberately. *See id.*

CAA preempts the People's public nuisance claims, regardless of how they may be characterized.

D. The People's state law claims cannot be dismissed as extraterritorial or as unduly intruding upon foreign policy.

The district court dismissed the People's public nuisance claims (as a matter of federal common law rather than state nuisance law), stating that those claims were "extraterritorial" and unduly interfered with "foreign policy." Both conclusions were wrong, regardless of the governing source of law.

Extraterritoriality. The district court concluded that although the People only seek an abatement remedy to remediate localized harms, their complaints more broadly "focus [on] ... sales of fossil fuels worldwide, beyond the reach of the EPA and the Clean Air Act," and thus "run[] counter to another cautionary restriction, the presumption against extraterritoriality." ER20-21 (citing *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004)).

Neither *Kiobel* nor *Sosa* has any application to the People's public nuisance claims. Both cases involved non-U.S. plaintiffs who sued for monetary damages under the Alien Tort Statute, 28 U.S.C. §1350, for injuries occurring outside the United States. In these cases, by contrast, plaintiffs are California public entities seeking equitable relief on behalf of their residents for in-state harms resulting from conduct that occurred in California as well as elsewhere. *Compare ConAgra*,

17 Cal.App.5th at 124, 167 (abatement remedy for public nuisance allowed only where harm is incurred); *with Kiobel*, 569 U.S. at 115, 124 ("[*A*]*ll* the relevant conduct took place outside the United States" and plaintiffs were seeking relief for ill-defined "violations of the law of nations occurring *outside* the United States.") (emphases added).

The presumption against extraterritoriality, a canon of federal *statutory* construction, has never been applied to state common law torts.[13] Instead, state and federal courts routinely look to conflict-of-laws rules and traditional common law principles to determine the source and content of the legal rights and obligations implicated by overseas conduct that causes domestic harm to U.S. residents. *See, e.g.*, *Ajuba Int'l, L.L.C. v. Saharia*, 871 F.Supp.2d 671, 681 (E.D. Mich. 2012) (tortious conduct committed in foreign country caused harm in Michigan and was actionable under Michigan tort law); *In re Agent Orange*, 635 F.2d at 994-95 (state tort law applies to claims brought by Vietnam War veterans injured by wartime use of chemical herbicides).

[13] Although California codified much of its common law in 1872, including the common law of public nuisance, the underlying common law categories are "still applicable," *Acuna*, 14 Cal.4th at 1104, and common law principles still apply in determining the scope and application of that law. *See Li v. Yellow Cab Co.*, 13 Cal.3d 804, 814-17 (1975) (emphasis in original) ("[t]he provisions of this Code, so far as they are substantially the same as existing statutes or the common law, must be construed as *continuations* thereof, and not as new enactments") (citing Cal. Civ. Code 1872 §5).

Even if this were a federal statutory case in which the presumption against extraterritoriality applied, that presumption would be overcome by the fact that at least some of Defendants' challenged conduct and all of the People's claimed injury occurred within the United States. The relevant inquiry is "'whether the case involves a domestic application of the statute,'" which in turn requires consideration of the statute's "'focus,'" or the "'object of its solicitude' … which can include the conduct it 'seeks to regulate,' *as well as the parties and interests it 'seeks to protect' or vindicate*." *WesternGeco LLC v. ION Geophysical Corp*., 138 S.Ct. 2129, 2136-37 (2018) (emphasis added) (alterations omitted) (quoting *RJR Nabisco, Inc. v. European Cmty*, 136 S.Ct. 2090, 2101 (2016), *and Morrison v. Nat'l Australia Bank Ltd*., 561 U.S. 247, 267 (2010)). In a public nuisance case, like any other case involving injury to property, the focus of concern is where that injury occurred. *See*, *e.g.*, *New Jersey v. City of New York*, 283 U.S. 473, 482 (1931) ("The situs of the acts creating the nuisance, whether within or without the United Sates, is of no importance."); *Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000, 1003-04 (9th Cir. 1987) (applying Restatement (Second) Conflict of Laws §175, which "creates a presumption that the law of the place where the injury occurred applies")); *cf. RJR Nabisco, Inc. v. European Community*, 136 S.Ct. 2090, 2111 (2016) (focus of RICO claim is where the injury to business or property occurred); *OBB Personenverkehr AG v. Sachs*, 136 S.Ct. 390, 396 (2015) (no

claim under commercial conduct exception to Foreign Sovereign Immunities Act where plaintiffs' "injuries [were] suffered in Austria").

The district court's overly broad focus on the historical causes of climate change caused it to give insufficient weight to the narrow, localized focus of the People's pleadings. It may be true that some of "the conduct and emissions contributing to the nuisance arise outside the United States." ER19. But it is equally true that much of the conduct alleged in these cases occurred *within* the United States, and that *all* of the harm for which abatement is sought has occurred and is continuing to occur in San Francisco and Oakland. *See, e.g.*, ER67-83, 92-95, 101-102, 103-104 ¶¶32-73, 96-100, 113-15, 118; ER139-154, 161-164, 170-173 ¶¶32-73, 96-100, 113-15, 118. Thus, because "at least some of the conduct relevant to [the People's] claims occurred in the United States," *Mujica v. AirScan, Inc.*, 771 F.3d 580, 595 (9th Cir. 2014), any presumption against extraterritoriality would be overcome *if* that presumption applied. *See also Doe v. Nestle, S.A.*, 906 F.3d 1120, 1125-26 (9th Cir. 2018).

