CITY OF OAKLAND
BARBARA J. PARKER (SBN 069722)
City Attorney
MARIA BEE (SBN 167716)
Chief Assistant City Attorney
ZOE M. SAVITSKY (SBN 281616)
Supervising Deputy City Attorney
One Frank H. Ogawa Plaza, 6th Floor
Oakland, California 94612
Telephone: (510) 238-3601
Facsimile: (510) 238-6500
Email: zsavitsky@oaklandcityattorney.org

CITY AND COUNTY OF SAN FRANCISCO
DAVID CHIU (SBN 189542)
City Attorney
SARA EISENBERG (SBN 269303)
Chief of Complex and Affirmative Litigation
RONALD H. LEE (SBN 238720)
ROBB W. KAPLA (SBN 238896)
ALEXANDER J. HOLTZMAN (SBN 311813)
Deputy City Attorneys
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4602
Tel.: (415) 554-4748
Fax: (415) 554-4715
Email: ronald.lee@sfcityatty.org

[Additional Counsel Listed on Signature Page]

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 REPLY IN SUPPORT OF RENEWED MOTION TO REMAND

Date: September 22, 2022
Time: 8:00 a.m. (PT)
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 Ninth Circuit has now held in two even more expansive climate-deception cases (*County of San Mateo v. Chevron Corp.*, 32 F.4th 733 (9th Cir. 2022) (*San Mateo III*) and *City & County of Honolulu v. Sunoco LP*, 39 F.4th 1101 (9th Cir. 2022) (*Honolulu*)) that complaints brought by local governments, which include state law public nuisance claims on behalf of the People, based on the same pattern of misconduct alleged here, seeking the same relief on that claim against many of the same defendants, are *not* within the district courts' original subject-matter jurisdiction. Defendants try to avoid those holdings in their supplemental opposition brief, Doc. 408 ("Supp. Opp."),[1] principally asserting that the People's cases here involve a "different theory of liability" than *San Mateo* and *Honolulu* because they narrowly "target Defendants' *production* of oil and gas" rather than predicating liability on Defendants' decades-long campaign of deception. Supp. Opp. 1, 2. Defendants are wrong on the facts and on the law.

The Ninth Circuit correctly held that the People's Complaints in these two cases rest on the same core allegations as the complaints in *San Mateo III* and *Honolulu*. In *San Mateo III*, the Ninth Circuit held that although "in *Oakland* the plaintiffs raised a single public nuisance claim, while here [San Mateo County and the other plaintiffs] allege multiple state tort theories, including public nuisance, failure to warn, design defect, private nuisance, negligence, and trespass, *the substance of their claims is the same* as in *Oakland*." *San Mateo III*, 32 F.4th at 747 (emphasis added).[2] As in *San Mateo III* and *Honolulu*, the People's Complaints are "about whether oil and gas companies misled the public about dangers from fossil fuels. [They are] not about companies that acted under federal officers, conducted activities on federal enclaves, or operated on the OCS." *Honolulu*, 39 F.4th at 1113. Because this Court lacks subject-matter jurisdiction, it should remand

[1] Unless otherwise indicated, all citations to a docket refer to the corresponding docket entry in Case No. 3:17-cv-6011-WHA.

[2] Defendants remarkably contend that while all the cases at issue include public nuisance claims, *additional* causes of action in *San Mateo* and *Honolulu* showed those cases were not removable. *See* Supp. Opp. 3 (distinguishing *San Mateo* as asserting "claims including strict liability for failure to warn and negligent failure to warn" and *Honolulu* as asserting "claims for failure to warn" whereas "Plaintiffs assert only a single claim for public nuisance"). This argument is nonsensical: the presence of one removable claim can make an entire action removable. 28 U.S.C. § 1441 (removal); *see also* 28 U.S.C. § 1367 (supplemental jurisdiction).

to the state courts where these cases were properly filed almost five years ago and vacate its order dismissing for lack of personal jurisdiction.

II. ARGUMENT

A. The People's Nuisance Claims Target Defendants' Climate Change Deception.

Defendants attempt to distinguish *San Mateo III* and *Honolulu* by asserting that "the Complaint in this case is materially different" because it "target[s] Defendants' *production* of oil and gas directly." Supp. Opp. 1. That is not true and never has been.

