No. 18-16663

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; 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.

BP 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.

Appeal from the District Court for the Northern District of California
Nos. 3:17-cv-06011, 3:17-cv-06012
(Hon. William H. Alsup)

BRIEF OF AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1, the Chamber of Commerce of the United States of America certifies that it is a non-profit business federation. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

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AMICUS CURIAE'S IDENTITY, INTEREST, AND AUTHORITY TO FILE

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber often files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

The Chamber believes that the global climate is changing, and that human activities contribute to those changes. The Chamber also believes that global climate change poses a serious long-term challenge that deserves serious solutions. And it believes that businesses, through technology, innovation, and ingenuity, will offer the best options for reducing greenhouse gas emissions and mitigating the impacts of climate change. An effective climate policy should leverage the power of business, maintain U.S. leadership in climate science, embrace technology and innovation, aggressively pursue greater energy efficiency, promote

climate resilient infrastructure, support trade in U.S. technologies and products, and encourage international cooperation. *See* U.S. Chamber of Commerce, *Addressing Climate Change*, https://tinyurl.com/y38v5gms. Governmental policies aimed at achieving these goals should come from the federal government, and in particular Congress and the Executive Branch, not through the courts, much less a patchwork of actions under state common law.

The Chamber is especially concerned that allowing such state common law actions to proliferate would, as Plaintiffs seem to attempt here, fashion a new tort that marries the broadest elements of public-nuisance and product-liability claims, but with none of the historical limits on those doctrines—especially causation. *See* U.S. Chamber Institute for Legal Reform, *Waking the Litigation Monster: The Misuse of Public Nuisance* 28–30, 31–34 (Mar. 2019), https://tinyurl.com/y46jrhy7 (*Public Nuisance*). The doctrine of "public nuisance arose to address discrete, localized problems, not far-reaching policy matters." *Id.* at 31. "In contrast, large-scale societal challenges implicate needs and interests that can be fully addressed and balanced only by the political branches of government." *Id.* And allowing public nuisance claims like the

Plaintiffs' would impose massive retroactive liability on American businesses for decades-old conduct that was lawful when and where it occurred, even though—by Plaintiffs' own account—countless other actors across the globe contributed to their alleged harms. If accepted, that theory would sprawl into other industries, with potentially drastic consequences. *See* U.S. Chamber Institute for Legal Reform, *Mitigating Municipality Litigation: Scope and Solutions* 9–13, 14–18 (Mar. 2019), https://tinyurl.com/y58gygdm. These concerns underscore why uniform legislative and Executive action, not countless state-law tort suits, are the best solution to the challenges of global climate change. *See id.* at 16; *Public Nuisance* at 32–34.

The Chamber has participated as amicus curiae in many cases about global climate change and the application of state law, *e.g.*, *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011); *North Dakota v. Heydinger*, 825 F.3d 912 (8th Cir. 2016); *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012), including cases pending in the Second Circuit and this Court raising issues very similar to those presented here, *see City of New York v. Chevron Corp.*, No. 18-2188 (2d

Cir. docketed July 26, 2018); *County of San Mateo v. Chevron Corp.*, No. 18-15499 (9th Cir. docketed Mar. 27, 2018).

All parties have consented to the filing of this brief. No party's counsel authored the brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person other than the Chamber, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Climate change is a pressing public policy issue with global implications. This appeal, however, turns on more ordinary questions: Did the district court have removal jurisdiction over tort claims related to the effects of climate change, and does the Constitution bar such claims under state law? Under settled legal principles, the answer to both questions is yes. The Chamber thus submits this brief in the hope of assisting the Court in resolving this appeal based on the application of those settled principles.

I. This Court has already held that claims alleging harms from the effects of global climate change arise under federal common law. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 855 (9th Cir. 2012); *see also Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 421 (2011). And with good reason: Federal common law governs claims that involve uniquely federal interests or require a uniform rule of decision. Both are true of global climate change, which is by definition a national and international problem requiring a uniform, coordinated federal response. A patchwork of state-law tort rules would be ineffective and unadministrable. Such claims therefore necessarily arise under federal

law and fall within the district courts' original jurisdiction. That remains true regardless of the remedy sought or the precise form of the defendants' alleged contribution to climate change.

This conclusion is also unchanged by the fact that Congress has displaced federal common law in this area with the Clean Air Act. That federal common law governs a particular area necessarily means state law cannot apply there. Adding federal statutory law on top of federal common law does not create a vacuum that state law can fill; it simply means the federal courts are not free to create causes of action in the area Congress has occupied. State law remains excluded. The alternative rule, urged by Plaintiffs here, would illogically mean that federal legislation in an area of uniquely federal concern deprives the federal court of jurisdiction and opens the door to inconsistent state-law standards.

