

**United States Court of Appeals
for the Ninth Circuit**

COUNTY OF SAN MATEO, Plaintiff-Appellee, v. CHEVRON CORPORATION, <i>et al.</i> , Defendants-Appellants	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, <i>et al.</i> , Defendants-Appellants	No. 18-15502 No. 17-cv-4934-VC N.D. Cal., San Francisco Hon. Vince Chhabria
COUNTY OF MARIN, Plaintiff-Appellee, v. CHEVRON CORPORATION, <i>et al.</i> , Defendants-Appellants	No. 18-15503 No. 17-cv-4935-VC N.D. Cal., San Francisco Hon. Vince Chhabria
COUNTY OF SANTA CRUZ, <i>et al.</i> , Plaintiff-Appellees, v. CHEVRON CORPORATION, <i>et al.</i> , Defendants-Appellants	No. 18-16376 Nos. 18-cv-00450-VC; 18-cv-00458-VC; 18-cv-00732-VC Hon. Vince Chhabria

**BRIEF OF AMICUS CURIAE SENATOR SHELDON WHITEHOUSE
IN SUPPORT OF APPELLEES AND AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, amicus curiae Senator Sheldon Whitehouse certifies that he is an individual and not a corporation.

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

Senator Sheldon Whitehouse represents the State of Rhode Island in the United States Senate. First elected to the Senate in 2006, Senator Whitehouse has actively sought comprehensive solutions to address climate change. He is a member of the Senate's Environment and Public Works Committee and author of the American Opportunity Carbon Fee Act, which would establish a fee on carbon emissions and return all revenue generated to the American people.

Senator Whitehouse has closely observed the influence of corporate lobbying and election spending in Congress, and how the fossil fuel industry has used its political and electioneering influence. The Senator regularly speaks on the Senate floor about the need to act on climate change and is the author of *Captured: The Corporate Infiltration of American Democracy*.

All parties have consented to the filing of amicus briefs. 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 of submitting the brief, and no person other than Senator
Whitehouse contributed money that was intended to fund
preparing or submitting the brief.

SUMMARY OF ARGUMENT

The Senator files this brief to provide context for arguments made by amicus curiae United States Chamber of Commerce (hereafter “the Chamber”)¹ in support of appellants’ request that

¹ This case highlights the fecklessness of the Court’s disclosure rules in identifying who the real party in interest is behind an amicus brief. See Appendix A, Letter from Sen. Sheldon Whitehouse to Chief Justice John Roberts (Jan. 4, 2019). The Chamber manufactures no product and provides no general service. It exists as an intermediary between business interests and the public and political worlds. It is not at all transparent as to the sources of its funding. If the Chamber provides any service other than lobbying and electioneering, it masks the identity of real parties or industries in interest behind the relative anonymity of the Chamber’s name. On the issue of climate change, its funding is particularly mysterious, as many companies on its board disagree with and deny accountability for the climate denial and opposition the Chamber espouses. See Senators Sheldon Whitehouse, Elizabeth Warren, *et al.*, The U.S. Chamber of Commerce: Out of Step with the American People and its Members, available at https://www.warren.senate.gov/files/documents/2016-6-14-Chamber_of_Commerce_Report.pdf (last viewed on Jan. 26, 2019).

As astronomers divine the presence of dark bodies from their effect on the behavior of visible bodies, one can divine some unseen force driving the Chamber to a position on climate issues no member corporation will publicly espouse. The secrecy of the Chamber’s funding obscures the exact explanation of this aberration. Arguably, the Chamber in this respect is sustained and controlled by fossil fuel industry funding. There is no reason that the Court, the other parties, and the country should be denied the identity of all real parties in interest behind its brief.

this Court review and reverse the lower court’s order remanding this case to state court.

