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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CITY OF OAKLAND, a Municipal Corporation, and THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through Oakland City Attorney BARBARA J. PARKER,

Plaintiffs,

v.

BP P.L.C., a public limited company of England and Wales, CHEVRON CORPORATION, a Delaware corporation, CONOCOPHILLIPS COMPANY, 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.

First-Filed Case No. 3:17-cv-6011-WHA
Related to Case No. 3:17-cv-6012-WHA

THE PEOPLE'S REPLY IN SUPPORT OF RENEWED MOTION TO REMAND

Date: April 22, 2021
Time: 8:00 AM
Place: Courtroom 12, 19th Floor

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, v. BP P.L.C., a public limited company of England and Wales, CHEVRON CORPORATION, a Delaware corporation, CONOCOPHILLIPS COMPANY, 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.	Case No. 3:17-cv-6012-WHA

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I. INTRODUCTION

Defendants' Opposition to the People's Renewed Motion to Remand, No. 17-cv-6011, Dkt. 349 ("Opp."), repackages arguments that have now been rejected by at least seven district courts and four circuit courts,[1] giving Defendants "[a] batting average of .000" in opposing remand based on the theories asserted in these cases. *City & Cty. of Honolulu v. Sunoco LP*, No. 20-CV-00163-DKW, 2021 WL 839439, at *2 n.3 (D. Haw. Mar. 5, 2021) ("*Honolulu* Stay Denial I"); *accord* Nos. 21-15313 & 21-15318, 2021 WL 1017392 (9th Cir. Mar. 13, 2021) ("*Honolulu* Stay Denial II"). This Court, too, should reject Defendants' meritless arguments and remand these two cases to state court, where they were filed and where they belong.[2]

Defendants have abandoned their bankruptcy and admiralty grounds for removal by failing to address them in their Opposition. They reassert the federal common law, *Grable*, and complete preemption theories that the Ninth Circuit squarely rejected, but only to preserve them for perhaps another appeal. *See* Opp. 1 n.1; *see City of Oakland v. BP PLC*, 969 F.3d 895, 906–08 (9th Cir. 2020) ("*Oakland*"), *petition for cert. filed*, No. 20-1089 (U.S. Feb. 9, 2021).

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[1] *Cty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 937 (N.D. Cal. 2018) ("*San Mateo I*"), *aff'd in part, appeal dismissed in part*, 960 F.3d 586 (9th Cir. 2020), *reh'g en banc denied* (Aug. 4, 2020) ("*San Mateo II*"), *petition for cert. filed*, No. 20-884 (Jan. 4, 2021); *Mayor & City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538 (D. Md. 2019) ("*Baltimore I*"), *as amended* (June 20, 2019), *aff'd in part, appeal dismissed in part*, 952 F.3d 452 (4th Cir. 2020) ("*Baltimore II*"), *cert. granted*, 141 S. Ct. 222 (2020); *Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, 405 F. Supp. 3d 947 (D. Colo. 2019) ("*Boulder I*"), *aff'd in part, appeal dismissed in part*, 965 F.3d 792 (10th Cir. 2020) ("*Boulder II*"), *petition for cert. filed*, No. 20-783 (Dec. 8, 2020); *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142 (D.R.I. 2019) ("*Rhode Island I*"), *aff'd in part, appeal dismissed in part*, 979 F.3d 50 (1st Cir. 2020) ("*Rhode Island II*"), *petition for cert. filed*, No. 20-900 (Jan. 5, 2021); *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31 (D. Mass. 2020); *City & Cty. of Honolulu v. Sunoco LP*, No. 20-CV-00163-DKW, 2021 WL 531237 (D. Haw. Feb. 12, 2021) ("*Honolulu*"), *appeals filed*, Nos. 21-15313 & 21-15318 (9th Cir. Feb. 23, 2021).

[2] While Defendants ask the Court to defer any ruling until next fall, after the Supreme Court rules on their pending certiorari petition, they have not satisfied their heavy burden of establishing the need for such a stay of proceedings. *See Nken v. Holder*, 556 U.S. 418, 434 (2009); *Honolulu* Stay Denial II, 2021 WL 1017392, at *1 (no basis for stay "considering our recent opinions rejecting the very same jurisdictional arguments"). Nor will the pending Supreme Court decision in *Baltimore* address any of the issues now before this Court, because the defendants in that case chose *not* to ask the Supreme Court to address the merits of the Fourth Circuit's rejection of federal officer jurisdiction. *See* People's Memorandum of Points and Authorities in Support of Renewed Motion to Remand, No. 17-cv-6011, Dkt. 342, 9:22–24 & n.5 ("Mot.").

Defendants devote most of their brief to federal officer jurisdiction under 28 U.S.C. § 1442. But that theory is precluded by *San Mateo II*, 960 F.3d 598–603, as well as *Rhode Island II*, 979 F.3d at 59–60 and *Baltimore II*, 952 F.3d at 462–71. Defendants cannot circumvent the appellate decisions in cases to which they were parties by now asking the Court to review thousands of pages of historical evidence that Defendants could have submitted in those previously decided cases. That is especially so given the prohibition in 28 U.S.C. §§1446(b)(1) and 1653 against adding new jurisdictional theories or facts to a notice of removal ("NOR") more than 30 days after service of the initial pleading.

Defendants also present brief arguments for removal jurisdiction based on the Outer Continental Shelf Lands Act ("OCSLA") and the federal enclave doctrine. Like federal officer jurisdiction, those theories have been rejected by *every* court to have considered them, *see supra* n.1, and should fare no better here. The *actual* allegations in the People's complaints and the *actual* elements of the People's representative public nuisance claims (as opposed to Defendants' self-serving mischaracterization of those allegations and elements) do not support removal.

Finally, Defendants argue that *Grable* jurisdiction exists because "the First Amendment injects affirmative federal-law elements into the plaintiff's cause of action." Opp. 24. That argument is meritless on its face and is foreclosed by the Ninth Circuit's express rejection of *Grable* jurisdiction in *Oakland*, 969 F.3d at 911.

