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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CITY OF OAKLAND, a Municipal Corporation, and THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through Oakland City Attorney BARBARA J. PARKER,

Plaintiffs,

v.

BP P.L.C., a public limited company of England and Wales, CHEVRON CORPORATION, a Delaware corporation, CONOCOPHILLIPS COMPANY, a Delaware corporation, EXXON MOBIL CORPORATION, a New Jersey corporation, ROYAL DUTCH SHELL PLC, a public limited company of England and Wales, and DOES 1 through 10,

Defendants.

First-Filed Case No. 3:17-cv-6011-WHA
Related to Case No. 3:17-cv-6012-WHA

THE PEOPLE'S SUPPLEMENTAL BRIEF IN SUPPORT OF RENEWED MOTION TO REMAND

Date: September 22, 2022
Time: 8:00 a.m.
Place: Courtroom 12

CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, and THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the San Francisco City Attorney DAVID CHIU, Plaintiffs, v. BP P.L.C., a public limited company of England and Wales, CHEVRON CORPORATION, a Delaware corporation, CONOCOPHILLIPS COMPANY, a Delaware corporation, EXXON MOBIL CORPORATION, a New Jersey corporation, ROYAL DUTCH SHELL PLC, a public limited company of England and Wales, and DOES 1 through 10, Defendants.	Case No. 3:17-cv-6012-WHA

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I. INTRODUCTION

The Court requested supplemental briefing to address relevant cases decided since the parties briefed the People's Renewed Motion to Remand in the spring of 2021, including *County of San Mateo v. Chevron Corp.*, 32 F.4th 733 (9th Cir. 2022) ("*San Mateo III*"). Between *San Mateo III* and the prior appeal here, the Ninth Circuit has reviewed and rejected all eight grounds for federal subject-matter jurisdiction asserted by Defendants. Nationwide, Defendants still have a "batting average of .000" in opposing remand to state court in analogous cases. *City & Cty. of Honolulu v. Sunoco LP*, No. 20-CV-00163-DKW-RT, 2021 WL 839439, at *2 n.3 (D. Haw. Mar. 5, 2021). During the past year alone, the Ninth Circuit, three other circuit courts, and four district courts have rejected Defendants' removal arguments.[1] This unbroken line of judicial authority addressing the same or similar claims asserted here—13 decisions in all, not including this case or the four decisions affirming remand that were vacated in light of *Baltimore III*[2]—compels remand of the People's lawsuits to state court, where they were properly filed nearly *five years* ago.

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[1] *San Mateo III*, 32 F.4th at 744; *Rhode Island v. Shell Oil Prods. Co.*, 35 F.4th 44, 50 (1st Cir. 2022) ("*Rhode Island III*"); *Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178, 195 (4th Cir. 2022) ("*Baltimore IV*"); *Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 1249 (10th Cir. 2022) ("*Boulder III*"), *cert. petition docketed*, No. 21-1550 (U.S. June 10, 2022); *City of Hoboken v. Exxon Mobil Corp.*, 558 F. Supp. 3d 191 (D.N.J. 2021) ("*Hoboken*"), *appeal pending*, No. 21-2728 (3d Cir.); *Connecticut v. Exxon Mobil Corp.*, No. 3:20-CV-1555 (JCH), 2021 WL 2389739 (D. Conn. June 2, 2021) ("*Connecticut*"), *appeal pending*, No. 21-1446 (2d Cir.); *Minnesota v. Am. Petroleum Inst.*, No. CV 20-1636 (JRT/HB), 2021 WL 1215656 (D. Minn. Mar. 31, 2021) ("*Minnesota*"), *appeal pending*, No. 21-1752 (8th Cir.); *Delaware v. BP Am. Inc.*, No. CV 20-1429-LPS, 2022 WL 58484 (D. Del. Jan. 5, 2022) ("*Delaware*"), *appeal pending*, No. 22-1096 (3d Cir.).

[2] In addition to those cited in n.1 above, courts granted or affirmed remand in the following decisions. *Cty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal. 2018) ("*San Mateo I*"), *aff'd in part, appeal dismissed in part*, 960 F.3d 586 (9th Cir. 2020) ("*San Mateo II*"), *vacated and remanded on other grounds*, No. 20-884 (U.S. May 24, 2021), *aff'd* 32 F.4th 733; *City of Oakland v. BP PLC*, 969 F.3d 895 (9th Cir. 2020) ("*Oakland*"), *cert. denied*, 141 S. Ct. 2776 (U.S. June 14, 2021); *Mayor & City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538 (D. Md. 2019) ("*Baltimore I*"), *as amended* (June 20, 2019), *aff'd in part, appeal dismissed in part*, 952 F.3d 452 (4th Cir. 2020) ("*Baltimore II*"), *vacated and remanded on other grounds*, 141 S. Ct. 1532 (2021) ("*Baltimore III*"), *aff'd* 31 F.4th 178; *Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, 405 F. Supp. 3d 947 (D. Colo. 2019) ("*Boulder I*"), *aff'd in part, appeal dismissed in part*, 965 F.3d 792 (10th Cir. 2020) ("*Boulder II*"), *vacated and remanded on other*

Defendants are grasping at straws. Writing for a unanimous panel in the prior appeal, Judge Ikuta rejected four of Defendants' removal theories (based on federal common law, *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005) ("*Grable*"), complete preemption, and admiralty). *Oakland*, 969 F.3d at 901, 907, 912 n.12. In *San Mateo III*, the same panel rejected the four remaining jurisdictional theories not addressed in *Oakland*: federal enclave (U.S. CONST. art. I, § 8, cl. 17); Outer Continental Shelf Lands Act ("OCSLA," 43 U.S.C. § 1349(b)(1)); federal officer (28 U.S.C. § 1442(a)(1)); and bankruptcy (28 U.S.C. § 1452(a)). *San Mateo III*, 32 F.4th at 750, 754, 760, 762. All grounds for removal have thus been addressed and rejected by the Ninth Circuit.

Despite this clear directive from the Ninth Circuit, Defendants now attempt to supplement their 2017 notices of removal with 1,425 pages of "new" materials discovered in their corporate records purportedly supports federal-officer jurisdiction. *See* Defs.' Opp'n to Pls.' Renewed Mot. to Remand 2 ("Opp."), Dkt. 349 (Feb. 24, 2021).[3] They also attempt to raise an entirely new theory of *Grable* jurisdiction, based on a potential First Amendment defense. Opp. at 24.

None of these new materials or argument may be considered by the Court. First, binding Ninth Circuit precedent instructs that Defendants' new legal theories and evidence are time-barred under 28 U.S.C. §§ 1446(b)(1) and 1653. *See Barrow Dev. Co. v. Fulton Ins. Co.*, 418 F.2d 316, 317 (9th Cir. 1969). Second Defendants are collaterally estopped from re-arguing the jurisdictional theories they previously lost in the Ninth Circuit in *San Mateo III*, the First Circuit in *Rhode Island III*, and the district courts in *Honolulu*, *Hoboken*, and *Delaware*, despite having had a full and fair opportunity to litigate those theories. Finally, every court to consider Defendants' expanded evidentiary record and First Amendment arguments has rejected them as insufficient to establish subject-matter jurisdiction. *See Honolulu*, 2021 WL 531237, at *5, *8 n.14; *Delaware*, 2022 WL

grounds, No. 20-783 (U.S. May 24, 2021), *aff'd*, 25 F.4th 1238; *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142 (D.R.I. 2019) ("*Rhode Island I*"), *aff'd in part, appeal dismissed in part*, 979 F.3d 50 (1st Cir. 2020) ("*Rhode Island II*"), *vacated and remanded on other grounds*, No. 20-900 (U.S. May 24, 2021), *aff'd*, 35 F.4th 44; *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31 (D. Mass. 2020) ("*Massachusetts*"); *City & Cty. of Honolulu v. Sunoco LP*, No. 20-CV-00163-DKW, 2021 WL 531237 (D. Haw. Feb. 12, 2021) ("*Honolulu*"), *appeal pending*, Nos. 21-15313, 21-15318 (9th Cir.).

