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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

COUNTY OF MAUI, Plaintiff, v. SUNOCO LP; ALOHA PETROLEUM, LTD.; ALOHA PETROLEUM LLC; EXXON MOBIL CORP.; EXXONMOBIL OIL CORPORATION; ROYAL DUTCH SHELL PLC; SHELL OIL COMPANY; SHELL OIL PRODUCTS COMPANY LLC; CHEVRON CORP; CHEVRON USA	CASE NO.: 20-cv-00470 **DEFENDANTS' OPPOSITION TO PLAINTIFF COUNTY OF MAUI'S MOTION TO REMAND; DECLARATION OF RICHARD TYLER PRIEST; DECLARATION OF DR. MARK R. WILSON; DECLARATION OF MELVYN M. MIYAGI IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO REMAND; EXHIBITS "1" – "27"; CERTIFICATE OF SERVICE**

INC.; BHP GROUP LIMITED; BHP GROUP PLC; BHP HAWAII INC.; BP PLC; BP AMERICA INC.; MARATHON PETROLEUM CORP.; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66; PHILLIPS 66 COMPANY; AND DOES 1 through 100, inclusive, Defendants.	ORAL ARGUMENT REQUESTED RELATED TO DOC. NO. 74

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I. INTRODUCTION

Plaintiff seeks to impose liability for global climate change on a select group of energy companies that it contends are responsible for supplying the world with a small fraction of the oil and gas products that governments, businesses, and consumers have demanded and used over many decades. Despite the obvious national and international implications of its claims, Plaintiff tried to evade federal jurisdiction by filing suit in state court and pleading nominally state law claims. But Plaintiff's artful pleading does not divest this Court of jurisdiction. Plaintiff cannot obscure the necessary role that federal law plays in the Complaint's core allegations or the fact that a significant portion of Defendants' actions were performed under the direction, supervision, and control of the U.S. government.

As the Court knows, Plaintiff's Motion to Remand is not the first to be filed in a climate change case. And while some courts in other proceedings have granted remand, those decisions are not dispositive here. In particular, while Defendants respectfully disagree with the Ninth Circuit's conclusion in *San Mateo* regarding federal officer removal on the record in that case, Defendants here now present a materially expanded evidentiary record—including the declarations of two prominent historians—that is the most extensive presented to any court to date, including the Ninth Circuit. Professor Mark Wilson, from the University of North Carolina, explains in his declaration how "the U.S. government has controlled and

directed oil companies in order to secure and expand fuel supplies for its military forces and those of its allies, both in wartime and in peacetime," by employing "direct orders, government ownership, and national controls." Wilson Decl. ¶ 2. Professor Tyler Priest, from the University of Iowa, explains in his declaration that for "more than six decades, the U.S. federal Outer Continental Shelf (OCS) program filled a national government need," Priest Decl. ¶ 7(1), and federal officials "supervised, directed, and controlled the rate of oil and gas production" from Defendants' operations on the OCS to enforce "the federal government's responsibilities as a resource owner and trustee" of these federal lands. *Id.* ¶ 48.

The decisions of other courts, including the Ninth Circuit, thus do not dictate the outcome here. Defendants' Opposition provides a significantly expanded factual record to review, even if many of the grounds and arguments for removal are similar to those raised in *Honolulu* and elsewhere. Defendants properly removed this action on numerous independent grounds.

***First*, this Court has jurisdiction because Plaintiff's claims arise out of and are connected with Defendants' activities on the OCS.** Under the Outer Continental Shelf Lands Act ("OCSLA"), state-law claims are removable if they "aris[e] out of, or in connection with . . . any operation conducted on the [OCS]." 43 U.S.C. § 1349(b). The Ninth Circuit did not reach the issue of whether removal was proper under OCSLA. It clearly is.

Plaintiff expressly alleges that the cumulative impact of Defendants' overall extraction and production activities over the past several decades—which necessarily include their substantial operations on the OCS—contributed to the global greenhouse gas emissions that Plaintiff claims caused its alleged injuries. *See, e.g.*, Compl. ¶ 2. Further, even assuming that Plaintiff's claims did not arise out of Defendants' activities on the OCS (they do), OCSLA jurisdiction still applies because the relief Plaintiff seeks would affect the viability of the federal OCS leasing program. *See* 43 U.S.C. § 1349(b)(1).

Plaintiff attempts to evade OCSLA jurisdiction by claiming it seeks damages arising from Defendants' alleged efforts to conceal and misrepresent the alleged dangers of petroleum products. Mot. at 1, 20–21. But production, sale, and consumption are indisputably critical links in the alleged causal chain: Plaintiff claims that Defendants' alleged misrepresentations caused increased demand, production, sale, and consumption of oil and gas, which caused increased emissions, which caused global climate change, in turn causing Plaintiff's alleged injuries. For example, Plaintiff contends that "Defendants' campaign [of deception] enabled Defendants to *accelerate their business practice of exploiting fossil fuel reserves*." Compl. ¶ 102 (emphasis added). Plaintiff itself places *production* of oil and gas in the (tenuous) causal chain between Defendants' alleged misrepresentations and Plaintiff's alleged harm. Jurisdiction, therefore, is proper.

***Second*, this case is removable under the federal officer removal statute.** Federal law provides for removal of an action against "any officer (or any person acting under that officer) of the United States or of any agency thereof . . . for or relating to any act under color of such office." 28 U.S.C. § 1442(a)(1). Removal under § 1442 must be liberally construed. *See Goncalves by and through Goncalves v. Rady Child.'s Hosp. San Diego*, 865 F.3d 1237, 1245 (9th Cir. 2017). The Court must "construe the facts in the removal notice in the light most favorable to" Defendants. *In re Commonwealth's Motion To Appoint Couns. Against Or Directed To Def. Ass'n Of Phila.*, 790 F.3d 457, 466 (3rd Cir. 2015).

Although the Ninth Circuit rejected the federal officer removal arguments in *San Mateo*, the record here includes substantial, additional categories of evidence not presented there. This evidence shows that Defendants have: performed critical and necessary functions for the U.S. military to meet national security needs; engaged in activities related to Plaintiff's claims pursuant to government mandates, leases, and contracts; and produced oil and gas on federal lands (including the OCS) under federal direction, supervision, and control. These are all activities that, "in the absence of [] contract[s] with [] private firm[s], the Government itself would have had to perform," which is sufficient for removal. *Watson v. Philip Morris Cos.*, 551 U.S. 142, 154 (2007). Additional evidence here includes, among other things:

- In response to the 1973–74 Arab Oil Embargo, the federal government had considered creating a *national oil company* to facilitate the production of

oil and gas on the OCS. Ultimately, however, the federal government chose to use private energy companies, including many Defendants—*acting as agents*—to accomplish this federal objective. *See, e.g.*, Priest Decl. ¶¶ 7(2), 53–55.

- "The U.S. government enlisted oil companies to operate government-owned industrial equipment." Wilson Decl. ¶ 15. As Professor Wilson explains, "[t]he oil companies were not merely top World War II prime contractors, but also served as government-designated operators of government-owned industrial facilities. *Id.* ¶ 19.

- Defendants have produced and continue to produce highly specialized petroleum products, including aviation fuel ("avgas"), for the U.S. military, and the government has "exerted substantial control and direction over the refineries' actions, including decisions on how to use raw materials and labor." *Exxon Mobil Corp. v. United States*, 2020 WL 5573048, at *1 (S.D. Tex. Sept. 16, 2020), *appeal docketed*, No. 20-20590 (5th Cir. Nov. 13, 2020).

- The U.S. Navy hired Standard Oil Company of California (a Chevron predecessor) as a contractor to operate the National Petroleum Reserve at Elk Hills for more than 30 years rather than using "its own personnel," and Standard Oil was "*in the employ of the Navy*" and responsible for "performing a function which is within the exclusive control of the Secretary of the Navy." Miyagi Decl. Ex. 1, at 15; *Id.* Ex. 2., at 3.

- Federal officers exerted significant control over Defendants' operations on the OCS. As Professor Priest explains: "The federal government directed operations on the OCS as more than merely a disinterested landowner and for purposes beyond monetary gain," Priest Decl. ¶ 7(2), and, for example, "exercised direct control and supervision over the amount of oil and gas that lessees could produce on the OCS." *Id.* ¶ 29.

This is more than enough for jurisdiction under the federal officer removal statute.

***Third*, this case is removable because there is federal enclave jurisdiction.**

Defendants produced and sold oil and gas on federal enclaves, including military bases, which establishes federal question jurisdiction. *See, e.g.*, *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1250 (9th Cir. 2006).

***Finally*, Plaintiff's claims arise under federal law because federal law exclusively governs claims for interstate and international pollution, as well as claims implicating the navigable waters of the United States.** *See*, *e.g.*, *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972); *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981); *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 421–23 (2011). Plaintiff's claims necessarily arise under federal common law. Furthermore, they raise and depend on the resolution of disputed, substantial federal questions relating to the federal government's exclusive control over the navigable waters of the United States, issues of treaty interpretation involving international climate accords, and the federal government's exclusive authority over foreign relations. *See Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005). Plaintiff's claims are also completely preempted by the Clean Air Act and other federal statutes.[1]

* * *

In sum, the Complaint challenges the production, sale, and use of oil and gas products used every day by virtually every person on the planet. A substantial portion of these products were produced on federal lands and under the direction and control of federal officers. The Complaint seeks to upend longstanding national and

[1] Although the Ninth Circuit rejected similar arguments regarding these grounds in *Oakland*, Defendants raise them here to preserve them for appellate review.

international policies developed by the political branches of our federal government to balance protecting our national economy and security with preserving the environment and climate. This case belongs in federal court and removal is proper.[2]

II. PROCEDURAL BACKGROUND

On October 12, 2020, Plaintiff filed its Complaint in the Circuit Court of the Second Circuit of the State of Hawai‘i. The Complaint alleges that "production and use of [Defendants'] fossil fuel products create greenhouse gas pollution that warms the planet and changes our climate." Compl. ¶ 1. According to the Complaint, "[t]his dramatic increase in atmospheric CO_2 and other greenhouse gases is the main driver of the gravely dangerous changes occurring to the global climate and environment." *Id.* ¶ 4. Plaintiff alleges that it "has suffered and will continue to suffer severe injuries" "[a]s a direct result of those and other climate crisis-caused environmental changes." *Id.* ¶ 11.

On May 26, 2020, the Ninth Circuit issued opinions that addressed and rejected some of Defendants' removal arguments in similar actions. *County of San Mateo v. Chevron Corp.*, 960 F.3d 586 (9th Cir. 2020) ("*San Mateo*"); *City of Oakland v. BP PLC*, 960 F.3d 570 (9th Cir. 2020) ("*Oakland*"). The Ninth Circuit's opinions, however, do not address all bases for federal jurisdiction asserted here.

[2] Several Defendants contend that they are not subject to personal jurisdiction in Hawai‘i. Defendants submit this remand opposition subject to, and without waiver of, these jurisdictional objections.