II. ARGUMENT

As an overarching matter, most of the removal jurisdiction theories advanced by Defendants would require the Court to reject *the People's* theory of the cases in favor of Defendants' theory of the People's cases. That is not permissible. Contrary to Defendants' mischaracterizations, the People do not (and could not) contend that Defendants' liability for public nuisance rests upon their extraction, refining, or combustion of fossil fuels alone. Rather, the People allege that Defendants engaged in a decades-long campaign to deceptively promote fossil fuel products they knew were harmful, discredit climate science, and spread disinformation about those products. *See* Oak. 1st. Am. Compl., Case No. 17-cv-6011, Dkt. 199; S.F. 1st Am. Compl., Case No. 17-cv-6012, Dkt. 168 (together, "Oak. & S.F. 1st Am. Compls."), ¶¶ 5, 7, 104–

23; *Oakland*, 969 F.3d at 906. It makes no difference to Defendants' liability where or how any particular product was extracted or refined.[3]

The People's deception allegations are critical to their claims because under California law, the mere act of manufacturing and selling a hazardous but lawful product does not establish public nuisance liability. *Cty. of Santa Clara v. Atl. Richfield Co.*, 137 Cal. App. 4th 292, 309 (2006) ("Liability is not based merely on production of a product."); *City of Modesto Redev. Agency v. Superior Ct.*, 119 Cal. App. 4th 28, 43 (2004), *as modified on denial of reh'g* (June 28, 2004) (same); *San Diego Unified Port Dist. v. Monsanto Co.*, No. 15-CV-578-WQH-JLB, 2016 WL 5464551, at *7 (S.D. Cal. Sept. 28, 2016) (same). Rather, Defendants' liability for contributing to a public nuisance requires proof of what the California Court of Appeal has characterized as "wrongful promotion." *People v. ConAgra Grocery Prods. Co.*, 17 Cal. App. 5th 51, 91, 101 (2017), *reh'g denied* (Dec. 6, 2017), *rev. denied* (Feb. 14, 2018), *cert. denied*, 139 S. Ct. 377 (2018); *see also Cty. of Santa Clara*, 137 Cal. App. 4th at 309 (liability for defendants' "affirmative and knowing promotion of [that] product for a hazardous use"). As in similar cases brought against these and other oil and gas defendants in other jurisdictions under other states' laws, "the source of tort liability . . . [is] the concealment and misrepresentation of [fossil fuel] products' known dangers," together with the "simultaneous promotion of their unrestrained use." *Baltimore II*, 952 F.3d at 467.[4]

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[3] Defendants place considerable reliance upon statements made by one of the People's previous attorneys about the nature of the People's claims. Opp. 3. But what matters here is what the complaints actually allege and how those allegations relate to the elements of the People's public nuisance claim. It is well settled that "[s]tatements of law or legal argument . . . fall outside the concept of judicial admissions." *Lam Research Corp. v. Schunk Semiconductor*, 65 F. Supp. 3d 863, 870 (N.D. Cal. 2014); *see Maloney v. Scottsdale Ins. Co.*, 256 F. App'x 29, 32 (9th Cir. 2007) ("Judicial admissions apply only to factual statements, not statements of law."); *see also Alvarez v. Hill*, 518 F.3d 1152, 1158 (9th Cir. 2008) ("Even when . . . [plaintiff's] counsel initially misconceived the proper legal theory of the claim, summary judgment does not follow if the plaintiff is entitled to relief on some other legal theory and requested as much." (cleaned up)); *Larin Corp. v. Mueller*, 364 F. App'x 380, 382–83 (9th Cir. 2010) (no judicial estoppel where defendant was not prejudiced by plaintiff's change in legal theories). In the context of determining removal jurisdiction, what counts is the substance and allegations of the complaint.

[4] Courts in analogous cases have repeatedly acknowledged that defendants have misrepresented the plaintiffs' allegations in exactly the manner Defendants do here. *See, e.g.*, *Baltimore II*, 952

A. The Court should estop Defendants from asserting federal officer jurisdiction.

The Ninth Circuit in *San Mateo II*, like the Fourth Circuit in *Baltimore II* and the First Circuit in *Rhode Island II*, squarely rejected the exact federal officer removal theories that these same Defendants are continuing to press here (just as the Tenth Circuit in *Boulder II* rejected those theories when presented by Defendant ExxonMobil). Mot. 6–7. Those rulings are binding on Defendants as a matter of collateral estoppel. *Id.* 7–10.

Defendants contend that it would be unfair to apply collateral estoppel to prevent them from pursuing theories they lost on the merits in seven district courts and four circuit courts, including the Ninth Circuit. They fail to reference any of the recognized "indices of unfairness," however, all of which weigh in favor of preclusion. *See Sec. & Exch. Comm'n v. Alexander*, 115 F. Supp. 3d 1071, 1081 (N.D. Cal. 2015); *see also* Mot. 10. While Defendants assert that disputes over federal officer jurisdiction implicate "federal interests" of such towering importance that they demand fresh consideration regardless of the Ninth Circuit's ruling, Opp. 10, there is no "removal-grounds" or "jurisdiction" exception to collateral estoppel. To the contrary, "[i]t has long been the rule that principles of res judicata apply to jurisdictional determinations—both subject matter and personal." *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982); *see also Dracos v. Hellenic Lines, Ltd.*, 762 F.2d 348, 349, 352–53 (4th Cir. 1985) (offensive, non-mutual collateral estoppel could apply to "the facts upon which jurisdiction is based"); *Kimberly Stonecipher-Fisher Revocable Living Tr. v. Gov't of the Virgin Islands*, No. CV 2017-32, 2018 WL 4704030, at *6–8 (D.V.I. Sept. 30, 2018) (applying offensive, non-mutual collateral estoppel to preclude relitigation of a subject-matter jurisdiction challenge).

Defendants also try to overcome collateral estoppel by relying on the "additional evidence" they chose not to offer before in these cases or in *San Mateo*. Defendants thus ask this Court to consider two new "expert" declarations and 63 exhibits, comprising 1,425 pages of previously

F.3d at 467 ("[R]eferences to fossil fuel production in the Complaint . . . [are] not the source of tort liability."); *Baltimore I*, 388 F. Supp. 3d at 560 ("This argument rests on a mischaracterization of the City's claims."); *Boulder I*, 405 F. Supp. 3d at 969 ("Defendants mischaracterize Plaintiffs' claims."); *Honolulu*, 2021 WL 531237, at *1 ("The principal problem with Defendants' arguments is that they misconstrue Plaintiffs' claims."); *Massachusetts*, 462 F. Supp. 3d at 44 (criticizing "ExxonMobil's caricature of the complaint").

undisclosed material that they contend will fill the evidentiary gaps in the federal officer allegations they pressed in the Ninth Circuit. That newly submitted but historically old material cannot overcome collateral estoppel for two distinct reasons, one based on the collateral-estoppel doctrine itself and one pertaining to the scope of permissible amendments to a notice of removal.

First, Defendants cannot avoid the preclusive effects of *San Mateo*, *Baltimore*, and *Rhode Island* merely by adducing "additional evidence" of purported government acts. To the contrary, "[i]t would defeat the principles of collateral estoppel for a party to avoid preclusion by simply offering facts and arguments it could have presented in an earlier case but chose not to." *XpertUniverse, Inc. v. Cisco Sys., Inc.*, No. 17-CV-03848-RS, 2018 WL 2585436, at *4 (N.D. Cal. May 8, 2018). Defendants must "bear[] the consequences" of that choice, which bars them from presenting "'new evidentiary facts . . . to obtain a different determination'" on federal officer removal. *United States v. Castillo-Basa*, 483 F.3d 890, 903 & n.10 (9th Cir. 2007) (cleaned up).[5]

Second, Defendants cannot re-plead their federal officer jurisdiction theory based on that new evidence, because the federal removal statute prohibits defendants from submitting new grounds for removal or new jurisdictional facts more than 30 days after being served with a state court complaint. *See* 28 U.S.C. §§ 1446(b)(1), 1653. Once that 30-day period has expired, a NOR may only be amended with leave of court—which Defendants did *not* request here—and then only "to clarify 'defective' allegations of jurisdiction previously made." *Barrow Dev. Co. v. Fulton Ins.*

