No. 21-15313

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY AND COUNTY OF HONOLULU,

Plaintiff-Appellee,

v.

SUNOCO LP, et al.,

Defendants-Appellants.

Appeal From The United States District Court for the District of Hawaii,
No. 20-cv-00163

The Honorable Derrick K. Watson

EMERGENCY MOTION UNDER CIRCUIT RULE 27-3
TO STAY THE DISTRICT COURT'S REMAND ORDER

RELIEF NEEDED BY MONDAY, MARCH 15, 2021

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CIRCUIT RULE 27-3 CERTIFICATE

9th Circuit Case No. 21-15313

City and County of Honolulu v. Sunoco LP, et al.

I certify the following:

1. The relief requested in the emergency motion that accompanies this certificate is for a stay of the district court's order remanding this case to state court pending disposition of Applicants' appeal.

2. Relief is needed no later than: Monday, March 15, 2021.

3. If relief is not granted within the requested time, the district court clerk will mail certified copies of the remand order to the state court. *See City and County of Honolulu v. Sunoco LP*, No. 20-cv-163, Dkt. 141 at 7 (D. Haw.) ("Because the Court recognizes that the Ninth Circuit has granted a motion to stay issuance of its mandate affirming a remand order in another climate case similar to this one, the Court grants a 'temporary' stay of ten days, or until the close of business on March 15, 2021, to permit Defendants to seek from the Ninth Circuit the relief that the Court denies here. If no instruction emanates from the Ninth Circuit with respect to a stay by this date, the Court will instruct the Clerk of Court to disseminate forthwith its February 12, 2021 Order granting remand."). At that point, "the State Court may thereupon proceed with such case." 28 U.S.C. § 1447(c). This will subject the parties to simultaneous proceedings along at least two tracks—they will

brief and argue Applicants' appeals from the remand order in this Court, and they will also litigate the merits of Plaintiff's claims in state court.

4. Applicants could not have filed this motion earlier because the district court did not issue its order denying their motion to stay execution of the remand order until Friday, March 5, 2021.

5. Applicants requested this relief in the district court on February 18, 2021. The district court denied the motion on March 5, 2021, but ordered the clerk to refrain from transmitting a certified copy of the remand order to the state court until March 15 so that Defendants could pursue relief in this Court.

6. Applicants have notified the Ninth Circuit court staff via email about the filing of this motion.

7. Applicants have served notice of this emergency motion by email and/or through the Court's CM/ECF system on March 8, 2021, on the below counsel for Plaintiff. Applicants informed Plaintiff of its intent to file this emergency motion and requested that Plaintiff provide its position on this emergency motion on Sunday, March 7, 2021. Plaintiff has indicated that it will oppose Applicants' requested relief.

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8. Counsel for Defendants, listed below, have consented to the filing of this emergency motion.

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I declare under penalty of perjury that the foregoing is true.

Executed March 8, 2021

/s/ Theodore J. Boutrous, Jr.
Theodore J. Boutrous, Jr.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Defendants submit the following statement:

Chevron Corporation is a publicly traded company (NYSE: CVX). It does not have a parent corporation, and no publicly held company owns more than 10% of its stock.

Chevron U.S.A. Inc. is an indirect subsidiary of Chevron Corporation. No publicly traded corporation owns 10% or more of Chevron U.S.A.'s stock.

Exxon Mobil Corporation is a publicly traded corporation and has no corporate parent. No publicly held corporation owns 10% or more of Exxon Mobil Corporation's stock.

ExxonMobil Oil Corporation's corporate parent is Mobil Corporation, which owns 100% of ExxonMobil Oil Corporation's stock. Mobil Corporation, in turn, is wholly owned by Exxon Mobil Corporation.

ConocoPhillips is a publicly traded corporation incorporated under the laws of Delaware with its principal place of business in Texas. It does not have a parent corporation and no publicly held company owns more than 10% of its stock.

ConocoPhillips Company is wholly owned by ConocoPhillips.

Phillips 66 is a publicly traded company. It does not have a parent corporation and no publicly held company owns 10% or more of its stock.

Phillips 66 Company is wholly owned by Phillips 66.

Sunoco LP is a publicly traded master limited partnership, currently listed on the New York Stock Exchange. Sunoco LP and its general partner, Sunoco GP LLC, are subsidiaries of Energy Transfer Operating, L.P. and Energy Transfer LP, which are publicly traded master limited partnerships listed on the New York Stock Exchange. No other publicly held corporation owns 10% or more of Sunoco LP's stock.

Aloha Petroleum, Ltd. is a wholly owned subsidiary of Sunoco LP. No other publicly held corporation owns 10% or more of its stock.

Aloha Petroleum LLC is a wholly owned subsidiary of Sunoco LP. No other publicly held corporation owns 10% or more of its stock.

Royal Dutch Shell plc is a publicly held company organized under the laws of the United Kingdom. Royal Dutch Shell plc does not have any parent corporations, and no publicly traded company owns 10% or more of Royal Dutch Shell plc's stock.

Shell Oil Company is a wholly owned subsidiary of Shell Petroleum Inc., whose ultimate corporate parent is Royal Dutch Shell plc. No other publicly held company owns 10% or more of the stock of Shell Oil Company.

Shell Oil Products Company LLC is a wholly owned subsidiary of Shell Oil Company. No other publicly held company owns 10% or more of the stock of Shell Oil Products Company LLC.

BP plc is a publicly traded corporation organized under the laws of England and Wales. No publicly traded corporation owns 10% or more of its stock.

BP America Inc. is a wholly owned indirect subsidiary of BP plc.

BHP Group Limited is a publicly traded company. It does not have a parent corporation, and no publicly held company owns more than 10% of its stock.

BHP Group plc is a publicly traded company. It does not have a parent corporation, and no publicly held company owns more than 10% of its stock.

BHP Hawaii Inc. is a wholly but indirectly owned subsidiary of BHP Group Limited. No other publicly held company owns more than 10% of its stock.

Marathon Petroleum Corp. is a publicly traded company (NYSE: MPC). It does not have a parent corporation and no publicly held company owns more than 10% of its stock.

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INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 8, Defendants respectfully move this Court for a stay of the district court's remand order pending appeal. A stay is warranted to preserve the meaningfulness of Defendants' appellate rights and spare the parties and the state court from what could be a substantial amount of unnecessary and ultimately futile litigation. *See* Fed. R. App. P. 8(a)(2)(A)(ii). Defendants' appeal presents serious legal issues, including questions currently pending before the Supreme Court and questions of first impression in this Court. Absent a stay, Defendants face irreparable harm, whereas a stay would cause Plaintiff no prejudice and, in fact, would serve the public interest and the interests of judicial economy.[1] And notably, this Court has already granted a stay pending the Supreme Court's disposition of a petition for a writ of certiorari in a case involving similar issues to those here. *See County of San Mateo v. Chevron Corp.*, No. 18-15499, Dkt. 240 (9th Cir.)

STATEMENT OF FACTS

The City & County of Honolulu ("Plaintiff") filed a Complaint against Defendants in Hawai'i state court on March 9, 2020. Alleging that Defendants' production and sale of oil and natural gas have contributed to harms related to global

[1] This motion is submitted subject to and without waiver of any defense or objection, including personal jurisdiction, insufficient process, or insufficient service of process.

climate change, including rising sea levels and extreme weather, the Complaint asserts claims under Hawai‘i state law for public and private nuisance, strict liability failure to warn, negligent failure to warn, and trespass. Plaintiff seeks, among other things, compensatory damages and abatement.