Neither addressed arguments pertaining to OCSLA or federal enclave jurisdiction.

Defendants in *Oakland* and *San Mateo* will soon file petitions for certiorari in the United States Supreme Court. The Supreme Court recently granted a substantially similar petition to the one that will be filed in *San Mateo*; oral argument in that case is currently set for January 19, 2021. *BP p.l.c. v. Mayor & City Council of Baltimore*, No. 19-1189 (U.S.) ("*Baltimore*"). If the Supreme Court agrees with petitioners, it may then decide whether federal jurisdiction exists (because, for example, the claims necessarily arise under federal law), or remand *Baltimore* to the Fourth Circuit (and *San Mateo* to the Ninth Circuit) for consideration of removal grounds that were not previously addressed. The Supreme Court's decision in *Baltimore* could have a significant, if not dispositive, impact on remand proceedings in this Court. Accordingly, Defendants respectfully submit that it would be more efficient for this Court to await the guidance the Supreme Court's decision will provide before ruling on Plaintiff's Motion.[3]

III. LEGAL STANDARDS

Removal from state court is proper if the federal court would have had original

[3] In *Honolulu*, this Court denied defendants' request to stay proceedings, in part, because it did not believe "[t]here is a strong likelihood of acceptance of certiorari" in *San Mateo* or *Oakland*. Order Lifting Stay, *City & Cnty. of Honolulu v. Sunoco LP*, No. 20-cv-00163 (D. Haw. Aug. 21, 2020) (No. 111). Yet, after *Baltimore*, the likelihood of acceptance of certiorari in those cases is far stronger.

jurisdiction of the action. 28 U.S.C. § 1441(a). Federal district courts "have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. "The removal process was created by Congress to protect defendants." *Legg v. Wyeth*, 428 F.3d 1317, 1325 (11th Cir. 2005). When invoking removal jurisdiction, a defendant's "factual allegations will ordinarily be accepted as true unless challenged by the [plaintiff]." *Leite v. Crane Co.*, 749 F.3d 1117, 1121–22 (9th Cir. 2014). The removing party need only demonstrate federal jurisdiction over a single claim. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 559, 563 (2005).

Courts broadly construe the right to remove under OCSLA, the federal officer removal statute, and the federal enclave doctrine. *See, e.g.*, *The Taxpayer Citizens Grp. v. Cape Wind Assocs., LLC*, 373 F.3d 183, 188 (1st Cir. 2004) (OCSLA is "a sweeping assertion of federal supremacy over the submerged lands."). In particular, the Supreme Court has "rejected a narrow, grudging interpretation" of the federal officer removal statute. *Jefferson Cnty. v. Acker*, 527 U.S. 423, 431 (1999) (internal quotation marks omitted). "Defendants enjoy much broader removal rights under the federal officer removal statute than they do under the general removal statute." *Leite*, 749 F.3d at 1122.

IV. ARGUMENT

A. The Action Is Removable Because It Is Connected to Defendants' Activities on the Outer Continental Shelf

This Court has jurisdiction over this action under OCSLA, which grants it original jurisdiction over actions "*arising out of, or in connection with . . . any operation* conducted on the [OCS] which *involves exploration, development, or production* of the minerals, of the subsoil and seabed of the [OCS], or which involves rights to such minerals." 43 U.S.C. § 1349(b)(1) (emphases added). OCSLA was enacted "to establish federal ownership and control over the mineral wealth of the OCS and to provide for the development of those natural resources." *EP Operating Ltd. v. Placid Oil Co.*, 26 F.3d 563, 566 (5th Cir. 1994). In connection with this broad aim, Congress extended federal jurisdiction "to the entire range of legal disputes that it knew would arise relating to resource development on the [OCS]." *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*, 754 F.2d 1223, 1228 (5th Cir. 1985). Accordingly, the phrase "arising out of, or in connection with" is "undeniably broad in scope." *EP Operating Ltd.*, 26 F.3d at 569.[4]

Both elements of OCSLA jurisdiction are satisfied here: (1) Defendants engage in an "operation conducted on the [OCS]" that entails the "exploration" and "production" of "minerals," and (2) Plaintiff's action "aris[es] out of, or in connection with" the operation. 43 U.S.C. § 1349(b)(1); *see EP Operating Ltd.*, 26

[4] Plaintiff asserts that "but for" causation is required. Mot. at 20, 21 n.11. But those words do not appear in the statute. In fact, use of the phrase "in connection with"—*separate and apart* from the grant of jurisdiction over claims "arising out of" OCS operations—necessarily means there is no causal requirement at all. A plaintiff's claim need only be connected to a defendant's operations on the OCS.

F.3d at 569.

Defendants satisfy the first prong of OCSLA's jurisdictional test. NOR ¶ 18. Indeed, Plaintiff does not dispute that Defendants have significant operations on the OCS, and specifically identifies some of those activities in its Complaint. *See, e.g.*, Compl. ¶ 24(b) (BP operations in the Gulf of Mexico).

Plaintiff's concession is understandable because Defendants and/or their affiliates operate a large share of the "more than 5,000 active oil and gas leases on nearly 27 million OCS acres" that the Department of the Interior administers under OCSLA. NOR ¶ 17. Oil produced from the OCS accounts for approximately *30% of all domestic production*. Miyagi Decl. Ex. 3, 1-4. "Between 1954 and 2016 . . . production from offshore leases totaled more than 20 billion barrels of oil" and "the federal government collected an estimated $80 billion in signature bonuses and $150 billion in royalties—not adjusted for inflation—from offshore oil and gas leases." Priest Decl. ¶ 7(1). According to data published by the Department of Interior for the period 1947 to 1995, sixteen of the twenty largest—including the five largest—OCS operators in the Gulf of Mexico, measured by oil volume, were a Defendant (or predecessor) or one of their subsidiaries. NOR Decl. Ex. 18. Also according to the Department of the Interior, in every subsequent year, from 1996 to the present, at least three of the top five OCS operators in this area have been a Defendant (or a

predecessor) or one of their subsidiaries. Miyagi Decl. Ex. 4; *see also* NOR ¶ 18.[5]

Defendants also satisfy the second prong of OCSLA's jurisdictional test because Plaintiff's claims "arise out of or in connection" with Defendants' operations on the OCS. Indeed, Plaintiff alleges that the cumulative impact of Defendants' *global* extraction and production activities over the past several decades—which necessarily include Defendants' significant production on the OCS—contributed to global greenhouse gas emissions that caused Plaintiff's alleged injuries. *See, e.g.*, Compl. ¶ 2. Plaintiff argues that the Court should deny federal jurisdiction because Defendants' "claims are only tangentially related to mineral exploration and production on the OCS." Mot. at 19. But Plaintiff's Complaint does not distinguish between fossil fuels by location of extraction or production; Plaintiff contends that Defendants' cumulative fossil fuel production activities contribute to *undifferentiated* greenhouse gas emissions that caused its alleged injuries. Compl. ¶ 209.

Plaintiff also tries to avoid federal jurisdiction by asserting that its "claims are based on Defendants' failure to warn consumers and the public of known dangers

[5] The Complaint improperly conflates the activities of Defendants with the activities of their separately organized predecessors, subsidiaries, and affiliates. Although Defendants reject Plaintiff's erroneous attempt to attribute the actions of predecessors, subsidiaries, and affiliates to the named Defendants, for purposes of removal only, Defendants describe the conduct of certain predecessors, subsidiaries, or affiliates of certain Defendants to show that Plaintiff's Complaint, as pleaded, was properly removed to federal court.

associated with fossil fuel products." Mot. at 20. As an initial matter, Plaintiff's allegations are wholly unfounded and implausible—and they are also demonstrably false. *See infra* Section IV.D. In any event, as explained above, production and consumption are integral components of its causal theory. Plaintiff alleges, for example, that "Defendants embarked on a decades-long campaign of deception designed to maximize continued dependence on their products," Compl. ¶ 101, and "accelerate[d] their business practice of exploiting fossil fuel reserves," Compl. ¶ 102, including reserves on the OCS. Far from "tangentially relat[ing] to mineral exploration and production on the OCS," Mot. at 19, Plaintiff's own allegations demonstrate that an essential factor in its claimed injuries is not any alleged misstatements or omissions, but the greenhouse gas emissions resulting from the production and consumption of petroleum products. *See, e.g.*, Compl. ¶¶ 2, 4, 5, 11.

Moreover, Plaintiff makes no attempt to limit its claims or requested relief to any purported misrepresentation or concealment. The Complaint confirms this fact as it does not assert a claim for fraud or even negligent misrepresentation. Instead, the Complaint seeks relief for harms allegedly caused by *worldwide production and sales activities*, including emissions that Plaintiff does not (and cannot) attribute to Defendants' alleged misrepresentations. Plaintiff seeks:

- Compensatory damages for all injuries suffered as a result of global climate change;
- Disgorgement of profits from Defendants' production and sale of oil and gas; and

- An order compelling Defendants to abate the alleged nuisance of global climate change.

Compl. at 134. Under Hawai‘i law, seeking abatement is functionally the same as seeking to *enjoin* Defendants' production of oil and gas. *See Haynes v. Haas*, 146 Haw. 452, 460–61 (2020).[6] If Plaintiff's claims were based exclusively on alleged concealment and misrepresentations, the requested relief would necessarily be limited to—at most—any harms allegedly resulting from the purported marginal increase in fossil fuel consumption caused by the asserted concealment and misrepresentations. But the Complaint contains no such limit. In fact, Plaintiff seeks far broader relief, which it carefully avoids disclaiming in its Motion.

OCSLA jurisdiction is also proper here for the separate and independent reason that the relief Plaintiff seeks would affect the future scope and viability of the federal OCS leasing program. Congress intended § 1349 to cover "any dispute that alters the progress of production activities on the OCS and thus threatens to impair the total recovery of the federally-owned minerals." *EP Operating Ltd.*, 26 F.3d at 570. Plaintiff seeks potentially billions of dollars in damages and disgorgement of

[6] Plaintiff's interpretation of *Haynes* is inapt. Mot. at 22. There, the court held a plaintiff could seek monetary damages as a backwards-looking remedy for an alleged nuisance. 146 Haw. at 461. But here, Plaintiff seeks abatement for prospective injuries, which is functionally equivalent to an injunction. While Plaintiff argues that abatement would not require enjoining Defendants' production of oil and gas, Plaintiff identifies no authority supporting the type of abatement relief it seeks, which includes "local measures such as mitigating flooding." Mot. at 21–22.

profits, together with an order of abatement to enjoin Defendants' production of oil and gas. *See* Compl. at 134, Prayer for Relief. The relief Plaintiff seeks would directly or indirectly force Defendants to reduce production. *See Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 521 (1992) ("[R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief."); *San Diego Unions v. Garmon*, 359 U.S. 236, 247 (1959) (same). More than merely "local measures," Mot. at 22, this would substantially interfere with OCSLA's congressionally mandated goal of obtaining the largest "total recovery of the federally-owned minerals" underlying the OCS. *Amoco Prod. Co. v. Sea Robin Pipeline Co.*, 844 F.2d 1202, 1210 (5th Cir. 1988); *see* 43 U.S.C. §§ 1802(1), (2). Plaintiff's contention that "granting relief would have no effect on [OCS] operations" is not plausible, as Defendants have significant production on the OCS. Mot. at 19.[7] For this reason as well, this action falls within the "legal disputes . . . relating to resource development on the [OCS]" that Congress intended to be heard

[7] The cases Plaintiff relies on are inapposite. For example, in *LLOG Exploration Co. v. Certain Underwriters at Lloyd's of London*, 2007 WL 854307, at *5 (E.D. La. Mar. 16, 2007), the court found that an "insurance coverage dispute regarding damages to production facilities that *have already occurred*" would "not affect or alter the progress of production activities on the OCS." Here, Plaintiff seeks prospective relief for *future operations* on the OCS. And *Parish of Plaquemines v. Total Petrochemical & Refining USA, Inc.*, 64 F. Supp. 3d 872, 894–95 (E.D. La. 2014), found no "operation conducted on the OCS" was at issue, as "[t]he activities or operations that the [plaintiff] allege[ed] to have caused its injury all occurred in state waters."

in the federal courts. *Laredo Offshore*, 754 F.2d at 1228.