[3] Unless otherwise noted, all docket numbers correspond to Case No. 17-cv-6011.

58484, at *8–13; *Hoboken*, 558 F. Supp. 3d at 204, 206–09. The Court should remand these cases to state court, where they belong. It should also vacate its prior ruling on personal jurisdiction as required by *Special Investments, Inc. v. Aero Air, Inc.*, 360 F.3d 989 (9th Cir. 2004).

II. LEGAL STANDARD

"[R]emoval statutes should be construed narrowly in favor of remand to protect the jurisdiction of state courts," and federal courts must "adher[e]" to the strong presumption against removal even when a plaintiff's claims are "novel and sweeping." *San Mateo III*, 32 F.4th at 764.

III. ARGUMENT

In *San Mateo III*, the Ninth Circuit squarely rejected Defendants' four remaining grounds for removal: OCSLA, federal-enclave, *Grable*, and federal-officer jurisdiction. Defendants try to side-step *San Mateo III* by pointing to "new" arguments based on "new" evidence from their files and the public record. But that evidence is decades old and was fully available to Defendants when they removed these cases. *See* Joint Status Report, Dkt. 392, at 3; *see generally* Opp. Under 28 U.S.C. §§ 1446 and 1653, Defendants' new materials are time-barred. Defendants' arguments are also precluded by the collateral estoppel doctrine. And on the merits, Defendants' theories are baseless, even as updated, as every court to consider them has held.

A. The Court must disregard Defendants' new arguments and new evidence.

As the People's Reply Brief demonstrated, Sections 1446 and 1653 prohibit this Court from considering Defendants' belatedly asserted jurisdictional arguments and the 1,425 pages of newly filed documents they offer in support. Reply Br. ("Reply"), Dkt. 358, at 5–8.

A defendant may only remove claims from state to federal court "within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based." 28 U.S.C. § 1446(b). The removing defendant must submit a notice "containing a short and plain statement of the grounds for removal." *Id.* § 1446(a). After expiration of that 30-day window, "[d]efective allegations of jurisdiction may be amended," *id.* § 1653, but the Ninth Circuit has made clear that any such amendment is limited "*solely* to clarify 'defective' allegations of jurisdiction *previously made*." *Barrow Dev. Co. v. Fulton Ins. Co.*, 418 F.2d 316, 317 (9th Cir. 1969) (emphasis added). Thus, a

defendant "cannot amend its notice, via an opposition [to a motion to remand] or otherwise, 'to add allegations of substance'" more than thirty days after receipt of the initial pleading. *Bristol Cap. Invs., LLC v. CannapharmaRx Inc.*, No. 2:21-CV-03808-SB, 2021 WL 2633155, at *2 (C.D. Cal. June 24, 2021) (quoting *Barrow*, 418 F.2d at 317). Nor can it advance "new arguments" for removal or otherwise "change" its theories of subject-matter jurisdiction. *Ortiz v. Tara Materials, Inc.*, No. 21-CV-00373-AJB-AHG, 2021 WL 5982289, at *2–3 (S.D. Cal. Dec. 17, 2021). Amendments after 30 days may only correct allegations already in the removal notice that are "defective in form," such as an "ambiguous" allegation of citizenship in a diversity case. *Barrow*, 418 F.2d at 318; *see also Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 831 (1989) ("§ 1653 speaks of amending 'allegations of jurisdiction,' which suggests that it addresses only incorrect statements about jurisdiction that actually exists, and not defects in the jurisdictional facts themselves."). "When defendants attempt to assert totally new grounds for removal or to create jurisdiction where none existed, however, the courts uniformly deny leave to amend." *Smiley v. Citibank (S. Dakota), N.A.*, 863 F. Supp. 1156, 1159 (C.D. Cal. 1993) (quotation omitted).

Defendants acknowledge that their notice of removal did not include their new theory of *Grable* jurisdiction. Opp. at 24 n.12. While they describe their new trove of documents as "a more fulsome factual record" in support of federal-officer removal than they previously presented, *id.* at 2, it is plain from Defendants' new arguments that they are not seeking to "clarify 'defective' allegations of jurisdiction previously made." *Barrow*, 418 F.2d at 317. Instead, they are "attempt[ing] to create jurisdiction where none existed," *Rockwell Int'l Credit Corp. v. U.S. Aircraft Ins. Grp.*, 823 F.2d 302, 304 (9th Cir. 1987), *overruled on other grounds by Partington v. Gedan*, 923 F.2d 686 (9th Cir. 1991), based on new facts and circumstances pertaining to *other* contracting relationships and responsibilities—none of which Defendants even hinted at before.

Even a cursory review of Defendants' new evidence confirms that it goes far beyond correcting "minor technical" problems in the removal notices. *See Wood v. Crane Co.*, 764 F.3d 316, 322 (4th Cir. 2014). As originally pleaded, Defendants' notices identified two activities purportedly supporting federal-officer removal: (1) performance under a unit contract between Standard Oil and the Navy to produce fossil fuels at the Elk Hills Reserve, and (2) production

under OCSLA mineral leases. *See* Notice of Removal, Dkt. 1 ¶¶ 55–62 ("NOR"). Most of Defendants' "new" evidence pertains to entirely different activities, such as Defendants' involvement in the Strategic Petroleum Reserve, their "production activities during World War II and the Korean War," and their sales of "specialized" military fuels. Opp. at 2.

The remaining materials pertain to the Elk Hills Reserve and the Outer Continental Shelf ("OCS") mineral leasing program; and Defendants rely on those documents to develop entirely new arguments, not to clarify ambiguities in their removal notice. Defendants declare that their new evidence—a previously undisclosed "Operating Agreement" between Standard Oil and the Navy, and an "expert" declaration purportedly recounting the history of Congress's OCS regulation—"provide[s] the 'more' that the Ninth Circuit thought was lacking in *San Mateo*." *Id.* at 14. That is an acknowledgement that the Ninth Circuit found the federal-officer allegations in Defendants' notice of removal *legally inadequate*, not confusing or ambiguous. *See* Opp. at 13–14. Under Section 1653, "new grounds may not be added and missing allegations may not be furnished" to salvage a substantively deficient removal notice. *Hillman v. PacifiCorp*, No. 2:21-cv-00848, 2022 WL 597583, at *3 (E.D. Cal. Feb. 28, 2022).

Defendants also argue that the Court may consider their new First Amendment theory of removal because they previously "raised *Grable* in their Notice of Removal." Opp. at 24 n.12. By that logic, a defendant could simply assert as a legal conclusion that it satisfies the requirements of, say, federal-question jurisdiction, without explaining why or how, and "then wait until a motion to remand is filed in order to provide [the requisite legal theory or] factual support." *Navarro v. Servisair, LLC*, No. C 08-02716 MHP, 2008 WL 3842984, at *7 (N.D. Cal. Aug. 14, 2008). Even worse, a defendant could wait until after losing an appeal from a remand order before offering any support for its jurisdictional theories, as Defendants try to do here. The "[c]ase law . . . does not support" this ploy. *Id.* Courts have uniformly rejected untimely attempts to advance new theories in support of previously asserted jurisdictional grounds. *See, e.g.*, *Bristol*, 2021 WL 2633155, at *2 (defendant may not offer a "new rationale" for diversity jurisdiction); *Hill Physicians Med. Grp., Inc. v. Pacificare of Cal.*, No. C 01-0318 SI, 2001 WL 492481, at *3 (N.D. Cal. Apr. 24, 2001) (defendant may not "substitute an entirely different federal statute as a basis for asserting

complete[] preemption"); *Ortiz*, 2021 WL 5982289, at *2 (defendant may not offer "a new argument" about "the amount-in-controversy requirement"); *Hillman*, 2022 WL 597583, at *5–6 (rejecting argument that because defendant's new and old "theories fall under the general rubric of federal question jurisdiction," "the 'legal basis' for jurisdiction has not changed").