[5] *See also Golden v. O'Melveny & Myers LLP*, No. 214-cv-08725, 2020 WL 1640020, at *6 (C.D. Cal. Apr. 1, 2020) ("Preclusion cannot be avoided simply by offering evidence in the second proceeding that could have been admitted, but was not, in the first."); *Cartmill v. Sea World, Inc.*, No. 10CV361-CAB, 2012 WL 13175846, at *6 (S.D. Cal. July 25, 2012) ("The fact Plaintiffs may not have discovered all pre-existing facts in [a prior proceeding] does not evade the doctrine of collateral estoppel."). Defendants' own citations confirm this principle. In *Stross v. NetEase, Inc.*, the district court applied offensive, non-mutual collateral estoppel to preclude the defendant from relitigating certain "jurisdictional issues," notwithstanding the absence of any "substantial overlap between the evidence and argument advanced in the two cases." No. CV 20-00861-AB, 2020 WL 5802419, at *4, 6–7, 10 (C.D. Cal. Aug. 20, 2020). And in *Kamilche Co. v. United States*, the Ninth Circuit rejected the government's attempt to relitigate the plaintiff's ownership of a parcel of real property, even though the government advanced a different legal theory (adverse possession), requiring different evidence, than it had previously asserted (ownership based on a land survey). 53 F.3d 1059, 1061, 1063 (9th Cir. 1995); *see also Resolution Tr. Corp. v. Keating*, 186 F.3d 1110, 1114 (9th Cir. 1999) (confirming that the courts do not simply look to whether "there [is] a substantial overlap between the evidence or argument" in the two cases); *Stucky v. Hawaii*, No. 09-00209, 2010 WL 1372317, at *14 (D. Haw. Mar. 31, 2010) (same).

Co., 418 F.2d 316, 317 (9th Cir. 1969). Amendment may not plead around "defective jurisdictional facts" in the original NOR. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 832 (1989); 28 U.S.C. § 1653. Amendment is never permitted after 30 days where it "goes beyond merely clarifying technical defects, but rather, amounts to adding a new substantive ground." *Victoriano v. Classic Residence Mgmt., LP*, No. 14CV2346-LAB JLB, 2015 WL 3751984, at *5 (S.D. Cal. June 15, 2015). As Judge Vaughn Walker presciently observed, any other rule

> would create a perverse incentive for removing parties and could undermine the various notice interests served by the removal petition requirement [of § 1446, because] removing parties could wait for their opponents to file a motion to remand and then torpedo their opponents by loading the opposition memorandum with previously undisclosed and stronger bases for jurisdiction.

Hemphill v. Transfresh Corp., No. C-98-0899-VRW, 1998 WL 320840, at *4–5 (N.D. Cal. June 11, 1998) (denying amendment to assert removal jurisdiction on basis not stated in NOR).

Defendants' proffer of "substantial new evidence," Opp. 10, constitutes an impermissible attempt to circumvent the Ninth Circuit's conclusive jurisdictional analysis in *San Mateo II*. The evidence and argument alleged in Defendants' NORs here is *identical* to evidence and arguments that the Ninth Circuit held did not support jurisdiction. To the extent Defendants contend their "new evidence" merely clarifies or "substantiates[s]" allegations in their NORs and does not add allegations of substance, Opp. 8, that evidence cannot overcome the preclusive effect of *San Mateo II* for the reasons discussed above. To the extent Defendants argue on the other hand that their evidence and explanations are so extensive that there is no longer a "substantial overlap" between these cases and *San Mateo II*, *see* Opp. 8–9, they necessarily concede that they have untimely sought to substantively amend their NORs in violation of §§ 1446 and 1653. As Judge Walker warned, Defendants are trying to sandbag the People and this Court with previously undisclosed arguments and facts that are alleged nowhere in their NORs. *See Hemphill*, 1998 WL 320840, at *4.

Two recent cases are instructive. In *Prado v. Dart Container Corp.*, 373 F. Supp. 3d 1281, 1284 (N.D. Cal. 2019) (Koh, J.), the defendant removed under the Class Action Fairness Act ("CAFA"), and alleged that removal was timely under § 1446(b)(1) because the plaintiff had served the complaint 30 days prior. In fact, the complaint had been served 31 days earlier, making

removal untimely. *Id.* The defendant moved to amend its NOR to allege that removal was nonetheless timely under § 1446(b)(3), which permits removal within 30 days of receipt of any document "from which it may first be ascertained that the case is . . . removable," because the complaint itself did not make removability sufficiently clear. *Id.* at 1286. The court did not permit the defendant to pursue that theory, ruling that although a defendant may "amend notices of removal . . . to correct technical defects," it may not "amend its notice of removal to rely on an entirely different timeliness ground not stated in the original notice of removal." *Id.* at 1287–88.

The relationships between Defendants and the federal government alleged in Part IV.B.1.b of the Opposition cannot be considered for the same reason the *Prado* court could not consider the defendant's new timeliness theory. *See* Opp. 15–21. Defendants now assert, for the first time, that they acted under the direction of federal officers when they assisted the United States during World War II ("WWII") and the Korean War, *id.* at 15–18; sold specialized aviation fuel to the military, *id.* at 18–20; performed under oil and gas leases with the Bureau of Land Management, *id.* 20; and provided oil to the Strategic Petroleum Reserve, *id.* at 21. None of those purported relationships were referenced or alleged in Defendants' NORs, and the grounds for federal officer jurisdiction that Defendants actually alleged in their NORs (OCS leases, NORs ¶¶ 58–59, and operations at the Elk Hills Reserve, *id.* ¶ 60) were considered and squarely rejected in *San Mateo II*. Rather than seeking to clarify the grounds previously preserved by their NORs, Defendants avowedly seek to interject "entirely different [federal officer] ground[s] not stated in the original notice of removal," which is impermissible for the reasons Judge Koh explained in *Prado*, 373 F. Supp. 3d at 1288.