II. State-law tort claims based on the effects of global climate change also violate the constitutional prohibition against extraterritorial state laws. The Supreme Court has given effect to this prohibition, which grows out of the States' status as equal sovereigns that are part of a single nation, through the Commerce Clause. *See Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989). A State may not make laws that, in practical

effect, control conduct beyond its territorial boundaries. *Id.* Such laws intrude on the other States' sovereign prerogatives and interfere with Congress's power to make uniform laws regulating interstate and foreign commerce. These restrictions apply not only to state statutes but also to tort claims that would impose liability for conduct in another State—or another country. Because that is precisely what Plaintiffs seek to do here, the Constitution bars their state-law tort claims.

ARGUMENT

I. Federal Courts Have Subject-Matter Jurisdiction over Claims Alleging Harms from Global Climate Change.

Plaintiffs' claims allege injuries from the effects of global climate change and seek to require Defendants to "fund[] an abatement program" to mitigate those effects. ER 62 (S.F. complaint). But climate change is, by definition, a national and international issue that is not amenable to a patchwork of local regulation, much less regulation through countless state-court tort actions. Thus—even setting aside that Plaintiffs mooted the jurisdictional issue by amending their complaints, as Chevron explains (at 12–16)—the district court was correct that these claims arise under federal common law. This remains true in the presence of a federal statutory regime like the Clean Air Act.

A. The District Court Properly Held That Tort Claims Related to Ambient Air Pollution Arise under Federal Common Law.

While a "federal general common law" no longer exists, *Erie R.R. v. Tompkins,* 304 U.S. 64, 78 (1938), there is still a body of "federal decisional law" that "addresses 'subjects within national legislative power where Congress has so directed' or where the basic scheme of the Constitution so demands," *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 421 (2011) (*AEP*). This body of "federal common law includes the general subject of environmental law and specifically includes ambient or interstate air and water pollution," *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 855 (9th Cir. 2012)—the very subject of Plaintiffs' claims here.

The crux of Plaintiffs' claims is that "Defendants' cumulative production of fossil fuels over many years" has helped cause "atmospheric greenhouse gas loading" and "contributes measurably to global warming and to sea level rise." ER 62, 133 (S.F. complaint); *see* ER 115–117, 180–183 (Oakland complaint). Plaintiffs thus seek to hold Defendants responsible for "accelerated sea level rise," "causing flooding of low-lying areas of San Francisco [and Oakland], increased shoreline erosion, and

salt water impacts to San Francisco's water treatment system." ER 58, 130 (complaints).

As these allegations make plain, Plaintiffs' claims turn on the effects of *all* "fossil fuel combustion and greenhouse gas emissions." ER 114, 178 (complaints). Nor could it be otherwise. Because such emissions become "well mixed globally in the atmosphere," 74 Fed. Reg. 66,496, 66,499 (2009), and because Plaintiffs' claims turn on the effects of decades of accumulation in the air, *see* ER 106–114, 174–179 (complaints), the ultimate issue here is the impact of all greenhouse gas emissions across the globe, by millions (if not billions) of actors across hundreds of nations.

In this context, federal common law, not state tort law, must govern. Air and water do not abide state lines or even national boundaries, and the sources and effects of greenhouse gas emissions are not isolated in any one location. As the district court observed, "[i]f ever a problem cried out for a uniform and comprehensive solution, it is the geophysical problem described by the complaints, a problem centuries in the making (and studying) with causes ranging from volcanoes, to wildfires, to deforestation to stimulation of other greenhouse gases—and,

most pertinent here, to the combustion of fossil fuels." ER 30–31 (remand opinion). That is why the Supreme Court has said that borrowing state law in this context would be "inappropriate," *AEP*, 564 U.S. at 422, and why this Court has applied federal common law to such claims, *Kivalina*, 696 F.3d at 855–56. The point is not that the petroleum industry is a "legal, regulated industr[y]," *see* Cal. State Ass'n of Counties Amicus Br. 11, but that "air and water in their ambient or interstate aspects" are inherently diffuse and undifferentiated, and thus require "federal common law." *See Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972).

