Nos. 18-15499, 18-15502, 18-15503, 18-16376

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COUNTY OF SAN MATEO, Plaintiff–Appellee, v. CHEVRON CORPORATION, *et al.*, Defendants–Appellants.	Appeal No. 18-15499 No. 17-cv-4929-VC N.D. Cal., San Francisco Hon. Vince Chhabria
CITY OF IMPERIAL BEACH, Plaintiff–Appellee, v. CHEVRON CORPORATION, *et al.*, Defendants–Appellants.	Appeal No. 18-15502 No. 17-cv-4934-VC N.D. Cal., San Francisco Hon. Vince Chhabria
COUNTY OF MARIN, Plaintiff–Appellee, v. CHEVRON CORPORATION, *et al.*, Defendants–Appellants	Appeal No. 18-15503 No. 17-cv-4935-VC N.D. Cal., San Francisco Hon. Vince Chhabria
COUNTY OF SANTA CRUZ, *et al.*, Plaintiff–Appellees, v. CHEVRON CORPORATION, *et al.*, Defendants–Appellants	Appeal No. 18-16376 Nos. 18-cv-00450-VC; 18-cv-00458-VC; 118-cv-00732-VC N.D. Cal., San Francisco Hon. Vince Chhabria

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae Public Citizen, Inc., is a nonprofit, non-stock corporation. It has no parent corporation, and no publicly traded corporation has an ownership interest in it of any kind.

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae Public Citizen, Inc., is a nonprofit consumer advocacy organization that appears on behalf of its nationwide members before Congress, administrative agencies, and courts on a wide range of issues. Climate change, and the need for effective measures to hold accountable those whose activities play a substantial role in contributing to it, is a major concern of Public Citizen. In addition, Public Citizen has a longstanding interest in the proper construction of statutory provisions defining the jurisdiction of federal trial and appellate courts. Public Citizen has frequently appeared as amicus curiae in cases involving significant issues of federal jurisdiction, including questions of original, removal, and appellate jurisdiction.[2] Removal jurisdiction is of particular concern to Public Citizen because it implicates the authority of state courts to provide remedies under state law for actions that threaten

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[1] All parties have consented to the filing of this brief. The brief was not authored in whole or part by counsel for a party; no party or counsel for a party contributed money that was intended to fund this brief's preparation or submission; and no person other than the amicus curiae, its members, or its counsel contributed money intended to fund the brief's preparation or submission.

[2] *E.g.*, *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547 (2014); *Miss. ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161 (2014).

public health and safety. Public Citizen is concerned that defendants often improperly invoke removal jurisdiction, including federal officer removal under 28 U.S.C. § 1442(a)(1), in litigation involving matters of significant public concern to deny plaintiffs their choice of forum and escape liability under state law.

These interests led Public Citizen to file amicus curiae briefs at both the petition and merits stage in *Watson v. Philip Morris Cos.*, 551 U.S. 142 (2007), a case in which, as here, the defendants invoked federal officer removal to derail state-court litigation over alleged misrepresentations about the dangers of their products. Public Citizen submits this brief to assist the Court in understanding the degree to which such invocations of section 1442(a)(1) distort its language and purpose.

SUMMARY OF ARGUMENT

In *Watson v. Philip Morris Cos.*, 551 U.S. 142, two plaintiffs sued cigarette manufacturers for fraudulently marketing cigarettes as "light" to deceive smokers into believing that smoking them would deliver lower levels of tar and nicotine than other cigarettes and hence present less danger of disease. Although the defendants' self-interested commercial

behavior could in no sense be reasonably described as carrying out official functions of the United States government, they invoked section 1442(a)(1) and removed the action on the ground that they were "acting under" a federal officer because (they claimed) the federal government regulated the manner in which they tested the tar and nicotine levels of their cigarettes.

The Supreme Court unanimously rejected the argument that the defendants could invoke section 1442(a)(1). *Id.* at 147. Emphasizing the statute's purpose of protecting against state interference with "'officers and agents' of the Federal Government 'acting … within the scope of their authority,'" *id.* at 150, the Supreme Court stated that "the statute authorized removal by private parties 'only' if they were 'authorized to act with or for [federal officers or agents] in affirmatively executing duties under … federal law,'" *id.* at 151. Self-interested commercial entities acting under compulsion of federal regulation, the Court held, did not "act under" a federal officer within the meaning of the law and were not entitled to invoke the statute. *Id.* at 153.