Section 1653 does not create the gaping loophole that Defendants need to succeed. "The purpose of § 1653 . . . is to ensure that a party is not denied his day in court on the basis of *technical* flaws in his pleading, not to give parties a second bite at the apple whenever they fail to establish federal jurisdiction due to substantive deficiencies in their allegations." *Schubarth v. Fed. Republic of Germany*, No. 14-CV-2140 (CRC), 2021 WL 7889662, at *8 (D.D.C. Jan. 25, 2021) (cleaned up); *see also Jackson v. NAACP*, 575 F. App'x 256, 259 (5th Cir. 2014) (§ 1653 prohibits "attempts to present legal theories *seriatim*"). To hold otherwise would violate Section 1446's "mandatory" time limits. *Kuxhausen v. BMW Fin. Servs. NA LLC*, 707 F.3d 1136, 1142 n.4 (9th Cir. 2013). Defendants' approach would also "create a perverse incentive," encouraging removing parties to "wait for their opponents to file a motion to remand and then torpedo their opponents by loading the opposition memorandum with previously undisclosed and stronger bases for jurisdiction." *Hemphill v. Transfresh Corp.*, No. C-98-0899-VRW, 1998 WL 320840 *4 (N.D. Cal. June 11, 1998). "[O]ne need not look further than the case at bar"—and the many exhibits and declarations submitted with Defendants' opposition brief—"to realize this scenario is far from hypothetical." *Id.* at *5. Under *Barrow*, the Court must evaluate jurisdiction based on the allegations in the removal notices, not evidence and arguments raised for the first time more than four years later.

B. Defendants are estopped from relitigating removal jurisdiction.

Defendants' asserted grounds for removal should independently be rejected on grounds of collateral estoppel. In the past year, the First, Fourth, and Ninth Circuits have rejected each of Defendants' eight asserted grounds for removal, in cases to which all Defendants were parties. *See Rhode Island III*, 35 F.4th 44; *Baltimore IV*, 31 F.4th 178; *San Mateo III*, 32 F.4th 733. Three district courts have likewise rejected the First Amendment arguments and federal-officer evidence Defendants now rely on. *See Delaware*, 2022 WL 58484; *Hoboken*, 558 F. Supp. 3d 191; *Honolulu*, 2021 WL 531237. Defendants are not entitled to yet another bite at the removal apple.

Offensive collateral estoppel precludes "a defendant from relitigating the issues which the defendant previously litigated and lost against another plaintiff." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329 (1979). A plaintiff may invoke collateral estoppel when (1) the defendant had "a full and fair opportunity to litigate the identical issue in the prior action, (2) the issue was actually litigated in the prior action, (3) the issue was decided in a final judgment, and (4) the party against whom issue preclusion is asserted was a party or in privity with a party to the prior action." *Syverson v. Int'l Bus. Machines Corp.*, 472 F.3d 1072, 1078 (9th Cir. 2007) (citations omitted); *see* Motion Br. ("Mot."), Dkt. 342, at 7–10. In those circumstances, the defendant should be precluded from re-arguing the issue, unless it can establish application of the doctrine would cause undue prejudice. *See Syverson*, 472 F.3d at 1079.

The decisions in *San Mateo III*, *Baltimore IV*, and *Rhode Island III* each satisfy the prerequisites for estoppel. All Defendants were parties to those cases in the trial and appellate courts. The public entity plaintiffs in *San Mateo*, *Baltimore*, and *Rhode Island*, like the People here, alleged state-law public nuisance claims for local environmental impacts caused by Defendants' decades-long deceptive campaigns to hide and distort the truth about climate change. *Compare* Oak. Compl. ¶¶ 143–48, *with* San Mateo Compl. ¶¶ 179–202, Baltimore Compl. ¶¶ 218–28, *and* Rhode Island Compl. ¶¶ 225–37. As here, Defendants removed those actions to federal court on theories of (1) federal common law, (2) *Grable*, (3) complete preemption, (4) OCSLA, (5) federal-officer, (6) federal-enclave, (7) bankruptcy jurisdiction, and admiralty. *Compare* Oak. NOR ¶¶ 5–11, *with* San Mateo NOR ¶¶ 5–11, Baltimore NOR ¶¶ 5–12, *and* Rhode Island NOR ¶¶ 5–11. Defendants fully, fairly, and vigorously litigated each removal ground before the district courts, and the First, Fourth, and Ninth Circuits rejected Defendants' arguments as legally inadequate in *Rhode Island III*, *San Mateo III*, and *Baltimore IV* respectively. Those rulings are "final judgments" for estoppel purposes and are binding on Defendants, notwithstanding any petitions for certiorari Defendants may file. *See* Mot. at 9–10 (collecting cases); 18A Charles Alan Wright et al., FED. PRAC. & PROC. § 4433 (3d ed. 2022).

The removal issues before this Court are "identical" to those resolved against Defendants in *Rhode Island*, *San Mateo*, and *Baltimore*. *Kamilche Co. v. United States*, 53 F.3d 1059, 1063

(9th Cir. 1995). Courts evaluating whether an issue was "previously litigated" generally consider whether that judgment involves "the same rule of law," concerns "closely related . . . claims" and "substantial[ly] overlap[s]" in "evidence or argument," and whether "pretrial preparation and discovery" in the first action could "reasonably be expected to have embraced" the issue raised in the second action. *Id.* at 1062. "[O]nce an *issue* is raised and determined, it is the *entire* issue that is precluded, not just the particular arguments raised in support of it in the first case." *Id.* at 1063.

San Mateo III applied the same legal tests this Court must consider to the same eight removal grounds asserted in Defendants' removal notices; the First and Fourth Circuits applied materially similar legal tests as well. Each case involved nearly identical public-nuisance claims for injuries caused by Defendants' climate-disinformation campaigns. Because the removal notices here are materially indistinguishable from those filed in *San Mateo, Rhode Island*, and *Baltimore*, the overlap of evidence and argument is substantial.[4] That substantial overlap would remain even if this Court were to consider Defendants' 1,425 pages of untimely exhibits and declarations; Defendants' new materials add various new arguments and theories (in violation of 28 U.S.C. §§ 1446, 1653), but those materials "merely rearrange the deckchairs," as one district court put it. *Honolulu*, 2021 WL 531237, at *5.

In any event, Defendants' "pretrial preparation and discovery" in *San Mateo, Rhode Island*, and *Baltimore* plainly could have encompassed Defendants' decades-old "new" evidence. Nearly all of that evidence concerns events, contracts, or activities that occurred 50 or more years ago, covering such diverse subjects as the production of fossil fuels during World War II and the Korean

[4] *Compare* Oak. NOR ¶¶ 13–21 (federal common law), ¶¶ 22–34 (*Grable* jurisdiction), ¶¶ 35–47 (complete preemption), ¶¶ 55–62 (federal officer removal), ¶¶ 63–66 (federal-enclave jurisdiction), ¶¶ 48–54 (OCSLA jurisdiction), ¶¶ 67–69 (bankruptcy removal), *with* San Mateo NOR ¶¶ 13–21 (federal common law), ¶¶ 22–35 (*Grable* jurisdiction), ¶¶ 36–48 (complete preemption), ¶¶ 56–64 (federal officer removal), ¶¶ 65–69 (federal-enclave jurisdiction), ¶¶ 49–50 (OCSLA jurisdiction), ¶¶ 70–74 (bankruptcy removal); Rhode Island NOR ¶¶ 13–20 (federal common law), ¶¶ 21–33 (*Grable* jurisdiction), ¶¶ 34–46 (complete preemption), ¶¶ 54–67 (federal officer removal), ¶¶ 68–72 (federal-enclave jurisdiction), ¶¶ 47–53 (OCSLA jurisdiction), ¶¶ 73-76 (bankruptcy removal); *and* Baltimore NOR ¶¶ 14–22 (federal common law), ¶¶ 23–37 (*Grable* jurisdiction), ¶¶ 38–50 (complete preemption), ¶¶ 58–66 (federal officer removal), ¶¶ 67–71 (federal-enclave jurisdiction), ¶¶ 51–57 (OCSLA jurisdiction), ¶¶ 76–78 (admiralty jurisdiction), ¶¶ 72–75 (bankruptcy removal). Defendants abandoned bankruptcy removal in these cases by not addressing it in their opposition to remand.

