Nos. 21-15313, 21-15318

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.

COUNTY OF MAUI,

Plaintiff-Appellee,

v.

CHEVRON USA INC., et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Hawaii,
Nos. 20-cv-00163, 20-cv-00470 (The Honorable Derrick K. Watson)

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Plaintiffs Honolulu and Maui have asserted wide-ranging claims in Hawaii state court that seek to hold Defendants liable for the alleged physical effects of global climate change based on theories, such as nuisance and trespass, that depend upon Defendants' worldwide production of petroleum products over the course of many decades. In an effort to avoid federal jurisdiction, however, Plaintiffs now argue that this Court should ignore their actual claims, ignore their alleged injuries, and ignore their requested relief, focusing instead solely on their allegations of "misrepresentation." But Plaintiffs cannot strip the federal courts of jurisdiction by pretending away essential elements of their claims.

Plaintiffs' own Complaints plainly define their alleged injuries as the physical impact of rising sea levels, soil erosion, and property destruction caused by the production, marketing, sale, and third-party combustion of Defendants' fossil fuels. Indeed, Plaintiffs conceded below that "fossil fuel *production* is … the delivery mechanism of [Plaintiffs'] injury." 2-ER-42 (emphasis added). And Plaintiffs demand compensatory damages for all injuries suffered as a result of *global* climate change, including disgorgement of profits from Defendants' production and sale of oil and gas. Accordingly, under Plaintiffs' own theory of harm, their alleged injuries result from Defendants' supply of oil and gas, a substantial portion of which occurred at the direction of federal officers and on the Outer Continental Shelf ("OCS").

Plaintiffs' Complaints thus necessarily relate to activities that Defendants took under federal officers' directions, 28 U.S.C. § 1442(a)(1), as well as actions "in connection with … any operation conducted on the" OCS, 43 U.S.C. § 1349(b)(1), and on federal enclaves. The record is replete with evidence of Defendants' undertaking key activities and operations that, but for their assistance, "the Government itself would have had to perform." *Watson v. Philip Morris Cos.*, 551 U.S. 142, 154 (2007). These include, for example, the production and supply of highly specialized fuels for the military, exploration and extraction of oil from federal lands on the OCS to meet Congress's statutorily mandated goal of energy independence, and management of vital, federally owned oil reserves under detailed agency arrangements with the government. Defendants need not show that these acts are the *only* bases for Plaintiffs' claims; it is "enough for the present purposes of removal that at least *some* of the [greenhouse-gas emissions] arose from the federal acts." *Baker v. Atl. Richfield Co.*, 962 F.3d 937, 945 (7th Cir. 2020) (emphasis added).

Plaintiffs do not dispute that their claims require proof that Defendants *caused* the alleged harms. And those harms—as well as the corresponding remedies actually demanded—allegedly arise from the production, marketing, sale, and combustion of Defendants' fossil fuels. That Plaintiffs included allegations about supposed "deception" does not eliminate the Complaints' other, detailed allegations regarding

the source of Plaintiffs' alleged injuries. Indeed, injury causation is a required element of all of Plaintiffs' claims, whereas "deception" is not. While a plaintiff may be the master of its complaint, that does not mean a plaintiff may compel the courts to ignore what the plaintiff has actually pleaded in the complaint.

Although Plaintiffs claim here that their case is solely about "deception," Resp.3, they tell a very different story elsewhere. In state court, these same Plaintiffs have relied on their allegations about the production, marketing, sale, and third-party combustion of Defendants' fossil fuels as necessary links in the causal chain. Plaintiffs argue there that it is Defendants' fossil-fuel "*products*," not merely alleged misrepresentations, "that give rise to claims of tortious conduct." Tr. 35:13–15, *City & Cnty. of Honolulu v. Sunoco LP*, No. 1CCV-20-0000380 (Haw. Cir. Ct. Oct. 15, 2021) (emphasis added). These concessions are dispositive here.

At bottom, Plaintiffs' claims all rest on alleged physical injuries that, as the Complaints expressly plead, are caused by the worldwide "buildup of CO_2 in the atmosphere," such that "[t]he mechanism" of those alleged harms is interstate and international "greenhouse gas emissions." 8-ER-1533, 8-ER-1560. This interstate and international pollution theory does not disappear merely because Plaintiffs find it strategically useful in this Court to emphasize other aspects of their Complaints, like purported misrepresentations. The causal theory undergirding Plaintiffs' claims

and the undisputed evidentiary record here demonstrate ample bases for federal jurisdiction pursuant to the federal-officer-removal statute, the Outer Continental Shelf Lands Act ("OCSLA"), and the federal-enclave doctrine.[1] Accordingly, this Court should reverse the district court's remand order so that these cases may proceed in the forum where they belong: federal court.

ARGUMENT

I. Plaintiffs' Complaints Seek To Impose Liability And Damages For Acts Undertaken At The Direction, Supervision, Or Control Of Federal Officers.

The federal-officer-removal statute provides a clear basis for removing Plaintiffs' Complaints. Congress entrusted federal courts to hear any claim "for or relating to any act" taken under a federal officer's direction. 28 U.S.C. § 1442(a)(1). As Defendants have shown, *see* OB.23–24, Plaintiffs seek to impose liability and damages based on the effects of Defendants' extraction, production, marketing, and sale of fossil fuels, substantial portions of which were performed under the direction, supervision, and control of federal officers. Plaintiffs' responses are unpersuasive.