B. The Action Is Removable Under the Federal Officer Removal Statute

Defendants may remove this action because the federal government directed Defendants to engage in activities relating to Plaintiff's claims and alleged injuries. *See* 28 U.S.C. § 1442(a)(1). The federal officer removal statute authorizes removal of claims (1) against a "person"; (2) "for or relating to"—i.e., "connected or associated with"—an "act under" color of federal office; (3) for which a defendant raises a colorable federal defense. *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 291–92 (5th Cir. 2020).

The Ninth Circuit has repeatedly held that "defendants enjoy much broader removal rights under the federal officer removal statute than they do under the general removal statute." *Leite*, 749 F.3d at 1122; *see also Goncalves*, 865 F.3d at 1244 ("Throughout our analysis, we pay heed to our duty to 'interpret Section 1442 broadly in favor of removal.'" (quoting *Acker*, 527 U.S. at 431)). At this stage, Defendants' allegations "in support of removal" need only be "facially plausible," and Defendants receive the "benefit of all reasonable inferences from the facts alleged." *Baker v. Atl. Richfield Co.*, 962 F.3d 937, 941, 945 (7th Cir. 2020); *see also Def. Ass'n of Phila.*, 790 F.3d at 471, 474 (courts "construe the facts in the removal notice in the light most favorable to the" existence of federal jurisdiction). Critically, the Supreme Court has held that a federal court must "credit [the

defendant's] theory of the case for purposes of [removal]." *Acker*, 527 U.S. at 432; *accord Leite*, 749 F.3d at 1124; *K&D LLC v. Trump Old Post Off. LLC*, 951 F.3d 503, 506 (D.C. Cir. 2020); *Baker*, 962 F.3d at 947.[8]

As discussed in detail below, Defendants acted under federal officers for decades, including by producing and supplying oil and gas for wartime efforts at the direction of the Petroleum Administration for War ("PAW"), supplying petroleum to the federal government under directives issued pursuant to the Defense Production Act of 1950, Pub. L. No. 81-774, 64 Stat. 798 ("DPA"), and producing and supplying large quantities of specialized jet fuel for the federal government for national defense and wartime efforts. *See* NOR ¶¶ 92–115. As Professor Wilson explains: "Over the last 120 years, the U.S. government has relied upon and controlled the oil and gas industry to obtain oil and gas supplies and expand the production of petroleum products, in order to meet military needs and enhance national security."[9] Wilson

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[8] Plaintiff attempts to distinguish *Acker* by arguing that the *Acker* Court "was still evaluating a theory grounded in the plaintiff's allegations that the defendants had violated [an] ordinance." Mot. at 23 n.13. This is no distinction. Defendants' theory of the case for removal purposes is grounded directly in the Complaint's allegations that Defendants' actions contributed to climate change, giving rise to Plaintiff's alleged injuries. *See* Compl. ¶¶ 4, 9–12, 96.

[9] Plaintiff may argue, as its counsel did in *City and County of Honolulu v. Sunoco LP*, No. 20-cv-00163 (D. Haw.) ("*Honolulu*"), that evidence presented in an opposition to remand, including the new declarations submitted here, cannot be considered by a court if it was not included in the Notice of Removal. That is incorrect. "[C]ourts in the Ninth Circuit regularly find this practice—i.e., supplementing allegations in the notice of removal with evidence . . .

Decl. ¶ 1. The "U.S. government has controlled and directed oil companies in order to secure and expand fuel supplies for its military forces and those of its allies, both in wartime and in peacetime." *Id.* ¶ 2. These practices continued across the 20th century. As two former Chairmen of the Joint Chiefs of Staff recently explained, the "history of the Federal Government's control and direction of the production and sale of gasoline and diesel to ensure that the military is 'deployment-ready'" spans "more than a century," and during their tenure petroleum products were "crucial to the success of the armed forces." Miyagi Decl. Ex. 5, at 2–3 (Amici Curiae Brief of General (Retired) Richard B. Myers and Admiral (Retired) Michael G. Mullen, in Support of Petitioners, *BP p.l.c. v. Mayor and City Council of Baltimore*, No. 19-1189 (U.S. Nov. 23, 2020)). "Because armed forces have used petroleum-based fuels since the 1910s, oil companies have been essential military contractors, throughout the last century." Wilson Decl. ¶ 2.

Plaintiff principally argues that Defendants have not shown they "acted under" the direction of federal officers.[10] *See* Mot. at 22–46. But Plaintiff misses

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permissible." *Dejong v. Prod. Assocs., Inc.*, 2015 WL 1285282, at *3 (C.D. Cal. Mar. 19, 2015). In fact, "courts *routinely* consider evidence submitted by defendants in opposition to a motion to remand." *McMann v. Air & Liquid Sys. Corp.*, 2014 WL 1794694, at *3 (W.D. Wash. May 6, 2014); *see also Singer v. State Farm Mut. Auto Ins.*, 116 F.3d 373, 374–77 (9th Cir. 1997) (considering evidence submitted for the first time in defendant's opposition to remand).

[10] Plaintiff's motion relies heavily on the claim that the Ninth Circuit and other courts "rejected Defendants' argument that they 'acted under' federal officers in supplying or formulating fossil fuels for the government." Mot. at 22. But while

the mark—misapprehending the term "acting under" and seeking to impose an impermissibly high standard that finds no basis in law.

Plaintiff essentially argues that "arm's length business arrangements with the federal government," such as contracts, employment agreements or leases, can *never* be the basis for federal officer removal unless there is "actual coercion" or "federal compulsion." Mot. at 23, 27. But that is not the law, and Plaintiff's theory conflicts with a number of cases where for-profit entities contracted with the federal government and properly removed cases to federal court. The Supreme Court has emphasized that "[t]he words 'acting under' are broad," and are satisfied where, "in the *absence of [] contract[s] with [] private firm[s]*, the Government itself would have had to perform" such tasks. *Watson*, 551 U.S. at 147, 154 (emphasis added). The Supreme Court has also recognized that "cases involving private contractors implicate the same uniquely federal interests as cases involving federal employees—'getting the Government's work done.'" *Thompson v. Crane Co.*, 2012 WL 1344453, at *19 (D. Haw. Apr. 17, 2012) (quoting *Boyle v. United Techs. Corp.*, 487 U.S. 500, 505 n.1 (1988)). For these reasons, courts have consistently found federal officer removal appropriate where defendants allege they were acting under federal officers through conduct undertaken as part of voluntary, mutually beneficial

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the Ninth Circuit found that the "acting under" prong was not satisfied, the evidentiary record here is substantially more comprehensive.

contractual arrangements. *See, e.g.*, *Kruse v. Actuant Corp.*, 2020 WL 3287883, at *6 (C.D. Cal. June 18, 2020); *Ward v. 84 Lumber Co.*, 2013 WL 12415465, at *6 (C.D. Cal. Mar. 11, 2013); *Doe v. UPMC*, 2020 WL 5742685, at *3 (W.D. Pa. Sept. 25, 2020) ("The 'triggering relationship' encompasses a broad range of relationships, including, but not limited to, agent-principal, contract or payment, and employer-employee relationships." (citation omitted)).

The fact that an entity may have earned a profit in its dealings with the federal government does not foreclose a finding that the entity "acted under" a federal officer. *See, e.g.*, *Goncalves*, 865 F.3d at 1246; *Leite*, 749 F.3d at 1120, 1124; *Thompson*, 2012 WL 1344453, at *28–29. Defendants need not prove their actions were taken as a result of "actual coercion" or "federal compulsion," as Plaintiff argues. Mot. at 27. Such a standard would preclude almost all applications of the federal officer removal statute, as most government business is conducted through contracts with private entities, as opposed to seizure of private entities to take over their operations. *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 586 (1952). Instead, "monitoring performance and dictating specifications is sufficient to permit removal." *AIG Eur. (UK) Ltd. v. McDonnell Douglas Corp.*, 2003 WL 257702, at *4 (C.D. Cal. Jan. 28, 2003) (rejecting plaintiff's argument that "the federal official must have direct and detailed control over the defendant in order to justify removal" (internal quotation marks omitted)).

The "acting under" element requires only that the private actor "be involved in 'an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior.'" *Goncalves*, 865 F.3d at 1245 (quoting *Watson*, 551 U.S. at 147). As both the Ninth Circuit and the Supreme Court have articulated, this relationship typically involves "subjection, guidance, or control." *Id.* Even "guidance"—a far cry from coercion—can suffice, so long as it surpasses "simply complying with the law." *See id.*

Defendants have unequivocally established—through substantial evidence including declarations from professors of history in relevant fields—that a significant portion of their oil and gas production and sales activities over the last century was conducted under the direction, guidance, supervision, and control of the federal government. Moreover, Defendants have *also* demonstrated "compulsion" and "coercion," by demonstrating that they *were* in fact compelled to produce significant quantities of oil and gas for the federal government during both World Wars and the Korean War. *See* NOR ¶¶ 29–34. As Professor Wilson explains: The U.S. government used "direct orders, government ownership, and national controls" in order to procure the fuel required for U.S. military forces. Wilson Decl. ¶ 2.

At bottom, Defendants' "theory of the case" is that Plaintiff's alleged harms resulted from decades of greenhouse gas emissions caused by billions of consumers' use of fossil fuels that were produced, in part, for the federal government and/or under federal government directives and control. Far beyond a mere "theory,"

however, Defendants have provided substantial *facts and evidence* demonstrating that they performed critical tasks at the direction of the federal government with which this action is "connected or associated."

