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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.

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 DENNIS J. HERRERA,

Plaintiffs,

v.

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

DEFENDANTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PLAINTIFFS' RENEWED MOTION TO REMAND

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

Defendants.

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I. INTRODUCTION

Defendants properly removed this case to federal court under the federal officer removal statute, the Outer Continental Shelf Lands Act ("OCSLA"), federal enclave jurisdiction, and *Grable*. Although the Ninth Circuit rejected federal jurisdiction in *County of San Mateo v. Chevron Corp.*, 32 F.4th 733 (9th Cir. 2022), and *City & County of Honolulu v. Sunoco LP*, __ F.4th __, 2022 WL 2525427 (9th Cir. July 7, 2022), the Court concluded that those cases turned on a different theory of liability than this one—namely, that the defendants' alleged *misrepresentations* about their products' environmental impacts caused over-consumption of fossil fuels that led, in turn, to global climate change. There is no question that the Complaint in this case is materially different from the ones the Ninth Circuit panels had before them. The Complaint here was filed by a different law firm and states only a single cause of action—for "public nuisance," nothing else. It does not seek liability for any supposed "failure to warn" or any other purported "misrepresentation" theory. On the contrary, Plaintiffs admittedly target Defendants' *production* of oil and gas directly. In light of the Ninth Circuit's decisions in *San Mateo* and *Honolulu*, this difference is fundamental in evaluating this Court's jurisdiction.

In *San Mateo*, the Ninth Circuit rejected many of the defendants' removal arguments based on its conclusion that there was insufficient supporting evidence. For example, the court ruled that the defendants had not established that they "acted under" a federal officer because the relationships cited reflected "arm's-length business relationship[s]" that did not involve "assist[ing] the government in performing a basic government function." 32 F.4th at 757–60; *see also id.* at 750 ("The Energy Companies do not allege how much of th[eir] conduct occurred on federal enclaves."). While the Ninth Circuit did not identify any evidentiary deficiencies with respect to OCSLA jurisdiction, it nevertheless rejected this ground because "the Counties' claims focus on the defective nature of the Energy Companies' fossil fuel products, the Energy Companies' 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[s] to actions taken on the outer Continental Shelf." *Id.* at 754–55.

The defendants in *Honolulu* submitted a far more robust evidentiary record in order to cure the deficiencies identified in *San Mateo*—a record that is materially similar to the one here. In rejecting jurisdiction in *Honolulu*, the Ninth Circuit relied primarily on the fact that this evidence went to the

defendants' production of oil and gas rather than the alleged misrepresentations that it concluded lay at the center of those cases. For example, the Ninth Circuit reasoned that because "Defendants do not contend that the government ordered their allegedly deceptive acts," their federal "defenses . . . do not arise from official duties" for purposes of federal officer removal. 2022 WL 2525427, at *6. The court likewise rejected OCSLA jurisdiction because "Plaintiffs contend that oil and gas companies created a nuisance when they misled the public," and the plaintiffs' "claimed injuries from Defendants' deceptive practices do not stem from activities on the OCS." *Id.* at *8. So, too, for federal enclave jurisdiction: "Like *San Mateo II*, the Complaints do not attack Defendants' underlying conduct. Yet Defendants try to recharacterize the claims from deceptive practices to activities on federal enclaves." *Id.* at *7.

This case is fundamentally different. Although Plaintiffs now pretend that their claims are based not on the production and sale of oil and gas, but on a "campaign of deception," Dkt. 405 at 13,[1] this flatly contradicts the position they have taken throughout this litigation and the allegations made in the Complaint itself. To highlight just a few examples:

- Plaintiffs' operative Complaint alleges that "Production of fossil fuels for combustion causes global warming," Dkt. 199 ("Compl.") ¶ 74;
- The Complaint asserts that "[t]oday, *primarily due to the combustion of fossil fuels produced by the Defendants and others*, the atmospheric level of carbon dioxide . . . is . . . higher than at any time during human civilization," *id.* ¶ 88 (emphasis added);
- Plaintiffs allege that "*Defendants' production of massive quantities of fossil fuels* has caused, created, assisted in the creation of, contributed to, and/or maintained and continues to cause, create, assist in the creation of, contribute to and/or maintain global warming-induced sea level rise, a public nuisance in Oakland," *id.* ¶ 140 (emphasis added);
- In opposing Defendants' motion to dismiss for failure to state a claim, Plaintiffs admitted that "the primary conduct giving rise to liability remains defendants' *production and sale* of fossil fuels," Dkt. 235 at 13 (emphasis added); and
- At oral argument, Plaintiffs stated: "Sure, the primary conduct here that gives rise to the nuisance is *the production of fossil fuels*," Hr'g Tr. (May 24, 2018) at 63:2-21 (emphasis added).

In short, as this Court has observed, according to Plaintiffs' theory of this case, "[A]ny such promotion [is] merely a 'plus factor.'" Dkt. 283 at 6.

[1] All docket references are to *City of Oakland v. BP P.L.C.*, No. 3:17-cv-0611-WHA (N.D. Cal.).

While courts in other climate change cases have adopted the construction urged by Plaintiffs, those cases involved a claim directly targeting deception. In *San Mateo*, for example, the complaint asserted claims including strict liability for failure to warn and negligent failure to warn. 32 F.4th at 744. Similarly, in *Honolulu*, the plaintiffs asserted claims for failure to warn. 2022 WL 2525427, at *2. Here, by contrast, Plaintiffs assert only a single claim for public nuisance that they allege is caused by Defendants' production of oil and gas: "Production of fossil fuels for combustion causes global warming." Compl. ¶ 74.

Plaintiffs urge this Court to simply ignore the differences between this case and cases like *San Mateo* and *Honolulu*. But doing so would violate the Supreme Court's admonition that "federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996). Plaintiffs' assertion that Defendants are bound by *San Mateo* because their new evidence is untimely insofar as it was not included with the notice of removal is refuted by the removal statute itself, which Plaintiffs concede requires only a "short and plain statement of the grounds for removal," Dkt. 405 at 3, such that "[n]othing in 28 U.S.C. § 1446 requires a removing defendant to attach evidence of the federal court's jurisdiction to its notice of removal," *Janis v. Health Net, Inc.*, 472 F. App'x 533, 534 (9th Cir. 2012); *see also McMann v. Air & Liquid Sys. Corp.*, 2014 WL 1794694, at *3 (W.D. Wash. May 6, 2014); *Dart Cherokee Basin Op. Co., LLC v. Owens*, 574 U.S. 81, 87–89 (2014). And Plaintiffs err in contending that the doctrine of nonmutual offensive collateral estoppel bars the Court from determining its jurisdiction because "changes in facts essential to a judgment will render collateral estoppel inapplicable in a subsequent action raising the same issues." *Montana v. United States*, 440 U.S. 147, 159 (1979).

Because Plaintiffs allege that climate change is caused by global production of fossil fuels—a substantial portion of which occurred on the OCS, federal enclaves, and under the direction of federal officers—removal is proper. And even if Plaintiffs' claims had targeted only Defendants' promotion of fossil fuels, removal would still be proper under *Grable* because those claims would raise substantial and disputed questions under the First Amendment, which *San Mateo* and *Honolulu* did not consider.[2]

[2] This Court has already found that several Defendants are not subject to personal jurisdiction. Those Defendants submit this remand opposition subject to, and without waiver of, that jurisdictional finding.