As the People have repeatedly explained, allegations of Defendants' deception campaign to promote the use of fossil fuels, made throughout the Complaints, are the central basis asserted for Defendants' liability. For example, the Complaints allege:

> Defendants, notably, did not simply produce fossil fuels. They engaged in largescale, sophisticated advertising and public relations campaigns to promote pervasive fossil fuel usage and to portray fossil fuels as environmentally responsible and essential to human well-being—although they knew that their fossil fuels would contribute, and subsequently were contributing, to dangerous global warming and associated accelerated sea level rise.

Complaint, Doc. 1-2 ("Compl."), ¶ 5. Elsewhere, the Complaints allege that Defendants "extensively promoted fossil fuel use in massive quantities through affirmative advertising for fossil fuels and downplaying global warming risks . . . by misleading the public about global warming by emphasizing the uncertainties of climate science." Compl. ¶ 62. They allege that "Defendants have engaged in advertising and public relations campaigns intended to promote their fossil fuel products by downplaying the harms and risks of global warming," first by "tr[ying] to show that global warming was not occurring" and then by "minimiz[ing] the risks and harms from global warming." *Id.* ¶ 63. They further allege that "Defendants' advertisements must be understood in their proper context—as following Defendants' substantial early knowledge on global warming risks and impacts, and following a decades-long campaign of misleading statements on global warming that primed the pump for massive use of their fossil fuel products." *Id.* ¶ 78. Defendants "have profited and will continue to profit by knowingly contributing to global warming, thereby doing all they can to help create and maintain a profound public nuisance." *Id.* ¶ 11. That the Defendant companies *produced* oil or gas products is not material to the People's

allegations of wrongful conduct; that Defendants *falsely, misleadingly, or otherwise wrongly promoted those products*, downplaying harms of which they had actual knowledge, is material.[3]

The People's description of the claims has been consistent with those allegations. While Defendants cherry-pick a few phrases from previous briefs and an early court hearing, the record as a whole demonstrates that the People's *legal* theory has always rested on Defendants' wrongful promotion of their products, not on how or where Defendants obtained their products. In the People's Opposition to Defendants' Rule 12(b)(6) Motion to Dismiss, Doc. 235, for example, the People argued that "[d]espite long knowing their fossil fuel products posed grave risks to coastal cities vulnerable to sea level rise," Defendants "engag[ed] in large-scale communications and advertising campaigns to discredit scientific research on global warming and portray these fuels as environmentally responsible." *Id.* at 1. The People similarly distinguished cases alleging nuisance caused by firearms because "none of [those] cases entailed an intentional, comprehensive misinformation campaign contributing to foreseeably disastrous consequences." *Id.* at 4. The People explained that under California public nuisance law, "promotion is one way to establish the liability of a manufacturer in public nuisance," *id.* at 13, and that "[m]any courts have sustained nuisance claims against the producer of an otherwise lawful product, *including cases where the producer engaged in misleading promotion*." *Id.* at 2 (emphasis added). Defendants' effort to evade controlling Ninth Circuit authority by asserting that the People "abandon[ed] the theory articulated in the Complaint in favor of an entirely new theory founded on promotion," Supp. Opp. 17, is foreclosed by the Ninth Circuit's holding that the core liability allegations in these cases match those in *San Mateo III* and *Honolulu*. *San Mateo III*, 32 F.4th at 747.

B. Defendants' Remaining Federal Officer Removal Theories Are Still Meritless.

In light of *San Mateo III* and *Honolulu*, Defendants now press only two of the federal-

[3] A California public nuisance claim for relief cannot be "premised on a defect in a product or a failure to warn," but must allege "far more egregious" conduct, which can include "misleading" "affirmative promotion" where the 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)). The People's Complaints are therefore necessarily about whether oil and gas companies misled the public about dangers from fossil fuels.

officer removal theories previously asserted: that they (1) "acted under federal officers during World War II," and (2) at various times sold military fuel. Supp. Opp. 7–12. Neither establishes jurisdiction. Defendants still have not shown they acted under federal officers, that their actions relate to the People's claims, or that colorable federal defenses arise from those actions.

1. Defendants Have Abandoned All Other Federal-Officer Theories.

Defendants' newest brief abandons most federal-officer removal theories in their February 2021 opposition to the People's Renewed Motion to Remand, including those concerning OCS and onshore leases of mineral rights on federal land, activities at the Elk Hills petroleum reserve, activities during the Korean War, and activities involving the strategic petroleum reserve. *Compare* Opposition Brief, Doc. 349 ("Opp."), 11–15 & 20–21 *with* Supp. Opp. 7–12. Those theories fail because they either "set out only normal commercial or regulatory relationships that do not involve detailed supervision" sufficient to satisfy § 1442, or were "rejected . . . in *San Mateo [III]*, and Defendants' new factual points do not change the outcome." *Honolulu*, 39 F.4th at 1107; *see also* People's Supplemental Brief ("Pl. Supp. Br."), Doc. 405, at 14–19. Defendants offer no response, thereby waiving any reliance on those failed arguments.