Defendants timely removed the case to the federal district court for the District of Hawaii. *See* Dkt. 1. The notice of removal asserted that Plaintiff's claims are removable because (among other things) they: (1) arise out of conduct undertaken at the direction of federal officers, and thus are removable under the federal officer removal statute, 28 U.S.C. § 1442; (2) arise out of conduct undertaken on the Outer Continental Shelf ("OCS"), and thus are removable under the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1349; and (3) are based on injuries to or conduct on federal enclaves. *See id.*

Over the past four years, approximately 22 other state and municipal entities have filed similar actions in courts across the country. This Court considered similar claims in *County of San Mateo v. Chevron Corp.*, 960 F.3d 586 (9th Cir. 2020), and *City of Oakland v. Chevron Corp.*, 968 F.3d 895 (9th Cir. 2020), but neither case resolved the OCSLA or federal enclave grounds for jurisdiction at issue here. In addition, the federal officer removal questions presented here differ materially from those resolved in *San Mateo* because the record evidence and allegations supporting federal jurisdiction in this case directly address and respond to the jurisdictional

issues that the *San Mateo* court highlighted in rendering its decision, and they raise additional bases supporting federal officer removal not considered in *San Mateo* or any other court of appeals. Petitions for writs of certiorari in both *San Mateo* and *Oakland* are currently pending before the Supreme Court.[2]

On February 12, 2021, the District of Hawaii remanded this case to state court. Dkt. 128 ("Ex. A").[3] In rejecting federal officer removal, the district court considered itself bound by *San Mateo*, discounting the substantial new evidence raised by Defendants here. *Id.* at 14–15. The district court also rejected Defendants' OCSLA and federal enclave grounds for removal based on its conclusion that Plaintiff's claims do not target Defendants' oil-and-gas production, but rather their "alleged failure to warn" and "disseminat[ion] of misleading information," which

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[2] Defendants also removed on the grounds that Plaintiff's claims are necessarily governed by federal common law, involve a substantial and necessary federal element under *Grable*, and are completely preempted. Although this Court rejected similar arguments regarding these grounds in *Oakland*, Defendants raised them to preserve them for appellate review. *See* Ex. A at 6 n.8. The *Oakland* petition directly presents the question whether climate change–related nuisance claims fall within federal courts' federal question jurisdiction because they necessarily arise under federal common law. *See* Petition for Writ of Certiorari at i, *Chevron Corp. v. City of Oakland* (No. 20-1089).

[3] This order also remanded an action brought by the County of Maui asserting similar claims against the same Defendants. *See County of Maui v. Chevron USA Inc., et al.*, No. 20-cv-470, Dkt. 99 (D. Haw.), *appeal filed*, No. 21-15318 (9th Cir.). Defendants have filed an emergency motion to stay the remand order in that case, as well.

purportedly do not involve "an act on the outer Continental Shelf" and "did not occur on a federal enclave." *Id.* at 8, 21.

Defendants filed a motion to stay execution of the remand order in the district court. Dkt. 133. On March 5, 2021, the district court denied Defendants' motion but instructed the clerk to delay transmission of the remand orders until March 15, 2021 to permit Defendants to seek a stay from this Court. Dkt. 141.

STANDARD OF REVIEW

In deciding whether to enter a stay, courts consider the following factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Leiva-Perez v. Holder*, 640 F.3d 962, 964 (9th Cir. 2011) (per curiam) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)). To establish that they are "likely to succeed on the merits," Defendants need show only that their appeals raise "serious legal questions"; they "need not demonstrate that it is more likely than not that they will win on the merits." *Id.* at 966–68.

"The first two factors . . . are the most critical," *Nken*, 556 U.S. at 434, and this Court requires a moving party to demonstrate that irreparable harm is "probable if the stay is not granted," *Leiva-Perez*, 640 F.3d at 968. But the likelihood of

success, substantial injury, and public interest factors are balanced using a "sliding scale" approach, such that "'a stronger showing of one element may offset a weaker showing of another.'" *Id.* at 964 (quoting *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011)). Indeed, even if Defendants fail to show a strong likelihood of success on the merits, they "'may be entitled to prevail if [they] can demonstrate a substantial case on the merits and the second and fourth factors [irreparable injury and public interest] militate in [their] favor.'" *Sierra Club v. Trump*, 929 F.3d 670, 718 (9th Cir. 2019) (quoting *Nat'l Res. Def. Council, Inc. v. Winter*, 502 F.3d 859, 863 (9th Cir. 2007)).

ARGUMENT

A. Defendants' Appeal Raises Serious Legal Questions About Federal Jurisdiction Over Climate Change–Related Nuisance Claims.

Defendants' appeal raises serious legal questions regarding federal courts' subject matter jurisdiction over what Plaintiff has labeled as state-law claims alleging harms related to climate change—an issue that has arisen in each of the nearly two dozen similar cases that have been filed in the past four years. The Supreme Court has already heard argument in one such case, with a decision expected by June. *See BP p.l.c. v. Mayor & City Council of Baltimore*, No. 19-1189 (U.S.). Certiorari petitions are pending in four other cases, including *San Mateo*, in which this Court has already stayed remand pending disposition by the Supreme Court. *See Chevron Corp. v. San Mateo County*, No. 20-884 (U.S.); *Chevron Corp.*

v. City of Oakland, No. 20-1089 (U.S.); *Shell Oil Prods. Co. v. Rhode Island*, No. 20-900 (U.S.); *Suncor Energy (U.S.A.) Inc. v. Board of County Commissioners of Boulder County*, No. 20-783 (U.S.). This case similarly presents substantial issues of law, including new issues that no appellate court has yet considered. If a stay is granted, this Court will be able to address those issues before this case returns to state court, thereby avoiding the risk of unnecessary litigation and inconsistent outcomes that may otherwise ensue.

1. The District Court's Remand Order Is Appealable as of Right.

Defendants have a clear right to appeal the remand order because they removed this case under the federal officer removal statute. While normally "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal," an "order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title *shall be reviewable* by appeal or otherwise." 28 U.S.C. § 1447(d) (emphasis added).

Defendants maintain that this Court has appellate jurisdiction to consider all bases for removal advanced by the removing parties. The plain language of 28 U.S.C. § 1447(d) authorizes review of the *order* remanding a case removed under Section 1442, not a portion of the order. 28 U.S.C. § 1447(d) ("An *order* remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an *order* remanding a case to the State court from which it

was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise.") (emphases added). As the Seventh Circuit held in a thorough and well-reasoned opinion based on the plain language of Section 1447(d), "[t]o say that a district court's 'order' is reviewable is to allow appellate review of the *whole* order, not just of particular issues or reasons." *Lu Junhong v. Boeing Co.*, 792 F.3d 805, 811 (7th Cir. 2015). Although this Court held otherwise in *San Mateo*, 960 F.3d at 598 (citing *Patel v. Del Taco, Inc.*, 446 F.3d 996 (9th Cir. 2006)), the Supreme Court agreed to resolve the conflict in *BP p.l.c. v. Mayor & City Council of Baltimore*, No. 19-1189 (U.S.).

There is good reason to believe that the Supreme Court will agree with the Seventh Circuit that appellate jurisdiction lies over the entire remand order. Indeed, this Court itself suggested that the Seventh Circuit may have adopted a better reading of the statute than the Ninth Circuit's *Patel* decision: "Were we writing on a clean slate, we might conclude that *Lu Junhong* provides a more persuasive interpretation of § 1447(d) than *Patel*. Precedents, however, do not cease to be authoritative merely because counsel in a later case advances new arguments. Therefore, we remain bound by *Patel* until abrogated by an intervening higher authority." *San Mateo*, 960 F.3d at 598–99.

The Supreme Court heard argument on January 19, 2021, and a decision is expected by the end of June. The outcome could have profound implications for this

Court's review of the district court's remand order because it could allow this Court to resolve the propriety of removing climate change–related claims under OCSLA and federal enclave jurisdiction, which no federal court of appeals has yet considered.[4]

2. Defendants' Appeal Presents Several Compelling Grounds for Federal Jurisdiction, Which This Court Will Be Able to Consider Anew.

Regardless of the outcome of the *Baltimore* case, Defendants have a substantial likelihood of success on the merits because federal officer removal rests on a different and more robust factual record here than in any of the cases that have previously considered removal of climate change–related claims. And if the Supreme Court does adopt the Seventh Circuit's interpretation of Section 1447(d), Defendants' appeal will also present several grounds for removal that no federal appellate court has yet considered—including OCSLA and federal enclave jurisdiction.