War, Standard Oil's 1972 "operating agreement" with the Navy, the history of the OCS leasing program from the 1950s through the 1970s, the operation of the Strategic Petroleum Reserve since the 1970s, and the sale of "specialized" military fuels during the Cold War. *See* Opp. at 2, 10–21. Nothing prevented Defendants from submitting those alternative grounds for federal-officer removal in *San Mateo*, *Rhode Island*, or *Baltimore*, or including them in their notice of removal here. "It would defeat the principles of collateral estoppel for a party to avoid preclusion by simply offering facts and arguments it could have presented in an earlier case but chose not to." *XpertUniverse, Inc. v. Cisco Sys., Inc.*, No. 17-CV-03848-RS, 2018 WL 2585436, at *4 (N.D. Cal. May 8, 2018). Having litigated the jurisdictional grounds asserted in their removal notices here, Defendants cannot now present "new evidentiary facts . . . to obtain a different determination." *United States v. Castillo-Basa*, 483 F.3d 890, 903 n.10 (9th Cir. 2007).

Even if Defendants could avoid the preclusive effect of *San Mateo*, *Baltimore*, and *Rhode Island* based on their belated identification of their own historical files, they could still not avoid the preclusive effect of the remand orders in *Honolulu*, *Hoboken*, and *Delaware*. Each of those decisions considered and rejected Defendants' new federal officer removal evidence *and* their First Amendment theory of *Grable* jurisdiction. *See Honolulu*, 2021 WL 531237, at *4–6, *8 n.14; *Hoboken*, 558 F. Supp. 3d at 204, 207–09; *Delaware*, 2022 WL 58484, at *8, *12–13. Those rulings preclude Defendants from relitigating removal jurisdiction, even in cases where appeals are pending. *See Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 882 (9th Cir. 2007).

The across-the-board rejection of Defendants' arguments in *Rhode Island III*, *San Mateo III*, *Baltimore IV*, *Honolulu*, *Hoboken*, and *Delaware* also precludes their position that it would somehow be unfair to apply collateral estoppel against them. Defendants urge the Court to allow them to dredge up old facts in support of removal because "the importance of the issues at hand" and "the significance of Defendants' evidence in support of federal officer removal" outweigh the risk of inconsistent results or other considerations. Opp. at 10. But the "importance" of the underlying *merits* issues is irrelevant, because those merits are not before the Court. And the remand issues are no more important in these cases than in the dozen-plus others that previously rejected them. Moreover, three of those courts have already found that Defendants' supposedly

"significan[t]" new evidence is not significant at all, and is inadequate to satisfy their removal burden. "[T]he only prejudice [resulting from] collateral estoppel" here "is the same prejudice every litigant experiences from collateral estoppel: [they don't] get another bite at the apple." *Vargas v. City of L.A.*, 857 F. App'x 360, 362 (9th Cir. May 20, 2021). Because Defendants cannot "explain how this bite would produce materially different results," *id.*, this Court should not allow them to use untimely exhibits and declarations as a springboard for relitigating the removal issues they have already lost 14 separate times.

C. Recent decisions underscore that Defendants' removal arguments lack merit.

Even if this Court were required to pore over all 1,425 pages of new materials, it should still remand. The Ninth Circuit's analysis in *San Mateo III* leaves no room for Defendants to make additional fact-based arguments under OCSLA or federal-enclaves jurisdiction, because that analysis established the lack of any meaningful connection between the Defendants' asserted federal interests and the public entities' wrongful-deception theories of liability. 32 F.4th at 750, 754, 762 (finding the connection too "attenuated"). Defendants' "new evidence" cannot change the result, and Defendants are still unable to identify any jurisdiction-creating federal interests that directly relate to the wrongful conduct alleged here. Moreover, Defendants' new *Grable* argument is precluded by the Ninth Circuit's rejection of *Grable* jurisdiction in this very case, and could not overcome the well-pleaded complaint rule even if it had been timely raised.

1. There is no OCSLA or federal-enclave jurisdiction.

OCSLA Jurisdiction. OCSLA grants federal courts jurisdiction over cases "arising out of, or in connection" with certain operations conducted on the OCS. 43 U.S.C. § 1349(b)(1). In *San Mateo III*, as here, Defendants asserted that the public entities' claims arose in connection with OCS operations because "a portion of" their total global fossil-fuel "extraction took place on the [OCS]." 32 F.4th at 754. The Ninth Circuit disagreed, both because the plaintiffs' "injuries occur[ed] exclusively within their local jurisdictions," and because their "claims focus[ed] on the defective nature of [Defendants'] fossil fuel products, [their] knowledge and awareness of the harmful effects of those products, and their 'concerted campaign' to prevent the public from recognizing those dangers"—none of which "refer[red] to actions taken on the [OCS]." *Id.* at 754–

55. The public entities' "tort claims [therefore did not] arise out of, or in connection with [Defendants'] operations on the [OCS] for purposes of jurisdiction under § 1349(b)(1)." *Id.* at 755.

That analysis is dispositive. Like the *San Mateo* plaintiffs, the People seek relief for injuries occurring exclusively in Oakland and San Francisco. *See* Oak. Compl. ¶¶ 124–36; S.F. Compl. ¶¶ 124–36. As in *San Mateo*, the People's public-nuisance claims "focus" on Defendants' "kn[owledge] that their fossil fuels would contribute . . . to dangerous global warming" and on Defendants' "large-scale, sophisticated advertising and communications campaigns to promote pervasive fossil fuel usage and to portray fossil fuels as environmentally responsible and essential to human well-being." Oak. Compl. ¶ 5; S.F. Compl. ¶ 6. Under California law, "[a] public nuisance cause of action is not premised on a defect in a product or a failure to warn," but on "far more egregious" conduct: specifically, on "misleading" "affirmative promotion" where defendants "kn[e]w[] that such use would create a public health hazard." *People v. ConAgra Grocery Prods. Co.*, 17 Cal. App. 5th 51, 84, 91–94 (2017) (quoting *Cty. of Santa Clara v. Atl. Richfield Co.*, 137 Cal. App. 4th 292, 309 (2006)). None of Defendants' newly submitted material overcomes the "attenuated" connection between the People's claims and Defendants' OCS operations. *San Mateo III*, 32 F.4th at 754. Nor does any of it show that the People's alleged injuries or Defendants' "allege[d] wrongful actions" occurred on, or have any relationship, to the OCS. *Id.* at 754.

Federal-Enclave Jurisdiction. Like OCSLA jurisdiction, federal-enclave jurisdiction exists only when a plaintiff's "claims arose from actions and injuries that occurred on federal enclaves." *San Mateo III*, 32 F.4th at 750. In *San Mateo III*, as here, Defendants invited the Ninth Circuit to find federal-enclave jurisdiction based on Standard Oil's operations at the Elk Hills Naval Petroleum Reserve. *Id.* The Ninth Circuit declined, explaining that "[t]he connection between conduct on federal enclaves and the [plaintiffs'] alleged injuries is too attenuated and remote to establish" federal-enclave jurisdiction. *Id.*

The connection Defendants allege here is no less attenuated or remote. The People expressly disclaimed recovery for any injuries occurring on federal lands, Oak. Compl. ¶ 142 n.82; S.F. Compl. ¶ 142 n.154, and none of Defendants' new evidence purports to connect their alleged tortious efforts to conceal and misrepresent the climate impacts of their fossil-fuel products to any

activity on a federal enclave.

2. There is no federal-officer jurisdiction.

Defendants' new evidence also fails to revive their fatally flawed theory of federal-officer removal. Defendants still cannot establish the "nexus" required for removal under Section 1442 because they cannot establish any connection between the federal government and "the misleading-marketing allegations that are at the center of [the People's] Complaint[s]." *Baltimore IV*, 31 F.4th at 231 n.21. Nor have they shown that any federal officer directed them to engage in misrepresentation or that they "act[ed] under" any federal officer in doing so. All Defendants can offer is more cumulative evidence of their supposed "arm's-length business arrangement[s]" and regulatory relationships, which the Ninth Circuit has already found inadequate. *See San Mateo III*, 32 F.4th at 758–60. Defendants also cannot satisfy the independent colorable-defense prong, as they have not even "attempt[ed] to explain why the[ir] [asserted] defenses are colorable." *Honolulu*, 2021 WL 531237, at *7.

a. Defendants cannot satisfy the federal-officer removal statute's nexus prong.