Contrary to the argument it puts forth in this Court, the Chamber’s actions are not those of an organization in search of “thoughtful governmental policies that will have a meaningful impact on global climate change.” Chamber Br. 1. They reflect a decades-long campaign of disinformation, obstruction, and political intimidation designed to prevent democratically accountable branches of government from adopting any policies that would reduce carbon pollution. The Court should assess the Chamber’s arguments accordingly.

ARGUMENT

I. WHILE PROFESSING TO SUPPORT LEGISLATIVE AND EXECUTIVE ACTION ON CLIMATE CHANGE, IN LIEU OF JUDICIAL RULINGS, THE CHAMBER OF COMMERCE HAS FOUGHT ANY ACTION ON THE PROBLEM.

In its brief, the Chamber explains that it “believes that the global climate is changing, and that human activities contribute to those changes,” and that “businesses must be part of any productive

conversation on how to address global climate change.” Chamber

Br. 1. It then makes the following claim:

If there are to be thoughtful governmental policies that will have a meaningful impact on global climate change, then under our system of government those policies should come from Congress and the Executive Branch, and not through the courts or ad hoc efforts from state and local officials.

Id. at 1-2.

This statement bears no resemblance to the Chamber’s actual position on climate change. In fact, the Chamber has a long and blemished record of opposition to “thoughtful governmental policies that will have a meaningful impact on global climate change,” whether those policies come from Congress or the executive branch. As a United States Senator since 2007, I have had a front row seat from which to observe the Chamber’s remorseless efforts to thwart any climate action in Washington.

Take federal legislation. In 2007, the Chamber opposed bipartisan cap and trade legislation.² In 2009, the Chamber was

² See, e.g., “Wake Up to Climate Change Legislation” attack ad, U.S. Chamber of Commerce (Nov. 9, 2007), available at <https://www.youtube.com/watch?v=XevRKc82soI> (last viewed on Jan. 24, 2019).

one of the leading interest groups lobbying against the Waxman-Markey cap and trade legislation.³ Since the failure of Waxman-Markey, the Chamber's allies in Congress have refused to hold hearings on, mark up, debate, or vote on any legislation proposing a policy framework for economy-wide reductions in carbon pollution.

After securing legislative inaction, the Chamber focused its efforts on defeating regulatory actions by the executive branch to limit carbon pollution. In 2010, the Chamber sued the Environmental Protection Agency (EPA), seeking to overturn its finding that greenhouse gas emissions endanger the public health and welfare.⁴ Beginning in 2014, the Chamber convened fossil fuel

³ See, e.g., Letter Opposing H.R. 2454, the “American Clean Energy and Security Act of 2009,” U.S. Chamber of Commerce (June 24, 2009), available at <https://www.uschamber.com/letter/letter-opposing-hr-2454-american-clean-energy-and-security-act-2009> (last viewed on Jan. 24, 2019). Of particular note is the Chamber's threat to consider votes on this legislation in its “How They Voted” scorecard, which may in turn influence election spending decisions.

⁴ *Chamber of Commerce v. EPA*, Petition for Review (Feb. 12, 2010), Case No. 10-1030 (D.C. Cir.), available at <https://www.chamberlitigation.com/sites/default/files/cases/files/2010/Chamber%20of%20Commerce%20v.%20EPA%20%28Endanger>

industry lobbyists, lawyers, and political strategists to plot legal strategies for opposing future regulatory actions to limit carbon pollution⁵ In 2015, the Chamber led a coalition of trade associations suing to block EPA’s proposed Clean Power Plan to reduce carbon emissions in the electric power sector.⁶ In 2017, the Chamber funded a study critical of the Paris Agreement,⁷ a study which President Trump cited in his justification for withdrawing from the agreement.⁸ This study was thoroughly debunked by independent

ment%20Rule%29%20%28Petition%20for%20Review%29.pdf (last viewed on Jan. 24, 2019).

⁵ Coral Davenport and Julie Hirschfeld Davis, “Move to Fight Obama’s Climate Plan Started Early,” N.Y. TIMES (Aug. 3, 2015), available at <https://www.nytimes.com/2015/08/04/us/obama-unveils-plan-to-sharply-limit-greenhouse-gas-emissions.html>.