In *Collins v. ServiceLink Field Servs., LLC*, No. 3:18-CV-02142-L-MDD, 2019 WL 1536347, at *1 (S.D. Cal. Apr. 9, 2019), the defendant removed a wage-and-hour dispute, also under CAFA. The plaintiff had not alleged a specific damages amount, so the defendant calculated and alleged estimated damages based on the complaint. *Id.* at *2–5. After the district court ruled that the defendant's assumptions and calculations were unreasonable and "greatly inflated," the defendant sought leave to amend, offering a new calculation method that would "reduce the original amount in controversy estimates by over $60,000,000." *Id.* at *6. Even though this amendment did not affect defendant's *statutory* bases for removal, the court held that "[t]his kind

of drastic change more so reflects substantive modification of prior allegations rather than a mere clarification," denied leave to amend, and remanded. *Id.*

The "additional evidence" that Defendants seek to present in Part IV.B.1.a of their Opposition, in support of "grounds addressed by the Ninth Circuit," Opp. 11 (capitalization altered) should be disregarded for the same reason the defendants' new damages evidence was rejected in *Collins*. Regarding the OCS leases, Defendants seek to present extensive legislative history pertaining to never-enacted bills to amend OCSLA, policy speeches by President Nixon, and "expert" opinions about how the government viewed its contractual relationships with lessees. Opp. 11–14. Regarding the Elk Hills Reserve, Defendants submit an unsigned, illegible 1945 memorandum purporting to describe the history of operations at the reserve, Dick Decl. Ex. 13, and a 1978 affidavit submitted by Standard Oil in litigation against the United States, complaining that Standard did not have "an equal voice" in managing the reserve, *id.* Ex. 11 at 2. Even if Defendants had a reasonable justification for their untimely submission of two never-disclosed and never-deposed experts' declarations plus 1,200 pages of hard-to-decipher documents, these materials, like the belated new damages calculations in *Collins*, go far beyond "a mere clarification" of the NORs and must be rejected. *See* 2019 WL 1536347, at *6.

Ultimately, Defendants want to have their cake and eat it too. They try to circumvent § 1653 by claiming that their "[n]ew" evidence "simply . . . substantiate[s]" the allegations in their removal notice. Opp. 2, 8. Yet at the same time, they try to avoid collateral estoppel by contending that the very same evidence creates new issues of federal officer jurisdiction that were not fully litigated and actually decided in *San Mateo*, *Baltimore*, and *Rhode Island*. *See id.* at 8. Defendants cannot have it both ways, and this Court should reject Defendants' attempt to force the City "to use [its] reply memorand[um] to oppose the entirely new bases for jurisdiction." *Hemphill*, 1998 WL 320840, at *4.

B. There remains no basis for federal officer removal.

There is no reason for the Court to consider Defendants' newly provided evidence, for the reasons set forth in Part II.A, *supra*. Because Defendants place such great reliance on these materials, however, the People address below why the materials would not overcome the federal

officer analysis in *San Mateo II* even if collateral estoppel were inapplicable and even if Defendants had properly included these facts and theories in a timely NOR. This is precisely what Judge Watson concluded when reviewing these same documents in *Honolulu* and what the Ninth Circuit recognized in denying these Defendants' (and others') motion to stay that remand order. *See Honolulu*, 2021 WL 531237, at *4–6; *Honolulu* Stay Denial II, 2021 WL 1017392, at *1.

Defendants cannot overcome the hole in their theory of federal officer removal: the failure to identify any act that (1) Defendants took "pursuant to a federal officer's directions" that (2) "is causally connected with [the People's] claims." *San Mateo II*, 960 F.3d at 598. Nor have Defendants established the colorable federal defense element. Merely listing the names of various federal defenses without providing any supporting facts or legal analysis, *see* Opp. 22; NORs ¶ 62, does not satisfy Defendants' burden. *Honolulu*, 2021 WL 531237, at *7 ("[S]omething more than simply asserting a defense and the word 'colorable' in the same sentence must be required.").

1. Defendants were not "acting under" a federal officer.

Defendants cast a wide net in search of a legally sufficient "acting-under" relationship, looking for federal officer jurisdiction in everything from WWII policies to commercial mineral leases. Their hunt fails, however, because none of the identified relationships involve the requisite level of "subjection, guidance, or control" by a federal officer. *Id.* at 599.

a. Defendants' newly provided evidence does not lead to different results for theories already rejected by the Ninth Circuit.

OCS leases: The Ninth Circuit, along with the Fourth and Tenth Circuits, has expressly rejected Defendants' reliance on their Outer Continental Shelf ("OCS") leases as a basis for federal officer jurisdiction. Defendants cite no contrary case law because there is none. Instead, they purport to rely on regulations governing OCS lessees' conduct, hortatory Presidential policy statements, and never-enacted bills they contend could have nationalized OCS production. Presented with that same "new" evidence, the court in *Honolulu* correctly characterized Defendants' "new approach" as "merely rearrang[ing] the deckchairs." 2021 WL 531237, at *5.

The Ninth Circuit in *San Mateo II* held that OCS leases cannot support federal officer jurisdiction because they "do not require that lessees act on behalf of the federal government, under

its close direction, or to fulfill basic governmental duties." 960 F.3d at 602–03; *accord Baltimore II*, 952 F.3d 463–66; *Boulder II*, 965 F.3d at 821–27. Attempting to show otherwise, Defendants present a faulty and untimely expert opinion that OCS leases are "not merely commercial transactions." Declaration of Richard Tyler Priest, Dkt. 349-65 ("Priest Decl."), ¶ 7(1). But the Ninth Circuit carefully reviewed those leases and concluded otherwise. Dr. Priest relies on those leases as well as several statutes and regulations and what he characterizes as standard petroleum engineering practices, but his declaration merely describes a straightforward relationship between a regulated industry and regulator, under a statute that delegates rulemaking authority to an agency which in turn promulgates and enforces rules. *See, e.g.*, *id.* ¶¶ 23–25. The crux of Dr. Priest's opinion is that "initial Code of Federal Regulations (C.F.R.), finalized in May 1954, went well beyond those that governed the average federally regulated entity at that time." *Id.* ¶ 19. That is a debatable proposition. But even if Dr. Priest were correct, his opinion expressly describes a set of codified regulations that applied to every regulated entity. That is not enough to establish federal officer jurisdiction: "Mere compliance with the law, even if the laws are highly detailed, and thus leave an entity highly regulated, does not show that the entity is acting under a federal officer." *San Mateo II*, 960 F.3d at 603 (cleaned up). Moreover, allegations that federal supervisors measured production and computed royalties (Opp. 12 & Priest Decl. ¶ 20) or expanded the amount of OCS acreage leased to private companies during the 1970s (Opp. 13 & Priest Decl. ¶ 50) entirely support the Ninth Circuit's characterization of the relationships as arms-length business transactions. Dr. Priest's opinion thus all but concedes that Defendants' arguments fail.

The smattering of never-enacted bills cited by Defendants, which supposedly would have amended OCSLA to create a "national oil company" (Opp. 13), have no bearing on whether Defendants "acted under" federal officers when they extracted oil on the OCS for their own commercial purposes. An unenacted law establishes no federal control and evinces no congressional intent. *Cent. Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 187 (1994).

Elk Hills Reserve: Defendants' NORs cite the Unit Plan Contract ("UPC") between the Navy and Standard Oil (Chevron's predecessor) that governed joint operation of the Elk Hills Reserve. *See* NORs ¶ 60. In their Opposition, Defendants pivot away from the UPC, which the

Ninth Circuit found to be merely an "arm's-length agreement" that did not give rise to an acting-under relationship. *San Mateo II*, 960 F.3d at 602; *accord Baltimore II*, 952 F.3d 468–71. Defendants now focus on "new" evidence they previously chose not to submit—a 1971 Operating Agreement under which the Navy hired Standard to operate the Reserve. Opp. 14–15. As with the UPC, though, this run-of-the-mill business relationship between the government and a private, independent contractor falls short of the "unusually close" relationship that federal officer removal demands. *Honolulu*, 2021 WL 531239, at *6 (rejecting the 1971 Operating Agreement as a basis for the "acting under" element).

