

Nos. 21-15313, 21-15318

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CITY AND COUNTY OF HONOLULU et al.,

Plaintiff-Appellees,

v.

SUNOCO LP, et al.,

Defendants-Appellants,

COUNTY OF MAUI,

Plaintiff-Appellee,

v.

SUNOCO LP, et al,

Defendants-Appellants

On Appeal from the United States District Court
for the District of Hawaii

Nos. 20-cv-00163, 20-cv-00470 (Hon. Derrick K. Watson)

**BRIEF OF HAWAI'I STATE ASSOCIATION OF COUNTIES AS AMICUS
CURIAE IN SUPPORT OF APPELLEES AND AFFIRMATION**

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CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1, the Hawaii State Association of Counties (“HSAC”) states that it is a non-profit, tax-exempt organization incorporated in the state of Hawaii. HSAC has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

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INTERESTS OF AMICUS CURIAE

The Hawai‘i State Association of Counties (“HSAC”) is a 501(c)(3) nonprofit organization dedicated to coordinating county programs in the best interest of the people of the State of Hawai‘i through cooperation of the legislative bodies of the several counties of the state. Membership includes the mayors of each county and the respective legislative bodies. HSAC is the Hawai‘i chapter of the National Association of Counties. HSAC has a distinct interest in the *City and County of Honolulu of Honolulu, et al. v. Sunoco LP, et al.* litigation because it serves as an affinity group of local county governments and understands the importance of having local courts hold tortfeasors accountable for local injuries they cause in a local jurisdiction. Defendants’ overarching argument for removal is tenuous connections to federal oil activities, which plays into a larger narrative of local adjudication by claiming federal jurisdiction so long as any portion of Defendants’ activities are remotely connected to a removal exception. Despite being largely responsible for widespread manufacturing and selling the product that is one of the largest contributors to the climate crisis, Defendants cling to discrete activities that are not part of Plaintiffs’ complaint, to evade state court jurisdiction. Under this theory, the industry, as a whole, could indefinitely evade any state’s jurisdiction as long as any singular tenuously related activity existed as some point in time under a federal removal exception. Plaintiffs’ claims are limited

to local harms of which there are many that are a result of the crisis and not the discrete activities upon which Defendants rely to escape state court jurisdiction.

A. The Climate Crisis Is Already Affecting Hawaii and Its Effects Will Continue to Drastically Worsen.

Hawai‘i stands at the precipice of the climate crisis. As an island state, it faces unique challenges with sea level rise, drought, heat, and extreme weather events such as hurricanes, which are not only growing stronger but also shifting north and increasingly threatening all four HSAC jurisdictions.¹



Sea level rise creates conditions for rapid erosion at the Sand Island Wastewater Treatment Plant, meaning overnight exposure of the outfall pipe. *City and County of Honolulu, Office of Climate Change, Sustainability and Resilience.*

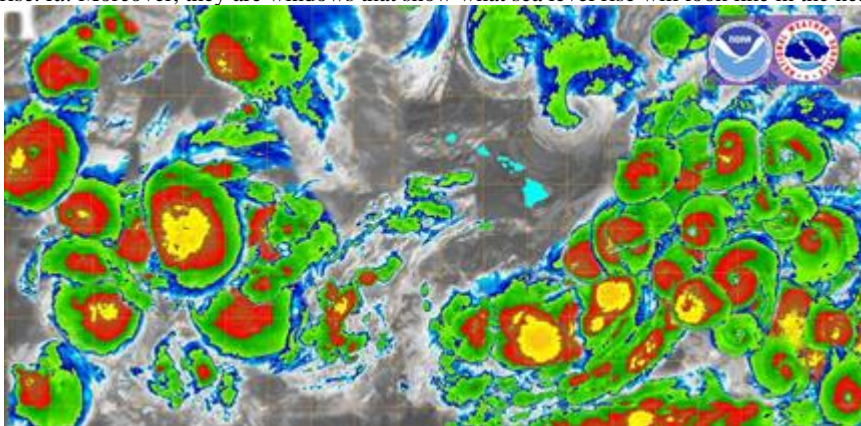
¹ Jun-Eun Chu, et al., *Reduced tropical cyclone densities and ocean effects due to anthropogenic greenhouse warming*, 6(51) SCI. ADVANCES (2020), <https://advances.sciencemag.org/content/6/51/eabd5109>.