2. Neither of the Remaining Interactions with the Federal Government Constitute an "Acting Under" Relationship.

Defendants now say they "acted under federal officers during World War II" and "suppl[ied] large quantities of highly specialized fuels" to the military. Supp. Opp. 8, 10. As the People have explained, neither is sufficient. Regarding World War II, Defendants assert that the government exerted extensive control over their operations, especially with respect to the manufacture of high-octane avgas, "through agencies such as the Petroleum Administration for War ('PAW')." *Id.* at 8–9. In support, they cite *United States v. Shell Oil Co.*, 294 F.3d 1045 (9th Cir. 2002), for the proposition that "the United States government exercised significant control" over avgas production and other "high-priority war programs." *Id.* (citations omitted). What *Shell Oil Co.* actually says, however, is that while "PAW, and other government agencies had the authority to require production of goods at refineries owned by the Oil Companies, and even to seize refineries if necessary, in fact they relied almost exclusively on contractual

agreements to ensure avgas production." 294 F.3d at 1049–50; *see also id.* at 1050 ("Throughout the war, the Oil Companies designed and built their facilities, maintained private ownership of the facilities, and managed their own refinery operations."). Although Defendants now assert that PAW strong-armed them into compulsory service, the only concrete examples they cite concern the production of avgas and its components. Supp. Opp. 8–9, 18. And avgas production was "more like an arm's-length business deal" that "involve[d] a typical commercial relationship" and is thus inadequate to establish federal-officer jurisdiction under *Honolulu*. *See* 39 F.4th at 1108.

Defendants next argue that they "continue to supply large quantities of highly specialized fuels . . . to meet the unique operational needs of the U.S. military." Supp. Opp. 10. But Defendants' own documents show that the design, development, and production of those fuels was principally in Defendants' hands. With respect to the Blackbird spy plane project, for example, the government's "management philosophy" was to restrain bureaucrats from "substituting their judgment for that of the contractors," meaning the "[r]equirements for Government approval as a prerequisite to action were minimal." Dick Decl. Ex. 24, Doc 349-25 at 27–28 (Development of SR-71 Blackbird); *see also* Pl. Suppl. Br. 19–20 & n.7. Just as the Ninth Circuit in *Honolulu* held that "evidence showing that the Navy employed Standard Oil" to operate the Elk Hills petroleum reserve "d[id] not rise to the level of 'acting under'" because "[t]he contract gave Standard Oil duties in general terms, and Standard Oil was free to fulfill them as desired," 39 F.4th at 1110, so too does the evidence regarding specialized military fuels here not establish "acting under" jurisdiction. Where, as here, "the government was relying on the expertise of [its contractors] and not vice versa," the contractor is not "acting under" the government for federal-officer removal purposes. *Cabalce v. Thomas E. Blanchard & Assocs., Inc.*, 797 F.3d 720, 728 (9th Cir. 2015) (quoting *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1007 (9th Cir. 2008)).

Defendants briefly argue that it makes no difference whether "government officials played a minimal role in designing, developing, and producing the fuels and left the day-to-day operations and management to those companies," because "all that is necessary to satisfy this requirement is that the contractor helps the Government to produce an item that it needs." Supp. Opp. 11 (cleaned up). But in *Winters v. Diamond Shamrock Chem. Co.*, which they cite for that proposition, the

manufacturers of Agent Orange were "acting under" the government because they "were compelled to deliver Agent Orange to the government under threat of criminal sanctions" and "the government maintained strict control over the development and subsequent production of Agent Orange." 149 F.3d 387, 398–99 (5th Cir. 1998), *abrogated in unrelated part by Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 296 (5th Cir. 2020). The government's "detailed specifications concerning the make-up, packaging, and delivery of Agent Orange, . . . *and the on-going supervision the government exercised* over the formulation, packaging, and delivery of Agent Orange" on threat of criminal prosecution were together "sufficient to demonstrate that the defendants acted pursuant to federal direction." *Id.* at 400 (emphasis added). Those factors are completely absent here. Consequently, there is no federal-officer jurisdiction.