1. Securing an Adequate Supply of Oil and Gas Is an Essential Government Function

Defendants' grounds for federal officer removal span more than a century, and include actions under federal officers in connection with numerous federal programs and federal contracts, all of which relate to the U.S. government's vital interest in ensuring adequate energy sources for national defense and economic security. The relationship that formed between Defendants and the government closely resembles the facts in *Goncalves*, where the Ninth Circuit approved removal by private contractors engaged to assist the federal government in healthcare operations. 865 F.3d at 1245. In that case, removal was proper because a federal agency "need[ed] someone to make reasonable efforts to pursue subrogation claims and decide when filing suit in federal court is a wise decision—and the government has delegated that responsibility to the carriers to act 'on the Government agency's behalf.'" *Id.* at 1247. The same is true here: the government uses private parties, under contracts with detailed specifications, "to fulfill a government need"—producing oil and gas from federal lands to further national energy security. *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 255 (4th Cir. 2017) ("[C]ourts have unhesitatingly treated the 'acting under' requirement as satisfied where a contractor

seeks to remove a case involving injuries arising from equipment that it *manufactured for the government*.").

President Taft first recognized the national interest in ensuring domestic supplies of oil in a 1910 address to Congress that led to the creation in 1912 of the Naval Petroleum Reserve at Elk Hills, which preserved oil for national emergencies. *See* NOR ¶ 28; NOR Decl. Ex. 18; *see infra* Section IV.B.2.b.2. World War I, as Professor Wilson explains, "demonstrated the importance of oil. . . . Between 1914 and 1917, US annual output increased by about 26 percent, from 266 million barrels to 335 million." Wilson Decl. ¶ 5. The US government "used its emergency war powers, and new government agencies, to instruct the oil industry to increase production." *Id.* ¶ 6. "Larger oil producers and distributors, 138 companies in all, were forced to get licenses from the government, with licensees obliged to comply with government priorities." *Id.* And the government stood "ready to use direct intervention" if oil companies did not comply with its directives. *Id.*

During World War II, the United States' need for high-octane avgas, lubricants, and synthetic rubber far outstripped the nation's capacity. The government pursued full production of its oil reserves and created agencies to *control* the petroleum industry, including Defendants' predecessors and affiliates; it built refineries and directed the production of certain products; and it managed scarce resources for the war effort. *See* NOR Ex. 24 (Statement of Senator

O'Mahoney, Chairman, Special Committee Investigating Petroleum Resources, S. Res. 36 (Nov. 28, 1945)) ("No one who knows even the slightest bit about what the petroleum industry contributed to the war can fail to understand that it was, without the slightest doubt, one of the most effective *arms* of this Government . . . in bringing about a victory." (emphasis added)). *See infra* Section IV.B.2.a.1.

In the early 1970s, the United States faced a precarious shortage of oil, which in turn, threatened domestic stability. NOR ¶¶ 36–39. To avert a national energy crisis, President Nixon immediately took steps to dramatically increase production on the OCS. Among other things, President Nixon ordered the Secretary of the Interior "to increase the acreage leased on the [OCS] to 10 million acres beginning in 1975, more than tripling what had originally been planned." Miyagi Decl. Ex. 6.

In 1974, Congress established the Federal Energy Administration ("FEA") "to promote the expansion of readily usable energy sources, and to assist in developing policies and plans to meet the energy needs of the nation," as well as to "assure a coordinated and effective approach to overcoming energy shortages." *See* Federal Energy Administration Act of 1974, Pub. L. No. 93-275, 88 Stat. 96. The FEA proposed that "leasing of the Federal OCS be accelerated" in an effort to provide "strategic foreign policy and national security advantages in having energy sources which are not susceptible to interruption by a foreign power." NOR Decl. Ex. 8 at 1012. Around the same time, Congress initiated a multi-year effort "to establish a

modern national policy for the development of OCS oil and gas resources," which culminated in amendments to the OCSLA in 1978, spurring oil and gas production from the OCS. Miyagi Decl. Ex. 7, at 27262. *See infra* Section IV.B.2.b.1.

Presidential administrations over the past several decades have continued to supervise and encourage oil production, even long *after* the potential link between greenhouse gas emissions and climate change was common knowledge. Miyagi Decl. Exs. 8–14. As President Obama stated in 2010, "[t]he bottom line is this: Given our energy needs, in order to sustain economic growth and produce jobs, and keep our businesses competitive, we are going to need to harness traditional sources of fuel even as we ramp up production of new sources of renewable, homegrown energy." *Id.* Ex. 15. The United States recently explained, "federal law and policy has long declared that fossil fuels are strategically important domestic resources that should be developed to reduce the growing dependence of the United States on politically and economically unstable sources of foreign oil imports." Brief of the United States as Amicus Curiae at 10, *City of Oakland v. BP PLC*, 960 F.3d 570 (2020) (No. 18-16663), ECF No. 198 (quoting 42 U.S.C. § 15927(b)(1)); *see* 83 Fed. Reg. 23295, 23296 (Final List of Critical Minerals 2018) ("[F]ossil fuels" are "indispensable to a modern society for the purposes of national security, technology, infrastructure, and energy production.").

Plaintiff's claims are necessarily based on this decades-long special

relationship between Defendants and the federal government, and should be heard in federal court. "The crux of the ['acting under'] inquiry . . . is whether there was a special relationship between the defendant and the federal government," which exists where an entity "provide[s] the federal government with materials that it need[s]." *Baker*, 962 F.3d at 941–42. Despite Plaintiff's suggestion to the contrary, Mot. at 26–29, this "special relationship" is important because it demonstrates that Defendants were not simply supplying the federal government with standardized products for its own consumption, but rather, acting to help the government accomplish critical tasks that otherwise the "[g]overnment itself would have had to perform." *Watson*, 551 U.S. at 154. As Professor Wilson explains: "[T]he U.S. government has relied upon and controlled the oil and gas industry to obtain oil and gas supplies and expand the production of petroleum products, in order to meet military needs and enhance national security." Wilson Decl. ¶ 1. Defendants' special relationship with the government does not consist of arm's-length business arrangements to provide the government with a fungible consumer good; rather, the relationship formed out of the U.S. government's need to mobilize an entire industry to accomplish fundamental public policy objectives—objectives that would benefit the nation as a whole. As Professor Wilson explains: "The United States could not do without the fuels . . . which is why the government has remained interested in controlling global oil supplies and directing the output of parts of the oil industry,

from the beginning of the 20th century through the present day." *Id.* ¶50.

2. Defendants Acted Under Federal Officers

In the several specific examples below, many of which were not before the Ninth Circuit, Defendants "acted under" federal officers to supply oil and gas for the government to advance federal interests, and did not simply enter into arm's-length business transactions to satisfy a general demand for oil and gas.

a. Defendants Acted Under Federal Officers to Produce and Supply Specialized Fuels for the Military

Many of the Defendants have developed and provided specialized fuels to the military under government contracts and as directed by the government. This evidence was not presented to or considered by the Ninth Circuit in *San Mateo* or by the Fourth Circuit in *Baltimore*. Notably, in a closely related case, a municipal plaintiff—represented by the same counsel as Plaintiff here—conceded that "producing goods for the United States military" is sufficient to establish federal officer removal where, *as here*, "the military directed the particular aspect of the contractor's performance that gave rise to the plaintiff's claims." Plaintiff's Reply in Support of Remand at 24, *District of Columbia v. Exxon Mobil Corp.*, No. 20-1932-TJK (D.D.C. 2020), ECF No. 63 (citing *Fidelitad, Inc. v. Insitu Inc.*, 904 F.3d 1095, 1100 (9th Cir. 2018)).

1) Defendants Acted Under Federal Officers During World War II and the Korean War

Multiple courts have found that the federal government exerted extraordinary control over Defendants during World War II and the Korean War to guarantee the supply of oil and gas for wartime efforts, such as high-octane avgas. *See, e.g.*, *United States v. Shell Oil Co.*, 294 F.3d 1045, 1049 (9th Cir. 2002) ("Because avgas was critical to the war effort, the United States government exercised significant control over the means of its production during World War II."); NOR ¶ 93.

These cases highlight the nature and extent of the control exerted by the federal government through agencies such as the PAW, which directed construction of new oil exploration and petroleum products manufacturing facilities and allocation of raw materials, issued production orders, entered into contracts giving extraordinary control to federal officers, and "programmed operations to meet new demands, changed conditions, and emergencies." *See* NOR ¶ 93; *Shell Oil Co. v. United States*, 751 F.3d 1282, 1286 (Fed. Cir. 2014) ("PAW told the refiners what to make, how much of it to make, and what quality."); *Exxon Mobil*, 2020 WL 5573048, at *11 (rejecting argument that private refiners "voluntarily cooperated"; instead finding they had "no choice" but to comply with the federal officers' direction).[11] As Professor Wilson succinctly explains: "PAW instructed the oil

[11] It is irrelevant that the *Exxon Mobil* court elsewhere held that the federal government was not an "operator" of ExxonMobil's refineries under CERCLA. CERCLA's "operator" standard demands a significantly tighter nexus than the federal officer removal statute. *Compare United States v. Bestfoods*, 524 U.S. 51, 66–67 (1998) (an "operator" must "manage, direct, or conduct operations

industry about exactly which products to produce, how to produce them, and where to deliver them." Wilson Decl. ¶ 11. Professor Wilson explains: "Some directives restricted the use of certain petroleum products for high-priority war programs; others dictated the blends of products; while others focused on specific pieces of the industry, such as the use of individual pipelines." *Id.*

During World War II alone, "[a]lmost seven billion barrels of [oil] had to be brought from the ground between December 1941 and August 1945. . . . That is *one-fifth of all the oil that had been produced in this country since the birth of the industry in 1859*." NOR Decl. Ex. 10, at 1. The government dictated where and how to drill, rationed essential materials, and set statewide quotas for production. Miyagi Decl. Ex. 16, at 28, 171, 177–79, 184 & n.18. "The government [] used [its] authority to control many aspects of the refining process and operations." *Exxon Mobil*, 2020 WL 5573048, at *14.

Controlling production of petroleum products by setting production quotas, dictating where and how to explore for petroleum, micromanaging operations, and rationing materials in order to help conduct a war are not the stuff of mere "regulation." They are instead indicative of the kind of special relationship that the

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specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations" (emphasis added)), *with Latiolais*, 951 F.3d at 296 ("[A]ny civil action that is *connected or associated with* an act under color of federal office may be removed." (emphasis added)).

Supreme Court described in *Watson*.

PAW's directives to Defendants were mandatory and were enforceable by law. PAW's message to the oil and gas industry was clear: the government would "get the results" it desired, and if "we can't get them by cooperation, then we will have to get them some other way." NOR Decl. Ex. 39, at 8. PAW also maintained "disciplinary measures" for noncompliance, including "restricting transportation, reducing crude oil supplies, and withholding priority assistance." NOR Decl. Ex. 22. In sum, the federal government deployed an array of coercive actions, threats, and sanctions to ensure Defendants assented to PAW's directives.