⁶ *Chamber of Commerce v. EPA*, Petition for Review (Oct. 23, 2015), Case No. 15-1382 (D.C. Cir.), available at <https://www.chamberlitigation.com/sites/default/files/U.S.%20Chamber%2C%20et%20al.%20v.%20EPA%20%28ESPS%29%20--%20Petition%20for%20Review.pdf> (last viewed on Jan. 24, 2019).

⁷ Impacts of Greenhouse Gas Regulations on the Industrial Sector, NERA Economic Consulting (Mar. 2017), available at <http://www.globalenergyinstitute.org/sites/default/files/NERA%20Final%20Report%202.pdf> (last viewed on Jan. 24, 2019).

⁸ Glenn Kessler and Michelle Ye Hee Lee, “Fact-checking President Trump’s claims on the Paris climate change deal,” WASH. POST

climate experts.⁹ Also in 2017, the Chamber spearheaded a lobbying campaign in support of a Congressional Review Act resolution to repeal a Department of Interior rule limiting methane emissions from oil and gas facilities on public lands.¹⁰

The Chamber also wields its influence through electoral politics. Since the decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), permitting outside groups to spend unlimited sums on electioneering activities, the Chamber has directly spent approximately \$150 million¹¹ on congressional races, more than

(Jun. 1, 2017), https://www.washingtonpost.com/news/fact-checker/wp/2017/06/01/fact-checking-president-trumps-claims-on-the-paris-climate-change-deal/?utm_term=.42bce20e6fcd.

⁹ See, e.g., Kevin Steinberger and Amanda Levin, “Chamber Inflates Costs, Ignores Benefits of Climate Action,” Natural Resources Defense Council (Mar. 22, 2017), available at <https://www.nrdc.org/experts/kevin-steinberger/chamber-inflates-costs-ignores-benefits-climate-action> (last viewed on Jan. 24, 2019).

¹⁰ See, e.g. Key Vote Alert, U.S. Chamber of Commerce (May 9, 2017), available at https://www.uschamber.com/sites/default/files/5.9.17-_key_vote_letter_to_senate_supporting_h.j._res._36_cra_resolution_repealing_blm_methane_rule.pdf (viewed on Jan. 24, 2019).

¹¹ U.S. Chamber of Commerce Outside Spending by Year, Center For Responsive Politics, <https://www.opensecrets.org/outsidespending/detail.php?cmte=US>

any other trade association.¹² Many of the attack ads the Chamber funds target candidates for their willingness to support policies to limit carbon pollution.¹³ Almost no candidate benefiting from the Chamber's outside spending has supported any meaningful climate legislation.

The political power of the Chamber is not only measured by what the Chamber actually spends in each electoral cycle, but by what it threatens to spend. The ability to spend unlimited money in politics necessarily imparts the ability to threaten to spend

+Chamber+of+Commerce&cycle=2018 (last viewed on Jan. 24, 2019).

¹² The Chamber goes through extraordinary lengths to keep its membership anonymous and, as a trade association organized under section 501(c)(6) of the Internal Revenue Code, it is not otherwise obligated to disclose this information. As a result, the corporations that fund this political spending are unknown.

¹³ *See, e.g.*, "Run, Jimmy" attack ad against Katie McGinty, 2016 candidate for U.S. Senate from Pennsylvania, available at <https://player.vimeo.com/video/208379329> (last viewed on Jan. 24, 2019); Nancy Madsen, "U.S. Chamber of Commerce says Tim Kaine supported higher energy costs for families," Politifact Virginia (Aug. 21, 2012), available at <https://www.politifact.com/virginia/statements/2012/aug/21/us-chamber-commerce/us-chamber-commerce-says-tim-kaine-supported-highe/>.

unlimited amounts. Such threats provide several advantages to the influencer: they are effective; they can be kept secret; and you don't actually have to spend the money. At the beginning of almost every election cycle, the Chamber threatens to spend far more than it actually spends, a warning to any moderate Republican who fears a well-funded primary challenger.¹⁴ It is no coincidence that bipartisan activity on climate change came to an end in Congress immediately after the *Citizens United* decision unleashed these powers.

