UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

STATE OF MINNESOTA, BY ITS ATTORNEY GENERAL, KEITH ELLISON, Plaintiff, v. AMERICAN PETROLEUM INSTITUTE, EXXON MOBIL CORPORATION, EXXONMOBIL OIL CORPORATION, KOCH INDUSTRIES, INC., FLINT HILLS RESOURCES LP, and FLINT HILLS RESOURCES PINE BEND, Defendants.	Case No. 20-cv-1636-JRT-HB

DEFENDANTS' RESPONSE TO PLAINTIFF'S NOTICE OF SUPPLEMENTAL AUTHORITY

Defendants write in response to the Attorney General's notice regarding *City & County of Honolulu* v. *Sunoco LP* and *County of Maui* v. *Chevron U.S.A. Inc.* ("*Hawai'i*"), Case Nos. 20-cv-00163 & 20-cv-00470, 2021 WL 531237 (D. Haw. Feb. 12, 2021).[1] Contrary to the Attorney General's contention, the non-binding decision in *Hawai'i* has little bearing on the motion to remand pending in this action.

First, *Hawai'i*'s cursory rejection of federal common law[2] and *Grable* jurisdiction—Defendants' first two bases for removal in this action—was predicated entirely on the Ninth Circuit's recent decision in *City of Oakland* v. *BP PLC*, 969 F.3d 895 (9th Cir. 2020), *pet. for cert. filed*, No. 20-1089 (U.S. Jan. 8, 2021). *See Hawai'i*, 2021 WL 531237, at *2 n.8 ("[T]he Court does not discuss [the federal common law and *Grable* bases for removal] beyond rejecting them in light of binding Ninth Circuit authority" in *City of Oakland*.). As Defendants have explained, *see, e.g.*, Remand Opp'n Br. 31, 41 n.27, *City of Oakland* was incorrectly decided, and defendants' certiorari petition is currently pending.

Second, in refusing to exercise federal officer jurisdiction, *Hawai'i* erroneously demanded a "causal connection" between plaintiffs' claims and defendants' activities under federal direction. *See* 2021 WL 531237, at *6-7. Although Section 1442 previously required a causal nexus by

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[1] By filing this response, Defendants do not waive any right, defense, affirmative defense, or objection, including any challenges to personal jurisdiction over Defendants.

[2] It is notable that yesterday, Sher Edling LLP, counsel for the Attorney General in this case, filed at least its seventeenth lawsuit seeking relief for alleged climate change injuries on behalf of governmental entities in state court (this time on behalf of the City of Annapolis). The proliferation of such cases in state courts (over twenty such cases in total) further underscores the need for a uniform standard under federal common law, rather than disparate state law, to the Attorney General's claims. *Am. Elec. Power Co.* v. *Connecticut*, 564 U.S. 410, 422 (2011) ("[B]orrowing the law of a particular State would be inappropriate" to govern plaintiffs' claims based on carbon dioxide emissions and climate change.).

conditioning removal on a defendant being sued "in an official capacity *for* any act under color of such office," Congress added "*or relating to*" to the statutory text in the Removal Clarification Act of 2011. 28 U.S.C. § 1442(a)(1) (emphasis added). As this Court and others have held, Congress thereby "broadened federal officer removal to actions, not just *causally* connected, but alternatively *connected* or *associated*, with acts under color of federal office." *Latiolais* v. *Huntington Ingalls, Inc.*, 951 F.3d 286, 292 (5th Cir. 2020) (en banc); *accord Graves* v. *3M Co.*, 447 F. Supp. 3d 908, 913 (D. Minn. 2020) (Tunheim, C.J.), *appeal docketed*, No. 20-1635 (8th Cir. Mar. 26, 2020).[3] Moreover, *Hawai'i* "assume[d] Defendants acted under a federal officer" by supplying specialized fuels for the federal government, including several of the federal-officer arguments Defendants present here. 2021 WL 531237, at *5.

Third, in rejecting federal enclave jurisdiction, *Hawai'i* emphasized plaintiffs' "disavow[al of] relief for injuries to federal property." *Id.* at *8. The Attorney General cannot evade jurisdiction with such a disclaimer, as it offers no method to isolate these injuries. Remand Tr. 10:1-3 (Counsel for the Attorney General: "[W]e haven't included in the complaint how to parse out the damage that has flowed from [Defendants'] unlawful conduct."). Nor could it: "[T]here is no realistic possibility of tracing any particular alleged effect of global warming to any particular emissions by any specific person, entity, [or] group at any particular point in time." *Native Village of Kivalina* v. *ExxonMobil Corp.*, 663 F. Supp. 2d 863, 880 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012); *see* Remand Tr. 10:11-14 (Counsel for the Attorney General: "[G]reenhouse gases mix in the atmosphere. Climate change is a global phenomenon, and so you can't separate out

[3] *Baker* v. *Atl. Richfield Co.*, 962 F.3d 937, 943-44 (6th Cir. 2020); *Sawyer* v. *Foster Wheeler LLC*, 860 F.3d 249, 258 (4th Cir. 2017); *In re Commonwealth's Motion to Appoint Counsel*, 790 F.3d 457, 470-72 (3d Cir. 2015).

necessarily how much climate change has worsened in Minnesota versus Wisconsin, for example.").

Fourth, *Hawai'i*'s OCSLA holding rests on its conclusion that plaintiffs targeted defendants' concealment of the risk of fossil fuels, not the production of fossil fuels themselves. 2021 WL 531237, at *1. That cannot be said of this action, which is an overt vehicle for limiting and ultimately ending Defendants' production and sale of fossil fuels in favor of renewables. *See* Remand Opp'n Br. 6-11. Moreover, even if this action only challenged Defendants' alleged misrepresentations about their fossil fuel production, that production necessarily includes Defendants' operations on the Outer Continental Shelf, warranting OCSLA jurisdiction.

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Respectfully submitted,

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