Defendants read too much into the Navy's "cho[ice] to operate the reserve through a contractor rather than with its own personnel." Opp. 14. The government routinely contracts with private entities to procure goods and services; and as the Ninth Circuit has made clear, such contractors do not automatically satisfy the acting-under standard. *See Cabalce v. Thomas E. Blanchard & Assocs., Inc.*, 797 F.3d 720, 729 (9th Cir. 2015) (denying federal officer jurisdiction in case against government contractor); *San Mateo II*, 960 F.3d at 600 ("[A] government contractor may meet the criteria for 'acting under' an officer under certain circumstances."); *Fidelitad, Inc. v. Insitu, Inc.*, 904 F.3d 1095, 1100 (9th Cir. 2018) (same).

In *Cabalce*, the Ninth Circuit affirmed a remand order where a defendant caused an explosion while performing "its contractual duties to handle, store, and destroy . . . fireworks" on behalf of the government. 797 F.3d at 728; *see also id.* at 723–25. The court acknowledged that the contract duties were defined "in general terms," *id.* at 728; required the defendant to destroy the fireworks "as prescribed and directed by [the government]," *id.* at 724; and mandated that "all destructions must be coordinated and approved by [the government]," *id.* (brackets omitted). But "the requisite federal control or supervision" did not exist because the contract did not specify *how* the defendant was to dispose of the fireworks, "relying [instead] on the [defendant's] expertise" to develop a safe plan for doing so. *Id.* at 728 (quotations omitted).

The same reasoning applies to the Operating Agreement. *See* Dick Decl. Ex. 1 § IV(a), (e). While the agreement defines the company's independent contractor duties "in general terms," it does not supply "*detailed specifications*" for operating the reserve. *Cabalce*, 797 F.3d at 728, 730.

In fact, the Operating Agreement expressly directs *Standard Oil*—not the Navy—to "furnish . . . a set of field operating procedures that are commensurate with the State of California laws and good oil field practice." Dick Decl. Ex. 1 § IV(f).[6]

In any event, nothing in the record suggests that the Operating Agreement is anything more than "an arm's-length business arrangement with the Navy," just as the Ninth Circuit held the UPC to be. *San Mateo II*, 960 F.3d at 602. Accordingly, neither Standard nor Chevron were acting under a federal officer when they operated the Elk Hills Reserve.

b. Defendants' newly asserted bases for "acting under" jurisdiction also fail.

Historical wartime contracts: Defendants' newly provided evidence of historical contracts during WWII and the Korean War predates the misconduct alleged in the complaints and fails to demonstrate the "delegation" of federal duties necessary to trigger federal officer removal. *Watson v. Phillip Morris Cos.*, 551 U.S. 142, 157 (2007); *see also San Mateo II*, 960 F.3d at 599. Defendants' Opposition largely repeats their prior arguments on the alleged materiality of Defendants' transactions with the military, which were thoroughly addressed in the People's motion. *See* Mot. 11–12. To the extent Defendants offer "new" evidence and arguments concerning those transactions, they fail to satisfy the "acting under" standard.

Defendants' characterization of directives from the Petroleum Administration for War ("PAW") during WWII, even if they had occurred during a time period pertinent to these cases, does not "demonstrate[] the subjection, guidance, or control required to show that they were acting under a federal office." *Parish of Cameron v. Auster Oil & Gas Inc.*, 420 F. Supp. 3d 532, 543–44 (W.D. La. 2019). In *Parish of Cameron*, as here, the defendants sought removal under § 1442 by "characteriz[ing] the U.S. oil and gas industry as essentially an agent of the federal government during [WWII]," and asserting that "the industry's activities were tightly controlled to support the country's war efforts." *Id.* at 543. The court nonetheless remanded because, as here, the defendants

[6] As additional evidence of federal officer control, Defendants include a 1974 letter directing Standard to determine whether the reserve could produce 400,000 barrels per day. *See* Opp. 14–15; Dick Decl. Ex. 2, at Ex. A,1. That letter, however, merely invokes the terms of the Operating Agreement, which do not establish "acting under."

did not show "that PAW and other federal agencies directed Defendants' activities or that they mandated how Defendants were to comply with federal regulations and directives." *Id*. at 544. The mere fact that the government set production quotas or otherwise influenced production thus demonstrated "little more than a regulated industry complying with . . . a federal regulatory regime," which cannot support federal officer removal. *Id*. The cases Defendants cite only reinforce this conclusion, noting that although PAW had the authority to compel production, "in fact they relied almost exclusively on contractual agreements to ensure avgas production." *United States v. Shell Oil Co.*, 294 F.3d 1045, 1050 (9th Cir. 2002).[7]

Even assuming that Defendants' conduct during the Korean War would be temporally relevant, Defendants' evidence of "acting under" during that period is similarly deficient. The suggestion that any Defendant was "directed" to expand production during the Korean War is belied by the mechanism by which Defendants say the government executed that "directive": by "calling on"—asking—the oil industry to drill new wells. Opp. 19; Declaration of Dr. Mark R. Wilson, Dkt. 349-66 ("Wilson Decl."), ¶ 28. Defendants also offer no evidence that any Defendant responded to that request, let alone acted under a federal officer in doing so. *See Honolulu*, 2021 WL 531239, at *5 (finding no "acting under" relationship for "fuel supplied during the Korean War" because "Defendants provide no information as to why this constituted the sort of 'unusually close' relationship required").

Similarly, Defendants offer no evidence of the actual relationship between the government and the sole Defendant predecessor identified as having operated a government-owned, contractor-operated facility. Instead, Defendants rely on generalizations across industries and operators. *See* Opp. 18; Wilson Decl. ¶ 19.[8] Without evidence that any particular relationship was "unusually

[7] Defendants' new evidence concerning the "Inch" pipelines fares no better, because it does not rebut the fact that the entity that built and operated the pipeline is not a defendant and therefore is immaterial to the "acting under" analysis. *See* Dick Decl. Ex. 17 n.8.

[8] This flaw is representative of the Wilson Declaration generally, which relies almost entirely on generalizations about the "oil industry" and fails to identify specific oil companies and how they purportedly "acted under" federal officers, as would be required to satisfy Defendants' burden. *See San Mateo II*, 960 F.3d at 603. For instance, almost all references to a Defendant or a Defendant's predecessor are in a single paragraph establishing that certain oil companies have won government

close," Defendants offer nothing more than the type of "arm's-length business arrangement" that does not support federal officer jurisdiction under *San Mateo II*. 960 F.3d at 599, 600.[9]

Strategic Petroleum Reserve: Defendants' newfound reliance on the Strategic Petroleum Reserve ("SPR") is equally unavailing. First, Defendants highlight their participation in the SPR's royalty-in-kind program for OCS mineral rights lessees. *See* Opp. 21. Under that program, lessees contributed oil to the SPR in lieu of making lease payments in cash. *See* Dick Decl. Ex. 59 at 17–18 (describing program). The Ninth Circuit in *San Mateo II*, however, rejected OCS leases as a basis for removal, concluding that "'the willingness to lease federal property or mineral rights to a private entity for the entity's own commercial purposes, without more' cannot be 'characterized as the type of assistance that is required' to show that the private entity is 'acting under' a federal officer." 960 F.3d at 603 (quoting *Baltimore II*, 952 F.3d at 465). Defendants do not and cannot explain why making *in-kind* royalty payments pursuant to those leases would constitute acting under a federal superior, when making *cash* payments does not.