Moreover, "a uniform and comprehensive" regime already exists for controlling emissions and responding to climate change: The federal Clean Air Act, the EPA regulations it authorizes, and a network of international and interstate agreements and organizations that deal with environmental regulation. *See AEP*, 564 U.S. at 417, 424–25 (describing EPA's "greenhouse gas regulation" and the applicable Clean Air Act provisions); *see generally* U.N. Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107; S. Treaty Doc No. 102-38 (entered into force March 21, 1994). These multifaceted efforts balance myriad economic, social, geographic, and political factors. They also

emphasize coordinated, cooperative action rather than focusing narrowly on a single sector or group of entities. And they reflect priorities and compromises that legislatures and executive agencies are best suited to balance. Such regulation is appropriately forward-looking and does not seek to hold companies retroactively liable for lawful activities.

A patchwork of state-law rules adopted in individual tort suits, by contrast, cannot provide a coherent or effective answer to the *global* problem presented by climate change. For one thing, a single State's law cannot redress the effects of a problem caused by countless sources around the globe. For another, an individual tort case decided under one State's law cannot adequately weigh the immeasurably complex interests and equities implicated by a global issue like this. And these problems are compounded by the fact that climate change is caused in part by emissions dating back decades or centuries.

To the extent that tort claims on this subject are viable, however, "there is an overriding federal interest in the need for a uniform rule of decision." *Milwaukee*, 406 U.S. at 105 n.6. At a minimum, a uniform rule is necessary to avoid inconsistent or duplicative obligations on various actors across the Nation, or even the world. The contributors to climate

change are scattered across the globe, and any local effects of climate change cannot be isolated to nearby local contributors. Quite the contrary, local effects of climate change reflect contributions by countless actors around the world. As the district court correctly held, only a uniform rule can ensure consistent obligations. ER 30–31 (remand opinion).

Plaintiffs' proffered reasons for a different result—that they "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," Pls.' Br. 38—do not withstand scrutiny.

It is immaterial that Plaintiffs' claims challenge fossil-fuel *production and sales* rather than *emissions*. *Id.* at 39–40. Plaintiffs allege no harms from these activities themselves. Rather, as the district court recognized, ER 19, they claim to have been harmed by the global effects of the resulting emissions, ER 106–114, 174–179 (complaints); *see* Legal Scholars Amicus Br. 20 (acknowledging that "fossil fuel emissions are a link in the causal chain between Defendants' allegedly wrongful actions and the Cities' alleged harms"). These claims thus raise the same issues,

and require the same uniform treatment, as suits directly challenging fossil-fuel emissions. ER 30–31 (remand opinion).

Likewise, it does not matter that Plaintiffs seek an "abatement fund" rather than an injunction that would "regulate emissions." Pls.' Br. 38, 40–41. "[State] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 246–47 (1959); *accord Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 637 (2012).

Finally, Plaintiffs' amici argue that "states have a legitimate interest in combatting the adverse effects of climate change on their residents." States Amicus Br. 5; *see also* Nat'l League of Cities Amicus Br. 10–13. But this case does not implicate legislative responses to climate change. *See* States Amicus Br. 5–9. Nor does it address "land-use decisions under state equivalents to the National Environmental Policy Act," or "the operation and validity of states' substantial regulatory efforts to reduce greenhouse gas emissions." *Id.* at 9–10. The narrow question here is whether *tort claims* related to the effects of global climate

change arise, if at all, under federal law. The district court correctly held that they do.

B. Congress's Statutory Displacement of Federal Common Law Does Not Revive State Law.

This conclusion is unchanged by the fact that "the Clean Air Act and the EPA actions it authorizes displace any federal common law" related to greenhouse gas emissions. *AEP*, 564 U.S. at 424; *see* Pls.' Br. 14. To be sure, "[w]hen Congress has acted to occupy the entire field, that action displaces any previously available federal common law action." *Kivalina*, 696 F.3d at 857. But this does not mean that state tort law springs back to life when federal statutes displace federal common law. That view, which Plaintiffs and their amici urge here, misunderstands the basic relationship between federal common law and state law. *See* Pls.' Br. 14–18; States Amicus Br. 11–14; Nat'l League of Cities Amicus Br. 14–17; NRDC Amicus Br. 11, 13–19.

By definition, post-*Erie* federal common law applies only in those "few areas, involving uniquely federal interests," that are "committed by the Constitution and laws of the United States to federal control." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) (internal quotation marks omitted). In these areas, "our federal system does not permit the

controversy to be resolved under state law." *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). Thus, the conclusion that a particular type of claim "should be resolved by reference to federal common law" implies the "corollary" that "state common law" does not apply in that space. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987). That is, "if federal common law exists, it is because state law cannot be used." *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 n.7 (1981). That does not change when *Congress* displaces federal common law with statutory law. The subject remains federal in nature, and such tort claims thus arise—if at all—under federal law.