The Chamber's actions are not those of an organization in search of "thoughtful governmental policies that will have a meaningful impact on global climate change." Chamber Br. 1. They reflect a decades-long campaign of disinformation, obstruction, and political intimidation designed to prevent democratically

¹⁴ See, e.g., Carol Leonnig, "Corporate donors fuel Chamber of Commerce's political power," WASH. POST (Oct. 19, 2012), available at https://www.washingtonpost.com/politics/decision2012/corporate-donors-fuel-chamber-of-commerces-political-power/2012/10/18/96ad666a-1943-11e2-bd10-5ff056538b7c_story.html?utm_term=.2798acebd23f.

accountable branches of government from adopting any policies that would reduce carbon pollution.¹⁵ The Court should assess the Chamber's arguments accordingly.

II. THE ISSUES RAISED IN THESE LAWSUITS ARE JUSTICIABLE AND NOT POLITICAL QUESTIONS.

The Chamber's legal strategy here is an extension of its political one. While its primary focus is convincing this Court that the issues raised by the plaintiffs-appellees should be addressed in

¹⁵ The predicament of the falsity of the climate denial position (now well documented in peer-reviewed academic research) is best illustrated by the major oil companies whose CEOs now publicly purport to acknowledge the reality and severity of their product's harmful effects on our planet and claim to support a market-based carbon price (some even provide slight — by industry standards — support to a not-yet-operational 501(c)(4) organization supporting a carbon price), but at the same time the industry's entire extant (and formidable) political and electioneering apparatus (including, we believe, the Chamber, though the Chamber's non-transparency obscures a true answer) remains remorselessly dedicated to opposing any meaningful legislative solution, including a price on carbon. These groups include the Chamber, the National Association of Manufacturers, the American Petroleum Institute, Americans for Prosperity, and an armada of others that collectively dominate political spending in America. *See, e.g.*, Robert Brulle, "The climate lobby: a sectoral analysis of lobbying spending on climate change in the USA, 2000 to 2016," *Climatic Change*, vol. 149, issue 3-4, pgs. 289 – 303, available at <https://link.springer.com/article/10.1007%2Fs10584-018-2241-z>.

federal court, the Chamber’s brief hints at the inevitable argument to come: “claims related to the causes and effects of climate change” “present political questions that cannot be resolved by the courts.” Chamber Br. 15.

Actually, they don’t present political questions. They present factual claims that courts are expert at resolving. They present questions of harm and liability that courts are expert at resolving. They require the winnowing of fact from fiction and fraud, where courts have both expertise and the ability to impose consequences for fiction and fraud. Court-required discovery helps winnow facts from industry-funded, poll-tested fictions shopped in legislative arenas.¹⁶ Finally, courts and juries have a storied equalizing role: they are established to provide a forum where even politically mighty interests must stand equal before the law with those they

¹⁶ The potential for bias exists in any industry-funded research, and courts understand that such research should not be relied upon in litigation. *See, e.g., Exxon Shipping Co. v. Baker*, 554 U.S. 471, 501 (2008) (“Because this research was funded in part by Exxon, we decline to rely on it.”).

have harmed.¹⁷ Politically mighty organizations prefer more favorable fields, where their political might settles the question. The Chamber would clearly love to neuter the judicial branch of government on these questions.