First, Defendants' appeal presents a substantial question regarding removal under the federal officer removal statute. In denying removal on this ground, the district court concluded that *San Mateo* precluded the exercise of federal officer

[4] If the Supreme Court in *Baltimore* holds that appellate jurisdiction lies over the entire remand order, it likely will remand *San Mateo* to this Court to consider the other grounds for removal at issue in that case—including OCSLA and federal enclave jurisdiction. Because those same grounds are at issue here, a stay in this case would ensure that these like cases proceed in a like manner.

removal jurisdiction even though Defendants have presented substantial new evidence that was not before this Court in *San Mateo*. *See, e.g.*, Ex. A at 14, 16. That was erroneous, and there is a reasonable likelihood that *this* Court will find this new evidence determinative, because it fills the evidentiary gaps that this Court found lacking and dispositive in *San Mateo*.

The federal officer removal statute authorizes removal where "(1) [defendant] is a 'person' within the meaning of the statute, (2) a causal nexus exists between the plaintiffs' claims and the actions . . . [taken] pursuant to a federal officer's direction, and (3) it has a 'colorable' federal defense to plaintiffs' claims." *Leite v. Crane Co.*, 749 F.3d 1117, 1120 (9th Cir. 2014). In *San Mateo*, this Court held that defendants did not satisfy the second prong because there was insufficient evidence that defendants acted "pursuant to a federal officer's direction" by carrying out a "basic governmental task" or acting as the government's "agent" in their operation of the Elk Hills Reserve or under OCS leases. 960 F.3d at 602–03. The new evidence presented by Defendants in this action goes directly to those matters, including evidence establishing that a Chevron predecessor acted "as the Navy's 'agent'" in operating the Elk Hills Reserve, and that Defendants' OCSLA leases "fulfill basic governmental duties" that the federal government would otherwise have had to perform. *Id.* For example:

- Defendant Chevron's predecessor, Standard Oil, acted under federal officers by operating the Elk Hills Reserve under the control of the U.S.

Navy. New evidence includes a different contract not presented in *San Mateo* that shows, among other things, that Standard Oil was "in the employ of the Navy Department and [was] responsible to the Secretary thereof"; and

- Defendants acted under federal officers in performing operations on the OCS to fulfill basic government duties that the federal government would otherwise have to perform itself. In fact, in response to the OPEC oil embargo, the federal government considered creating a *national* oil company to facilitate the production of oil and gas on the OCS, but ultimately decided to use private companies to accomplish this objective.

The new evidence also demonstrates that Defendants "acted under" federal officers in additional ways that were not considered in *San Mateo*. Among other things, Defendants' new evidence demonstrates that:

- Defendants acted under federal officers by producing and supplying highly specialized, non-commercial grade fuels for the military that continue to be the "lifeblood of the full range of Department of Defense (DoD) capabilities";

- The federal government controlled Defendants' production and supply activities during World War II and the Korean War, including "under contracts" and "as agent[s]." Indeed, as senior government officials have explained: "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"; and

- Defendants acted under federal officers by supplying oil for and managing the Strategic Petroleum Reserve, including in the event that the President calls for an emergency drawdown, which was done, for example, in response to Hurricane Katrina in 2005 and disruptions to the oil supply from Libya in 2011.

This new evidence includes expert declarations from two professors of history, which explain in detail how Defendants acted under the direction, guidance,

supervision, and control of federal officers. As Defendants' evidence shows, all of these are "'basic governmental tasks' that 'the Government itself would have had to perform' if it had not contracted with a private firm." *San Mateo*, 960 F.3d at 599 (quoting *Watson v. Philip Morris Cos., Inc.*, 551 U.S. 142, 153–54 (2007)). And none of this evidence was before this Court or any other appellate court that has ruled on federal officer removal in similar circumstances.

Whether there is a "causal nexus" between the above conduct and Plaintiff's claims also presents a substantial question. While this Court in *San Mateo* did not have occasion to reach this question, *see* 960 F.3d at 603, the district court here "assume[d] that Defendants acted under a federal officer" in conducting certain activities but concluded there was not a causal nexus between Defendants' conduct and Plaintiff's claims because it believed that Plaintiff's claims turn "*not* [on] [Defendants'] 'fossil fuel production activities,' but [on] their alleged *failure to warn* about the hazards of using their fossil fuel products and *disseminating* misleading information about the same," Ex. A at 8, 17.

The district court recognized that, "at first-blush, these cases, which allegedly involve 'Defendants' exacerbation of global warming . . . ,' may seem to include subject matter appropriate for this federal forum." *Id*. at 2. The district court's reasoning ultimately rejecting this initial interpretation is erroneous. Plaintiff's Complaint alleges that greenhouse gas emissions caused by billions of consumers'

use of fossil fuels—which were produced, in part, at the federal government's direction—allegedly resulted in Plaintiff's purported harms. Indeed, there would be no alleged harm, and therefore no case, without the emissions allegedly caused (in part) by Defendants' oil-and-gas production. At the very least, therefore, Defendants' position that Plaintiff's claimed injury necessarily relies on Defendants' production and distribution of oil and gas is a reasonable one. And as the Supreme Court and the Seventh Circuit have made clear, Defendants' theory of the case must be credited for purposes of federal officer removal. *See Jefferson Cnty., Ala. v. Acker*, 527 U.S. 423, 432–33 (1999) ("[W]e credit the [defendants]' theory of the case for purposes of . . . our jurisdictional inquiry."); *Baker v. Atlantic Richfield Co.*, 962 F.3d 937, 941, 947 (7th Cir. 2020) ("Both the [plaintiffs] and the [defendants] have reasonable theories of this case. Our role at this stage of the litigation is to credit only the [defendants]' theory" so long as the theory is "plausible.").

Moreover, the district court erred in rejecting Defendants' theory of the case on the ground that production of oil and gas under federal direction or control is not "the very act" that formed the basis of Plaintiff's claims. *See* Ex. A at 17–18 ("Defendants' theory of the case is not a theory for *this* case, like the one in *Leite*."). That determination conflicts with the decisions of several appellate courts, which hold that "any civil action that is *connected or associated with* an act under color of federal office may be removed." *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286,

296 (5th Cir. 2020) (en banc); *see also, e.g.*, *In re Commonwealth's Motion to Appoint Counsel Against or Directed to Defender Ass'n of Philadelphia*, 790 F.3d 457, 471 (3d Cir. 2015).

Second, Defendants have a strong argument that OCSLA confers federal jurisdiction over this action. OCSLA gives federal district courts original jurisdiction over actions that "aris[e] out of, or in connection with . . . any operation conducted on the Outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the [OCS]." 43 U.S.C. § 1349(b)(1). Plaintiff's claims encompass all of Defendants' worldwide "exploration, development, extraction . . . and . . . production" of oil and natural gas. Dkt. 1-2 at ¶ 19a, *see also id.* at ¶¶ 20g, 21a, 23b, 24a, 26a. This necessarily encompasses activities by Defendants on the OCS, and therefore falls within the "broad . . . jurisdictional grant of section 1349." *EP Operating Ltd. P'ship v. Placid Oil Co.*, 26 F.3d 563, 569 (5th Cir. 1994).

While the district court found that OCSLA jurisdiction does not exist because Plaintiffs' claims do not "arise out of, or in connection with" Defendants' activities on the OCS, it acknowledged that "the Ninth Circuit has not clarified the scope of the jurisdictional reach of the OCSLA." Ex. A at 7–8. And it is well established that a question of first impression is sufficient to justify a stay. *See, e.g.*, *Delisle v. Speedy Cash*, 2019 WL 7755931, at *2 (S.D. Cal. Oct. 3, 2019) ("A 'substantial

case' exists where the applicant's claims raise 'serious legal questions,' i.e., 'issue[s] of first impression' or issues causing a split in legal authority."); *In re Pacific Fertility Ctr. Litig.*, 2019 WL 2635539, at *3 (N.D. Cal. June 27, 2019) ("Courts . . . have found that the following constitute serious legal issues: issues of first impression . . . .").