Foreign Policy. The district court's vague invocation of foreign policy fares no better, for largely the same reasons. The court stated that to hold Defendants liable based in part on conduct they engaged in outside the United States could "affect foreign relations." ER21. The court also expressed concern that "[t]he problem [of climate change] deserves a solution on a more vast scale than can be

supplied by a district judge or jury in a public nuisance case," and that such a solution could only be supplied by the political branches. ER25.

If the district court were right, no public entity could ever bring any civil claim in the United States, in any court or under any body of law, that related in any way to harms caused by climate change (or any other global problem, such as human trafficking), given its worldwide scope and effects. But global issues, like state and national issues, can be addressed incrementally, using well-established, narrowly focused legal doctrines that address specific types of wrongful conduct; and state and federal judges are fully competent to apply established legal principles in such circumstances. *See, e.g.*, *Harbor Fumigation, Inc. v. Cty. of San Diego Air Pollution Control Dist.*, 43 Cal.App.4th 854, 858 (1996) (affirming state legislature's authority to regulate "'toxic air contaminant[s]'"—such as pesticide "[m]ethyl bromide"—which contribute to "depletion of the earth's ozone layer").

The People's complaints do not seek to regulate conduct on foreign soil, or to interfere with this or any other country's treaty-making power, or to "solve" the problem of global warming. These lawsuits do not conflict with any existing international agreements or any delegation of authority to the Executive branch. No foreign government or state-owned company is a defendant, and no such entity is being asked to do, or refrain from doing, anything. Nor did the district court identify any specific foreign policy or other federal interest sufficient to overcome

the states' longstanding authority to regulate wrongful promotional activities causing harms within their borders. *Compare Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 421 (2003); *Medellin v. Texas*, 552 U.S. 491, 498-99 (2008).

The elements of the People's representative public nuisance claims (which under California law can *only* be brought by a public entity and can only seek equitable abatement and not damages) are straightforward, well-settled, and as experience has shown, judicially manageable. *See supra* at 3 n.1. Because the facts alleged in the People's complaint fit squarely within California's public nuisance paradigm, *see, e.g.*, cases cited *supra* at 36 n.10), these claims are justiciable and can be adjudicated without any interference with any foreign policy concerns.

For all these reasons, the district court erred in dismissing the People's public nuisance claims.

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

After dismissing all claims under Rule 12(b)(6), the district court dismissed ExxonMobil, BP, Royal Dutch Shell, and ConocoPhillips under Rule 12(b)(2) as well, concluding that those Defendants lacked sufficient minimum contacts with California to support personal jurisdiction. ER6-10. This, too, was error (although

if this Court concludes that the district court had no subject matter jurisdiction over the case as a whole, it should not reach this issue either).

The legal principles governing specific personal jurisdiction are well-established. Where, as here, Defendants chose not to contest the People's jurisdictional allegations, those allegations must be accepted as true and "only … a prima facie showing" is needed to establish jurisdiction. *See* ER6, 7; *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004); *Washington Shoe Co. v. A-Z Sporting Goods Inc.*, 704 F.3d 668, 671 (9th Cir. 2012); *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1127 (9th Cir. 2010). Jurisdiction in these cases extends to the full extent due process permits, because there is no controlling federal statute and because California's long-arm statute is co-extensive with the Due Process Clause. *See* Fed. R. Civ. P. 4(k)(1)(A); Cal. Civ. P. Code §410.10; *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 433 F.3d 1199, 1205 (9th Cir. 2006) (en banc).

The Ninth Circuit applies a three-pronged "minimum contacts" test to disputes over specific personal jurisdiction. In tort cases like these, the first prong asks whether the non-resident defendant purposefully directed its activities toward the forum. *Yahoo!*, 433 F.3d at 1206.[14] Defendants conceded in the district court,

[14] In contract cases, this Court applies the "purposeful availment" test, which asks whether the defendant purposefully availed itself of the privilege of

for purposes of their Rule 12(b)(2) motion, that the People's allegations satisfied this first-prong test, *see* ER6-7; and the allegations in the amended complaints fully support that concession. *See generally* ER67-83 ¶¶32-73; ER138-154 ¶¶32-73.

The second prong of the test asks whether a plaintiff's claim "arises out of or relates to the defendant's forum-related activities." *Yahoo!*, 433 F.3d at 1205-06; *see Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S.Ct. 1773, 1780 (2017). That prong requires plaintiffs to demonstrate a nexus between their claims and the defendants' forum-related activities sufficient to satisfy minimum-contacts concerns. *See Shute v. Carnival Cruise Lines*, 897 F.2d 377, 385 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. 585 (1991); *In re W. States Wholesale Nat. Gas Antitrust Litig.*, 715 F.3d 716, 742 (9th Cir. 2013) ("*In re W. States*"). The district court erred in applying this second prong, failing to recognize that the first and second prongs are effectively the same when a defendant is alleged to have intentionally directed its tortious conduct against the in-state plaintiff who claims resulting injury (because the purposeful-direction and resulting-causation requirements combine in those circumstances). Instead, the court erroneously created an entirely new second-prong standard, requiring plaintiffs in a multiple-defendant public nuisance case to establish that *each* Defendant's conduct, *in*

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conducting activities in the forum, thereby invoking the benefits and protections of its laws. *Yahoo!*, 433 F.3d at 1206.