3. Wartime Oil Refining and Military Fuel Contracts Have Nothing to Do with the People's Claims.

Even if Defendants' actions during World War II or in selling fuel to the military satisfied the "acting under" requirement, those actions would still be insufficient to establish federal-officer jurisdiction because Defendants' potential public nuisance liability is not "for or relating to" that conduct. *See* Pl. Supp. Br. 12–14. A defendant's actions support removal under the federal-officer removal statute only if "such action is causally connected with the plaintiff's claims against it." *San Mateo III*, 32 F.4th at 755. That causal connection requires a showing that "the challenged acts 'occurred *because of* what [defendants] 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) (quoting *Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 137 (2d Cir. 2008)).

Here, as the People have repeatedly explained in briefing and argument, the "challenged acts" are Defendants' wrongful dissemination of misleading and deceptive information about climate change and its relationship to fossil fuels. Defendants' wartime relationships with the government have no causal relationship to those allegations because, as has been litigated and explained in other similar cases against the same and additional defendants, "Defendants' alleged disinformation campaign, which is what the instant case is actually about, started decades later." *Delaware v. BP Am. Inc.*, No. CV 20-1429-LPS, 2022 WL 58484, at *10 (D. Del. Jan. 5, 2022).

Nor do Defendants contend their military fuel sales had any relationship to their public representations about climate change. In these cases, like the others around the country concerning the fossil fuel industry's deception campaign and its resultant harms, "the relationship between [the People'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." *Mayor & City Council of Baltimore v. BP P.L.C.* (*Baltimore IV*), 31 F.4th 178, 234 (4th Cir. 2022); *see also Goncalves*, 865 F.3d at 1245.

Defendants seek to avoid the outcome reached by every court to consider the federal-officer removal nexus requirement in a climate-deception case by urging the Court to adopt a different legal standard. They say "[i]n 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.'" Supp. Opp. 12 (quoting *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 755 (2017); *see also Personenverkehr AG v. Sachs*, 577 U.S. 27, 35 (2015)). But *Fry* and *Sachs* are not federal-officer removal cases. *Fry* construed the administrative exhaustion requirements of the Individuals with Disabilities Education Act ("IDEA"), determining under what circumstances claimants must follow certain dispute resolution procedures "before the filing of a civil action under [other disability rights laws] seeking relief that is also available under" IDEA. 28 U.S.C. § 1415(l); *see Fry*, 137 S. Ct. at 754–55. Further, *Fry* stands for the proposition that the gravamen of a plaintiff's complaint is determined by whether the complaint "in fact 'seeks' relief available under the IDEA—not, as a stricter exhaustion statute might, whether the suit 'could have sought' relief available under the IDEA (or, what is much the same, whether any remedies 'are' available under that law)." *Id.* at 755. Finally, *Fry also* makes clear that in examining a plaintiff's complaint to determine its gravamen, "that examination should consider substance, not surface. The use (or non-use) of particular labels and terms is not what matters." *Id.* Separately, *Sachs* construed an exception in the Foreign Sovereign Immunity Act, "which provides in part that a foreign state does not enjoy immunity when 'the action is based upon a commercial activity carried on in the United States by the foreign state.'" *Sachs*, 577 U.S. at 31 (quoting 28 U.S.C. § 1605(a)(2)). Neither case sheds any light on the proper construction of the federal-officer removal statute. The Court must

follow the Ninth Circuit's instructions and reject Defendants' invitation to adopt a novel, unsupported standard.[4]

4. Defendants Have Not Presented Any Colorable Federal Defense.

Even if Defendants could satisfy the other requirements for federal-officer removal, they have still failed to articulate any colorable federal defense supporting removal. A colorable defense "must arise out of [a defendant's] official duties." *Honolulu*, 39 F.4th at 1110. "[C]onclusory statements and general propositions of law do not make [a defendant's] defenses colorable." *Id.* In *Honolulu*, the Ninth Circuit held that Defendants' "First Amendment" defenses, as well as their "due process, Interstate and Foreign Commerce Clauses, foreign affairs doctrine, and preemption defenses[, all] similarly do not arise from official duties." *Id.* That left only the defendants' "government contractor and immunity defenses," which the Ninth Circuit held were supported only by "conclusory statements and general propositions of law" and were not colorable. *Id.*

Defendants present the same laundry list of defenses here, *see* NOR ¶ 62, but their briefing fails to distinguish *Honolulu* other than asserting these cases "target[] Defendants' production of oil and gas." Supp. Opp. 5. That is not true, for the reasons explained above and in the People's Supplemental Brief. The Complaints in these cases each allege a single claim for relief—public nuisance—and the wrongful conduct alleged, consistent with and limited by well-established California state law requirements, centers on Defendants' misrepresentations to the public, *i.e.*, their wrongful promotion of fossil-fuel products. *See* Section II.A, *supra*.

