

SHER EDLING LLP

PROTECTING PEOPLE AND THE PLANET

February 9, 2022

Via ECF

Molly C. Dwyer
Clerk of Court
U.S. Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: *City and County of Honolulu, et al. v. Sunoco LP, et al.*, No. 21-15313; *County of Maui v. Sunoco LP, et al.*, No. 21-15318;
Plaintiffs-Appellees' Citation of Supplemental Authorities

Dear Ms. Dwyer,

Pursuant to Fed. R. App. P. 28(j), Plaintiffs-Appellees submit as supplemental authority the recent decision in *Board of County Commissioners of Boulder County, et al. v. Suncor Energy (U.S.A.) Inc.*, Case No. 19-1330, (10th Cir. Feb. 8, 2022) (**Ex. A**) ("*Boulder*"). That court, in a climate-change related suit like this one, rejected removal jurisdiction based on the same theories Appellants assert here, namely federal officer removal, the Outer Continental Shelf Lands Act (OCSLA), and federal enclave jurisdiction.

Appellants here argue in part that their oil and gas leases on the outer continental shelf (OCS) support removal under 28 U.S.C. §1442. The Tenth Circuit said nearly identical leases could not satisfy §1442's "acting under" requirement because "winning bids for leases to extract fossil fuels from federal land ... is not assisting the government with essential duties or tasks," *Boulder* at 16, and the lease terms "do not appear to contemplate the type of close [government] supervision" that can support removal. *Id.* At 17.

The court also rejected OCSLA jurisdiction. It held that OCSLA requires a "but-for" connection between the plaintiff's claims and OCS operations, *id.* At 54, and that "a dispute must have a sufficient nexus to an operation on the OCS" for jurisdiction to attach, *id.* At 56. Like Appellees, the *Boulder* plaintiffs "largely challenge[d] the [defendants'] sale and deceptive promotion of fossil fuels" which have "no direct connection to Exxon's *production* of fossil fuels on the OCS," *id.* At 57, and there was "no indication" the defendants' OCS operations "were a pure 'but-for' cause" of their injuries, *id.* At 57–58, so there was no jurisdiction. The "chain of contingencies" between the claims and impairment of recovery of OCS resources was also "too uncertain, speculative, and hypothetical to serve as a jurisdictional hook." *Id.* At 60.

Molly C. Dwyer
Clerk of Court
February 9, 2022
Page 2

The court also rejected federal enclave jurisdiction, because the plaintiffs disclaimed recovery for injuries on federal land, *id.* at 53, and the complaint’s references to damage in a national park merely “provide[d] an example of the regional trends” from climate change that affected the plaintiffs and their residents, *id.* at 52–53.

Respectfully submitted,

/s/ Victor M. Sher

Victor M. Sher

Sher Edling LLP

Counsel for Plaintiffs-Appellees
in Nos. 21-15313, 21-15318

cc: All Counsel of Record (via ECF)