Defendants' purported responsibilities during emergency "drawdown[s]" of the SPR also cannot establish "acting under" a federal officer. Opp. 21. Defendants highlight lease terms that required SPR infrastructure lessees to be available as "sales and distribution point[s] in the event of a drawdown." *Id.* (emphasis omitted). But those lease obligations "track legal requirements" found in 42 U.S.C. § 6241 (describing *inter alia* process for initiating drawdown); *see San Mateo II*, 960 F.3d at 603 (rejecting OCS lease terms on similar grounds). Once again, "compliance with the law, even if the laws are highly detailed, and thus leave an entity highly regulated, does not show that the entity is acting under a federal officer." *Id.* (quotations omitted).

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contracts, Wilson Decl. ¶ 34, which is insufficient on its own to establish federal officer jurisdiction. *See Cabalce*, 797 F.3d at 729. The declaration also says nothing about whether any Defendant "acted under" a federal officer in carrying out the deception campaign at the heart of the People's claims, and therefore provides no support for Defendants' nexus arguments.

[9] The same is true of the government's purported reliance on oil companies to supply specialty fuels. Opp. 19 (citing Wilson Decl. ¶ 40). Defendants' evidence indicates that the Defendants were simply satisfying routine obligations as government contractors, Wilson Decl. ¶ 40, which again does not establish federal officer jurisdiction, *see Cabalce*, 797 F.3d at 729.

2. There is no causal connection between Defendants' acts and the People's claims.

Federal officer jurisdiction arises only where Defendants show they were "acting under" federal officers in "carrying out the 'act[s]' *that are the subject of the petitioner's complaint*." *Watson*, 551 U.S. at 147 (quoting 28 U.S.C. § 1442) (emphasis added). While Defendants' arguments "may have the flavor of federal officer involvement in [their] business, . . . that mirage only lasts until one remembers what [the People] [are] alleging," *Rhode Island II*, 979 F.3d at 59–60: that Defendants failed to warn of the known risks of fossil fuel combustion, misled the public regarding those risks, promoted their products' unlimited use, and engaged in a multi-decadal disinformation campaign to prop up the market for their products, *e.g.*, Oak. & S.F. 1st Am. Compls. ¶¶ 5, 7, 104–23. Every court to consider the issue has reached this conclusion. *See* Mot. 12–13; *Baltimore II*, 952 F.3d at 466–68; *Boulder I*, 405 F. Supp. 3d at 976–77; *Rhode Island I*, 393 F. Supp. 3d at 152; *San Mateo I*, 294 F. Supp. 3d at 939.

Defendants are wrong that the Court can disregard the deception and wrongful promotion at the heart of the Complaints and instead "credit the *defendant's theory of the case*." Opp. 22. The "for or relating to" requirement of 28 U.S.C. § 1442(a)(1) does not give Defendants license to contort the People's claims into something they are not. *See Honolulu*, 2021 WL 531237, at *7 ("[I]f Defendants had it their way, they could assert any theory of the case, however untethered to the claims of Plaintiffs, because this Court must 'credit' that theory."). Rather, Defendants must show that their "*challenged acts* occurred because of what they were asked to do by the Government." *Goncalves by and through Goncalves v. Rady Children's Hosp. San Diego*, 865 F.3d 1237, 1245 (9th Cir. 2017) (emphasis added). The cases Defendants cite do not allow defendants to rely upon a fabricated straw-man theory of the case. For example, in *Leite v. Crane Co.*, 749 F.3d 1117, 1124 (9th Cir. 2014), plaintiffs accused the defendant of failing to warn about the hazards of asbestos. Because the defendant argued that it provided specific warnings required by the federal government, the Ninth Circuit concluded that the defendant had established a causal connection to the "basis of plaintiffs' claims." *Id.*

In any event, much of the conduct that Defendants now rely on as a basis for federal officer jurisdiction predates the allegations of misconduct in the Complaints and is therefore irrelevant. For example, Defendants describe: (1) federal efforts to obtain oil and gas during WWII and the Korean War, Opp. 16–19; (2) Standard Oil's operation of the Elk Hills petroleum reserve, beginning in 1944, *id.* at 14; and (3) pipeline construction during WWII, *id.* at 17 n.8. "Critical under the [federal officer] statute is to what extent defendants acted under federal direction at the time they were engaged in the conduct now being sued upon." *In re MTBE Prods. Liab. Litig.*, 388 F.3d 112, 124–25 (2d Cir. 2007) (cleaned up). Defendants' distant historical conduct has no bearing on the People's public nuisance allegations focusing on Defendants' wrongful promotion of products they knew to be harmful. *See* Oak. & S.F. 1st Am. Compls. ¶¶ 2, 6, 104–23, 145, 147.

Even if each of the acts Defendants purportedly took at the direction of a federal officer occurred within the relevant period, *none* have the requisite causal connection with the conduct challenged in the Complaints. Defendants present no evidence that their allegedly deceptive promotional activities were in any way directed by any federal officer. The Fourth Circuit rejected a virtually identical argument in *Baltimore II*, reasoning that there was no connection because the references to fossil fuel production in the complaint "only serve to tell a broader story about how the unrestrained production and use of Defendants' fossil fuel products contribute to greenhouse gas pollution. Although this story is necessary to establish the avenue of Baltimore's climate change-related injuries, it is not the source of tort liability." 952 F.3d at 467; *see also Rhode Island II*, 979 F.3d at 59–60 (distinguishing defendants' government contracts from the plaintiff's allegations concerning defendants' failure to warn and campaign of deception).

Defendants' assertion that they satisfy the broader "connected or associated with" standard adopted in other circuits is also unavailing. The Ninth Circuit has declined to adopt this standard. *See Ulleseit v. Bayer HealthCare Pharm. Inc.*, 826 F. App'x 627, 629 n.2 (9th Cir. 2020); *Goncalves*, 865 F.3d at 1245. Moreover, Defendants' nexus showing falls short even under the more relaxed standard. *See, e.g., Baltimore II*, 952 F.3d at 466–67 (discussing "relaxed reading" of nexus prong). In *Baltimore II*, the court recognized that a similar complaint "clearly [sought] to challenge the promotion and sale of fossil fuel products without warning and abetted by a

sophisticated disinformation campaign." *Id.* at 467. That was why "the relationship between Baltimore's claims and any federal authority over a portion of certain Defendants' production and sale of fossil fuel products [wa]s too tenuous to support removal under § 1442." *Id.* at 468.