California, was an *independent* cause of the *full* extent of the People's claimed injuries. *See* ER7-10.[15]

A. The People satisfied the first and second prongs.

In this circuit, the first prong's "purposeful direction" or "effects" test is satisfied where "(1) the defendant committed an intentional act; (2) the act was expressly aimed at the forum state; and (3) the act caused harm that the defendant knew was likely to be suffered in the forum state." *Yahoo!*, 433 F.3d at 1206. Defendants conceded for purposes of their Rule 12(b)(2) motions that the People's allegations satisfied this purposeful-direction prong. *See* ER6-7; *see also* ER64-67 ¶¶17-18, 22-30; ER135-138 ¶¶17-18, 22-30 (allegations of Defendants' pervasive control over subsidiaries with extensive California operations and promotions); *Williams v. Yamaha Motor Co*., 851 F.3d 1015, 1024-25 (9th Cir. 2017) (where a principal controls a subsidiary, the subsidiary's actions may be attributed to the principal for personal jurisdiction purposes).

[15] Once a plaintiff satisfies the first two prongs of specific personal jurisdiction analysis, the burden shifts to defendants to present a "compelling case" that the exercise of personal jurisdiction would nonetheless not "comport with fair play and substantial justice." *Schwarzenegger*, 374 F.3d at 802 (9th Cir. 2004) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-78 (1985)); *see also Walden v. Fiore*, 571 U.S. 277, 285 (2014). The district court never reached this third prong, which is rarely satisfied if the first two prongs have been established. *Asahi Metal Industry Co. v. Superior Ct.*, 480 U.S. 102, 116 (1987) (quoting *Burger King*, 471 U.S. at 477-78) (Brennan, J., concurring in part and in the judgment).

Because Defendants conceded the sufficiency of the connection between their conduct *and the forum*, the district court focused exclusively on the connection between Defendants' conduct and the People's *public nuisance claims*. *Compare, e.g.*, *Goodyear Dunlop Tires Ops. v. Brown*, 564 U.S 915, 919-20 (2011) (tire manufacturer's sale of tires in North Carolina does not support personal jurisdiction over claim that manufacturer was responsible for North Carolina residents injured by bus accident in France). But by focusing on that second prong in a vacuum, the court failed to recognize that in an intentional tort case, there is no meaningful difference between the first two prongs. Once a court finds that a defendant intentionally "aimed at" at a targeted plaintiff under the first "purposeful direction" prong, it logically follows that plaintiff's resulting lawsuit "arises out of or relates to" that intentional conduct (although the ultimate causation determination should be left for trial). *See Washington Shoe*, 704 F.3d at 675 ("[W]hen we have determined that the tort is an intentional one, …. the 'acts are performed for the very purpose of having their consequences felt in the forum state.'") (quoting *Brainerd v. Governors of the Univ. of Alta.*, 873 F.2d 1257, 1260 (9th Cir. 1989)); *Columbia Pictures Television v. Krypton Broad.*, 106 F.3d 284, 289 (1997) (conduct was expressly aimed at California because defendant knew that conduct directed at the southeastern United States would have effects in California), *rev'd on other grounds*, 523 U.S. 340 (1998).

The only time aiming an intentional tort at an in-state resident would *not* satisfy the first and second prongs together would be if plaintiffs' complaint for some reason failed to allege that defendants' tortious, intentional acts were a cause-in-fact of plaintiffs' in-state harms. But here the People expressly alleged (and for purposes of specific personal jurisdiction Defendants did not dispute) that Defendants aimed their conduct at the California public entities—including by wrongfully promoting the expanded use of their fossil-fuel products by California residents and others. *See* ER67-106 ¶¶32-123; ER138-174 ¶¶32-123.[16]

The district court's approach to the second prong imposed a novel and unprecedented burden that no public entity could ever satisfy in a public nuisance case against multiple out-of-state defendants. Applying a unique form of "but-for" causation (even though the merits of the People's public nuisance claims only require the far-more-lenient "substantial factor" proof set forth in the Restatement (Second) Torts §435, *see ConAgra*, 17 Cal.App.5th at 101-02; *South Coast Framing, Inc. v. Workers' Comp. Appeals Bd.*, 61 Cal.4th 291, 298 (2015); *Rutherford v. Owens-Illinois, Inc.*, 16 Cal.4th 953, 968-69 (1997)), the court required the People to prove that *each* Defendant's out-of-state conduct was the

[16] In evaluating a defendant's "intent" for purposes of the first prong, courts merely require an "act … denot[ing] an external manifestation of an actor's will" rather than "an intent to accomplish a result or consequence of that act," *Washington Shoe*, 704 F.3d at 673-74 (quoting *Schwarzenegger*, 374 F.3d at 806).

independent, but-for cause of the *entirety* of the harms to public infrastructure alleged in the First Amended Complaint:

> The question is therefore *whether or not plaintiffs' alleged harm*—namely, *the effects of global warming-induced sea level rise—would have occurred even absent each defendant's respective California-related activities*. It is manifest that *global warming would have continued in the absence of all California-related activities of defendants*. Plaintiffs have therefore failed to adequately link each defendants' [sic] alleged California activities to plaintiffs' harm.