Defendants also acted under the federal government by operating and managing government-owned petroleum production facilities. Professor Wilson explains that during World War II the government built "dozens of large government-owned industrial plants" that were "*managed by private companies under government direction*." Wilson Decl. ¶ 14 (emphasis added). He shows that "[a]t the heart of the U.S. mobilization for World War II were government-owned, contractor-operated (GOCO) industrial facilities." *Id.* "The U.S. government enlisted oil companies to operate government-owned industrial equipment. . . . [T]he oil companies worked to comply with government orders." *Id.* ¶ 15. Critically, these "oil companies were not merely top World War II prime contractors, but also served as government-designated operators of government-owned industrial facilities" or

government-owned equipment within industrial facilities. *Id.* ¶ 19. Among the largest facilities was a refinery site in Richmond, California, operated by Socal (a Chevron predecessor), which was "the second-largest of all the facilities focused on aviation gasoline production, providing 10 percent of total global output of aviation fuel" by January 1945. *Id.* This reflects a new kind of relationship between the U.S. government and Defendants, in which the government not only controlled, directed and incentivized production, but also financed and owned a portion of the industry's productive capacity.

Defendants also acted under the federal government by building and operating pipelines transporting oil during World War II. NOR ¶¶ 98–102. "To [e]nsure adequate supplies of petroleum through the east during . . . World War II, the Government caused to be constructed, between the Texas oilfields and the Atlantic seaboard, two large pipelines, commonly known as the 'Big Inch' and the 'Little Big Inch,' respectively" (together, the "Inch Lines"). *Schmitt v. War Emergency Pipelines, Inc.*, 175 F.2d 335, 335 (8th Cir. 1949). The Inch Lines "were built for a single purpose, to meet a great war emergency. . . . [T]hey helped to win a war that would have taken much longer to win without them." Miyagi Decl. Ex. 17, at 17. *See* NOR Decl. Ex. 10, at 104–05, 108. Indeed, Professor Wilson notes that these pipelines "carried 42 percent of all oil transported in the US[] during World War II." Wilson Decl. ¶ 13. War Emergency Pipelines, Inc., an entity that included

predecessors or affiliates of Defendants, *see* NOR Decl. Ex. 44, constructed and operated the Inch Lines "under contracts" and "*as agent*" for the federal government "without fee or profit." *Schmitt*, 175 F.2d at 335–36 (emphasis added). They were thus "serving as the government's agent," which is sufficient for removal. *Goncalves*, 865 F.3d at 1246.

At the advent of the Korean War in 1950, President Truman established the Petroleum Administration for Defense ("PAD") under authority of the DPA. PAD issued production orders to Defendants and other oil and gas companies, including to ensure adequate quantities of avgas for military use. *See* NOR Decl. Ex. 46; *see also Exxon Mobil*, 2020 WL 5573048, at *15 (detailing government's use of DPA "to force" petroleum industry to "increase their production of wartime . . . petroleum products"). As Professor Wilson explains, the DPA "gave the U.S. government broad powers to direct industry for national security purposes," and "PAD directed oil companies to expand production during the Korean War, for example, by calling on the industry to drill 80,000 wells inside the United States, and more than 10,000 more wells abroad, in 1952." Wilson Decl. ¶ 28.

The government also invoked DPA after the 1973 Oil Embargo to address "immediate and critical" petroleum shortages suffered by the military. NOR ¶ 104; NOR Decl. Ex. 47, pt. 1, at 442. Interior Priority Regulation 2 authorized "directives" to ensure "normal supply of petroleum products required by the

Department of Defense" and provided companies that complied with immunity from "damages or penalties." Petroleum Products Under Military Supply Contracts, 38 Fed. Reg. 30572, 30572, §§ 1, 3 (Nov. 6, 1973). The Interior Department subsequently "issued directives to 22 companies [including Defendants or their predecessors, subsidiaries, or affiliates] to supply a total of 19.7 million barrels of petroleum during the two-month period from November [to] December 31, 1973, for use by DOD." NOR Decl. Ex. 48, at 78; *see also id.* Ex. 47, at 443; *id.* Ex. 49.

2) Defendants Have Continued to Produce and Supply Large Quantities of Specialized Jet Fuel to the Military

To this day, Defendants continue to produce and supply large quantities of highly specialized fuels that are required to conform to exact DOD specifications to meet the unique operational needs of the U.S. military. Plaintiff itself notes that the Seventh Circuit in *Baker* found federal officer removal appropriate where the government "'required' one defendant[] to refine . . . 'according to detailed federal specifications.'" Mot. at 46 n.30 (quoting *Baker*, 962 F.3d. at 940, 945). Plaintiff misleadingly implies that the government "required" the act of refining itself in *Baker*. Instead, the government required refining under "detailed federal specifications." *Baker*, 962 F.3d. at 940. The same is true of Defendants' conduct.

Professor Wilson explains that "[b]y 2010, the U.S. military remained the world's biggest single purchaser and consumer of petroleum products" and, "*[a]s it*

had for decades, the military continued to rely on oil companies to supply it under contract with specialty fuels, such as JP-5 jet aviation fuel and other jet fuels, F-76 marine diesel, and Navy Special Fuel." Wilson Decl. ¶ 40 (emphasis added). "[I]n the absence of . . . [these] contract[s] with [the Defendants], the Government itself would have had to perform" these essential tasks to meet the critical DOD fuel demands. *Baker*, 962 F.3d at 942 (quoting *Watson*, 551 U.S. at 154).

During the Cold War, Shell Oil Company developed and produced specialized jet fuel for the federal government to meet the unique performance requirements of the U-2 spy plane and later the OXCART and SR-71 Blackbird programs. NOR ¶ 105. For the U-2, Shell Oil Company produced fuel known as JP-7, which required special processes and a high boiling point to ensure the fuel could perform at very high altitudes and speeds. "The Government stated that the need for the 'Blackbird' was so great that the program had to be conducted despite the risks and the technological challenge. . . . A new fuel and a chemical lubricant had to be developed to meet the temperature requirements." NOR Decl. Ex. 51, at 24. For OXCART, Shell Oil Company produced millions of gallons of secret fuel under government contracts with specific testing and inspection requirements. NOR Decl. Ex. 53. It also constructed "special fuel facilities" for handling and storage, including a hangar, pipelines, and storage tanks at air force bases at home and abroad, and "agreed to do this work without profit" under special security

restrictions per detailed government contracts. NOR Decl. Exs. 53–61.

Defendants continue to supply DOD with highly specialized fuels to power planes, ships, and other vehicles, and to satisfy national defense requirements. *See, e.g.*, NOR ¶¶ 106–15. For example, between 1983 and 2011, Marathon subsidiary Tesoro Corporation entered into at least 15 contracts with the DOD Defense Logistics Agency ("DLA") to supply highly specialized military jet fuels, such as JP-4, JP-5, and JP-8. *See* NOR Decl. Ex. 62; NOR ¶ 107. DOD exerted *significant control* over Tesoro's actions in fulfilling the contracts. In particular, the specifications *require* "unique additives that are required by military weapon systems," such as (1) static dissipator additive ("SDA") to prevent fires during refueling by rapidly dissipating accumulated static charge during quick turnarounds on aircraft carriers, (2) fuel system icing inhibitor ("FSII") to prevent freezing due to the fuels' natural water content for military jets at ultra-high altitudes, which could cause blockages leading to engine flameout,[12] and (3) corrosion inhibitor/lubricity improver ("CI/LI") to maintain fuel handling system integrity when fuels are stored for long periods, as on aircraft carriers. NOR Decl. Ex. 64, at 5, 7, 10; NOR ¶¶ 109–

[12] For more on the necessary function of the SDA, FSII, and CL/LI additives, see NOR ¶¶ 110–113.

12.[13] DOD specifications also required Tesoro to conform the fuels to other specific chemical and physical requirements, such as enumerated ranges for conductivity, heat of combustion, and thermal stability, all of which are essential and unique to performance of the military function. NOR Decl. Ex. 64, at 6; NOR ¶¶ 113-14.

The DOD's detailed specifications for the makeup of the military jet fuels and "the compulsion to provide the product to the government's specifications" demonstrate the necessary "acted under" special relationship between Defendants and the government. *Baker*, 962 F.3d at 943. These unique jet fuels are designed specifically for military use and thus fall into the category of specialized military products that support federal officer jurisdiction, *see Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387 (5th Cir. 1998); *Baker*, 962 F.3d at 943, and not the category of heavily regulated civilian products that the Supreme Court in *Watson* found was insufficient for federal officer removal.

b. Defendants Produced Oil and Gas at Federal Direction

Many of the Defendants have also engaged in the exploration and production of oil and gas under agreements with federal agencies and under ongoing supervision of federal officers "to *assist*, or to help *carry out*, the [federal] duties or tasks" that are vital to national security. *Watson*, 551 U.S. at 152 (emphases added).

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[13] Tesoro Alaska Petroleum Company's September 5, 2007 contract with DLA Defense Energy Supply Center to supply JP-8 required that Tesoro meet the specifications of MIL-DTL-83133E. *See* NOR Decl. Ex. 62.

1) Defendants Produced Oil and Gas Under Federal Mineral Leases

Plaintiff mischaracterizes Defendants' OCSLA leases as mere commercial arrangements and asserts that "private entities engaging in those activities do not automatically become federal officers because of the national importance of their industries." Mot. at 37. But Defendants are entitled to removal not just because of the importance of the industry to national interests—removal is also appropriate because Defendants have agreed, through the leases, to perform an essential service for the government under the direct supervision and direction of federal officers.

Professor Priest explains that these leases are "*not merely commercial transactions* between the federal government and the oil companies. They reflect the creation of a valuable national security asset for the United States over time." Priest Decl. ¶ 7(1). The development of the OCS was "the result of extraordinary technological innovation" and a "political and policy-driven project to incorporate . . . the OCS into the nation's public lands and manage OCS resources in the long-term interest of U.S. energy security." *Id.* The federal government "procured the services of oil and gas firms to develop urgently needed resources on federal offshore lands that the federal government was unable to do on its own" because it lacked the experience, expertise and technological capabilities. *Id.* But it was the *federal government*, not the oil companies, that "dictated the terms, locations, methods and rates of hydrocarbon production on the OCS" and, accordingly, "[t]he policies and

plans of the federal OCS program did not always align with those of the oil firms interested in drilling." *Id.* ¶ 7(2). "Federal officials viewed these firms as agents of a larger, more long-range energy strategy to increase domestic oil and gas reserves." *Id.* The federal government enlisted Defendants, as its agents, to get the federal government's oil and gas out of the ground and to the domestic market and supervised and controlled Defendants' actions in doing so.

Put differently, the federal government owns substantial amounts of oil and gas that are trapped in the OCS. The government could either extract and sell (or use) the oil and gas itself or hire third parties to perform that task on its behalf. Since the federal government had "no experience or expertise," it chose the second option. This is the definition of "acting under": "in the *absence of [] contract[s] with [] private firm[s]*, the Government itself would have had to" extract and produce oil and gas from the OCS. *Watson*, 551 U.S. at 147, 154 (emphasis added).