Plaintiffs contend that the Supreme Court in *AEP* "expressly chose *not* to invalidate the plaintiffs' *state-law* nuisance claims," which they take to mean that "the federal common law concerning regulation of emissions" cannot support removal jurisdiction "because it has been displaced by statute." Pls.' Br. 15–17. But the state-law claims *AEP* declined to address "sought relief under … *the law of each State where the defendants operate power plants*." 564 U.S. at 429 (emphasis added). Thus, the Court at most left open the possibility, as in *Ouellette*, that "aggrieved individuals [might] bring[] a 'nuisance claim pursuant to the

law of the *source* State.'" *Id.* (quoting *Ouellette*, 479 U.S. at 497). But that theory has no application here, because Plaintiffs do not challenge emissions from any particular source(s) in California (or anywhere else). Rather, they allege harms from cumulative interstate and international emissions, which fall squarely within *AEP*'s conclusion that applying "the law of a particular State would be inappropriate." 564 U.S. at 422.

In all events, the Supreme Court's reservation of an issue that was neither briefed to that Court nor addressed below hardly suggests that the Court was silently abandoning the basic premise of its federal common law doctrine: Where a case implicates uniquely federal interests, "state law cannot be used." *Milwaukee*, 451 U.S. at 313 n.7. Indeed, the state-law claims in *AEP* were voluntarily dismissed on remand. *See* Notice of Voluntary Dismissal, *Connecticut v. Am. Elec. Power Co.*, No. 04-CV-05669 (S.D.N.Y. Dec. 6, 2011), ECF No. 94. Likewise, Plaintiffs' assertion that *Kivalina* "left [the] plaintiffs' *state-law* claims untouched" (Pls.' Br. 16–17) is unavailing; the district court in *Kivalina* "declined to exercise supplemental jurisdiction over the state law claims," 696 F.3d at 854–55, which—as Plaintiffs concede—"eliminate[d] those state law

claims as an issue on appeal." Pls.' Br. 16. This Court could not and did not approve of state-law claims that were not before it.

Plaintiffs' rule would also have bizarre effects. If a claim is so connected with federal interests, or so clearly requires a uniform rule of decision, as to arise under federal common law, the federal courts will have original jurisdiction to hear that claim. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 850 (1985). But on Plaintiffs' view, if Congress adds another layer of federal law in the form of a comprehensive statutory regime, the federal courts will *lose* jurisdiction and the claim will proceed in state court under state law, subject only to an ordinary-preemption defense. Pls.' Br. 17. It makes no sense to say that *adding* a federal statutory regime in a uniquely federal area revives state law and deprives the federal courts of jurisdiction.

II. The Constitution Bars California from Imposing Liability Based on Lawful Conduct that Occurred Beyond its Borders.

State-law tort claims arising from the effects of climate change would also violate the Constitution. The entire structure of the Constitution, and the Commerce Clause in particular, prohibit the States from regulating beyond their territorial bounds. State-law nuisance

claims like these violate that prohibition because they would impose liability for conduct in other States—or other nations—that was perfectly lawful where and when it occurred. *See* ER 16 (dismissal opinion) (noting that Plaintiffs' "breathtaking" theory "would reach the sale of fossil fuels anywhere in the world, including all past and otherwise lawful sales").

In our federal system, the "sovereignty of each State … implie[s] a limitation on the sovereignty of all of its sister States." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980). A single State may not "impos[e] its regulatory policies on the entire Nation." *BMW of N. Am. v. Gore*, 517 U.S. 559, 571, 585 (1996). A State therefore lacks the "power to exercise 'extra territorial jurisdiction,' that is, to regulate and control activities wholly beyond its boundaries." *Watson* v. *Emp'rs Liab. Assurance Corp.*, 348 U.S. 66, 70 (1954). This prohibition applies "whether or not the [out-of-state activity] has effects within the State." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989).

The "critical inquiry" under this doctrine "is whether the practical effect" of the state law "is to control conduct" beyond the State's boundaries. *Id.* Evaluating this effect requires considering the state law's direct effects and what would happen if "many or every[ ] State adopted

similar" rules. *Healy*, 491 U.S. at 336. This Court has applied these principles to invalidate several state laws that effectively "attempted to regulate [conduct] everywhere in the country." *Daniels Sharpsmart, Inc. v. Smith*, 889 F.3d 608, 616 (9th Cir. 2018) (enjoining a California law penalizing plaintiff "for disposing of medical waste in a manner that was perfectly legal in the states" where disposal occurred); *see also Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1322 (9th Cir. 2015) (en banc) (invalidating a California law that regulated art sales in other states); *NCAA v. Miller*, 10 F.3d 633, 635 (9th Cir. 1993) (invalidating a Nevada law that would effectively control athletic-association proceedings in other states).