Third, the propriety of federal enclave jurisdiction presents a serious legal question. *See Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1250 (9th Cir. 2006) ("Federal courts have federal question jurisdiction over tort claims that arise on 'federal enclaves.'"). Given that Plaintiff's claims encompass all of Defendants' production and sales activities, and that its alleged injuries arise from global climate change, Plaintiff necessarily complains about production and emissions on federal enclaves, including the federal government's emissions from jet fuel supplied by Defendants on U.S. military bases. Plaintiff does not dispute that Defendants engage in substantial oil-and-gas production on federal enclaves, but the district court concluded that this production is irrelevant because "the relevant conduct here" is "the warning and disseminating of information about the hazards of fossil fuels," and "there is no dispute such conduct did not occur on a federal enclave." Ex. A at 21. As discussed above, that reading of the Complaint presents an additional serious legal question for purposes of removal jurisdiction. And while the district court observed that Plaintiff "disavow[s] relief for injuries to federal property," Ex. A at

21, this is irrelevant for jurisdictional purposes, *see Corley v. Long-Lewis, Inc.*, 688 F. Supp. 2d 1315, 1336 (N.D. Ala. 2010) (finding that jurisdiction lies where at least "some of the events alleged . . . occurred on a federal enclave").

In any event, federal enclave jurisdiction requires only that "*some of the events* alleged . . . occurred on a federal enclave." *Corley*, 688 F. Supp. 2d at 1336 (emphasis added); *see also Durham*, 445 F.3d at 1250 (finding removal proper where "some of [plaintiff's] claims arose on federal enclaves"); *Jones v. John Crane-Houdaille, Inc.*, 2012 WL 1197391, at *1 (D. Md. Apr. 6, 2012) ("A suit based on events occurring in a federal enclave . . . implicates federal question jurisdiction under § 1331."). There is no dispute that some of Defendants' alleged promotion and marketing occurred on federal enclaves.

B. Defendants Will Suffer Irreparable Harm Absent a Stay.

Once the clerk mails a certified copy of the remand order to the state courts, "the State Court may thereupon proceed with such case." 28 U.S.C. § 1447(c). Thus, absent a stay, the parties will proceed simultaneously along at least two tracks: they will brief and argue Defendants' appeal of the remand order in this Court, and, at the same time, they will litigate the merits of Plaintiff's claims in state courts. And because the remand order disposed of two *different* actions by two *different* Hawai'i municipalities, the remand will be to two *different* Hawai'i state courts.

Denying Defendants' motion could render their right to appeal hollow if the state courts issue rulings on the merits. *Cf. Providence Journal Co. v. Fed. Bureau of Investigation*, 595 F.2d 889, 890 (1st Cir. 1979) ("Meaningful review entails having the reviewing court take a fresh look at the decision of the trial court before it becomes irrevocable."); *Hiken v. Dep't of Def.*, 2012 WL 1030091, at *2 (N.D. Cal. Mar. 27, 2012) (balance of hardships tipped in favor of granting stay because right to appeal an order to disclose information "would become moot" absent a stay). Even if Defendants' appeal is expedited, resolution of that appeal will take a substantial period of time. During that time, the state courts could rule on various substantive and procedural motions, including dispositive motions in which the parties' claims and defenses are adjudicated. It is also possible that the state courts will decide discovery motions. And there is a concrete and substantial risk that these motions would be decided differently than they would be in federal court. For example, Plaintiff may argue that Hawai‘i state courts have different pleading standards or discovery rules than federal courts, raising the possibility that the outcome of these motions in state court would be different than in federal court.

There is no efficient way to un-ring that bell if the Court ultimately concludes that Defendants properly removed this action. The district court would have to wrestle with the effects of any state court rulings made while the remand order was on appeal—including by revisiting the scope of any discovery orders, determining

whether and to what extent any discovery that was improperly ordered may be clawed back or subjected to protective orders, evaluating the precedential or persuasive force of any intervening merits orders, and more. This would create a "rat's nest of comity and federalism issues" that would need to be untangled if this Court reverses. *Northrop Grumman Tech. Servs., Inc. v. Dyncorp Int'l LLC*, 2016 WL 3346349, at *4 (E.D. Va. June 16, 2016).

Moreover, Defendants are unlikely to recover much (if any) of their litigation costs from the governmental plaintiff in this case. Unrecoverable expenses constitute irreparable harm. *See Raskas v. Johnson & Johnson*, 2013 WL 1818133, at *2 (E.D. Mo. Apr. 29, 2013); *Citibank, N.A. v. Jackson*, 2017 WL 4511348, at *2 (W.D.N.C. Oct. 10, 2017) (granting motion to stay remand and noting litigation costs would be avoided); *cf. Golden Gate Rest. Ass'n v. City & Cty. of S.F.*, 512 F.3d 1112, 1125 (9th Cir. 2008) (considering "otherwise avoidable financial costs" in irreparable harm analysis).

Appropriately, "courts have been sensitive to concerns about forcing parties to litigate in two forums simultaneously when granting stays pending appeal," precisely because of the risk of inconsistent outcomes and other burdens posed by parallel litigation in state and federal courts. *Northrop Grumman*, 2016 WL 3346349, at *3; *see also Raskas*, 2013 WL 1818133, at *2 (staying remand order due to risk of "inconsistent outcomes if the state court rules on any motions while

the case is pending" on appeal); *Dalton v. Walgreen Co.*, 2013 WL 2367837, at *2 (E.D. Mo. May 29, 2013) (granting stay to guard against "potential of inconsistent outcomes if the state court rules on any motions while the appeal is pending"). Those same concerns have led numerous courts wrestling with climate change–related cases to stay remand orders pending further appeals—including this Court in *San Mateo*. *County of San Mateo v. Chevron Corp.*, No. 18-15499, Dkt. 280 (9th Cir.).

C. The Balance of Harms Tilts Sharply in Defendants' Favor.

"Where, as is the case here, the government is the opposing party," the third and fourth stay factors (*i.e.*, harm to the opposing party and the public interest) "merge" and should be considered together. *Leiva-Perez*, 640 F.3d at 970. Plaintiff will not be harmed if the Court grants Defendants' Motion; on the contrary, it will benefit from a stay. With a stay in place, Plaintiff will avoid the same risk of harm from potentially inconsistent outcomes as would impact Defendants. Similarly, a stay would conserve Plaintiff's resources—financial and otherwise—by allowing it to litigate Defendants' appeal without simultaneous state-court proceedings. It is well established that "conserving judicial resources and promoting judicial economy" is a recognized ground for a stay. *Raskas*, 2013 WL 1818133, at *2; *see also United States v. Real Prop. & Improv. Located at 2366 San Pablo Ave., Berkeley, Cal.*, 2015 WL 525711, at *5 (N.D. Cal. Feb. 6, 2015) (noting that there is "a cognizable public interest in promoting judicial economy").

Plaintiff's ability to recover damages will not be prejudiced by any stay because "such monetary injury is not normally considered irreparable." *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980). And that is especially true here because a substantial amount of the damages Plaintiff seeks to recover would be compensation for purported costs that it has not yet incurred and which it may not incur for decades (if ever). *See, e.g.*, Dkt. 1-2 at ¶ 10 ("[T]he average sea level *will rise* substantially along the City's coastline.") (emphasis added); *id.* ("[E]xtreme weather . . . *will become* more frequent, longer-lasting, and more severe.") (emphasis added). Any delay would not substantially harm Plaintiff in its pursuit of abatement, which cannot be measurably exacerbated during a stay. And while "a stay would not permanently deprive [Plaintiff] of access to state court," Defendants "face[] a real chance that [their] right to meaningful appeal will be permanently destroyed by an intervening state court judgment," *Northrop Grumman*, 2016 WL 3346349, at *4, or other substantive state-court ruling.

CONCLUSION

For these reasons, Defendants respectfully request that the Court stay entry of the district court's remand order pending resolution of their appeal.