[1] Defendants also preserved their arguments that Plaintiffs' claims arise under federal common law and involve substantial federal questions. OB.64–65.

A. Plaintiffs' Claims Are "For Or Relating To" Defendants' Extraction, Production, And Sales Activities Under Federal Officers.

Plaintiffs first argue that the Removal Clarification Act of 2011 requires a causal nexus between Plaintiffs' claims and the acts taken under federal officers. Resp.35. That is incorrect. The 2011 amendment added the phrase "or relating to" to Section 1442(a)(1) and 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). Accordingly, numerous courts have "abandoned" "the old 'causal nexus' test" in favor of a "broader" standard. *Cnty. Bd. of Arlington Cnty. v. Express Scripts Pharmacy, Inc.*, 996 F.3d 243, 256 (4th Cir. 2021); *see also Baker*, 962 F.3d at 944 ("We ... now join all the courts of appeals that have replaced causation with connection."); *In re Commonwealth's Mot. to Appoint Counsel Against or Direct to Def. Ass'n of Phila.*, 790 F.3d 457, 471–72 (3d Cir. 2015) (similar). These cases align with the Supreme Court's interpretation of "relating to" in another context, where it confirmed that the "ordinary meaning of these words is a broad one." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992).

In any event, Plaintiffs' claims are removable under either standard because under Plaintiffs' own theory, their alleged injuries were caused by activities that De-

fendants took in part under the direction and supervision of federal officers. Plaintiffs can muster only a single argument against this straightforward conclusion, insisting that the "specific conduct that triggers Defendants' liability is their use of deception," which Plaintiffs argue was not done under the direction of federal officers. Resp.3, Resp.36–39. But this argument both misstates the law and ignores Plaintiffs' own allegations.

"The federal statute permits removal" here because Defendants were acting under federal officers when "carrying out the 'act[s]' that are the *subject* of [Plaintiffs'] [C]omplaint[s]." *Watson*, 551 U.S. at 147 (emphasis added). As stated in *the first sentence*, the Complaints' subject is whether Defendants can be held liable for the "unrestricted production and use of fossil fuel products [that] create greenhouse gas pollution that warms the planet and changes our climate." 8-ER-1530.

Moreover, as this Court has made clear, federal-officer removal is satisfied where there is a connection between a defendant's actions "taken pursuant to a federal officer's directions, and plaintiff's *claims*." *Goncalves*, 865 F.3d at 1244 (emphasis added). A "claim" is not, as Plaintiffs would have it, simply one component of the alleged cause of action that the plaintiff has strategically chosen to highlight; a "claim" is a demand for "a legal remedy to which one asserts a right," *Arizona v. Tohono O'odham Nation*, 818 F.3d 549, 557 (9th Cir. 2016) (quoting Black's Law Dictionary (10th ed. 2014)), "esp[ecially] the part of a complaint in a civil action

specifying what relief the plaintiff asks for," Black's Law Dictionary (11th ed. 2019). Here, Plaintiffs' "claims" are pleas for compensatory and punitive damages, disgorgement, and orders of abatement for alleged physical injuries stemming from the effects of global climate change allegedly caused by the production and combustion of fossil fuels.

Production and combustion are necessary links in the causal chain leading to Plaintiffs' asserted injuries. That is why Plaintiffs include them in the Complaints. Plaintiffs allege that greenhouse gases are the "primary driver" of climate change, and that these greenhouse gases are created by "combusting fossil fuels to produce energy and using fossil fuels to create petrochemical products." 4-ER-519; 4-ER-542–53; 8-ER-1560; 8-ER-1584. Plaintiffs further allege that all of the harms that form the basis of their claims, including rising sea levels, erosion, and extreme weather, are caused by rising global temperatures that result from this fossil-fuel combustion, 4-ER-580; 8-ER-1630–31; indeed, "fossil fuel production is … the delivery mechanism of [Plaintiffs'] injury," 2-ER-42. Plaintiffs' own allegations thus demonstrate that the *sine qua non* in their claimed injuries is the greenhouse-gas emissions resulting from the production and combustion of petroleum products,

making Defendants' extraction, production, and sale of oil and gas essential elements of this causal chain. *See* 8-ER-1530–34; OB.19–20.

Further, Plaintiffs dissemble about whether the relief they seek is limited to allegations of misrepresentation. They argue here that their "recovery will necessarily be limited to those harms that are attributable to Defendants' failure to warn and deceptive promotion." Resp.44. Even if that were true, the Complaints expressly identify Defendants' extraction, production, and sale of fossil fuels as the direct cause of all of Plaintiffs' alleged harms. Moreover, Plaintiffs also attempt to preserve their ability to seek relief that is *not* so limited: they say they seek only "*local* measures to protect residents, property, and public infrastructure," Resp.45, but do not disclaim their request for "measures" that would have to account for the full impact of rising tides or harsher storms, not just any marginal difference caused by any alleged misrepresentation.