II. LEGAL STANDARD

Removal from state court is proper if the federal court would have had original jurisdiction of the action. 28 U.S.C. § 1441(a). "The removal process was created by Congress to protect defendants." *Legg v. Wyeth*, 428 F.3d 1317, 1325 (11th Cir. 2005).

III. ARGUMENT

The robust evidentiary record Defendants have presented in this action goes far beyond what the Ninth Circuit considered in *San Mateo*, rendering that decision inapposite here. *See Hart v. Massanari*, 266 F.3d 1155, 1172 (9th Cir. 2001) ("Insofar as there may be factual differences between the current case and the earlier one, the court must determine whether those differences are material to the application of the rule or allow the precedent to be distinguished on a principled basis."). And while *Honolulu* considered a similar record, it involved an entirely different theory of liability. When the evidence is evaluated in light of the allegations set forth by Plaintiffs in the Complaint and their representations to the Court, rather than the newly adopted theory they now advance to avoid federal jurisdiction, it is clear that federal jurisdiction exists under the federal officer removal statute, OCSLA, federal enclave jurisdiction, and *Grable*.

A. The Court Has Jurisdiction Over This Action.

1. This Action Is Removable Under the Federal Officer Removal Statute.

Removal is proper under the federal officer removal statute because Plaintiffs seek to impose liability for conduct Defendants undertook under the direction, supervision, or control of federal officers. The federal officer removal statute authorizes removal where "(1) [defendant] is a 'person' within the meaning of the statute, (2) a causal nexus exists between the plaintiffs' claims and the actions . . . [taken] pursuant to a federal officer's direction, and (3) it has a 'colorable' federal defense to plaintiffs' claims." *Leite v. Crane Co.*, 749 F.3d 1117, 1120 (9th Cir. 2014). "[T]he Supreme Court has made clear that the statute must be 'liberally construed,'" and courts must "pay heed to [their] duty to 'interpret Section 1442 broadly in favor of removal.'" *Goncalves v. Rady Children's Hosp. San Diego*, 865 F.3d 1237, 1244–45 (9th Cir. 2017). Indeed, "[d]efendants enjoy much broader rights under the federal officer removal statute than they do under the general removal statute." *Leite*, 749 F.3d at 1122. Allegations "in support of removal" need only be "facially plausible," and defendants

must be given the "benefit of all reasonable inferences from the facts alleged." *Baker v. Atl. Richfield Co.*, 962 F.3d 937, 941 (7th Cir. 2020). And courts are required to "credit the [defendants]' theory of the case for purposes of . . . [the] jurisdictional inquiry." *Jefferson Cnty., Alabama v. Acker*, 527 U.S. 423, 432–33 (1999). Defendants easily satisfy this liberal standard.[3]

a. Defendants Raise "Colorable Federal Defenses."

Defendants' notice of removal alleges several meritorious—not just colorable—"federal defenses, including preemption, the government contractor defense, and others." Dkt. 1 ("NOR") ¶ 62. In *Honolulu*, the Ninth Circuit held that these defenses were not sufficient to satisfy the colorable federal defense prong of the federal officer removal statute, but that conclusion was based on the court's holding that the claims there involved misrepresentation rather than production: "Defendants do not contend that the government ordered their *allegedly deceptive acts*. Defendants' due process, Interstate and Foreign Commerce Clauses, foreign affairs doctrine, and preemption defenses similarly do not arise from official duties." 2022 WL 2525427, at *6 (emphasis added). In other words, the *Honolulu* court held that the federal defenses were not "colorable" because the plaintiffs' claims did not target production.

Here, however, Plaintiffs unquestionably target Defendants' production of oil and gas. Indeed, they expressly told this Court that "the primary conduct giving rise to liability remains defendants' production and sale of fossil fuels." Dkt. 235 at 13; *see also supra* at 2. Plaintiffs have sought to minimize these statements on the ground that they were "made by one of the People's previous attorneys," Dkt. 358 at 3 n.3, but new "counsel is bound by pretrial representations of original counsel," *La Jolla Spa MD, Inc. v. Avida Pharm., LLC*, 2018 WL 6523048, at *3 (S.D. Cal. Dec. 12, 2018) (citing *Moore v. Sylvania Elec. Prods., Inc.*, 454 F.2d 81, 83–84 (3d Cir. 1972)). And while Plaintiffs have asserted that "[s]tatements of law or legal argument . . . fall outside the concept of judicial admissions," Dkt. 358 at 3 n.3, these are *factual* representations about Plaintiffs' theory of the case, and "judicial estoppel . . . bar[s] the assertion of inconsistent positions in the same litigation," *Hamilton v. State Farm Fire Cas. Co.*, 270 F.3d 778, 783 (9th Cir. 2001).

[3] There is no dispute that Defendants, as corporations, are "persons" within the meaning of the federal officer removal statute. *See Saldana v. Glenhaven Healthcare LLC*, 27 F.4th 679, 684 (9th Cir. 2022).

Much of Defendants' oil-and-gas production was explicitly required by federal contracts. *See infra*, Section A.1.b. And there can be no doubt that the defenses asserted in the notice of removal are valid defenses to claims predicated on such production. The Supreme Court has long held that the government contractor defense "warrant[s] the displacement of state law" when "civil liabilities aris[e] out of the performance of federal procurement contracts." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 505–06 (1988). And the Clean Air Act—like the Clean Water Act, which parallels the structure of the Clean Air Act—preempts state-law claims that target out-of-state pollution. *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987) ("[W]e conclude that the CWA precludes a court from applying the law of an affected State against an out-of-state source."); *Merrick v. Diageo Ams. Supply, Inc.*, 805 F.3d 685, 693 (6th Cir. 2015) ("[C]laims based on the common law of a non-source state . . . are preempted by the Clean Air Act.").

Even if there were some doubt on this point in the wake of *Honolulu*, it would have to be resolved in favor of removal. As the Supreme Court has explained, "In construing the colorable federal defense requirement, we have rejected a 'narrow, grudging interpretation' of the statute, recognizing that 'one of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court.'" *Acker*, 527 U.S. at 431. As a result, courts "do not require the officer virtually to 'win his case before he can have it removed.'" *Id.* So long as a defense is not frivolous, it satisfies the "colorable federal defense" prong. *Cf. Arbaugh v. Y&H Corp.*, 546 U.S. 500, 513 n.10 (2006) ("A claim invoking federal-question jurisdiction . . . may be dismissed for want of subject-matter jurisdiction if it is not colorable, *i.e.*, if it is 'immaterial and made solely for the purpose of obtaining jurisdiction' or is 'wholly insubstantial and frivolous.'"); *McBridge Cotton & Cattle Corp. v. Veneman*, 290 F.3d 973, 981 (9th Cir. 2002) ("A colorable claim is one which is not 'wholly insubstantial, immaterial, or frivolous.'"). The defenses asserted in the notice of removal certainly are not frivolous.