Sea level rise is increasing erosion along Hawai'i's coasts, including at Punalu'u Beach Park, pictured above. *City and County of Honolulu, Department of Parks and Recreation.*



King tides are increasing in severity with sea level rise, causing ocean water to flow back through storm drains, flooding streets, such as the flooding pictured above in the Mapunapuna industrial area. Sea Grant University of Hawai'i, *Hawai'i and Pacific Islands King Tides Project*, <https://www.pacioos.hawaii.edu/king-tides/map.html>. Although King Tides are the highest tides of the year – a naturally occurring phenomenon, not a result of climate change – they pose coastal hazards and have more severe effects with sea level rise. *Id.* Moreover, they are windows that show what sea level rise will look like in the near future. *Id.*



This infographic from the U.S. National Weather Service shows all of the hurricanes and tropical storms in the Northern Central Pacific Basin from 2015. Kevin Kodama, *Mosaic of infrared satellite images from the NOAA GOES and the JMA MTSAT geostationary during 2015 hurricane season*, U.S. National Weather Service and Central Pacific Hurricane Center (November 13, 2015),

<https://www.facebook.com/US.NationalWeatherService.Honolulu.gov/photos/a.120037254732828.19697.113020565434497/904018966334649/?type=3&theater>.

While hurricanes grab headlines, increased heat across HSAC member counties poses a significant threat to lives and economic sustainability. Rising temperatures and increased numbers of excessively hot days as a result of the climate crisis will have an outsized impact on the counties. One emerging heat challenge is a push for additional air conditioning in island homes, adding a prospective burden to the electricity grid.² The counties – responsible for health, safety, and the provision of public services that rely directly on electricity – are now evaluating the need for, and potential development of, cooling centers, recently used in the Pacific Northwest during the “heat dome” episode, which were necessary to prevent lower income populations from suffering and even dying in extreme heat. This is not a prediction for the distant future: In 2014, extreme heat in Honolulu increased air conditioning usage and stressed the grid to the point that the local energy utility had to issue emergency public service announcements to curtail air conditioning use.³ In 2015, Honolulu then set

² Christina Jedra, *Why the Growing Demand For AC Threatens Hawaii’s Renewable Energy Goals*, CIVIL BEAT (Sept. 20, 2019), <https://www.civilbeat.org/2019/09/as-ac-replaces-trade-winds-hawaiis-demand-for-electricity-imperils-renewable-goals/>.

³ *Hawaiian Electric asks Oahu customers to conserve power tonight*, HAWAII NEWS NOW (Sept. 17, 2014), <http://www.hawaiinewsnow.com/story/26551141/hawaiian-electric-asks-oahu-customers-to-conserve-power-tonight>.

or tied eleven days of record heat during an El Niño year.⁴ With increasing surface air temperatures predicted at 1.8°F to 7.2°F by the end of the century, the counties will have to fund and design better electricity and cooling systems to protect their citizens from dangerously high temperatures.⁵

The excessive heat is largely a result of increasing frequency of intense El Niño events. The counties are experiencing less rainfall on average, becoming more prone to drought. Paradoxically, extreme La Niña events are also projected to increase, mostly in years following El Niño events. This means counties will swing

Hawaiian Electric is asking Oahu customers to conserve electricity in the evenings this week, especially between 5 p.m. and 9 p.m., as the hot, muggy weather is driving up air conditioning use and demand for electricity more than normal. In addition, the entire power plant, operated by Kalaeloa Partners, an independent power producer, is out of service due to unexpected repairs. The light winds also mean there is little power being provided by the island's wind farms.

Id.

⁴ KK Rebecca Lai, *New York Times Weather Chart*, N.Y. Times (Feb. 19, 2016), https://www.nytimes.com/interactive/2016/02/19/us/2015-year-in-weather-temperature-precipitation.html#honorlulu_hi. Temperatures have increased even more dangerously since 2015, with 2019 now holding the record for the hottest recorded year on O‘ahu. 2019 deemed the hottest year ever on record for O‘ahu, KITV (Feb. 19, 2020), <https://www.kitv.com/story/41733909/2019-deemed-the-hottest-year-ever-on-record-for-oahu>.