DATED: March 8, 2021

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached motion is proportionately spaced, has a typeface of 14 points, and complies with the word limits set forth in Fed. R. App. P. 27(d) because it has 4,820 words as calculated by Microsoft Word 2016.

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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

CITY AND COUNTY OF HONOLULU, Plaintiff, vs. SUNOCO LP, *et al.*, Defendants.	Case No. 20-cv-00163-DKW-RT **ORDER (1) GRANTING MOTION TO REMAND AND (2) REMANDING ACTION TO STATE CIRCUIT COURT**
COUNTY OF MAUI, Plaintiff, vs. CHEVRON U.S.A. INC., *et al.*, Defendants.	Case No. 20-cv-00470-DKW-KJM **ORDER (1) GRANTING MOTION TO REMAND AND (2) REMANDING ACTION TO STATE CIRCUIT COURT**

In these cases, Plaintiffs seek to have their claims remanded to State Court, arguing that this Court lacks subject matter jurisdiction over the same. For their part, Defendants, a roll call of "energy" companies, removed those same claims to this Court, arguing that subject matter jurisdiction exists here on numerous grounds. Since the first of these actions, No. 20-cv-163, was removed, some of those grounds have become less persuasive due to binding Ninth Circuit Court of Appeals

precedent. Nonetheless, in their oppositions to Plaintiffs' motions to remand, Defendants continue to advance three principal reasons for why these cases should remain in federal court: (1) Plaintiffs' claims are related to Defendants' activities on the Outer Continental Shelf; (2) Defendants acted under the direction of federal officers for decades while engaging in activities related to Plaintiffs' claims; and (3) Plaintiffs' claims arise on federal enclaves.[1]

While, at first-blush, these cases, which allegedly involve "Defendants' exacerbation of global warming…," may seem to include subject matter appropriate for this federal forum, upon closer inspection, the claims Plaintiffs have elected to pursue in these cases reveal that federal jurisdiction is lacking on the grounds advanced by Defendants. The principal problem with Defendants' arguments is that they misconstrue Plaintiffs' claims. More specifically, contrary to Defendants' contentions, Plaintiffs have chosen to pursue claims that target Defendants' alleged concealment of the dangers of fossil fuels, rather than the acts of extracting, processing, and delivering those fuels. When viewed in this light, Plaintiffs' claims simply do not relate to Defendants' activities on the Outer Continental Shelf, under the direction of federal officers, or on federal enclaves because there is no contention that Defendants' alleged acts of concealment implicate those spheres. As a result, with no basis for federal jurisdiction existing over the claims Plaintiffs have chosen

[1]As mentioned with further specificity below, the Court acknowledges that Defendants persist in raising three other grounds for removal in order to preserve those grounds for appellate review.

to pursue, the Court GRANTS Plaintiffs' motions to remand and REMANDS these cases to the State Courts from which they came.[2]

RELEVANT PROCEDURAL BACKGROUND

On April 15, 2020, in No. 20-cv-163 (Honolulu Action), Defendants Chevron Corporation and Chevron U.S.A., Inc. (collectively, Chevron) removed Plaintiff City and County of Honolulu's (Honolulu) Complaint from the First Circuit Court of the State of Hawai'i (First Circuit). In the notice of removal, Chevron asserted eight grounds for federal jurisdiction: (1) the Outer Continental Shelf Lands Act (OCSLA); (2) federal officer jurisdiction; (3) federal enclave jurisdiction; (4) federal common law; (5) *Grable*[3] jurisdiction; (6) federal preemption; (7) bankruptcy jurisdiction; and (8) admiralty jurisdiction. On September 11, 2020, Honolulu filed a motion to remand its case to the First Circuit. Dkt. No. 116.[4] On October 9, 2020, Defendants[5] filed a consolidated opposition to the motion to

[2]Although Defendants request oral argument on the motions to remand, *see, e.g.*, Dkt. No. 117 at 10, the Court finds that resolution of these matters would not be advanced by oral argument, given the more than adequate written record on file. Therefore, pursuant to Local Rule 7.1(c), the Court elects to decide the motions to remand without a hearing.

[3]*Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005).

[4]References to Dkt. No. __ shall be to filings in No. 20-cv-163. References to Dkt. No. __* shall be to filings in No. 20-cv-470.

[5]Defendants in the Honolulu Action are: Sunoco LP; Aloha Petroleum, Ltd.; Aloha Petroleum LLC; Exxon Mobil Corporation; Exxonmobil Oil Corporation; Royal Dutch Shell PLC; Shell Oil Company; Shell Oil Products Company LLC; Chevron Corporation; Chevron U.S.A., Inc.; BHP Group Limited; BHP Group PLC; BHP Hawaii Inc.; BP PLC; BP America Inc.; Marathon Petroleum Corporation; ConocoPhillips; ConocoPhillips Company; Phillips 66; and Phillips 66 Company (collectively, Defendants).

remand, Dkt. No. 117, to which Honolulu replied on October 30, 2020. Dkt. No. 121.[6]

Also on October 30, 2020, in No. 20-cv-470 (Maui Action), Chevron removed Plaintiff County of Maui's (Maui and, with Honolulu, Plaintiffs) Complaint from the Second Circuit Court of the State of Hawai'i (Second Circuit). In the notice of removal, Chevron asserted six grounds for federal jurisdiction: (1) OCSLA; (2) federal officer jurisdiction; (3) federal enclave jurisdiction; (4) federal common law; (5) *Grable* jurisdiction; and (6) federal preemption. With the filing of the notice of removal in the Maui Action, the Court stayed the Honolulu Action, pending anticipated remand briefing in the former. On November 25, 2020, Maui filed a motion to remand its case to the Second Circuit. Dkt. No. 74*. On December 22, 2020, Defendants[7] filed a consolidated opposition to the motion to remand. Dkt. No. 96*. And on January 20, 2021, Maui filed a reply in support of its motion to remand. Dkt. No. 98*.

RELEVANT LEGAL PRINCIPLES

Pursuant to Section 1441(a) of Title 28, any civil action brought in a State court may be removed to federal court by a defendant provided that the federal court

[6]Although mentioned in the notice of removal filed in the Honolulu Action, Defendants do not again argue the applicability of bankruptcy or admiralty jurisdiction in their brief opposing the motion to remand. Therefore, the Court finds those grounds to have been abandoned, and does not further address them herein.

[7]Defendants in the Maui Action are the same as those in the Honolulu Action and, thus, are also collectively referred to herein as Defendants.

would have original jurisdiction over the action. Original jurisdiction can be obtained in various ways. As argued in the briefing before the Court, three ways are relevant here.

First, in pertinent part, OCSLA provides federal courts with jurisdiction over any case "arising out of, or in connection with … any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals…." 43 U.S.C. § 1349(b)(1).

Second, the removal statute allows cases commenced in State court to be removed by, among others, "[t]he United States or any agency thereof or any officer (*or any person acting under that officer*) of the United States or any agency thereof, in an official or individual capacity, for or relating to any act under color of such office…." 28 U.S.C. § 1442(a)(1) (emphasis added).

> In order to invoke § 1442(a)(1), a private person must establish: (a) it is a person within the meaning of the statute; (b) there is a causal nexus between its actions, taken pursuant to a federal officer's directions, and the plaintiff's claims; and (c) it can assert a colorable federal defense. To demonstrate a causal nexus, the private person must show: (1) that the person was acting under a federal officer in performing some act under color of federal office, and (2) that such action is causally connected with the plaintiffs' claims.

Cty. of San Mateo v. Chevron Corp., 960 F.3d 586, 598 (9th Cir. 2020) (quotations, citations, and alteration omitted).

Third, "[f]ederal courts have federal question jurisdiction over tort claims that

arise on federal enclaves." *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1250 (9th Cir. 2006) (quotation omitted).

Finally, "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c). The burden of establishing this Court's subject matter jurisdiction "rests upon the party asserting jurisdiction[,]" *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994), which, here, means Defendants, *Corral v. Select Portfolio Servicing, Inc.*, 878 F.3d 770, 773 (9th Cir. 2017). "[A]ny doubt about the right of removal requires resolution in favor of remand." *Moore-Thomas v. Alaska Airlines, Inc.*, 553 F.3d 1241, 1244 (9th Cir. 2009).