History reveals a long battle between powerful influencers who want to bring government to their heel, at whatever cost to the public, and a public that needs its own interests protected but has not arrayed the political might of the big influencers.¹⁸ Courts have

¹⁷ Unique in the constitutional constellation, the jury is designed not just to protect the individual against government, but also to protect the individual against other “more powerful and wealthy citizens.” 3 William Blackstone, *COMMENTARIES ON THE COMMON LAW OF ENGLAND* *381 (1992 reprint) (1765). Juries are not obliged to respect political power or proprieties, just to do justice in the case before them. 1 Alexis De Tocqueville, *DEMOCRACY IN AMERICA* 314 (Arthur Goldhammer trans., Penguin Putnam Inc. 2004) (1838) (“The jury system as it is understood in America seems to me a consequence of the dogma of popular sovereignty just as direct and just as extreme as universal suffrage. Both are equally powerful means of ensuring that the majority reigns.”).

¹⁸ See, e.g., Theodore Roosevelt, *New Nationalism Speech* (1910) (“[T]he United States must effectively control the mighty commercial forces[.] . . . The absence of an effective state, and especially, national, restraint upon unfair money-getting has tended to create a small class of enormously wealthy and economically powerful men, whose chief object is to hold and increase their power.”); David Hume, *PHILOSOPHICAL WORKS OF DAVID HUME* 290 (1854) (“Where the riches are in a few hands, these

an important role in this contest as the branch of government theoretically less responsive to political might.¹⁹ It should come as no surprise that the mightiest of political influencers would like to steer all questions that are of importance to them to the arenas where their political might holds greatest sway. But that's not how the Founders set our government up. There is no doctrine of "too big to adjudicate" or "too important to the politically mighty to

must enjoy all the power and will readily conspire to lay the whole burden on the poor, and oppress them still farther, to the discouragement of all industry."); Andrew Jackson, 1832 Veto Message Regarding the Bank of the United States (July 10, 1832) (transcript available in the Yale Law School library) ("It is to be regretted that the rich and powerful too often bend the acts of government to their selfish purpose . . . to make the richer and the potent more powerful, the humble members of society . . . have neither the time nor the means of securing like favors to themselves, have a right to complain of the injustice of the Government."); Niccolo Machiavelli, *THE PRINCE* IX (1532) ("[O]ne cannot by fair dealing, and without injury to others, satisfy the nobles, but you can satisfy the people, for their object is more righteous than that of the nobles, the latter wishing to oppress, whilst the former only desire not to be oppressed.").

¹⁹ The courts have long recognized this truism. See *Chisholm v. Georgia*, 2 U.S. (2 Dall. 419, 479 (1793)) (The Constitution "places all our citizens on an equal footing, and enables each and every one of them to obtain justice without any danger of being overborne by the weight and number of their opponents.").

adjudicate.” The politically mighty have enough advantages without the Court conferring such a benefit upon them.

There may come a time in this litigation when this Court is faced squarely with questions of justiciability. At that time, Senator Whitehouse expects to provide more extensive context for assessing whether or not legal claims made by any appellant-defendant or supporting amici are consistent with actions they take before the other branches of government. For present purposes, and for the foregoing reasons, Senator Whitehouse respectfully suggests that any legal arguments or factual assertions the Chamber makes about the merits, justiciability, and the proper role of the federal courts vis-à-vis other courts or other branches of government be treated with the scrutiny deserving of assertions made a by self-interested party with a long history belying its arguments.

CONCLUSION

For the foregoing reasons, amicus curiae Senator Sheldon Whitehouse respectfully requests that the Court take into context that those raising questions about the propriety of judicial action here, supposedly in favor of legislative or executive action, similarly

oppose action by the other branches of government, so that their pleas should be understood as rent-seeking, self-interested pleas to complete inaction, and that the courts are well-equipped to adjudicate these matters and enter an order consistent with the positions expressed herein.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby 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 January 29, 2019.

I 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/ Robert S. Peck

Robert S. Peck

CERTIFICATE OF COMPLIANCE

Pursuant to 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 2,856 words (as determined by the Microsoft Word 365 word-processing system used to prepare the brief), excluding the parts 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 Microsoft Word 365 in 14-point Century Schoolbook font.

/s/ Robert S. Peck

Robert S. Peck