In fact, although Plaintiffs attempt to disclaim any reliance on production and combustion before this Court, in state court following remand Plaintiffs recently conceded that their claims center on greenhouse-gas emissions. In Plaintiffs' own words, the causal theory asserted in their claims is that Defendants' alleged misrepresentations led to sustained or increased production, which led to "increased combustion, which le[d] to increased emissions, which le[d] to accelerated global climate change, which le[d] to injuries in Hawaii." Hr'g Tr. 107:8–17, *Honolulu*, No.

1CCV-20-0000380 (Haw. Cir. Ct. Aug. 27, 2021). Indeed, Plaintiffs have admitted that Defendants' depiction of their causal chain (reproduced below) is "exactly correct." *Id.* at 123:4–5.

See also Hr'g Tr. 35:13–15, *Honolulu*, No. 1CCV-20-0000380 (Haw. Cir. Ct. Oct. 15, 2021) (arguing that it is Defendants' fossil-fuel "*products*," not alleged misrepresentations, "that give rise to claims of tortious conduct" (emphasis added)).[2]

Plaintiffs' attempt to characterize their claims as solely involving "misrepresentation" is thus nothing more than gamesmanship calculated to concentrate the Court's attention on an "earlier" moment in the causal chain leading to Plaintiffs' alleged injuries. *City of New York v. Chevron Corp.*, 993 F.3d 81, 97 (2d Cir. 2021). But, as the Second Circuit explained in a case involving nearly identical claims, Plaintiffs cannot "whipsaw[] between disavowing any intent to address emissions" while "identifying such emissions as the singular source" of the alleged harm. *Id.* at 91. Plaintiffs should not be allowed to "have it both ways" (*id.*) by conceding in state court the vital role that production, sales, and emissions play in their claims for

[2] Defendants submitted these transcripts as exhibits to their Motion to Take Judicial Notice.

relief, while disavowing in this Court any such role in an effort to avoid federal jurisdiction. As the Second Circuit put it, "[a]rtful pleading cannot transform [Plaintiffs'] [C]omplaint[s] into anything other than … suit[s] over global greenhouse gas emissions." *Id.* (emphasis and internal quotation marks omitted). "It is precisely because fossil fuels emit greenhouse gases—which collectively exacerbate global warming—that [Plaintiffs are] seeking damages." *Id*. No matter how Plaintiffs' claims are characterized, and no matter how often Plaintiffs assert that their claims target "deception" alone, their requested relief necessarily seeks damages for physical harms resulting from global emissions.

Moreover, Defendants need not show "that the complained-of-conduct itself"—here, according to Plaintiffs, the alleged deception alone—"was at the behest of" the federal government. *Baker*, 962 F.3d at 944 (emphasis omitted). Nor is it necessary that the federal-officer activity be the *only* conduct alleged to give rise to Plaintiffs' injuries. *Id.* at 945. All that is necessary is that certain "allegations are directed at the relationship between [Defendants] and the federal government" and that "some" portion of the relationship may have "caused [Plaintiffs'] injuries." *Id.* at 944–45 (internal quotation marks omitted).

As the Supreme Court has explained, to determine the "gravamen" of a complaint for jurisdictional purposes, courts are to "zero[] in on the core of [the] suit," in particular what "actually injured" the plaintiff. *OBB Personenverkehr AG v.*

Sachs, 577 U.S. 27, 35 (2015). The Supreme Court has applied this principle broadly, beyond *Sachs* and the Foreign Sovereign Immunities Act ("FSIA"). *See Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 755 (2017) (interpreting the Individuals with Disabilities Education Act). "What matters is the crux—or, in legal-speak, the gravamen—of the plaintiff's complaint, setting aside any attempts at artful pleading." *Id*. In both *Sachs* and *Fry*, the Court "worr[ied]" that any other approach would make it "too easy" for plaintiffs to manipulate their complaint in order to "bypass" the rules governing federal jurisdiction. *Id*. (citing *Sachs*, 577 U.S. at 32–36). That concern presages Plaintiffs' gambit here, in which they have attempted to evade federal court by incanting "magic words," *id*., focusing on their misrepresentation allegations to the exclusion of the rest of their Complaints. This, they are not permitted to do.

Plaintiffs' responses are without merit. They first seek to limit *Sachs* to its facts, arguing that the phrase "based upon" in the FSIA has no relevance to the statutory phrase "relating to" at issue here. Resp.40–41. But, if anything, the phrase "relating to" is broader than the phrase "based upon," so any interpretation that would satisfy the latter would apply all the more to the former. And Plaintiffs selectively quote *Fry* to suggest that the gravamen of a complaint is defined solely by alleged illegal conduct, not by a plaintiff's asserted injuries. Resp.42. In fact, *Fry*—like the Supreme Court's other cases—uses a holistic approach, instructing that the

"substance" of the complaint, rather than "particular labels and terms," is "what matters." 137 S. Ct. at 755. And "[t]hat inquiry makes central the plaintiff's own claims." *Id.* The key question here is whether Plaintiffs could "have brought essentially the same claim" absent Defendants' alleged extraction, production, and sale of oil and gas. *Id.* at 756. The answer is clearly no. By their very terms, Plaintiffs' causes of action, alleged injuries, and requested relief all hinge on allegations that Defendants' extraction and production of fossil fuels led to global climate change, which in turn caused Plaintiffs' alleged physical injuries.