Put simply: Defendants fail to identify a single instance where the government exercised control over the allegedly tortious conduct that gives rise to these suits. That omission is fatal to Defendants' assertion of federal officer jurisdiction, as other courts have found in cases involving failure to warn or deceptive marketing. *See, e.g.*, *In re MTBE Prods. Liab. Litig.*, 488 F.3d at 131 (federal officer removal improper where regulations "say nothing" about marketing and related misconduct).[10]

C. Defendants' remaining grounds for removal likewise fail.

1. There is no OCSLA jurisdiction.

Contrary to Defendants' insistence, Opp. 5, a case does not "aris[e] out of, or in connection with," an OCS operation, 43 U.S.C. § 1349(b)(1), simply because the operation contributed to or otherwise aggravated an injury to a plaintiff that would have occurred in the absence of defendant's OCS operations. OCSLA "require[s]" at a minimum "a but-for connection" between "the cause of action and the OCS operation," meaning there is no OCSLA jurisdiction where, as here, the elements of plaintiff's claims can be established without any proof of a defendant's OCS operations. *In re Deepwater Horizon*, 745 F.3d 157, 163 (5th Cir. 2014) (quotations omitted).

Defendants do not dispute that courts in the Fifth Circuit—where almost all OCSLA cases have been adjudicated—routinely apply this but-for test to define the scope of OCSLA jurisdiction. *See, e.g.*, *id.* (collecting cases). Nor do they identify any case where a court found OCSLA jurisdiction yet concluded there was *no* but-for connection between the lawsuit and an OCS

[10] *See also Meyers v. Chesterton*, No. 15-292, 2015 WL 2452346, at *6 (E.D. La. May 20, 2015) (rejecting federal officer removal because "nothing about the Navy's oversight prevented the Defendants from complying with any state law duty to warn"), *vacated as moot sub nom. Meyers v. CBS Corp.*, No. 15-30528, 2015 WL 13504685 (5th Cir. Oct. 28, 2015); *Faulk v. Owens-Corning Fiberglass Corp.*, 48 F. Supp. 2d 653, 662 (E.D. Tex. 1999) (remanding where defendant failed to "tether" production of military avgas to failure to warn claims); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 428 F. Supp. 2d 1014, 1017–18 (D. Minn. 2006) (remanding design defect case where FDA did not exercise control over design, manufacture, or sale of defibrillators at issue).

operation. To the contrary, in each of Defendants' cited cases, the dispute would not have existed absent an OCS operation. *See, e.g.*, *EP Operating Ltd. P'ship v. Placid Oil Co.*, 26 F.3d 563, 565 (5th Cir. 1994) ("The current dispute arose out of EP's attempt to recover some value from these unused and depreciating assets on the OCS."); *United Offshore Co. v. S. Deepwater Pipeline Co.*, 899 F.2d 405, 407 (5th Cir. 1990) ("The present dispute . . . involves a contractual dispute over the control of an entity which operates a gas pipeline [from the OCS].").

Nor is there any merit to Defendants' conclusory assertion that the Fifth Circuit's but-for standard "is contrary to the text of the statute." Opp. 6. Statutory phrases such as "in connection with" or "relate to" are "essentially indeterminate because connections, like relations, stop nowhere." *Maracich v. Spears*, 570 U.S. 48, 59 (2013) (cleaned up). Accordingly, courts must apply "a limiting principle" to reasonably cabin the scope of these phrases. *Id.* In practice, many courts have done so by requiring a but-for connection between the elements of a plaintiff's claims and the defendant's challenged conduct. In construing an arbitration agreement, for example, the Ninth Circuit recently concluded that a plaintiff's qui tam lawsuit did not "'arise out of' or 'relate to' a contractual or employment relationship" because "even if [the plaintiff] had never been employed by defendants, . . . she would still be able to bring a suit against them for presenting false claims to the government." *United States ex rel. Welch v. My Left Foot Children's Therapy, LLC*, 871 F.3d 791, 799 (9th Cir. 2017). Likewise, in *Doe v. Princess Cruise Lines*, the Eleventh Circuit held that a plaintiff's state-law tort claims for false imprisonment (among others) "did not relate to, arise out of, or . . . connect with [her] crew agreement or her duties for [the defendant cruise line] as a bar server" because "[t]he cruise line could have engaged in that tortious conduct even in the absence of any contractual or employment relationship." 657 F.3d 1204, 1219 (11th Cir. 2011). And more recently, the Second Circuit held that a plaintiff's ERISA claims did not "relate to" his employment because "none of the facts relevant to the merits of [the plaintiff's] claims against [the defendant] relates to his employment." *Cooper v. Ruane Cunniff & Goldfarb Inc.*, __ F.3d __, No. 17-2805, 2021 WL 821390, at *7 (2d Cir. Mar. 4, 2021).

Here, Defendants' liability for their role in contributing to a public nuisance can be established without regard to either the fact or amount of their OCS operations. For the People to

prevail on their representative public nuisance claim, they must demonstrate that Defendants contributed to the creation of a public nuisance through their "affirmative and knowing promotion of a product for a hazardous use." *Santa Clara*, 137 Cal. App. 4th at 305, 309 (emphasis omitted). The People seek to do so by proving that Defendants' "concealment and misrepresentation of [fossil fuels'] known dangers—and simultaneous promotion of their unrestrained use—. . . drove consumption, and thus greenhouse gas pollution, and thus climate change." *Baltimore II*, 952 F.3d at 467. Defendants do not—and cannot—contend that their wrongful promotion qualifies as an OCS operation. Nor do they suggest that the People would not have been injured by that wrongful promotion but for Defendants' operations on the OCS. Whatever impact Defendants' OCS operations may have had on the *amount* of harm suffered by the People, those operations had nothing to do with the *fact* of harm, which is all the People need to prove to establish liability. Accordingly, no OCSLA jurisdiction exists. Even if Defendants had never extracted a single barrel of oil from the OCS, the People "would still be able to bring a suit against them" for their role in creating a public nuisance under California law. *Welch*, 871 F.3d at 799.

Defendants cannot escape this conclusion by speculating that the People's requested relief threatens to impair future OCS recovery. Far from "forbidding" future OCS production, the People's complaints expressly state that they "do not seek to restrain Defendants from engaging in their business operations"; instead, the People merely seek "an abatement program to build sea walls and other infrastructure" in their jurisdictions to protect their communities. *See* Oak. & S.F. 1st Am. Compls. ¶ 11; *see also ConAgra Grocery Prods. Co.*, 17 Cal. App. 5th at 169 (upholding remedy in action to abate lead paint public nuisance by removing paint from residences within specific jurisdictions); *Oklahoma v. Purdue Pharma LP*, No. CJ-2017-816, 2019 WL 4019929, at *12, *15 (Okla. Dist. Ct. Aug. 26, 2019) (defendants created a public nuisance with their misleading marketing and promotion of opioids and were required to fund abatement). It is entirely unclear why Defendants think that such an abatement fund would make "future OCS production . . . prohibitively costly," Opp. 7, given that the size of the fund bears no relation to Defendants' future operations on the OCS.