In 1953, Congress passed OCSLA for the express purpose of making oil and gas on the OCS "available for expeditious and orderly development" in keeping with "national needs." 43 U.S.C. §1332(3). These initial regulations "went well beyond those that governed the average federally regulated entity at that time." Priest Decl. ¶ 19. As Professor Priest explains: "An OCS lease was *a contractual obligation* on the part of lessees to ensure that all operations *'conform to sound conservation practice' . . . and effect the 'maximum economic recovery'* of the natural resources

on the OCS." *Id.* (citing 19 Fed. Reg. §250.11, 2656) (emphasis added). And the federal government retained the power to "direct how oil and gas resources would be extracted and sold from the OCS." *Id.* ¶ 20.

Professor Priest explains that federal officials in the Department of Interior—known as "supervisors"—exerted substantial control and oversight over Defendants' operations on the OCS. *Id.* ¶ 28. "OCS regulations were general requirements that rarely, if ever could be uniformly applied" because "each well within each reservoir was unique. Priest Decl. ¶ 22. Instead, "substantial discretion [was left] to the supervisor in implementing them." *Id.* ¶ 23. For example, a lessee was required to "promptly drill and produce other wells as the supervisor may reasonably require," and therefore supervisors had complete authority to control and dictate the rate of production from OCS wells. *Id.* ¶ 19. Moreover, federal supervisors had "additional powers to direct how oil and gas resources would be extracted and sold." *Id.* ¶ 20. For example, supervisors had to approve all "drilling and development programs" and had authority to suspend operations in certain situations. *Id.* Defendants also had to comply with detailed "government specifications for 'samples, tests, and surveys,' the timing and procedures for well tests, and 'well-spacing and well-casing programs.'" *Id.* And the supervisors also "had the final say over methods of measuring production and computing royalties," which was based on "the estimated reasonable value of the product as determined by the supervisor." *Id.* (internal

quotation marks omitted). At bottom, as Professor Priest explains, these federal officials "did not engage in perfunctory, run-of-the-mill permitting and inspection." *Id.* ¶ 22. Rather, they "provided direction to lessees regarding when and where they drilled, and at what price, in order to protect the correlative rights of the federal government as the resource owner and trustee" of federal lands. *Id.* ¶ 28.

Professor Priest also explains that the federal government exerted substantial control by issuing highly specific and technical orders, known as "OCS Orders." *Id.* ¶ 24. From 1958 to 1960, several OCS Orders were issued, which among other things: "specified how wells, platforms, and other fixed structures should be marked"; "dictated the minimum depth and methods for cementing well conduct casing in place"; "prescribed the minimum plugging and abandonment procedures for all wells"; and "required the installation of subsurface safety devices on all OCS wells." *Id.* ¶ 24 (citations omitted). Through these OCS Orders, federal officials "exercised active control on the federal OCS over the drilling of wells, the production of hydrocarbons, and the provision of safety." *Id.* ¶ 25.

Two decades later, the country faced severe energy shortages. Professor Priest explains that "[i]n 1971 the United States could provide for just 75.8 percent of the petroleum liquids it needed," and "[t]he adequacy of crude oil supplies [] concerned public officials." *Id.* ¶ 40. In response, President Nixon directed the Interior Department to "rapidly expand industry access to OCS lands for

exploration" and "launch an 'accelerated program' of development on the OCS." *Id.* But "while the federal OCS program sought to expand lease sales and oil and gas output across the OCS, officials also reasserted federal control over the management of oil and gas production on wells . . . of the federal OCS." *Id.* ¶ 42. This was, again, accomplished largely through OCS Orders. For example, a 1970 OCS Order directed that "'all producible oil and gas wells may be produced at daily rates not to exceed the Maximum Efficient Rate' (MER)." *Id.* ¶ 44 (citing OCS Order No. 11, 11-2). "The newly required MER was a calculated production ceiling that would theoretically enable the largest recovery of oil and gas." *Id.* Lessees were "required to submit a proposed MER from each producing reservoir to the supervisor for approval," *id.*, thereby "add[ing] another critical dimension to the lease management responsibilities of the federal OCS regional supervisor." *Id.* ¶ 45. Another Order, to minimize the waste of OCS resources, "prohibited the flaring or venting of oil and gas from wells" subject to approval from the supervisor in certain circumstances. *Id.* ¶ 47 (citing OCS Order No. 11, 11-9). Professor Priest explains that, "[i]n these ways, [DOI officials] *supervised, directed, and controlled* the rate of oil and gas production from the reservoirs on the OCS and enforced the federal government's responsibilities as a resource owner and trustee." *Id.* ¶ 48 (emphasis added).

The "specter of an oil shortage became reality in October 1973" when OPEC "embargoed oil shipments to the United States." *Id.* ¶ 50. In two "prime-time Oval

Office addresses, [President] Nixon called for a national effort—on the scale of the Manhattan Project or the Apollo moon missions—to develop the 'potential to meet our own energy needs without depending on any foreign energy sources' by 1980." *Id.* As part of this effort, OCSLA was amended in 1978 to ensure more production on the OCS. Congress mandated "expedited exploration and development of the [OCS] in order to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments," including by "mak[ing] such resources available to meet the Nation's energy needs as rapidly as possible." 43 U.S.C. § 1802(1)–(2); *see also California ex rel. Brown v. Watt*, 668 F.2d 1290, 1296 (D.C. Cir. 1981).

During the debate over the 1978 amendments, members of Congress proposed creating a national oil company to develop the OCS (as national oil companies do in many other countries). *See* NOR Decl. Ex. 9. Plaintiff's assertion that a national oil company was not proposed is incorrect. Mot. at 36 n.24. In fact, there were *multiple* proposals. One proposal, by Senator Hollings, would have "put a moratorium on conventional leasing" and "authorize[] and direct[] the Secretary of the Interior to initiate a major program of offshore oil exploration." NOR Decl. Ex. 9. This proposal, as Professor Priest explains, "called for the creation of a national oil company." Priest Decl. ¶ 52 (citing S903-911, 121st Congress, (Jan. 27, 1975)). Senator Hollings explained that the "*Federal Government can conduct this program*

by using the same drilling and exploration firms that are usually hired by oil companies," but "the taxpayers of the United States—rather than the oil companies—would be the clients." NOR Decl. Ex. 9. That the government could use private firms to help conduct its operations is nothing new or remarkable— as noted above, the government uses private firms to carry out essential government functions all the time. In fact, this is precisely the type of relationship that the Supreme Court found warrants federal officer removal in *Watson*. 551 U.S. at 154.

"Around the same time, in April 1974, separate hearings took place in the Senate Committee on Commerce on a bill that would have formally established a Federal Oil and Gas Corporation." *Id.* ¶ 53 (internal quotation marks omitted). As Professor Priest explains: This corporation, "'Fogco,' was to be 'owned by the federal government' and 'in case of any shortage of natural gas or oil and serious public hardship, could itself engage in production on Federal lands in sufficient quantities to mitigate such shortage and hardship.'" *Id.* (citation omitted).

Yet another proposal, from Representatives Harris and McFall, "would provide for the establishment of a National Energy and Conservation Corporation—to be called Ampower—similar to the Tennessee Valley Authority." 121 Cong. Rec. 4490 (daily ed. Feb. 26, 1975). Representative Harris explained: "The creation of a quasi-public corporation such as Ampower can and should perform these functions on public lands" to "[e]nsure that the public's oil and gas is developed in the public

interest." Miyagi Decl. Ex. 18, 9275-76.

While these proposals were ultimately rejected, the adopted amendments set out an arrangement by which the government would contract with private energy companies, including Defendants, to perform these essential tasks on its behalf with expanded federal supervision and control. Indeed, as Professor Priest explains, federal officials set "the size, timing and location of leasing activity." Priest Decl. ¶ 56. This arrangement increased the Secretary of the Interior's control over the OCS leasing program to align production with national needs, and instructed the Secretary to create oil and gas leasing programs on a five-year review cycle that "will best meet national energy needs for the five-year period following its approval or reapproval." 43 U.S.C. § 1344(a)–(e).

This evidence confirms that the federal government uses OCS lessees to meet a "basic governmental task," *San Mateo*, 960 F.3d at 599. Rather than forming a national oil company to implement Congress's mandate to exploit these national resources, the government opted to use private parties under the direction of federal officers to provide for the economic and national security of the country. Professor Priest explains that the importance of the OCS to domestic energy security and economic prosperity has continued to the present, across every presidential administration. *C.f.* Priest Decl. ¶ 79. For example, in 2010, President Obama announced "the expansion of offshore oil and gas exploration" because "our

dependence on foreign oil threatens our economy." *Id.* ¶ 78.

The Ninth Circuit found that the OCS leases, *by themselves*, did not require Defendants to fulfill basic government duties, and 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." *San Mateo*, 960 F.3d at 603 (emphasis added and internal quotation marks omitted). But Defendants here have demonstrated more—namely, that their performance under the leases was subject to the direction, supervision and control of federal officers and fulfilled an essential governmental purpose. This evidence justifies removal under *Goncalves*. 865 F.3d at 1247 (finding federal officer removal where conduct "help[ed] officers fulfill . . . basic governmental tasks." (citation omitted)).

2) Defendants Acted Under the U.S. Navy at Elk Hills National Petroleum Reserve No. 1

The analysis above applies equally to Chevron predecessor Standard Oil of California's operation of the federal government's National Petroleum Reserve No. 1 in Elk Hills, which it did "in the employ" of the Navy. Miyagi Decl. Ex. 26 (Brief for the American Petroleum Institute as Amicus Curiae Supporting Reversal, *BP p.l.c. v. Mayor & City Council of Baltimore*, No. 19-1189 (U.S. Nov. 23, 2020)). Again, Plaintiff relies on *San Mateo* and *Baltimore*, which concluded that the Unit Production Contract ("UPC"), standing alone, did not provide sufficient evidence

that Chevron or its predecessor "acted under" federal officers. Mot. at 38–39. The Ninth Circuit viewed the UPC as merely an "arm's-length" agreement between co-owners, *San Mateo*, 960 F.3d at 602, and the Fourth Circuit could not determine "whether production authorized by Congress was carried out by Standard," *Mayor & City Council of Baltimore v. BP P.L.C.*, 952 F.3d 452, 471 (4th Cir. 2020). Defendants here, however, have provided additional evidence demonstrating that the Navy separately hired Standard Oil to *operate* the field on its behalf for 31 years and that Standard Oil was "in the employ" of the Navy during this period.