⁵ See Zhang, C., et al., *Dynamical downscaling of the climate for the Hawaiian Islands. Part II: Projection for the late twenty-first century*, 29 J. CLIMATE 8333 (2016).

back and forth between opposite weather extremes. After the record heat days in 2015, subsequent years saw extreme flooding in every county.



A City and County of Honolulu truck got stranded trying to assist stranded citizens after parts of Liliha flooded in September 2015. Craig Gima, *Showers drench Oahu; State remains under flood watch*, STAR ADVERTISER (Sept. 3, 2015), <https://www.staradvertiser.com/2015/09/03/hawaii-news/showers-drench-oahu-state-remains-under-flood-watch-2/>.

In 2018, Kaua‘i’s Nā Pali Coast received 50 inches of rain in less than 24 hours – a national record.⁶ The rain gauges in Hanalei broke after the first 28 inches. *Id.*

⁶ Heidi Chang, *A Hawaiian island got about 50 inches of rain in 24 hours. Scientists warn it’s a sign of the future* (Apr. 28, 2018), <https://www.latimes.com/nation/la-na-hawaii-storm-kauai-20180428-story.html>.



Flooding on Kauai after receiving fifty inches of rain in less than twenty-four hours. *Id.*

Later in 2018, Hurricane Lane brought torrential rains to the County of Hawai‘i, which received approximately 52 inches of rain between August 22-26, 2018, making it the wettest tropical cyclone ever recorded in Hawai‘i.⁷



Flooding in Hilo on August 23, 2018. Daniel Manzo, et al., *Monster Hurricane Lane pummeling Hawaii with torrential rains, winds* (Aug. 24, 2018), <https://abcnews.go.com/US/category-hurricane-145-mph-winds-nearing-hawaii/story?id=57350920>.

⁷ Susannah Cullinane, *Hurricane Lane dumped 52 inches of rain on Hawaii and there might be more on the way* (Aug.28, 2018), <https://www.cnn.com/2018/08/28/us/hawaii-tropical-storm-lane-flooding-wxc/index.html>.

Earlier this year in March, flooding in East Maui destroyed homes, washed out roads, made bridges impassable, and caused Kaupakalua Dam to overflow.⁸



Flooding on Hana Highway. *Id.*

The County of Maui Department of Public Works has estimated the necessary repairs will cost \$9 million.⁹

During the same storm, the City and County of Honolulu also experienced extreme flooding on the North Shore in Hale‘iwa, where residents had to evacuate.¹⁰ The Waiāhole Stream had flow rates of almost 9,000 cubic feet per second, which broke the previous record of 432 cubic feet per second in

⁸ Ben Gutierrez, *Homes flooded, roadways damaged on Maui as torrential rains batter state* (Mar. 9, 2021), <https://www.hawaiinewsnow.com/2021/03/08/flash-flood-watch-issued-big-island-maui-county/>.

⁹ Kehaulani Cerizo, *\$9 million needed for county flood repairs* (Apr. 20, 2021), <https://www.mauinews.com/news/local-news/2021/04/9-million-needed-for-county-flood-repairs/>.

¹⁰ Matthew Cappucci, *Severe flash flooding triggers state of emergency in Hawaii* (Mar. 10, 2021), <https://www.washingtonpost.com/weather/2021/03/10/hawaii-flash-flooding-emergency/>.

2012. *Id.* The normal flow rate for the Waiāhole Stream is 90 cubic feet per second – one percent of the record-breaking rate in March. *Id.*



Flooding in Hau'ula, O'ahu during the March 2021 storm. *Id.*

B. Local Adjudication Is the Only Recourse the Counties of Hawai‘i Have Left to Seek Redress from Local Climate Crisis Effects.

The extreme weather events in Hawai‘i over the last decade offer a glimpse into the stark reality faced by future generations who will suffer even more severe effects of the climate crisis. The crisis being inherited by Hawai‘i’s children, including today’s youth and those yet unborn, is unparalleled. The brunt of protecting Hawai‘i’s people falls largely on the counties, as the counties have jurisdiction and govern local affairs, such as repairs to county highways after flooding. The saying “all disasters are local” has never rung truer than in the climate crisis era, when local governments will be increasingly left to protect their

citizens while multiple, cascading disasters occur sometimes simultaneously across the state.