Plaintiffs separately fault Defendants for not "set[ting] forth the elements of their cited defenses." Dkt. 405 at 21. But under the rule requiring a "short and plain statement" of the grounds for removal, a party "is not required to state precisely each element" so long as it alleges "minimal factual allegations on those material elements" so as to "provide fair notice," *Davis v. Olin*, 886

F. Supp. 804, 808 (D. Kan. 1995) (citing 5 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1216 (1990)). The notice of removal provided Plaintiffs with fair notice of Defendants' defenses. *See Sherman v. Alexander*, 684 F.2d 464, 472 (7th Cir. 1982) ("[Plaintiff] had complete notice of all facts upon which his removal was predicated . . . . He thus had fair notice and an opportunity to respond to the proposed notice of removal[.]"). In fact, Plaintiffs have discussed many of these defenses at length in attempting to persuade this Court that they do not support removal. *See, e.g.*, Dkt. 81 at 19–20 ("Any alleged conflict between state public nuisance law and federal law is just a defense of ordinary preemption that can be raised in state court, not an inevitable part of the People's affirmative cases and certainly not any part of the People's well-pleaded state law complaints."); *id.* at 11 n.3 ("On remand, defendants will have their day in court to argue that, under *International Paper*'s ordinary preemption ruling, the CAA preempts California law nuisance claims not just against stationary source dischargers of interstate pollution but also against producers of products.").

b. Defendants "Acted Under" Federal Officers.

"The words 'acting under' are broad[.]" *Watson v. Philip Morris Cos.*, 551 U.S. 142, 147 (2007). While "simply *complying* with the law" is not enough, the requirement is generally satisfied where a defendant engages in an "effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior." *Id.* at 152. To distinguish mere compliance from assistance, courts consider whether "the private contractor . . . is helping the Government to produce an item that it needs." *Id.* at 153. In the words of the Supreme Court: "The assistance that private contractors provide federal officers goes beyond simple compliance with the law and helps officers fulfill other basic governmental tasks." *Id.* For this reason, "[c]ourts have consistently held that the 'acting under' requirement is easily satisfied where a federal contractor removes a case involving injuries arising from a product manufactured for the government." *Moore v. Elec. Boat Corp.*, 25 F.4th 30, 35 n.3 (1st Cir. 2022) (collecting cases).

In *San Mateo*, the Ninth Circuit held that the defendants did not "act under" federal officers because it concluded that the relationships cited—in particular, OCS leases and the unit agreement for the Elk Hills reserve—evinced arm's-length commercial transactions rather than contracts for the provision of items that the Government needs. In response, the defendants in *Honolulu*, like Defendants here, offered additional evidence demonstrating that those relationships satisfied the

"acting under" requirement, as well as evidence regarding several other relationships with the federal government. 32 F.4th at 755–60. Although the Ninth Circuit in *Honolulu* rejected some of those relationships as insufficient to satisfy the "acting under" prong, it expressly declined to consider whether Defendants satisfied that prong by producing and supplying essential military fuels for the federal government during World War II or by producing and supplying specialized, non-commercial grade fuels for the U.S. military that are essential for unique military operations. 2022 WL 2525427, at *3 (concluding that it "need not reach" these grounds). Those questions—which no federal appellate court has yet resolved—must be answered in the affirmative.

First, Defendants acted under federal officers during World War II. During that time, the United States pursued full production of its oil reserves and created agencies to *control* the petroleum industry, including Defendants' predecessors and affiliates.[4] It built refineries, directed the production of certain products, and managed scarce resources for the war effort. As Senator O'Mahoney, Chairman of the Special Committee Investigating Petroleum Resources, put it in 1945, "[n]o one who knows even the slightest bit about what the petroleum industry contributed to the war can fail to understand that it was, without the slightest doubt, one of the most effective *arms of this Government* . . . in bringing about a victory." Dick Decl., Ex. 5 (emphasis added). And as two former Chairmen of the Joint Chiefs of Staff explained, the "history of the Federal Government's control and direction of the production and sale of gasoline and diesel to ensure that the military is 'deployment-ready'" spans "more than a century," and during their tenure, petroleum products were "crucial to the success of the armed forces." Dick Decl., Ex. 14 at 2–3.

Multiple courts have found that the federal government exerted control over Defendants during World War II to ensure the supply of fuel, such as high-octane avgas. "Because avgas was critical to the war effort, the United States government exercised significant control over the means of its production during World War II." *United States v. Shell Oil Co.*, 294 F.3d 1045, 1049 (9th Cir. 2002); *see also Exxon Mobil Corp. v. United States*, 2020 WL 5573048, at *14 (S.D. Tex. Sept. 16, 2020)

[4] The Complaint conflates the activities of Defendants with those of their predecessors, subsidiaries, and affiliates. Defendants reject these attributions, but describe the conduct of certain predecessors, subsidiaries, and affiliates to show that the Complaint, as pleaded, should remain in federal court.

("The government [] used [its] authority to control many aspects of the refining process and operations."). These cases show the nature and extent of federal control exerted through agencies such as the Petroleum Administration for War ("PAW"), which directed construction of new oil exploration and manufacturing facilities, issued production orders, entered into contracts giving extraordinary control to federal officers, and "programmed operations to meet new demands, changed conditions, and emergencies." U.S. Petroleum Administration for War, *Petroleum in War and Peace: Papers Presented by the Petroleum Administration for War Before the United States Senate Special Committee to Investigate Petroleum Resources* 8 (1945), https://tinyurl.com/y9kr8hcv. "PAW told the refiners what to make, how much of it to make, and what quality." *Id.*

As Professor Wilson explains in his unrebutted declaration, "PAW instructed the oil industry about exactly which products to produce, how to produce them, and where to deliver them." Wilson Decl. ¶ 11; *see also* Dick Decl., Ex. 16 at 28, 171, 177–79, 184 & n.18. "Some directives restricted the use of certain petroleum products for high-priority war programs; others dictated the blends of products; while others focused on specific pieces of the industry, such as the use of individual pipelines." Wilson Decl. ¶ 11.[5] PAW's directives to Defendants were mandatory and enforceable by law. *Exxon Mobil*, 2020 WL 5573048, at *11 (finding that private refiners had "no choice" but to comply with federal direction). Its message to the energy industry was clear: the government would "get the results" it desired, and if "we can't get them by cooperation, then we will have to get them some other way." Dick Decl., Ex. 18 at 8. PAW also maintained "disciplinary measures" for noncompliance, including "restricting transportation, reducing crude oil supplies, and withholding priority assistance." Dick Decl., Ex. 19 at 1.