In this case, major oil companies are alleged to have concealed their knowledge of the climate effects of their activities, preventing consumers

from understanding the dangers of the companies' products. Notwithstanding the unanimous holding in *Watson*, the oil companies invoke section 1442(a)(1) on the theory that some of their production and sale activities involved contractual relationships with the federal government and that they "acted under" a federal officer in complying with the terms of their contracts.

This Court has held that, under some circumstances, a contractual relationship may bring a private party within the ambit of section 1442(a)(1). *See Goncalves by & Through Goncalves v. Rady Children's Hosp. San Diego*, 865 F.3d 1237 (9th Cir. 2017). But not all contractual relationships transform private entities into persons "acting under" federal officers in carrying out "actions under color of [federal] office." 28 U.S.C. § 1442(a)(1); *see Cabalce v. Thomas E. Blanchard & Assocs., Inc.*, 797 F.3d 720, 728–30 (9th Cir. 2015). Here, the contractual relationships cited by the oil companies do not establish that the oil companies were acting on the government's behalf to assist government officers in carrying out their legal duties, as the statute requires. *See Watson*, 551 U.S. at 152. And because no federal officer directed the defendants to conceal the hazards posed by fossil fuels, the oil companies have also

failed to carry their burden of showing that they are being sued "for" anything they ostensibly did under the direction of a federal officer, as the statute additionally requires. 28 U.S.C. § 1442(a)(1); *see Cabalce*, 797 F.3d at 728–30.

For these reasons, the district court properly rejected defendants' invocation of section 1442(a)(1).

ARGUMENT

I. The federal officer removal statute's application is limited by its language, context, history, and purposes.

Section 1442(a)(1) provides:

> (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.

An ordinary English speaker and reader might be surprised to learn that oil companies sued for the way they have conducted their private enterprises would claim to fall within the scope of the statute. An

understanding of the statute's history and application by the Supreme Court would reinforce that reaction.

The earliest predecessor of section 1442(a)(1) was enacted during the War of 1812 to provide for removal of cases brought against federal customs officers, and those assisting them in performing their duties, because of widespread efforts of state-court claimants to interfere with the execution of unpopular trade restrictions. *See Watson*, 551 U.S. at 148. In statutes enacted in 1833 and 1866, Congress extended removal rights to include revenue officers and persons acting under their authority. *See id*. Again, Congress acted out of concerns about state court interference with the performance of the often-unpopular duties of such officers, including the collection of tariffs and other taxes, *see id*., as well as the enforcement of liquor laws, which often met with local resistance. *See id*. at 149. Finally, in 1948, Congress extended removal to all federal officers acting under color of their office, as well as other persons who assisted in such actions under their direction. *See id*. at 148.

As the Court explained in *Watson*, animating all the variants of the statute has been the "'basic' purpose … [of] protect[ing] the Federal Government from the interference with its 'operations' that would ensue

were a State able, for example, to 'arres[t]' and bring 'to trial in a State cour[t] for an alleged offense against the law of the State,' 'officers and agents' of the Federal Government 'acting ... within the scope of their authority.'" *Id*. at 150 (quoting *Willingham v. Morgan*, 395 U.S. 402, 406 (1969)). The statute serves as a check against "'local prejudice' against unpopular federal laws or federal officials," as well as against efforts by "States hostile to the Federal Government [to] … impede … federal revenue collection or the enforcement of other federal law." *Id*.

For example, in May 1878, federal internal revenue agent James Davis raided a moonshine still in the hills near Tracy City, Tennessee. Before he and his companion could destroy the still, seven armed men attacked them. Returning fire, Davis killed one of his assailants, wounded another, and captured a third, but he was forced to retreat without destroying the still. According to a contemporary newspaper account, the raid caused "intense excitement" in the neighborhood.[3] A local grand jury indicted Davis for murder. With the support of the Attorney General of the United States, Davis invoked the predecessor to

[3] www.tngenweb.org/monroe/news3.txt (reproducing newspaper report dated May 29, 1878).