ER7 (citing *Doe v. Am. Nat. Red Cross*, 112 F.3d 1048, 1051-52 (9th Cir. 1977) (emphasis modified); *see also id.* at ER8 ("[N]owhere do plaintiffs contend that sea level rise would not occur absent defendants' California contacts.").

That is not and cannot be the proper inquiry. *See, e.g.*, *In re W. States*, 715 F.3d at 742 (defendants' *collective* conduct underlying alleged price-fixing conspiracy was sufficiently connected to the higher gas prices plaintiffs paid to satisfy personal jurisdiction). Only when *none* of the injuries alleged by plaintiffs could possibly have resulted from the defendants' purposeful contacts should personal jurisdiction be denied under the second prong. *See, e.g.*, *Doe*, 112 F.3d at 1051-52; *Omeluk v. Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 272 (9th Cir. 1995).

The district court's second-prong analysis thus rested on three independently reversible errors.

First, the court erred in limiting its inquiry to the activities performed by Defendants and their agents and subsidiaries "in California." ER7. The cases uniformly hold that a defendant can direct its purposeful activity at a state from afar, and that a defendant's out-of-state activities count as much as its in-state activities if they are purposefully directed at the state or state residents.[17]

A claim arises from or relates to a defendant's forum-directed activities if that conduct "connects [defendants] to the forum in a meaningful way." *Walden*, 571 U.S. at 290. There is no requirement that the conduct physically occur in the forum (rather than being directed at the forum from elsewhere, as often occurs with respect to intentional torts). *See Burger King*, 471 U.S. at 476; *Schwarzenegger*, 374 F.3d at 803; *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995) (personal jurisdiction over Austrian bank that allegedly hid money for co-defendant in Vienna in furtherance of fraudulent Ponzi scheme directed against investors in California and elsewhere).

In *Pakootas v. Teck Cominco Metals, Ltd.*, 905 F.3d 565 (9th Cir. 2018), for example, this Court affirmed the exercise of personal jurisdiction in the Eastern District of Washington over a Canadian lead and zinc smelter that discharged slag

[17] Nonetheless, the People's complaints are replete with allegations about Defendants' in-state conduct as well (including extracting oil and natural gas in California, refining oil in California, and transporting, marketing, and selling fuel and other refined products in California). ER67-83 ¶¶32-73; ER138-154 ¶¶32-73.

into the Columbia River, which eventually traveled to the State of Washington. *Id.* at 572. Rejecting the smelter's argument that its waste-disposal activities were "expressly aimed" only at Canada and not at Washington, the Court concluded that the smelter should have anticipated being sued in Washington because it "knew the Columbia River carried waste away from the smelter, and that much of this waste travelled downstream into Washington, yet [it] continued to discharge hundreds of tons of waste into the river every day." *Id.* at 577-78. The smelter's immediate aim may have been the Columbia River, but the inevitable down-river impacts on Washington were neither "random," "fortuitous," nor "attenuated." *Id.* at 578 (quoting *Burger King*, 471 U.S. at 475).

So too here. Defendants' conduct may have occurred in many places (as well as California), but Defendants *knew* their intentional acts, domestic and foreign, would inevitably harm California coastal communities including Oakland and San Francisco. That is what the People's Complaints allege, *see, e.g.*, ER98-102 ¶¶103-16; ER167-171 ¶¶103-16, and that is all the People need to satisfy the second prong.[18]

[18] *See also Calder v. Jones*, 465 U.S. 783, 789-90 (1984) (allegedly defamatory story written, edited, and published in Florida was "expressly aimed" at California where the subject lived and suffered reputational harm, and where many copies of the story circulated); *Haisten v. Grass Valley Med. Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1397 (9th Cir. 1986) ("[The Supreme] Court has allowed the exercise

Second, the district court erred in requiring the People to prove that the in-state harms they suffered were materially greater than the harms suffered by any other jurisdiction. The district court concluded that "whatever sales or events occurred in California were causally insignificant in the context of the worldwide conduct leading to the international problem of global warming." ER8. But for purposes of specific personal jurisdiction, what matters is whether a sufficient connection exists between Plaintiffs' claims and Defendants' conduct (which Defendants conceded, for purpose of this motion, they expressly aimed at California). *See Dubose v. Bristol-Myers Squibb Co.*, No. 17-cv-00244-JST, 2017 WL 2775034 at *4 (N.D. Cal. June 27, 2017) ("[T]he relevant inquiry is whether the plaintiff's choice of forum is a *proper* place for personal jurisdiction, not whether it is the best one.").

Defendants relied below on *Bristol-Myers Squibb Co. v. Superior Court*, in which the Supreme Court held there was no specific personal jurisdiction in California over a drug manufacturer where none of the injured plaintiffs resided in California or claimed to have suffered injury in California. 137 S.Ct. at 1782. But here, *all* of the People's alleged harms are being suffered in California.[19]

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of jurisdiction over a defendant whose only 'contact' with the forum state is the 'purposeful direction' of a *foreign* act having *effect* in the forum state.").

