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PROTECTING PEOPLE AND THE PLANET

January 24, 2022

Via ECF

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

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

Dear Ms. Dwyer,

Pursuant to Federal Rule of Appellate Procedure 28(j), Plaintiffs-Appellees City and County of Honolulu, the Honolulu Board of Water Supply, and County of Maui submit *Graves v. 3M Co.*, 17 F.4th 764, 773 (8th Cir. Oct. 20, 2021) (**Ex. A**), as supplemental authority. The opinion undermines Defendants-Appellants' assertions of federal-officer jurisdiction.

In *Graves*, civilian and military contractors sued an earplug manufacturer under state law, alleging that the defendant failed to warn of the known risk of injury posed by using their earplugs. 17 F.4th at 768. Even though the manufacturer specifically designed the earplugs for the military, this Court rejected federal-officer jurisdiction over the civilian contractors' claims. *See id.* at 767, 770. Because federal-officer removal requires "'a causal connection between the charged conduct and asserted official authority,'" the defendant needed to show that it was "'acting under' federal authority when it failed to warn commercial earplug customers of the injury risks plaintiffs allege[d]." *Id.* at 769. It could not carry that burden, however, because the government did not exercise "'any control over the instructions or warnings'" given to civilian purchasers. *Id.* at 770.¹

The same is true here. Under Plaintiffs-Appellees' complaint, the charged conduct is Defendants-Appellants' decades-long campaign to conceal and misrepresent the climate impacts of their fossil-fuel products. Yet Defendants-Appellants identify no connection—causal or otherwise²—between those campaigns and government-controlled conduct. They therefore fail the nexus requirement of federal-officer removal.³

¹ By contrast, the military contractors' claims were removable because the government dictated the warnings given to those contractors. *See* 17 F.4th at 770.

² *Graves* applied a causal-nexus standard, which is consistent with the statutory text. *See* 17 F.4th at 769 ("The 'causal connection' element stems from the requirement in § 1442(a)(1) that the person seeking removal is being sued 'for or relating to any act under color of such office.'"). In any event, Defendants-Appellants' arguments fail under a maximally broad reading of the nexus requirement, as Plaintiffs-Appellees explained in their brief.

³ *Graves* also confirms that Defendants-Appellants failed to raise a colorable defense by failing to explain how their purported defenses apply. *See* 17 F.4th at 772 (rejecting some of the asserted defenses as implausible).

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Respectfully submitted,

/s/ Victor M. Sher

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cc: All Counsel of Record (via ECF)