28 U.S.C. § 1442(a)(1) and removed the case to federal court on the ground that he had acted in the discharge of his duties as a federal officer and was immune from state prosecution. In *Tennessee v. Davis*, 100 U.S. 257 (1880), the Supreme Court affirmed the removal, holding that because the federal government "can act only through its officers and agents," the ability to remove state-court actions brought against federal officers and agents for actions within the scope of their duties was essential to the vindication of federal authority. *Id.* at 263.

The Supreme Court has repeatedly pointed to *Davis* as exemplifying the core purposes of § 1442(a)(1)'s authorization for removal of cases by federal officers and persons acting under them who are sued in state court for the performance of official acts. *See, e.g., Mesa v. California*, 489 U.S. 121, 126–27 (1989); *Arizona v. Manypenny*, 451 U.S. 232, 241 n.16 (1981); *Willingham*, 395 U.S. at 406. Those purposes, however, are subject to a significant limitation: The statute permits removal only when federal officers or persons assisting them in carrying out federal law have "a colorable defense arising out of their duty to enforce federal law." *Willingham*, 395 U.S. at 406–07; *see also Mesa*, 489 U.S. at 129.

Thus, the principal way in which the statute serves the policies underlying it is by "assuring that an impartial setting is provided in which the federal defense of immunity can be considered during prosecution under state law," *Manypenny*, 451 U.S. at 243; only where such a federal defense is available does the statute also serve to "permit a trial upon the merits of … state-law question[s] free from local interests or prejudice." *Id.* at 242. For this reason, the statute expressly limits removal to circumstances where the defendant is sued for the performance of official duties—"act[s] under color of … office." 28 U.S.C. § 1442(a)(1); *Mesa*, 489 U.S. at 134–35. An action removed under the statute "must have been instituted 'on account of' acts done by the defendant as a federal officer under color of his office." *Maryland v. Soper (No. 1)*, 270 U.S. 9 (1926) (holding removal improper in a murder prosecution where the federal defendants did not explain how the victim's death was connected to performance of their duties).

Within the limits imposed by the statute's language and purposes, the Supreme Court has stated that section 1442(a)(1) must be "liberally construed," *Colorado v. Symes*, 286 U.S. 510, 517 (1932), so that the policies it is intended to serve are not "frustrated by a narrow, grudging

interpretation," *Manypenny*, 451 U.S. at 242. At the same time, however, the Court has recognized that the statute's "broad language is not limitless," and that "a liberal construction nonetheless can find limits in a text's language, context, history, and purposes." *Watson*, 551 U.S. at 147. When, as in *Watson*, the Supreme Court has faced attempts to stretch the statute beyond its intent, the Court has declined to construe it expansively. *See Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72 (1991); *Mesa*, 489 U.S. at 139. As the Court stated in *Mesa*, respect for state courts dictates that the "language of § 1442(a) cannot be broadened" beyond its "fair construction." *Id.* at 139 (quoting *Maryland v. Soper (No. 2)*, 270 U.S. 36, 43–44 (1926)). Section 1442(a)(1) removal remains "an 'exceptional procedure' which wrests from state courts the power to try" cases under their own laws, and, therefore, "the requirements of the showing necessary for removal are strict." *Screws v. United States*, 325 U.S. 91, 111–12 (1945) (opinion of Douglas, J.) (citing *Soper (No. 2)*, 270 U.S. at 42).

The extension of section 1442(a)(1) to "person[s] acting under" officers of the United States supports the statute's predominant concern: protecting vulnerable individual officers and employees of the federal

government against prosecution or suit in state courts for the performance of their official duties. The primary function of that language is to include federal employees who fall outside the definition of "officers of the United States"—a term of art referring to federal officers who exercise significant authority. *See Primate Prot.*, 500 U.S. at 81 (discussing limited meaning of the term "officers of the United States"). Thus, including persons "acting under" officers was essential to achieve the statutory purpose of "apply[ing] to all officers and employees of the United States and any agency thereof." H.R. Rep. No. 80-308, at A134 (1947) (quoted in *Primate Prot.*, 500 U.S. at 84). As the Supreme Court has recognized, the term "person" also extends to a private person who "acts as an assistant to a federal official in helping that official to enforce federal law." *Watson*, 551 U.S. at 151. The paradigmatic case for application of the statute to such a person was *Soper (No. 1)*, where the Court pointed out that a private individual hired to drive and assist federal revenue officers in busting up a still "had 'the same right to the benefit of' the removal provision as did the federal agents." *Watson*, 551 U.S. at 150 (quoting *Soper (No. 1)*, 270 U.S. at 30).