[19] The Court in *Bristol-Myers* contrasted the facts in that case with those in cases like *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), which

Third, the district court erred in requiring the People to show that *each* Defendant's activities caused the *entirety* of the in-state harms. *See* ER8 (People needed to demonstrate that "sea level rise would not occur absent defendants' California contacts"). That unprecedented standard could never be satisfied where there are multiple tortfeasors. *See, e.g.*, *State ex rel Wilson v. Superior Ct.*, 227 Cal.App.4th 579, 606 (2014). The proper inquiry should have been whether Defendants' purposefully directed conduct led to *increased* sea-level rise and *increased* harms to the local environment and public infrastructure, which is precisely what the People alleged. ER116 ¶141; ER181 ¶141.

B. Defendants cannot satisfy the third prong.

In district court, Defendants made only a half-hearted attempt to identify unique, case-specific factors sufficient to meet their "compelling" burden of

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authorized personal jurisdiction in a New Hampshire libel action against a magazine publisher whose magazine "was distributed throughout the country" (and presumably beyond). The fact that most of the harm from that libel occurred outside New Hampshire made no difference, because the number of copies sold in New Hampshire (10,000-15,000), while comparatively low, established a sufficient connection between the circulation of the magazine in New Hampshire and "damage allegedly caused within the State," even though the overwhelming proportion of those damages were "suffered outside the State." 137 S.Ct. at 1782 (citing *Keeton*, 465 U.S. at 774, 776); *see also Yahoo!*, 433 F.3d at 1207 ("We take this opportunity to clarify our law and to state that the "brunt" of the harm need not be suffered in the forum state. If a jurisdictionally sufficient amount of harm is suffered in the forum state, it does not matter that even more harm might have been suffered in another state."); *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218 (9th Cir. 2011); *In re W. States*, 715 F.3d at 744.

proving that due process would be violated under the third due-process prong if the first two prongs were satisfied. *See Ochoa v. J.B. Martin and Sons Farms, Inc.*, 287 F.3d 1182, 1192 (9th Cir. 2002); *Haisten*, 784 F.2d at 1400.

The seven factors relevant to this prong are: (1) the extent of the defendant's purposeful interjection into the forum state's affairs; (2) the burden on the defendant of defending in the forum; (3) the extent of conflict with the sovereignty of the defendant's state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of any alternative forum." *Freestream Aircraft Ltd. v. Aero Law Group*, 905 F.3d 597, 607 (9th. Cir. 2018). Based on Defendants' concession about the first prong, the allegations in the amended complaints showing Defendants' and their agents' and subsidiaries' frequent and continuous presence in this state and the well-developed California law governing representative public nuisance claims, Defendants cannot meet their third-prong burden—although, as with the entire personal jurisdiction inquiry, that determination should be made in the first instance by the state courts on remand.

C. Personal jurisdiction may, in the alternative, be based on Defendants' nationwide contacts.

Finally, the People asserted that the court could exercise personal jurisdiction over the two foreign-headquartered defendants, BP and Royal Dutch

Shell, pursuant to Fed. R. Civ. P. 4(k)(2), which allows personal jurisdiction over a defendant that "is not subject to jurisdiction in any state's courts of general jurisdiction" (because they are headquartered outside the country) if "exercising jurisdiction is consistent with the United States Constitution and laws." The district court rejected this alternative jurisdictional ground (which would apply if this Court concluded that the People have viable federal common law claims, *see Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1158-59 (9th Cir. 2006), based on the same erroneous causation analysis it relied upon earlier. *See* ER10.

This ruling simply highlights the underlying flaws with the court's analysis. Under that analysis, no court, state or federal, could exercise specific personal jurisdiction over Defendants even if their conduct in *and* out of the United States directly caused climate change harms to public entities in jurisdictions throughout the country. That could not be right.

CONCLUSION

For the foregoing reasons, the People respectfully request that the Court reverse the district court's judgment and remand with instructions to further remand these cases to state court.

Dated: March 13, 2019

Respectfully submitted,

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STATUTORY ADDENDUM

Table of Contents

STATUTORY ADDENDUM

Cal. Const. art. XI, §7. Counties and cities; ordinances and regulations; authority.

A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.

Cal. Civ. Code §3479. Nuisance; what constitutes.

Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.

Cal. Civ. Code §3480. Public nuisance.

A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.

Cal. Civ. Code §3491. Remedies; public.

The remedies against a public nuisance are:

1. Indictment or information;
2. A civil action; or,
3. Abatement.

Cal. Civ. Code §3494. Abatement; parties authorized

A public nuisance may be abated by any public body or officer authorized thereto by law.

Cal. Civ. Proc. Code §410.10. Basis.

A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.

Cal. Civ. Proc. Code §731. Nuisance; action to abate, damages; parties authorized to sue; public nuisance.