DISCUSSION

The Court addresses, in turn, the three principal grounds for removal at issue here: (1) jurisdiction under the OCSLA; (2) federal officer removal; and (3) federal enclave jurisdiction.[8]

1. OCSLA

As mentioned, in pertinent part, jurisdiction rests under the OCSLA over any

[8]As an initial matter, the Court acknowledges that, in both notices of removal and in their opposition briefs, Defendants assert that jurisdiction is proper in federal court under (1) federal common law, (2) federal preemption, and (3) *Grable*. The Court also observes, however, that, in both opposition briefs, Defendants themselves acknowledge that these bases for federal jurisdiction have been recently rejected by the Ninth Circuit. *See, e.g.*, Dkt. No. 117 at 8 n.1. Thus, while acknowledging that these bases have been raised in both the Honolulu and Maui Actions, the Court does not discuss them further beyond rejecting them in light of binding Ninth Circuit authority. *See City of Oakland v. BP PLC*, 969 F.3d 895, 906-908 (9th Cir. 2020).

case "arising out of, or in connection with … any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals…." 43 U.S.C. § 1349(b)(1). Thus, for jurisdiction to lie, (1) an "operation" involving "exploration, development, or production" must be conducted on the outer Continental Shelf, and (2) the case must arise out of or in connection with that operation. *Id*. While OCSLA does not define the term "operation," the terms "exploration, development, or production" are defined as follows. "Exploration" "means the process of searching for minerals," such as surveys and drilling. 43 U.S.C. § 1331(k). "Development" is described as "those activities which take place following discovery of minerals in paying quantities," such as drilling, platform construction, and onshore support facilities. *Id*. § 1331(l). "Production" "means those activities which take place after the successful completion of any means for the removal of minerals," such as the transfer of minerals to shore, monitoring, and work-over drilling. *Id*. § 1331(m).

Here, the parties do not dispute that Defendants, at least to some extent, engage in operations of exploration, development, or production on the outer Continental Shelf. The real dispute between them, instead, is whether this case arises out of or in connection with that operation. While the Ninth Circuit has not clarified the scope of the jurisdictional reach of the OCSLA, the Court finds that this

case does not arise out of or in connection with Defendants' operations on the outer Continental Shelf.

The reason is the nature of the cases Plaintiffs bring here--in particular, the alleged conduct of Defendants targeted in the Complaints. Specifically, the essence of those Complaints is that Defendants have allegedly created a public nuisance. The important part for this analysis is *how* the Defendants allegedly created that nuisance. Contrary to Defendants' assertions, it is *not* through their "fossil fuel production activities," *see* Dkt. No. 117 at 14, but through their alleged *failure to warn* about the hazards of using their fossil fuel products and *disseminating* misleading information about the same, *see* Dkt. No. 1-2 at ¶ 157; Dkt. No. 1-2* at ¶ 207.[9] When viewed in this light, these cases simply have nothing to do with the "exploration, development, or production" of minerals from the outer Continental Shelf, as those terms are defined in the statute. Notably, each of those defined terms involve examples of activities requiring either some direct act on the outer Continental Shelf, such as drilling, or acts in support of an act thereon, such as platform construction. As alleged in the Complaints, failing to warn and disseminating information about the use of fossil fuels have nothing to do with such

[9]Defendants' citation to the Complaints here reveals the fault in their argument. The relevant paragraph alleges that "Defendants' acts and omissions as alleged herein are indivisible causes of the City's injuries and damages…." Dkt. No. 117 at 14 (citing Dkt. No. 1-2 at ¶ 170). The important phrase is "as alleged herein…[,]" which, as discussed, is the alleged failure to warn and dissemination of misleading information, *not* fossil fuel production.

direct acts or acts in support.

Therefore, while the Court acknowledges that the Ninth Circuit has not clarified the jurisdictional reach of OCSLA, based upon this Court's reading of the statute, these cases do not arise out of or in connection with "any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals…." *See* 43 U.S.C. § 1349(b)(1).[10]

2. Section 1442(a)(1)/Federal Officer Removal

As mentioned, Section 1442(a)(1) permits removal when, among other things, (1) there is a causal nexus between a defendant's actions, taken pursuant to a federal officer's direction, and the plaintiff's claims, and (2) there is a colorable federal defense. *San Mateo*, 960 F.3d at 598. For there to be a causal nexus, a defendant must show that (A) it was acting under a federal officer in performing some act under color of federal office, and (B) such action is causally connected to the plaintiff's claims. *Id*.

To begin, the Court observes that this case hardly operates on a clean slate on the topic presented: whether Defendants, including the ones here, acted under a

[10]The Court notes that both parties cite various non-binding cases that discuss the jurisdictional reach of the OCSLA. *See* Dkt. No. 116-1 at 23-24 & nn.10-11; Dkt. No. 117 at 11-12. Only Plaintiffs, however, cite cases that have considered the specific issue of OCSLA jurisdiction in the context of an action like this one, and every one of those cases has found that jurisdiction does not lie. *See* Dkt. No. 116-1 at 24 n.11.

federal officer's direction. This is because the Ninth Circuit recently addressed that exact same issue in a similar lawsuit. *See id*. at 598-603. Put succinctly, the Ninth Circuit did not answer the question in Defendants' favor, *i.e*., it affirmed a district court's finding that Section 1442(a)(1) did not provide jurisdiction over a dispute very similar to the one here.

Undaunted, Defendants again press the same argument. In doing so, Defendants contend that, in these cases, they have provided "substantial additional evidence" that they acted under federal officers, which they, for whatever reason, did not present to the district court or to the Ninth Circuit in *San Mateo*. Dkt. No. 117 at 17; *see also* Dkt. No. 96* at 18 n.10. Bearing in mind the tinged canvas upon which the Court writes, the Court first addresses whether Defendants acted under a federal officer, then whether any such action is causally connected to Plaintiffs' claims, and, finally, whether a colorable federal defense has been stated.

A. Acting Under

In determining whether a private person acted under a federal officer, a court should consider at least four factors. *San Mateo*, 960 F.3d at 599. First, whether the person is acting in a manner akin to an agency relationship. Second, whether the person is subject to an officer's "close direction" or in an "unusually close" relationship involving detailed regulation, monitoring, or supervision. *Id*. (quotation omitted). Third, whether the person is assisting in fulfilling "basic

government tasks that the Government itself would have had to perform if it had not contracted with a private firm." *Id*. (quotation omitted). And finally, whether the person's activity is "so closely related to the government's implementation of its federal duties that the private person faces a significant risk of state-court prejudice" and may have difficulty in raising an immunity defense. *Id*. (quotation and internal quotation omitted).

In their opposition briefs, Defendants first contend that "securing an adequate supply of oil and gas is an essential government function." Dkt. No. 117 at 19-23; Dkt. No. 96* at 22-27. Defendants argue that the federal government created agencies to "control" the petroleum industry, directed the production of certain products, supervised and encouraged the domestic production of oil and gas, and procured millions of barrels of fuel products for the military. Defendants assert that, in this light, they have a "special relationship" with the federal government, justifying jurisdiction here.

The Court is unmoved. Among other deficiencies, Defendants fail to explain how the matters they address in this argument satisfy any of the factors that the Ninth Circuit only recently determined should be considered when addressing whether a private person acted under a federal officer for purposes of Section 1442(a)(1). Instead, Defendants rely on broad policy goals and announcements of various political administrations, interlaced with occasional reference to

"supervis[ion][,]" "control[,]" and "military specifications[.]" No explanation is made, though, as to why any of this constitutes an agency-type relationship, close direction, the fulfillment of basic government tasks, or the risk of state-court prejudice. Therefore, the Court rejects that the alleged "special relationship" between the federal government and Defendants results in Defendants acting under a federal officer for purposes of Section 1442(a)(1).