Finally, Plaintiffs accuse Defendants of "rewriting" their Complaints, arguing that this Court's command to "credit [a] defendant's theory of the case" when applying the nexus prong, *Leite v. Crane Co.*, 749 F.3d 1117, 1124 (9th Cir. 2014), must be understood narrowly, Resp.43–44. But it is Plaintiffs who seek to rewrite their Complaints in an attempt to persuade this Court to put on blinders and ignore Plaintiffs' causal theory, alleged injuries, and requested relief. This Court should refuse to permit Plaintiffs to avoid federal jurisdiction by mischaracterizing their own Complaints.

B. Defendants Acted Under Federal Officers.

Plaintiffs next contend that Defendants were not "acting under" federal officers when they extracted and produced vast quantities of fossil fuels over the decades, arguing that Defendants were merely engaging in arm's-length consumer contracts

or, at most, regulator-regulated relationships. Resp.22–34. In each instance, however, Plaintiffs gloss over—or outright ignore—key allegations and record evidence showing that Defendants' operations were under federal officers' "guidance" and "control," and that Defendants assisted the government in producing "item[s] that it needs," tasks that, without Defendants, "the Government itself would have had to perform." *Watson*, 551 U.S. at 153–54. Indeed, the U.S. government has long treated fossil fuels as essential to meet military needs, ensure national security, and foster economic prosperity. 2-ER-149, 152. It has relied on Defendants to address this "vital need," 2-ER-149, treating them as "in the employ" of the federal government, 2-ER-243, 5-ER-815. And federal officials directed Defendants to extract, produce, and supply oil and gas from specific sources, at specific volumes, and to exacting specifications. Any lawsuit that relates to those activities belongs in federal court.

First, Defendants have manufactured and supplied extensive amounts of specialized fuels for the military. OB.29–38. Plaintiffs contend that this activity does not involve the requisite level of government control and supervision. Resp.31–34. Plaintiffs are mistaken. Federal-officer removal is appropriate whenever—as here—the government "require[s]" a defendant to manufacture contracted products "ac-

cording to detailed [federal] specifications." *Baker*, 962 F.3d at 947. A federal officer need not physically supervise the production; setting detailed, bespoke specifications as part of a government-contractor relationship is sufficient.

That is exactly what happened here. For decades, Defendants produced and supplied large quantities of highly specialized, non-commercial-grade fuels that had to conform to precise governmental needs to satisfy the unique operational requirements of the U.S. military's planes, ships, and other vehicles. 8-ER-1478–79. Indeed, the district court below correctly "assume[d]" that the production of these specialized fuels constituted "act[ing] under a federal officer." 1-ER-13. The record here is clear: "[T]he military" has "rel[ied] 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." 2-ER-191–92. Absent Defendants' production of these specialized fuels, "the Government itself would have had to" produce them, thus confirming that removal was proper. *Watson*, 551 U.S. at 154. Defendants' relationship with the government closely resembles the one in *Arlington*, which the Fourth Circuit found qualified for removal under Section 1442. 996 F.3d at 252 (government dictating "[p]ricing, eligibility verification, shipping, [and] payment" of prescriptions).

The amicus brief filed by former Chairmen of the Joint Chiefs of Staff confirms this point: "For more than a century, petroleum products have been essential

for fueling the United States military around the world." Amicus Br. of Gen. (Ret.) Richard B. Myers & Adm. (Ret.) Michael G. Mullen at 3. Thus, the "oil and gas products produced by … Defendants have been and continue to be critical to national security, military preparedness, and combat missions." *Id.* at 5. To ensure a steady supply, "the Federal Government has … incentivized, directed[,] and contracted with Defendants to obtain oil and gas products, including specialized jet fuels," and "[a] substantial portion of the oil and gas used by the United States military are non-commercial grade fuels that are developed and produced by private parties, including many of the Defendants here, under the oversight and direction of military officials." *Id.* at 6. The contracts to produce such specialized fuels "were not typical commercial agreements"—they required Defendants "to supply fuels with unique additives to achieve important objectives." *Id.* at 20.

Second, Defendant Chevron's predecessor Standard Oil operated the Navy's portion of Elk Hills Reserve. Plaintiffs contend that the contract under which Standard Oil was hired by the government to operate the Navy's portion of the Reserve includes "only general direction[s]" and not the precise specifications needed for federal-officer removal. Resp.19. But the Navy had to decide whether it wanted to produce oil itself or hire a contractor for the job, OB.49–50, and it "chose to operate the reserve through a contractor rather than with its own personnel," 2-ER-220. Standard Oil operated the Reserve for the Navy for more than 30 years, and during

this period the Navy viewed Standard Oil as not only an agent—which alone would be sufficient for federal-officer jurisdiction—but "*in the employ of the Navy Department*." 5-ER-815 (emphasis altered). In fact, in a communication demanding that Standard Oil increase production to 400,000 barrels per day to meet the unfolding energy crisis, the Navy unequivocally told Standard Oil: "*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." 2-ER-243 (emphasis added); *accord* 8-ER-1481–83 (Navy had "exclusive control over operations").