The history of Elk Hills is recounted in *United States v. Standard Oil Co. of California*, 545 F.2d 624 (9th Cir. 1976). Both the Navy and Standard Oil owned intermingled parts of Elk Hills, and Standard Oil agreed not to produce oil without notice to the federal government. *See id.* at 626. As a result of World War II, the need for oil dramatically increased, and the parties negotiated the UPC to govern production at Elk Hills. *See id.*; NOR Decl. Ex. 6. The UPC provided the government with the *absolute* right to establish the time and rate of Standard Oil's production and the *exclusive* right to carry out the actual operations at the site. *Id.*

As operator of Elk Hills, the Navy had to decide whether it wanted to produce oil on its own or hire a contractor for the job. "***The Navy chose to operate the reserve through a contractor rather than with its own personnel***." Miyagi Decl. Ex. 1, at 15 (emphasis added). Standard Oil "was awarded the contract, and

continued to operate NPR-1 [for the Navy] for the next 31 years." *Id.* This evidence was not before the Ninth Circuit.

The Navy decided to use a private contractor to operate Elk Hills on its behalf to maximize production as quickly as possible. NOR ¶ 78. Declassified documents, which were not before the Ninth Circuit, demonstrate that a "substantial increase in production at the earliest possible date was urgently requested by the Joint Chiefs of Staff to meet the critical need for petroleum on the West Coast to supply the armed forces in the Pacific theatre," and that Standard Oil was "chosen as operator because it was the only large company capable of furnishing the facilities for such a development program." NOR Decl. Ex. 31, at 1.

"Shortly after the unit plan contract was signed, the Congress . . . authorized the production [at the Elk Hills Reserve] at a level of 65,000 [barrels per day] to address fuel shortages . . . and World War II military needs." Miyagi Decl. Ex. 1, at 15. Production reached the "peak of 65,000 barrels per day in 1945." *Id.* Ex. 19.

Standard Oil's production and operation of Elk Hills for the Navy were subject to substantial supervision by Navy officers. NOR ¶¶ 81–83. The Operating Agreement between the Navy and Standard Oil provided that "OPERATOR [Standard Oil] is *in the employ of the Navy Department* and is *responsible to the Secretary thereof*." *See* NOR Decl. Ex. 32, at 3 (emphases added). Naval officers directed Standard Oil to conduct operations to further national policy. For example,

in November 1974, the Navy directed Standard Oil to determine whether it was possible to produce 400,000 barrels per day to meet the unfolding energy crisis, advising Standard Oil that "*you are in the employ of the Navy* and *have been tasked with performing a function which is within the exclusive control of the Secretary of the Navy*." Miyagi Decl. Ex. 2, at 3 (emphases added).

Standard Oil's operation of Elk Hills at the Navy's direction is quintessential "acting under." It was "an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior." *Watson*, 551 U.S. at 152. It operated Elk Hills for decades "in the employ of," and under the "subjection, guidance, or control" of the Navy, a paradigmatic example of the "unusually close [relationship] involving detailed regulation, monitoring, or supervision." *Id.* at 151, 153.

3) Defendants Supplied Oil Directly to the Government and Managed the Strategic Petroleum Reserve

In further response to the 1970s oil embargoes, Congress created the Strategic Petroleum Reserve in the 1975 Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871, to meet its treaty obligations under the 1974 Agreement on an International Energy Program, and blunt the future use of petroleum as a weapon by foreign countries. NOR ¶ 86. Defendants "acted under" federal officers by supplying oil for and managing the Strategic Petroleum Reserve for the government. This evidence was not before and was not considered by the Ninth Circuit.

Defendants have acted at the direction of federal officers to supply oil and gas

to the Strategic Petroleum Reserve. From 1999 to December 2009, "the Strategic Petroleum Reserve received 162 million barrels of crude oil through the [royalty-in-kind ('RIK')] program" valued at over $6 billion. Miyagi Decl. Ex. 22, at 18, 39 tbl. 13; *see also* NOR Decl. Ex. 36 (Operator Letter invoking OCSLA and royalty provisions in leases "to use [RIK] to replenish the Strategic Petroleum Reserve"). The federal government also contracted with Defendants to assist in the physical delivery of these RIK payments to the Strategic Petroleum Reserve. NOR ¶ 89. *See, e.g.*, Miyagi Decl. Ex. 20, at 19.

Finally, some Defendants acted under federal officers as operators and lessees of the Strategic Petroleum Reserve infrastructure. NOR ¶ 90. From 1997 to 2019, DOE leased to Defendant Shell Oil Company affiliates the Sugarland/St. James Terminal and Redstick/Bayou Choctaw Pipeline in St. James, Louisiana. Starting in January 2020, DOE leased those facilities to an affiliate of Defendants Exxon Mobil Corporation and ExxonMobil Oil Corporation. *See* Miyagi Decl. Ex. 21.

The Strategic Petroleum Reserve subjects Defendants to the federal government's supervision and control, including in the event that the President calls for an emergency drawdown. NOR ¶ 91. *See* Miyagi Decl. Ex. 22, at 16, 34 ("Under the lease agreement, Shell provide[d] for all normal operations and maintenance of the terminal and [wa]s *required to support the Strategic Petroleum Reserve as a sales and distribution point in the event of a drawdown*." (emphasis added)); *Id.* Ex.

21, at 15; 42 U.S.C. § 6241(d)(1). The United States exercised this emergency control after the President's orders to draw down the reserve in response to Hurricane Katrina in 2005 and disruptions to oil supply in Libya in 2011. Miyagi Decl. Ex. 27. Thus, the hundreds of millions of barrels of oil flowing through these facilities were subject to federal government control and supervision, and Defendants engaged in "an effort to *assist*, or to help *carry out*," the federal government's task in ensuring energy security. *Watson*, 551 U.S. at 152 (emphasis added).

3. Defendants Have Shown the Requisite Nexus and Colorable Federal Defense

Plaintiff's claims and alleged injuries "relate to" Defendants' production and supply of oil and gas under the direction of the federal government. The Ninth Circuit has made clear that "the hurdle erected by [the causal-connection] requirement is quite low." *Goncalves*, 865 F.3d at 1244 (internal quotations omitted). Indeed, when Congress inserted the words "or relating to" into the Removal Clarification Act of 2011, it "broadened federal officer removal to actions, not just *causally* connected, but alternatively *connected* or *associated*, with acts under color of federal office." *Latiolais*, 951 F.3d at 292 (emphasis added).[14]

[14] *Accord Baker*, 962 F.3d at 943; *Sawyer*, 860 F.3d at 258; *In re Commonwealth's Motion*, 790 F.3d at 467. Plaintiff relies on a footnote in an unpublished decision to argue that the Removal Clarification Act of 2011 did not alter the causal connection requirement in the Ninth Circuit. The plain statutory text precludes that view. And the Ninth Circuit had interpreted the requirement liberally even

The federal government's policy choices to produce significant amounts of oil and gas to fulfill national interests, and its direct supervision of Defendants' activities to advance those goals, go to the core of Plaintiff's claims, which fundamentally rest upon the alleged impacts caused by the *cumulative production* of petroleum products—including those products produced under the direction and supervision of the federal government. Plaintiff's only response is that its claims are limited to Defendants' alleged "failure to warn" and "disinformation campaign," not the production and sale of oil and gas. Mot. 43–46.[15] That argument fails because, as the Ninth Circuit has explained, "[i]n assessing whether a causal nexus exists, we credit the defendant's theory of the case." *Leite*, 749 F.3d at 1124. In any event, Plaintiff's position should be recognized for what it is: a baseless and strained attempt to evade federal jurisdiction. Plaintiff has *labeled* its claims as sounding in state law and now argues that the claims rest on a theory purportedly focused on concealment and misrepresentation. But, as explained above, Plaintiff's claims do

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before the Act. *See, e.g.*, *Durham*, 445 F.3d at 1252 ("[W]e are to interpret section 1442 broadly in favor of removal.").

[15] Plaintiff relies heavily on opinions from other courts finding a lack of a causal connection, Mot. 44–45, but as demonstrated above, Defendants have provided substantial additional evidence here. In fact, Plaintiff concedes that a causal nexus exists when the "challenged acts occurred because of what they were asked to do by the Government." Mot. at 43 (*quoting Goncalves*, 865 F.3d at 1245). Defendants' evidence confirms that they were "asked" by the government to produce and supply substantial amounts of petroleum products for the government itself and the public to accomplish critical federal policy objectives.

not and cannot rest solely on alleged misrepresentations, but instead rise and fall on a chain of causation linking *all* of Defendants' production and sale of oil to global climate change and the allegedly resulting harms for which Plaintiff seeks relief.

Plaintiff places Defendants' production and sale of oil and gas *directly in its alleged causal chain*: under Plaintiff's theory, Defendants' alleged misrepresentations caused demand for Defendants' products, which led to increased production and consumption of those products, which led to increased emissions, which led to global climate change, ultimately causing Plaintiff's alleged injuries. *See, e.g.*, Compl. ¶ 101 ("Defendants embarked on a decades-long campaign of deception designed to maximize continued dependence on their products."); *id.* ¶ 102 ("[Defendants'] campaign enabled Defendants to accelerate their business practice of exploiting fossil fuel reserves."). This chain is depicted below:

Thus, Plaintiff's misinformation and failure-to-warn allegations, even if credited, only underscore the connection—Plaintiff alleges *that misinformation maintained or increased production and consumption of oil and gas*, *see, e.g.*, Compl. ¶¶ 101–02, 139–44, and much of that alleged production occurred at the direction of the federal government in furtherance of federal objectives. This satisfies the "low"

nexus requirement for federal officer removal.[16]

Finally, because Defendants acted under federal officers to implement the government's policies and decisions to promote the production of oil and gas, they have several colorable federal defenses to raise, including the government contractor defense, *see Boyle*, 487 U.S. at 500; *Gertz v. Boeing*, 654 F.3d 852 (9th Cir. 2011); preemption, *see Goncalves*, 865 F.3d at 1249; and federal immunity, *see Campbell-Ewald Co. v. Gomez*, 577 U.S. 153 (2016). For example, in *Boyle*, the Court applied a federal common law government contractor defense in a state-law product liability action because (1) the suit involved a unique federal interest and (2) a state law holding government contractors liable for design defects in military equipment would present a significant conflict with federal policy. 487 U.S. at 504–13. Here, both elements are met. In addition, as the Court acknowledged in *Campbell-Ewald*, "[w]here the Government's 'authority to carry out the project was validly conferred,'" a contractor "who simply performed as the Government directed," may

[16] Although Plaintiff attempts to disclaim injuries arising from "Defendants' provision of fossil fuel products to the federal government," Compl. ¶ 14, "courts have found that neither a plaintiff's disclaimer nor its characterization of his claims is determinative." *Reaser v. Allis Chambers Corp.*, 2008 WL 8911521, at *6 (C.D. Cal. June 23, 2008). Rather, all a defendant must show is that the three elements of the federal officer removal statute are satisfied. *Ballenger v. Agco Corp.*, 2007 WL 1813821, at *1 n.2, *4 (N.D. Cal. June 22, 2007) ("[T]he fact that Plaintiff's complaint expressly disavows any federal claims is not determinative. Rather, removal is proper under the removal statute" if the elements of the statute are met.).

be immune from liability. 577 U.S. at 167 (quoting *Yearsley v. W.A. Ross Const. Co.*, 309 U.S. 18, 21 (1940)). Here, Defendants produced oil and gas at the direction of the federal government, and thus have a colorable argument that they are immune from liability for any alleged injuries resulting therefrom. Additionally, Plaintiff's claims are barred by the U.S. Constitution, including the Interstate and Foreign Commerce Clause, U.S. Const. art. I, §8, cl. 3, and Due Process Clauses, *id.* amend. V and XIV, § 1, as well as the First Amendment, *id.* amend. I, and the foreign affairs doctrine, *see United States v. Pink*, 315 U.S. 203, 230–31 (1942).