Seemingly recognizing that the text of the Complaints does not support removability, Defendants pivot to purportedly inconsistent statements the People have made about the liability theory in these cases. But all of these purported statements predate the Ninth Circuit's opinions in *Oakland* and *San Mateo III* rejecting the same misreading of the Complaints that Defendants

[4] Every court considering the federal-officer issue in a climate-deception case has concluded that Defendants' "role in providing the United States' military with specialized fuel" and wartime activities "d[o] not relate to" claims like the People's here, because those claims are "not focused on the specialized and limited production efforts" for the government, "or, for that matter, Defendants' overall production efforts." *See City of Hoboken v. Exxon Mobil Corp.*, 558 F. Supp. 3d 191, 208 (D.N.J. 2021).

continue to urge on the Court. No equitable basis exists for this Court to foreclose the People from pursuing a theory of liability the Ninth Circuit has approved. *See Hamilton v. State Farm Fire Cas. Co.*, 270 F.3d 778, 782–83 (9th Cir. 2001) (judicial estoppel intended to avoid risk of inconsistent court determinations or prevent threat to judicial integrity); *McNamara v. Picken*, 950 F. Supp. 2d 125, 129 (D.D.C. 2013) ("[I]t is well established that judicial admissions on questions of law *have no legal effect*." (emphasis added)). Defendants' conclusory assertion of federal defenses is no more persuasive in these cases than in any of the others.

C. *Honolulu* and *San Mateo* Foreclose Defendants' OCSLA Arguments.

The Ninth Circuit held in *San Mateo III* and *Honolulu* that OCSLA removal was not available for the state law public nuisance claims at issue, which were substantively similar to those alleged here. *See San Mateo III*, 32 F.4th at 747. As the court explained in *Honolulu*:

> Defendants' sporadic OCS activities cannot shoehorn OCSLA jurisdiction for just any tort claim. The parties agree that some Defendants engaged in exploration, development, and production on the OCS. . . . Yet federal jurisdiction does not exist because oil and gas companies' OCS activities are too attenuated and remote from Plaintiffs' alleged injuries.
>
> Plaintiffs contend that oil and gas companies created a nuisance when they misled the public. But just because Defendants were allegedly trying to hoodwink the public about harm from oil and gas operations—partially occurring on the OCS—does not mean that OCS activities caused Plaintiffs' injuries. The connection is too tenuous.

39 F.4th at 1112; *see also San Mateo III*, 32 F.4th at 754–55; Suppl. Br. 10–11. Defendants' only response is to insist, yet again, that the People's Complaints rest primarily on "the cumulative impact of Defendants' global oil-and-gas *production* over the past several decades [which] contributed to global greenhouse gas emissions," and that "[a] substantial portion of that targeted '*production* of fossil fuels' indisputably occurred on the OCS." Supp. Opp. 14–15 (emphasis added). Again, that is not the theory of liability alleged in the Complaints, which is why *Honolulu* is dispositive. The People's "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," because "disseminating information about the use of fossil fuels ha[s] nothing to do with such direct acts or acts in support of OCS operations." 39 F.4th at 1112–

13 (quotation omitted). "Defendants ask [the Court] to build a bridge too far to reach federal jurisdiction under OCSLA." *Id.* at 1113. "Because such a construction would lead to unstable results," the Court should "refuse" to adopt it, just as the Ninth Circuit did in *Honolulu*. *Id.*