If Defendants' appeal is granted, the City and County of Honolulu will lose its chance to seek legal redress in Hawai'i courts, for the Defendants' failures to warn, wrongful promotion, and related campaign of deception.

Defendants wish to make local adjudication impossible before the Court reaches the merits of Plaintiffs' claims, but Plaintiffs have a right to bring their claims in the court of their choosing it is unlikely a local jury would find allow Defendants' to escape liability. And without the ability to adjudicate claims in its own jurisdiction, the counties of Hawai'i would also lose their only avenue to restorative justice, cost recovery, and the possibility of helping protect their people's safety and the infrastructure they rely on.

The climate crisis poses an immense threat to all of the people of Hawai'i; however, this question of jurisdiction has even larger implications. If Defendants are allowed to escape this Court's jurisdiction, other large corporations will have a green light to deceptively market other dangerous products in Hawai'i's counties so long as any portion of their activities, even activities unrelated to a plaintiff's claims, falls under a federal removal exception. Counties must have the ability to bring cases against out-of-state corporations whose products and deceptive marketing campaigns are targeted at local county residents and harm

county interests. This truth is illustrated by issues such as current litigation against tobacco and pharmaceutical companies nationwide, and litigation in the County of Kaua‘i over water supply contamination from toxic pesticides.

Mitigating the damages from harmful products within the counties is both costly and time consuming. In the case of water contamination and climate impacts, the dangerous products can literally harm and kill generations of residents and tax county financial resources for decades or more. HSAC has a distinct interest in Plaintiffs being able to bring their claims in state court because Defendants are not the only large out-of-state corporations causing harm in Hawai‘i through their deceptively marketed, dangerous products.

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs have alleged claims for deceptive marketing practices and failure to warn under Hawai‘i state law. This action was initially removed and is now on appeal under three theories of federal subject matter jurisdiction: (1) federal-officer jurisdiction, 28 U.S.C. § 1442(a)(1); (2) jurisdiction under the Outer Continental Shelf Lands Act (“OCSLA”), 43 U.S.C. § 1349(b)(1); and (3) federal-enclave jurisdiction. HSAC affirms its support for the arguments already presented in Appellees’ Answering Brief regarding all three issues. As a nonprofit organization representing members of the legislative bodies of all four counties, it provides additional analysis and perspective regarding the appropriateness of state court jurisdiction, particularly regarding federal enclaves.

Defendants characterize this removal action and appeal as one of segregated civil justice – where the slightest touch of the federal government removes a state’s ability to adjudicate harms done to its people. Defendants raise every issue and the kitchen sink in searching for federal removal. In their attempts to meet the requirements for federal officer jurisdiction, the premise under which this appeal is even possible, Defendants go so far as to allege contracts for specialized jet fuels with the U.S. military – many of which predate Statehood – as meeting the requirement for acting under government control or supervision. Defendants clearly miss the mark as Plaintiffs do not allege any such allegation over

specialized jet fuels in the Complaint. Moreover, these types of arguments have serious, long term consequences for state court jurisdiction. In the present case, Plaintiffs are concerned about the impacts of climate change in their respective counties. All of the harms alleged in the Complaint concern deceptive marketing and failure to warn over the sale of fossil fuels to Hawai‘i residents. Defendants could continue to contract and produce specialized jet fuel for military use and not be liable for that particular activity under Plaintiffs’ theory of liability. The ramifications of using this type of argument to evade state court opens the door for other corporations to commit harms in Hawai‘i then escape state court. For example, Hawai‘i has already struggled with the harmful effects of pesticide use by agrochemical companies. *See generally Atay v. County of Maui*, 842 F.3d 688 (9th Cir. 2016); *Syngenta Seeds, Inc. v. County of Kauai*, 842 F.3d 669 (9th Cir. 2016); *Hawai‘i Papaya Indus. Ass’n v. County of Hawaii*, 666 F. App’x 631 (9th Cir. 2016); *Syngenta Seeds, Inc. v. County of Kauai*, 664 F. App’x 669 (9th Cir. 2016). Many of those companies have had specialized wartime contracts with the U.S. government. For example, Dow Agrosiences LLC and Monsanto Company both worked to develop Agent Orange under wartime contracts with the U.S. government and were also both parties to *Atay v. County of Maui*, 842 F.3d 688 (9th Cir. 2016). *See Agent Orange*, DOW CORPORATE, <https://corporate.dow.com/en-us/about/legal/issues/agent-orange.html>. Although

this case was removed for other jurisdictional reasons regarding the Constitutionality of state statutes, it reasonably foreseeable that future cases may be brought by the counties against these same companies that are not subject to federal question jurisdiction. The preclusive effect of allowing Defendants to avoid state court jurisdiction because they at some point have had wartime contracts for unrelated products to the ones in question in this action would allow other large industries to similarly evade jurisdiction.