The Navy had "full and absolute power to determine … the rate of prospecting and development on, and the quantity and rate of production from [Elk Hills]," and reserved the right, "from time to time," to "shut in wells on the Reserve if it so desire[d]." 8-ER-1481 (emphasis omitted). This arrangement allowed the Navy to manage Elk Hills as it saw fit—but "rather than [do so] with its own personnel," "[t]he Navy chose to operate the reserve through a contractor." 2-ER-220.

Thus, Standard Oil's activities at Elk Hills taken under the Navy's direction "assist[ed]" and "help[ed] carry out[] the duties [and] tasks of the federal superior." *Watson*, 551 U.S. at 152 (emphasis omitted). For decades, Chevron's predecessor was in the employ of and under the "subjection, guidance, or control" of the Navy, the exact "unusually close [relationship] involving detailed regulation, monitoring, or supervision" that permits federal-officer removal. *Id*. at 151, 153.

The same argument applies to Defendants' production of oil and gas under the Defense Production Act ("DPA"). Plaintiffs describe this conduct as mere "regulatory compliance," Resp.23–24, but the DPA production orders did not simply set standards for Defendants to meet in their normal operations. Rather, the DPA "gave the U.S. government broad powers to direct industry for national security purposes," and the federal government "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" alone. 2-ER-180–81. Such demands on private actors are qualitatively different from the facts of Plaintiffs' cited authority, *Washington v. Monsanto Co.*, 738 F. App'x 554 (9th Cir. 2018), where the defendant was ordered only "to accept a third party's purchase orders," *id.* at 556.

Third, Defendants produced oil and gas under detailed OCS leases subject to federal-officer supervision and direction. This Court in *County of San Mateo v. Chevron Corp.* held that the OCS leases, "without more," did not demonstrate that Defendants were required "to fulfill basic government duties." 960 F.3d 586, 602 (9th Cir. 2020), *cert. granted, judgment vacated sub nom. Chevron Corp. v. San Mateo Cnty., Cal.*, 141 S. Ct. 2666 (2021). But the expanded evidentiary record here shows that the federal government "procured the services of oil and gas firms to develop urgently needed energy 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. 2-ER-73–74. And the *federal government*, not the oil companies, "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." 2-ER-75–77; *see also* 8-ER-1490–91.

Plaintiffs argue that Defendants' leases and operations on the OCS entail only the right of first refusal by the government without any officer-directed conduct. Resp.15. But that claim is contradicted by the record evidence. The federal officials who oversee and manage the OCS program "did not engage in perfunctory, run-of-the-mill permitting and inspection." 2-ER-89–91. 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. 2-ER-96–97.

Plaintiffs also contend that Defendants' extraction, production, and sale of oil and gas from the OCS do not constitute "a basic governmental function." Resp.15–18. The authorities on which they rely, however, only underscore the propriety of removal here. In *Riggs v. Airbus Helicopters, Inc.*, 939 F.3d 981 (9th Cir. 2019), this Court concluded that mere compliance with federal aviation regulations did not give rise to federal-officer removal, but there, manufacturers were simply complying

with the law; here, by contrast, Defendants were obeying the specific instructions of federal officers, *see id.* at 983–84. Likewise, *Fidelitad, Inc. v. Insitu, Inc.* involved a manufacturer complying with generic federal regulations for the sale of goods to foreign governments, not executing the specific terms of an agreement with the U.S. government. 904 F.3d 1095, 1098–1100 (9th Cir. 2018). Here, the federal government "dictated the *terms, locations, methods*, *and rates* of hydrocarbon production on the OCS," 2-ER-75–77 (emphasis added)—and it did so to achieve its own governmental purposes, using Defendants to exploit its own proprietary resources and further its national-security interest of ensuring sufficient energy reserves. 43 U.S.C. §§ 1332(3), 1344(a)–(e), 1802(1)–(2); OB.41–46.

It is undisputed that the federal government controls substantial amounts of oil and gas 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 prior experience or expertise," it chose the second option. 2-ER-86. This is the definition of "acting under": "[I]n the absence of … contract[s]

with … private firm[s], the Government itself would have had to" extract and produce oil and gas. *Watson*, 551 U.S. at 154.[3]

Fourth, Plaintiffs challenge Defendants' operation of the Strategic Petroleum Reserve ("SPR") as a basis for federal-officer removal, arguing that the *San Mateo* decision regarding the OCS forecloses the question. Resp.22–23. But the government's arrangements with Defendants regarding the SPR and OCS are not identical. Notably, at the SPR, Defendants were obligated to pay in-kind royalties to fill the reserve and to draw down the supply whenever called upon by the government. 3-ER-401–03. And contrary to Plaintiffs' assertion (Resp.23), 42 U.S.C. § 6241 does not codify lease requirements; it *authorizes* the President to direct drawdowns. Under this arrangement, Defendants function as permanent private contractors helping "the [g]overnment to produce an item that it needs." *Baker*, 962 F.3d at 942.

Finally, Plaintiffs' efforts to disclaim "injuries arising on federal property and those that arose from Defendants' provision of fossil fuel products to the federal government for military and national defense purposes" cannot succeed. *See*

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[3] The federal government's longstanding need for Defendants' products will continue for the foreseeable future. As the Interior Department recently acknowledged, "conventional energy will continue to play a major role in America for years to come." U.S. Dep't of Interior, *Climate Action Plan* 21 (Sept. 14, 2021), https://www.doi.gov/sites/doi.gov/files/department-of-interior-climate-action-plan-final-signed-508-9.14.21.pdf.