By contrast, the vast majority of persons and entities in this country who, in going about their daily business, obey directions from federal officers do not qualify. *See id.* at 152–53. Only persons who are "authorized to act with or for [federal officers or agents] in affirmatively executing duties under … federal law," *id.* at 151 (brackets by the Court; citation omitted), and whose conduct "involve[s] an effort to *assist*, or to help *carry out*, the duties and tasks of the federal superior," *id.* at 152, fall within the language and purposes of the statute.

II. The defendants have not demonstrated that they acted under a federal officer in carrying out actions under color of a federal office, or that they are being sued on account of any such actions.

A. The contractual relationships the defendants cite do not bring them within the federal officer removal statute.

This Court has stated that "[t]o invoke the [federal officer removal] statute, [a defendant] must show that (1) it is a person within the meaning of the statute, (2) a causal nexus exists between plaintiffs' claims and the actions [the defendant] took pursuant to a federal officer's direction, and (3) it has a colorable federal defense to plaintiffs' claims." *Cabalce*, 797 F.3d at 727 (citation omitted). The second part of the test, which is at issue in this case, itself comprises two components: the

defendant must show (a) that it was, in 1442(a)(1)'s terms, "acting under" a federal officer in performing some "act under color of [federal] office," and (b) that such action is causally connected with the plaintiffs' claims (in the statute's words, that the action or prosecution is "for or relating to" an official act). *See Goncalves*, 865 F.3d at 1244.[4]

The defendants' claims to have been acting under federal officers in performing acts under color of federal office rest entirely on three contractual relationships briefly discussed by the oil companies in a three-page section of their brief. Appts' Br. 63–66.[5] The commercial

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[4] As to the requirement that the defendant be a "person," this Court has held that a corporation is a person within the meaning of the statute. *See Goncalves*, 865 F.3d at 1244. With respect to the requirement of a federal defense, the court has held that defenses that a plaintiff's claims are preempted by federal law qualify. *See id*. at 1249. These requirements for removal are thus not at issue before this panel, which lacks authority to overrule Ninth Circuit precedent. *See United States v. Arriaga-Pinon*, 852 F.3d 1195, 1199 (9th Cir. 2017). Nonetheless, the holding that a garden-variety preemption defense that is not based on the defendant's performance of an act under color of federal office qualifies under the statute appears incorrect. The Supreme Court has repeatedly emphasized that section 1442(a)(1) exists to allow a federal forum for a claim of immunity "arising out of [the defendant's] duty to enforce federal law." *Willingham*, 395 U.S. at 406–07. The preemption defenses asserted here by the oil companies do not meet that description. However, because the claim of federal officer removal fails for other reasons, whether the federal defenses invoked here qualify under the statute is a moot point.

[5] The companies have, under this Court's precedents, waived reliance on any other contractual relationships not asserted in their

relationships they describe do not involve actions under federal officers, or under color of federal office, within the meaning of the statute.

In *Watson*, the Supreme Court reserved the question whether a contractual relationship between a private company and the federal government could ever serve as a basis for removal under section 1442(a)(1). The Court noted, however, that some lower courts had "held that Government contractors fall within the terms of the federal officer removal statute, at least when the relationship between the contractor and the Government is an unusually close one involving detailed regulation, monitoring, or supervision." 551 U.S. at 153. The Court noted that such results were "at least arguably" justifiable where contractors were assisting in performing governmental functions, *id.* at 154, but declined to determine "whether and when particular circumstances may enable private contractors to invoke the statute," *id.*

This Court subsequently determined that a private contractor could remove under section 1442(a)(1) where the nature of the relationship established by the contract satisfied the criteria laid out in *Watson* to

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opening brief or on aspects of the contracts mentioned that are not explained in the opening brief. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999).