Federal jurisdiction under the Enclave Clause of Article I, Section 8, Clause 17 of the U.S. Constitution makes a case removable if the federal government has exclusive control and the claims asserted occurred on the enclave. This type of jurisdiction does not apply in the present case. Defendants extend their narrative of segregated civil justice to preclude state jurisdiction when any activity purportedly related to Plaintiffs' claims occurred on an enclave. This theory proves too much. Firstly, none of the claims alleged in the Complaint occurred on a federal enclave and all claims occurred in Hawai'i. Secondly, even if some claims did arise in a federal enclave in Hawai'i, the state has concurrent jurisdiction, so Defendants would only be able to remove under federal question or diversity jurisdiction.

For the foregoing reasons and the arguments already submitted by Plaintiffs, HSAC submits that the district court's order remanding this case to state court was proper.

ARGUMENT

FEDERAL ENCLAVE JURISDICTION DOES NOT EXIST AND SHOULD NOT BE ARTFULLY READ INTO THE COMPLAINT.

HSAC agrees with the district court's ruling and Appellees' Answering Brief that federal enclave jurisdiction does not exist. Defendants' basis for this unsubstantiated argument is mainly the sale or use of products on military bases located within the state. Firstly, Plaintiffs rest their claims on the deceptive marketing practices used to sell Defendants' products and failure to warn *not* the actual sale. Secondly, these deceptive marketing practices in question took place outside of federal enclaves – and Defendants do not contend otherwise. Defendants' argument is stretching the bounds of federal jurisdiction, and HSAC states its support for the arguments already addressed on this issue in other briefs for Plaintiffs.

A. None of the Allegations in Plaintiffs' Complaint Occurred on a Federal Enclave And Any Reading to the Contrary Provides A Backdoor to Evading State Court Jurisdiction.

Hawai'i has a long history with the U.S. Military. Although Defendants' have conceded that concurrent jurisdiction exists in Hawai'i over military bases, this point is of particular importance to the counties. *See* 3-ER-428, 8-ER-1504. Defendants' attempts to evade state court jurisdiction is of distinct interest to all four counties. The existence of military activity and federal enclaves in the form of military installations on every county means that if Defendants' assertions that

some of their negligent acts occurred in said enclaves (a contention not supported by Plaintiffs' Complaint), any large corporation could avoid this state's jurisdiction so long as at least a single act of an alleged violation occurred concurrently on one of the military bases in Hawai'i. Here, Defendants are essentially asking this Court to strip the state court's jurisdiction because some of Defendants' products were sold on military bases and some Defendants' have had contracts for specialized jet fuel with the U.S. military. Appellants Opening Brief at 63. In fact, Defendants do not restrict this contention to federal enclaves in Hawai'i. *Id.* Instead, Defendants stretch the bounds of reasonable federal jurisdiction by trying to allege that the occurrence of any alleged activity in a federal enclave anywhere in the United States should make the case removable. At best, this argument misses the mark because Plaintiffs' Complaint (1) alleges only activities that occurred *within the state of Hawaii and not on federal lands*; (2) does not concern purely the sale but rather the *deceptive marketing and failure to warn* of Defendants' products; and (3) makes no mention and forms no allegations based on contracts to develop specialized jet fuels for military use. Defendants creatively attempt to avoid state court jurisdiction in this way by reading fiction into the Complaint.

More insidious is Defendants' suggestion that activity in any federal enclave should make any claim removable. *Id.* Under this hypothetical, a defendant corporation could indefinitely avoid state court jurisdiction so long as its activities

at some point touch a federal enclave somewhere. This reading of federal enclave jurisdiction, if held true, would essentially foreclose a state's ability to ever hold large corporations accountable for harms to its people. Furthermore, this reading, although beneficial to Defendants' potential liability for harms committed in any state, is likely an artful attempt to avoid concurrent jurisdiction in Hawai'i. *See supra*. HSAC reaffirms its support of Plaintiffs' explanations that the alleged harms were committed within Hawai'i outside of military bases or federal lands, foreclosing enclave jurisdiction. HSAC further highlights that even if some of the alleged harms were committed on federal enclaves in Hawai'i, federal jurisdiction would still be inappropriate due to Hawai'i's concurrent jurisdiction.