Plaintiffs offer two responses to this evidence. First, Plaintiffs contend that these activities "are

[5] Defendants acted under federal officers in constructing and operating the Inch Lines (pipelines extending from Texas to New Jersey) "under contracts" and "as agent[s]" for the federal government, bringing hundreds of millions of barrels of oil and refined products for use and combustion on the cross-Atlantic fronts during World War II. *Schmitt v. War Emergency Pipelines, Inc.*, 175 F.2d 335, 335 (8th Cir. 1949); 8 Fed. Reg. 1068–69 (Jan. 20, 1943) (Petroleum Directive 63); 8 Fed. Reg. 13343 (Sept. 30, 1943) (Petroleum Directive 73); Dick Decl., Ex. 15 at 1–2; *id.*, Ex. 16 at 104–05, 108; *id.*, Ex. 17 at 3. Without Defendants as contractors and agents (via War Emergency Pipelines, Inc.), "the Government itself would have had to perform" these wartime activities. *Watson*, 551 U.S. at 154.

irrelevant for purposes of removal because Defendants' alleged disinformation campaign, which is what the instant case is actually about, started decades later." Dkt. 405 at 18. But this case is *not only* about disinformation—and Plaintiffs have admitted as much. *See supra* at 2. Second, Plaintiffs assert that this "wartime evidence does not demonstrate 'the requisite federal control or supervision'" under *Washington v. Monsanto Co.*, 738 F. App'x 554 (9th Cir. 2018). Dkt. 405 at 18. But in that case "the federal government purchased off-the-shelf PCB products from Monsanto and recommended the use of PCBs as a component in defense specifications," without "supervis[ing] Monsanto's manufacture of PCBs or direct[ing] Monsanto to produce PCBs in a particular manner[.]" 738 F. App'x at 555. Here, by contrast, the federal government controlled production of petroleum products by setting production levels, dictating where and how to explore for petroleum, managing operations, and rationing materials in order to help conduct a war. This clearly satisfies the "acting under" requirement as articulated in *Watson* and *Goncalves*.

Second, Defendants continue to supply large quantities of highly specialized fuels that must conform to precise Department of Defense ("DOD") specifications to meet the unique operational needs of the U.S. military. Professor Wilson explains that "[b]y 2010, the U.S. military remained the world's biggest single purchaser and consumer of petroleum products" and, "[a]s it had for decades, the military continued to rely 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." Wilson Decl. ¶ 40. "[I]n the absence of . . . [these] contract[s] with [Defendants], the Government itself would have had to perform" these essential tasks to meet the critical DOD fuel demands. *Baker*, 962 F.3d at 942.

For example, during the Cold War, Shell Oil Company developed and produced specialized jet fuel to meet the unique performance requirements of the U-2 spy plane and later the OXCART and SR-71 Blackbird programs. Dick Decl., Exs. 22–24. For the U-2, it produced fuel known as JP-7, which required special processes and a high boiling point to ensure the fuel could perform at very high altitudes and speeds. For OXCART, Shell Oil Company produced millions of gallons of specialized fuel under contracts with specific testing and inspection requirements. Dick Decl., Exs. 25–33.

Similarly, BP entities provided approximately 1.5 billion gallons of specialized military fuels for the DOD's use in *the four years from 2016 to 2020 alone*. Dick Decl., Ex. 34 at 6. These fuels

include JP-5, JP-8, and F-76, together with fuels containing specialized additives, including fuel system icing inhibitor ("FSII"), corrosion inhibitor/lubricity improver ("CI/LI") and, for F-76 fuels, lubricity improver ("LIA"). *Id.* at 1–6. Such additives are essential to support the high performance of the military engines they fueled. FSII is required to prevent freezing caused by the fuels' natural water content when military jets operate at ultra-high altitudes, potentially leading to engine flameout, while CI/LI and LIA are used to avoid engine seizures and to ensure fuel handling system integrity when military fuels are stored for long periods, as on aircraft carriers. Dick Decl., Exs. 36–37. And, from at least 2010 to 2013, Shell Oil Company or its affiliates entered into billion-dollar contracts to supply specialized JP-5 and JP-8 military jet fuel. *Id.*, Exs. 47–55. The DOD's detailed specifications require that these fuels "shall be refined hydrocarbon distillate fuel oils" made from "crude oils" with "military unique additives that are required by military weapon systems." *Id.*, Ex. 35 at 5, 10, §§ 3.1, 6.1; *id.*, Ex. 56 at 5, 11, §§ 3.1, 6.1.

The detailed requirements and "compulsion to provide the product to the government's specifications" establish the necessary relationship for federal officer removal. *Baker*, 962 F.3d at 943. These unique jet fuels are designed for military use and thus fall into the category of specialized military products that support jurisdiction. *See Watson*, 551 U.S. at 154 ("providing the Government with a product that it used to help conduct a war" supports removal); *Baker*, 962 F.3d at 943.

Plaintiffs contend that these relationships do not show that Defendants "acted under" federal direction because government officials played "a minimal role in designing, developing, and producing" the fuels and "le[ft] the day-to-day operations and management to those companies." Dkt. 405 at 19. But all that is necessary to satisfy this requirement is that the contractor "help[s] the Government to produce an item that it needs." *Watson*, 551 U.S. at 153. Indeed, the Supreme Court cited approvingly *Winters v. Diamond Shamrock Chemical Co.*, 149 F.3d 378 (5th Cir. 1998), which exercised jurisdiction in a case arising from a contractor's production of Agent Orange because the contractor "fulfilled the terms of a contractual agreement by providing the Government with a product that it used to help conduct a war," performing a "job that, in the absence of a contract with the private firm, the Government itself would have had to perform." *Watson*, 551 U.S. at 153–54.

That is what happened here, as a recent amicus brief from two former Chairmen of the Joint

Chiefs of Staff makes clear: "For more than a century, petroleum products have been essential for fueling the United States military around the world." *City & County of Honolulu v. Sunoco LP*, No. 21-15313 (9th Cir.), Dkt. 49 at 3. Thus, "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 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 fuels "were not typical commercial agreements"—they required Defendants "to supply fuels with unique additives to achieve important objectives." *Id.* at 20. This is exactly the type of conduct that satisfies the "acting under" requirement.

c. Plaintiffs' Claims Have a Sufficient Nexus to Acts Under Federal Officers.

By including the words "for or relating to" in the federal officer statute, 28 U.S.C. § 1442(a)(1), Congress "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). The "'hurdle erected by [the connection] requirement is quite low.'" *Goncalves*, 865 F.3d at 1244. In evaluating the nexus requirement, "[w]hat matters is the crux—or, in legal-speak, the gravamen—of the plaintiff's complaint, setting aside any attempts at artful pleading." *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 755 (2017). Courts determine the "gravamen" of the complaint by "zero[ing] in on the core" elements, especially what "actually injured" the plaintiff. *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 35 (2015).