Defendants are required to show only "that the defense is 'not without foundation' and was made in good faith." *Thompson*, 2012 WL 1344453, at *20. These and other federal defenses are more than colorable, and a defendant invoking § 1442(a)(1) "need not win his case before he can have it removed." *Willingham v. Morgan*, 395 U.S. 402, 407 (1969). Indeed, "[t]he purpose of the federal officer removal statute is 'to *ensure a federal forum* in any case where a [defendant] is entitled to raise a defense arising out of his duties.'" *Goncalves*, 865 F.3d at 1244 (quoting *Arizona v. Manypenny*, 451 U.S. 232, 241 (1981)) (emphasis added). And the question of "whether [a defendant] was specifically directed by the federal Government, is one for the federal—not state—courts to answer." *Leite*, 749 F.3d at 1124 (internal quotation marks omitted); *see also Baker*, 962 F.3d at 945 ("[W]hether . . . [a plaintiff's] injuries flowed from the Companies' specific wartime

production for the federal government or from their more general manufacturing operations" are "*merits questions* that a federal court should decide.").

C. The Court Has Jurisdiction Because Plaintiff's Claims Arise on Federal Enclaves

"Federal courts have federal question jurisdiction over tort claims that arise on 'federal enclaves.'" *Durham*, 445 F.3d at 1250.[17] "A suit based on events occurring in a federal enclave . . . necessarily arise[s] under federal law and implicates federal question jurisdiction under § 1331." *Jones v. John Crane-Houdaille, Inc.*, 2012 WL 1197391, at *1 (D. Md. Apr. 6, 2012); *see also Totah v. Bies*, 2011 WL 1324471, at *2 (N.D. Cal. Apr. 6, 2011) (denying motion to remand where defamation claim arose on a federal enclave).

Plaintiff does not deny that a portion of Defendants' production and refining of oil and gas occurred on federal enclaves. Nor could it. Some Defendants maintained production operations on federal enclaves and sold fossil fuels on military bases and other federal enclaves. For example, as discussed above, Chevron's predecessor Standard Oil operated Elk Hills Naval Petroleum Reserve,

[17] Plaintiff's assertion that removal based on enclave jurisdiction fails because Defendants identify only one enclave in Hawai'i, Mot. 54, misapprehends Defendants' arguments. Plaintiff's claims are traceable to conduct on multiple federal enclaves, not just Red Hill. Moreover, in contrast with *Ching v. Aila*, 2014 WL 4216051 (D. Haw. Aug. 22, 2014), Plaintiff's claims raise questions of federal law, and arise out of conduct that occurred on federal enclaves, such that concurrent jurisdiction does not overcome enclave jurisdiction.

which was a federal enclave, for most of the twentieth century. *See* NOR Decl. Ex. 19, Miyagi Decl. Exs. 23–24 (California statutes relating to federal jurisdiction); *Azhocar v. Coastal Marine Servs., Inc.*, 2013 WL 2177784, at *1 (S.D. Cal. May 20, 2013) ("[Federal] enclaves include . . . military bases [and] federal facilities." (citation omitted)). Jurisdiction lies where, as here, at least "*some of the events* alleged . . . occurred on a federal enclave." *Corley v. Long-Lewis, Inc.*, 688 F. Supp. 2d 1315, 1336 (N.D. Ala. 2010) (emphasis added).

Plaintiff argues that only the place of *injury* determines federal enclave jurisdiction, Mot. at 40, and that "the Complaint expressly disclaims injuries to any federal property within the County," Mot. at 47.[18] But this approach would lead to the absurd result that federal jurisdiction would not exist over claims where all relevant conduct occurred on a federal enclave, but plaintiff happened to be outside the enclave at the time of injury. Courts have rejected that strained interpretation. *See Corley*, 688 F. Supp. 2d at 1336 ("[Plaintiff] cannot avoid [] federal enclave jurisdiction simply by stating that, while he is suing for [exposure] to asbestos, he is leaving out those times he was exposed while working in a federal enclave.").

[18] Plaintiff misinterprets Defendants' argument that such disclaimer fails. Mot. at 49. Defendants do not contest Plaintiff's disclaimer of injuries to federal property. But this disclaimer is insufficient to avoid removal because it does not, and cannot, disclaim that at least a portion of Defendants' oil and gas activities occurred on federal enclaves. Here, even if some portion of the alleged *injury* is to non-federal property, relevant *conduct* occurred on federal enclaves.

D. Plaintiff's "Misrepresentation" Allegations Are Irrelevant to the Court's Jurisdiction and Based on Demonstrably False Premises

Plaintiff's claims and alleged injuries are based upon a causal theory that necessarily depends on the cumulative production, sale, and use of oil and gas that release greenhouse gases.[19] Plaintiff's suggestion that this Court focus solely on its misrepresentation allegations requires the Court to ignore reality: there can be no liability under Plaintiff's theory but for Defendants' production and sale of fossil fuels. Plaintiff's efforts to cast its claims as limited to concealment and misrepresentations are therefore irrelevant to the removal analysis.

In any event, Plaintiff's attempt to avoid federal jurisdiction through

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[19] To the extent that Plaintiff's claims rely on alleged misrepresentations, they are also removable. The Supreme Court has made clear that where nominally state-law tort claims target speech on matters of public concern, the First Amendment imposes affirmative substantive elements into the plaintiff's cause of action, such as factual falsity and malice, and proof of causation of actual damages. *See, e.g.*, *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 774–75 (1986); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964). These are not "defenses," but rather constitutionally required elements on which the plaintiff bears the burden of proof—by clear and convincing evidence—as a matter of federal law. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53, 56 (1988). Indeed, the freedom of speech is "most seriously implicated . . . in cases involving disfavored speech on important political or social issues," chief among which in the contemporary context is the question of "[c]limate change," which "has staked a place at the very center of this Nation's public discourse." *Nat'l Review, Inc. v. Mann*, 140 S. Ct. 344, 348 (2019) (Alito, J., dissenting from denial of certiorari). As such, Plaintiff's claims contain necessary "federal issue[s], actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities," making removal appropriate. *Grable*, 545 U.S. at 314, NOR ¶¶ 139–49.

allegations of concealment and misrepresentation ignores the vast public record establishing that the risks of climate change, including its potential impacts on Maui, have been widely known and discussed publicly for decades.[20] Plaintiff falsely claims that oil companies knew something that the Plaintiff and the public did not "[f]or more than half a century": that the use of oil and gas could result in changes to the climate, and that oil companies "conceal[ed] dangers posed by their fossil-fuel products." Mot. at 4. The voluminous public record reflecting understanding about climate change demonstrates that these claims are implausible.

The potential link between fossil fuel use and climate change was publicly reported by the early 1950s. NOR ¶ 157; NOR Decl. Exs. 11, 12, 70, 73. *Local Hawai'i media* reported on the link between carbon dioxide emissions and climate change at least as early as 1955. *See, e.g.*, NOR ¶ 158; NOR Decl. Ex. 14 (*Warming up the World*, The Honolulu Advertiser, A4 (Sept. 29, 1955)) ("[T]he carbon dioxide content in the atmosphere is increasing, and this in turn ***may well have a 'greenhouse' effect*** on the temperature of the air around us."); *id.* Ex. 15 (*Carbon Dioxide May Vary Climate*, The Honolulu Advertiser, A2 (July 16, 1956)) ("It has been estimated that during the next 50 years industrial burning of coal, oil and gas

[20] Plaintiff attacks Defendants' position as "premature and misguided" arguments on the merits. Mot. at 57. However, Plaintiff argues repeatedly that removal is improper because Plaintiff's claims depend on an alleged campaign of deception. Defendants' arguments showing that Plaintiff's core allegations are implausible and meant to avoid federal jurisdiction are therefore appropriately raised here.

will produce 1,700 billion tons of new carbon dioxide.").

National and Hawai'i newspapers similarly reported the potential risks of sea level rise from global warming as early as the 1950s. *See, e.g.*, NOR ¶ 159; NOR Decl. Ex. 71 ("Accelerated burning of coal and oil by man may be increasing the carbon dioxide content in the atmosphere and thereby melting snow in the polar region. . . . Over a few generations, . . . ***a melting polar region could also raise sea level all over the world 200 to 250 feet*** and change the earth's gravity."); *see also* NOR Decl. Ex. 16; Miyagi Decl. Ex. 25. In short, the risks of climate change—and its potential effects on Hawai'i—were discussed and reported for decades.

The sheer volume of publications demonstrates the falsity of Plaintiff's claims of "concealment." Searches for the phrases "greenhouse effect" or "global warming" or "climate change" in the Newspapers.com archives for Hawai'i papers between 1957 and 2000 alone identify more than 18,000 results. The same search in all U.S. newspapers covered by Newspapers.com yields more than 350,000 articles. The assertion that Defendants somehow prevented Plaintiff or the public from learning about potential climate change risks linked to fossil fuels use is belied by, and implausible, given the long and substantial public discussion of these issues.

The U.S. government has been aware of a potential link between fossil fuel use and climate change since the 1950s. *See Juliana v. United States*, 947 F.3d 1159, 1164 (9th Cir. 2020) ("A substantial evidentiary record documents that the federal

government has long promoted fossil fuel use despite knowing that it can cause catastrophic climate change, and that failure to change existing policy may hasten an environmental apocalypse."); NOR ¶¶ 160–63. Hawai'i itself studied and reported the link between fossil fuels, climate change, and sea level rise *more than 35 years ago*—issuing a report in 1985 on the "Effects on Hawaii of a Worldwide Rise in Sea Level Induced by the 'Greenhouse Effect,'" which stated that "[t]he situation continues to be aggravated by the use of fossil fuels for energy generation." NOR ¶ 165; NOR Decl. Ex. 74, at 4. Nevertheless, Hawai'i has maintained its view that oil and gas are "essential to the health, welfare, and safety of the people of Hawaii." Haw. Rev. Stat. Ann. § 125C-1 (1975).

Plaintiff's claims are based on demonstrably implausible premises—the scientific and policy debate about the causes, timing, impacts, and responses to climate change was taking place through thousands of newspaper articles, scientific publications, and government reports. Plaintiff's assertion that the scientific community and the public were somehow deceived simply ignores this vast public record, and should be rejected as implausible.

V. CONCLUSION

For the foregoing reasons, and those set forth in Defendants' Notice of Removal, the Court should deny Plaintiff's Motion to Remand. Defendants respectfully request oral argument.

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