B. Notwithstanding the Fact that None of the Allegations Occurred in Enclaves, Hawai'i Exercises Concurrent Jurisdiction Over Federal Enclaves, so Federal Jurisdiction Must Be Alleged Under Federal Question or Diversity Jurisdiction.

A federal enclave – a portion of land over which the U.S. government exercises exclusive federal legislative jurisdiction – may be created in one of three ways. *Kelly v. Lockheed Martin Services Group*, 25 F. Supp. 2d 1, 3 (D.P.R. 1998). The three methods are: (1) the United States purchases land with the state's consent and the state transfers complete jurisdiction to the United States pursuant to Clause 17 of Section 8 of Article One of the United States Constitution; (2) the United States purchases land over which a state exercises jurisdiction, and the state may cede some or all of its jurisdiction to the federal government after purchase; or (3)

the United States reserves jurisdiction over portions of a state when the state enters the Union. *Id.* There are additionally three theories for applying state law in federal enclaves: (1) local law in effect at the time of cession continues to apply until it is abrogated by federal law; (2) “subsequent state regulatory changes consistent with the state law in place at the time of cession are applicable within a federal enclave, meaning the law develops as state law develops rather than being frozen in time; or (3) all state laws of the state in which the federal enclave exists are applicable unless they interfere with the federal government’s jurisdiction. *Id.* at 4 (citing *Howard v. Commissioners of the Sinking Fund of the City of Louisville*, 344 U.S. 624 (1953)).

The Enclave Clause of the Constitution does not on its own create a basis for subject matter jurisdiction. It provides that “Congress shall have Power To . . . exercise exclusive Legislation” in enclave lands, U.S. Const. Art. 1, § 8, cl. 17; however, this language is permissive such that it subjects federal enclaves to Congressional Authority rather than suggesting that enclaves are governed by law arising out of the Enclave Clause. *Ching v. Aila*, CIV. No. 14-00253 JMS-RLP, at *13 n.6 (D. Haw. Aug. 22, 2014). Moreover, Congress has clearly provided Hawai‘i with concurrent jurisdiction; thus, claims arising on military bases are subject to federal subject matter jurisdiction only under theories of federal question or diversity jurisdiction. *Id.*

Generally, the activities of federal installations are shielded from direct state legislation by the Supremacy Clause of the Constitution unless Congress provided clear and unambiguous authorization for such regulation. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180 (1988). In Hawai‘i, Congress has provided clear and unambiguous authorization for such regulation in the section 16(b) of the Admissions Act, which provides that exclusive authority of Congress over military bases in Hawai‘i is “subject to the proviso hereinafter set forth.” Pub. L. No. 86-3, 73 Stat. 4, 11-12 (March 18, 1959). The proviso provides that such exclusive legislation

shall not . . . prevent [Hawai‘i] from exercising over or upon such lands, concurrently with the United States, any jurisdiction whatsoever which it would have in the absence of such reservation of authority and which is consistent with the laws hereafter enacted by the Congress pursuant to such reservation of authority.

Id. Hawai‘i clearly has concurrent jurisdiction on U.S. military bases as set forth in the proviso of the Admissions Act. The legislative history provides further support in a Senate Report from 1959 indicating that, “until Congress acts to exercise its reserved power,” Hawai‘i is authorized “to exercise all of its other usual functions in the area.” S. Rep. No. 80, 1 Sess. (1959), reprinted in 1959 U.S.C.C.A.N. 1346, 1365. Thus, even if Defendants successfully demonstrated some of the allegations occurred on a federal enclave, they have failed to show either federal question or diversity jurisdiction.

CONCLUSION

This Court should uphold the district court's remand orders.

Dated: September 24, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type volume limitations of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 3,802 words, excluding the parts exempted by Rule 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Rule 32(a)(6) because it appears in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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Hawaii State Association of Counties

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing 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 September 24, 2021.

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.

Dated: September 24, 2021

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