Defendants next argue that they acted under federal officers in producing and supplying specialized fuels for the military. Dkt. No. 117 at 23-33; Dkt. No. 96* at 27-36. More specifically, Defendants point to the supply of specialized fuels during World War II, the Korean War, the Cold War, and between 1983 and 2011 to the Department of Defense. For present purposes, the Court will assume Defendants acted under a federal officer in (1) suppling specialized fuels to, and constructing pipelines for, the federal government during World War II, (2) supplying specialized fuels for certain spy or reconnaissance planes during the Cold War, and (3) supplying specialized jet fuels for the Department of Defense between 1983 and 2011 (*see* Dkt. No. 117 at 31-32). However, with respect to fuel supplied during the Korean War and the 1973 Oil Embargo, other than "directives" to increase or ensure the supply of oil, *see id*. at 28-29, Defendants provide no information as to why this constituted the sort of "unusually close" relationship required. *See San Mateo*, 960 F.3d at 599, 601-602.

Defendants next argue that they produced oil on federal lands pursuant to leases governed by federal statutes, such as the OCSLA. Dkt. No. 117 at 33-40; Dkt. No. 96* at 37-45. As Plaintiffs point out, though, the Ninth Circuit has already addressed the question of whether leases to produce oil on the outer Continental Shelf cause entities the same as, or similar to, Defendants to act under a federal officer. *See* Dkt. No. 121 at 17; Dkt. No. 98* at 13-14. Like many other questions, that one was resolved *against* Defendants when the Ninth Circuit held that the leases "do not require that lessees act on behalf of the federal government, under its close direction, or to fulfill basic governmental duties." *San Mateo*, 960 F.3d at 602-603.

Nonetheless, in their opposition briefs, Defendants attempt to explain why *San Mateo* does not control. They argue that additional paragraphs in the leases, ones that presumably were there when the Ninth Circuit reviewed the same leases, "provide significantly more detail about government control over federal mineral lessees like Defendants than the factual record at issue in the cases upon which Plaintiff relies." Dkt. No. 117 at 33. Defendants further argue that "their performance under the leases fulfilled an essential governmental purpose" that the Ninth Circuit presumably ignored. *Id*. at 34. Defendants, at least in the Maui Action, also rely on the opinion of Richard Priest, an Associate Professor of History and Geographical and Sustainability Sciences at the University of Iowa, that the 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." Dkt. No. 96* at 37 (citing Dkt. No. 96-1 at ¶ 7(1)).

This Court is unconvinced that any of the supposedly additional or new arguments presented here alter the Ninth Circuit's holding that the leases do not give rise to an unusually close relationship with the federal government for purposes of Section 1442(a)(1). Principally, while Defendants appear to have taken a new approach in presenting the leases—describing them as securing an essential governmental purpose—ultimately, they have merely rearranged the deckchairs. The leases are the same leases the Ninth Circuit reviewed less than a year ago. Defendants may now be highlighting different provisions in those leases than what they brought to the court's attention in *San Mateo*, but that hardly means the Ninth Circuit ignored or did not appreciate Defendants' new focus. Nothing has changed in the cited relationship with the government over the last year, and oil is still oil (whether or not Defendants now wish to describe it as a "valuable national security asset"). Still further, the newly cited lease provisions show nothing more than what the Ninth Circuit described as "largely track[ing] legal requirements" and evidencing a high degree of regulation. *See San Mateo*, 960 F.3d at 603. As such, in light of *San Mateo*, the Court does not agree that Defendants acted under a federal officer with respect to oil and gas leases with the government.

A similar result is true of Defendants' reliance on their operation for the

federal government of National Petroleum Reserve No. 1 in Elk Hills. Dkt. No. 117 at 41-44; Dkt. No. 96* at 45-48. Notably, this argument was also addressed by the Ninth Circuit in *San Mateo*, and it too was rejected as a basis for federal officer removal. *See San Mateo*, 960 F.3d at 601-602. Despite the Ninth Circuit's ruling, Defendants largely sidestep the same, asserting only that this case is different because an oil company, Standard Oil, was hired to "operate" Elk Hills and, in one of the operating agreements with the government, was stated as "in the employ" of the Navy. Dkt. No. 117 at 41; Dkt. No. 96* at 46. The Court is, again, unconvinced that the cited operating agreement rendered Standard Oil as acting under a federal officer. While the agreement states, without explaining, that Standard Oil was "in the employ" of the Navy, nothing else in the agreement, and certainly nothing to which Defendants cite, sets forth the kind of "unusually close" relationship that is necessary. Instead, the agreement provides only general direction regarding the operation of Elk Hills. *See* Dkt. No. 119-11 at § 4 (at 189-190).[11] Therefore, in light of *San Mateo*, the Court does not agree that Defendants' Elk Hills operations constituted "acting under" a federal officer.

Defendants final argument in this regard is that they acted under a federal

[11]For example, the agreement merely states that operating Elk Hills will include, among other things, "drilling of wells," "exploration and prospecting[,]" and the "maintenance" of facilities. *See* Dkt. No. 119-11 at § 4(e). None of these tasks include anything close to the "detailed regulation, monitoring, or supervision" required. *See San Mateo*, 960 F.3d at 599 (quotation omitted).

officer in supplying oil to, and managing, the strategic petroleum reserve (SPR). Dkt. No. 117 at 44-46; Dkt. No. 96* at 48-50. They argue that 162 million barrels of crude oil have been supplied to the SPR through a royalty-in-kind program, those barrels have been delivered to the SPR under contract with the government, they have operated some of the SPR's infrastructure, and they are subject to government control when the President calls for an emergency drawdown of the SPR. The Court disagrees that the foregoing represents a relationship sufficient under Section 1442(a)(1). Defendants provide no explanation as to any type of control the government may wield over them, instead only conclusorily stating that they "acted at the direction of federal officers" when supplying oil or operating infrastructure. At best, the relationship Defendants describe is a regular business one.[12] Therefore, the Court does not find that Defendants acted under a federal officer with respect to the SPR.

B. Causal Connection

As mentioned, in order for federal officer removal to be appropriate, Defendants must further show that "there is a causal nexus between [their] actions, taken pursuant to a federal officer's directions, and the plaintiff's claims." *San*

[12]Further, the Court agrees with Plaintiffs' argument regarding the applicability of *San Mateo* here. *See* Dkt. No. 121 at 29; Dkt. No. 98* at 24-25. Specifically, in *San Mateo*, the Ninth Circuit observed that the oil and gas leases discussed earlier included terms for Defendants to pay royalties to the government. 960 F.3d at 602. As discussed, the Ninth Circuit did not find the leases sufficient under Section 1442(a)(1). Thus, if the leases *in toto* do not create a Section 1442(a)(1) relationship, the Court cannot see how a part of those leases−royalties−could either.

Mateo, 960 F.3d at 598 (quotation and alteration omitted).

Here, Defendants argue that there is a causal connection between their acts under federal direction and Plaintiffs' claims because those claims relate to Defendants' production and supply of oil and gas to the federal government, something which Defendants go so far as to describe as the "core" of Plaintiffs' claims. Dkt. No. 117 at 47; Dkt. No. 96* at 51. This Court disagrees. As discussed earlier, in their Complaints, Plaintiffs have chosen to target Defendants alleged failure to warn and/or disseminate accurate information about the use of fossil fuels. While it does not take a geologist to know that fossil fuels must go through a process of production and supply before they can be used, this does not mean that Plaintiffs' claims rely on or even relate to Defendants' information-related activities. The Court further disagrees that Plaintiffs' claims rest upon the "cumulative production of petroleum products…." Dkt. No. 96* at 51 (emphasis omitted). Instead, as stated in the Complaints, Plaintiffs' claims focus on Defendants' alleged "*exacerbation* of global warming…." Dkt. No. 1-2 at ¶ 41; Dkt. No. 1-2* at ¶ 51 (emphasis added). In other words, Plaintiffs do not claim that no petroleum products would have been used, only that Defendants made the use worse. *See* Black's Law Dictionary 679 (10th ed. 2014) (defining "exacerbate" as "[t]o make worse").