D. *Honolulu* and *San Mateo* Foreclose Defendants' Federal Enclave Arguments.

The Ninth Circuit in *Honolulu* rejected Defendants' federal-enclave removal arguments, for reasons that fully apply here. Citing *San Mateo III* and the principle that "the doctrine of federal enclave jurisdiction [must be invoked] narrowly," the court held that to establish federal-enclave removal, plaintiffs "must allege that an injury occurred on a federal enclave or that an injury stemmed from conduct on a federal enclave" and "the connection between injuries and conduct must not be 'too attenuated and remote.'" 39 F.4th at 1111 (quoting *San Mateo III*, 32 F.4th at 750). Those requirements were not met in *Honolulu* because the "Plaintiffs' claims are not about Defendants' oil and gas operations, and Defendants' activities on federal enclaves are too remote and attenuated from Plaintiffs' injuries." *Id.* Because Honolulu's "Complaints d[id] not attack Defendants' underlying conduct," drilling on federal land, the Ninth Circuit "agree[d] with the district court" that "it would require the most tortured reading of the Complaints to find jurisdiction." *Id.* (cleaned up). The court also rejected the defendants' "argu[ment] that because some conduct happened on federal enclaves, the conduct relates to injuries from Defendants' deceptive practices." *Id.* As the Ninth Circuit explained, "[f]ederal enclave jurisdiction needs a *direct connection* between the injury and conduct," and Defendants' activities on federal enclaves were "too attenuated from Plaintiffs' claimed injuries" to create jurisdiction. *Id.* (emphasis added).

Defendants' arguments here are the same. They say the People "do not deny that a *portion* of Defendants' production and sale of oil and gas occurred on federal enclaves" and add the twist that some climate change may be attributable to "the federal government's emissions from jet fuel [that Defendants supplied] on military bases." Supp. Opp. 15 (emphasis added). Those assertions, like the others, are far "too remote and attenuated from [the People's] injuries" to support removal. *See id.* "Following *San Mateo [III]*" as the Ninth Circuit did in *Honolulu*, this Court must "rebuff Defendants' arguments." *See* 39 F.4th at 1112.

E. Defendants' *Grable* Arguments Based in Proposed First Amendment Defenses Are Frivolous.

Defendants' argument that the People's claims "arise under federal law for purposes of *Grable* jurisdiction because they necessarily incorporate affirmative federal constitutional elements imposed by the First Amendment" also fails. *See* Supp. Opp. 16. Defendants argue that the First Amendment is not a defense but is rather an affirmative element of the People's claims, again misrepresenting the People's allegations and the elements of their public nuisance claim.

Defendants generally rely on *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964), and subsequent cases that, they say, require the People in their prima facie case to establish elements "including factual falsity, actual malice, and proof of causation of actual damages" (although they do not specify which applies here), leading them to conclude a federal question is necessarily raised on the face of the Complaints. Supp. Opp. 1, 16–17. If that were enough to satisfy *Grable*, though, *every* defamation suit brought by a public official or public figure in *every* state court would be removable because "the Constitution 'prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice."'" *See Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 773 (1986) (quoting *Sullivan*, 376 U.S. at 279–80). In any event, Defendants' cited cases prove the fallacy of their argument. Defendants cite four Supreme Court decisions, three of which were never in federal district court, but were litigated entirely in the state courts until the Supreme Court granted review.[5] The fourth was litigated in the federal courts because of *diversity*, and the decision does not discuss subject-matter jurisdiction at all.[6] In the only case Defendants cite that was actually removed from state court, jurisdiction was invoked pursuant to the bankruptcy removal statutes, 28 U.S.C. §§ 1334(b) & 1452, not because of *Grable* or any federal question. *In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, 511 F. Supp. 2d 742, 761–64 (S.D. Tex. 2005). The First Amendment discussion there arose in the context of a motion to dismiss. *See id.* at 809–15.

[5] *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 10 (1990) (Ohio); *Hepps*, 475 U.S. at 771 (Pennsylvania); *Sullivan*, 376 U.S. at 263–64 (Alabama).

[6] *See Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 48 (1988).

Defendants concede that "most state-law misrepresentation claims are not subject to removal because they do not implicate broader federal interests." Supp. Opp. 17. They nonetheless insist that here the People's Complaints supposedly "seek to suppress" speech that "addresses a subject of national and international importance" and seek to "abuse the machinery of their own state courts to impose *de facto*" regulations on their commercial message. *Id.* Those are distinctions without a difference. In *California v. Sky Tag, Inc.*, No. CV118638 ABC (PLAx), 2011 WL 13223655 (C.D. Cal. Nov. 29, 2011), for example, the Los Angeles City Attorney brought state law claims to "compel removal of illegal supergraphic signs" erected in the city and enjoin future signs. *Id.* at *1. The defendants argued the case was removable because the City's action sought to impose a prior restraint on their speech, and "this alleged First Amendment violation is not an affirmative defense but an element of the City's claim." *See id* at *3. The court disagreed:

> Assuming the City's requested injunction is in fact a prior restraint, Defendants are correct that prior restraints are presumed invalid, and that the City bears the burden to justify the speech restriction. That does not, however, transform Defendants' defense of a First Amendment violation into an element of the City's claims. As the master of its complaint, the City has not alleged any First Amendment claim, and, if it must eventually demonstrate that an injunction in this case would comport with the First Amendment, it need only do so in response to Defendants' objection. This is no different than other First Amendment defenses that courts have repeatedly found did not support removal jurisdiction. [collecting cases]

Id. (citations omitted). That same analysis applies here, as does the similar analysis by the three other district courts that rejected these same Defendants' First Amendment arguments in other climate-deception cases. *See Delaware*, 2022 WL 58484, at *8; *Hoboken*, 558 F. Supp. 3d at 204–05; *Connecticut v. Exxon Mobil Corp.*, No. 3:20-CV-1555 (JCH), 2021 WL 2389739, at *10 (D. Conn. June 2, 2021). There is no authority supporting Defendants' argument that First Amendment defenses can confer *Grable* jurisdiction.

F. Defendants' New Evidence and Argument Are Still Not Properly Before the Court.

Defendants' surfeit of new materials and arguments are not properly before the Court for the reasons explained in the People's Supplemental Brief. *See* Pl. Supp. Br. 3–6. A defendant must remove a case "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). After 30 days, "[d]efective allegations of jurisdiction may be amended," *id.* § 1653, but "*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). Defendants contend because they "plausibly alleged federal jurisdiction, there is nothing improper" about submitting new evidence and arguments to support jurisdictional theories generally consistent with the broad grounds for removal alleged in their removal notice. *See* Supp. Opp. 22–23. But the statute says otherwise, and as Defendants' Supplemental Opposition confirms, the new evidence and argument impermissibly present *new* theories of jurisdiction that were not alleged at the time of removal and were added only in response to unfavorable rulings.

As noted above, Defendants' new federal-officer theories rely on their relationships with the federal government during World War II and their sales of specialized fuels to the military. *See* Part II.B., *supra*. To support those theories, Defendants rely on the new evidentiary record they have presented, namely the expert declaration and numerous exhibits submitted in response to the People's renewed motion to remand in 2021. *See* Supp. Opp. 4, 8–12. But those arguments and materials do not "solely . . . clarify 'defective' allegations of jurisdiction previously made," *Barrow*, 418 F.2d at 317, because neither the Second World War nor any specialized military fuels are mentioned *anywhere* in Defendants' 32-page removal notice. The Notice's federal officer allegations focus exclusively on Defendants' operations on the OCS and Standard Oil's operations at the Elk Hills reserve, *see* NOR ¶¶ 58–60. The most it says about military fuels and the World War II is that "[t]hese and other federal activities are encompassed in Plaintiff's Complaint" including because "the Federal Government . . . has purchased [oil and gas] to fuel its military operations," *id.* ¶ 61. The Notice does not reference the Petroleum Administration for War, avgas, the "U-2 spy plane," "the OXCART and SR-71 Blackbird programs," or "specialized JP-5 and JP-8 military jet fuel," all of which Defendants now assert as bases for federal-officer removal. *See* Supp. Opp. 8–12. A defendant "cannot amend its notice, via an opposition [to a motion to remand] or otherwise, 'to add allegations of substance'" more than 30 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). Yet that is exactly what Defendants are seeking to do.

Defendants' contention that their new materials and argument should be considered "because [they do] not *contradict* the allegations in the notice of removal," Supp. Opp. 23, misstates the standard, which asks whether the defendant has presented a new theory in support of removal, not whether its new theory is inconsistent with a previous theory. Under Defendants' logic, a defendant that removed on one ground (say, federal-officer) could later add an unrelated second ground (say, diversity) if the two were not facially inconsistent. A defendant could also remove under the federal officer removal statute based on one set of alleged facts (such as operations at the Elk Hills reserve), and then pivot to an entirely different relationship (such as sales of specialty fuels to the military) when that first ground fails. As the People have explained, Section 1653 is designed 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). The Court must hold Defendants to the theories and factual grounds for those theories set forth in their removal notices.