An action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance, as defined in Section 3479 of the Civil Code, and by the judgment in that action the nuisance may be enjoined or abated as well as damages recovered therefor. A civil action may be brought in the name of the people of the State of California to abate a public nuisance, as defined in Section 3480 of the Civil Code, by the district attorney or county counsel of any county in which the nuisance exists, or by the city attorney of any town or city in which the nuisance exists. Each of those officers shall have concurrent right to bring an action for a public nuisance existing within a town or city. The district attorney, county counsel, or city attorney of any county or city in which the nuisance exists shall bring an action whenever directed by the board of supervisors of the county, or whenever directed by the legislative authority of the town or city.

28 U.S.C. §1291. Final decisions of district courts.

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. §1331. Federal question.

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. §1333. Admiralty, maritime and prize cases.

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the

condemnation of property taken as prize.

28 U.S.C. §1334. Bankruptcy cases and proceedings.

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

(d) Any decision to abstain or not to abstain made under subsection (c) (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. Subsection (c) and this subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction—

(1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate; and

(2) over all claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327.

28 U.S.C. §1441. Removal of civil actions.

(a) Generally.—Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Removal based on diversity of citizenship.—(1) In determining whether a civil action is removable on the basis of the jurisdiction under section 1332(a) of this title, the citizenship of defendants sued under fictitious names shall be disregarded.

(2) A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Joinder of Federal law claims and State law claims.—(1) If a civil action includes—

(A) a claim arising under the Constitution, laws, or treaties of the United States (within the meaning of section 1331 of this title), and

(B) a claim not within the original or supplemental jurisdiction of the district court or a claim that has been made nonremovable by statute,

the entire action may be removed if the action would be removable without the inclusion of the claim described in subparagraph (B).

(2) Upon removal of an action described in paragraph (1), the district court shall sever from the action all claims described in paragraph (1)(B) and shall remand the severed claims to the State court from which the action was removed. Only defendants against whom a claim described in paragraph (1)(A) has been asserted are required to join in or consent to the removal under paragraph (1).

(d) Actions against foreign States.—Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) Multiparty, multiforum jurisdiction.—(1) Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the United States for the district and division embracing the place where the action is pending if—

(A) the action could have been brought in a United States district court under section 1369 of this title; or

(B) the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district court and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.

The removal of an action under this subsection shall be made in accordance with section 1446 of this title, except that a notice of removal may also be filed before trial of the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section 1369 in a United States district court that arises from the same accident as the action in State court, or at a later time with leave of the district court.

(2) Whenever an action is removed under this subsection and the district court to which it is removed or transferred under section 1407(j)1 has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.

(3) Any remand under paragraph (2) shall not be effective until 60 days after the district court has issued an order determining liability and has certified its intention to remand the removed action for the determination of damages. An appeal with respect to the liability determination of the district court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the district court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination shall not be subject to further review by appeal or otherwise.

(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

(5) An action removed under this subsection shall be deemed to be an action under section 1369 and an action in which jurisdiction is based on section 1369 of this title for purposes of this section and sections 1407, 1697, and 1785 of this title.

(6) Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.

(f) Derivative removal jurisdiction.—The court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

28 U.S.C. §1442. Federal officers or agencies sued or prosecuted.

(a) A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

(3) Any officer of the courts of the United States, for or relating to any act under color of office or in the performance of his duties;

(4) Any officer of either House of Congress, for or relating to any act in the discharge of his official duty under an order of such House.

(b) A personal action commenced in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States and is a nonresident of such State, wherein jurisdiction is obtained by the State court by personal service of process, may be removed by the defendant to the district court of the United States for the district and division in which the defendant was served with process.

(c) Solely for purposes of determining the propriety of removal under subsection (a), a law enforcement officer, who is the defendant in a criminal prosecution, shall be deemed to have been acting under the color of his office if the officer—

(1) protected an individual in the presence of the officer from a crime of violence;

(2) provided immediate assistance to an individual who suffered, or who was threatened with, bodily harm; or

(3) prevented the escape of any individual who the officer reasonably believed to have committed, or was about to commit, in the presence of the officer, a crime of violence that resulted in, or was likely to result in, death or serious bodily injury.

(d) In this section, the following definitions apply:

(1) The terms “civil action” and “criminal prosecution” include any proceeding (whether or not ancillary to another proceeding) to the extent that in such proceeding a judicial order, including a subpoena for testimony or documents, is sought or issued. If removal is sought for a proceeding described in the previous sentence, and there is no other basis for removal, only that proceeding may be

removed to the district court.

(2) The term “crime of violence” has the meaning given that term in section 16 of title 18.

(3) The term “law enforcement officer” means any employee described in subparagraph (A), (B), or (C) of section 8401(17) of title 5 and any special agent in the Diplomatic Security Service of the Department of State.

(4) The term “serious bodily injury” has the meaning given that term in section 1365 of title 18.

(5) The term “State” includes the District of Columbia, United States territories and insular possessions, and Indian country (as defined in section 1151 of title 18).

(6) The term “State court” includes the Superior Court of the District of Columbia, a court of a United States territory or insular possession, and a tribal court.

28 U.S.C. §1452. Removal of claims related to bankruptcy cases.

(a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title.

42 U.S.C. §7401. Congressional findings and declaration of purpose.

(a) Findings

The Congress finds—

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare,

including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation;

(3) that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments; and

(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.

(b) Declaration

The purposes of this subchapter are—

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution prevention and control programs.