Resp.29–31; *see also* 8-ER-1534–35 & n.9.[4] Plaintiffs' allegations necessarily arise from the total accumulation of all greenhouse-gas emissions, and, according to Plaintiffs, "it is not possible to determine the source of any particular individual molecule of CO_2 in the atmosphere attributable to anthropogenic sources." 8-ER-1534; 8-ER-1634. Indeed, Plaintiffs do not offer any method to isolate their alleged climate-related injuries from federally directed conduct, nor is there a "realistic possibility" of doing so. *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). Especially in view of Plaintiffs' contrary statements following remand to the Hawaii state courts—in which Plaintiffs conceded that Defendants' extraction and production of fossil fuels were crucial elements of their causal theory—this Court should not accept Plaintiffs' attempts to strategically ignore whole swaths of their Complaints. *See O'Connell v. Foster Wheeler Energy Corp.*, 544 F. Supp. 2d 51, 54 n.6 (D. Mass. 2008) (rejecting attempt to disclaim "recovery for any injuries resulting from" acts

[4] Plaintiffs' attempted disclaimers also do not cover all of the bases for removal. For example, Defendants' roles with regard to the SPR, the Elk Hills reserve, and the OCS involve not injuries on federal property, but rather *activities* on federal property that allegedly caused Plaintiffs' purported injuries. Similarly, Defendants produced fossil fuels for the federal government for purposes *other* than the military or national defense.

"committed at the direction of an officer of the United States Government"); *Ballenger v. Agco Corp.*, No. C 06-2271 CW, 2007 WL 1813821, at *2 (N.D. Cal. June 22, 2007) ("[T]he fact that Plaintiffs' complaint expressly disavows any federal claims is not determinative.").

C. Defendants Satisfy The Colorable-Defense Prong.

Defendants have also raised several meritorious federal defenses: Plaintiffs' claims are barred by the government-contractor defense, preemption (including statutory preemption under the Clean Air Act), federal immunity, the foreign-affairs doctrine, and various constitutional provisions, such as the Interstate and Foreign Commerce Clauses, the Due Process Clause, and the First Amendment. *See* 8-ER-1498.

Plaintiffs object that Defendants "simply assert[ed]" their federal defenses, 1-ER-21, without adequately proving them, Resp.46. But Plaintiffs' argument conflicts with the Supreme Court's warning not to adopt a "grudging" approach to removal under Section 1442(a)(1). *Jefferson Cnty., Ala. v. Acker*, 527 U.S. 423, 431 (1999). And this Court has instructed courts to "interpret section 1442 broadly in favor of removal." *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1252 (9th Cir. 2006). A defendant "need not win his case before he can have it removed." *Willingham v. Morgan*, 395 U.S. 402, 407 (1969). Rather, "[o]ne of the primary

purposes of the" federal-officer-removal statute "was to have [federal] defenses litigated in the federal courts." *Id*.

Importantly, moreover, "[t]he statute governing removal of civil actions tracks the language of Rule 8(a)(1), requiring the defendant to provide 'a short and plain statement of the grounds for removal.'" *Leite*, 749 F.3d at 1122 (quoting 28 U.S.C. § 1446(a)). Defendants have more than satisfied that liberal pleading standard by asserting numerous colorable defenses to Plaintiffs' claims and providing ample support across two lengthy removal notices to demonstrate, at a minimum, a "colorable" basis for defenses such as preemption, the government-contractor defense, and defenses under the Interstate and Foreign Commerce Clauses and the foreign-affairs doctrine. *See, e.g.*, 8-ER-1430; 8-ER-1444–45; 8-ER-1456–62; 8-ER-1474–97; 8-ER-1498. Indeed, the Second Circuit recently rejected claims closely analogous to Plaintiffs', confirming that Defendants' defenses are far more than colorable. *See New York*, 993 F.3d at 95–103.

Plaintiffs' own cases confirm that Defendants here have amply carried their burden. *See Arlington*, 996 F.3d at 249, 256 (finding colorable-defense prong satisfied where defendants "assert[] that they could assert" colorable federal defenses). By contrast, in *Cabalce v. Thomas E. Blanchard & Associates, Inc.*, 797 F.3d 720 (9th Cir. 2015), removal was improper because the defendant "failed to proffer *any* evidence" of a government-contractor defense, *id.* at 730 (emphasis added). Here,

far from making the district court do their work for them, Resp.47, Defendants have set forth sufficient facts to establish several colorable defenses to Plaintiffs' claims.

II. Plaintiffs' Actions Are Removable Because They Are Connected To Defendants' Activities On The Outer Continental Shelf.

Plaintiffs' claims are also removable under OCSLA for two independent reasons: (1) the claims are connected with Defendants' extraction and production of oil and gas from the OCS, and (2) the requested relief would potentially impair OCS operations. Plaintiffs do not contest that significant portions of Defendants' oil and gas production occur on the OCS. *See* Resp.50 & n.27. Instead, they argue that OCSLA jurisdiction requires but-for causation between Defendants' OCS operations and Plaintiffs' claims, and that Defendants have failed to meet this burden. *Id.* at 49–52. This argument misapprehends both the standard for removal and how that standard applies here.