Plaintiffs do not dispute that claims targeting the production of fossil fuels satisfy the nexus requirement. Instead, they assert that this case is only about "Defendants' 'disseminating misleading information about' their fossil fuel products," which no federal officer controlled. Dkt. 405 at 12. As explained above, this characterization is belied by both the Complaint and Plaintiffs' representations to this Court. *See, e.g.*, Compl. ¶ 140 ("Defendants' production of massive quantities of fossil fuels has caused, created, assisted in the creation of, contributed to, and/or maintained and continues to cause,

create, assist in the creation of, contribute to and/or maintain global warming-induced sea level rise, a public nuisance in Oakland."); Dkt. 235 at 13 ("[T]he primary conduct giving rise to liability remains defendants' production and sale of fossil fuels."). *Lake v. Ohana Military Communities, LLC*, 14 F.4th 993 (9th Cir. 2021), is therefore distinguishable, as that case involved only deception claims. *Id.* at 999 ("Ohana allegedly never informed existing or potential tenants of the Plan, its remediation efforts, or known pesticide contamination at MCBH."). Even if there were some doubt as to the contours of Plaintiffs' claims, the law is clear that where both parties "have reasonable theories of th[e] case," the court's "role at this stage of the litigation is to credit only the [defendants]' theory." *Baker*, 962 F.3d at 941, 947; *see also Leite*, 749 F.3d at 1124 ("In assessing whether a causal nexus exists, [courts] credit the defendant's theory of the case."); *Acker*, 527 U.S. at 432–33 ("[W]e credit the [defendants]' theory of the case for purposes of . . . our jurisdictional inquiry."). Defendants' theory of the case as focusing on the production of fossil fuels is certainly reasonable.[6]

Regardless of whether Plaintiffs' claims target misrepresentations, they are still "for or relating to" Defendants' production and sale of oil and gas because none of Plaintiffs' claims is complete upon a showing of misrepresentations. Rather, to prevail, Plaintiffs must show much more, including that the tortious conduct alleged caused Plaintiffs' property-based injuries. Because Plaintiffs assert that "global warming is primarily caused by [Defendants'] fossil fuels, and that global warming is causing severe injuries," Compl. ¶ 117, Plaintiffs' claimed damages—and, correspondingly, all of their requested relief—are related to fossil fuel production and consumption.

2. This Action Is Removable Under the Outer Continental Shelf Lands Act.

OCSLA grants jurisdiction over actions "[(1)] arising out of, or in connection with . . . any [(2)] operation conducted on the [OCS] which involves exploration, development, or production of the minerals, of the subsoil and seabed of the [OCS]." 43 U.S.C. § 1349(b)(1). Plaintiffs do not dispute that Defendants engage in an "operation conducted on the [OCS]" that entails the "exploration" and "production" of "minerals." *See* NOR ¶¶ 8, 48. Nor could they. Defendants operate a large share of

[6] Because a court need only credit a defendant's "reasonable" theory of the case, *Baker*, 962 F.3d at 941, Plaintiffs' concern that this approach would allow "Defendants to freely rewrite the complaint and manufacture a cause of action explicitly disclaimed by Plaintiff" is misplaced, Dkt. 405 at 14.

the "more than 5,000 active oil and gas leases on nearly 27 million OCS acres" that the Department of Interior ("DOI") administers under OCSLA. *Id.* ¶ 52. From 1947 to 1995, 16 of the 20 largest OCS operators in the Gulf of Mexico, measured by oil volume, were either a Defendant or a Defendant's predecessor or subsidiary. Dick Decl., Ex. 7. Since then, at least three of the top five OCS operators in this area have been a Defendant or a Defendant's predecessor or subsidiary. Dick Decl., Ex. 8.

Instead, Plaintiffs challenge only whether their claims "aris[e] out of or in connection with" Defendants' operations on the OCS. *See* Dkt. 405 at 10–11. Unlike some courts that have interpreted this language to "require[] a but-for connection between a claimant's cause of action and operations on the OCS," *Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178, 220 (4th Cir. 2022), the Ninth Circuit has held that the statute "does not necessarily require but-for causation," *San Mateo*, 32 F.4th at 754.

There can be little doubt that Plaintiffs' claims satisfy OCSLA's broad nexus requirement. Plaintiffs allege that the cumulative impact of Defendants' global oil-and-gas production over the past several decades contributed to global greenhouse gas emissions. *See, e.g.*, Compl. ¶ 3 ("Most of the carbon dioxide now in the atmosphere as a result of the combustion of Defendants' fossil fuels is likely attributable to their recent production—*i.e.*, to fossil fuels produced by Defendants since 1980."); *id.* ¶ 10 ("Defendants' cumulative production of fossil fuels over many years places each of them among the top sources of global warming pollution in the world."). And a substantial portion of these emissions arise from the combustion and use of fossil fuels produced by Defendants on the OCS. In fact, oil produced from the OCS has accounted for as much as *30% of domestic production*. Dick Decl., Ex. 9 at 1-4. "Between 1954 and 2016 . . . production from offshore leases totaled more than 20 billion barrels of oil and nearly 175 trillion cubic feet of natural gas." Priest Decl. ¶ 7(1).

Plaintiffs contend that OCSLA jurisdiction is nevertheless foreclosed by *San Mateo*. While the Ninth Circuit concluded that the claims in that case lacked the requisite nexus to OCS activities, it did so based on its conclusion that the plaintiffs' claims centered on a theory of deception and misrepresentation. As the court explained: "[T]he Counties' claims focus on the defective nature of the Energy Companies' fossil fuel products, the Energy Companies' knowledge and awareness of the harmful effects of those products, and their 'concerted campaign' to prevent the public from

recognizing those dangers. These allegations do not refer to actions taken on the outer Continental Shelf." *San Mateo*, 32 F.4th at 754–55; *see also Honolulu*, 2022 WL 2525427, at *8 ("Plaintiffs' claimed injuries from Defendants' deceptive practices do not stem from activities on the OCS, even if OCS-produced oil accounts for 30% of annual domestic production, as Defendants assert. As the district court stated, 'failing to warn and disseminating information about the use of fossil fuels have nothing to do with such direct acts or acts in support' of OCS operations."). By contrast, Plaintiffs concede that the "primary conduct here that gives rise to the nuisance is *the production of fossil fuels*." Hr'g Tr. (May 24, 2018) at 63:2-21 (emphasis added); *see also supra* at 2. A substantial portion of that targeted "production of fossil fuels" indisputably occurred on the OCS.

Moreover, even if Plaintiffs' claims were based in part on deception or misrepresentation, these allegations make clear that Defendants' production of fossil fuels is a necessary link in the alleged causal chain connecting Defendants' representations to Plaintiffs' alleged climate change-related injuries. Because a substantial portion of this production occurred on the OCS, OCSLA jurisdiction is proper.

3. The Court Has Jurisdiction Because the Claims Arise on Federal Enclaves.

"Federal courts have federal question jurisdiction over tort claims that arise on 'federal enclaves.'" *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1250 (9th Cir. 2006). "A suit based on events occurring in a federal enclave . . . necessarily arise[s] under federal law and implicates federal question jurisdiction under § 1331." *Jones v. John Crane-Houdaille, Inc.*, 2012 WL 1197391, at *1 (D. Md. Apr. 6, 2012).

Plaintiffs do not deny that a portion of Defendants' production and sale of oil and gas occurred on federal enclaves. Defendants maintained production operations on federal enclaves and sold fossil fuels on military bases and other enclaves. For example, Chevron's predecessor Standard Oil operated Elk Hills, which was a federal enclave, for most of the twentieth century. NOR, Thomson Decl., Ex. H; Dick Decl., Exs. 11, 61–62. Moreover, given that Plaintiffs' claims encompass all of Defendants' production and sales activities, and their alleged injuries arise from global climate change, Plaintiffs necessarily complain about the federal government's emissions from jet fuel supplied by Defendants on military bases. *Jimenez v. Haxton Masonry, Inc.*, 2020 WL 3035797, at *4–6 (N.D. Cal. June 5,

2020) (applying doctrine to Marine Corps Base Camp Pendleton, Naval Base Ventura County, Navy Base Coronado, Navy Base Point Loma, Seal Beach Naval Weapons Station, and Marine Corps Air Station Miramar).