(c) Pollution prevention

A primary goal of this chapter is to encourage or otherwise promote reasonable Federal, State, and local governmental actions, consistent with the provisions of this chapter, for pollution prevention.

42 U.S.C. §7604. Citizen suits.

(a) Authority to bring civil action; jurisdiction

Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation,

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not

discretionary with the Administrator, or

(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment) or who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of any condition of such permit.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties (except for actions under paragraph (2)). The district courts of the United States shall have jurisdiction to compel (consistent with paragraph (2) of this subsection) agency action unreasonably delayed, except that an action to compel agency action referred to in section 7607(b) of this title which is unreasonably delayed may only be filed in a United States District Court within the circuit in which such action would be reviewable under section 7607(b) of this title. In any such action for unreasonable delay, notice to the entities referred to in subsection (b)(1)(A) of this section shall be provided 180 days before commencing such action.

(b) Notice

No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State in which the violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to 60 days after the plaintiff has given notice of such action to the Administrator, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of section 7412(i)(3)(A) or (f)(4) of this title or an order issued by the Administrator pursuant to section 7413(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) Venue; intervention by Administrator; service of complaint; consent

judgment

(1) Any action respecting a violation by a stationary source of an emission standard or limitation or an order respecting such standard or limitation may be brought only in the judicial district in which such source is located.

(2) In any action under this section, the Administrator, if not a party, may intervene as a matter of right at any time in the proceeding. A judgment in an action under this section to which the United States is not a party shall not, however, have any binding effect upon the United States.

(3) Whenever any action is brought under this section the plaintiff shall serve a copy of the complaint on the Attorney General of the United States and on the Administrator. No consent judgment shall be entered in an action brought under this section in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator during which time the Government may submit its comments on the proposed consent judgment to the court and parties or may intervene as a matter of right.

(d) Award of costs; security

The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Nonrestriction of other rights

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency). Nothing in this section or in any other law of the United States shall be construed to prohibit, exclude, or restrict any State, local, or interstate authority from—

(1) bringing any enforcement action or obtaining any judicial remedy or sanction in any State or local court, or

(2) bringing any administrative enforcement action or obtaining any administrative remedy or sanction in any State or local administrative agency, department or instrumentality, against the United States, any department, agency, or instrumentality thereof, or any officer, agent, or employee thereof under State or local law respecting control and abatement of air pollution. For provisions

requiring compliance by the United States, departments, agencies, instrumentalities, officers, agents, and employees in the same manner as nongovernmental entities, *see* section 7418 of this title.

(f) "Emission standard or limitation under this chapter" defined

For purposes of this section, the term "emission standard or limitation under this chapter" means—

(1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard,

(2) a control or prohibition respecting a motor vehicle fuel or fuel additive, or

(3) any condition or requirement of a permit under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment),, [sic] section 7419 of this title (relating to primary nonferrous smelter orders), any condition or requirement under an applicable implementation plan relating to transportation control measures, air quality maintenance plans, vehicle inspection and maintenance programs or vapor recovery requirements, section 7545(e) and (f) of this title (relating to fuels and fuel additives), section 7491 of this title (relating to visibility protection), any condition or requirement under subchapter VI of this chapter (relating to ozone protection), or any requirement under section 7411 or 7412 of this title (without regard to whether such requirement is expressed as an emission standard or otherwise); or

(4) any other standard, limitation, or schedule established under any permit issued pursuant to subchapter V of this chapter or under any applicable State implementation plan approved by the Administrator, any permit term or condition, and any requirement to obtain a permit as a condition of operations. [sic] which is in effect under this chapter (including a requirement applicable by reason of section 7418 of this title) or under an applicable implementation plan.

(g) Penalty fund

(1) Penalties received under subsection (a) of this section shall be deposited in a special fund in the United States Treasury for licensing and other services. Amounts in such fund are authorized to be appropriated and shall remain available until expended, for use by the Administrator to finance air compliance and enforcement activities. The Administrator shall annually report to the Congress about the sums deposited into the fund, the sources thereof, and the actual and proposed uses thereof.

(2) Notwithstanding paragraph (1) the court in any action under this

subsection to apply civil penalties shall have discretion to order that such civil penalties, in lieu of being deposited in the fund referred to in paragraph (1), be used in beneficial mitigation projects which are consistent with this chapter and enhance the public health or the environment. The court shall obtain the view of the Administrator in exercising such discretion and selecting any such projects. The amount of any such payment in any such action shall not exceed $100,000.

43 U.S.C. § 1349. Citizens suits, jurisdiction and judicial review

(a) Persons who may bring actions; persons against whom action may be brought; time of action; intervention by Attorney General; costs and fees; security

(1) Except as provided in this section, any person having a valid legal interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this subchapter against any person, including the United States, and any other government instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution) for any alleged violation of any provision of this subchapter or any regulation promulgated under this subchapter, or of the terms of any permit or lease issued by the Secretary under this subchapter.

(2) Except as provided in paragraph (3) of this subsection, no action may be commenced under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation, in writing under oath, to the Secretary and any other appropriate Federal official, to the State in which the violation allegedly occurred or is occurring, and to any alleged violator; or

(B) if the Attorney General has commenced and is diligently prosecuting a civil action in a court of the United States or a State with respect to such matter, but in any such action in a court of the United States any person having a legal interest which is or may be adversely affected may intervene as a matter of right.