G. Defendants Should Be Estopped from Rearguing Positions They Have Lost Multiple Times.

As the People explained in their Supplemental Brief, the First, Fourth, and Ninth Circuits have all affirmed remand orders against these same Defendants and have rejected these Defendants' same theories of removal in similar cases. *See Rhode Island v. Shell Oil Prod. Co.*, 35 F.4th 44 (1st Cir. 2022); *Baltimore IV*, 31 F.4th 178; *San Mateo III*, 32 F.4th 733; Suppl. Br. 6–10. In the two months since the People filed that brief, a group including these same Defendants lost again in *Honolulu*, 39 F.4th 1101. Defendants should be estopped from continuing to litigate these same issues. While Defendants contend that each appeal they lost "effected a significant change in the legal climate" that permits them to relitigate jurisdiction, Supp. Opp. 20 (quotations omitted), the only thing that has changed is the number of decisions rejecting Defendants' ever-

evolving theories of removal. While a district court may decline to apply the estoppel doctrine where "modifications in 'controlling legal principles' . . . could render a previous determination inconsistent with prevailing doctrine," *Montana v. United States*, 440 U.S. 147, 161 (1979), there has been no change of doctrine here, just the rejection of each new argument Defendants urge in their ongoing efforts to keep these cases out of state court.

The estoppel doctrine is designed "[t]o preclude parties from contesting matters that they have had a full and fair opportunity to litigate, protect[] their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and foster[] reliance on judicial action by minimizing the possibility of inconsistent decisions." *Id.* at 153–54. These cases present a classic scenario for applying the estoppel doctrine. Defendants' arguments have been repeatedly and consistently rejected by every court to consider them, at the trial and appellate level, in the Ninth Circuit and throughout the country. Enough is enough.

H. The Court Must Vacate Its Personal Jurisdiction Order If It Grants Remand.

As the People will explain in greater detail in their opposition to Defendants' Motion for Entry of Partial Final Judgment Pursuant to Fed. R. Civ. P. 54(b), Doc. 409, if the Court agrees with the People that these two cases should be remanded to state court for lack of subject-matter jurisdiction, it should also vacate its personal jurisdictional order. Not only does it make sense for the state courts where these cases will be litigated to determine whether they can assert personal jurisdiction over each defendant (after considering the new case law from the Supreme Court and other courts), but that approach would also be consistent with the Ninth Circuit's mandate in these cases, which directed this Court to "determine whether there was an alternative basis for jurisdiction" at the time of removal, and "[i]f there was not, the cases should be remanded to state court." *City of Oakland v. BP PLC*, 969 F.3d 895, 911 (9th Cir. 2020).

III. CONCLUSION

For the reasons stated in this brief and the People's prior briefs, and by the Ninth Circuit in these cases, *San Mateo II and III*, and *Honolulu*, these cases should be remanded to the California state courts where they were filed, and where they belong.

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Respectfully submitted,

CITY OF OAKLAND

By: *Zoe M. Savitsky*

BARBARA J. PARKER (SBN 069722)
City Attorney
MARIA BEE (SBN 167716)
Chief Assistant City Attorney
ZOE M. SAVITSKY (SBN 281616)
Supervising Deputy City Attorney
One Frank H. Ogawa Plaza, 6th Floor
Oakland, California
Tel.: (510) 238-3601
Fax: (510) 238-6500
zsavitsky@oaklandcityattorney.org

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

CITY AND COUNTY OF SAN FRANCISCO

By: *Sara Eisenberg*

DAVID CHIU (SBN 189542)
City Attorney
SARA EISENBERG (SBN 269303)
Chief of Complex and Affirmative Litigation
RONALD H. LEE (SBN 238720)
ROBB W. KAPLA (SBN 238896)
ALEXANDER J. HOLTZMAN (SBN 311813)
Deputy City Attorneys
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4602
Tel.: (415) 554-4748
Fax: (415) 554-4715
ronald.lee@sfcityatty.org

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

SHER EDLING LLP

VICTOR M. SHER (State Bar #96197)
MATTHEW K. EDLING (State Bar #250940)
MARTIN D. QUIÑONES (State Bar #293318)
KATIE H. JONES (State Bar #300913)
QUENTIN C. KARPILOW (*pro hac vice*)

100 Montgomery St. Ste. 1410
San Francisco, CA 94104
Tel.: (628) 231-2500
vic@sheredling.com
matt@sheredling.com
marty@sheredling.com
katie@sheredling.com
quentin@sheredling.com

ALTSHULER BERZON LLP

MICHAEL RUBIN (State Bar #80618)
BARBARA J. CHISHOLM (State Bar #224656)
CORINNE F. JOHNSON (State Bar #287385)

177 Post Street, Suite 300
San Francisco, CA 94108
Tel: (415) 421-7151
mrubin@altber.com
bchisholm@altber.com
cjohnson@altber.com

Attorneys for The People