On Defendants' theory, federal OCSLA jurisdiction would exist in *every* case seeking a

large monetary judgment against a company that extracted oil and gas on the OCS, regardless of the subject matter or nature of the claims. The Court should not "presum[e] that Congress intended such an absurd result." *Boulder I*, 405 F. Supp. 3d at 979. Instead, it must reject Defendants' assertion of OCSLA jurisdiction, as has every court to consider the issue. *See San Mateo I*, 294 F. Supp. 3d at 938–39; *Boulder I*, 405 F. Supp. 3d at 978–79; *Rhode Island I*, 393 F. Supp. 3d at 151–52; *Baltimore I*, 388 F. Supp. 3d at 566; *Honolulu*, 2021 WL 531237, at *3.

2. There is no enclave jurisdiction.

Defendants' invocation of enclave jurisdiction fails for at least two reasons. First, none of the alleged injuries occurred on a federal enclave. *See Willis v. Craig*, 555 F.2d 724, 726 (9th Cir. 1977). To the contrary, the People expressly disavowed relief from any such harms—a fact Defendants attempt to ignore. *See* Oak. 1st Am. Compl. ¶ 142 n.82; S.F. 1st Am. Compl. ¶ 142 n.154. Second, none of the relevant tortious conduct occurred within a federal enclave because Defendants do not—and cannot—claim that their campaign of climate deception took place on federal lands. *See Honolulu*, 2021 WL 531237, at *8.

As a result, Defendants have not carried their burden of showing that federal lands are "the locus in which the [People's] claim[s] arose." *Earth Island Institute v. Crystal Geyser Water Co.*, No. 20-CV-02212-HSG, 2021 WL 684961, at *10 (N.D. Cal. Feb. 23, 2021) (quotations omitted). To conclude otherwise would "require the most tortured reading of the [People's] Complaints." *Honolulu*, 2021 WL 531237, at *8. This Court should therefore reject Defendants' attempts to manufacture enclave jurisdiction—as every court has done in related cases. *See id.*; *San Mateo I*, 294 F. Supp. 3d at 939; *Rhode Island I*, 393 F. Supp. 3d at 152; *Boulder I*, 405 F. Supp. 3d at 973–75; *Baltimore I*, 388 F. Supp. 3d at 563–66.[11]

[11] In response to this overwhelming authority, Defendants muster only a single, inapposite case, *Corley v. Long-Lewis, Inc.*, 688 F. Supp. 2d 1315 (N.D. Ala. 2010), which found enclave jurisdiction because the plaintiff was "clearly exposed to asbestos" while working on Naval bases, and the complaint specifically alleged that "each and every exposure to asbestos . . . contributed to the cause of his asbestos-related mesothelioma." *Id.* at 1328–29. Here, by contrast, none of the People's injuries occurred on federal lands.

3. Defendants' assertion of *Grable* jurisdiction is foreclosed by the Ninth Circuit's opinion in these cases and is meritless.

Defendants again raise federal question jurisdiction under *Grable & Sons Metal Products, Inc. v. Darue Engineering and Manufacturing*, 545 U.S. 308 (2005), but that potential ground for removal was already fully litigated and soundly rejected by the Ninth Circuit *in this very case*. *See Oakland*, 969 F.3d at 904–07. The Ninth Circuit held that because "the Cities' state-law claim does not raise a substantial federal issue, the claim does not fit within the slim category *Grable* exemplifies." *Id.* at 907 (cleaned up). It then remanded for this Court "to determine whether there was an alternative basis for jurisdiction" other than the § 1331 grounds the Ninth Circuit rejected (federal common law, *Grable*, and complete preemption). *Id.* at 908, 911.

"[A] district court is limited by [the Ninth Circuit's] remand in situations where the scope of the remand is clear." *Mendez-Gutierrez v. Gonzales*, 444 F.3d 1168, 1172 (9th Cir. 2006). The Ninth Circuit made the scope of its remand crystal clear, and the rule of mandate and law of the case doctrine preclude Defendants' efforts to relitigate *Grable* jurisdiction. *See Stacy v. Colvin*, 825 F.3d 563, 567–68 (9th Cir. 2016); *Castillo-Basa*, 483 F.3d at 903 n.10 (parties are barred from bringing "new evidentiary facts . . . to obtain a different determination"); *see also Volvo Trademark Holding Aktiebolaget v. Clark Mach. Co.*, 510 F.3d 474, 481 (4th Cir. 2012) ("[U]nder the mandate rule[,] a remand proceeding is not the occasion for raising new arguments or legal theories.").

Defendants protest that they had an additional First Amendment theory underlying their *Grable* jurisdiction arguments that was not "address[ed]" by the Ninth Circuit. Opp. 24 n.12. But that was only because Defendants chose not to pursue that theory on appeal.[12] Defendants try to justify their failure to press this argument in the Ninth Circuit by asserting that "Plaintiffs' theory of the case plainly rested on Defendants' production and sale of fossil fuels." Opp. 24 n.12. Defendants are wrong, *see supra* n.4, but the reasons for their deliberate waiver, whether mistaken

[12] That choice was deliberate: Defendants *did* raise the First Amendment before the Ninth Circuit as an argument for affirmance of the dismissal order, yet they omitted it as a basis to affirm the order denying remand. *See* Answering Brief of Defendant-Appellee Chevron Corporation, No. 18-16663, Dkt. 78 (May 10, 2019), at 52–55.

or not, are irrelevant. *See Castillo-Basa*, 483 F.3d at 903 ("[E]ach party bears the consequences of its own inadequate litigation efforts."). Defendants' decision to hold their First Amendment *Grable* argument in their pocket after asserting it in their NORs (¶ 32) cannot undo their waiver. As Judge Watson concluded, in rejecting a similar last-ditch effort to invoke First Amendment *Grable* jurisdiction, that argument "has been rejected by the Ninth Circuit as a basis for removal" because it is "premised upon *Grable*." *Honolulu*, 2021 WL 531237, at *8 n.14.

Even if the Court were to entertain Defendants' impermissible second bite at the apple, their First Amendment argument is at most a federal defense, not a necessary element of the People's state law claims. Therefore, it plainly cannot support federal jurisdiction. *See, e.g.*, *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 391–92 (1987) (under the well-pleaded complaint rule, a federal defense does not provide a basis for removal); *Nevada v. Culverwell*, 890 F. Supp. 933, 937 (D. Nev. 1995) (no removal based on First Amendment defense). Defendants' logic would transform every state-law defamation case, every state-law deceptive trade practices case, and any other case involving advertising into a federal case, running afoul of comity principles and vastly expanding the "special and small category" of cases *Grable* encompasses. *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 679 (2006).

V. CONCLUSION

This Court lacks jurisdiction over these cases and should grant the People's Renewed Motion to Remand.

Dated: March 18, 2021

Respectfully submitted,

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