This is true even though Defendants rely upon the Ninth Circuit's statement

that a defendant's "theory of the case" should be credited in assessing causal connection. Dkt. No. 117 at 47 (citing *Leite v. Crane Co.*, 749 F.3d 1117, 1124 (9th Cir. 2014)); Dkt. No. 96* at 51 (same). Defendants' theory of the case is not a theory for *this* case, like the one in *Leite*. In *Leite*, the defendant was accused of failing to warn the plaintiffs of the hazards posed by asbestos. 749 F.3d at 1119-20. As a defense, the defendant argued that it provided warnings required by the federal government. *Id*. at 1123. The Ninth Circuit concluded that the defendant had established a causal connection because "the very act that forms the basis of plaintiffs' claims−Crane's failure to warn about asbestos hazards−is an act that [defendant] contends it performed under the direction of the [government]." *Id*. at 1124. Nothing remotely similar exists here.

Here, Defendants' assert their theory of the case as: "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." Dkt. No. 117 at 18; Dkt. No. 96* at 21. While that may be a perfectly good theory in the abstract or as part of some other case, here, "the very act that forms the basis of plaintiffs' claims" is *not* "billions of consumers' use of fossil fuels…." Instead, it is Defendants' warnings and information (or lack thereof) about the hazards of using fossil fuels−something noticeably absent from Defendants' stated theory. Put simply, if Defendants had it

their way, they could assert *any* theory of the case, however untethered to the claims of Plaintiffs, because this Court must "credit" that theory. To do so, though, would completely ignore the requirement that there must be a causal connection *with the plaintiff's claims*. *See San Mateo*, 960 F.3d at 598.

In this light, even if Defendants had done all of the acts discussed above at the direction of a federal officer, including those acknowledged as such by the Court, none of them are causally connected to Plaintiffs' claims. Those claims concern the alleged failure to warn and/or to disseminate accurate information about the hazards of fossil fuels, and Defendants make no argument that they failed to warn or disseminate accurate information at the direction of a federal officer. Therefore, the Court does not find that a causal connection exists between the claims here and any acts Defendants may have taken at the direction of a federal officer.[13]

C. Colorable Federal Defense

The Court also finds that Defendants have failed to show a colorable federal defense exists here. In the Honolulu Action, in one paragraph, Defendants assert that a variety of federal defenses are colorable. Dkt. No. 117 at 50. Defendants appear to *assume* they are right since they never take the time to set forth the

[13]Even if the Court was willing to accept Defendants' strained "theory of the case," that theory has nothing to do with the supply of specialized fuels to, and constructing pipelines for, the federal government during World War II, the supply of specialized fuels for certain spy or reconnaissance planes during the Cold War, or the supply of specialized jet fuels for the Department of Defense between 1983 and 2011−the only bases for federal direction that the Court assumed may exist here. As mentioned, Defendants' theory concerns "billions of *consumers'* use of fossil fuels…," something which has nothing to do with supplying specialized fuels to the *military*.

elements of any of the cited defenses, let alone attempt to explain why the defenses are colorable. The Maui Action fares no better. While Defendants expand the discussion from one paragraph to two, Dkt. No. 96* at 53-55, the additional space they devote only cites general propositions of law and once again omits any explanation of why any of the asserted defenses are colorable. Conclusory assertions do not make it so. *See id*. at 54 ("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."). Thus, while the Court acknowledges that the meaning of "colorable" in this context is not precisely defined and the Supreme Court has instructed that courts should not be "grudging" in their interpretation, *see Jefferson Cty. v. Acker*, 527 U.S. 423, 431 (1999), something more than simply asserting a defense and the word "colorable" in the same sentence must be required, *see Cabalce v. Thomas E. Blanchard & Assocs., Inc.*, 797 F.3d 720, 731-732 & n.6 (9th Cir. 2015) (holding that a defendant "did not demonstrate by a preponderance of the evidence a colorable government contractor defense" after failing to proffer any evidence supporting the defense).

3. Federal Enclave

Defendants argue that jurisdiction exists here because Plaintiffs' claims arise on federal enclaves. Dkt. No. 117 at 50-52; Dkt. No. 96* at 55-56. More specifically, Defendants argue that they produced and refined oil and gas on federal

enclaves.

As mentioned, federal courts have jurisdiction over tort claims that "arise" on federal enclaves. *Durham*, 445 F.3d at 1250. It would require the most tortured reading of the Complaints to find that standard met here. As discussed, contrary to Defendants' assertions, the relevant conduct here, let alone "all" of it, is not the production or refining of oil and gas. *See* Dkt. No. 96* at 56. It is, instead, the warning and disseminating of information about the hazards of fossil fuels. It is from that conduct that Plaintiffs claims arise, and there is no dispute such conduct did not occur on a federal enclave. Moreover, as Plaintiffs explain, in their Complaints, they disavow relief for injuries to federal property. Dkt. No. 116-1 at 39-42; Dkt. No. 74-1 at 48-51; *see also* Dkt. No. 1-2 at ¶ 14; Dkt. No. 1-2* at ¶ 14. Therefore, like every other court to have addressed this issue, the Court finds that federal enclave jurisdiction does not exist over Plaintiffs' claims. *See, e.g.*, *Cty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 939 (N.D. Cal. 2018); *Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, 405 F. Supp. 3d 947, 974-975 (D. Colo. 2019); *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142, 152 (D.R.I. 2019); *Mayor & City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538, 564-566 (D. Md. 2019).[14]

[14]In their opposition briefs, Defendants ask this Court to find "irrelevant" Plaintiffs' allegations about "misrepresentations" and "concealment[,]" arguing that "there can be no liability under Plaintiff's theory but for Defendants' production and sale of fossil fuels." Dkt. No. 117 at 52;

CONCLUSION

Because Defendants have failed to carry their burden of establishing subject matter jurisdiction over these cases, the motions to remand (Dkt. No. 116 in Case No. 20-cv-163 and Dkt. No. 74 in Case No. 20-cv-470) are GRANTED.

Case No. 20-cv-163, *City & County of Honolulu v. Sunoco LP, et al.*, is hereby REMANDED to the First Circuit Court for the State of Hawai'i, pursuant to Section 1447(c) of Title 28. The Clerk is instructed to mail a certified copy of this Order to the clerk of the First Circuit Court and then CLOSE the case.

Further, Case No. 20-cv-470, *County of Maui v. Chevron U.S.A. Inc., et al.*, is hereby REMANDED to the Second Circuit Court for the State of Hawai'i, pursuant to Section 1447(c) of Title 28. The Clerk is instructed to mail a certified copy of this Order to the clerk of the Second Circuit Court and then CLOSE the case.

Dkt. No. 96* at 57-58. There are many problems with this argument. First, given that each of Plaintiffs' claims concern Defendants' alleged warning and information practices, Defendants essentially ask this Court to find the entire case "irrelevant[,]" which would seem an odd request to make at this procedural juncture. Second, the Court does not see why Defendants can only be liable for producing and selling fossil fuels, as they appear to suggest. That assumes Defendants have done nothing else worthy of liability−something which the Complaints allege is not the case. Third, Defendants' argument is simply an attempt to argue the *merits* of Plaintiffs' claims. That is, however, not the purpose of this instant endeavor. Finally, in a footnote at the end of their opposition brief in the Maui Action, Defendants argue, for the first time, that, even if Plaintiffs' claims rely on "alleged misrepresentations," this case is still removable because it involves First Amendment speech. *See* Dkt. No. 96* at 57 n.19. Putting aside that this is the only time in either of their opposition briefs that Defendants acknowledge the actual claims being brought in these cases, this argument does not appear to have been properly raised (or even preserved). *See City of Oakland*, 969 F.3d at 911 n.12. It also appears to be premised upon *Grable*, which, as explained, Defendants acknowledge has been rejected by the Ninth Circuit as a basis for removal. *See id.* at 906-907; Dkt. No. 96* at 6 n.1.

IT IS SO ORDERED.

Dated: February 12, 2021 at Honolulu, Hawai‘i.

Derrick K. Watson
United States District Judge