The federal officer removal statute allows defendants to remove cases where the alleged wrongful conduct was performed under the direction of a federal officer "for or relating to any act under color of such office." 28 U.S.C. § 1442(a)(1). To satisfy that element, Defendants must show that "the challenged acts [in the People's complaint] occurred *because of* what they were asked to do by the Government." *Goncalves ex rel. Goncalves v. Rady Children's Hosp. San Diego*, 865 F.3d 1237, 1245 (9th Cir. 2017) (quotation omitted). Here, as in other climate-deception cases, the challenged acts are Defendants' "disseminating misleading information about" their fossil fuel products. *Honolulu*, 2021 WL 531237, at *3.[5] Defendants do not contend, nor does their new evidence suggest, that any federal officer exerted control over the way any Defendant

[5] *See also Baltimore IV*, 31 F.4th at 233 ("[T]he Complaint clearly seeks to challenge the promotion and sale of fossil-fuel products without warning and abetted by a sophisticated disinformation campaign").

communicated about their products, whether wrongfully or not. That omission precludes federal-officer jurisdiction, as every court to consider the issue has concluded.[6]

Lake v. Ohana Military Communities, LLC, 14 F.4th 993 (9th Cir. 2021), reinforces this conclusion. There, military families sued private companies that provided military base housing, alleging that those companies failed to warn them about pesticide contamination. *See id.* at 998. Even though "the Navy exercised significant control over [on-base] housing," the Ninth Circuit rejected federal-officer removal. *Id.* at 1004. The court held that "the 'central issue' in the causal nexus analysis—whether a federal officer directed the defendant to take the action challenged—[wa]s unmet" because the defendants "d[id] not argue that the Navy had control *over [their] decision whether to disclose the pesticide contamination*." *Id.* (emphasis added; cleaned up). Defendants similarly cannot satisfy the "causal nexus requirement" here, because they do not argue and cannot show that the federal government exercised control over any representations concerning the climate-change impacts of their fossil-fuel products.

Unable to show that the federal government was involved in their campaign of deception, Defendants instead rewrite the People's complaints. They insist the People's "claims necessarily—and primarily—target Defendants' production of oil and gas" and that the Court must uncritically

[6] *See Baltimore III*, 31 F.4th at 234 ("[T]he relationship between Baltimore's claims and any federal authority over a portion of certain Defendants' production and sale of fossil-fuel products is too tenuous to support removal under § 1442."); *Rhode Island III*, 2022 WL 1617206, at *3 n.6 (no nexus because there was no evidence that the federal government "mandate[d]" any of the defendants tortious "activities"); *Minnesota*, 2021 WL 1215656, at *9 (no nexus because "Defendants do not claim that any federal officer directed their respective marketing or sales activities, consumer-facing outreach, or even their climate-related data collection"); *Honolulu*, 2021 WL 531237, at *7 (D. Haw. Feb. 12, 2021) (no nexus because "Defendants make no argument that they failed to warn or disseminate accurate information at the direction of a federal officer"); *Boulder I*, 405 F. Supp. 3d at 976–77 (no nexus because "Defendants have not shown that a federal officer instructed them how much fossil fuel to sell or to conceal or misrepresent the dangers of its use, as alleged in this case"); *Connecticut*, 2021 WL 2389739, at *11 (no nexus because "ExxonMobil does not assert, or even suggest, that the federal government directed ExxonMobil to make these allegedly deceptive statements"); *Massachusetts*, 462 F. Supp. 3d at 47 (no nexus because "ExxonMobil's marketing and sale tactics were not plausibly related to the drilling and production activities supposedly done under the direction of the federal government" (cleaned up)); *San Mateo I*, 294 F. Supp. 3d at 939 ("[T]he defendants have not shown a 'causal nexus' between the work performed under federal direction and the plaintiffs' claims, which are based on a wider range of conduct.").

"credit the defendants' theory of the case." Opp. at 22 (cleaned up). But the federal officer removal statute does not "authorize Defendants to freely rewrite the complaint and manufacture a cause of action explicitly disclaimed by Plaintiff and then ask the Court to accept their 'theory of the case' for purposes of removal." *Delaware*, 2022 WL 58484, at *10 n.21. The complaint—not the defendant—defines the challenged conduct and the theory of liability. *See, e.g.*, *Baltimore IV*, 31 F.4th at 233–34 & n.23; *Minnesota*, 2021 WL 1215656, at *5 ("To adopt Defendants' theory, the Court would have to weave a new claim for interstate pollution out of the threads of the Complaint's statement of injuries. This is a bridge too far."). To conclude otherwise "would completely ignore the requirement that there must be a causal connection with *the plaintiff's claims*." *Honolulu*, 2021 WL 531237, at *7; *accord Connecticut*, 2021 WL 2389739, at *11.

The Ninth Circuit rejected analogous misconstructions of the complaints in *San Mateo III* in refusing to characterize Defendants' "alleg[ed] wrongful actions" (for purposes of OCSLA jurisdiction) as their fossil-fuel production on the OCS. *San Mateo III*, 32 F.4th at 754. There, as here, the plaintiffs' claims "focus[ed] on . . . [Defendants'] fossil fuel products, [their] knowledge and awareness of the harmful effects of those products, and their 'concerted campaign' to prevent the public from recognizing those dangers." *Id.* at 754–55. *San Mateo III*'s OCSLA analysis confirms that Defendants fail the nexus prong of federal-officer jurisdiction. As explained above, *San Mateo* held that the claims did not "aris[e] out of or in connection with" OCS operations because those claims were "too attenuated" from Defendants' fossil-fuel production on the OCS. *Id.* at 754. OCSLA's "arising out of, or in connection with" standard is no more stringent than the causal nexus standard of federal-officer removal, which derives from the "for or related to" language in Section 1442; and courts typically treat the phrases "relates to" and "in connection with" as essentially interchangeable. *See San Mateo III*, 32 F.4th at 752 ("both terms are broad and indeterminate"). The connection between the People's claims and any government-controlled fossil-fuel production is thus also "too attenuated" to support federal jurisdiction. *Id.* at 754.

b. Defendants' arguments and allegations do not satisfy Section 1442's "acting under" element.

San Mateo III also precludes Defendants' new argument that federal-officer jurisdiction exists because they were "acting under" one or more federal officers. There, as here, Defendants

posited that they acted under federal superiors by supplying fossil fuels to the military and by producing oil and gas on the OCS. *See* 32 F.4th at 757–60. The Ninth Circuit disagreed, explaining that those relationships could not support federal-officer removal because they amounted to nothing more than "arm's-length business arrangement[s]" and "[m]ere compliance with the law." *See id.* at 759–60 (cleaned up). Defendants' "new" evidence suffers from the same fatal flaw. None of it shows any Defendant performed a "basic governmental task" under the "close direction" of a federal officer. *Id.* at 756–57. This Court should reject Defendants' attempts to manufacture an acting-under relationship, as courts have in numerous other analogous cases.

OCS Leases. *San Mateo III* held that the two unexecuted form OCS leases Defendants rely on (one dated February 2017 and the other dated June 1991) cannot satisfy the acting-under requirement because they "do not require that lessees act on behalf of the federal government, under its close direction, or to fulfill basic governmental duties." 32 F.4th at 759. Defendants recast the leases here as "a valuable national security asset," Opp. at 11, but that does not change the lease terms and does not create or alter Defendants' obligations under them. Although Defendants now seem to "have taken a new approach in presenting the leases," "that hardly means that [*San Mateo III*] ignored or did not appreciate" Defendants' assertion that the leases advance general policy objectives. *Honolulu*, 2021 WL 531237, at *5. To the contrary, *San Mateo III* recognized that OCS oil production implicated some national-security issues, observing that the leases gave the federal government "the right of first refusal" to purchase OCS minerals "in time of war," but held those "lease requirements largely track statutory requirements" and do not show government subjection or control. *San Mateo III*, 32 F.4th at 759–60. Defendants' use of different words to describe the government's *reasons* for leasing OCS rights to Defendants to accomplish national security goals does not alter the leases' unremarkable commercial nature, nor alter that the leases said nothing about the tortious conduct challenged here.