(3) An action may be brought under this subsection immediately after notification of the alleged violation in any case in which the alleged violation constitutes an imminent threat to the public health or safety or would immediately affect a legal interest of the plaintiff.

(4) In any action commenced pursuant to this section, the Attorney General, upon the request of the Secretary or any other appropriate Federal official, may intervene as a matter of right.

(5) A court, in issuing any final order in any action brought pursuant to subsection (a)(1) or subsection (c) of this section, may award costs of litigation, including reasonable attorney and expert witness fees, to any party, whenever such

court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in a sufficient amount to compensate for any loss or damage suffered, in accordance with the Federal Rules of Civil Procedure.

(6) Except as provided in subsection (c) of this section, all suits challenging actions or decisions allegedly in violation of, or seeking enforcement of, the provisions of this subchapter, or any regulation promulgated under this subchapter, or the terms of any permit or lease issued by the Secretary under this subchapter, shall be undertaken in accordance with the procedures described in this subsection. Nothing in this section shall restrict any right which any person or class of persons may have under any other Act or common law to seek appropriate relief.

(b) Jurisdiction and venue of actions

(1) Except as provided in subsection (c) of this section, the district courts of the United States shall have jurisdiction of cases and controversies arising out of, or in connection with (A) any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals, or (B) the cancellation, suspension, or termination of a lease or permit under this subchapter. Proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the State nearest the place the cause of action arose.

(2) Any resident of the United States who is injured in any manner through the failure of any operator to comply with any rule, regulation, order, or permit issued pursuant to this subchapter may bring an action for damages (including reasonable attorney and expert witness fees) only in the judicial district having jurisdiction under paragraph (1) of this subsection.

(c) Review of Secretary's approval of leasing program; review of approval, modification or disapproval of exploration or production plan; persons who may seek review; scope of review; certiorari to Supreme Court

(1) Any action of the Secretary to approve a leasing program pursuant to section 1344 of this title shall be subject to judicial review only in the United States Court of Appeal1 for the District of Columbia.

(2) Any action of the Secretary to approve, require modification of, or disapprove any exploration plan or any development and production plan under this subchapter shall be subject to judicial review only in a United States court of appeals for a circuit in which an affected State is located.

(3) The judicial review specified in paragraphs (1) and (2) of this subsection shall be available only to a person who (A) participated in the administrative proceedings related to the actions specified in such paragraphs, (B) is adversely

affected or aggrieved by such action, (C) files a petition for review of the Secretary's action within sixty days after the date of such action, and (D) promptly transmits copies of the petition to the Secretary and to the Attorney General.

(4) Any action of the Secretary specified in paragraph (1) or (2) shall only be subject to review pursuant to the provisions of this subsection, and shall be specifically excluded from citizen suits which are permitted pursuant to subsection (a) of this section.

(5) The Secretary shall file in the appropriate court the record of any public hearings required by this subchapter and any additional information upon which the Secretary based his decision, as required by section 2112 of Title 28. Specific objections to the action of the Secretary shall be considered by the court only if the issues upon which such objections are based have been submitted to the Secretary during the administrative proceedings related to the actions involved.

(6) The court of appeals conducting a proceeding pursuant to this subsection shall consider the matter under review solely on the record made before the Secretary. The findings of the Secretary, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The court may affirm, vacate, or modify any order or decision or may remand the proceedings to the Secretary for such further action as it may direct.

(7) Upon the filing of the record with the court, pursuant to paragraph (5), the jurisdiction of the court shall be exclusive and its judgment shall be final, except that such judgment shall be subject to review by the Supreme Court of the United States upon writ of certiorari.

46 U.S.C. §30101. Extension of jurisdiction to cases of damage or injury on land.

(a) In general.—The admiralty and maritime jurisdiction of the United States extends to and includes cases of injury or damage, to person or property, caused by a vessel on navigable waters, even though the injury or damage is done or consummated on land.

(b) Procedure.—A civil action in a case under subsection (a) may be brought in rem or in personam according to the principles of law and the rules of practice applicable in cases where the injury or damage has been done and consummated on navigable waters.

(c) Actions against United States.—

(1) Exclusive remedy.—In a civil action against the United States for injury or damage done or consummated on land by a vessel on navigable waters, chapter 309 or 311 of this title, as appropriate, provides the exclusive remedy.

(2) Administrative claim.—A civil action described in paragraph (1) may not be brought until the expiration of the 6-month period after the claim has been presented in writing to the agency owning or operating the vessel causing the injury or damage.

STATEMENT OF RELATED CASES

Pursuant to Local Rule 28-2.6(c), the People identify the following related appeal, which raises the same or closely related issues of subject matter jurisdiction: *County of San Mateo, et al. v. Chevron Corp., et al.*, 9th Cir. Nos. 18-15499, 18-15502, and 18-15503, which are appeals by defendant oil and gas companies from orders of the district court (Chhabria, J.) remanding the plaintiff California cities and counties' state law public nuisance and other claims.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 18-16663

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This brief contains 13,997 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

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9th Circuit Case Number(s) 18-16663

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