Plaintiffs' claims violate this doctrine. Those claims turn on the alleged effects of Defendants' fossil-fuel production and exploration in other States and across the globe. ER 19 (dismissal opinion); *e.g.*, ER 74 (complaint alleging that BP "owns and operates three gasoline refineries" in Washington, Illinois, and Ohio); ER 77 (alleging that "Conoco-Phillips … produces oil in Alaska"); ER 78 (same, as to Exxon); ER 83 (alleging that Shell "produces natural gas in the Marcellus and Utica formations in Pennsylvania and Ohio"). Again, it could not be otherwise:

Greenhouse gas emissions "do[ ] not recognize geographic boundaries." *See Am. Booksellers Found. v. Dean*, 342 F.3d 96, 99 (2d Cir. 2003) (invalidating a Vermont law regulating online content because "the internet's boundary-less nature" meant the law reached out-of-state conduct). This case is thus "an attempt to reach beyond the borders of California and control [commerce] that occur[s] wholly outside of the State." *Daniels Sharpsmart*, 889 F.3d at 615. That is impermissible, "whether or not the [out-of-state] commerce has effects within" California. *Healy*, 491 U.S. at 336.

Allowing claims like these would give California—or any other State—the power to veto lawful commerce in every other State, and even in other nations. *See* ER 21 (dismissal opinion) ("The challenged conduct is, as far as the complaints allege, lawful in every nation."). It could also have "the baleful effect of subjecting businesses to conflicting requirements" in different States or countries. *Daniels Sharpsmart*, 889 F.3d at 616. "This kind of potential regional and even national regulation … is reserved by the Commerce Clause to the Federal Government and may not be accomplished piecemeal through the extraterritorial reach of individual state [laws]." *Healy*, 491 U.S. at 340.

It does not matter that Plaintiffs seek monetary rather than injunctive relief, or that this case involves tort claims rather than a statute. "[A] State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States," and "State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute." *Gore*, 517 U.S. at 572 & n.17; *see also San Diego Bldg. Trades*, 359 U.S. at 246–47. Likewise, whether a state seeks to regulate by statute or by court decision, "any attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power." *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982) (plurality opinion); *see also Bristol-Myers Squibb Co.* v. *Superior Court of Cal.*, 137 S. Ct. 1773, 1780 (2017) (the due-process limits on "the coercive power of a State" over non-resident litigants are "a consequence of territorial limitations on the power of the respective States") (citation omitted).

This issue is also distinct from whether a presumption against extraterritoriality applies. *See* Conflict of Laws & Foreign Relations Law Scholars Amicus Br. 3–7. Even if the "geographic scope of state law is"

ordinarily "a question of state law," and even if California has not "limit[ed] the application of state statutes when conduct outside the state causes injury within the state," *id*. at 4–5, the Constitution *does* impose these limits, which Plaintiffs' amici overlook.

In sum, Plaintiffs' state-law tort claims would impose liability—and potentially massive financial consequences—for lawful conduct that took place in other States and other nations. That extraterritorial conduct may have "effects within the State," but that does not change the constitutional rule: A state may not seek to control "commerce that takes place wholly outside of the State's borders." *Healy*, 491 U.S. at 336.

CONCLUSION

For these reasons, the Court should affirm the judgment below.

May 14, 2019

Respectfully submitted,

/s/ Peter D. Keisler

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CERTIFICATE OF SERVICE

I certify that I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 14, 2019. I also certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Peter D. Keisler
Peter D. Keisler

CERTIFICATE OF COMPLIANCE

Under Federal Rule of Appellate Procedure 29(a)(4)(g), I certify that:

This brief complies with Rule 29(a)(5)'s type-volume limitation because it contains 4,228 words (as determined by the Microsoft Word 2016 word-processing system used to prepare the brief), excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with Rule 32(a)(5)'s typeface requirements and Rule 32(a)(6)'s type-style requirements because it has been prepared in a proportionately spaced typeface using the 2016 version of Microsoft Word in 14-point Century Schoolbook font.

/s/ Peter D. Keisler
Peter D. Keisler