Dr. Priest's assertions that "the federal government had no prior experience or expertise" in fossil fuel production when it began leasing OCS mineral rights nearly 70 years ago, and that federal officers viewed OCS production as important to "U.S. energy security," likewise do not elevate the leases beyond everyday commercial transactions. Opp. at 11 (cleaned up). The level of

"federal supervision or control" required to satisfy Section 1442 is typically "missing" when "the government [is] relying on the expertise of [a contractor] and not vice versa," both because it tends to show the government did not exert extensive control over the defendant and because it indicates the task at issue is not a basic government function. *See Cabalce v. Thomas E. Blanchard & Assocs., Inc.*, 797 F.3d 720, 728 (9th Cir. 2015) (cleaned up). Moreover, "[i]t cannot be that the federal government's mere designation of an industry as important—or even critical—is sufficient to federalize an entity's operations and confer federal jurisdiction." *Buljic v. Tyson Foods, Inc.*, 22 F.4th 730, 740 (8th Cir. 2021). Although many private commercial activities have national significance (*e.g.*, farming, manufacturing, health care), only a select few rise to the level of "basic governmental tasks" supporting federal-officer removal. *See, e.g., Riggs v. Airbus Helicopters*, 939 F.3d 981, 983–84, 986 (9th Cir. 2019) (helicopter manufacturer did not act under federal officer when self-certifying compliance with federal aviation regulations). "Fossil fuel production under the OCS leases by private companies" is not among those select few. *Delaware*, 2022 WL 58484, at *12; *see also Boulder III*, 25 F.4th at 1254 (same).

"Defendants' reference to certain congressional proposals to create a 'national oil company' does not help them" either. *Delaware*, 2022 WL 58484, at *13. "These never-enacted bills provide no basis to find a congressional intent to create, directly or indirectly, a 'national oil company.'" *Id.* Nor are Defendants helped by Dr. Priest's descriptions of OCSLA "regulations," "OCS Orders," and OCS "supervisors." Opp. at 12–13. That testimony simply describes a run-of-the-mill regulator-regulated relationship; and as *San Mateo III* made clear, "[m]ere compliance with the law" does not create an acting-under relationship "even if the laws are highly detailed, and thus leave an entity highly regulated." 32 F.4th at 760 (cleaned up). Accordingly, nothing in Defendants' hundreds of pages of new exhibits and declarations disturbs *San Mateo III*'s unequivocal holding that the OCS "leases on which the defendants rely do not give rise to the 'unusually close' relationship where the lessee was 'acting under' a federal officer." *Id.*

BLM Leases. Defendants cite "onshore leases" for mineral rights granted by the Bureau of Land Management as separate evidence that they once acted under federal officers, providing in support another unexecuted form lease, dated October 2008. Opp. at 20; Dick Decl. Ex. 57. But those

leases are no different from the OCS leases. BLM is housed within the same Department of the Interior as the Bureau of Ocean Energy Management, which implements the OCSLA leases. The lease terms and legal requirements Defendants rely on in describing the onshore leases are indistinguishable from those in the OCS context and are thus equally insufficient to confer jurisdiction. *Compare* Opp. at 20, *with San Mateo III*, 32 F.4th at 760.

Elk Hills Reserve. In *San Mateo III*, the Ninth Circuit held that Standard Oil of California (one of Chevron's predecessors) did not act under the Navy when it extracted oil from the Elk Hills Reserve pursuant to a unit production contract ("UPC"). *See* 32 F.4th at 758–59. Defendants try to sidestep that holding by pointing to a separate Operating Agreement under which the government purportedly hired Standard Oil to operate the Navy's portion of the Reserve between the 1940s and early 1970s. Opp. at 14. But as the People argued previously, Reply at 10–12, this "arm's-length business arrangement with the Navy does not involve conduct so closely related to the government's implementation of federal law that [Defendants] would face a significant risk of state-court prejudice." *San Mateo III*, 32 F.4th at 759 (quotation marks omitted). "While the [Operating Agreement] states, without explaining, that Standard Oil was 'in the employ' of the Navy, nothing else in the [A]greement, and certainly nothing to which Defendants cite, sets forth the kind of 'unusually close" relationship that is necessary." *Honolulu*, 2021 WL 531237, at *6.

Strategic Petroleum Reserve. The same reasoning forecloses Defendants' reliance on the Strategic Petroleum Reserve ("SPR"). Defendants insist that they acted under federal officers by supplying and managing the SPR. They offer few details, however, regarding the "type of control the government may wield over them." *Honolulu*, 2021 WL 531237, at *6. The details they do supply only confirm that no acting-under relationship exists, for the reasons set forth in the People's Reply Brief. *See* Reply at 14.

Defense Production Act. Defendants mistake regulatory compliance for an acting-under relationship when they try to base removal on the Defense Production Act ("DPA"). *See* Opp. at 11, 18–19. Compliance with DPA directives does not satisfy the acting-under standard. *See Boulder III*, 25 F.4th at 1253 (citing *Washington v. Monsanto Co.*, 738 F. App'x 554, 555–56 (9th Cir. 2018) (unpublished) (Monsanto did not act under federal authority by complying with DPA

orders for PCBs)); *Honolulu*, 2021 WL 531237, at *5 (fossil-fuel "directives" during the Korean War and the 1973 Oil Embargo did not create an acting-under relationship).

World War II. Defendants also contend that they acted under federal officers when they produced fossil fuels and built pipelines during World War II. But as the People demonstrated in their Reply Brief, this contention fails for at least two reasons. *See* Reply at 12–14.

First, "Defendants' activities during the Korean War, the two World Wars, and events occurring still earlier than these . . . are irrelevant for purposes of removal because Defendants' alleged disinformation campaign, which is what the instant case is actually about, started decades later." *Delaware*, 2022 WL 58484, at *10 (cleaned up); *see also Hoboken*, 558 F. Supp. 3d at 208 (reaching same conclusion).

Second, Defendants' wartime evidence does not demonstrate "the requisite federal control or supervision," *Cabalce*, 797 F.3d at 728, as the Ninth Circuit's recent decision in *Monsanto* makes clear. 738 F. App'x 554. There, Monsanto tried to remove a lawsuit for PCB contamination under Section 1442, claiming that it acted under federal authority when "the federal government sponsored, required, and compelled the production of PCBs before, during, and after World War II." *Id.* at 555. Although the defendant offered evidence that it complied with government "directives" to fulfill PCB purchase orders, the Ninth Circuit held federal-officer removal improper because Monsanto failed to show that "the federal government supervised Monsanto's manufacture of PCBs or directed Monsanto to produce PCBs in a particular manner, so as to come within the meaning of 'acted under.'" *See id.* (cleaned up). The same is true here because Defendants' compliance with "directives from the Petroleum Administration for War" amounts to mere regulatory compliance. *See* Reply at 12–13.

Specialized Military Fuels. Finally, Defendants contend that they acted under federal authority when they sold "specialized" fuels to the military. Opp. at 19. But Defendants cannot satisfy Section 1442 simply by showing that the military hired private companies to develop fuels meeting certain performance criteria. *See Monsanto*, 738 F. App'x at 555. Instead, they must show that the government directly supervised and controlled the development and manufacturing of those fuels, such as by "shar[ing] day-to-day operating responsibility" with a private contractor.

Ulleseit v. Bayer HealthCare Pharms. Inc., 826 F. App'x 627, 629 (9th Cir. 2020) (cleaned up), *vacated and remanded on other grounds*, 142 S. Ct. 57 (2021), *reinstated in relevant part*, No. 19-15778, 2021 WL 6139816, at *1 (9th Cir. Dec. 29, 2021).