distinguish circumstances in which a private person acts under a federal officer in performing actions under color of federal office from those in which it does not. *See Goncalves*, 865 F.3d at 1245. Specifically, a corporation contracting with the government can be found to act under a federal officer when it is "involved in 'an effort to assist, or to help carry out, the duties or tasks of the federal superior,'" when its relationship with a federal officer "involves 'subjection, guidance or control'" and not merely "compliance with the law," and when the contractor's role is to "help[] officers fulfill other basic governmental tasks." *Id.* at 1245 (quoting *Watson*, 151 U.S. at 151–53). Applying these principles, this Court held that private entities that administered federal health insurance plans and had been "delegated" authority by the government "to act 'on the Government agency's behalf'" in pursuing subrogation claims were entitled to remove under section 1442(a)(1) when they were sued for such actions. *Id.* at 1247 (quoting *Watson*, 551 U.S. at 156).[6]

[6] Similarly, this Court has held that a defense contractor that followed the detailed direction of Navy officers in providing the Navy with equipment and manuals describing that equipment was entitled to remove under the statute when sued for the actions it took subject to those directions because it had performed "official duties" on behalf of the government. *See Leite v. Crane Co.*, 749 F.3d 1117, 1124 (9th Cir. 2014).

By contrast, in the absence of such circumstances, this Court has held that a federal contractor does not act under a federal officer. Thus, in *Cabalce*, the Court held that a company that contracted with the federal government to dispose of fireworks was not entitled to remove an action against it under § 1442(a)(1), where it failed to show that it was sufficiently under "subjection, guidance, or control" of a federal officer in implementing the contract, 797 F.3d at 728, and where the contract made clear that the contractor was an independent actor rather than acting as an agent of the government, *see id.* at 728–29. As a result, the company's actions "were not acts of a government agency or official." *Id.* at 729.

The contracts on which the oil companies rely here do not establish the kind of relationship that supports characterizing the companies' self-interested business activities as acts on behalf of the government at the direction of federal officers. Any obligations imposed on the companies by the contracts were limitations on their essentially private conduct, more akin to the regulatory limitations that *Watson* held insufficient to justify invocation of section 1442(a)(1) than to the delegation of authority "to act 'on the Government agency's behalf'" that sufficed in *Goncalves*, 865 F.3d

at 1247 (quoting *Watson*, 551 U.S. at 156). None of the contracts on which the companies rely supports the counterintuitive conclusion that the companies, in producing and selling fossil fuel products, were helping to perform governmental tasks under color of federal authority.

Specifically:

- The Elk Hills Naval Petroleum Reserve contract between Standard Oil Company of California and the United States Navy allocated rights in oil fields within the reserve between Standard Oil and the government, and required Standard Oil to *curtail* its production to protect the interests of the government. *See United States v. Standard Oil Co. of Calif.*, 545 F.2d 624, 628 (9th Cir. 1976). The agreement recognized the distinct interests of the government and the company and created mechanisms to balance the two. When Standard Oil chose to produce oil from the reserve for itself, it was not exercising delegated authority to act on behalf of the government, *see Goncalves*, 865 F.3d at 1247; it was acting in its own interests.
- The companies' oil and gas leases on the Outer Continental Shelf allow private actors to purchase leaseholds on federal property and

extract resources from those leases for their own commercial uses, with payment of royalties to the government. The government's willingness to make public property available, for a price, to private interests who wish to use it for their own profitable purposes does not delegate to private persons authority to act on behalf of the government or otherwise transform them into public actors assisting government officers in "fulfill[ing] … basic governmental tasks." *Watson*, 551 U.S. at 153. That the companies, by entering into the leases, have chosen to subject themselves to detailed regulation of their activities on the leaseholds likewise cannot, under *Watson*'s reasoning, transform them into persons acting under federal officers. *See* 551 U.S. at 153. If the companies' contrary view were correct, any number of companies and individuals who have paid for the right to extract resources from federal lands subject to the terms established by the laws, regulations, and contracts governing their activities—timber companies, miners and prospectors, grazers—would likewise qualify for removal under section 1442(a)(1).