A. Plaintiffs' Alleged Injuries Arose In Connection With Defendants' OCS Operations.

OCSLA establishes federal jurisdiction over actions "arising out of, or *in connection with*" any OCS operation. 43 U.S.C. § 1349(b)(1) (emphasis added). That language is "straightforward and broad," *Petrobras Am., Inc. v. Vicinay Cadenas, S.A.*, 815 F.3d 211, 215 (5th Cir. 2016), and Congress "intended" for it to "extend[] 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).

The text of OCSLA precludes any all-encompassing but-for causation requirement because OCSLA's "in connection with" standard is "undeniably broad in scope." *EP Operating Ltd. P'ship v. Placid Oil Co.*, 26 F.3d 563, 569 (5th Cir. 1994). As the Supreme Court held in the personal-jurisdiction context, the "requirement of a 'connection' between a plaintiff's suit and a defendant's activities" does *not* require a "causal showing." *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1026 (2021). Plaintiffs argue that *Ford Motor* is irrelevant because it was not interpreting OCSLA. Resp.55 n.29. But the Supreme Court's holding demonstrates that the Court interprets the term "connection" in the jurisdictional context to encompass more than a causal nexus—in accordance with its plain meaning.[5]

Courts have found OCSLA jurisdiction even where an OCS operation is only indirectly or partially related to alleged harms that occur downstream from the OCS operation. For example, in *United Offshore Co. v. Southern Deepwater Pipeline*

[5] Indeed, the concurring opinions in *Ford Motor* noted that the majority "parse[d]" the words "arise out of or relate to" with the precision of the "language of a statute." 141 S. Ct. at 1033 (Alito, J., concurring in the judgment); *see also id.* at 1034 (Gorsuch, J., concurring in the judgment) (similar).

Co., OCSLA conferred jurisdiction over a case that "involve[d] a contractual dispute over the control of an entity which operates a gas pipeline," even though that "dispute is one step removed" from OCS operations. 899 F.2d 405, 407 (5th Cir. 1990). And the court in *Superior Oil Co. v. Transco Energy Co.* found OCSLA jurisdiction over a claim involving the breach of contracts for the sale of natural gas that was simply *produced* on the OCS. 616 F. Supp. 98, 105–07 (W.D. La. 1985). Similarly, courts have found OCSLA jurisdiction over disputes when an OCS operation accounted for only a *portion* of the plaintiff's alleged injury. *See Lopez v. McDermott, Inc.*, No. CV 17-8977, 2018 WL 525851, at *3 (E.D. La. Jan. 24, 2018) (OCSLA jurisdiction where "it *appear*[*ed*] that *at least part of the work* that Plaintiff alleges caused his exposure to asbestos arose out of or in connection with the OCS operations" (emphases added)); *Ronquille v. Aminoil Inc.*, No. CV 14-164, 2014 WL 4387337, at *2 (E.D. La. Sept. 4, 2014) (OCSLA jurisdiction over asbestos-damages claims at an onshore facility where "*at least part of the work* that Plaintiff allege[d] caused his exposure to asbestos arose out of or in connection with [the] OCS operations" (emphasis added)). These cases belie Plaintiffs' assertion that there must be at least "a but-for connection" between their claims and Defendants' OCS operations. Resp.53.

In any event, Defendants' substantial OCS operations satisfy even Plaintiffs' preferred "but-for" test, which itself is a "sweeping standard." *Bostock v. Clayton*

Cnty., 140 S. Ct. 1731, 1739 (2020). Plaintiffs' theory of harm is that "the normal use of [Defendants'] fossil fuel products," 8-ER-1628–29, "plays a direct and substantial role in the unprecedented rise in emissions of greenhouse gas pollution," which "is the main driver of" Plaintiffs' alleged injuries, 4-ER-480. Plaintiffs' claims thus implicate *all* of Defendants' "exploration, development, extraction, manufacturing," and "marketing" of oil and gas—including their substantial activities on the OCS. 8-ER-1536; *see also* 8-ER-1540–56.

As with the federal-officer basis for removal, Plaintiffs insist that Defendants' OCS activities are immaterial because the relevant activity is Defendants' alleged "concealment and misrepresentation of the dangers of fossil fuels." Resp.50. They posit that, even if Defendants had not extracted "a single drop of oil from the OCS, Plaintiffs would still have suffered an injury" because of Defendants' "deception campaigns." *Id*. But under Plaintiffs' own theory, their injuries arise from increased greenhouse-gas emissions stemming from the production and use of fossil fuels. Plaintiffs allege that "fossil fuel production is … the delivery mechanism of [Plaintiffs'] injury." 2-ER-42. Indeed, their Complaints identify "emissions as the singular source of [their] harm." *New York*, 993 F.3d at 91. Moreover, Plaintiffs allege that the *purpose* of allegedly spreading misinformation was to "accelerate [Defendants'] business practice of exploiting fossil fuel reserves." 4-ER-550. And Plaintiffs never dispute that a substantial proportion of those fossil fuels were extracted from

the OCS. Thus, a but-for element of Plaintiffs' claims is necessarily the production of Defendants' petroleum products, a significant portion of which came from the OCS. *See* 8-ER-1636–39. Under any formulation, Plaintiffs' claims fall well within OCSLA's "in connection with" standard.