Defendants' own documents confirm that government officials played at most a minimal role in designing, developing, and producing fuels for the U-2, OXCART, and Blackbird projects "during the Cold War." Opp. at 19. According to one historical account, the government adopted a "management philosophy" in its Blackbird project of giving maximal "free[dom]" to private contractors, meaning officials refrained from "substituting their judgment for that of the contractors," and the "[r]equirements for Government approval as a prerequisite to action were minimal." Dick Decl. Ex. 24 at 27–28 (Development of the Lockheed SR-71 Blackbird).

The same is true of Blackbird's predecessor projects. According to a historical report of OXCART and U-2, excerpts of which Defendants seek to rely upon,[7] private contractors took the lead in designing, developing, and manufacturing the new planes. *See, e.g.*, Sher Decl. Ex. 1 at 9; *id.* at 11–14. The government merely told its contractors what kind of planes it wanted, leaving the day-to-day operations and management to those companies. *See, e.g.*, *id.* at 10 (describing "[Lockheed's] approach to prototype development"); *id.* at 15–16 (describing how top Lockheed engineer "t[ook] charge of the OXCART's development himself"). Indeed, "the lack of detailed and restricting [government] specifications" is one of the main reasons why the OXCART and U-2 projects were able to produce planes "in record time." *Id.* at 17. Far from showing that the government exercised significant supervision or control over the development of specialized fuels, then, Defendants' evidence demonstrates that "the government was relying on the expertise of [private contractors]" to manufacture the planes—"and not vice versa." *See Cabalce*, 797 F.3d at 728.

This conclusion is reinforced by Shell Oil's contracts for manufacturing fuels and fuel facilities for the OXCART program. *See* Dick Decl. Ex. 25. Those agreements gave the

[7] Dick Decl. Ex. 22 contains excerpts of Gregory W. Pedlow & Donald E. Welzenbach, *The Central Intelligence Agency and Overhead Reconnaissance: The U-2 and OXCART Programs, 1954–1974* (1992). The People provide additional excerpts from the report in Sher Decl. Ex. 1.

government the same generic rights to inspect the final deliverables that any commercial contract would provide. *See, e.g.*, Dick Decl. Ex. 28 at 29 (agreeing that work will "conform to high professional standards"). Nothing in the contracts suggests the government oversaw or controlled the manufacturing process itself, as Section 1442 demands. *See, e.g.*, Dick Decl. Ex. 29 at 3–4 (tasking Shell with providing "technical supervision" and "[e]ngineering," "general administration," and "laboratory support necessary to make the facility operational").

The Defense Logistics Agency's ("DLA") contracts are no different. Like any commercial agreement, those contracts informed the fuel manufacturer what kind of product the government wanted—*e.g.*, a fuel with certain additives. *See* Dick Decl. Ex. 35. Like any commercial agreement, the contracts also gave the government the right to inspect and ensure that the fuels delivered were, in fact, the fuels requested. *See id.* at 8–9. Beyond "quality assurance" provisions that are "typical of any commercial contract," *Baltimore III*, 31 F.4th at 231, nothing in the DLA contracts show that the federal government oversaw or controlled the "day-to-day" development or manufacturing of those fuel products, *Ulleseit*, 826 F. App'x at 629.

c. Defendants do not satisfy the colorable-defense prong.

Defendants have also not established federal-officer jurisdiction because they have failed to satisfy their "burden of proving by a preponderance of the evidence" that they have a colorable federal defense. *Leite v. Crane Co.*, 749 F.3d 1117, 1122 (9th Cir. 2014). "[A] defendant invoking § 1442(a)(1) need not win his case before he can have it removed," *id.*, but it must at a minimum show a substantively "plausible" federal defense, *Minnesota*, 2021 WL 1215656, at *9, that "arise[s] out of the [defendant's] official duties," *Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 138 (2d Cir. 2008) (cleaned up). Conclusory assertions will not suffice. *See Cabalce*, 797 F.3d at 731–32 & 732 n.6 (holding that the defendant "did not demonstrate by a preponderance of the evidence a colorable government contractor defense"); *see also Hilbert v. McDonnell Douglas Corp.*, 529 F. Supp. 2d 187, 202–03 (D. Mass. 2008) (rejecting defense as too conclusory); *Anderson v. Hackett*, 646 F. Supp. 2d 1041, 1053 (S.D. Ill. 2009) (same).

Here, as in other climate-deception cases, Defendants "simply asser[t] a defense and the word 'colorable' in the same sentence." *Honolulu*, 2021 WL 531237, at *7. They "do not explain

exactly how these defenses relate either to the claims or actions taken at the direction of a foreign officer." *Minnesota*, 2021 WL 1215656, at *9. They do not even set forth the elements of their cited defenses. The Court should decline to "do [Defendants'] work for [them], either by manufacturing [their] legal arguments, or by combing the record on [their] behalf for factual support." *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 874 F.3d 1083, 1100 (9th Cir. 2017).

3. There is no *Grable* jurisdiction.

As the People showed above in Part III.B, the Ninth Circuit's decision in *Oakland* prevents Defendants from relitigating *Grable* jurisdiction. Even if *Oakland* were not dispositive, the well-pleaded complaint rule would preclude Defendants from removing these cases based on their asserted First Amendment defenses, as four courts have recently concluded in analogous cases.[8]

The Ninth Circuit rejected *Grable* jurisdiction *in these cases*, holding that the "state-law claim does not raise a substantial federal issue" and thus "does not fit within the slim category *Grable* exemplifies." *Oakland*, 969 F.3d at 907 (cleaned up). The panel expressly directed this Court on remand to review Defendants' "alternative bas[e]s for jurisdiction"—*i.e.*, bases *other than* the three that the Ninth Circuit had just rejected (federal common law, *Grable*, and complete preemption). *Id.* at 908, 911. This Court must "execut[e]" the Ninth Circuit's mandate "without variance or examination." *United States v. Garcia-Beltran*, 443 F.3d 1126, 1130 (9th Cir. 2006).

The mandate precludes Defendants' new arguments for *Grable* jurisdiction. Even if it did not, the law of the case would. Under that doctrine, "a party cannot offer up successively different legal or factual theories that could have been presented in a prior request for review." *Sec. Inv. Prot. Corp. v. Vigman*, 74 F.3d 932, 937 (9th Cir. 1996). Defendants try to do just that. They "could have . . . on the prior appeal" presented their First Amendment theory of *Grable* jurisdiction. *In re Cellular 101, Inc.*, 539 F.3d 1150, 1155 (9th Cir. 2008). After all, they presented that very First Amendment argument to the Ninth Circuit as an alternative ground in support of this Court's prior dismissal order. *See* Answering Brief of Defendant-Appellee Chevron Corporation, No. 18-16663, Dkt. 78 (May 10, 2019), at 52–55. In addition, their *removal notices* referenced these very

[8] *See Connecticut*, 2021 WL 2389739, at *10; *Hoboken*, 558 F. Supp. 3d at 204; *Honolulu*, 2021 WL 531237, at *8 n.14; *Delaware*, 2022 WL 58484, at *8.

same First Amendment defenses in sections on *Grable* jurisdiction and federal-officer removal. Oak. NOR ¶¶ 32, 62; S.F. NOR ¶¶ 32, 62. Ultimately, the fault lies with Defendants' "own inadequate litigation efforts." *Castillo-Basa*, 483 F.3d at 903.

Even if this Court were to give Defendants a "gratuitous second bite at the apple," *Wilhelm v. Rotman*, No. 1:10-CV-00001 DLB PC, 2014 WL 5426260, at *1 (E.D. Cal. Oct. 23, 2014), it should reject Defendants' *Grable* arguments, as every court to consider the argument has done. *See Connecticut*, 2021 WL 2389739, at *10; *Hoboken*, 558 F. Supp. at 191; *Delaware*, 2022 WL 58484, at *8. "Defendants cite no authority for the proposition that the First Amendment—through *Grable* jurisdiction—converts state law causes of action involving speech into federal causes of action for purposes of assessing jurisdiction." *Delaware*, 2022 WL 58484, at *8. That is because there is none. Where, as here, a defendant raises the First Amendment as a defense to state-law claims, courts uniformly conclude under the well-pleaded complaint rule that such defenses cannot give rise to federal subject-matter jurisdiction.[9] Defendants' First Amendment arguments are "no different than other First Amendment defenses that courts have repeatedly found did not support removal jurisdiction." *California v. Sky Tag, Inc.*, No. CV 1:18-00638 (ABC) (PLAx), 2011 WL 13223655, at *3 (C.D. Cal. Nov. 29, 2011) (collecting cases).