4. Plaintiffs' Claims Raise Disputed and Substantial Federal Issues Under *Grable*.

Suits alleging only state-law causes of action may still "arise under" federal law where the "state-law claim[s] necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005). Even if the Court were to construe Plaintiffs' claims as limited to misrepresentations regarding the effect of Defendants' oil-and-gas products—rather than the production and sale of those products—those claims would still arise under federal law for purposes of *Grable* jurisdiction because they necessarily incorporate affirmative federal constitutional elements imposed by the First Amendment.

The Supreme Court has made clear that where nominally state-law tort claims target speech on matters of public concern, the First Amendment injects affirmative federal-law elements into the plaintiff's cause of action, including factual falsity, actual malice, and proof of causation of actual damages. *See Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 774–76 (1986) (state common-law standards "must similarly fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages"); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 285–86 (1964) (public officials have the burden of proving with "convincing clarity" that the statement was made with "'actual malice'"); *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 20 (1990) ("[A] statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection."). These issues are not "defenses," but constitutionally required elements of the claim on which the plaintiff bears the burden of proof *as a matter of federal law*. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53, 56 (1988) (extending First Amendment requirements beyond defamation to other state-law attempts to impose liability for speech); *In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, 511 F. Supp. 2d 742, 811 (S.D. Tex. 2005) ("First Amendment protections and the actual malice standard . . . have been expanded to reach

. . . breach of contract, misrepresentation, and tortious interference with contract or business.").

To be sure, most state-law misrepresentation claims are not subject to removal because they do not implicate broader federal interests. Here, however, the federal interests are unquestionably "substantial." The same is true of the underlying speech Plaintiffs seek to suppress, because it addresses a subject of national and international importance that falls within the purview of federal authority over foreign affairs and economic, energy, and security policy. Moreover, Plaintiffs are public entities seeking to use the machinery of their own state courts to impose *de facto* regulations on Defendants' nationwide speech on issues of national concern. First Amendment interests are at their apex where, as here, a governmental entity seeks to use state law to regulate speech on issues of "public concern." *Hepps*, 475 U.S. at 774. Given the uniquely compelling federal interests at stake here, federal courts may entertain the claims at issue in this case "without disturbing any congressionally approved balance of federal and state judicial responsibilities," making removal appropriate. *Grable*, 545 U.S. at 314.

Plaintiffs do not meaningfully argue the merits of *Grable* jurisdiction. Instead, they assert that the Court cannot consider the issue under the mandate rule and the law-of-the-case doctrine. Dkt. 405 at 21–22. But while Defendants did not assert this basis for *Grable* jurisdiction in the original remand proceedings, that is only because Plaintiffs' theory of the case at that time plainly rested on Defendants' production and sale of fossil fuels. To the extent the Court credits Plaintiffs' attempt to abandon the theory articulated in the Complaint in favor of an entirely new theory founded on promotion—and it should not—Defendants have a due process right to respond to that new theory. *See Estes v. Wells Fargo Home Mortgage*, 2015 WL 362904, at *5 (W.D. Wash. Jan. 27, 2015) ("[I]t is a violation of due process to include new arguments in a reply brief because Estes does not have an opportunity to respond.").

B. Collateral Estoppel Does Not Prevent the Court From Determining Its Jurisdiction.

"[F]ederal courts have a continuing, independent obligation to determine whether subject matter jurisdiction exists." *Mashiri v. Dep't of Education*, 724 F.3d 1028, 1031 (9th Cir. 2013). Plaintiffs, however, urge the Court to forswear this obligation and blindly defer to the jurisdictional findings of other courts, in other cases, considering other evidence and arguments. In particular, Plaintiffs contend

that the Court should accord collateral estoppel effect to decisions from "the First, Fourth, and Ninth Circuits [that] have rejected each of Defendants' eight asserted grounds for removal," as well as decisions from "[t]hree district courts [that] have likewise rejected the First Amendment arguments and federal-officer evidence Defendants now rely on." Dkt. 405 at 6.

Tellingly, *none* of the decisions Plaintiffs cite—nor any of the nearly two dozen other climate change cases pending across the country—has resolved jurisdiction on collateral estoppel grounds. This is unsurprising: As Chief Justice Marshall observed more than 200 years ago, federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). It therefore stands to reason that courts should undertake the same independent inquiry to determine whether jurisdiction *does* exist as they do to determine whether jurisdiction does *not* exist. Applying the approach advocated by Plaintiffs, however, would mean prohibiting every court in the country from exercising jurisdiction whenever an earlier decision has granted a motion to remand—or, conversely, prohibiting every court in the country from *declining* to exercise jurisdiction whenever an earlier decision has *denied* a motion to remand.[7] That is especially imprudent where, as here, "'the legal landscape is shifting beneath [the parties'] feet.'" *City of Annapolis, Md. v. BP P.L.C.*, 2021 WL 2000469, at *4 (D. Md. May 19, 2021).

Even if Plaintiffs were correct that the Court *could* outsource its jurisdictional inquiry to another tribunal, it should not do so here. The Ninth Circuit has made clear that "[c]ollateral estoppel . . . prevents parties from relitigating an issue of fact or law if the *same issue* was determined in prior litigation." *Resolution Trust Corp. v. Keating*, 186 F.3d 1110, 1114 (9th Cir. 1999) (emphasis added). And whether "the same issue" was decided in prior litigation turns on whether "there [is] a substantial overlap between the evidence or argument to be advanced in the second proceeding and that advanced in the first." *Kamilche Co. v. United States*, 53 F.3d 1059, 1062 (9th Cir. 1995).

The evidence supporting removal in this case—in particular, the evidence concerning Defendants' production of specialized military fuel for the federal government during World War II and in the years since—is materially different from that considered in the cases cited by Plaintiffs.

[7] Notably, this Court's order denying Plaintiffs' first motion to remand was the first to decide federal jurisdiction in cases alleging state-law torts arising out of global climate change. *See* Dkt. 134.

What is more, this evidence goes to facts that were essential to the judgment in those earlier cases. *See Montana*, 440 U.S. at 159 ("[C]hanges in facts essential to a judgment will render collateral estoppel inapplicable in a subsequent action raising the same issues.").[8] For example, *San Mateo* rejected federal officer removal based solely on its conclusion that the defendants did not "act under" a federal officer. 32 F.4th at 760 ("Because we conclude that the Energy Companies have not carried their burden of proving by a preponderance of the evidence that they were 'acting under' a federal officer, we do not reach the question whether actions pursuant to the fuel supply agreement, unit agreement, or lease agreement had a causal nexus with the Counties' complaints, or whether the Energy Companies can assert a colorable federal defense."). Defendants' new evidence regarding their production of specialized fuel was not even before the *San Mateo* court, so it does not "overlap" *at all* with the issues decided in that case. Courts in this Circuit have found similar factual distinctions sufficient to preclude "substantial overlap between the evidence" for purposes of collateral estoppel. *See, e.g.*, *Stross v. NetEase, Inc.*, 2020 WL 5802419, at *6 (C.D. Cal. Aug. 20, 2020) (concluding that "there is not a substantial overlap between the evidence and argument advanced in the two cases" where, "in its instant Motion, Defendant offers several new factual allegations . . . that directly controvert some of the factual allegations that were essential to the [first] Court's jurisdictional finding").[9]

Perhaps recognizing the import of these materially different records, Plaintiffs assert that Defendants should be estopped from litigating jurisdiction because "Defendants' 'pretrial preparation and discovery' in *San Mateo*, *Rhode Island*, and *Baltimore* plainly could have encompassed

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[8] Plaintiffs point to a four-factor test that the Ninth Circuit has endorsed for determining issue identity. Dkt. 405 at 8. That test was borrowed from the Restatement (Second) of Judgments, *Kamilche*, 53 F.3d at 1062, which in turn explains that not all of the factors will be relevant in determining whether issues in two cases are identical, *see* Restatement (Second) of Judgments § 27, cmt. c.