Plaintiffs counter that Defendants' interpretation of OCSLA sweeps too broadly. Resp.57. But the propriety of federal jurisdiction here results from the unbounded nature of Plaintiffs' claims, which are global in scope. *See* 8-ER-1560–63 & Fig. 1 (discussing global CO_2 emissions). Plaintiffs' claims implicate all global sources of emissions because "greenhouse gas molecules do not bear markers that permit tracing them to their source." 8-ER-1639. And Plaintiffs allege that their harms arise as a result of these *cumulative* global emissions—not just any marginal increase in emissions from Defendants' alleged misrepresentations. *See* 8-ER-1617 (describing Defendants' activities as "a substantial factor in causing global warming and consequent sea level rise"). As the source of up to one-third of annual domestic oil production, *see* OB.58 & n.8, the OCS is squarely within the scope of Plaintiffs' sprawling claims.

B. Plaintiffs' Requested Relief Would Impair OCS Production Activities.

Jurisdiction is also proper for the independent reason that Plaintiffs' claims pose a threat to OCS production activities. OB.62–63. "[*A*]*ny dispute* that alters the

progress of production activities on the OCS and thus *threatens* to impair the total recovery of the federally-owned minerals was intended by Congress to come within the jurisdictional grant." *EP Operating*, 26 F.3d at 570 (emphases added). Plaintiffs seek potentially massive damages and disgorged profits, plus an order of "abatement," 4-ER-612; 8-ER-1641–42—relief that would inevitably deter, if not make entirely impractical, further production on the OCS. "If the [Defendants] want to avoid all liability" under Plaintiffs' theory of the case, "their only solution would be to cease global production altogether," including on the OCS. *New York*, 993 F.3d at 93.

Plaintiffs object that their claims' potential impacts on OCS operations are "wholly 'speculative'" because they supposedly seek only to prevent Defendants from continuing their alleged disinformation campaign, which would not affect future operations. Resp.56–57. But that theory is fundamentally at odds with Plaintiffs' claim that, absent "disinformation," demand would have been (and will be) lower. And Plaintiffs' requested relief similarly tells a different story. Not only have they sought compensation for all of the alleged injuries caused by global climate change, they also seek "abatement," 4-ER-612; 8-ER-1641–42, thereby raising the possibility of a judicial order mandating that Defendants curtail, eliminate, or offset the alleged effects of global climate change, including by reducing operations

on the OCS. Although Plaintiffs now describe their lawsuits as targeting solely alleged misinformation, they do not disclaim the vast sweep of their requested relief, which encompasses *all* alleged injuries arising from global climate change.

In sum, "the singular source of [Plaintiffs'] harm" is greenhouse-gas emissions, *New York*, 993 F.3d at 91, which according to Plaintiffs are due to Defendants' fossil fuels. Plaintiffs' claims have an undeniable connection with OCS operations. Moreover, Plaintiffs' requested relief would inevitably disincentivize and threaten to reduce operations on the OCS. The district court therefore had jurisdiction under OCSLA.

III. Plaintiffs' Claims Arise From Oil And Gas Production And Consumption On Federal Enclaves.

Federal courts have jurisdiction 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); *see also Durham*, 445 F.3d at 1250 (removal proper where "some of [plaintiff's] claims arose on federal enclaves"). Plaintiffs' claims encompass *all* of Defendants' production and sales activities, and their alleged injuries arise from *global* climate change. Accordingly, Plaintiffs' claims necessarily depend in large part on Defendants' substantial extraction, production, and sale of oil and gas on federal enclaves.

Plaintiffs contend that it is the location of the injury, rather than its source, that is "usually dispositive" for jurisdiction. Resp.58. But Plaintiffs' cases do not establish such a rule. This Court in *Willis v. Craig* focused on where the events giving rise to plaintiff's negligence took place without considering whether the site of the injury was dispositive. 555 F.2d 724, 726 (9th Cir. 1977) (per curiam). Likewise, *Akin v. Ashland Chemical Co.* describes federal-enclave jurisdiction as extending to all "[p]ersonal injury actions which *arise from* incidents occurring in federal enclaves." 156 F.3d 1030, 1034 (10th Cir. 1998) (emphasis added). Plaintiffs' claims clearly satisfy this standard, because Plaintiffs allege that their injuries "arise from" the effects of global climate change driven, in part, by the production, sale, and consumption of oil and gas on federal enclaves.

Plaintiffs also repeat their refrain that jurisdiction does not exist because federal enclaves are not "the locus of Plaintiffs' claims" for misrepresentation. Resp.60. But once again, Plaintiffs cannot succeed on their claims without proving that Defendants caused their alleged harms. All of the alleged damages—and, correspondingly, all of the requested relief—are related to global fossil-fuel production and consumption, a significant portion of which arose on federal enclaves. *See* 7-ER-1408 (specialized jet fuel supplied by Defendants to U.S. military bases); 7-ER-1413–20 (Elk Hills Naval Petroleum Reserve). Thus, Plaintiffs' claims "arise" from conduct "on 'federal enclaves'" and are removable. *Durham*, 445 F.3d at 1250.

CONCLUSION

The Court should reverse the district court's remand order.

DATED: November 8, 2021

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