- Citgo's contracts to sell standardized commercial commodities—gasoline and diesel—to NEXCOM, which operates retail stores on Navy bases, do not qualify it as a person acting under a federal officer in performing acts under color of office. Merely selling products to the government, and complying with the contract terms incidental to that sale, does not constitute assisting federal officers "in affirmatively executing duties under … federal law." *Watson*, 551 U.S. at 151 (citation omitted). Such standard, arms-length commercial transactions do not make one of the parties the agent of the other or establish the degree of subjection and control required by section 1442(a)(1). *See Cabalce*, 797 F.3d at 728–29. Government purchases of "off-the-shelf" products from a defendant thus do not show that the defendant's conduct "come[s] within the meaning of 'act[ed] under.'" *Washington v. Monsanto Co.*, 738 F. Appx. 554, 555 (9th Cir. 2018).

The companies' blanket assertion that "'a private actor' may qualify as a federal officer by "'helping the Government to produce an item that it needs" pursuant to a federal contract,'" Appts' Br. 65 (quoting *Fidelitad, Inc. v. Insitu, Inc.*, 904 F.3d 1095, 1101 n.3 (9th Cir. 2018)),

provides no support for its reliance on the contracts it invokes here. Appellants use of the term "may" suggests that a private actor is permitted to qualify whenever it produces something the government needs. But the cited decision says only that "*Watson* … suggests that a private actor *might* fall within the terms of the statute" under some such circumstances. *Fidelitad*, 904 F.3d at 1101 n.3 (emphasis added; citing *Watson*, 551 U.S. at 153). The contractual arrangements that the companies invoke are not the kinds of contract that *Watson* suggested might suffice. This Court, moreover, has explicitly recognized that contractors supplying goods to the government can fall within the statute only "in some circumstances." *Id*. at 1100. The circumstances here fall far short of those this Court has held satisfy the statute. *See Goncalves*, 865 F.3d at 1245–47; *Leite*, 749 F.3d at 1123–24.

B. The companies have not shown the requisite causal connection between this action and the acts they claim were taken under the direction of federal officers.

Removal under section 1442(a)(1) requires that the defendant show not only that it did something that constituted an act under a federal officer and under color of that officer's office, but also that the defendant demonstrate that the action or prosecution removed was brought against

it "for or relating to" that act. This Court has characterized this aspect of the statute as requiring that the claims against the defendant be "causally connected" to the acts performed under the direction of a federal officer. *Goncalves*, 865 F.3d at 1244. Although the causal-connection requirement in most cases is not difficult to satisfy, it does require a showing "that the challenged acts 'occurred *because of* what [the defendants] were asked to do by the government.'" *Id.* at 1245 (citation omitted); *see*, *e.g.*, *Cabalce*, 797 F.3d at 728 (holding that removal was improper because the government had not directed the acts that were the basis of the lawsuit).

Here, as the plaintiffs demonstrate in their brief (at 15–16), the companies have not made that showing. Rather, the claims against the oil companies rest on their concealment of their knowledge of the climate hazards posed by their activities, not on anything they were "asked to do by the government." *Goncalves*, 865 F.3d at 1245. Nothing in the contractual relationships cited by the companies demonstrates that the government "direct[ed] [them] to conceal" the hazards posed by fossil fuels, and thus the companies have "failed to demonstrate a 'causal nexus' between [the plaintiffs'] claims and any actions [the companies]

took pursuant to a federal officer's direction." *Washington v. Monsanto Co.*, 274 F. Supp. 3d 1125 (W.D. Wash. 2017), *aff'd*, 738 F. Appx. 554 (9th Cir. 2018).

CONCLUSION

For the foregoing reasons, as well as those set forth in the briefs of the plaintiffs-appellees, this Court should affirm the order of the district court.

Respectfully submitted,

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January 29, 2019

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-face and volume limitations set forth in Federal Rules of Appellate Procedure 32(a)(7)(B) and 29 as follows: The type face is fourteen-point Century Schoolbook font, and the word count, as determined by the word-count function of Microsoft Word 2016, is 4,528, excluding parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and the rules of this Court.

/s/ Scott L. Nelson
Scott L. Nelson

CERTIFICATE OF SERVICE

I certify that on January 29, 2019, I caused the foregoing to be filed with the Clerk of the Court through the Court's ECF system, which will serve notice of the filing on all filers registered in the case, including all parties required to be served.

/s/ Scott L. Nelson
Scott L. Nelson