[9] Plaintiffs argue that Defendants are also estopped by three district court decisions that "rejected Defendants' new federal officer removal evidence and their First Amendment theory of *Grable* jurisdiction." Dkt. 405 at 9 (emphasis omitted). While a "trial-court judgment operates as res judicata while an appeal is pending," 18A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 4433 (Apr. 2022), that does not mean an immediate remand is appropriate. On the contrary, given "the potential for a collateral estoppel-based judgment based on a prior judgment that is subsequently vacated or reversed on appeal," courts typically "delay[] further proceedings in the second action pending conclusion of the appeal in the first action[.]" *Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 882–83 (9th Cir. 2007).

Defendants' decades-old 'new' evidence." Dkt. 405 at 8. But there was *no* pretrial preparation or discovery to speak of in those cases; the motions to remand were filed before Defendants even filed a responsive pleading. In other words, Defendants did not simply "cho[o]se not to" introduce their evidence in earlier cases. *XpertUniverse, Inc. v. Cisco Sys., Inc.*, 2018 WL 2585436, at *4 (N.D. Cal. May 8, 2018). In any event, the intervening decisions in *San Mateo*, *Rhode Island*, and *Baltimore* effected a "significant 'change in the legal climate'" that allows Defendants to litigate jurisdiction. *Starker v. United States*, 602 F.2d 1341, 1347 (9th Cir. 1979); *see also Comm'r of Internal Revenue v. Sunnen*, 333 U.S. 591, 606 (1948) ("[T]he clarification and growth of these principles through the Clifford-Horst line of cases constitute, in our opinion, a sufficient change in the legal climate to render inapplicable in the instant proceeding, the doctrine of collateral estoppel[.]").

Even if the predicates for collateral estoppel were satisfied here (they are not), the doctrine would still be inapplicable given the risks that attend the use of nonmutual offensive collateral estoppel. As the Supreme Court has acknowledged, "offensive use of collateral estoppel does not promote judicial economy in the same manner as defensive use does" and "may be unfair to a defendant," especially "where the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329–31 (1979). While the Court rejected a categorical rule prohibiting nonmutual offensive collateral estoppel, it "grant[ed] trial courts broad discretion to determine when it should be applied." *Id.* at 331.

Exercise of that broad discretion against applying collateral estoppel would be appropriate here given the importance of the issues at hand. This Court has already recognized that this case touches on matters of deep national and global concern: "The dangers raised in the complaints are very real. But those dangers are worldwide. Their causes are worldwide. The benefits of fossil fuels are worldwide. The problem deserves a solution on a more vast scale than can be supplied by a district judge or jury in a public nuisance case." Dkt. 283 at 15. While Plaintiffs insist that "the 'importance' of the underlying *merits* issues is irrelevant, because those merits are not before the Court," Dkt. 405 at 9, it is not only the merits that raise serious federal issues. As the Supreme Court has explained, "[s]tate-court proceedings may reflect 'local prejudice' against unpopular federal laws or federal officials," and "States hostile to the Federal Government may impede through delay federal revenue

collection or the enforcement of other federal law." *Watson*, 551 U.S. at 150. For this reason, the federal officer "removal statute's 'basic' purpose is to protect the Federal Government from [such] interference with its 'operations[.]'" *Id.* And while Plaintiffs maintain that "the remand issues are no more important in these cases than in the dozen-plus others that previously rejected them," Dkt. 405 at 9, those cases did not blindly refuse jurisdiction on the basis of collateral estoppel, as Plaintiffs ask this Court to do.

C. Defendants' Evidence Is Properly Before the Court.

Plaintiffs do not dispute that this case presents a materially different factual record than *San Mateo*, and while *Honolulu* considered a similar record, the Ninth Circuit in that case did not consider Defendants' evidence regarding their production of specialized military fuels or conduct during World War II. Nor do Plaintiffs dispute the factual accuracy of this evidence or submit any rebuttal evidence of their own; in fact, they do not submit any evidence at all. Instead, Plaintiffs insist that "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." Dkt. 405 at 2. This argument misunderstands both "binding Ninth Circuit precedent" and the evidence presented by Defendants.

Section 1446 provides that "[t]he notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant . . . of a copy of the initial pleading[.]" 28 U.S.C. § 1446(b)(1). Defendants were served with Plaintiffs' Complaint on September 21, 2017, *see* Dkt. 1-1 ¶¶ 2–6, and they filed their notice of removal 29 days later, on October 20, 2017.

To be sure, Defendants did not file all of their *evidence* supporting federal jurisdiction until later. But "[n]othing in 28 U.S.C. § 1446 requires a removing defendant to attach evidence of the federal court's jurisdiction to its notice of removal." *Janis*, 472 F. App'x at 534; *see also McMann*, 2014 WL 1794694, at *3 ("The statute governing removal of civil actions does not require a defendant to attach jurisdictional evidence to its removal notice."). This is for good reason. Under the removal statute, a notice of removal need only "contain[] a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders." 28 U.S.C. § 1446(a). This language "tracks the general pleading requirement stated in Rule 8(a) of the Federal Rules of Civil Procedure." *Dart Cherokee*, 574 U.S. at 87. As a result, "a defendant's notice of removal need include only a plausible

allegation" sufficient to satisfy the jurisdictional threshold. *Id.* at 89. "[N]otices [of removal] need not attach evidence so long as they allege facts sufficient to render the jurisdictional allegations plausible." *Thrash v. Cirrus Enterprises, LLC*, 2017 WL 2645499, at *2 n.1 (N.D. Cal. June 20, 2017). Evidence supporting jurisdiction is required "only when the plaintiff contests, or the court questions, the defendant's allegation." *Dart Cherokee*, 574 U.S. at 89. Because Defendants' notice of removal plausibly alleged federal jurisdiction, there is nothing improper about the fact that they submitted evidence substantiating those allegations only after Plaintiffs filed their motion to remand. *See Dejong v. Production Associates, Inc.*, 2015 WL 1285282, at *3 (C.D. Cal. Mar. 19, 2015) ("[C]ourts in the Ninth Circuit regularly find this practice—i.e., supplementing allegations in the notice of removal with evidence demonstrating the parties' citizenship—permissible.").