D. No evidentiary hearing is necessary to grant remand.

During the May 12, 2022 status conference, the Court asked whether it would be appropriate to hold an evidentiary hearing regarding federal-officer removal. Tr. of Proceedings, May 12, 2022, Dkt. 399, at 19–20. No evidentiary hearing is required, because Defendants' theories of removal fail as a matter of law. Even if the Court were to consider Defendants' untimely exhibits and declarations, the Ninth Circuit's analysis of OCSLA, federal-enclaves, and bankruptcy jurisdiction in *San Mateo III* would still be controlling. Moreover, as explained above, Defendants cannot satisfy the nexus or colorable-defense prong of federal-officer jurisdiction

[9] *See, e.g.*, *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 965 (10th Cir. 1996) ("[T]he First Amendment as a defense does not constitute a basis for federal jurisdiction, for it is fundamental that anticipation of a defense cannot confer jurisdiction." (cleaned up)); *Troung v. Am. Bible Soc'y*, 171 F. App'x 898 (2d Cir. 2006) ("First Amendment defenses . . . cannot establish federal question jurisdiction.").

(because they never argued that a federal officer was involved in their climate-deception campaigns and never explained why their asserted defenses are plausible or how those defenses arise out of their official duties); and they cannot overcome *Oakland* or the well-pleaded complaint rule, both of which dispose of their First Amendment theory of *Grable* jurisdiction. The Court should therefore remand without holding an evidentiary hearing, as every court has done in related climate-deception cases.

Nonetheless, if the Court were inclined to deny remand, it should afford the People an opportunity to conduct limited jurisdictional discovery. In resolving motions to remand, courts use the "same framework" that governs Rule 12(b)(6) motions. *Leite*, 749 F.3d at 1122. A plaintiff may therefore attack removal jurisdiction in "one of two ways." *Id.* In a "facial attack," the court accepts a defendant's factual allegations as true, draws all reasonable inferences in the defendant's favor, and "determines whether the allegations are sufficient as a legal matter to invoke the court's jurisdiction." *Salter v. Quality Carriers, Inc.*, 974 F.3d 959, 964 (9th Cir. 2020). In a "factual attack," such as the Court would address should the Court deny remand, the plaintiff "contests the truth of [the defendant's] factual allegations"—either by "introducing evidence outside of the pleadings," *id.*, or by "making a reasoned argument as to why any assumptions on which [the factual allegations] are based are not supported by evidence," *Harris v. KM Indus., Inc.*, 980 F.3d 694, 700 (9th Cir. 2020).

When a plaintiff challenges the basis for removal on factual grounds, the burden shifts to the defendant to "support its allegations with competent proof." *Leite*, 749 F.3d at 1122. "A district court may hear evidence and make findings of fact necessary to rule on the subject matter jurisdiction question," so long as the contested "jurisdictional facts are not intertwined with the merits." *Rosales v. United States*, 824 F.2d 799, 803 (9th Cir. 1987). If, however, "the jurisdictional issue and substantive claims are so intertwined that resolution of the jurisdictional question is dependent on factual issues going to the merits, the district court should employ the standard applicable to a motion for summary judgment and grant the motion to [remand] only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Id.*; *see also Leite*, 749 F.3d at 1121–22 & n.3 ("[I]f the existence of jurisdiction turns on disputed

factual issues, the district court may resolve those factual disputes itself," unless "the issue of subject-matter jurisdiction is intertwined with an element of the merits of the plaintiff's claim.").

Through "reasoned argument," *Harris*, 980 F.3d at 700, the People have attacked the truthfulness of the factual allegations underpinning Defendants' various theories of federal-officer removal. If the denial of a remand motion turns on factual disputes, the plaintiffs "should be permitted to conduct jurisdictional discovery." *King v. Great Am. Chicken Corp, Inc.*, 903 F.3d 875, 876 (9th Cir. 2018). Indeed, this Court recently permitted jurisdictional discovery in connection with a motion to remand, recognizing that "[d]iscovery may be appropriately granted where pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary." *Berkeley Research Grp., LLC v. United Potato Growers of Am., Inc.*, No. C 16-07205 WHA, 2017 WL 952680, at *2 (N.D. Cal. Mar. 13, 2017). Other courts in this circuit routinely do the same.[10]

Thus, if the Court concludes that it cannot grant the People's remand motion as a matter of law, it should permit the People to seek limited jurisdictional discovery, including as to: (1) whether Defendants acted under federal officers when they produced fossil fuels; and (2) whether any federal officer directed, controlled, or participated in Defendants' efforts to conceal and misrepresent the climate-change impacts of their fossil-fuel products.

E. The Court must vacate its personal jurisdiction ruling.

If the Court finds it lacks subject matter jurisdiction over these cases, as it should, it must vacate its order dismissing the complaints against Defendants BP, ConocoPhillips, Exxon Mobil, and Royal Dutch Shell for lack of personal jurisdiction (Dkt. 287) under *Special Investments, Inc. v. Aero Air, Inc.*, 360 F.3d 989 (9th Cir. 2004).

In *Special Investments*, the Ninth Circuit concluded the district court erred in failing to vacate its personal jurisdiction order once it held that it lacked subject-matter jurisdiction. *Id.* at

[10] *See also, e.g., Serrano v. Bay Bread LLC*, No. 14-CV-01087-TEH, 2014 WL 1813300, at *2 (N.D. Cal. May 6, 2014); *Wakefield v. Glob. Fin. Priv. Cap., LLC*, No. 15-CV-0451 JM JMA, 2015 WL 3710875, at *4 (S.D. Cal. June 15, 2015); *Finkelstein v. Guardian Life Ins. Co. of Am.*, No. C 07-01130 CRB, 2007 WL 1345228, at *6 (N.D. Cal. May 8, 2007); *Meekins v. Chipotle Servs., LLC*, No. CV-18-08599-SJO, 2018 WL 6503498, at *1 (C.D. Cal. Dec. 11, 2018).

994–95. There, the district court had granted a Rule 12(b)(2) motion to dismiss a removed case as to one of several defendants while a motion to remand the entire case was pending, "with the results that: (1) the subject matter jurisdiction issue had to be addressed anyway; and (2) when it was addressed, the court decided that it lacked jurisdiction." *Id.* at 995. The Ninth Circuit observed that, in contrast to the dismissal of a case in its entirety on the basis of lack of personal jurisdiction, the district court's dismissal of less than all the defendants placed the plaintiff in a prejudicial quandary: "An order dismissing one party for lack of personal jurisdiction while allowing suit to continue against the remaining defendants is not a final, appealable order." *Id.* at 993. But "Supreme Court precedent suggest[s] that an order of a court that lacked subject matter jurisdiction over a case to begin with could, nonetheless, have an issue preclusive effect" in the state court on remand. *Id.* at 994 (citing *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584–85 (1999)).

So, too, here. The procedural posture of the People's cases is identical to *Special Investments* because the Ninth Circuit declined to reach the People's appeal of this Court's dismissal for lack of personal jurisdiction as to four of the five Defendants. (Chevron has not challenged personal jurisdiction because it is headquartered in California.) *Oakland*, 969 F.3d at 911 n.13 (inviting the People to seek vacatur of this Court's personal jurisdiction ruling on remand, citing *Ruhrgas*, 526 U.S. at 587–88, and *Special Invs.*, 360 F.3d at 994–95). If the Court concludes it "did not have [subject matter] jurisdiction at all in the first place," the order dismissing the four Defendants would not be subject to a notice of appeal, and the Court must therefore vacate its personal jurisdiction order at the time of remand. *Special Invs.*, 360 F.3d at 995.

IV. CONCLUSION

For the reasons above and in the People's previous briefs, these actions should be remanded to state court and the Court should vacate its personal-jurisdictional ruling. In the alternative, the Court should grant the People leave to conduct limited jurisdictional discovery.

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Respectfully submitted,

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