Plaintiffs are no more successful arguing that Defendants' evidence is barred by Section 1653. That provision states only that "[d]efective allegations of jurisdiction may be *amended*, upon terms, in the trial or appellate courts." 28 U.S.C. § 1653 (emphasis added). But Defendants have never before sought to amend their notice of removal, and they do not seek to do so now.

Plaintiffs suggest that Defendants' evidence should be treated as a de facto motion to amend because it includes "new facts and circumstances pertaining to *other* contracting relationships and responsibilities—none of which Defendants even hinted at before." Dkt. 405 at 4. But simply adding facts to develop the jurisdictional allegations pleaded in a notice of removal does not constitute an *amendment* to the notice. Otherwise, the Supreme Court's holding that a notice of removal need only contain "'a short and plain statement of the grounds for removal,'" *Dart Cherokee*, 574 U.S. at 87, would be wholly illusory. Under Plaintiffs' reading, a defendant would have to allege every fact it might later rely on to support federal jurisdiction, in plain contravention of the rule that the "pleading standard . . . does not require 'detailed factual allegations.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Even if the evidence submitted with Defendants' opposition could be construed as an amendment, it is entirely proper. *See Bristol Capital Investors, LLC v. Cannapharmarx, Inc.*, 2021 WL 2633155, at *2 (C.D. Cal. June 24, 2021) ("[A]n opposition may be construed as an amendment to a notice of removal[.]"). While a notice of removal may be amended freely prior to the expiration

of the 30-day period in which removal can be effectuated, after this time a notice of removal "'may be amended only to set out more specifically grounds for removal that already have been stated, albeit imperfectly, in the original petition; *new grounds* may not be added and missing *allegations* may not be furnished.'" *Hillman v. PacifiCorp*, 2022 WL 597583, at *3 (E.D. Cal. Feb. 28, 2022) (emphases added).

Defendants' evidence "set[s] out more specifically grounds for removal that have already been stated." *Id.* Plaintiffs' own cases make this clear. *See, e.g.*, *Navarro v. Servisair, LLC*, 2008 WL 3842984, at *6–7 (N.D. Cal. Aug. 14, 2008) (permitting amendment to allege citizenship of LLC's members where notice of removal alleged citizenship "in a conclusory manner"); *Barrow Dev. Co. v. Fulton Ins. Co.*, 418 F.2d 316, 317–18 (9th Cir. 1969) (allowing amendment to plead a corporation's state of incorporation and principal place of business where notice of removal alleged only the state of citizenship). The evidence certainly does not set out "new grounds" for jurisdiction because each of the grounds supported—OCSLA, federal officer removal, federal enclave, and *Grable*—was asserted in the notice of removal. NOR at 3–5; *cf. Hillman*, 2022 WL 597583, at *6–7 (rejecting amendment asserting federal enclave jurisdiction where notice of removal asserted jurisdiction only on the ground that the case implicated tribal lands held in trust); *Hill Physicians Med. Grp., Inc. v. Pacificare of Cal.*, 2001 WL 492481, at *3 (N.D. Cal. Apr. 24, 2001) (denying amendment asserting complete preemption under the Medicare Act where notice of removal asserted complete preemption under ERISA); *Hemphill v. Transfresh Corp.*, 1998 WL 320840, at *4 (N.D. Cal. June 11, 1998) (denying leave to amend where notice of removal asserted diversity and maritime jurisdiction and amendment asserted jurisdiction under the Carriage of Goods by Seas Act); *Smiley v. Citibank (South Dakota), N.A.*, 863 F. Supp. 1156, 1161–62 (C.D. Cal. 1993) (rejecting motion to amend where notice of removal asserted diversity jurisdiction and amendment asserted federal question jurisdiction). And the evidence does not supply "missing allegations" because it does not *contradict* the allegations in the notice of removal. *Cf. Rockwell Int'l Credit Corp. v. United States Aircraft Ins. Grp.*, 823 F.2d 302, 304 (9th Cir. 1987) (denying amendment that sought to allege a different real party in interest in order to satisfy diversity); *Ortiz v. Tara Materials, Inc.*, 2021 WL 5982289, at *3 (S.D. Cal. Dec. 17, 2021) (rejecting amendment that sought to plead amount in controversy through plaintiff's own claims where the notice of removal

alleged that the amount-in-controversy requirement was satisfied only by aggregating putative class members' claims).

Because Defendants were not required to present evidence supporting removal until Plaintiffs challenged federal jurisdiction, and because that evidence at most sets out more specifically the jurisdictional grounds in the notice of removal, Defendants' evidence is properly before the Court.

D. No Evidentiary Hearing Is Necessary.

Defendants agree that an evidentiary hearing is not necessary. As the Ninth Circuit has explained, jurisdictional "allegations will ordinarily be accepted as true unless challenged by the" plaintiff. *Leite*, 749 F.3d at 1121. Because Plaintiffs have not challenged Defendants' jurisdictional allegations or supporting evidence, the only question before the Court is whether the undisputed record supports federal jurisdiction as a matter of law.[10]

E. Vacatur of the Court's Prior Personal Jurisdiction Ruling Is Not Required.

This Court has already ordered that Plaintiffs' claims against certain Non-Resident Defendants must be dismissed for lack of personal jurisdiction.[11] Displeased with that determination, Plaintiffs argue that this Court's order must be vacated under *Special Investments Inc.* v. *Aero Air, Inc.*, 360 F.3d 989 (9th Cir. 2004), if this Court holds that it lacks subject matter jurisdiction over Plaintiffs' claims. That is incorrect, as the Non-Resident Defendants explain in their concurrently filed Motion for Entry of Partial Final Judgment Pursuant to Federal Rule of Civil Procedure 54(b). In *Special Investments*, the Ninth Circuit vacated a trial court's order dismissing plaintiffs' claims for lack of personal jurisdiction because, following remand to state court, plaintiffs would have no opportunity to appeal that ruling. *See* 360 F.3d at 994–95. Not so here. Entering partial final judgment under Rule 54(b) would permit Plaintiffs to immediately appeal this Court's personal jurisdiction ruling, while their claims against the remaining Defendant proceed, obviating the need for vacatur. *See* Brief at 8–9. Accordingly, the Court need not vacate its prior personal jurisdiction ruling, and should instead

[10] While Plaintiffs agree that an evidentiary hearing is unnecessary, they request one "if the Court [is] inclined to deny remand" so they can have "an opportunity to conduct limited jurisdictional discovery." Dkt. 405 at 23. But Plaintiffs have not identified a single issue on which they might require discovery; rather, they seek license to go on a fishing expedition should the Court be inclined to deny their motion.

[11] The Non-Resident Defendants are BP p.l.c, ConocoPhillips, Exxon Mobil Corporation, and Shell plc (f/k/a Royal Dutch Shell plc).

enter partial final judgment dismissing Plaintiffs' claims against the Non-Resident Defendants for lack of personal jurisdiction. *See* Fed. R. Civ. P. 54(b).

IV. CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' renewed motion to remand.

Respectfully submitted,

Dated: July 21, 2022

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** Pursuant to Civ. L.R. 5-1(i)(3), the electronic signatory has obtained approval from this signatory